STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	Nos. 220906;229264 Macomb Circuit Court
ROBERT JOHN KURZAWA, Defendant-Appellant.	LC Nos. 99-000811-FH; 99-000812-FH

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of burning a dwelling house, MCL 750.72; MSA 28.267, and maliciously killing animals, MCL 750.50b(2); MSA 28.245(b)(2). He was sentenced to concurrent terms of imprisonment of thirteen to twenty years and two to four years, respectively. We remanded to allow defendant to move for resentencing, and defendant was resentenced to concurrent terms of imprisonment of ten to twenty years and two to four years, respectively. Defendant appeals as of right. We affirm.

Defendant's convictions stem from the burning of his girlfriend's home while her pets were inside. The victim told defendant that she wanted to "slow down" their relationship, and the next day, defendant told two of the victim's neighbors that he was going to burn down the victim's home. Shortly after making these statements, defendant was seen leaving the victim's home, which immediately began to burn. The home and its contents were destroyed, including three of the victim's pets. Inside the home, investigators found a propane tank on its side with the valve open, as well as straw strewn about the home. Defendant was arrested the next day, and he admitted to police that he burned down the victim's home.

Defendant first argues that the trial court erred by refusing to instruct the jury on the elements of the lesser offense of malicious destruction of property. MCL 750.380; MSA 28.612. This Court has previously held that malicious destruction of property is a cognate lesser offense of burning a dwelling. *People v Foster*, 103 Mich App 311, 320; 302 NW2d 862 (1981). A trial court must grant a requested instruction for a cognate lesser offense only where it is consistent with the evidence and with the defendant's theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). Here, defendant's theory of the case was that he was too intoxicated to formulate the intent required to commit the offense of burning a dwelling. This theory is inconsistent with the offense of malicious destruction of property, which requires the specific

intent to injure or destroy the property. See *People v Culp*, 108 Mich App 452, 458; 310 NW2d 421 (1981). Therefore, the trial court was not required to grant the requested instruction.[1]

Defendant similarly argues that the trial court should have *sua sponte* instructed the jury on the lesser offense of burning insured property. MCL 750.75; MSA 28.270. However, the trial court did not have a duty to give a lesser-offense instruction that defendant failed to request. *People v Kuchar*, 225 Mich App 74, 77; 569 NW2d 920 (1997). In any event, burning insured property is neither a necessarily included nor a cognate lesser offense of burning a dwelling. A conviction of burning insured property requires proof of an element that is not required for a conviction of burning a dwelling; namely, an intent to defraud the insurer. MCL 750.75; MSA 28.270. Moreover, the two statutes protect different interests—one protects habitation, while the other seeks to prevent fraud. *People v Ayers*, 213 Mich App 708, 720; 540 NW2d 791 (1995).

Defendant claims that he was denied the effective assistance of counsel by defense counsel's failure to request this instruction. However, burning insured property was not a true lesser-included offense; therefore, counsel was not ineffective by failing to make a meritless request. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Additionally, defendant has not overcome the strong presumption that the challenged action was a matter of sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). Indeed, had defense counsel requested and received an instruction on burning insured property, defendant may have been convicted of *both* offenses, without violating the constitutional protection against double jeopardy. See *Ayers*, *supra* at 720-721.

Defendant also argues that the trial court erred by failing to grant a requested cautionary instruction. We review the trial court's decision for an abuse of discretion. *People v Elmore*, 92 Mich App 678, 683; 285 NW2d 417 (1979). One of the victim's neighbors testified that defendant "said that he had already killed two people" and said of the victim that he was going to blow off her head and blow up her house. Defendant did not object to the testimony, but later requested that the court instruct the jury that he had never been convicted of or charged with killing anyone. Defendant essentially wanted the court to take judicial notice that defendant had never killed anyone, contrary to the neighbor's testimony. A trial court may take judicial notice of a fact that is "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." MRE 201(b). Here, the witness' testimony was that defendant claimed to have *killed* two people in the past. Whether defendant had ever been *charged with* or *convicted of* killing anyone does not refute this testimony. The trial court could not have taken judicial notice that defendant had never *killed* anyone in the past—no accurate

[1] Defendant also requested instructions on the offenses of burning real property other than a dwelling, MCL 750.73; MSA 28.268, and attempted arson, MCL 750.92; MSA 28.287. On appeal, defendant briefly asserts that the trial court erred by refusing to grant the requested instructions. However, defendant fails to raise this issue in the statement of the question presented, and also fails to specifically argue this issue in the body of his brief on appeal. Therefore, this issue is not properly before this Court for review. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

resource would be capable of proving such a negative assertion. The trial court did not abuse its discretion by refusing to grant defendant's request.

Likewise, defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct. However, defendant failed to preserve this issue by objecting at trial to the alleged misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved claims of prosecutorial misconduct under the plain-error rule. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Under the plain-error rule, defendant forfeits review of this issue unless he demonstrates plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights where it is outcome determinative. *Id*. Even then, this Court will exercise its discretion to reverse only where the error resulted in the conviction of an actually innocent defendant or where the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

We conclude that defendant has failed to demonstrate outcome-determinative plain error and has accordingly forfeited review of this issue. We agree that the prosecutor improperly appealed to the jury's sympathy for the victim and her dog. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). We also agree that the prosecutor's comment that the jury would grow to despise defendant was intemperate. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, we conclude that the prosecutor's tactics did not affect the outcome of the proceedings, given the overwhelming evidence of defendant's guilt. We also reject defendant's assertion that defense counsel was ineffective by failing to object to the alleged prosecutorial misconduct. Defendant has not shown "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Stanaway*, *supra* at 687-688.

Defendant also challenges the scoring of the legislative sentencing guidelines in his case. Defendant successfully sought a remand from this Court, arguing that Prior Record Variable (PRV) 2, PRV 5, and Offense Variable (OV) 7 were misscored. Defendant argued that the proper minimum sentence range was 72 to 120 months, instead of 99 to 160 months. On remand, defendant was resentenced according to his proposed minimum sentence range.[2] Defendant now argues that the trial court also misscored OV 2. However, our order remanding the case to allow for resentencing specified that the proceedings on remand were limited to the issues raised in defendant's motion for remand. Defendant did not raise his challenge to the scoring of OV 2 until resentencing. An issue beyond the scope of the remand order that is raised for the first time after remand is not properly before this Court for review. *People v LeFlore (After Remand)*, 122 Mich App 314, 320; 333 NW2d 47 (1983).

In any event, defendant's challenge lacks merit. Under MCL 777.32(1)(a); MSA 28.1274(42)(1)(a), fifteen points under OV 2 were appropriate where defendant possessed an incendiary device—a propane tank—during the commission of the instant offenses. Moreover, contrary to defendant's argument, no human victim was required in order for OV 2 to apply.

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[2] Thus, defendant's challenges to his thirteen-year minimum sentence, which were raised in his initial brief on appeal, are moot.

Under MCL 777.22(1) & (2); MSA 28.1274(32)(1) & (2), OV 2 must be scored for all crimes against a person and for all crimes against property. For purposes of scoring the sentencing guidelines, burning a dwelling house is classified as a crime against a person, MCL 777.16c; MSA 28.1274(26c), and maliciously killing animals is classified as a crime against property. MCL 777.16b; MSA 28.1274(26b). Thus, OV 2 was applicable to the instant offense, and the trial court properly assessed fifteen points against defendant.

Finally, defendant argues that his ten-year minimum sentence is disproportionate to the circumstances surrounding the offense and the offender, under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The sentence is within the legislative guidelines and is proportionate.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Patrick M. Meter