STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
v	No. 293220 Wexford Circuit Court
VICTOR JOHN CAMINATA, Defendant-Appellant.	LC No. 08-008941-FH

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant Victor John Caminata appeals as of right his jury conviction of maliciously burning a dwelling house (arson of a dwelling). See MCL 750.72. The trial court sentenced him as a fourth habitual offender, see MCL 769.12, to serve 108 months to 40 years in prison for this conviction. On appeal, Caminata argues that his conviction was not supported by legally sufficient evidence and, for that reason, must be reversed. He also argues that he was deprived of a fair trial by several errors: the prosecution engaged in misconduct, two jurors saw him outside the court in shackles, and his trial counsel was constitutionally ineffective. These errors, he maintains, also warrant a new trial. We do not agree that there were any errors warranting relief and, for that reason, we affirm.

I. BASIC FACTS

A. THE FIRE

This case has its origins in a fire at the home where Caminata lived with his then girlfriend, Nicole Vanderhoef, on March 2, 2008. Vanderhoef testified that she bought the home in 2006 and that she lived there with her two children: Tyler, who was 14 at the time of trial, and Matisan, who was seven at the time of trial. She stated that, after they began to date, Caminata moved into her home with his three children. He lived with her until April 2007 when their relationship ended for a time. However, they reconciled in late August or early September 2007 and he moved back in along with his children.

Some weeks before the fire, she and Caminata decided to purchase a wood furnace in order to reduce their propane gas bills. She paid for the furnace and Caminata installed it in the basement.

Vanderhoef also testified about relationship problems that she had had with Caminata. She explained that there were issues with a "very large blended family and not a lot of space." He wanted her to refinance her home so that he could build an addition to the home for his children. She also paid the majority of the bills. She stated that she worked, had income from an annuity that paid $800 per month, and received child support. Caminata worked in construction and was a volunteer firefighter. He paid about a quarter of the household bills, but she paid the mortgage. She also had disputes with Caminata over the children.

Vanderhoef testified that she got into a "very heated argument" with Caminata in the evening before the day of the fire. She said they argued from about four or five that evening until midnight. Finally, she told Caminata that he had to "be ready to leave" when she got home from work on the next day. She said that, after they awoke the next morning, Caminata was trying to be "sweet and pleasant" and to make up, but she said she "kind of pulled away." She testified that she heard him loading wood into the wood furnace before she left for work at 6:30.

Tyler Vanderhoef testified that he was at home on the day of the fire with his sister, Caminata, and Caminata's oldest daughter. Tyler said he was preparing the dishes for the washer while Caminata was dozing in a chair in the living room. At some point Caminata got Tyler's attention by stating, "[H]ey do you see that?" Tyler said that Caminata was referring to smoke that was coming out of the wall. Tyler first helped Caminata get the girls and pets out of the house. After that Tyler followed Caminata to the basement where Caminata was using a fire extinguisher to put out the fire in the wood furnace. Eventually they left the house. Tyler said he saw flames coming from the chimney and roof after they left the house. He also stated that Caminata tried to take hoses off a fire truck to help with the firefighting.

The prosecutor also admitted into evidence a recording of the 911 call by Caminata. On the recording, Caminata allegedly reports the fire in a casual manner and states that it is a chimney fire. There was also evidence that he told investigators that he tried to put the chimney fire out by throwing a chem stick—which is a device that is used to put out or slow a chimney fire—down the chimney.

Vanderhoef testified that at around ten to noon, Caminata called her and told her that the house was on fire. She returned home to see her house on fire with windows that were bursting. Shortly after the fire Caminata began talking about rebuilding the house with the insurance proceeds. He even had plans made within days of the fire and rented a bulldozer and dumpsters. Vanderhoef also recalled that, at some point before the fire, she missed a payment on the house insurance and Caminata was adamant that she should send money in to reinstate the policy.

Vanderhoef stated that they continued to stay together for a while after the fire. But they separated permanently about three weeks later after another fight. She admitted on cross-examination that she probably received more than $270,000 in insurance payments for losses caused by the fire, but stated that the majority of the payments went to her builder. She also stated that Caminata did not receive any of the money and that the insurance company did not cover his losses from the fire because he was not an insured on the policy.

B. THE CAUSE AND ORIGIN OF THE FIRE

At trial, the prosecution presented evidence that the fire that destroyed Vanderhoef's home was deliberately set and the defense offered expert testimony that the fire had accidental origins. For both the prosecution and defense, the evidence and testimony focused on the area where a block chimney and a metal chimney pipe went up from the basement to the roof. Testimony and evidence established that the wood furnace that Caminata installed vented into the block chimney while the propane boiler vented through a metal chimney pipe that went up to the roof through a "chase" next to the block chimney. The chase was a void created by placing walling around the chimney on the upper levels. The metal chimney went into the chase from the basement through a hole in the ground floor near the block chimney. There was evidence that the fire began in this void and eventually burned through the roof near the block chimney before it spread.

Sergeant Brian Rood testified that he investigated the fire at Vanderhoef's home. He stated that he had had basic, advanced, juvenile, and vehicle fire training. Rood identified photos of the area around the chimney and noted that the block chimney had no smoke and fire damage on the blocks on one side and only minor smoke damage on the other; overall he stated that it had "no hard fire damage," which is not what one would expect. He also stated that the logs placed in the wood furnace had no fire damage and, for that reason, he did not believe that the wood furnace was radiating any heat. He also saw some fire damage between the joists on the underside of the first floor.

James Raad, who was admitted as the prosecution's expert on the cause and origin of fires, testified that the fire damage at two points between joists was caused by a direct flame attack—such as from an open flame or torch. He also testified that the burn marks at the point where the metal chimney went through the floor and into the chase to the roof showed signs of direct flame attack. He explained that the area showed a "localized burn pattern" and, if the fire had come from inside the chase into the basement, he would have expected to see "ventilation burn patterns emitting" from the other side of the hole. For this reason, he concluded that the flame moved from outside the chase to the inside of the chase.

Raad also concluded that the block chimney was not the source of the fire. He noted that the wood in the wood furnace was only slightly charred and, therefore, had not been burning very long. He also stated that he did not find expanded or puffed creosote—which is a by-product of wood burning—in the chimney. He explained that, had there been a fire in the chimney, he would have expected to see that the creosote was either "completely burned out of there" or "would expect to see expanded creosote" in there which in layman's terms would be "puffed creosote." The metal chimney pipe was also clean on the inside and had signs of a clean burn on the outside. From this, he concluded that the chimney was not an ignition source.

Raad also ruled out the possibility that the fire started from an electrical source on the basis of an examination of the nearby electrical components by an electrical engineer, George Orphan. Orphan testified that he examined the electrical components brought to him and found no evidence of arcing or overheating. On the basis of all the evidence, Raad determined that the fire originated in the lower end of the chimney chase and had been deliberately set.

Michael Jenkinson testified that he was a Detective Sergeant with the Michigan State Police who investigated the present fire. The trial court admitted Jenkinson as an expert on the cause and origin of fires.

Jenkinson stated that the basement was not heavily damaged by the fire. He noted that there were "isolated pockets of relatively deep burning" between the joists in the basement and that these isolated burns had no "connection to the fire on the other side of the joist." He opined that these isolated areas of charring in the basement near the void that ran up to the roof were caused by application of a direct source of fire—such as a blow torch, lighter, or match. He believed that the fire likely started at the hole where the metal chimney entered the void on the other side of the joist from the area of the two isolated burns. He stated that this "is where we suspect that the ignition was successful . . . ."

Jenkinson dismissed the possibility that the fire had its origins in the block chimney. He explained that the wood in the wood furnace was not damaged and, therefore, had not burned for very long. While the wood did not necessarily have to be roaring red hot, it would have to have been burning for some significant time to cause the material inside the chimney to ignite. He also found it noteworthy that the block chimney did not have cracks or defects on the side where the fire began.

From the evidence, Jenkinson concluded that the fire started at the point where the metal chimney went up through the ground floor into the chase and that it was deliberately set.

To rebut the testimony proffered by the prosecution's experts, Caminata's trial counsel called Richard Kovarsky. Kovarsky testified that he was a forensic engineer who investigates the cause and origin of fires. He admitted that he was a professional expert witness and stated that he had investigated around 3000 fires.

Kovarsky testified generally about flaws in the investigation of the fire at issue, including the failure to secure the home after the fire and the failure to have all the electrical components examined as a potential source for the fire. He also testified that he thought the metal chimney pipe showed signs of distress that may have been caused by excessive heat within the pipe.

Kovarsky stated that the fire might have been caused by the block chimney. He stated that the chimney had creosote build-up and cracks that showed signs of smoke and soot getting through. He stated that the wood found in the wood furnace was consistent with having been burned for 20 to 30 minutes and that, over time, the heat from the block chimney could have ignited the wood framing in the chase. He opined that the fire in the chase was consistent with this theory and he was not surprised that the intense burning came upward because the hole in the floor would have provided ventilation for the fire. He stated that the fire would have burned in the chase until it burned through the roof.

As for the two areas of isolated burning on the underside of the floor, he offered that there "could have [been] embers that worked their way over to that area" from the area of the chase. When asked by Caminata's trial counsel whether, hypothetically, had someone wanted to start a fire would they have done so at the points where the isolated burns occurred, Kovarsky offered that he would not have tried to ignite the lumber at the isolated points. He explained that

there was a high probability that the fire would just fizzle at those points. Instead, the area by the "chimney chase . . . would have a much better probability of succeeding . . . ."

Kovarsky stated that, if flames were observed coming from the chimney, there was nothing that he was aware of that would cause that other than a chimney fire. When asked whether he concurred with the insurance company's initial determination that the fire was caused by a chimney fire, Kovarsky testified that "that appears to be a reasonable conclusion, yes." When squarely asked by Caminata's trial counsel whether he thought the fire was caused by arson or a chimney fire, he stated that the chimney fire was the most probable cause: "I certainly didn't see anything that in my opinion suggests an intentional fire and certainly the chimney fire or a chimney related fire would be right now my most probable cause of the fire."

In closing arguments, the prosecutor argued that the evidence showed that the fire was deliberately started and that Caminata had the motive—to try and save his relationship with Vanderhoef and to rebuild the house for her in the way that he wanted—as well as the opportunity to start it. In contrast, Caminata's trial counsel argued that the evidence showed that the fire was not deliberately set; rather, it was accidental and likely the result of a chimney fire.

The jury ultimately rejected Caminata's trial counsel's theory of the case and found Caminata guilty of committing arson of a dwelling. He now appeals.

II. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

A. STANDARDS OF REVIEW

Caminata first argues that the prosecution did not present sufficient evidence to prove beyond a reasonable doubt that the fire was "intentionally set, and not the unfortunate result of creosote buildup in the chimney." He also argues that there was insufficient evidence to prove that he was the one that set the fire and, finally, he concludes that his conviction was against the great weight of the evidence. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). However, this Court reviews a trial court's decision whether to grant a new trial because the verdict is contrary to the great weight of the evidence for an abuse of discretion. *Id.* at 84.

B. SUFFICIENCY OF THE EVIDENCE

In order to convict Caminata on the charge of committing arson of a dwelling, in relevant part, the prosecutor had to prove that Caminata willfully or maliciously burned Vanderhoef's home. See MCL 750.72; *People v Wolford*, 189 Mich App 478, 480-481; 473 NW2d 767 (1991) (rejecting a challenge to the sufficiency of the evidence of arson of a dwelling because there was evidence that the fire had an incendiary origin and that the defendant willfully or maliciously set it); *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) (stating that identity is an element of every offense). There is rarely direct evidence that a defendant set a fire, but circumstantial evidence can sufficiently establish the elements of arson of a dwelling. *People v Nowak*, 462 Mich 392, 402-403; 614 NW2d 78 (2000); *Wolford*, 189 Mich App at 480 (stating

that the prosecution does not have to present direct evidence linking the defendant to the crime, but rather may satisfy the elements with circumstantial evidence).

In this case, the prosecution presented evidence that the fire was not the result of a chimney fire and was not caused by an electrical failure. Sergeant Rood testified that the chimney did not have "hard fire damage" and that the wood furnace was likely not radiating any heat. Similarly, the prosecution's experts on the cause and origin of fires both noted that the wood in the wood furnace was not particularly charred and, therefore, was not likely burning for a significant time before the fire. As Jenkinson explained, the fire in the wood furnace would have had to have been burning for a long time in order to ignite the material inside the chimney. Raad stated that he would expect to see the creosote in the chimney either entirely burned or to find evidence of expanded or puffed creosote in the chimney if there had been a chimney fire, but there was no such evidence. He also noted that the metal pipe chimney was clean on the inside and showed signs of a clean burn on the outside. Likewise, the prosecution presented evidence that the electrical components near the origin of the fire showed no signs of arcing or overheating.

In addition to this negative circumstantial evidence, there was positive circumstantial evidence that the fire was intentionally set. Both Raad and Jenkinson identified two areas on the underside of the ground floor that showed signs of a direct attack by fire that—because of their isolation from the fire that ultimately consumed the home and from electrical components—had no logical origin other than through human intervention. They also both agreed that the spot where the metal chimney pipe went up through the floor and into the chase showed signs of direct flame attack. Indeed, Jenkinson characterized this last area with evidence of a direct flame attack as the place where the "ignition was successful." Thus, there was strong circumstantial evidence that the fire at Vanderhoef's home was not accidental and, in fact, was intentionally started.

The prosecutor also presented circumstantial evidence that Caminata was the person responsible for setting the fire. There was evidence that he was relying on Vanderhoef for a place to live and to pay a substantial portion of their combined bills. There was also evidence that he wanted her to refinance her home so he could build an addition for his own children, but that she would not agree. The evidence showed too that they had had a serious fight the night before the fire and that she had told him that he had to move out on the day of the fire. This evidence suggested that Caminata had a strong motive to commit arson: by burning the home, he could place himself in a position where he would be able to get Vanderhoef to agree to a remodeled or replaced home with the features he wanted and would be in a position where he was indispensible to her—that is, he could "save" his relationship and get the changes to the home that he wanted.

Along with this evidence, the prosecution presented circumstantial evidence that showed that Caminata was the one most likely to have set the fire. The evidence showed that he tended the wood furnace and went to the basement to load the wood furnace on the morning of the fire. He was also the first to notice the smoke from the area of the chimney chase. Further, there was evidence that he casually reported the fire as a chimney fire and went to the basement and tried to put out the fire by extinguishing the wood in the wood furnace. Yet the evidence showed that the wood he purportedly loaded into the furnace had not been burning for the time he originally

stated. Rather, it had been burning for approximately 20 to 30 minutes prior to the fire. When viewed in the light most favorable to the prosecution, a reasonable jury could conclude that Caminata was in the basement near the point where the fire was intentionally set just a short time before he noticed the fire and—on that same basis—could conclude that he was the one that set it. The jury could further reasonably conclude that his attempts to put the fire out were staged and that the reason he was able to casually report the fire was because he himself had set it.

Accordingly, when the evidence is viewed in the light most favorable to the prosecution, there was clearly sufficient evidence to support the challenged elements of the charge. *Roper*, 286 Mich App at 83.

C. WEIGHT OF THE EVIDENCE

Caminata also briefly argues that—in addition to being insufficient—the evidence so clearly favored him that the trial court should have granted him a new trial because the jury's verdict was against the great weight of the evidence. A trial court should grant a defendant a new trial where the evidence presented at a trial preponderates so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *Id.* at 89. In denying Caminata's motion for a new trial, the trial court correctly noted that there was conflicting evidence presented at trial as to whether the fire was accidental or deliberately set. And, although Caminata presented expert testimony that suggested how the evidence tending to support the conclusion that the fire was deliberately set could be explained under his theory of the case, it cannot be said that his expert's testimony—when coupled with the evidence from the fire—so preponderated against the verdict that it would be a miscarriage of justice to let the verdict stand. See *id.* (noting that conflicting testimony usually presents a question of fact for the jury unless the contradictory testimony was so far impeached that the jury could not have believed it or it otherwise defied indisputable physical facts or physical realities); see also *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (stating that, "absent exceptional circumstances, issues of witness credibility are for the jury."). Accordingly, the trial court did not abuse its discretion when it denied Caminata's motion premised on the great weight of the evidence. *Roper*, 286 Mich App at 89.

III. PROSECUTORIAL MISCONDUCT

A. STANDARDS OF REVIEW

Caminata next argues that the prosecutor engaged in misconduct that deprived him of a fair trial. For that reason, he maintains, this Court must grant him a new trial. This Court reviews de novo claims of prosecutorial misconduct as a constitutional issue. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). However, where the defendant's trial counsel failed to object or request a curative instruction for the alleged misconduct, this Court will review the claimed misconduct to determine whether there was plain error affecting the defendant's substantial rights. *Id.*

B. ANALYSIS

In reviewing claims of prosecutorial conduct, this Court examines the conduct at issue to determine whether the improper conduct deprived the defendant of a fair trial. See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The defendant bears the burden of demonstrating that the prosecutor engaged in misconduct and that the misconduct deprived him of a fair trial. *Brown*, 279 Mich App at 134.

Caminata first argues that the prosecutor committed misconduct when she asked his expert witness, Kovarsky, about whether he was familiar with the "jealousy or the hero type motive" for arson even though the trial court had earlier determined that the prosecution's expert, Jenkinson, was not qualified to offer an opinion about possible motives for arson. Although the trial court had earlier determined that Jenkinson was not qualified to offer testimony about motives, the trial court had not made any rulings about Kovarsky's qualifications in that area. And, the fact that the trial court had determined that one expert on the origin and cause of fires was not qualified to testify about common motives in arson does not mean that a different expert on the origin and cause of fires could not have sufficient training and experience to offer an opinion on the subject. Hence, on this record, we cannot conclude that the prosecutor's attempt to ascertain whether Kovarsky had knowledge about this area was inherently improper. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (noting that prosecutorial misconduct may not be predicated on a good faith effort to admit evidence). Indeed, when first asked whether he was familiar with arson motives, Kovarsky stated that he had in fact read on the subject. Accordingly, the prosecutor's questions were not improper.

Even if the two questions posed to Kovarsky could be said to have been improperly made, when Caminata's trial counsel objected, the trial court determined—without conducting a voir dire of the witness—that he was not qualified to offer an opinion on motive and sustained the objection. The trial court also instructed the jury that the lawyers' questions to the witnesses are "not evidence" and should only be considered "as they give meaning to the witness' answers." This instruction cured any minimal prejudice that these two questions might have posed. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (stating that curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and juries are presumed to follow their instructions).

Caminata next argues that the prosecutor committed misconduct when she asked Kovarsky on two occasions whether he had disagreed with all the experts on a different investigation and whether he typically agreed with other experts in his investigation. Caminata argues that these questions suggested that the prosecutor had special knowledge that Kovarsky was not credible. A prosecutor may not imply that he or she has special knowledge that a particular witness is not credible. See *Bahoda*, 448 Mich at 276. However, a prosecutor may legitimately explore whether a witness is biased. See MRE 611(b); *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001) (stating that evidence of bias is almost always relevant). And, evidence that an expert witness has a tendency to give opinions that favor his or her client is relevant to establish bias. See *Wilson v Stillwill*, 411 Mich 587, 600-601; 309 NW2d 898 (1981) (stating that it is minimally relevant to cross-examine an expert about his or her patterns of testifying where the patterns might suggest that the witness has testified in such a manner that he

or she might more readily be hired in future cases). Thus, the prosecutor in this case did not commit misconduct by pursuing this line of questioning.

Finally, Caminata argues that the prosecutor committed misconduct when she denigrated Kovarsky in her closing argument as a "hired gun" and noted that one of her experts, Jenkinson, had a job without regard to whether he rendered an opinion to her liking. In evaluating a prosecutor's remarks, this Court must examine them in light of the evidence and arguments adduced at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). This is because a comment that might be inappropriate in one context, might nevertheless be appropriate when made to rebut an argument made by the opposing counsel. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

In his closing argument, Caminata's trial counsel vigorously attacked the credibility of the prosecution's expert witnesses. Indeed, he stated that he "love[d]" Raad as an expert witness because he only had "40 hours of training" and then accused him of outright lying on the stand. Although he stated that Jenkinson appeared to be honest, he emphasized that he was honest about all the shortcomings of his investigation. In contrast, Caminata's trial counsel lauded his own expert's credentials: "We then have Mr. Kovarsky testify, remember him? Honors graduate from John Hopkins, Rutgers, electrical engineer, professional registered engineer in six states, worked for the Department of Defense, 21 years of experience, 3,000 arson investigations. 3,000. Testified 50 to 70 times in court." Thus, Caminata's trial counsel implied that his expert was more qualified and did a more thorough investigation than the prosecution's experts. He then proceeded to argue that his own expert was also *more credible* because he had no stake in the outcome and, therefore, had no reason to lie: "Suppose for the sake of argument that he has a reason to say that our guy didn't do it. What does he get out of that? He has really nothing to gain." He then closed his remarks by arguing that, when you have competing experts that come to diametrically opposite conclusions, you have no choice but to find the defendant not guilty:

> [W]hat are we left with? Uh, this is like going to two different doctors, isn't it? And one of them says you have cancer and one says you don't, and where are you? You have no idea. That's where we're at here, and that's not proof. You're more confused now than you were when you started; that's where you're at, and that's what we have. Competing experts; one says yes, the other says no. That's not proof beyond a reasonable doubt, that's called confusion, and that's called not guilty.

In the prosecutor's rebuttal, she disagreed that there was a tie between the experts and emphatically disagreed with the implication that Caminata's expert was more credible because he had no stake in the litigation:

> [Caminata's trial counsel] states that, you know, we have got a tie with experts; one says this and one says that. Well not really. His expert is a hired gun. If we hired him, I'm thinking maybe he would have came up with—he's a hired gun, and we have Sergeant Jenkinson who has a job whether he tells me it's arson or he doesn't tell me it's arson. And he said, it would have been much easier to say it's a chimney fire, but he did a thorough investigation.

Although a prosecutor is free to argue that an expert witness has a financial motive to testify, he or she is not free to directly impugn the integrity of the defendant's expert. See *Unger*, 278 Mich App at 240. But the remarks at issue were not a direct attack on Kovarsky's integrity. The remarks were clearly made in response to Caminata's trial counsel's closing argument and were intended to address two specific arguments that his counsel made: that Jenkinson did not conduct a proper investigation and, because the experts' opinions were diametrically opposite, the jury could not find guilt beyond a reasonable doubt. In response, she argued that the evidence shows that Jenkinson did a proper investigation and that the jury could resolve the factual dispute by finding that Jenkinson's testimony was more credible than Kovarsky's testimony.

The prosecutor used strong language to highlight these differences; she characterized Kovarsky as a hired gun and suggested that he might have had a different opinion had she hired him. She also noted that Jenkinson had a job without regard to whether his opinion fit her needs. Nevertheless, these comments were supported by the evidence. It was undisputed that Caminata's trial counsel hired Kovarsky to testify and Kovarsky agreed that he made his living as a professional expert witness. And she was free to argue that he was not as worthy of belief as her own expert because his livelihood depended on his continued employment as an expert, whereas her expert had no such dependency. *Unger*, 278 Mich App at 237 (stating that the prosecutor in that case could permissibly argue that the defendant's expert was not worthy of belief because he had a financial motive to testify). It well-settled too that she did not have to express that argument in bland or sanitized terms. *Id.* at 239; see also *People v Allen*, 351 Mich 535, 544; 88 NW2d 433 (1958) ("Criminal trials are not basket luncheons, and we seem faintly to recall that in our experience opposing lawyers rarely if ever pelted each other with rose petals."). Finally, when her remarks are read in context, it is clear that the prosecutor was not intimating that she had special knowledge about Kovarsky's credibility, but rather was arguing that his opinion was suspect on the basis of his status as a career expert witness. Nor did she suggest that she has special knowledge that Jenkinson was truthful or more accurate; rather, she simply responded to Caminata's trial counsel's argument that his expert was more credible because he had no stake in the litigation by pointing out her belief that Jenkinson was the expert who truly had no stake in the outcome. See *Bahoda*, 448 Mich at 276. Given that the remarks were supported by the evidence, were in direct response to Caminata's trial counsel's closing argument, and were directed at his possible financial incentive to testify, we conclude that the remarks were not improper.

Even if we were to conclude that the prosecutor's comments referring to Kovarsky as a "hired gun" and suggesting that his testimony would have been different had she hired him were improper, we would conclude that the comments would not warrant relief. The comments consisted of one short statement at the close of the prosecutor's rebuttal argument and were not particularly prejudicial. And, had Caminata's trial counsel objected and requested a specific curative instruction, any prejudice could have been alleviated. See *Unger*, 278 Mich App at 240-241 (concluding that the prosecutor's remarks that the defendant's expert was hired by the defense to "'fool this jury'", to provide "'[r]easonable doubt at reasonable prices,'" and to do what "'he was paid to do'", were improper but harmless because a timely instruction could have cured any prejudice).

IV. SHACKLING

A. STANDARDS OF REVIEW

Caminata next argues that he was deprived of a fair trial when two different jurors saw him in shackles outside the courtroom on two separate occasions. Because Caminata's trial counsel did not object to the manner in which the trial court handled these incidents, we will review these claims for plain error affecting Caminata's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

Generally, a defendant has a due process right to be free of shackles or handcuffs during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, this rule does not extend outside the courtroom; a defendant may be routinely shackled outside the courtroom to prevent escape. *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), mod on other grounds 433 Mich 851 (1989). Where a juror inadvertently sees a shackled defendant outside the courtroom, in order to warrant any relief, the defendant must establish that he was prejudiced by the encounter. *Id.* at 385; see also *United States v Waldon*, 206 F3d 597, 606-608 (CA 6, 2000) (refusing to grant relief where a juror inadvertently saw the defendant in shackles outside the courtroom and then communicated that to one other juror where there was no evidence of actual prejudice).

On the second day of trial in this case, and after the prosecution had rested, Caminata's trial counsel approached the trial court about the possibility that a juror had seen Caminata in shackles in the hall. After the deputy acknowledged that a juror may have seen Caminata just as they were entering lockup, the trial court indicated that he would bring the juror in to question him and instruct him that he should disregard anything that he saw and not discuss it with the other jurors. The trial court also stated that he would hear Caminata's trial counsel's arguments concerning the disqualification of the juror here, if he chose to make such an argument. However, Caminata's trial counsel stated that he would reserve that argument for later and asked only that the juror be instructed not to disclose what he saw to anyone. The trial court then brought the juror in and questioned him:

> THE COURT: [Referring to the juror], did you during the course of one of our breaks when I let you leave the courthouse, did you have an occasion to see the defendant?
>
> JUROR: Yeah. I was walking over to the I think it's juvenile.
>
> THE COURT: All right. You were over by what is commonly referred to as the Probate Court?
>
> JUROR: Oh.
>
> THE COURT: Did you see the defendant there?
>
> JUROR: Yeah.

THE COURT: Did you see who he was with?

JUROR: No.

THE COURT: You didn't—

JUROR: It was just the officer, but—

THE COURT: Did you see that he was in custody, is that what you saw, or do you know?

JUROR: I really didn't—

After this exchange, the trial court interrupted the juror and instructed him that he was not to consider the fact that Caminata was in custody when making his determinations in this case. He also instructed the juror that he was not to tell any of the other jurors anything about what he saw even during deliberations. The juror indicated that he would comply with the trial court's instructions. Caminata's trial counsel thereafter did not request the disqualification of the juror and the juror eventually participated in the jury's deliberations and served as the foreman.

On this record, Caminata has not demonstrated actual prejudice. *Moore*, 164 Mich App at 385. Indeed, there is no evidence that the juror even saw Caminata in handcuffs or leg irons. The juror stated that he saw Caminata with an officer, but also stated that he "really didn't" when asked whether he saw that Caminata was in custody. Further, the trial court specifically instructed the juror that he was not to consider the fact that Caminata was in custody in making his determinations and instructed him not to discuss what he saw with the other jurors. *Waldon*, 206 F3d at 606-608. Accordingly, given the trial court's prompt investigation and instructions, we cannot conclude that there was plain error warranting relief. *Carines*, 460 Mich at 763.

On the last day of trial, Caminata's trial counsel again informed the court that a juror may have seen his client in shackles. A bailiff explained to the trial court that he was with Caminata waiting for an elevator when the elevator opened and he saw a juror inside. The bailiff stated that they would wait for the next car and asked the juror to continue on. At that point the trial court asked Caminata's trial counsel what he would like to do. After he had a discussion with Caminata off the record, Caminata's trial counsel stated: "I don't think we choose to do anything about it, Judge." The decision to deliberately forego any action constitutes a waiver that extinguishes the claimed error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Therefore, there was no error warranting relief with regard to this inadvertent encounter with a juror.[1]

[1] We also reject Caminata's contention that the second incident involving a juror was deliberately staged. Caminata has not offered anything other than self-serving speculation concerning whether the bailiff deliberately summoned the elevator with knowledge that a juror

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Caminata finally argues that his trial counsel was constitutionally ineffective for failing to bring forth evidence that Detective Taylor was a biased witness, for failing to properly handle the incidents involving jurors seeing Caminata in shackles, for failing to present evidence that Vanderhoef's son Tyler could have started the fire, and for failing to present evidence that Caminata could have actually tried to put the fire out by placing a chem stick into the chimney. In order to establish ineffective assistance of counsel that would warrant relief, Caminata must show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for his trial counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Yost*, 278 Mich App at 387.

A. FAILURE TO IMPEACH

Caminata first argues that his trial counsel was ineffective because he failed to impeach Detective Taylor with evidence that he held a bias against him. Specifically, Caminata alleges that he had met Taylor through a mutual acquaintance who was a deputy. Caminata explains that he later had a falling out with this mutual acquaintance because the acquaintance began to date his ex-wife and because he testified against the mutual acquaintance in a domestic violence case. From this, he concludes that Taylor must have been testifying out of animosity against Caminata. Contrary to Caminata's assertion, there is no substantive evidence that Taylor held a "strong bias" against him. Rather, he merely speculates that because Taylor knew a mutual acquaintance who allegedly had a bias against Caminata, Taylor must also have had a bias. In the absence of substantive evidence of bias that his trial counsel was either aware of or could have discovered with an investigation, we cannot conclude that his trial counsel's decision to refrain from impeaching Taylor in the suggested manner fell below an objective standard of reasonableness. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (stating that the defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel).

Further, even if there were such evidence, he was—contrary to Caminata's assertions on appeal—not a particularly "key" witness. Although Taylor testified about some statements that Caminata made that the fire was a chimney fire, he also confirmed that Caminata had always maintained his innocence, that he had seen flames coming from the chimney, and that he had been given permission by the insurance company to remove items from the scene of the fire. Because Taylor's testimony was not particularly prejudicial and actually might have aided Caminata in some significant respects, Caminata's trial counsel's decision not to impeach him with the evidence of bias was well within the realm of reasonable trial strategy. See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987) (noting that whether and how to cross-examine a witness is a matter of trial strategy). And this Court will not second-guess matters of trial strategy. *Unger*, 278 Mich App at 242-243. For the same reason, even if we could reasonably conclude that Caminata's trial counsel should have tried to impeach Taylor with evidence that he had some sort of bias against Caminata based on his prior dealings with

---

was in the elevator in order to cause that juror to see Caminata in shackles. Nor do we see any need to remand for a hearing to give Caminata an opportunity to explore his speculations.

someone who allegedly held such a bias, we cannot conclude that there is a reasonable probability that the failure to do so affected the outcome of the trial. Taylor's testimony was limited, might have aided the defense, and did not deal with the primary issue—that is, whether the fire was deliberately set. *Yost*, 278 Mich App at 387.

B. SHACKLING INCIDENTS

Caminata also states—in an argument that spans a total of two sentences—that the animosity between him and the deputy who allegedly knows Taylor might have played a role in the second incident where a juror saw him in shackles. He concludes that "he received ineffective assistance of counsel for counsel's failure to bring this to the court's attention, ask for an evidentiary hearing on this matter, and if police misconduct were involved motion (sic) for appropriate relief." Caminata has abandoned any claim of error in this regard by his complete failure to support this claim with any meaningful discussion of the record, other evidence, or by citation to supporting authorities. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

C. FAILURE TO INVESTIGATE AND PRESENT A DEFENSE

Caminata next argues that his trial counsel was ineffective because he failed to present evidence and argue that Vanderhoef's fourteen-year-old son, Tyler, was at home and had both the motive and opportunity to set the fire. Although Caminata argues that his trial counsel failed to investigate Tyler's possible motivation and ability to set the fire, he also states that his trial counsel had the discovery materials that allegedly supports the theory that Tyler had a motive to set the fire. His trial counsel also plainly had access to Tyler's testimony from the preliminary examination. Accordingly, it is not clear what might have been revealed by any further investigation. In any event, Caminata's trial counsel approached this case from the theory that the fire was accidental in origin—that is, he presented evidence and argued that the fire was not in fact deliberately set by anyone. Although his trial counsel could have pursued inconsistent defenses, see *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), he also could reasonably conclude that the best possible defense was to present evidence that the fire was accidental and that pursuing an inconsistent alternate defense blaming Tyler would be counterproductive. Consequently, on this record, we cannot conclude that Caminata's trial counsel's decision not to implicate Tyler in setting the fire fell below an objective standard of reasonableness under prevailing professional norms. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995) (holding that a defendant's trial counsel is not constitutionally deficient for choosing to present one of two alternative weak defenses).

D. EXCULPATORY EVIDENCE

Finally, Caminata argues that his trial counsel was ineffective for failing to present evidence that it was possible for Caminata to have used a ladder to access the roof and to physically place a chem stick down the chimney. Specifically, Caminata argues that his trial counsel should have had a builder or roofer testify about how easily the chimney could have been accessed from the roof.

Whether to call a witness is generally a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In this case, there was evidence that Caminata had told investigators that he tried to put the fire in the chimney out by placing a chem stick down the chimney. There was also evidence that a ladder was found propped against the house. And, at trial, the prosecutor asked questions that suggested that it would be difficult, if not impossible, for a person to place a chem stick in the chimney. Thus, the prosecution implied that Caminata lied about placing a chem stick in the chimney.

Although he did not present a separate witness to address whether Caminata could have physically placed a chem stick in the chimney, Caminata's trial counsel did elicit testimony from Jenkinson on cross-examination concerning the nature of the roof of the home at issue. He also got Jenkinson to admit that it would be possible to place a chem stick in the chimney and asked him whether the residue found in the chimney could have been from a chem stick. Thus, Caminata's trial counsel actually elicited testimony concerning the nature of the roof and got the prosecution's own expert to explain that it was possible for someone to get on the roof and use a chem stick on the chimney. On this record, we cannot conclude that trial counsel's decision to address the issue in this way—rather than by calling a separate witness—fell below an objective standard of reasonableness. *Unger*, 278 Mich App at 242-243 ("We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.").

There were no errors warranting relief.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly