STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUWAN KNUMAR DEERING,

Defendant-Appellant.

UNPUBLISHED
December 11, 2008

No. 274208
Oakland Circuit Court
LC No. 2006-207873-FC

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM

Defendant appeals by right his jury-trial convictions of five counts of first-degree felony murder, MCL 750.316(1)(b), and one count of burning a dwelling house, MCL 750.72. Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to mandatory life imprisonment for each of the first-degree felony murder convictions, and to 25 to 50 years in prison for the arson conviction. We affirm.

Defendant first argues that he received the ineffective assistance of counsel because his attorney did not interview or procure a defense arson investigation expert to testify at trial, and because counsel failed to challenge the scientific bases underlying the opinion of the prosecution's expert witness during cross-examination. We disagree. Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[1] hearing before the trial court. In addition, this Court denied defendant's motion to remand for an evidentiary hearing with respect to his ineffective assistance of counsel claim. Accordingly, defendant's claim of ineffective assistance of counsel is unpreserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Id*. A defendant has waived the issue if the record does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed de novo. *Id.*

A claim of ineffective assistance of counsel is established only when the defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must overcome the strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* Additionally, in order to show prejudice, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for counsel's errors. *Id.* at 302-303. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Before defense counsel began his cross-examination of the prosecution's arson investigation expert, James R. Lehtola, counsel asked Lehtola for his opinion regarding the difficulty of assessing the cause and origin of a fire on the basis of photographic evidence six years after the fire took place. The fire occurred on April 6, 2000, and defendant's trial began on July 18, 2006. Lehtola responded that he would be unable to formulate an opinion based only upon this limited information, and that it would be "very difficult" for an arson investigator to determine the cause and origin of a fire solely on the basis of photographs and films taken six years earlier. Defense counsel then continued with his cross-examination of Lehtola.

During cross-examination, Lehtola testified that the back door of the house that burned had been nailed shut. This testimony supported defendant's theory, subsequently developed through neighbor Marvin Craig's testimony, that Marie Dean, the homeowner and mother of four of the five victims, may have been responsible for setting the fire. Lehtola also admitted on cross-examination that he did not attempt to test the charred debris recovered from the porch for the presence of gasoline, which could have been used in a lawnmower and "weed whacker" that were stored on the porch, where the fire apparently originated. Lehtola also testified that gasoline is a more volatile substance than a midrange petroleum product, and can therefore be easier to ignite. This testimony could have supported the theory that the fire was not intentionally set, but was instead the result of accidental ignition of gasoline that had leaked or had been spilled onto the porch. Moreover, on cross-examination, Lehtola testified that no fingerprints were recovered from the bottle of charcoal lighter fluid, and he had not recovered an ignition source, such as a cigarette lighter or matches. This testimony could have supported the defenses that the fire was not intentionally set, or that if the fire were the result of arson, no physical evidence connected defendant to the crime.

We conclude that defense counsel performed in an objectively reasonable manner under the circumstances. *Toma*, *supra* at 302. Although counsel did not directly challenge the scientific bases underlying Lehtola's opinions, the record demonstrates that counsel was aware that a defense expert, at the time of defendant's trial, would have had difficulty formulating the scientific basis for an opinion regarding the cause and origin of the fire based only upon the available evidence. On cross-examination, defense counsel exercised sound trial strategy when

he adapted his tactics to the circumstances presented and attempted to elicit admissions from Lehtola that supported the defense theories that the fire was accidentally caused, or in the alternative, that defendant was not the person who set the fire.

Furthermore, defendant fails to show a reasonable probability of a different outcome but for counsel's alleged errors. *Id.* at 302-303. We decline defendant's invitation to assess counsel's performance using the benefit of hindsight; therefore, we conclude that defendant did not receive the ineffective assistance of counsel when his attorney failed to confront Lehtola with the National Fire Protection Association guidelines. *Matuszak*, *supra* at 58. Moreover, even if defense counsel had challenged the scientific bases of Lehtola's opinion that the fire was the result of arson on the grounds of alleged inconsistencies with guidelines set forth by the National Fire Protection Association, Lehtola might have explained precisely what the guidelines covered and why the guidelines did not apply, which would have further damaged defendant's position that the fire was not started intentionally. Because defendant cannot show that counsel's performance was objectively unreasonable under the circumstances, and cannot demonstrate outcome-determinative prejudice, his ineffective assistance of counsel claim fails. *Toma*, *supra* at 302-303.

Defendant next argues that the prosecution presented legally insufficient evidence to persuade a rational trier of fact beyond a reasonable doubt that defendant intentionally set the fire that resulted in the deaths the five victims. We disagree. This court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether any rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). We will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

In Michigan, the elements of first-degree felony murder are: "'(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)].'" *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). The crime of burning a dwelling house, MCL 750.72, is one of the enumerated crimes set forth in the felony murder statute. MCL 750.316(2)(a); *People v Nowack*, 462 Mich 392, 400-401; 614 NW2d 78 (2000). "The facts and circumstances of the killing may give rise to an inference of malice." *Carines*, *supra* at 759.

The elements of burning a dwelling house are: (1) the burning of a dwelling house, (2) by, or at the direction of, or with the assistance of the defendant, and, (3) the defendant maliciously or willfully set the fire. *People v Lindsey*, 83 Mich App 354, 355; 268 NW2d 41 (1978). The required mental state for arson is either (1) "an intent to burn the dwelling house of

another," or (2) "doing an act in circumstances where a plain and strong likelihood of such a burning exists." *Nowack*, *supra* at 408-409. Minimal circumstantial evidence is sufficient to prove the element of intent because of the difficulty of proving an actor's state of mind. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Reviewing the record de novo, and viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant intentionally burned the Dean residence, which in turn resulted in the deaths of the five victims. In July 2000, defendant, who was incarcerated in the Oakland County Jail on unrelated charges, admitted to his cellmate, Philip Turner, that he had burned a house because a person named "Big Mike" owed him money for drugs. This evidence is consistent with Marie Dean's testimony that her house had burned and that her husband, Oliver Dean, also known as "Big Mike," had been addicted to crack cocaine. Similarly, defendant admitted to Raymond Jeffries while they were incarcerated in August 2000, that he was a drug dealer and that if he could live his life over again, five children would still be alive.[2] Moreover, defendant admitted to informant Ralph McMorris, while McMorris and defendant were incarcerated in 2003, that he had sprayed the front of a house with charcoal lighter fluid and had set the house on fire, which resulted in the deaths of several children. This evidence also corroborates Lehtola's testimony that the origin of the fire was at the entry to the front porch and the entry from the porch to the house, and that the fire was caused by "the open flame ignition of vapors from an ignitable liquid that was distributed within that area." Lehtola opined that the fire resulted from arson, and that analysis of debris samples and the burn patterns showed that the arsonist used a midrange petroleum product, such as charcoal lighter fluid, to set the fire.

On the basis of this evidence and reasonable inferences drawn from the evidence, we conclude that a rational trier of fact could have concluded beyond a reasonable doubt that a dwelling house was burned, that the house was burned by defendant, and that defendant maliciously or willfully set the fire. MCL 750.72; *Lindsey*, *supra* at 355. Likewise, a rational trier of fact could have concluded beyond a reasonable doubt that the fire set by defendant killed five human beings, which resulted from defendant's having "creat[ed] a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." MCL 750.316(1)(b); *Smith*, *supra* at 318-319. The evidence was sufficient to support defendant's convictions of first-degree felony murder and burning a dwelling house.

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. Defendant failed to bring a motion for a new trial; accordingly, we review the unpreserved claim that the verdict was against the great weight of the evidence for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the

[2] Five children died as a result of the fire at issue in this case.

conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, *supra* at 763 (citation and internal quotations omitted).

It is true that a new trial may be granted when the verdict is against the great weight of the evidence and allowing the verdict to stand would result in a miscarriage of justice. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993); see also MCR 6.431(B). But in general, "[a] verdict may be vacated only when it 'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence.'" *DeLisle*, *supra* at 661, quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925).

Defendant's argument that the verdict was against the great weight of the evidence is twofold. First, defendant argues that the jailhouse informants' testimony in this case was inherently implausible in light of Marie Dean's testimony that defendant had never attempted to collect a debt from her. However, where witness credibility is at issue, and conflicts in the evidence exist, the question of credibility is for the fact-finder to decide. *People v Lemmon*, 456 Mich 625, 642-647; 576 NW2d 129 (1998). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647.

Moreover, "[t]he jury is 'free to believe or disbelieve, in whole or in part, any of the evidence presented at trial.'" *People v Unger*, 278 Mich App 210, 228; 749 NW2d 272 (2008), quoting *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). Contrary to defendant's argument, the jury was not required to believe Marie Dean's testimony when she denied that defendant had contacted her in an attempt to collect Oliver's drug debt, but to reject McMorris's testimony that defendant admitted to starting the fire in retaliation for Marie's failure to pay the debt. Because McMorris's testimony did not "contradict[] indisputable physical facts or law," the jury was free to believe or disbelieve McMorris regarding defendant's attempt to collect Oliver's debt from Marie, even to the extent that his testimony conflicted with Marie's testimony that defendant did no such thing. See *Lemmon*, *supra* at 642-643, 647. Because this conflict in the testimony was for the fact-finder to resolve, defendant's first argument contending that the verdict was against the great weight of the evidence must fail. *Id*.

The second component of defendant's contention that the verdict was against the great weight of the evidence consists of an attack on the jailhouse informants' testimony that defendant remained at the scene of the fire until he heard the windows break from the heat. According to defendant, this testimony was inherently implausible because it conflicted with the testimony of other witnesses regarding the timing of the events. We conclude that defendant's second argument lacks merit as well. Even if the witnesses in this case could have testified with precision regarding the timing of the events, and even if it would have defied the laws of physics for defendant to have remained on the scene until he heard the windows pop, thereby rendering Turner's and McMorris's testimony incredible, the time that defendant fled the scene after setting the fire to the Dean residence is not an essential element of the crimes of burning a dwelling house or first-degree felony murder. Even assuming arguendo that defendant did not remain on the scene until he heard the windows break, the admission of any testimony to the contrary was clearly harmless in light of the ample independent and admissible evidence that defendant committed the offenses at issue in this case. Accordingly, defendant's argument fails.

Defendant next argues that he is entitled to a new trial on the basis of newly discovered evidence—namely, (1) that one of the jailhouse informants who testified against him failed to disclose that he had testified in an additional case, which defendant discovered when this Court issued its opinion in *People v Fox*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket No. 261972), and (2) that despite the informant's denial that he had ever received a benefit for assisting law enforcement, he had apparently received just such a benefit for testifying in *Fox*. We disagree. Defendant failed to move for a new trial in the court below; therefore we review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

A new trial may be granted on the basis of newly discovered evidence if a defendant is able to satisfy a four part test: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not merely cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); see also MCR 6.508(D). "Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

Contrary to defendant's argument, the evidence of the police informant's participation in *Fox* does not satisfy the four-part test set forth in *Cress*, *supra* at 692. Specifically, defendant is unable to show that, using reasonable diligence, he could not have discovered that the informant testified in the *Fox* trial or that the informant had received a benefit for his participation in that case. See *Cress*, *supra* at 692. Defendant does not contest that the prosecution provided him with the informant's criminal history. Defendant could have investigated the information contained therein and discovered that misdemeanor charges against the informant had been dismissed. With the information defendant obtained pursuant to this inquiry, defendant could have impeached the informant at trial with evidence of his testimony in the *Fox* case.

Defendant also argues that a new trial is warranted where newly discovered evidence shows that a witness committed perjury. However, even in the cases relied upon by defendant, this Court still required the defendants to establish that the new evidence could not have been earlier discovered with reasonable diligence, that the new evidence was not merely cumulative, and that the new evidence likely would have caused a different result at trial. See, e.g., *People v Mechura*, 205 Mich App 481; 483-485; 517 NW2d 797 (1994); *People v LoPresto*, 9 Mich App 318, 324; 156 NW2d 586 (1967). Defendant has failed to show that he could not have discovered the police informant's testimony in the *Fox* case or the informant's resulting benefit through the use of reasonable diligence. Nor has he demonstrated a reasonable probability that the outcome would be any different if the new evidence were introduced at retrial.

Lastly, even if the informant did commit perjury when he failed to mention his testimony in the *Fox* case and his resulting benefit for so testifying, defendant could only have used this information to impeach the witness's credibility. *Davis*, *supra* at 516. Quite simply, defendant is not entitled to a new trial on the basis of the newly discovered evidence.

Defendant argues in the alternative that the prosecution committed misconduct when it failed to disclose that the informant had participated in the *Fox* matter and that he had received a

benefit for doing so. Defendant also contends that the prosecution failed to disclose a "tacit agreement" that the informant would receive a benefit for testifying against defendant in this case. We disagree. This Court reviews unpreserved issues for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

"A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005); see also *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), and *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Cox, supra* at 448. But the prosecution is not required to disclose evidence "whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness." *People v Banks*, 249 Mich App 247, 254; 642 NW2d 351 (2002). Nor are the police and prosecution required to seek out and find exculpatory evidence on defendant's behalf. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997).

Defendant argues that the prosecutor should have disclosed that the informant testified in the *Fox* case and that the informant received a benefit for testifying in that case. As a preliminary matter, as the prosecution points out, and as defendant implicitly admits through his exclusive reliance on foreign authority, no Michigan appellate court has ever imposed a duty upon a prosecutor to investigate and disclose information possessed by a prosecutor in a different locality on the basis of constructive knowledge. Because defendant relies only upon the "constructive knowledge" theory that the prosecutor possessed the information, defendant cannot demonstrate that the prosecutor actually possessed the information that the informant had participated in *Fox*. Thus, defendant is unable to meet the first element of a *Brady* claim. *Cox*, *supra* at 448. In turn, because defendant fails to show that the prosecutor actually possessed the information, defendant cannot show that the prosecutor suppressed it because the prosecution is unable to suppress something it does not have. As such, defendant is unable to satisfy the third element of a *Brady* claim. *Id*. Even if the prosecutor had possessed the information regarding the informant, and had suppressed it, the information was as accessible to defendant as it would have been to the prosecution. Accordingly, defendant is unable to establish the second element of a *Brady* claim as well. *Cox, supra* at 448.

Furthermore, as previously discussed, defendant cannot show that there was a reasonable probability that the outcome would have been different had he been provided with the information regarding the informant's involvement in *Fox*. As such, defendant's contention that the prosecutor committed misconduct when it failed to disclose this evidence lacks merit.

Although defendant contends that the allegedly suppressed evidence of the informant's participation in *Fox* suggests that there was a tacit agreement between the informant and the prosecution, the informant had not yet committed the crimes for which he received the benefit when he testified in the present case, and was not incarcerated at the time he testified against defendant. In *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976), our Supreme Court held that a prosecutor is not required to disclose "future possibilities" of leniency. Further, the

prosecutor here could not have entered a "tacit agreement" for the future possibility of leniency with the informant where the necessary predicate for such leniency—the informant's crimes—did not yet exist. At most, defendant has shown that there may have been a "tacit agreement" between the prosecutor and the informant for the future possibility of leniency for crimes that the informant had not yet committed. Defendant is entitled to no relief on this issue.

Defendant next argues that the trial court erroneously received the testimony of two law enforcement officials, Oakland County Sheriff's Deputy Christopher Lanfear and Detective Sergeant Gary Miller, both of whom testified that defendant had lied to them during their interviews with him. Defendant asserts that the prosecutor committed misconduct when he relied on this testimony during his closing rebuttal argument. We disagree. Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, defendant failed to preserve this evidentiary issue for appellate review by objecting at trial. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Allegations of prosecutorial misconduct are reviewed on a case-by-case basis, analyzing the prosecutor's comments in view of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); see also *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). However, defendant failed to object at trial; therefore, defendant's argument is unpreserved. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Id*. at 454.

At trial, Miller and Lanfear testified regarding their impressions of defendant's statements during interviews with defendant conducted on April 21, 2000, April 22, 2000, and April 24, 2000. According to Miller, on April 21, 2000, defendant was incarcerated for driving while license suspended and possession of marijuana. Lanfear testified that he interviewed defendant on April 22, 2000, and again on April 24, 2000. Lanfear further testified that defendant was advised of his *Miranda*[3] rights and signed a waiver providing that he understood those rights and voluntarily waived them for the purposes of his interviews with the police. In Lanfear's view, defendant's account of his whereabouts on the night of the fire set forth in his statement of April 22, 2000, was inconsistent with the account defendant provided during his interview on April 24, 2000. Regarding his impressions of defendant, Lanfear testified that during an interview, when a suspect changes key points of his story, he knows that the suspect is not telling the truth. On cross-examination, Miller testified that he did not believe that defendant had been honest with him during his interviews with defendant.

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Further, a prosecutor may not ask a defense witness if a prosecution witness has lied. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). However, neither Lanfear nor Miller commented on the credibility of any witness that testified at trial. While defendant cites ample authority for the established

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

proposition that a witness may not comment on the credibility of another witness, none of the cases cited by defendant applies here.

In addition, nothing in the record indicates that the jurors assessed inordinate weight to the testimony of Lanfear and Miller. Even if Lanfear's and Miller's testimony was arguably improper, any unfair prejudice could have been cured by a timely jury instruction. *Unger*, *supra* at 241. The trial court specifically instructed the jury to judge the credibility of law enforcement testimony in the same manner as any other witness. Jurors are presumed to have followed their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Moreover, the law enforcement testimony was admissible as lay opinion evidence pursuant to MRE 701. See *Dobek*, *supra* at 77-78. Lanfear's and Miller's testimony regarding defendant's inconsistencies during the interview was "rationally based on the perception of the witness" and was "helpful to a clear understanding of . . . a fact in issue." MRE 701. Further, because the testimony had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," it constituted relevant evidence, MRE 401, and defendant has failed to persuade us that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, MRE 403. Therefore, the trial court did not err when it admitted the testimony of Lanfear and Miller concerning defendant's inconsistent statements during the police interviews. Nor has defendant shown that any error in the admission of the law enforcement officers' testimony resulted in a miscarriage of justice. See MCL 769.26.

To the extent that defendant contends that the prosecutor committed misconduct by arguing in rebuttal that defendant lied to the police during the interviews, and insofar as defendant asserts that he received the ineffective assistance of counsel because his attorney failed to object to Miller's and Lanfear's testimony, these claims are not set forth in defendant's statement of the questions presented. Consequently, defendant has failed to properly present these arguments for appellate review. MCR 7.212(C)(5); *Unger*, *supra* at 262.

Defendant raises four additional issues in a supplemental brief filed *in propria persona*, none of which has merit. First, defendant argues that both the district court and the circuit court lacked subject matter jurisdiction over this case. We disagree. Special steps to preserve a challenge to subject matter jurisdiction are unnecessary, and a party may raise the issue for the first time on appeal. *McFerren v B & B Investment Group*, 233 Mich App 505, 512; 592 NW2d 782 (1999). Whether a lower court had subject matter jurisdiction is a question of law that this Court reviews de novo. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004).

In his brief, defendant fails to cite any authority to support his claim that the alleged procedural defects regarding the signatures on the Felony Information and the district court's bind-over certification operate to nullify his convictions. Further, nothing in the record indicates that the procedure used to arrest and bind defendant over for trial was improper or deficient. To the extent that defendant argues that "there was no warrant or complaint signed by anyone," the lower court record reveals that a document entitled "Felony Information/Complaint" was signed by the prosecutor, a complaining witness, and the district judge on March 3, 2006. In Michigan, a prosecutor may bring criminal charges either by information or indictment. MCR 6.112(B); *People v Harris*, 37 Mich App 179, 180; 194 NW2d 414 (1971), rev'd on other grounds *People v Duncan*, 388 Mich 489 (1972). The circuit court acquires jurisdiction over felony charges under

either charging mechanism. MCL 767.1; see also MCR 6.112(B). The trial court acquired subject matter jurisdiction over the felony charges in this case when the prosecutor filed the Felony Information.

Further, the record shows that a document entitled "Return to Circuit Court" was signed by the district judge, and filed in the Oakland Circuit Court on April 28, 2006. This document shows that the circuit court acquired personal jurisdiction over defendant. *People v Goeke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). Defendant has otherwise failed to show that other deficiencies deprived either the district or the circuit court of jurisdiction over defendant or the subject matter. An appellant "may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Because defendant's claim in this regard is both legally and factually unfounded, he is entitled to no relief.

Defendant next contends that the district court failed to make a proper factual determination of probable cause prior to issuing the warrant for defendant's arrest. We disagree. This Court reviews an unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

The record does not support defendant's argument. At defendant's preliminary examination, defense counsel brought a motion to disqualify the district judge on the basis that he had authorized the warrant for defendant's arrest. The district judge did not admit that he failed to make the required findings of fact before authorizing defendant's arrest warrant, but instead merely stated that he had no personal knowledge regarding defendant or the crimes of which defendant was accused. Because defendant's allegations that the district court failed to make the requisite findings of fact prior to issuing the warrant for defendant's arrest are not supported by authority or by the record, defendant cannot demonstrate error requiring reversal in this regard. See *Norman*, *supra* at 260.

Defendant next argues that the government violated his Sixth Amendment right to counsel when it placed informants in his jail cell in order to elicit incriminating statements from him. We disagree. Defendant failed to raise this issue in the court below; therefore, the issue is unpreserved. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). This Court reviews an unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

A defendant's right to counsel under the Sixth Amendment attaches when adversary judicial proceedings are initiated. *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). In Michigan, the right to counsel attaches "at or after the initiation of adversary judicial proceedings by way of formal charge, preliminary hearing, indictment, information or arraignment." *People v Cheatham*, 453 Mich 1, 9 n 8; 551 NW2d 355 (1996). Under the Sixth Amendment, governmental agents are prohibited from using incriminating statements that are deliberately elicited from the accused outside the presence, or absent the waiver, of counsel after the initiation of judicial proceedings. *Maine v Moulton*, 474 US 159, 176; 106 S Ct 477; 88 L Ed 2d 481 (1985).

But "the government is certainly able to elicit statements from individuals prior to the commencement of adversary judicial proceedings." *United States v Harris*, 9 F3d 493, 500 (CA 6, 1993). Moreover, because the Sixth Amendment right to counsel is "offense specific," the government may elicit incriminating statements from an incarcerated defendant so long as the statements elicited do not concern the particular offense or offenses for which adversary judicial proceedings have already commenced. See *McNeil v Wisconsin*, 501 US 171, 175; 111 S Ct 2204; 115 L Ed 2d 158 (1991). Turning back to the instant case, when defendant made his incriminating statements to the jailhouse informants, he had not been charged with homicide or arson, but was incarcerated in the Oakland County Jail on unrelated charges. Even assuming arguendo that Turner, Jeffries, and McMorris were all governmental agents who deliberately elicited incriminating information from defendant, the Sixth Amendment right to counsel had not yet attached with respect to the instant offenses when defendant made his pre-2006 statements to these jailhouse informants. Because defendant had not yet been charged with the offenses at issue in this case, use of the jailhouse informants by the government did not violate defendant's Sixth Amendment right to counsel. *Id*.; see also *Illinois v Perkins*, 496 US 292, 299; 110 S Ct 2394; 110 L Ed 2d 243 (1990).

Lastly, defendant argues that the prosecutor misrepresented the evidence when he argued that the arson investigation laboratory report constituted conclusive proof of arson. We disagree. Defendant failed to object to the prosecution's remarks during closing argument; therefore, this issue is unpreserved. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). An unpreserved claim of prosecutorial misconduct is reviewed for plain error. *Id*.

As a general rule, "'prosecutors are accorded great latitude regarding their arguments and conduct.'" *Bahoda*, *supra* at 282 (citation omitted). Moreover, a prosecutor is "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [his or her] theory of the case.'" *Id*. (citation omitted). A prosecutor is not required to present his or her arguments using only the blandest terms possible. *Matuszak*, *supra* at 56.

Contrary to defendant's argument, the record demonstrates that the prosecution did not represent the forensics report as "positive proof of arson," but instead argued that only the person who set the fire could know that the accelerant used to start the fire was charcoal lighter fluid at the time defendant provided the jailhouse informants with this information. That a mid-range petroleum product such as charcoal lighter fluid was used to start the fire was, in turn, confirmed by the laboratory report. Because the record demonstrates that the prosecutor argued reasonable inferences from the evidence when he relied upon the information in the laboratory report, defendant's prosecutorial misconduct claim fails. See *Bahoda*, *supra* at 282.

To the extent that defendant raises the cursory arguments that the prosecutor relied on impermissible character evidence and that he received the ineffective assistance of counsel, we conclude that defendant has failed to provide any factual or legal basis for the relief he seeks. "It is not enough for an appellant in his brief to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); see also *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens