STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323011 Macomb Circuit Court
DARIUS CORTEZ DENT, Defendant-Appellant.	LC No. 2014-000235-FH

Before: KRAUSE, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of arson of a dwelling house, MCL 750.72, arson of personal property valued between $1,000 and $20,000, MCL 750.74(1)(c)(*i*)[1], and six counts of killing or torturing an animal, MCL 750.50b. He was sentenced to 96 to 240 months' imprisonment for the arson of a dwelling house conviction, 12 to 60 months' imprisonment for the arson of personal property conviction, and one to four years' imprisonment for each conviction of MCL 750.50b. Defendant appeals by right. We affirm.

Defendant and Amanda Bell connected through an Internet site and met for the first time on July 6, 2012 at a bar. When the bar closed, Bell invited defendant back to her house. Bell's friends Michael Evans, Chelsea Perkins, and Travon Downey were at the house when Bell and defendant arrived. Bell also had three dogs and four cats in the house.

At trial, both Bell and Evans testified that defendant threatened to kill one of Bell's dogs while he was at her house. Bell asked defendant to leave and did not see him again that night. After defendant left, Bell and her friends left between 4:15 a.m. or 4:30 a.m. to get something to eat. When they returned to the house, they could smell smoke. Evans saw a fire in the kitchen. Beyond losing a substantial amount of personal property, six of Bell's seven animals were killed in the fire. The fire investigator's report ruled out any electrical, mechanical, or accidental

[1] Following the commission of these offenses, the Legislature amended and redesignated arson of a dwelling house as MCL 750.73 and arson of personal property valued between $1,000 and $20,000 as MCL 750.75. See 2012 PA 531; 2012 PA 532.

causes for the fire and concluded that it was caused by a human act. Specifically, clothes were placed atop a gas stove, and the burners were turned on.

Defendant first argues that the prosecutor committed misconduct by eliciting testimony from defendant that he had been in prison in April 2014 and on Christmas 2013. We disagree.

To preserve a claim of prosecutorial misconduct, a defendant must contemporaneously object to the alleged misconduct and ask for a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). If a defendant fails to timely and specifically object below, review is generally precluded "except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Stated otherwise, unpreserved claims of prosecutorial misconduct are reviewed for "outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Callon*, 256 Mich App at 329.

Defendant failed to preserve his claim of prosecutorial misconduct because defense counsel did not object to the challenged questions. Further, defense counsel rejected the trial court's offer to give a curative instruction. Defendant's claim lacks merit.

The prosecutor's questions came after defendant's testimony on direct examination that he wore different clothes on July 6, 2012, than those described by the prosecution's witnesses. On cross-examination, defendant testified that he did not know about the fire at Bell's house until a few months after it occurred when he received a voicemail from the police. To test defendant's ability to recall his outfits, the prosecutor asked if he could remember what he was wearing exactly two months before trial. Defendant said he wore his "jail outfit." When asked what he wore two months before then, defendant again said he wore his jail outfit.

Defendant then testified that he could remember what he wore on July 6, 2012, because meeting Bell for the first time was a special occasion. In response, the prosecutor asked if Christmas was a special time for defendant and if he could recall what he had worn the previous Christmas. Defendant said he was "locked up last Christmas."

Generally, evidence of a defendant's prior convictions is not admissible. MRE 404(b). Here, however, the prosecutor did not question defendant regarding his criminal history or past imprisonment. Instead, she questioned defendant's ability to recall what he wore on other occasions in response to his testimony that he wore different clothes on July 6, 2012, from those described by the prosecution's witnesses. The prosecutor admitted outside the presence of the jury that she did not expect to elicit the responses defendant gave and that she did not realize how long defendant had been incarcerated before trial. A prosecutor is not guilty of misconduct if he or she is engaging in good-faith to admit proper evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Even if we were to deem the prosecutor's questions amounted to plain error, reversal is not warranted. Despite defendant's arguments to the contrary, a curative instruction could have

alleviated any prejudicial effect the questions may have had. Curative instructions will cure most inappropriate prosecutorial statements, and it is presumed that jurors will follow their instructions. *Unger*, 278 Mich App at 235. The court offered to instruct the jury to disregard defendant's testimony regarding his jail attire. Further, it is unlikely that any error affected the outcome of the trial, resulted in the conviction of an actually innocent person, or seriously affected the fairness, integrity, or public reputation of judicial proceedings. One might assume defendant was in jail while awaiting trial for arson, and, although the evidence against defendant was largely circumstantial, the testimony of the prosecution's witnesses and admission of the fire investigator's report supported defendant's convictions. Both Bell and Evans testified that defendant threatened Bell's dogs, and Evans testified that he saw defendant in Bell's neighborhood after defendant left her house. Further, Diane Louise Morse, Bell's neighbor at the time of the fire, testified that she saw a man jump Bell's fence just before she saw what looked like a burning candle in defendant's back window. Importantly, her description of that individual's clothes matched Bell's description of what defendant was wearing that night.

Defendant also argues he was denied the effective assistance of counsel when his attorney failed to object to the prosecutor's improper questions and declined the court's offer for a curative instruction. We disagree.

Generally, to preserve a claim of ineffective assistance of counsel, a defendant must file a motion for a new trial or an evidentiary hearing in the trial court to establish a record supporting the claim. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Defendant did not raise this issue in a motion for a new trial or an evidentiary hearing. The issue is not preserved.

Claims of ineffective assistance of counsel are mixed questions of law and fact. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). This Court reviews a trial court's findings of fact for clear error, and reviews questions of constitutional law de novo. *Id*. A defendant must establish the factual predicate for a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because defendant did not seek a new trial or an evidentiary hearing, this Court's review is limited to the record. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant was not denied the effective assistance of counsel when his attorney failed to object to the prosecutor's questions and declined the court's offer for a curative instruction. To establish a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. The defendant must overcome the presumption that defense counsel's challenged actions were simply sound trial strategy. *Id*. at 52.

Defendant has not established counsel's performance fell below an objective standard of reasonableness by not objecting to the prosecutor's questions as to defendant's recollection of past outfits. Because the prosecutor's questions did not constitute misconduct, there would have been no basis for defense counsel to object on that ground. Defense counsel need not make futile or meritless objections. *Unger*, 278 Mich App at 256.

Even if the prosecutor committed misconduct and defense counsel were deficient for failing to object, defendant cannot show there is a reasonable probability that but for this alleged failing, the outcome of the trial would have been different. The prosecution's evidence, although largely circumstantial, supports defendant's convictions. And, there is no indication that the jury considered defendant's comments regarding wearing jail clothing when reaching its verdict.

In addition, based on the existing record, defendant has failed to overcome the presumption that defense counsel's decision to deny the court's offer for a curative instruction was sound trial strategy. Defense counsel likely declined the instruction because he did not want to draw any further attention to evidence that defendant was in jail two months before trial or on Christmas the year before. When the court asked defense counsel if he would like a curative instruction or would rather leave it alone, defense counsel responded, "I'm tempted to say leave it alone, your Honor." This Court will not second-guess counsel on matters of trial strategy, nor assess counsel's competence on the basis of hindsight. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Next, defendant argues that insufficient evidence existed for a rational jury to find beyond a reasonable doubt that defendant was the individual who committed the crimes charged. We disagree.

This Court reviews claims of insufficient evidence de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). The evidence must be viewed in a light most favorable to the prosecution to "determine whether a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt." *Id*. at 377-378.

The prosecution presented sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant was the individual who committed arson of a dwelling house, arson of personal property, and six counts of killing or torturing an animal. To prove arson of a dwelling house, the prosecution must present sufficient evidence that the defendant wilfully or maliciously burned a dwelling house or its contents. MCL 750.72; *People v Barber*, 255 Mich App 288, 294-295; 659 NW2d 674 (2003). For arson of personal property valued between $1,000 and $20,000, the prosecution must show that defendant wilfully and maliciously burned personal property, and that the value of the burned property is between $1,000 and $20,000. MCL 750.74(1)(c)(*i*). Finally, MCL 750.50b(2)(b) states, in pertinent part:

> (2) Except as otherwise provided in this section, a person shall not do any of the following without just cause:
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> * * *
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> (b) Commit a reckless act knowing or having reason to know that the act will cause an animal to be killed, tortured, mutilated, maimed, or disfigured.

Defendant does not argue that the prosecution failed to prove each element of the crimes, but only that the evidence presented was insufficient to prove defendant's identity as the person who committed these crimes. Identity is an element of every crime. *People v Yost*, 278 Mich

App 341, 356; 749 NW2d 753 (2008). Circumstantial evidence and any reasonable inferences that arise from such evidence may be sufficient to establish the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Bell testified that on the day of the fire, defendant threatened to shoot her dog and became aggressive when she asked him to leave. She also received a number of angry texts from defendant that morning. Officer Christopher David Rhodea, the police officer in charge of the case, confirmed that Bell showed him the text messages. Although his recollection of the events differed slightly from Bell's, Evans also testified that defendant threatened to kill Bell's dog. Further, Evans saw defendant standing in the shadows on a side street when he, Bell, Perkins, and Downey were on their way to get something to eat.

Although Evans locked the front door of Bell's house when they left for the restaurant, neither Evans nor Bell specifically locked the back door. Evans said that when he ran to the back of the house during the fire, he realized the back door was unlocked. From this evidence, one could infer that defendant was still near Bell's house when she and the others left, that he was angry with Bell, and that he had the opportunity to enter the house and start the fire.

Bell also testified that on the night she met defendant, he wore a neon green "Coogi" T-shirt that was long in the front, loose fitting black shorts, and a black baseball hat. Evans said that defendant wore a baggy polo shirt and a baseball hat. He said that he had no doubt defendant was the individual he saw standing in the shadows because he recognized the size of defendant's shirt, his hat, and his build.

Morse's description of the individual she saw jump Bell's fence just before she noticed what appeared to be a candle burning in Bell's back window, matched Bell's description of defendant's outfit. Morse said that the individual was an African-American male, and that he wore a long, bright green shirt, shorts, and a baseball hat. She saw the man at approximately 4:00 a.m. on July 6, 2012. Morse did not see Bell's car in the driveway at the time.

From this evidence, a rational jury could conclude beyond a reasonable doubt that defendant was the man Morse saw jumping Bell's fence. The jury could also infer that he did so while Bell and her friends were no longer home, giving defendant the opportunity to set a fire without their knowing.

Finally, the fire investigator's report concluded that the fire was incendiary caused by a human act. The report ruled out any electrical, mechanical, or accidental causes for the fire.

Although defendant testified that he never returned to Bell's house after he left voluntarily, never threatened to kill Bell's dogs, and wore a different outfit on July 6, 2012, from that described by the prosecution's witnesses, this Court must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400. We find no error.

Defendant also challenges the trial court's assessment of 15 points for offense variable (OV) 2 on two grounds. First, defendant argues that Bell's gas stove, where the fire originated, could not be considered an "incendiary device" under MCL 777.32. Second, defendant asserts that he is entitled to resentencing pursuant to *Alleyne v United States*, 570 US ___; 133 S Ct

2151; 186 L Ed 2d 314 (2013), because the trial court made improper independent factual determinations when scoring OV 2. We disagree.

To preserve a scoring error claim, the defendant must raise the issue "at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals." *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013). At sentencing, the prosecutor questioned the assessment of 15 points for OV 2 and the court ruled that OV 2 was correctly scored because the gas stove was an incendiary device. Defense counsel did not object to this ruling on the basis that the stove should not be considered an incendiary device, or on any other basis. Therefore, defendant has not preserved this issue for appeal.

Unpreserved claims of scoring error are reviewed for plain error affecting substantial rights. *Id*. at 457. Plain error affects substantial rights when the error alters the outcome of the lower court proceedings. *Id*. Reversal is warranted only when plain, forfeited error results in the conviction of an innocent defendant or when an error is so serious it affects the fairness, integrity or the public reputation of the judicial proceedings independent of the defendant's innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The court did not plainly err when it assessed 15 points for OV 2. A gas stove may be considered an "incendiary device" under MCL 777.32. Defendant is not entitled to resentencing.

OV 2 is scored according to the "lethal potential of the weapon possessed or used." MCL 777.32(1). A court may assess 15 points for OV 2 when "[t]he offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon." MCL 777.32(1)(b). "Incendiary device" is defined as "gasoline or any other flammable substance, a blowtorch, a fire bomb, Molotov cocktail, or other similar device." MCL 77.32(3)(d). The court likened the gas stove to a blowtorch and concluded that the stove was an incendiary device, but that the clothes placed on top of the burners were not. The fire investigator's report determined that the fire started when clothes were placed on top of a natural gas stove, and the stove was turned on. The natural gas from the stove would have ignited the fire and patently is a "flammable substance" under the definition of "incendiary device" at MCL 777.32(3)(d).

To preserve a constitutional challenge to the scoring of offense variables on the basis of judicial fact-finding, the defendant must raise the issue at sentencing. *People v Lockridge*, 498 Mich 358, 392; ___ NW2d ___ (2015); *People v Beck*, ___ Mich App ___; ___ NW2d ___ (No.321806; Nov 17, 2015), slip op at 2. Defendant did not object to the court's assessment of 15 points for OV 2 based on the court's use of facts not admitted by defendant or found by the jury to make the determination. Therefore, defendant did not preserve this issue for review. When a defendant fails to timely object to the scoring of OVs on *Alleyne* grounds, this Court reviews the claim for plain error affecting substantial rights. *Lockridge*, 498 Mich at 392-393; *Beck*, ___ Mich App at ___, slip op at 2.[2]

[2] We assume that because defendant's *Alleyne* challenge concerns the constitutionality of the method of fact-finding rather than a challenge to the actual score determined by the trial court or

Defendant's claim that the court engaged in judicial fact-finding when scoring OV 2 in violation of *Alleyne* lacks merit. In *Lockridge*, the Supreme Court considered the application of *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Alleyne* to Michigan's sentencing guidelines, and held that that "the Sixth Amendment does not permit judicial fact-finding to score OVs to increase the floor of the sentencing guidelines range." *Lockridge*, 498 Mich at 388-389. The *Lockridge* Court rewrote Michigan's sentencing guidelines to "sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Lockridge*, 498 Mich at 391. The remedy the Court imposed renders the sentencing guidelines advisory only. *Id*. at 391, 399. Nevertheless, the Court held that a sentencing court must continue to determine the applicable guidelines recommended range and take it into account when imposing a sentence. *Id*. at 365, 392.

To warrant relief under plain error review, "the defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights." *Lockridge*, 498 Mich at 393. The last criterion "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. With respect to judicial fact-finding at sentencing contrary to the Sixth Amendment, a defendant cannot establish plain error or prejudice when "(1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Id*. at 394-395. A defendant, then, would not be entitled to resentencing. *People v Bergman*, ___ Mich App ___, ___; ___ NW2d ___ (No.320975; Sept 29, 2015), slip op at 14. But "defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Lockridge*, 498 Mich at 395.

In the present case, the jury found facts sufficient to assess 15 points for OV 2. To convict defendant of arson of a dwelling house and arson of personal property, the jury had to find beyond a reasonable doubt that defendant "wilfully and maliciously burned" Bell's house and personal property. See MCL 750.72; MCL 750.74(1)(c)(*i*). Beyond Bell's and Evans's testimony that defendant threatened to kill Bell's dog, the only evidence presented at trial that the fire was set "wilfully and maliciously" came from the fire investigator's report, which stated, "The area of fire origin is noted as a natural gas fire stovetop in the kitchen." The report continued, "After ruling out electrical, mechanical, and accidental fire causes, it is this investigator's opinion that the fire be listed as an incendiary fire caused by a human act, the human act would be placing the clothing on the burners and turning the burners in the on position to ignite the clothing." Therefore, the jury would have necessarily found that defendant

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the accuracy of the information relied on, the extended ability to preserve sentencing issues of MCL 769.34(10), see *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), or its counterpart, MCR 6.429(C), do not apply. As our Supreme Court noted in *Lockridge*, virtually all *Alleyne* challenges to sentences that occurred before that case was decided will be unpreserved. *Lockridge*, 498 Mich at 394.

used an incendiary device, a natural gas stove, in order to conclude that defendant "wilfully and maliciously" burned Bell's house and personal property, and convict defendant of arson.

We affirm.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Michael J. Kelly