STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 11, 2011
v	No. 293486 Genesee Circuit Court
DANA SHAWN SEBASTIAN, Defendant-Appellant.	LC No. 08-022038-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without parole. He appeals as of right. We affirm.

I. FACTS AND PROCEEDINGS

Defendant was convicted of murdering Kaneco Parson, whose body was found by Grand Blanc Police Detective Sergeant Matt Simpson in the attached garage of a house that defendant was renting. Simpson entered the home and garage without a warrant at the request of Marlene Powell, an employee of the firm that managed the house as a rental property.

Defendant was delinquent in his rent and was notified that he was required to pay the delinquent rent or vacate the premises within seven days, or eviction proceedings would be initiated. Defendant failed to pay his delinquent rent or vacate the premises within the seven-day period. On February 28, 2007, defendant borrowed Powell's car and failed to return it. Powell notified the police, who located defendant and the car at a bar. When the police searched Powell's car, they found a small quantity of crack cocaine. Powell denied that the cocaine belonged to her. Defendant was arrested for unlawfully driving away an automobile and for possession of cocaine.

After defendant's arrest, Anthony Carollo asked the police to search the house that defendant was renting. Carollo testified that he was concerned that defendant might be keeping drugs in the house. When Detective Simpson inquired about Carollo's authority to consent to a search of the property, Carollo and Powell represented that they were the managers for the property and, according to Detective Simpson, they also stated that defendant had been evicted from the premises. Carollo and Powell denied informing Detective Simpson that defendant had

already been evicted and instead claimed that they merely told him that he was in the process of being evicted. In any event, Simpson requested documentation of the eviction, and Carollo and Powell produced the Demand for Possession form, which Simpson interpreted to mean that defendant had been evicted. Therefore, Detective Simpson agreed to search the house with the assistance of a drug-sniffing dog. Carollo used Powell's key to open the house and admit Detective Simpson and the dog inside. Simpson did not find any significant quantities of drugs inside the house. Carollo asked Simpson to search the garage and opened the garage door to allow him inside. Inside the garage, Simpson discovered Parson's dead body wrapped inside a blanket and concealed behind some boxes. Parson had recently rented a room from defendant at the rental property. Simpson thereafter secured the area and obtained a search warrant.

After the police discovered Parson's body, a police officer questioned defendant about his activities during the previous week, but did not mention that a body had been discovered in his garage. Defendant stated that Parson and two other drug dealers had followed him home on February 23, 2007. He further stated that on February 26, 2007, Parson was at his house and got into an argument with two other men, who defendant later identified as Jerell Clement and Jaquan Dudley. Defendant claimed that when he went into the kitchen, he saw Parson's bloody body lying on the floor. The men told defendant not to call the police and would not let defendant help Parson. According to defendant, the men placed Parson's body in a blanket, dragged it into the garage, and told defendant that they would return later for the body. Defendant claimed that the men threatened to kill his son if defendant contacted the police.

Clement and Dudley both testified at defendant's preliminary examination. They both stated that they had gone to defendant's house to look for Parson earlier on the day that Parson's body was discovered because they had not heard from Parson for a few days. No one answered the door, so they walked around the house peering into windows, but did not see anyone. Several of defendant's neighbors saw this activity and one reported it to the police. Clement and Dudley stated that they intended to go back to defendant's house later that evening and force their way inside if defendant did not let them in. Before they left, however, they learned about the discovery of Parson's body from a television news report. After hearing the report, they drove to defendant's house and tried to cross a police cordon. When police officers intercepted them and instructed them to go to the police station to give statements, they tried to evade the police. Officers detained them and found a firearm in their vehicle. The officers learned that Dudley, who had given a false name, had taken the gun from his girlfriend without her permission.

After the preliminary examination, defendant moved to suppress the body and other physical evidence discovered as a result of Simpson's warrantless search. The trial court determined that the warrantless search was invalid, but concluded that the evidence would inevitably have been discovered. Therefore, it denied defendant's motion to suppress.

The defense theory at trial was that Dudley and Clement killed Parson. Neither Dudley nor Clement were available at the time of trial. Dudley had been killed before defendant's trial and Clement could not be located. Therefore, their preliminary examination testimony was introduced at trial. According to their testimony, Parson sold cocaine to defendant on credit shortly before he was killed. Clement testified that he tried to contact Parson on February 27, 2007, by calling defendant's telephone, which Parson had previously used to call Clement.

Defendant told Clement that Parson had gone to Ohio with some other men. On February 28, 2007, defendant confided to a neighbor that his former drug suppliers were threatening to kill him and his son unless he paid them $3,000 or $4,000. Defendant also told his neighbor that he had just cleaned his house with bleach. The jury convicted defendant of first-degree premeditated murder.

After defendant was convicted, he moved for a new trial and again raised the suppression issue. Defendant also argued for the first time that Clement's and Dudley's preliminary examination testimony should have been suppressed because the discovery of their identities was the fruit of the warrantless search. The trial court again denied the motion, but this time determined that the warrantless search was valid because Detective Simpson reasonably relied on the managers' apparent authority to consent to a search of defendant's home.

II. MOTION TO SUPPRESS

Defendant argues that the trial court erred in denying his motion to suppress all evidence resulting from the warrantless search of his home, including Dudley's and Clement's preliminary examination testimony. Defendant preserved his argument that all physical evidence resulting from the warrantless search should be suppressed because he raised that argument in a pretrial motion to suppress and the issue was decided by the trial court. However, defendant's argument that Dudley's and Clement's preliminary examination testimony also should have been suppressed was not raised until after trial, when defendant raised the issue in his motion for a new trial. Therefore, that issue is not preserved. See *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

This Court reviews for clear error a trial court's findings of fact at a suppression hearing. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). A factual finding is clearly erroneous when, "although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). This Court reviews de novo the trial court's ultimate decision on a motion to suppress, including "whether the Fourth Amendment was violated and whether an exclusionary rule applies." *Hyde*, 285 Mich App at 436. Thus, this Court reviews a trial court's factual findings regarding the validity of consent to search for clear error, but if the trial court's decision involves a question of law, review is de novo. *People v Mayhew*, 236 Mich App 112, 117; 600 NW2d 370, (1999); *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Russell*, 266 Mich App 307, 314; 703 NW2d 107 (2005). "To avoid forfeiture under the plain error rule, defendant must show that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 314-315; see also *Carines*, 460 Mich at 763.

Both the United States and Michigan Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Borchard-Ruhland*, 460 Mich 278, 293; 597 NW2d 1 (1999).

The judicially created exclusionary rule requires that evidence seized in an unconstitutional search must be suppressed at trial. *United States v Leon*, 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *People v Mungo*, 288 Mich App 167, 176; 792 NW2d 763 (2010). "The exclusionary rule . . . generally bars the introduction into evidence of materials seized and observations made during an unconstitutional search." *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003). "Additionally, the exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called 'fruit of the poisonous tree' doctrine." *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999). Application of the exclusionary rule "has been restricted to 'those instances where its remedial objectives are thought most efficaciously served.'" *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008) (citation omitted). "Three exceptions to the exclusionary rule have emerged: independent source exception, the attenuation exception, and the inevitable discovery exception." *Stevens*, 460 Mich at 636 (citation omitted).

Defendant argues that Parson's body, as well as the physical evidence seized pursuant to the search warrant that Simpson obtained after the body was discovered, all resulted from an Simpson's initial warrantless search and, therefore, should have been suppressed as the fruit of the poisonous tree. He argues that Simpson's initial search of his house and garage was invalid because, although the search was conducted with the consent of Powell and Carollo, neither Powell nor Carollo had authority to consent to the search, and further, Simpson had no reasonable basis for believing that they had the apparent authority to consent to the search.

As indicated previously, the trial court issued conflicting decisions regarding the validity of the warrantless search. When the court originally denied defendant's motion to suppress, it stated that the warrantless search was invalid, but relied on the inevitable discovery doctrine to conclude that suppression of the evidence was not required. Later, however, when the court decided defendant's motion for a new trial, it concluded that the warrantless search was a valid consent search. Thus, we shall address both the validity of the search and the applicability of the inevitable discovery doctrine.

A search is valid if an officer obtains the consent of a third party who possesses common authority over, or other sufficient relationship to, the premises or things sought to be inspected. *People v Wagner*, 114 Mich App 541, 546-547; 320 NW2d 251 (1982). Further, "there is no Fourth Amendment violation where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe to have common authority over the premises." *Goforth*, 244 Mich App at 315.

We disagree with plaintiff's argument that the evidence showed that Powell and Carollo had the authority to consent to Detective Simpson's search of defendant's house. Common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. *Wagner*, 114 Mich App at 548; see also *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). A landlord (or landlord's agent) is not generally authorized to consent to a search of a tenant's premises without a warrant, and a police officer's erroneous belief that the landlord or agent is so authorized does not render the search legal. *Moore v Andreno*, 505 F3d 203, 209 (CA 2, 2007); see also *Chapman v United States*, 365 US 610; 81 S Ct 776; 5 L Ed 2d 828 (1961); *People v Reed*, 393 Mich 342, 364 n 12; 224 NW2d 867 (1975). Furthermore, a landlord's "mere authority to evict a person cannot of itself deprive that

person of an objectively reasonable expectation of privacy." *United States v Washington*, 573 F3d 279, 284 (CA 6, 2009). "There are extensive legal procedures that a landlord must adhere to before occupants are lawfully dispossessed of property without their consent, and the landlord's failure to evict an occupant who is in technical violation of the lease effectively waives whatever authority the landlord has to treat a person as a trespasser." *Id.*, citing 49 Am Jur 2d, Landlord and Tenant, § 260, p 286.

In *Reed*, 393 Mich at 364 n 12, this Court noted that "an owner and his or her agent may not consent to search for a tenant *unless the right is contracted for*." Powell acknowledged below that defendant's lease agreement did not give the rental agent the right to enter the residence without the tenant's consent. Powell claimed, however, that a separate verbal agreement with defendant allowed her to enter the residence without defendant's consent. Powell testified that when defendant rented the residence, she told him that Michigan Real Estate Services had the right to enter the property to "check on the properties if we have complaints." Defendant replied that this would not be a problem. Even assuming that a valid new contractual agreement authorizing the owner's agent to enter the premises arose, see *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 371-373; 666 NW2d 251 (2003), that agreement did not encompass the right to authorize the police search of the property that was conducted here. There was no evidence that either Powell or Carollo had received a complaint about the house. Additionally, a search for drugs using a trained dog cannot reasonably be viewed as "checking" on the property. Detective Simpson's search well exceeded the scope of the limited search contemplated by the alleged verbal agreement with defendant. Consequently, the evidence did not support a finding that either Powell or Carollo had actual authority to consent to the police search of the premises.

Plaintiff also argues that the warrantless search may be upheld because Detective Simpson reasonably believed that Powell and Carollo had the authority to consent to a search of the premises. We again disagree.

In *Rodriguez*, 497 US 177, the United States Supreme Court addressed whether "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so." *Id.* at 179. In *Rodriguez*, Gail Fischer, the defendant's former live-in domestic partner, permitted police officers to enter the apartment she formerly shared with the defendant so that the officers could arrest the defendant for assault. *Id.* at 179-180. Fischer suggested to the officers that she still lived with the defendant, but she had moved out a month earlier. Fischer's name was not on the lease and she did not contribute to the rent. She had a key, which she had kept without the defendant's knowledge. *Id.* at 181. The Supreme Court concluded that if the officers reasonably believed that the person who consented to the entry was a resident of the premises, there was no Fourth Amendment violation. *Id.* at 186. The Court remanded the case to the trial court to determine whether the officers reasonably believed that Fischer had the authority to consent. *Id.* at 189. Pursuant to *Rodriguez*, the search is valid only if the officer's mistaken belief concerning the third party's authority arises from a mistake of fact, and not when the mistaken belief arises from a mistake of law. *United States v Almeida-Perez*, 549 F3d 1162, 1169-1170 (CA 8, 2008); *Moore*, 505 F3d at 209 ("the *Rodriguez* apparent authority rule applies [only] to mistakes of fact [and] not mistakes of law)," quoting 4 Wayne R.

LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed), § 8.3(g), pp 175-176.

Initially, we note that Simpson testified below that he was never shown a copy of defendant's lease agreement. Further, Simpson never indicated that he relied on Powell's alleged authority to consent to a search pursuant to any verbal agreement with defendant. Rather, Simpson testified that his sole basis for believing that Powell and Carollo were authorized to consent to a search of the premises was that Powell and Carollo were the managers for the property and he understood that defendant, their tenant, had already been evicted. Thus, neither the lease agreement nor Powell's alleged verbal agreement with defendant can serve as a basis for evaluating the reasonableness of Simpson's belief that either Powell or Carollo had the apparent authority to consent to a search.

With respect to defendant's purported eviction, Simpson testified that he was told by both Powell and Carollo that defendant had been evicted from the property. However, Simpson was not willing to simply accept their word, so he requested documentation to confirm defendant's eviction. According to Simpson, he was given a copy of the Demand for Possession form, which he mistakenly interpreted as indicating that defendant had been evicted. We cannot conclude that Simpson's mistaken understanding of the document was reasonable. The form clearly states, "If you do not do one of the above [pay the overdue rent or vacate the premises], your landlord/landlady *may* take you to court to evict you." Nothing in the document would convey to a person of ordinary understanding that an eviction had taken place, or that an eviction was certain to take place within seven days of service. Further, Simpson admitted that he saw no indication at the house that an eviction had occurred. Therefore, the search of the residence was not permissible under the apparent authority exception to warrantless searches.

As previously indicated, however, the trial court also found that even if the warrantless search was invalid, suppression of any resulting evidence was not required pursuant to the inevitable discovery doctrine. As our Supreme Court explained in *Hawkins*, 468 Mich at 499, "application of the exclusionary rule is not constitutionally mandated, and the question whether the exclusionary rule's remedy is appropriate in a particular context is regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."

In *Nix v Williams*, 467 US 431, 444; 104 S Ct 2501; 81 L Ed 2d 377 (1984), the United States Supreme Court adopted the inevitable discovery rule to permit admission of evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means. The rule provides that evidence obtained through an unconstitutional search may "still be admitted at trial if the prosecution establishe[s] by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *People v Brzezinski*, 243 Mich App 431, 435; 622 NW2d 528 (2000). The rule is based on the premise that the prosecution should not be put in a worse position than it would be if no police error or misconduct had occurred. *Nix*, 467 US at 433 (citing the converse of the principle set forth in *Wong Sun v United States*, 371 US 471, 488; 83 S Ct 407; 9 L Ed 2d 441 (1963), that the poisonous tree doctrine ensures that the prosecution will not be put in a better position than it would have been if no illegal search had been conducted). In other words, "[i]f the evidence would have been inevitably obtained, then

there is no rational basis for excluding the evidence from the jury." *Brzezinski*, 243 Mich App at 435-436.

In *Nix*, the victim's body was discovered as a result of an unlawfully obtained statement from the defendant. However, the body was found within an area that was already being searched by 200 volunteers who inevitably would have discovered it "in short order." *Nix*, 467 US at 435–37. Although *Nix* involved an unlawfully obtained statement, the inevitable discovery doctrine has been applied to the fruits of illegal searches as well as to the fruits of illegally obtained confessions. See *Brzezinski*, 243 Mich App at 433, 437.

Plaintiff argues that Parson's body and related evidence would inevitably have been discovered because Clement and Dudley would have reported that Parson was missing and Parson's last known location was at defendant's house. Conversely, defendant argues that Clement and Dudley would not have come forward with this information because they had their own reasons for wanting to avoid the police. He suggests that Clement and Dudley would have more likely attempted to kill defendant in retaliation for Parson's death than involve the police. But regardless of whether Clement or Dudley would have come forward, we agree with the trial court that the inevitable discovery rule applies for several other reasons.

Before Clement and Dudley learned that a body had been found at defendant's house, they attempted to look for Parson at the house. They subsequently planned to return to the house and force their way inside to look for Parson. Even if they would not have notified the police, their conduct likely have attracted the attention of defendant's neighbors. They had already drawn the attention of the neighbors when they were at the house previously, and one neighbor had reported their presence to the police because he was concerned for defendant's safety. If Clement and Dudley had broken into the house as they intended, their activity would have likely been reported to the police by a neighbor. Further, any damage to the property would have likely been discovered by either Powell or Carollo, who were pursuing defendant to collect overdue rent and were in the process of initiating eviction proceedings.

The impending eviction proceeding is further reason to believe that Powell's management company would have soon regained possession of the house. Although defendant contends that it is speculative whether he would have ultimately been evicted, his circumstances established by a preponderance of the evidence that an eviction was imminent. Powell testified that she intended to pursue eviction proceedings if defendant did not resolve his rent delinquency. Defendant had already been served with a seven-day notice of Demand for Possession, and he failed to cure his rent deficiency within the seven-day period. Further, the evidence showed that defendant did not have the means to pay his rent. He was looking for housemates to help pay the rent, but the presence of a dead body inside the garage would have made this option unrealistic. In addition, defendant had recently been arrested for possession of cocaine and unlawfully driving away an automobile.

Furthermore, it is improbable that defendant would have been able to keep Parson's body concealed in the garage indefinitely in a suburban neighborhood, especially where he had already attracted the attention of his neighbors. The reality that a dead body decomposes and emits an odor likely would have alerted others that a body was inside the garage.

The combined circumstances of Parson's disappearance and association with defendant's house, the likelihood of defendant's imminent eviction, and the natural fact of decomposition all establish by a preponderance of the evidence that Parson's body and related evidence would inevitably have been discovered by lawful means. The possibility that defendant might have removed the body before any of these events occurred does not preclude application of the inevitable discovery rule, because defendant has no constitutional right to destroy evidence. See *Segura v United States*, 468 US 796, 816; 104 S Ct 3380; 82 L Ed 2d 599 (1994) (rejecting the dissent's assertion that evidence would have been destroyed before it came to light because "we decline to extend the exclusionary rule . . . to further 'protect' criminal activity as the dissent would have us do"). Accordingly, the trial court did not err in concluding that suppression of the evidence resulting from Simpson's improper warrantless search was not required under the inevitable discovery exception to the exclusionary rule. Although our rationale for applying the inevitable discovery rule is not entirely congruent with the trial court's reasoning, this Court will affirm a trial court's decision where it reaches the correct result for the wrong reason. *People v McLaughlin*, 258 Mich App 635, 652 n 7; 672 NW2d 860 (2003).

Defendant also argues that the trial court erred in admitting Dudley's and Clement's testimony. He contends that identification of these witnesses was the fruit of the warrantless search because the police encountered them only because they came to defendant's house after seeing a news report of the discovery of the body. Defendant contends that their subsequent efforts to avoid the police indicates that they would not have come forward on their own accord. As previously indicated, this issue is unpreserved because defendant did not timely challenge Dudley's or Clement's testimony in the trial court. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Russell*, 266 Mich App at 314-315.

In *United States v Ceccolini*, 435 US 268; 98 S Ct 1054; 55 L Ed 2d 268 (1978), the United States Supreme Court held that the testimony of a live witness would not be excluded merely because the identity of that witness was discovered as the result of an unlawful search. The Court did not issue a blanket exception to the poisonous fruit doctrine for live witnesses, but held that a witness's testimony would be excluded under this rule only in narrow circumstances. The Court stated:

> Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. [*Id.* at 280.]

In *People v Frazier*, 478 Mich 231; 733 NW2d 713 (2007), our Supreme Court considered whether the exclusionary rule should be applied to exclude the testimony of two witnesses whose identities were the fruits of the defendant's illegally obtained and excluded confession. The Court held that if the witnesses were identified as the result of illegally obtained misconduct, "the exclusionary rule would not apply to the [witnesses'] testimony." *Id.* at 252-253. The Court stated:

> Under the attenuation exception to the exclusionary rule, exclusion is improper when the connection between the illegality and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. Attenuation can occur when the causal connection is remote or when the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. [*Id.* at 253 (citations and internal quotations omitted).]

The Court concluded that "the degree of attenuation was sufficient to dissipate the connection between any Sixth Amendment violation and the testimony" because the witnesses testified of their own free will during the first trial, and their willingness to testify was not connected to the alleged Sixth Amendment violation. *Id.* at 254. The Court also noted that there was no indication "that their testimony was, or would be in the next trial, coerced." *Id.* The Court concluded that "'[t]he cost of permanently silencing [the third-party] testimony is too great for an evenhanded system of law enforcement to be in order to secure such a speculative and very likely negligible deterrent effect.'" *Id.* at 254-255, quoting *Ceccolini*, 435 US at 280.

As defendant observes, the evidence in this case indicates that Clement and Dudley tried to evade the police, and that Dudley tried to conceal his identity by giving a false name. Further, Clement could not be located for trial. However, their testimony cannot reasonably be considered the fruit of the warrantless search. The police did not discover Clement or Dudley as a result of the search. Rather, the discovery of Parson's body triggered a chain of events. The discovery was broadcast on the news, Clement and Dudley saw the broadcast, and they went on their own accord to the crime scene. There is no suggestion that the news broadcast was done at the behest of the police for the purpose of inducing witnesses to come forward. Clement and Dudley voluntarily decided to go to defendant's house, presumably knowing that police officers would be controlling the crime scene. It is not clear or obvious that Clement's and Dudley's actions were the result of the warrantless search. Their actions are better characterized as an unintended result of an independent chain of events once the news report was broadcast. The "discovery" of these witnesses is sufficiently attenuated from the unlawful search "to dissipate the connection" between the search and their arrival. *Frazier*, 478 Mich at 524. Accordingly, admission of their testimony was not plain error.

II. JURY INSTRUCTIONS

Defendant argues that he was denied a fair trial because the trial court did not orally instruct the jury on the elements of the charged offenses, and instead merely provided the jury with a written copy of the elements of the offenses. We conclude that defendant waived this claim of error.

Before the jury was instructed, the trial court advised the parties that it did not intend to read the elements of the charged offenses as part of the jury instructions, and instead would provide the jury with a written copy of the elements of the offenses. The prosecutor responded, "so you're not giving – you're not reading. You're just giving them those." The trial court acknowledged that it intended to follow that procedure, but then asked, "Unless you want them to be read. Does the defense want them read?" Defense counsel replied, "No, we don't need them read." Because defense counsel affirmatively approved the trial court's decision to only

provide a written copy of the elements of the offenses and counsel expressly informed the court that "we don't need them read," this issue has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). A waiver extinguishes any error and, thus, there is no error to review. *Id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens