STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2004
v	No. 247746 Wayne Circuit Court
RANDY MAX PATTERSON, Defendant-Appellant.	LC No. 02-005832

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of arson of a dwelling house, MCL 750.72, and conspiracy to commit arson of a dwelling house, MCL 750.157a.[1] He was sentenced to concurrent prison terms of thirteen to twenty years for each conviction, to be served concurrently. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

I. FACTS AND PROCEEDINGS

Defendant's grandparents, Randolph (or Randall) and Ruth Patterson, owned a house on Pryor Street in Detroit. By the late 1990s, the house was in poor condition. It was infested with cockroaches, badly cluttered, and in need of several repairs. In late 2001, the Pattersons, both of whom were suffering from poor health, left the house to live with defendant, his fiancée, and his three children, in Troy. Defendant was appointed the Pattersons' guardian, apparently over the objections of his sister and other family members. The Pattersons' outstanding mortgage balance on the house was $22,500. Their homeowners' insurance policy provided $24,000 coverage for the house, and an additional $9,000 for the contents.

[1] The jury was unable to reach a verdict on an additional charge of first-degree felony murder, MCL 750.316(1)(b). After being recharged with first-degree murder, defendant pleaded nolo contendere to second-degree murder, MCL 750.317, and was sentenced to another term of thirteen to twenty years' imprisonment. Defendant appealed his plea-based conviction in Docket No. 246326, but this Court dismissed the appeal for lack of jurisdiction.

By April 2002, the condition of the Pryor house had worsened. The home was infested with mice, rats, and dog feces. Vandals had broken windows, stolen aluminum siding, and scattered debris throughout the house. The week before April 16, 2002, defendant visited the house with his grandfather and Bradford "Eddie" Everette, an acquaintance of defendant who often earned money doing odd jobs for defendant. When they saw the condition of the house, Everette offered to burn it down for $50 so that defendant could collect the insurance money. Defendant replied that he would have to find out the amount of insurance coverage. A few days before the fire, the insurance agency received a call from "Randy" inquiring about the insurance on the house.[2]

Defendant gave a statement to the police in which he admitted that, late in the afternoon of April 16, he picked up Everette from his apartment. He drove Everette to a gas station, where Everette filled two bottles with gasoline. Defendant then drove Everette to the Pryor house. Everette entered the house, doused the sofa with gasoline, and ignited it.[3]

Everette did not escape from the house. His body was found in a front bedroom. The medical examiner determined that the cause of death was smoke and soot inhalation, and that the manner of death was accident. The arson investigator determined that the fire was arson, accomplished by ignition of gasoline poured on the sofa. A neighbor testified that she heard a large explosion, and then saw some flames and large clouds of smoke.

The Pattersons' insurance carrier paid the policy limits, dividing the amounts among the mortgage holder, the Pattersons, a repair company, and a public adjusters service that assisted the Pattersons in preparing their claim.

In the afternoon or evening of April 17, 2002, Detroit Police Officers Miguel Bruce and Derryk Thomas went to defendant's home in Troy. They did not have a warrant for defendant's arrest. Defendant was meeting with two insurance adjusters to discuss his claim on the house. Defendant's grandparents, his fiancée Prenscella Hardwell, and two of their children were also in the house. After the adjusters left, the officers asked to talk to defendant about the fire. They drove defendant to police headquarters. Bruce and Thomas both testified at a *Walker*[4] hearing that defendant was not under arrest, that he was not yet a suspect in the case, and that defendant willingly agreed to go to police headquarters with them. They decided to interview defendant at headquarters because it would be too difficult to discuss the fire when other people were in the house. Defendant and Hardwell testified that the police ordered defendant to go to police headquarters, despite defendant's request to stay home so he could tend to his grandparents.

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[2] Pearline Kearney, the Pattersons' niece, testified that she handled the arrangements to upgrade the Pattersons' insurance in the late 1990s, and that defendant was not involved in this transaction.

[3] Defendant's statement is the only evidence regarding his and Everette's agreement, plans, and preparations for burning the house. Defendant filed a pretrial motion to suppress his police statement, which was denied.

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Defendant claimed that as the police escorted him from the house, he asked Hardwell to contact his attorney.

The police drove defendant to headquarters in an unmarked police car. They did not handcuff him or conduct a patdown search. Defendant testified that he tried to call his attorney on his cell phone from the back seat of the police car, but Thomas stopped the car and ordered defendant out of the back seat to seize his cell phone. Defendant said he refused, so Thomas forcibly pulled him from the car, tearing defendant's shirt in the process. According to defendant, Thomas kicked him in the head and took the cell phone. Defendant claimed that Bruce told Thomas to stop, but Thomas disregarded his advice and then handcuffed defendant. Thomas denied that he assaulted defendant or took his cell phone.

Thomas acknowledged that defendant was not free to go when they arrived at police headquarters, but he also stated that defendant wanted to assist in the investigation. Thomas did not advise defendant of his *Miranda*[5] rights because he still was not a suspect. Thomas held a forty-five-minute interview with defendant a few hours after he had arrived. Defendant told him that he sometimes paid Everette to do odd jobs, and that Everette offered to burn the Pryor house for $50, but defendant did not say that he accepted Everette's offer. Thomas felt that defendant's responses were contradictory, inconsistent, and incomplete. At the *Walker* hearing, Thomas testified that defendant appeared calm, and did not appear to believe he was getting himself into trouble. He did not ask to leave the interview. Defendant testified that he refused to answer any of Thomas' questions.

Around 8:00 p.m., defendant took a polygraph test with Sergeant Grubbs. Thomas testified that defendant volunteered to take the polygraph test. Defendant testified that he agreed to the test only because the officers promised him that he could leave after taking the test, but he also said that the officers told him he had no choice. Before the test, the polygraph examiner advised defendant of his *Miranda* rights, the first time these rights were given during his contact with the police. At the *Walker* hearing, defendant gave contradictory testimony about *Miranda* warnings before the polygraph. First, he testified that he was not advised of his constitutional rights, but then admitted that he was. After admitting that Grubbs read him his rights, defendant stated that he had not really understood his rights, because he did not read them and he did not listen to Grubbs when she gave them orally. He later stated that he had not heard anything Grubbs said, so he could not be certain of whether she read him his rights. Finally, when the prosecutor introduced a written advice of rights form, defendant acknowledged that he had signed it, and that he had to have seen the paper in order to sign it.

The polygraph examiner determined that defendant was giving false answers. Thomas began a second interview, but still did not read the *Miranda* rights because he still did not consider defendant a suspect. (About 2-1/2 hours passed between the start and completion of the first interview. Four hours into the second interview, defendant admitted that Everette wanted to set the house on fire for $50. Thomas began to consider defendant a suspect, and gave him a printed copy of the *Miranda* rights. Defendant read and signed the advice of rights form.

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

Thomas testified that defendant did not appear confused, intoxicated, or incoherent during the interview. He was cooperative, and did not ask for an attorney or to make a phone call.

Thomas wrote out defendant's verbal answers to Thomas' questions, and defendant signed it. Defendant described his and Everette's plan to burn the house for the insurance money, and related the sequence of events leading up to and including the arson. He stated that he waited five minutes for Everette after he heard the explosion, and then drove around the block to look for him. Thomas gave defendant a questionnaire containing questions concerning the voluntariness of the statement, and defendant indicated with his initials that he had not been threatened or coerced, nor was he promised anything. When given the opportunity to add anything to the statement, defendant wrote in his own handwriting, "No, this is all the complete truth. I didn't have nothing to do with Eddie's death."

Defendant testified at the *Walker* hearing that Thomas gave him the papers (both the statement and his acknowledgment of rights form) and told him that he would be released after he signed them. He signed the papers without reading them, because his eyes were swollen from crying and his handcuffs were painfully tight. He wanted to leave, but the police would not allow him. Hardwell called an attorney for defendant, but he did not arrive until the next morning.

The trial court questioned defendant at the *Walker* hearing about his claim that Thomas dragged him out of the car. The trial court asked defendant how much he weighed, and defendant replied that he weighed 250 pounds. Defendant was vague about whether he denied giving any statement, or whether Thomas forced him to give a statement, but eventually he admitted that he gave answers to Thomas' questions. The trial court pursued defendant's testimony that the police did not search him, and defendant reiterated that they did not. The trial court also questioned defense counsel about defendant's position. The trial court was clearly skeptical that the officers compelled defendant to go to the station, because if they were arresting him, they would have searched him.

The trial court verbally denied defendant's motion to suppress, and advised the parties that it would place the reasons for the decision on the record on June 21, 2002. No hearing was held on June 21, however, and defendant acknowledges that there is no written or transcribed opinion in the lower court file.

II. FELONY MURDER CHARGE

In his first two issues, defendant contends that the trial court erred in denying his pretrial motion to suppress the felony murder charge, and in submitting the felony murder charge to the jury, because the evidence did not support the charge.

We conclude that these issues are not properly before this Court because defendant ultimately pleaded nolo contendere to a reduced charge of second-degree murder after the jury

failed to reach a verdict on the felony murder charge.[6] Both MCL 600.308(2)(d) and MCL 770.3(1)(d) expressly provide that a defendant has no appeal of right from a final order or judgment based upon a defendant's plea of guilty or nolo contendere. *People v Perks*, 259 Mich App 100, 107-108; 672 NW2d 902 (2003). MCR 7.203(A)(1)(b) provides that this Court lacks jurisdiction of an appeal of right of a criminal conviction where the conviction is based on a plea of guilty or nolo contendere. Consequently, by pleading nolo contendere to the homicide charge, defendant waived any right he had to challenge the sufficiency of the evidence to support either his bindover or the submission of the charge to the jury.

To the extent defendant argues that the felony murder charge affected the arson and conspiracy charges, our Supreme Court held in *People v Graves*, 458 Mich 476, 486-488; 581 NW2d 229 (1998), that where a defendant is improperly charged with a higher offense, but the jury properly convicts him of a lesser included offense, reversal is warranted only where there is persuasive indicia of jury compromise. *Graves* involved a defendant who was charged with first-degree murder, but convicted of second-degree murder, so it is factually distinguishable from the instant case, which involves a hung jury. The reasoning still applies, however, because the arson and conspiracy counts involved distinct charges, and, with respect to the challenged felony murder charge, there was no verdict, and therefore no compromise verdict. Defendant's subsequent nolo contendere plea to second-degree murder prevented any possibility of defendant being wrongfully convicted of a higher offense, or of a compromise verdict, so defendant's claim of an erroneous charge is moot. There was no persuasive indicia of jury compromise.

The jury's failure to reach a verdict on the felony murder charge at trial and defendant's subsequent nolo contendere plea to second-degree murder also precludes consideration of his claim challenging the trial court's jury instructions for felony murder.

III. SUPPRESSION OF EVIDENCE AND MIRANDA RIGHTS

Defendant argues that the trial court erred in denying his motion to suppress his statement. Although the trial court did not prepare a written opinion explaining its decision, the trial court's questions and statements at the *Walker* hearing reveal that it did not believe that the police arrested defendant or considered him a suspect when they came to his house in Troy, because the officers did not arrive in a squad car or conduct a patdown search. The trial court

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[6] We note that although we chose to resolve this issue on procedural grounds, defendant's argument against the felony murder charge is without merit. The facts and circumstances of this case give rise to an inference of malice, and a jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). In *People v Djordjevic*, 230 Mich App 459, 463; 584 NW2d 610 (1998), this Court held that arson poses a high risk of death or great bodily harm to the arsonist. Defendant's attempt to distinguish *Djordjevic* is unconvincing, because this Court's decision in *Djordjevic* emphasized the possibility of death or great bodily harm to the arsonist and firefighters—persons equally at risk in a fire in an abandoned house. *Id.*, 463. Furthermore, there was evidence here that vandals and street people sometimes came into the house, and these persons added to the number of persons at risk.

also did not believe defendant's claim that Thomas seized his cell phone and forcibly pulled him out of the car, because defendant was too large for Thomas to handle in this way. It is also apparent that the trial court was unimpressed by defendant's numerous contradictions before he finally conceded that he had been presented with an advice of rights form before his polygraph and that the statement he signed was his own. Finally, the trial court perceived a significant inconsistency between defendant's claim that Thomas forced him to sign the statement, and the fact that defendant added an exculpatory disclaimer to the bottom of the statement.

A. Standard of Review

This Court reviews de novo the entire record when reviewing a trial court's decision regarding a defendant's motion to suppress an incriminating statement. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). A trial court's underlying factual findings, however, are reviewed for clear error. *Id.*

B. Analysis

The Due Process Clause of the Fourteenth Amendment prohibits use of an involuntary statement coerced by police conduct. US Const, Am XIV; *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The question of whether a statement was made voluntarily is generally determined by an examination of police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). When this Court reviews a trial court's determination of voluntariness, it is required to examine the entire record and make an independent determination of the issue as a question of law. *Wells*, *supra* at 386. However, this Court will affirm the trial court's decision unless it is left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). If the question of voluntariness rests on a disputed factual question that turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court, given its superior opportunity to evaluate these matters. *Id.*

In evaluating police conduct, the factors the trial court should consider include

> [t]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Sexton, supra* at 753.]

Thomas testified that defendant showed no signs of poor health or intoxication, and no indicia of unwillingness. Thomas and Bruce testified that they picked up defendant in the late afternoon, or around 5:00 or 6:00 p.m., which would place him in custody for eight or nine hours before he gave the statement. Even if defendant and Hardwell are to be believed, and defendant was picked up around 2:00 or 3:00 p.m., that would extend the period by only three or four hours.

The trial court also believed the officers' testimony that defendant willingly accompanied them to headquarters, and disbelieved defendant's testimony that he was taken against his will, handcuffed, and deprived of his cell phone. Defendant did not claim that he was deprived of food, water, bathroom breaks, or medical attention. We defer to the trial court when, as here, the question of voluntariness rests on a disputed factual question that turns on the credibility of witnesses or the weight of the evidence, therefore, the trial court's finding of voluntariness will stand. *Sexton, supra* at 752.

Defendant also claims that he was not advised of his *Miranda* rights until after he made incriminating statements. Police officers must give *Miranda* warnings when the accused is interrogated while in custody. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). Custodial interrogation is questioning initiated by the police after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* at 395-396. *Miranda* warnings are not necessary when the defendant is not in custody and is merely the focus of an investigation. *Id.* at 395.

The trial court clearly disbelieved defendant's claim that the police took him into custody against his will when they transported him from his home to police headquarters. Consequently, *Miranda* warnings were unnecessary until Thomas determined that defendant had become a suspect and was no longer free to leave. Further, defendant's claim that he was not advised of his *Miranda* rights until after he incriminated himself is not supported by the record. Defendant made only a partially incriminating statement when he told Thomas that Everette had offered to burn the house for $50, without admitting that he had accepted Everette's offer. Before defendant ultimately gave his fully incriminating and detailed statement, he had been advised of his *Miranda* warnings twice—before his polygraph and again by Edwards. Defendant's claim that he did not understand or pay attention to the rights does not negate the evidence that he received them. Consequently, we find no *Miranda* violation.

IV. BIAS OF JUDGE

Defendant contends that the trial judge displayed bias by threatening his sister, Tameka Patterson, a witness for the prosecution. Tameka evidently created a disturbance on the first day of trial, which nearly caused the trial judge to have her jailed for contempt of court. The following day, she arrived late. When she eventually arrived, she told the trial judge that she had been given conflicting instructions about when to arrive, and that she refused to go with the deputy who was sent to pick her up because another passenger in the car was rude to her. The trial judge admonished Tameka for her resistance to court orders, threatened to jail her for thirty days for any further acts of contempt, and held her in a cell after her testimony in case defense counsel decided to call her. The trial judge also admonished her for delaying the trial and wasting valuable court time and resources by "playing games."

Defendant did not move to disqualify the trial judge, nor does he argue on appeal that she should have been disqualified, but the rules concerning disqualification are instructive concerning his present complaint of bias. A judge will not be disqualified on grounds of bias unless she harbors personal, actual, and extrajudicial bias or prejudice against a party or attorney. MCR 2.003; *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996).

The trial judge did not evince any personal bias toward defendant, his family, or any of his witnesses. Tameka was the only witness who received a scolding from the trial judge, and it is clear that the scolding was justifiably prompted by Tameka's disruptive behavior, her failure to appear when scheduled to testify, and her resistance to the deputy who came to drive her to the courthouse. The trial judge's anger was not extrajudicial, because it arose entirely from Tameka's conduct during the course of the trial. *Cain, supra* at 495. The trial judge questioned Tameka and defendant's mother about Tameka's whereabouts, and assured Tameka's mother twice that she was angry with Tameka, not the mother. The trial court made no complaint when the Pattersons' niece, Pearline Kearney, and defendant's girlfriend, Hardwell, both testified for defendant. Moreover, the trial judge's critical comments about the county prosecutor were mostly targeted at the prosecution, not the defense.

V. SENTENCING

Defendant claims that the trial court's upward departure from the sentencing guidelines was erroneous. Defendant's minimum sentence range under the statutory sentencing guidelines was fifty-seven to ninety-five months. The trial court exceeded this range and sentenced defendant to a minimum term of thirteen years. Defendant objected to the upward departure at sentencing.

MCL 769.34(3) requires the sentencing court to articulate a "substantial and compelling reason" for departing from the guidelines. "Substantial and compelling reasons" must be based on factors that are objective and verifiable, and the reasons justifying departure should "keenly" or "irresistibly" grab the court's attention. *People v Babcock*, 469 Mich 247, 257, 272; 666 NW2d 231 (2003). The court may not base a departure on an offense or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds that the characteristic has been given inadequate or disproportionate weight. *Id.* at 258; MCL 769.34(3)(b).

The trial court articulated the following reasons for its upward departure from the guidelines:

> The circumstances surrounding the dangers of this case are overwhelming. I don't think I could put it any better than the prosecution did in this particular case.
>
> And the potential of harm was realized in that Mr. Everette lost his life, and even though, yes, he was a participant with you, by the same token, the law says, and I agree, that you are still responsible for that based on the plan, the prior plan of conspiracy that took place prior to this time.

Defendant argues that Everette's death was already taken into consideration by offense variable ("OV") 3, which assigns either one hundred or thirty-five points where the victim was killed. MCL 777.33(1)(a) and (b). MCL 777.33(2) further instructs:

> (b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

> (c) Score 35 points if death results from the commission of a crime and the elements of the offense or attempted offense involve the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive under the influence or while impaired causing death.

MCL 777.33(2)(b) clearly applies here, and the trial court duly assigned one hundred points to OV 3. The trial court thus based its guideline departure on a factor already taken into consideration by the guidelines. To the extent circumstances could arise where OV 3 gives inadequate weight to a victim's death where homicide is not the sentencing offense, the trial court failed to make such required findings in the instant case. *Babcock, supra* at 258; MCL 769.34(3)(b). Furthermore, considering that Everette was an adult who initiated the plan and willingly agreed to commit the arson, we question whether such a finding could properly be made here.

The trial court's remaining reason for the upward departure—that the dangers of arson are overwhelming—also did not justify the court's departure from the guidelines. First, to the extent the court was commenting on the dangers of arson generally, the general seriousness of an arson offense is already reflected in the formulation of the guidelines for arson. Second, the comparative danger involved in a particular act of arson of a dwelling house is a subjective determination, and the trial court here failed to identify any objective factor showing why defendant's act of arson was more overwhelmingly dangerous than any other act, or explain why the circumstances should "keenly" or "irresistibly" grab the court's attention. *Babcock, supra* at 257. Because the trial court did not adequately articulate appropriate reasons for an upward departure, we vacate defendant's sentences and remand for resentencing.

VI. EFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 11 brief, defendant asserts that he was denied effective assistance of counsel because his attorney failed to present defendant's theory of the case. Defendant argues that his attorney should have called witnesses to prove that the building in question was not a "dwelling house" for purposes of the arson statute. We disagree.

A. Standard of Review

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

B. Analysis

Defendant contended in a directed verdict motion at trial that there was insufficient evidence to support his conviction of arson of a dwelling house under MCL 750.72, because the evidence established that the Pryor Street house was uninhabitable. He also argued that the evidence established only the lesser offense of arson of other real estate, MCL 750.73. Defendant now argues that if trial counsel had diligently gathered information from defendant and other persons with knowledge, he could have prepared a much stronger argument that the Pryor house was too blighted to qualify as a dwelling house under the statute.[7]

MCL 750.72 provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony punishable by imprisonment in the state prison not more than 20 years.

The statute does not define "dwelling house." In *People v Reed*, 13 Mich App 75; 163 NW2d 704 (1968), this Court reversed the defendant's conviction for arson of a dwelling on the ground that the structure he burned was not habitable. The Court stated:

> Unless a structure is actually being dwelt in or lived in, it would seem that if it is unoccupied, it would have to be a structure that could reasonably be presumed to be a place capable of being dwelt in or lived in to qualify as a dwelling house within the meaning of the statute. [*Id.*, 79.]

The Court then concluded that the structure in question was not a dwelling house because it was boarded up, without means of ingress and egress, and too dilapidated to be habitable without renovation. *Id.*

Similarly, in *People v Foster*, 103 Mich App 311; 302 NW2d 862 (1981), this Court held that the defendant could not be charged with arson of a dwelling place where the burned building had been stripped of its water heater, toilet, and radiators, the windows and back door were broken, and the building was infested with rats. *Id.*, 315. The Court concluded, "the structure . . . could not be reasonably presumed to be fit for habitation. While substantial restorative work could have made the structure habitable, at the time of the fire it was a mere shell of a house and not a dwelling." *Id.*, 316.

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[7] Either MCL 750.72 or MCL 750.73, arson of other real property, could serve as a predicate felony for felony murder. Under the first-degree murder statute, MCL 750.316, arson is an enumerated felony for first-degree felony murder. The statute states that the term arson refers to a felony violation of chapter X of the penal code. MCL 750.316(2)(a). MCL 750.73 qualifies as a felony under chapter X. Furthermore, our Supreme Court held in *People v Nowack*, 462 Mich 392, 400-401; 614 NW2d 78 (2000), that the first-degree murder statute, as amended in 1996, provides that statutory, not common-law arson, is the relevant predicate offense in felony murder cases. Accordingly, defendant's felony murder charge would not have been affected if he had been charged only with arson of other real property.

However, in *People v Williams*, 114 Mich App 186, 195-196; 318 NW2d 671 (1982), this Court held that there was sufficient evidence to support a charge of arson of a dwelling house where the house had been partly damaged, but was not beyond repair. Although the house had been previously damaged by fire, and the gas and electrical service had been shut off, there also was evidence that the house would have been habitable after the first fire if it had been cleaned. *Id.*

In the instant case, defense counsel sought to show that the Pryor house was uninhabitable. He called Leonza Foster, a Pryor Street resident who acted as a caretaker for the home after the Pattersons left. Foster testified that the house was full of debris and paper, and that he had seen vandals stealing aluminum and windows from the house. Defense counsel also relied on testimony of other witnesses, who testified that the home had been vandalized, that it was infested with mice, rats, and dog feces, and that vandals had broken windows and stolen aluminum siding.

Based on this evidence, defense counsel argued that the house was not habitable, and asked the trial court to instruct the jury on the lesser included offense of arson of other real estate. The trial court opined that there was sufficient evidence that the house was habitable, but agreed to give the instruction. Defendant also moved for a directed verdict on the ground that the prosecutor failed to show that the structure was a dwelling house. The trial court denied the motion.

Defendant now claims that defense counsel could have presented a much stronger argument by calling additional witnesses with more expansive knowledge of the condition of the house between the owners' departure and the fire. Defendant seeks remand to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), for further factual development of his claim of ineffective assistance of counsel. Remand may be granted if the motion identifies an issue sought to be reviewed on appeal and shows (1) that the issue should be initially decided by the trial court or (2) that development of a factual record is required for appellate consideration. MCR 7.211(C)(1)(a). Where remand is sought to develop the record, an affidavit or offer of proof regarding the facts to be established on remand is required. MCR 7.211(C)(1)(a)(ii). In determining whether to remand, this Court can consider whether the defendant has shown that the issue is meritorious. *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993), abrogated in part on other grounds *People v Mitchell*, 454 Mich 145 (1997).

In support of his argument, defendant has submitted affidavits from Leonza Foster, Ernest Collier, Barbara Patterson (defendant's mother), and Johnathan Patterson (defendant's brother). In sum, these witnesses aver that the owners' friends and relatives had removed all valuables, that the door locks had been broken on multiple occasions, that the windows were broken, that vandals frequented the house, and that the furnace and aluminum siding had been removed. Collier, Barbara and Johnathan all stated that they had expected to testify at defendant's trial, but were not called. Foster stated that he was not questioned about these matters when he testified at the trial.

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (19990). The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance

of counsel only when the failure to do so deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Here, the trial testimony already established that the house was in poor condition, and that vandals had broken windows and stolen aluminum siding. The proffered testimony of the additional witnesses would have been cumulative to the evidence already presented. Because the additional evidence would have added little to the habitability evidence already introduced, counsel's failure to call the additional witnesses did not deprive defendant of a substantial defense. Further, defendant has not shown that a reasonable probability exists that, if the witnesses had been called, the outcome of the proceedings would have been different. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

In sum, the facts alleged in the affidavits, even if true, do not establish that defense counsel missed an opportunity to present a viable defense. Accordingly, an evidentiary hearing to establish a factual record is also unnecessary.

VII. ADMISSIBILITY OF STATEMENTS

In addition to his arguments regarding voluntariness and whether *Miranda* rights were necessary, defendant now claims that his statement was the fruit of an illegal arrest. We disagree.

A. Standard of Review

This Court reviews de novo the entire record when reviewing a trial court's decision regarding a defendant's motion to suppress an incriminating statement. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). A trial court's underlying factual findings, however, are reviewed for clear error. *Id.*

B. Analysis

This Court held in *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998):

> A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual has committed the felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992), *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995).

The police may not arrest a suspect for questioning when there is insufficient probable cause for arrest. *Brown v Illinois*, 422 US 590, 592, 605; 95 S Ct 2254; 45 L Ed 2d 416 (1975); *Kelly*, *supra*, 633-634. But the "mere fact of an illegal arrest 'does not per se require the suppression of a subsequent confession.'" *Id.*, 634, quoting *People v Washington*, 99 Mich App 330, 334; 297

NW2d 915 (1980). Rather, suppression is required under the exclusionary rule "only when an 'unlawful detention has been employed as a tool to directly procure *any* type of evidence from a detainee.'" *Kelly, supra* at 634, quoting *People v Mallory*, 421 Mich 229, 240-241, 243 n 8; 365 NW2d 673 (1984). If intervening circumstances "break the causal chain between the unlawful arrest and inculpatory statements," the confession is rendered free of the taint of the unlawful arrest. *Kelly, supra* at 634.

Here, the prosecutor argued in the trial court that the police asked defendant if he would accompany them to police headquarters for an interview, and that defendant willingly agreed to go.

As discussed in the opinion in relation to defendant's *Miranda* and voluntariness claims, there is no record that the trial court made verbal or written findings concerning the factual controversies surrounding defendant's statement. But it is apparent from the questions the court asked at the *Walker* hearing, and from other statements made during the proceedings, that it rejected defendant's claim that he was arrested before giving his incriminating statement. The court verbally denied defendant's motion to suppress, and advised the parties that it would place the reasons for the decision on the record on June 21, 2002. No hearing was held on June 21, however, and defendant acknowledges that there is no written or transcribed opinion in the lower court file. However, the trial court questioned defendant at the *Walker* hearing about his claim that Thomas dragged him out of the car. The trial court asked defendant how much he weighed, and defendant replied that he weighed 250 pounds. The trial court pursued defendant's testimony that the police did not search him, and defendant reiterated that they did not. The trial court also questioned defense counsel about defendant's position. The trial court was clearly skeptical that the officers compelled defendant to go to the station, because if they were arresting him, they would have searched him.

Although there is no explicit verbal or written finding of fact as to this factual issue, the trial court's questions and statements at the *Walker* hearing reveal that it did not believe that the police arrested defendant or considered him a suspect when they initially went to his house in Troy, because the officers did not arrive in a squad car or conduct a patdown search. It is also apparent that the trial court did not believe defendant's claim that Thomas seized his cell phone and forcibly pulled him out of the car, because defendant was too large for Thomas to handle in this way. Accordingly, this Court should reject defendant's claim that his statement was the product of an illegal arrest.

Defendant also discusses the factual controversy regarding the time the officers arrived at his house in Troy. The officers estimated that they arrived around 5:00 or 6:00 p.m. Defendants' witnesses estimated the time as 1:30 or 2:00 p.m. Assuming, arguendo, that defendants' witnesses are correct, this does not affect the question of whether defendant was arrested.

Defendant's convictions are affirmed, but his sentences are vacated and the case remanded for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter