# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>QUINTIN JOHNSON,<br><br>Defendant-Appellant. | UNPUBLISHED<br>February 6, 2001<br><br>Nos. 215187<br>Wayne Circuit Court<br>Criminal Division<br>LC No. 98-003001 |
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>JULIA WIGLEY,<br><br>Defendant-Appellant. | <br><br><br><br>No. 215223<br>Wayne Circuit Court<br>Criminal Division<br>LC No. 98-003001 |

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

In Docket No. 215187, defendant Quintin Johnson was convicted of four counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and one count of burning a dwelling house, MCL 750.72; MSA 28.267. In Docket No. 215223, defendant Julia Wigley was convicted of four counts of second-degree murder, MCL 750.317; MSA 28.549, one count of arson, and one count of burning insured property, MCL 750.75; MSA 28.270. Defendants were tried jointly, before separate juries. Defendant Johnson was sentenced to four terms of life imprisonment for the felony-murder convictions, and to five to twenty years' imprisonment for burning a dwelling house, all sentences to run concurrently. Defendant Wigley was sentenced to two terms of life imprisonment for two of the second-degree murder convictions, forty to sixty years' imprisonment for the remaining two second-degree murder convictions, five to twenty years' imprisonment for burning a dwelling house, and three to ten years' imprisonment for burning insured property, all sentences to run concurrently. Both defendants appeal as of right.

Their appeals have been consolidated for this Court's consideration. We affirm in part, reverse in part, and remand for further proceedings.

This case arises from a house burning in Detroit, in which four children died. The prosecutor presented evidence that Wigley, who lived on the main floor of the house, was upset with her upstairs tenants and engaged Johnson to start the fire, the plan being both to strike at the tenants and to collect insurance proceeds.

## I. Docket No. 215187 (Defendant Johnson)

### A. Prosecutorial Misconduct

Defendant Johnson argues that the prosecutor, in opening statements, improperly attributed to defendant specific damaging words that the prosecutor knew the evidence would not support. Our examination of the opening statements reveals no such misconduct.

A prosecutor enjoys wide latitude in fashioning arguments based on the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). A prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). Where applicable, "'the general rule is that when a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith.'" *People v Solak*, 146 Mich App 659, 676; 382 NW2d 495 (1985), quoting *People v Pennington*, 113 Mich App 688, 694; 318 NW2d 542 (1982).

In this case, the prosecutor, suggesting that defendant had showed indifference regarding the victims of the fire, stated, "He looked at them. He said 'it doesn't matter.'" Describing defendant's statement to police, the prosecutor stated, "It's going to be the statement that says 'I did this in exchange . . . .'" Defendant is correct in observing that the evidence did not show that he actually saw the victims before the fire, or that he uttered those precise words attributed to him. However, there was evidence from which the prosecutor could argue that defendant acted with indifference to whether the residents upstairs were home, and that he had bargained with codefendant Wigley to burn the house in exchange for four dollars and a dog. The prosecutor was fairly summarizing, not quoting, Johnson's actions and remarks that were to be presented at trial. Defendant cites no authority for the proposition that statements attributed to a defendant in the course of argument must be verbatim quotations from the evidence. Indeed, in *Solak*, *supra* at 676, this Court found that it was not error for a prosecutor, when arguing that the defendant used profanity, to attribute to defendant in argument specific profane language where the evidence introduced at trial indicated profanity only generally. This Court concluded that the prosecutor's statement was offered in good faith, and that the statement "was not impermissibly injected as an attempt to prejudice the jury." *Id.*

Had defense counsel objected to the specific statements challenged here, and expressed concern that any stepping from literal to figurative representations concerning what the evidence would show that defendant said or did might mislead or prejudice the jury, the prosecutor could have offered some clarification, or the trial court could have provided a curative instruction. In

the absence of that specific objection, appellate relief is barred except to prevent manifest injustice. See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). There was no manifest injustice in this instance. It seems unlikely that the jury would have disregarded their instruction not to regard counsel's statements as evidence, and then to mistake the prosecutor's summary of defendant's actions and words for literal quotations, and then to judge defendant on them instead of on the competent evidence subsequently presented.

Defendant additionally characterizes certain of the prosecutor's opening statements as reflective of the intent element for first-degree premeditated murder, and argues that, because he was charged only with felony murder, the prosecutor thus presented argument not related to the prosecutor's theory of the case. Assuming, without deciding, that defendant's characterization must be taken at face value, defendant nonetheless fails to present a meritorious claim.

The intent element for premeditated murder also satisfies the intent element for felony murder. The latter requires that the defendant intend to kill, do great bodily harm, or knowingly create a very high risk of death or great bodily harm. See *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993). The first of these three states of mind matches the specific intent element of premeditated murder. See *People v Dykhouse*, 418 Mich 488, 515; 345 NW2d 150 (1984). Thus, defendant's argument that the prosecutor was deviating from her theory of the case by arguing the intent element for premeditated murder in a felony-murder prosecution is without legal merit.

B. Sequestration Order

Defendant argues that the trial court abused its discretion in allowing one witness, defendant's girl friend and mother of his six children, to testify despite her having been present at earlier stages of the trial in violation of the court's sequestration order. We disagree.

The question whether to sequester witnesses, and whether to allow a witness to testify who has violated a sequestration order, are entrusted to the trial court's sound discretion. *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987). An abuse of discretion occurs only where a court's action is "so violative of fact and logic as to constitute perversity of will or defiance of judgment . . . ." *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

"A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *Solak, supra* at 669. Defendant has not met this burden in this instance. The obvious reason to sequester witnesses is to shield against the possibility that the testimony of one may influence the testimony of another. Defendant points to no statement of his girl friend that might have been inflected this way, nor can we discern from the record where this might have happened. Further, the girl friend was herself more sympathetic to the defense than to the prosecution, and so the prosecutor had nothing to gain from the witness' hearing the other witnesses.

Defendant argues that he was prejudiced by the trial court's decision to let the witness testify, because the prosecutor then elicited testimony from the witness that was in violation of the rules of evidence and of defendant's constitutional rights. Concerning the latter, defendant does not specify the constitutional provisions allegedly violated, and we will not attempt to

divine what this might be. See *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993) (a party's mere assertion that the party's rights were violated, unaccompanied by record citations, cogent argument, or supporting authority, is insufficient to present this issue for consideration by this Court). Concerning the rules of evidence, defendant chooses this opportunity to argue that the witness was impeached by her prior inconsistent statements in violation of MRE 613(a), on the ground that the police officer who took the statement from the witness with which she was impeached did not appear to establish a foundation for that impeachment evidence. Defendant argues in error.

This is a collateral issue, relating to the one presented with the statement of the issues on appeal only in that the issue arose because the witness was allowed to testify in the first instance. The question whether the witness was improperly impeached by use of her police statement has no direct bearing on the witness' having heard some earlier testimony. An issue that is not raised within the statement of questions in the brief on appeal is not properly before this Court. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). See also MCR 7.212(C)(5).

Regardless, this ancillary issue has no merit. The witness' police statement was not introduced as substantive evidence, but was placed before the witness to refresh her memory. When the witness appeared to contradict the police statement, the prosecutor did not attempt to introduce the statement, but instead accepted the witness' answers. Defendant cites no authority for the proposition that a police statement cannot be placed before a witness to refresh her memory unless the officer who took the statement appears to establish a foundation.

Finally, defendant complains that the violation of the sequestration order created an undeserved impeachment opportunity for the prosecutor. However, the girl friend's testimony was either ambivalent or else damaging to Johnson, nowhere exculpatory or otherwise favorable to him, and so defendant suffered no prejudice from any impeachment of the witness' credibility.

C. Codefendant's Testimony Before Her Jury Only

Defendant claims error from the trial court's decision to allow only defendant Wigley's jury to hear Wigley's testimony. However, not only did the defense fail to preserve this issue with an objection, but defense counsel in fact placed on the record an emphatic objection to Wigley testifying before defendant's jury. A party may not request an action of the trial court and then challenge that action on appeal as erroneous. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Because defendant originally requested the decision over which he now claims error, defendant fails to bring an issue for this Court's review. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

D. Instruction on Burning Insured Property

Finally, defendant argues that the trial court erred in refusing his request for an instruction on burning insured property. Both defendant and codefendant Wigley requested this instruction, but the court granted Wigley's request only. We agree that the court should have provided it for defendant as well, but find the error harmless.

A trial court is required to instruct on a cognate lesser offense where the defendant requests the instruction and there is evidence to support it. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). In this case, the evidence well supported the charge of burning insured property as concerned Wigley, as the trial court acknowledged by instructing her jury accordingly. Although we agree with the trial court that there was no evidence to suggest that defendant himself expected to receive any insurance proceeds in the matter, we agree with defendant that the evidence that he set the fire at Wigley's behest, as "an insurance job," well implicated defendant in the matter as an aider and abettor. Thus, defendant's jury should have received the instruction.

However, error in failing to provide an instruction on a cognate lesser offense is subject to harmless-error analysis. *People v Beach*, 429 Mich 450, 494; 418 NW2d 861 (1988). "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26; MSA 28.1096. The defendant bears the burden of demonstrating that a preserved, nonconstitutional error resulted in a miscarriage of justice. *Lukity, supra* at 493-494. See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (appendix).

In this case, it seems more probable than not that the only change in the outcome that would have resulted had the court given the requested instruction would have been that defendant, like his codefendant, would have been convicted of a count of burning insured property in addition to the convictions of arson and murder. The two property offenses differ sufficiently that convictions of both do not offend principles of double jeopardy. *People v Ayers*, 213 Mich App 708, 720-721; 540 NW2d 791 (1995).

Defendant points out that the strategy at trial was to steer the jury toward burning insured property and away from arson, in hopes of defeating arson as the predicate for first-degree felony murder. However, defendant's jury was properly instructed separately on arson as the predicate for felony murder and on arson standing alone. Had defendant's jury been instructed on burning insured property, the instruction would have come as a charge to consider in addition to arson, not as an alternative to it. Had the jury in that case illogically chosen not to convict of arson as a consequence of being able to convict of burning insured property, as defendant appears to speculate, it would nonetheless be a leap to suppose that the jury would have also concluded that the arson predicate for felony murder was not satisfied. Prejudicial error can hardly be premised on such speculation.

On appeal, defendant stresses the trial strategy to defeat specifically the intent element of felony murder, but does not argue that any specific element of arson was not satisfied. Although defendant argues that he set the fire without knowledge that anyone was at home at the time, that would go to intent for murder only; the crime of arson does not concern itself with whether a dwelling's occupants were actually in the building at the time. MCL 750.72; MSA 28.267 ("either occupied or unoccupied"). Defendant does not otherwise argue that the evidence was weak concerning any element of arson in this case such that his jury might have resolved it in favor of the lesser crime of burning insured property had it the opportunity to do so.

Because defendant more likely than not avoided ending up with an additional conviction and sentence as the result of the trial court's erroneous refusal to provide the instruction he requested, defendant has failed to demonstrate that he has suffered any prejudice, let alone manifest injustice, as the result of the error. *Lukity*, *supra* at 493-494. Thus, the error was harmless and appellate relief is not warranted.

### E. Double Jeopardy

Although defendant raised the issue neither at trial nor on appeal, we note that defendant was convicted and sentenced for both felony murder and the predicate felony of arson. This constitutes multiple convictions for the same crime, in violation of double jeopardy principles. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Although the issue is not preserved, we nonetheless take this opportunity to correct this error sua sponte. Where a defendant is convicted for both felony murder and the predicate felony, the remedy on appeal is to reverse and vacate the conviction for the predicate felony. *Minor*, *supra* at 690, citing *Harding*, *supra* at 714. Accordingly, we vacate defendant's conviction and sentence for arson.

## II. Docket No. 215223 (Defendant Wigley)

### A. Prior Inconsistent Statements

When defendant Wigley announced that she would elect to take the stand in her own defense, the trial court cautioned her that some statements that she had made to a police officer at the scene of the fire, which the court had ruled inadmissible under *Miranda*,[1] would become admissible for impeachment purposes. At trial, defendant testified that she had temperate feelings about her upstairs renters on the day of the fire, that at the scene of the fire she was in tears, and that she did not recall saying anything to the police officer about the children trapped in the fire. The prosecutor then called the police officer as a rebuttal witness, and elicited from him that defendant was yelling at the top of her voice, that she was not crying, and that when asked about children in the house she expressed a bitter indifference toward their plight and continued to curse about the upstairs renters owing her rent money.

On appeal, defendant argues that this impeachment evidence should have been excluded under MRE 403 on the ground that its probative value was substantially outweighed by the risk of unfair prejudice. Defendant additionally asserts that the prosecutor argued the impeachment evidence as substantive evidence of defendant's guilt, and that the trial court's instructions did not sufficiently limit the jury's consideration of the impeachment evidence. None of these issues was raised at trial, however. When claiming error over an unpreserved issue, a defendant "must show a plain error that affected substantial rights, "and the appellate court should reverse "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 774 (appendix), citing *United*

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

*States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Defendant fails to meet that burden here.

Defendant's credibility was obviously very much at issue, and having testified that, at the fire she was in tears, had no excessive anger towards the upstairs renters, and did not remember saying anything about the children in the house, the evidence that she was not in tears, and had in fact spoken harshly about the upstairs residents, bore directly on her credibility. The record makes very plain that defendant had been advised of the hazards of taking the stand, including that her otherwise inadmissible statements on the scene could come in as impeachment. It was defendant's right to take the stand, and to gamble that the benefits of her testimony would ultimately outweigh the hazards of having that impeachment evidence brought to the jury's attention. Defendant chose to gamble, and in this instance lost. If the rebuttal testimony was prejudicial to defendant, it was not "unfair prejudice," MRE 403, considering that defendant herself knowingly chose to take that chance.

Additionally, although the evidence that defendant spoke harshly of the upstairs renters at the scene of the fire certainly was damaging to her, the rebuttal evidence also emphasized that defendant was in a state of great excitement at the time. This comported with defendant's own testimony in that particular, and conceivably strengthened her defense. Defendant's display of great emotion comported with her insistence that she had not expected her house to be burned, and worked against the theory that it was burned according to her own plan. Especially if the harms that defendant suffered from the rebuttal testimony are weighed against the benefits she received, it is clear that no unfair prejudice resulted.

Concerning the allegation of improper closing argument, defendant claims error from the following remarks of the prosecutor:

> You heard what she said. There was no tears. . . . It burns your mind. You can't forget it. Think about—think about what happened. What [sic] she crying? No. Did she care? No. Did she ever care? No.
>
> * * *
>
> . . . And her reaction speaks louder than words.
>
> A total disregard for life, and that's what you have that began in 7 o'clock that morning, when those children were alive, and then by 9 o'clock that evening, they were gone. And her reaction, [the police officer] gave it to you.

We reject defendant's argument that the prosecutor was making improper use of the impeachment evidence. "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Harris v New York*, 401 US 222, 224; 91 S Ct 643; 28 L Ed 2d 1 (1971). Having spoken of her demeanor on the night in question in hopes of persuading the jury that she felt no hostility to the people

upstairs, defendant opened the door to introduction of her prior inconsistent remarks on that occasion.

"[I]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Jenkins v Anderson*, 447 US 231, 238; 100 S Ct 2124; 65 L Ed 2d 86 (1980). Where a criminal defendant chooses to take the stand, that person is "under an obligation to speak truthfully and accurately," and the prosecutor may "utilize the traditional truth-testing devices of the adversary process." *Harris, supra* at 225. Thus, voluntarily made statements nonetheless inadmissible in the prosecutor's case in chief under *Miranda* may be used for impeachment just as the prosecutor might use statements made to any third person. *Id.* at 225-226. "[I]t could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment." *Id.* at 226. These pronouncements from the United States Supreme Court indicate that once a defendant takes a position on the stand, the prosecutor may make broad use of impeachment evidence to elicit information in conflict with the defendant's representations. In this case, the prosecutor properly elicited from the police officer his complete account of defendant's behavior and demeanor at the fire, and properly encouraged the jury to consider the officer's full story in contradiction to defendant's.

Concerning the jury instructions, defendant makes issue of the following:

> The prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out of court statement as evidence against the defendant unless you do the following: First, you must find the defendant actually made the statement as it was given to you. If you find the defendant did not make the statement at all, you should not consider it. If you find the defendant made part of the statement, you may consider that part as evidence.
>
> Second, if you find the defendant did make the statement, you must decide whether the whole statement or part of it is true. When you think about whether the statement is true, you should consider how and when the statement was made, as well as all the other evidence in the case.
>
> You may give the statement whatever importance you think it deserves. You may decide it is very important or not very important at all. In deciding this, you should once again think about how and when the statement was made and about all the other evidence in the case.
>
> * * *
>
> There has been some evidence that a witness made an earlier statement that did not agree with their testimony during trial. You must be very careful about how you consider this evidence. The statement was not made during this trial, so you must not consider it when you decide whether the elements of the crime have been proven.

> On the other hand, you may use it to help you decide whether you think the witness is truthful. Consider the statement carefully, ask yourself if the witness made the statement and whether it differs from the witness' testimony here in court. But then remember that you can only use it to help you decide whether you believe the witness' testimony here in court. However, if the witness testified that the earlier statement was true, or if the earlier inconsistent statement was given under oath subject to the penalty of perjury at a prior hearing, it may be considered as proof of the facts in the statement.

Defense counsel stated on the record that he had "no objections" to the instructions as given. Had defense counsel wished to emphasize that defendant herself was a witness who had been impeached with an out-of-court statement, counsel was free to do so, and no manifest injustice resulted from his failure to raise the issue. Because defendant raised the issue of how she regarded the people upstairs in her own testimony, the impeachment evidence to which defendant thus opened the door was properly thorough and specific in rebutting defendant's account of events. The distinction between impeachment and substantive evidence in such a case is hard to draw, and no manifest injustice resulted from failure to draw it more boldly.

B. Instruction on the Causation Element of Murder

Defendant brings to our attention a minor error in the trial court's instructions on first- and second-degree murder. The court stated that the prosecutor was obliged to prove that defendant "caused the death of the deceased," then attempted to clarify by adding, "That is, the deceased died as a result of soot and smoke inhalation." This is clearly erroneous, in that the court appears to be equating defendant's legal culpability for causation with the victims' having died from the effects of the fire. However, elsewhere in the instructions, the court spelled out arson as the predicate felony for the first-degree murder charge, and properly established that, to satisfy that predicate, defendant must have caused the fire. Further, when instructing on second-degree murder, the court stated, "If the defendant unlawfully injured the deceased and started a series of events that naturally or necessarily resulted in the deceased's death, it is no defense that the injury was not the only cause of death."

Imperfect instructions do not require reversal if they fairly presented the issues to be tried and adequately protected the rights of the accused. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Further, "jury instructions are to be read as a whole, not extracted in a piecemeal fashion." *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1990). Considering the jury instructions in this case in their entirety, we are satisfied that the court's other instructions well balanced and corrected its minor misstatements concerning causation for murder. It is not reasonable from a reading of the instructions actually given, in full context, to suppose that the jury deliberated with an idea that defendant bore some kind of strict liability if the children died from the fire, regardless of her culpability in the fire itself. The court misspoke, but it strains at credulity to suggest that the jury became wedded to the strictest meaning of the court's words in that particular, and consequently decided the causation element in a way that was irrational, counterintuitive, and in disregard of some of the court's other instructions. The court's instructional errors were momentary, obvious, and corrected elsewhere. No manifest injustice resulted from this unpreserved issue. The error was harmless.

C. Instruction on Burning Insured Property

Defendant argues that the trial court erroneously instructed the jury to consider burning insured property as a charge in addition, instead of as an alternative, to the arson and four murder counts with which defendant was originally charged. We disagree.

Defense counsel requested the instruction in the first instance, and all indications on the record are that defense counsel accepted that the instruction would be presented as a charge in addition to those originally brought. Presumably counsel would have liked to have that lesser offense charged as an alternative to arson, but those two crimes concern sufficiently different societal interests that a defendant may properly be convicted and sentenced for both. *Ayers, supra* at 720-721. Thus the trial court was not obliged to offer the two as mutually exclusive alternatives. Instead, counsel was simply gambling that, given the chance to convict of burning insured property, the jury would eschew convicting defendant of arson.

Again, a party may not request an action of the trial court and then challenge that action on appeal as erroneous. *McCray, supra* at 14. When a party requests an instruction on a lesser cognate offense that was not among the offenses originally charged, the prosecutor does not object, and the court grants the request, this effectively amends the information to include the additional charge. *People v McKinley*, 168 Mich App 496, 506-507; 425 NW2d 460 (1988), citing *People v Williams*, 412 Mich 711, 714-715; 316 NW2d 717 (1982). Defendant argues that *McKinley* was wrongly decided, but we are persuaded that *McKinley* quite reasonably applied the reasoning of *Williams* to a case where a defendant was charged with a felony count of a firearms violation, the defendant requested an instruction on a misdemeanor firearms violation, and then was convicted of both. *McKinley, supra* at 498, 506-508. We feel no need to reconsider the reasoning in *McKinley*.

In this case, defendant gambled that putting the lesser charge of burning insured property before the jury would relieve her of conviction of arson. That defendant lost the gamble is not grounds for appellate relief.

D. Hearsay

Defendant argues that the trial court erroneously sustained some hearsay objections by the prosecutor. We disagree.

As defendant attempted to describe the moods and plans of defendant Johnson and Barbara Allen, by telling of their statements, the prosecutor peppered her testimony with sustained hearsay objections. Defense counsel finally attempted to get the testimony in as statements against a party opponent, which are exempt from the definition of hearsay, attempting to characterize defendants Wigley and Johnson as party opponents for purposes of MRE 801(d)(2). The trial court rejected this characterization, and so must we.

Although defendant Wigley wished as a defensive strategy to suggest that defendant Johnson was solely responsible for the crimes for which they were both charged, that defense posture did not transform Johnson into a party against whom Wigley was offering evidence. She was offering evidence *for* herself, not *against* Johnson, whose jury was not present when Wigley

testified. The two codefendants were potentially mutually adverse witnesses, but not adverse parties. The trial court correctly construed MRE 801(d)(2)(E) as authorizing only the prosecutor in this instance to introduce out-of-court statements of Johnson, or of Allen as Johnson's coconspirator, as statements "offered against a party."

Defendant Wigley further asserts that other bases existed upon which defendant's testimony concerning discussions between Johnson and Allen might have been admissible, but these grounds were not urged at trial. Although defendant suggests that counsel's general disagreement with their exclusion under hearsay principles should suffice to preserve those additional grounds as matters on appeal, we cannot agree. Particularly in the area of hearsay, a party attempting to rehabilitate evidence over a hearsay objection cannot simply oppose the objection generally and thus incorporate and preserve the myriad exemptions and exceptions within the hearsay rule.

Defendant additionally argues that, even where evidence is properly excluded by the rules governing hearsay, where a defendant's constitutional right to present a defense comes to bear, that right must trump the hearsay rules. However, defendant suffered no deprivation of her right to present a defense in this instance.

"[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). However, a defendant's right to present a defense does not extend to a right to present fundamentally unreliable or otherwise defective evidence. The rules generally excluding hearsay simply recognize the basic unreliability of evidence that cannot be tested in court through cross-examination. See *People v Sykes*, 229 Mich App 254, 261-262; 582 NW2d 197 (1998). In *Chambers*, the United States Supreme Court concluded that the hearsay evidence in question "bore persuasive assurances of trustworthiness" and thus should have been admitted as a statement against penal interest. *Chambers, supra* at 302. The Court was not excusing the general hearsay prohibition in light of the defendant's need to present a defense, but instead was cautioning against applying the rule "mechanistically" by failing to recognize an exception for statements against penal interest. *Id.*

Defendant Wigley, neither at trial nor on appeal, asserts that the statements of defendant Johnson were admissible as statements against penal interest, MRE 804(b)(3). In any event, Wigley's attempt to implicate another in the crimes to the exclusion of herself was obviously self serving, and her report of Johnson's or Allen's out-of-court statements would carry no special indications of trustworthiness. This case is further distinguishable from *Chambers* in that the latter concerned cross-examination of a prosecution witness and presentation of defense witnesses other than the defendant himself. *Chambers, supra* at 293.

E. Ineffective Assistance of Counsel

Although we have concluded that the trial court committed no error in rejecting defense counsel's attempt to overcome several hearsay objections, we conclude that defendant Wigley's argument that counsel's failure to pursue other avenues for overcoming those objections constituted ineffective assistance warrants further consideration.

The federal and state constitutions, US Const, Am VI, Const 1963, art 1, § 20, guarantee a criminal defendant the right to the *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant Wigley asserts that the alleged statements of defendant Johnson and Allen were admissible because they were not offered for the truth of the matter asserted, or because they fell under the exception for statements of then-existing state of mind, reflecting emotion, intent, motive, or plan. See MRE 801(a) and 803(3). In reviewing the testimony that prompted the various hearsay objections, we find that, in the first instance, defendant was attempting to describe Allen's hostile opinion of defendant's upstairs tenants, and personal interest in the conflict. Depending on precisely how the declarant expressed her disdain, such declarations could have been admissible as not offered to prove the truth of the matter asserted, or as statements of a then-existing state of mind. On another occasion, Wigley was prevented from describing defendant Johnson's allegedly irate reaction to being told not to burn Wigley's house after all. This likewise could have been admissible as a statement of then-existing state of mind. Further, the words Wigley attributed to Johnson, "What do you mean?", form a question, not an assertion at all. MRE 801(1).

Further, Wigley was prevented from telling of threats that Johnson allegedly made against her. Assertions typically contained within threats, e.g., that the person threatened will regret her course of action, do not prove any matter at issue at trial, and thus would be admissible to prove the threat, not the thing asserted.

Finally, Wigley was prevented from testifying that Barbara Allen "made a comment to me and—as to not do something or not to say something." After an objection was sustained, defense counsel instructed Wigley to "move on." Counsel should not have given up so easily; an order not to say or do something is not an assertion, and thus evidence of a statement to that effect is not hearsay.

Defense counsel's failure to navigate the rules governing hearsay more skillfully prevented Wigley from explaining fully her account of the antagonism that Allen and Johnson developed for her, of how Johnson apparently felt justified in acting without Wigley's acquiescence, and that some kind of plan existed between Allen and Johnson.

Had Wigley been allowed to present all the admissible testimony in this regard that she wished to offer, her gambit in choosing to take the stand in her own defense might have resulted in a different verdict. Counsel's failure to rehabilitate that testimony over hearsay objections was error beyond what one should expect from an ordinary defense lawyer, and that possibly affected the outcome to Wigley's prejudice.

For these reasons, in the interests of justice, we hereby retain jurisdiction and remand this case to the trial court with instructions to conduct an evidentiary hearing on the claim of ineffective assistance of counsel. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

## III. Conclusion

In Docket No. 215187, we vacate defendant Johnson's conviction and sentence for arson, and remand for modification of the judgment of sentence to reflect this decision. Defendant Johnson's remaining convictions and sentences are affirmed. In Docket No. 215223, we remand for an evidentiary hearing concerning defendant's claim of ineffective assistance of counsel.

Affirmed in part, reversed in part, and remanded. We retain jurisdiction in Docket No. 215223 only.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage