STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2012
v	No. 298643 Wayne Circuit Court
MARIO WILLIS, Defendant-Appellant.	LC No. 09-028750-01-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and arson of a dwelling house, MCL 750.72. He was sentenced to concurrent prison terms of 500 to 750 months for the murder conviction and 10 to 20 years for the arson conviction. We affirm defendant's convictions, but remand for resentencing.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from his participation in an arson fire on November 15, 2008, which caused the death of Detroit Firefighter Walter Harris. The prosecutor's theory of the case was that defendant paid one of his employees, Darian Dove, to set fire to a house owned by defendant's then-girlfriend, Megan Daniel, at 7418 East Kirby in the city of Detroit and, after Detroit firefighters responded to the scene, the roof collapsed on Firefighter Harris, who had entered the house, causing his death. Dove pleaded guilty to second-degree murder for his role in the offense and testified against defendant at trial. Defendant denied any involvement in the offense and presented an alibi defense.

The evidence at trial showed that Megan purchased the house from defendant in 2006 and obtained a mortgage loan to finance the purchase. A fire previously damaged the house in September 2007 and Megan received insurance proceeds to make repairs. Dove, an employee of defendant's landscaping business, testified at trial that he intentionally set both the September 2007 fire and the November 15, 2008, fire at issue in this case, at defendant's request. According to Dove, defendant drove him to a gas station to purchase gasoline for the second fire, dropped him off near the house, and gave him $20 after he set the fire. Dove testified that he expected to receive additional compensation that included a truck, but never received it.

When Detroit firefighters arrived at the house fire shortly after 5:00 a.m. on November 15, 2008, fire was emanating from the top portion of the two-story house. The roof collapsed while firefighters were inside the house. Harris was buried by debris and died from his injuries.

In November 2009, Dove pleaded guilty to second-degree murder pursuant to a plea agreement that entitled him to a minimum sentence of 17 years in exchange for his cooperation in testifying truthfully against defendant in this case. On April 6, 2010, defendant filed a notice of alibi in which he named Megan as an alibi witness to testify that defendant was with her at the time of the fire. Defendant was charged with first-degree felony-murder and arson, but the jury found defendant guilty of the lesser offense of second-degree murder and arson. After defendant was sentenced, he filed a motion for a new trial or resentencing, raising many of the claims that he raises in this appeal. He requested a *Ginther*[1] hearing with respect to a claim of ineffective assistance of counsel, but the trial court determined that an evidentiary hearing was not necessary. This Court subsequently denied defendant's motion to remand for an evidentiary hearing on his claims. *People v Willis*, unpublished order of the Court of Appeals, entered March 18, 2011 (Docket No. 298643).

II. PUBLIC TRIAL

We first address defendant's claim that his right to a public trial was violated by the trial court's alleged closure of the courtroom during jury selection. We consider this issue to be unpreserved because defendant failed to assert this right at trial. *People v Vaughn*, 491 Mich 642; ___ NW2d ___ (2012). Accordingly, defendant's entitlement to relief is subject to the forfeiture rule in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). *Vaughn*, 491 Mich at 662-663. As explained in *Vaughn*, in analyzing a forfeited claim of error, a defendant is not entitled to relief unless he can establish:

> (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Vaughn*, 491 Mich at 663].

Defendant did raise this issue in his motion for new trial. MCR 6.431(B) provides that a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." We review a trial court's decision on a motion for a new trial for an abuse of discretion, and review any findings of fact made by the court for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). We review issues of constitutional law de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A defendant's Sixth Amendment right to a public trial extends to jury selection. *Vaughn*, 491 Mich at 648-650. The record indicates that the trial court only ordered persons who would be testifying at trial to leave the courtroom before jury selection. When denying defendant's motion for a new trial, the trial court expressly found that it did not close the courtroom. Although defendant submitted affidavits from relatives which indicate that deputies asked nonwitnesses to leave the courtroom because there was not enough room for the potential jurors, given the trial court's express finding that it did not close the courtroom and the absence of any indication in the record that the courtroom was closed, we cannot conclude that the deputies' alleged conduct in asking nonwitnesses to leave the courtroom may be attributed to the trial court.

Regardless, defendant's claim that he was deprived of his right to a public trial remains a forfeited issue because it was not timely presented to the trial court. While the denial of a right to a public trial may be considered a structural error, the plain-error analysis applicable to forfeited claims of error still requires a defendant to show that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, 491 Mich at 665. The record in this case indicates that both the prosecutor and defense counsel participated in the voir dire of potential jurors. The two-day voir dire process ended with neither party expressing dissatisfaction with the jury. Because there is nothing in the record to indicate that the alleged closure of the courtroom during jury selection seriously affected the fairness, integrity, or public reputation of the proceedings, defendant is not entitled to a new trial on the basis of this issue.

III. DEFENDANT'S TRIAL EXHIBIT Y

Defendant next argues that the trial court deprived him of his constitutional rights to confront and cross-examine witnesses and to present a defense by barring defense counsel from playing a video recording of a June 9, 2009, six-hour police interview of Dove, which was admitted at trial as defendant's exhibit Y. Defendant argues that he should have been permitted to play approximately three hours of the recording to show the jury that police officers pressured Dove to adopt their scenario of how the fire occurred.

"The proponent of evidence bears the burden of establishing its relevance and admissibility." *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006). Where a trial court excludes evidence, a proper offer of proof requires that the defendant specify the purpose of the evidence, unless the substance of the evidence is apparent from the context in which questions are asked. See MRE 103(a)(2); *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). Although this case does not involve excluded evidence, we believe that these principles are applicable here because they involve the mode for presenting evidence to the jury. MRE 611(a) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

At trial, the trial court permitted defense counsel to play 45 minutes of the various recordings that had been introduced as defense exhibits. Defense counsel had previously informed the court that he did not intend "to play six hours worth" of the recordings. Because defense counsel never objected to the time limitations imposed by trial court for playing the recordings and never made an offer of proof with respect to the relevancy or importance of exhibit Y in particular, either in whole or in part, we conclude that this issue is unpreserved. See MRE 103(d). We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

The right to present evidence in support of a defense and the right to confront witnesses are not absolute. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The defendant must still comply with rules of procedure and evidence that are designed to ensure fairness and reliability in the ascertainment of guilt or innocence. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); see also *People v Kowalski*, 492 Mich 106, 138; ___ NW2d ___ (2012). Examining defendant's claim in the context of the limited offer of proof made by defense counsel at trial regarding the recordings, defendant has not established anything about the trial court's ruling regarding the mode for presenting the evidence that infringed on his constitutional rights. Accordingly, defendant has not established a plain error entitling him to relief.

IV. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor's conduct denied him a fair trial. Defendant concedes that he did not object to the prosecutor's conduct at trial, leaving this issue unpreserved. We review an unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763; *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). The general test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* at 460. Not all claims of prosecutorial misconduct are constitutional in nature. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *Id.* at 262.

Initially, we reject defendant's claim that the prosecutor's closing remarks regarding whether Megan provided a "rock solid alibi" to Officer Shea during a recorded interview on June 10, 2009, had the effect of improperly shifting the burden of proof. A prosecutor may not imply in closing argument that the defendant must prove something because this type of argument tends to shift the burden of proof. *Fyda*, 288 Mich App at 464. But alibi testimony is testimony offered to place the defendant elsewhere than at the scene of the crime when the crime is committed. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978). Although a defendant's presentation of an alibi does not absolve the prosecution of its duty to prove that the defendant committed the crime beyond a reasonable doubt, *People v Erb*, 48 Mich App 622, 629; 211 NW2d 51 (1973), "once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence related to their theory of the case. *Unger*, 278 Mich App at 236.

The argument need not be stated in the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

The prosecutor's "rock solid" comment, examined in context, constituted proper comment on the weakness of defendant's alibi claim relative to whether Megan provided an alibi on June 10, 2009, for defendant's whereabouts at a place other than the area of the fire on East Kirby Street on November 15, 2008. According to the prosecutor's theory, that fire was started by Dove while defendant was waiting for him in the area in an Excursion truck. While Megan provided information regarding a "date night" with defendant on the evening of November 14 and extending into November 15, 2008, the prosecutor could reasonably infer from the evidence that Megan failed to provide the necessary details to account for defendant's whereabouts at the actual time of the fire. In addition, the trial court instructed the jury before deliberations that the prosecutor has the burden of proof and that defendant was not required to prove that he was somewhere else. The jury is presumed to have followed the court's instructions, which were sufficient to protect defendant's substantial rights. *Unger*, 278 Mich App at 235; see also *Fyda*, 288 Mich App at 465.

We also reject defendant's argument that the prosecutor shifted the burden of proof by challenging defense counsel in rebuttal argument to show that Dove is a liar. Examined in context, the challenged remarks were directed at the weakness of defendant's alibi theory in light of other evidence, such as cell phone records, that supported Dove's account of defendant's involvement in the arson fire. Because the prosecutor was permitted to comment on the weakness of defendant's alibi theory, there was no plain error. *Fields*, 450 Mich at 115.

Defendant also argues that the prosecutor misled the jury in closing arguments when commenting on evidence regarding when Megan first disclosed defendant's alibi. We disagree. The essence of Megan's trial testimony was that she and defendant had a "date night" on November 14 and 15, 2008, that defendant briefly left their home to purchase cigarettes after they returned from "date night" at 12:30 a.m., and that they thereafter slept together. Megan testified that she would have known if defendant left the house while she was asleep because of an alarm system in the house. While there was evidence that Megan made earlier statements regarding the "date night" and defendant going out for cigarettes, which included statements by Megan in the recorded police interview on June 10, 2009, Dove testified that he set the fire after 4:00 a.m., and the evidence showed that the firefighters were dispatched to the fire scene at approximately 5:00 a.m. Absent further detail in Megan's prior statements to indicate that she could adequately account for defendant's whereabouts at the time of the fire, the prosecutor could reasonably infer that the alibi was developed between the time of the June 10, 2009, interview and the filing of the notice of alibi on April 6, 2010. It was not improper for the prosecutor to comment on the timing of the notice of alibi to support this argument. *People v Holland*, 179 Mich App 184, 190; 445 NW2d 206 (1989). Because the prosecutor was permitted to argue all reasonable inferences arising from the evidence in support of his theory of the case, defendant has not established a plain error. *Unger*, 278 Mich App at 236.

Defendant also argues that during opening statement and again in closing and rebuttal arguments, the prosecutor made an improper appeal to the jury to convict him on the basis of wealth and class bias. It is improper for a prosecutor to inject issues broader than a defendant's guilt or innocence. *People v Bahoda*, 448 Mich 261, 284; 531 NW2d 659 (1995). Some federal

cases hold that a prosecutor's appeal to class bias to obtain a conviction is improper. But as explained in *United States v Derman*, 211 F3d 175, 179 (CA 1, 2000), a case-by-case approach is applicable in evaluating such claims to determine if there are improper appeals to class prejudice or argument relevant to the issues at hand.

In this case, it is not apparent from the record that the prosecutor made an improper appeal to class prejudices. The challenged remarks, examined in context, were directed at relevant issues concerning the relationship between defendant and Dove in order to explain why Dove would set the fire at defendant's request. In his opening statement, the prosecutor stated that Dove was "an ordinary minion who thrives and survives based on what [defendant] provides him for work. He's a nothin [sic]. He's a handyman," while defendant was "his boss, a coward who sends this person out to take the hit." These remarks were not an appeal to class bias. The prosecutor's closing remark that defendant was more polished and refined than Dove, examined in context, also did not constitute an improper appeal to class bias. And while the prosecutor commented in rebuttal argument that "this is a little bit about class," we note that defense counsel had also addressed this issue in his closing argument by stating that "the prosecutor keeps bringing in the class thing" and that "[t]his isn't about class, it's about whether [defendant] knew about a fire and whether he aided and abetted." The prosecutor's response that "this is a little about class" was accompanied by an argument that Dove was a "follower" and "flunky" for defendant, who was described as a businessman. Examined in context, it is apparent that the prosecutor was suggesting that the jury evaluate defendant's and Dove's respective positions in evaluating their different roles in the fire. The prosecutor's rebuttal argument was supported by defendant's own testimony, which described Dove as a "grunt," although defendant denied any involvement in the fire.

Considering the record as a whole, defendant has not established a plain error. Further, to the extent that the prosecutor's remarks could be considered improper, the trial court instructed the jury that "you have taken an oath to return a true and just verdict based only on the evidence and my instructions on the law. Do not let sympathy or prejudice influence your decision." The court's instructions were sufficient to protect defendant's substantial rights.

Defendant next argues that the prosecutor made improper appeals to the jury to convict him based on the jury's civic duty or out of sympathy for the victim, a low-paid hero in a dangerous profession. Prosecutorial arguments that appeal to the jury's civic duty or sympathy for the victim are improper. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). The prosecutor must refrain from appealing to the jury's fears and prejudices. *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 237. The prosecutor's characterization of the victim as heroic in opening was tied to the conduct that resulted in his death. The prosecutor was not required to state his argument in the blandest possible terms. *Dobek*, 274 Mich App at 66. As a whole, the prosecutor's opening remarks were directed at the facts that he intended to prove with respect to why the victim, a firefighter, would enter a burning house. A firefighter's duties were particularly relevant in this case because the murder charge required proof that defendant acted with malice when he sent Dove into the house to set the fire. The malice necessary to establish murder requires an intent to kill, an intent to cause great bodily harm, or a wanton and willful disregard that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Nowack*, 462 Mich 392, 408; 614 NW2d 78 (2000). Like common-law arson, it manifests contempt for human life. *Id.* Because the challenged opening remarks did not inject

issues broader than defendant's guilt or innocence, and did not plainly appeal to the jury's sympathy, they were not plain error. *Carines*, 460 Mich at 763; *Abraham*, 256 Mich App at 273.

We reach this same conclusion with respect to the prosecutor's remarks in closing and rebuttal arguments. At most, we would question whether the prosecutor made a statement unsupported by the evidence and that lacked relevancy to the charges when he remarked that firefighters have low-paying jobs. But considering that the jury was instructed that the lawyers' statements and arguments are not evidence, those remarks do not rise to the level of outcome-determinative plain error. *Unger*, 278 Mich App at 237.

Defendant also argues that the prosecutor engaged in improper "name calling" by referring to him as a "coward" in opening statement and closing argument. We disagree. In *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), this Court found that the prosecutor's use of the terms "coward," "moron," and "idiot" to describe the defendant exceeded the bounds of proper comment on the evidence, but did not require reversal because of the overwhelming evidence against the defendant and the isolated nature of the comments. Nonetheless, a prosecutor may use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996); see also *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996) (the prosecutor's use of the word "monster" to describe the defendant was a permissible comment on the evidence). Here, the prosecutor's reference to defendant as a "coward" was based on the evidence showing that defendant made Dove set the fire. The prosecutor's argument was not plain error.

Defendant also argues that the prosecutor improperly disparaged him by arguing that he lacked a conscious. Again, we are not persuaded that the remarks were improper considering that they were directed at evidence that Dove, unlike defendant, admitted involvement in setting the fire.

Defendant also argues that the prosecutor engaged in improper vouching and bolstering by remarking in closing argument that his job was to "see that justice is done" and that he had found the responsible parties. While it is the prosecutor's duty to seek justice, *People v Wallace*, 160 Mich App 1, 9; 408 NW2d 87 (1987), a prosecutor may not use the prestige of his office to inject a personal opinion. *Bahoda*, 448 Mich at 286. In addition, a prosecutor may not vouch for the credibility of a witness or imply some special knowledge regarding whether a witness is testifying truthfully. *Dobek*, 274 Mich App at 66. For the most part, the challenged remarks were not improper because they were directed at evidence that Dove's testimony regarding the responsible parties for the fire was credible. *Id.* To the extent that the prosecutor exceeded the bounds of proper argument by emphasizing his responsibilities to do justice and to find the responsible parties, given the isolated nature of the arguments and the trial court's instructions that the jury was to decide this case based only on the evidence, the remarks did not affect defendant's substantial rights. *Unger*, 278 Mich App at 235.

Defendant next argues that the prosecutor provided unsworn testimony during closing argument by stating that he did not offer Dove a deal before he confessed. We disagree. Dove testified that he did not reach a plea agreement with the prosecutor until November 3, 2009. Thus, it was not improper for the prosecutor to argue that Dove did not have a "deal" at the time

of his police interview in June 2009, when Dove admitted his involvement in starting the fire. Accordingly, there was no plain error.

Defendant also argues that the cumulative effect of the prosecutor's improper conduct deprived him of a fair trial. The cumulative effect of several errors may be sufficiently prejudicial to deny a defendant a fair trial. *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008). But only actual errors are aggregated to determine their cumulative effect. *Bahoda*, 448 Mich at 292 n 64. Here, defendant has not established any errors that, considered singularly or cumulatively, denied him a fair trial.

V. UNDISCLOSED EXCULPATORY EVIDENCE

Defendant next argues that a new trial is required because the prosecutor failed to disclose evidence that would have supported his alibi defense, namely, a statement allegedly provided by Megan at the fire department on November 19, 2008, which was allegedly written on a yellow legal pad. This issue is unpreserved because it was never presented to the trial court, either before or at trial, notwithstanding Megan's trial testimony that she initialed a statement on a yellow legal pad at the fire department on November 19, 2008, which contained answers to the questions "where we were," "where was Mario," and "what we did that day." To properly preserve an issue for appeal, a defendant must timely assert the right. *Carines*, 460 Mich at 762-763.

Although defendant later raised this issue in his motion for a new trial, we are not persuaded that the trial court abused its discretion by deciding the motion without conducting an evidentiary hearing, MCR 6.431(B); *Miller*, 482 Mich at 544, nor are we persuaded that remand for an evidentiary hearing is necessary. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), a prosecutor has a duty to disclose impeachment and exculpatory evidence that might lead the jury to entertain a reasonable doubt regarding a defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros*, 866 F2d 1304, 1308 (CA 11, 1989), cert den 493 US 932; 110 S Ct 322; 107 L Ed 2d 312 (1989). [*Lester*, 232 Mich App at 281-282.]

In this case, defendant's claim that material exculpatory evidence was not disclosed by the prosecutor fails when analyzed as an unpreserved forfeited issue because, apart from the lack of evidence that Megan said anything on November 19, 2008, that would account for defendant's whereabouts at the time of the fire, it is not clear from the trial record that the alleged written statement exists. Although defendant submitted an affidavit from Megan in support of his new

trial motion, Megan did not identify any individual from either the fire department or police department who took the statement. Even assuming that defendant could establish that Lieutenant Chuck Simms, or someone else from the fire or police departments, had prepared a written statement on a yellow legal pad, Megan's affidavit offers nothing of substance to show that she accounted for defendant's whereabouts at the time of the fire on November 15, 2008. "Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 281-282. There must be a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.* Because defendant failed to establish a reasonable probability that the result of the proceeding would have been different if he was able to corroborate Megan's trial testimony regarding her disclosure that she had "date night" with him and sent him out for cigarettes using a writing from the November 19, 2008, interview at the fire department, the trial court did not abuse its discretion in denying the motion for a new trial without an evidentiary hearing.

VI. NEWLY DISCOVERED EVIDENCE

Defendant argues that his convictions must be vacated on the ground that newly discovered evidence shows that Dove committed perjury at trial. We conclude that defendant failed to establish entitlement to a new trial, and that he has not shown that remand for further factual development of this issue is required.

The decision whether to grant a new trial based on newly discovered evidence is governed by the following test set forth in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003):

> [A] defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [Citation omitted.]

Newly discovered impeachment evidence may be grounds for a new trial if it satisfies this four-part test. *People v Grissom*, 492 Mich 296, 304; ___ NW2d __ (2012). "More specifically, newly discovered impeachment evidence satisfies *Cress* when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and (2) a different result is probable on retrial." *Id.* at 306.

Newly discovered evidence in the form of recanted testimony may provide a basis for a new trial, but such testimony has traditionally been regarded as suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Our Supreme Court has recognized that "[a]s a rule the court is not impressed by the recanting affidavits of witnesses who attempt to show that they perjured themselves at the trial." *People v Smallwood*, 306 Mich 49, 55; 10 NW2d 303 (1943). But other circumstances, such as a hostile motive of the recanting witness for making a false charge against a defendant, may justify a new trial. *Id.*

In this case, defendant did not submit any affidavits to establish that Dove intended to recant his trial testimony, but rather relied on statements allegedly made by Dove in prison that

were consistent with Dove's original claims in June 2009 that, while inside the house with a woman, he started a fire to keep warm and that the fire accidentally spread to the structure. The primary statement on which defendant relied consists of a five-page "prisoner kite" form that is labeled "the truth statement." Defendant alleged in an affidavit that he received this "letter" from another inmate in June 2010. In the letter, Dove states that he put a "little gas" on metal to start a fire in the upstairs portion of the house to keep himself and a woman named Felicia warm, but forgot to move the gas can. He stated that the house caught on fire after he and Felicia went downstairs, and that they went to a telephone booth to call 911. Dove claimed that the police put words in his mouth when he was interviewed, and that he was scared because he was told that he could spend the rest of his life in prison. The other statement submitted by defendant was purportedly written by a prison inmate, Nikemo Burton, who wrote that Dove told him in May 2010 that he was given a 20-year sentence for the fire and that he had been "with one of girls they was getting high and made a mistake and started a fire."

We agree with prosecutor that this new version of what occurred is inconsistent with the physical evidence that gasoline was poured along the walls in the upstairs portion of the house. In addition, the trial court found it clear that the jury chose to believe Dove's version of the events, which the jury understood was given pursuant to a plea agreement that included a 17-year minimum sentence for his plea to second-degree murder. The recanting statements are particularly suspect because, assuming that Dove actually made the statements, he apparently waited until after he learned the full extent of his sentence and made statements that tended to reduce his own culpability by characterizing the fire as accidental.

Considering the suspect nature of recanting testimony, the fact that the recanting statements do not adequately explain the physical evidence of gasoline along the walls, and the other evidence presented at trial pertaining to the credibility of the version that Dove provided to the jury as part of a plea agreement, we reject defendant's claim on appeal that he has established that Dove's trial testimony was perjured. We are not persuaded that defendant has established entitlement to a new trial or a remand for further proceedings with respect to this claim. *Williams*, 275 Mich App at 200.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, we address defendant's numerous claims of ineffective assistance of counsel. Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant has the burden of showing both deficient performance and resulting prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Defendant must overcome a strong presumption that counsel's performance was sound trial strategy. *Carbin*, 463 Mich at 600. Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Vaughn*, 491 Mich at 669.

First, the record does not support defendant's claim that defense counsel did not interview Megan. Indeed, Megan averred in her affidavit that she told defense counsel about defendant's alibi. To the extent that defendant argues that counsel performed deficiently by not eliciting from Megan on redirect-examination that she was subjected to two separate interviews on November 19, 2008, we note that "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Counsel's decisions will not be assessed with the benefit of hindsight. *Unger*, 278 Mich App at 243; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). But "[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

In this case, Megan's trial testimony was vague concerning who was present at the fire department when she was allegedly interviewed. She testified that "they" asked "where we were," "where was Mario," and "[w]hat we did that day." But her testimony left no doubt that she was claiming that two written statements were taken from her. Although Megan averred in her posttrial affidavit that two separate interviews were conducted and that she told defense counsel about the two interviews, as indicated previously, Megan's affidavit does not indicate that she could account for defendant's whereabouts at the actual time of the fire. Megan averred that she told one interviewer that "November 14-15, 2008, was date night" and "[w]e went out and then when we returned I sent [defendant] back out to buy clove cigarettes for me at the gas station." This offer of proof does not establish a factual basis for concluding that there is a reasonable probability that the result of the trial would have been different but for defense counsel's alleged errors in questioning Megan and failure to request a copy of the alleged written statement.

Defendant also failed to offer factual support for his claim that counsel should have called Lieutenant Simms to testify regarding the alleged November 19, 2008, interview of Megan that was recorded on a yellow legal pad. Defendant has the burden of establishing the factual predicate of his claim. *Carbin*, 463 Mich at 600. Because defendant failed to offer any evidence in support of his claim that Lieutenant Simms could have provided any testimony favorable to the defense, this ineffective assistance of counsel claim cannot succeed and defendant has not established any basis for remanding this case for an evidentiary hearing regarding this claim.

Defendant next argues that counsel was ineffective for failing to subpoena Walter Collier to testify at trial. According to Collier's affidavit, he and Dove were in the same ward in the Wayne County Jail when Dove told him sometime in 2009 that "the fire in the house started from chemicals that got accidentally knocked over" and that he "was with a woman when this happened." Dove allegedly told Collier that he wanted to get back at defendant for giving his name to the police. Collier averred that he told defendant what Dove said when they met outside a courtroom. Defendant averred in a separate affidavit that he informed defense counsel about Collier and counsel later told him "that this was hearsay and could not be used at trial."

Although defendant argues on his appeal that Collier's testimony could have been used to attack Dove's credibility, defendant has not established that the proposed testimony could have

provided a substantial defense, especially given the physical evidence that gasoline had been poured along the walls and that the fire did not result from an accidental spill from "chemicals," and defendant's acknowledgement that Dove previously presented this accidental fire theory to the police. In addition, counsel reasonably could have had concerns about using a jail inmate who had contact with defendant to present this evidence. The jury was apprised of other evidence placing Dove with a woman named Felicia, including Officer Scott Shea's testimony that Dove identified Felicia as woman in the background with his 911 telephone call to report the fire. The jury also heard other evidence of prior inconsistent statements by Dove and testimony from several defense witnesses that called Dove's credibility into question without having to address whether a fire was accidentally set. The jury was also aware that Dove was testifying pursuant to a plea agreement, as well as evidence that he had attempted to withdraw his plea before trial.

Given this record, defendant's claim that counsel's performance was deficient cannot succeed. In addition, the affidavits on which defendant relies are insufficient to justify a remand to the trial court. The offer of proof is insufficient to support a finding of either deficient performance or prejudice relative to counsel's failure to subpoena Collier to testify at trial.

Defendant next raises several issues concerning the various recordings that were presented at trial as defense or prosecution exhibits. Defendant's principal argument is that counsel should have requested transcripts of the various recordings that were introduced at trial so that they could be supplied to the jury or used at trial to make objections, question witnesses, or provide content for closing arguments. Transcripts of recorded conversations may be provided to a jury, provided the parties stipulate to their accuracy or the trial court uses a method that ensures the accuracy and fairness of the transcripts. See *People v Lester*, 172 Mich App 769, 775-776; 432 NW2d 433 (1988).

To the extent that defendant argues that Dove's 911 telephone call contains a statement by a woman in the background that "clinches" the defense, the record indicates that this call was one of the recordings that defense counsel chose to play to the jury at trial. Further, Dove testified at trial that the woman's voice in recording belonged to Felicia. In his closing argument, defense counsel argued that "Felicia is there when this fire is happening. She's there because we know she's in the background of the 9-1-1 tape." A decision concerning what evidence to highlight in closing argument is presumed to be a matter of trial strategy. *Horn*, 279 Mich App at 39. Defendant has not overcome the strong presumption that his counsel's strategy was sound. *Carbin*, 463 Mich at 600.

We also reject defendant's argument that defense counsel erred by failing to object to the prosecutor's elicitation of testimony from Dove regarding what defendant told him about obtaining an attorney. Contrary to what defendant argues, that statement was not made during the recorded telephone conversation between Dove and defendant while Dove was being interviewed by the police. Rather, as plaintiff argues, Dove's testimony pertained to a conversation that Dove had with defendant when the police "surrounded" his house and brought him in. Accordingly, we find no factual support for defendant's claim of error.

The record also does not support defendant's claim that defense counsel mistakenly believed that he had to play the entire recording of Dove's six-hour police interview on June 9,

2009, which was admitted as defense exhibit Y, when making his offer of proof regarding this evidence at trial. Nor does the record indicate that defense counsel was unprepared to use this exhibit at trial. Defense counsel's failure to object to the prosecutor's apparent misstatement of this evidence in his closing argument with respect to when Dove started to "come clean" during the interview does not establish that counsel was unprepared. "[D]eclining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Although defendant suggests on appeal that the timing and other circumstances of the June 9, 2009, interview was crucial for the purpose of attacking Dove's credibility at trial, it is apparent from the record that defense counsel chose to highlight other prior statements, such as Dove's preliminary examination testimony regarding his access to defendant's cell phones, to attack Dove's credibility. This Court will not substitute its judgment for that of counsel on matters of trial strategy, or evaluate counsel's strategy with the benefit of hindsight. *Id.* at 242-243. Defendant has not overcome the strong presumption that counsel's strategy with respect to the use of exhibit Y was sound. *Carbin*, 463 Mich at 600.

To the extent that defendant argues that counsel should have obtained a transcript of the recording of Megan's June 10, 2009, police interview to pinpoint where Megan talked about defendant's alibi and to challenge Officer Shea's credibility, it is apparent from the record that defense counsel did not need a transcript to bring out relevant information. In fact, defense counsel elicited from Officer Shea that Megan stated that defendant went to purchase cigarettes for her. Accordingly, defendant has not established either deficient performance or prejudice with respect to this matter.

Defendant next argues that counsel was ineffective for not introducing the recording of Dove's June 11, 2009, interview at the police station. Defendant argues that this interview was material because it was the first time that Dove claimed that gasoline was used to start the fire. However, defendant's submitted transcript of that June 11, 2009, interview does not establish factual support for his claim. That interview indicates that Dove started a "light fire," with a concoction containing detergent, bleach, and ammonia, but also had a bottle of gasoline that he must have "kicked." It also contains information regarding defendant's cell phones that, consistent with Dove's trial testimony, would tie defendant to a particular cell phone that the prosecutor claimed was used by defendant during the relevant time period of the arson. Defense counsel reasonably may have chosen not to use the June, 11, 2009, police interview to avoid the jury hearing Dove's prior statements regarding the cell phone. The jury was amply apprised of the evolution of Dove's claims regarding the circumstances of the fire and other circumstances, such as his plea agreement, that affected his credibility. Therefore, while the failure to introduce evidence that can catch a witness in a lie can constitute deficient performance, *Armstrong*, 490 Mich at 290-291, given the record in this case and the offer of proof made by defendant in support of his motion for new trial, it cannot be said that defense counsel's failure to introduce the recorded June 11, 2009, interview amounts to ineffective assistance of counsel.

Defendant next seeks an evidentiary hearing regarding whether counsel was ineffective for not objecting to the closure of the courtroom during jury selection. We have previously determined in part II of our opinion that the alleged closure of the courtroom by deputies does not require reversal. In addition, as discussed in *Vaughn*, 491 Mich at 669-670, a defense attorney reasonably could determine that closure of the courtroom during voir dire will benefit the defendant because it will encourage potential jurors to be more forthcoming in their

responses, or counsel may simply prefer a closed courtroom to expedite the process. Further, a defendant must still demonstrate actual prejudice. *Id.* at 673. Because defendant does not claim actual prejudice and did not offer any proof that counsel's performance was deficient, we deny defendant's request to remand for a hearing regarding this issue.

Defendant next argues that his counsel was ineffective by not requiring the prosecutor to produce the original surveillance tapes from a gas station. According to Detroit Police Sergeant Ronald Gibson, who was qualified as an expert in digital multimedia forensic evidence, the gas station used a computer-based surveillance system, which he used to download video recordings of surveillance at the gas station and to produce still photographs of an Excursion-type vehicle. The trial court allowed the prosecutor to introduce this evidence, over defense counsel's objection to the authentication of the evidence. Because the record shows that defense counsel objected to the evidence based on lack of authentication, defendant has failed to establish that any request for the prosecutor to bring the original to court or that any further argument regarding this evidence would reasonably have resulted in its exclusion at trial. Thus, this claim cannot succeed.

Defendant next argues that counsel was ineffective for not objecting to an exhibit that depicted his "7MONSTRA" license plate on the rear of an Excursion truck on the ground that it was confusing and misleading. Although MRE 403 permits a trial court to exclude evidence on the ground that its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ," the license plate in this case was a feature that Dove used to identify the vehicle driven by defendant at the time of the fire. We find no support for defendant's claim that the photograph was objectionable on the ground that it was misleading or confusing. Accordingly, we reject defendant's claim that counsel was ineffective regarding this matter. See *Horn*, 279 Mich App at 39-40 (counsel need not make a futile objection).

To the extent that defendant's argument is directed at the inferences drawn by the prosecutor in his opening statement and closing argument with respect to whether "7MONSTRA" was depicted in still photographs produced from the gas station, and defense counsel's failure to object to the prosecutor's arguments, we also conclude that defense counsel was not ineffective. As indicated previously, a prosecutor may generally argue the evidence and all reasonable inferences from the evidence. *Unger*, 278 Mich App at 236. Here, defendant has failed to establish that the prosecutor's inferences were unreasonable. Thus, counsel was not ineffective for failing to object.

Defendant next argues that counsel was ineffective for failing to object to the prosecutor's alleged misconduct addressed in part IV of this opinion. Given our conclusion that the prosecutor's conduct was for the most part proper, and that any perceived misconduct did not affect defendant's substantial rights, defendant has not established that counsel's failure to object deprived him of the effective assistance of counsel.

Defendant also argues that counsel should have asked the trial court to take judicial notice of the alibi statute and brought out when he was informed of the alibi through the testimony of Megan and defendant at trial. We note, however, that one of defendant's trial attorneys elicited testimony from Megan on redirect examination that she provided her "alibi

witness" before the preliminary examination. While this led to further questioning by the prosecutor in which Megan testified regarding her alleged recorded statement on the yellow legal pad at the fire department, considering that the matter was explored by defense counsel, defendant has failed to establish either deficient performance or resulting prejudice with respect to this issue. Because Megan claimed that she provided her "alibi witness" before the preliminary examination, defense counsel reasonably could have concluded that it was unnecessary to address the notice requirements of the alibi statute.[2]

Defendant next argues that defense counsel was ineffective for not objecting to other-acts evidence at trial, namely, the evidence that he was involved with Dove in setting the first fire at the house on East Kirby in September 2007. Defendant argues that an objection should have been raised under MRE 403 on the ground that the probative value of the evidence did not outweigh its prejudicial effect. The balancing test in MRE 403 requires a court to assess whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). While an assessment under MRE 403 is part of the analytic framework for admitting other-acts evidence under MRE 404(b), *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), defendant has not established any basis for concluding that an objection under MRE 403 stood a reasonable likelihood of success. Therefore, we find no basis for concluding that counsel was ineffective regarding this evidence.

Defendant also argues that counsel should have objected to the prosecutor's remark during closing argument regarding evidence of a letter written by Dove to a judge on the ground that other-acts evidence was used to shore up Dove's credibility. The record indicates that the letter was part of Dove's attempt to withdraw his guilty plea before trial. The prosecutor introduced the letter after defense counsel elicited testimony from Dove regarding his attempt to withdraw the plea. Dove wrote in the letter that he should not receive a sentence of 17 years because defendant was the mastermind behind the offense. Dove testified at trial that he was angry with defendant and that the letter was the first time that he told someone about the first fire at the house. Examined in this context, we reject defendant's argument that the prosecutor's remarks about the letter in closing argument were improper. The prosecutor's remarks were a fair response to the testimony elicited by defense counsel. See *Brown*, 279 Mich App at 135 (a prosecutor may fairly respond to issues raised by the defendant). Thus, counsel was not ineffective for failing to object.

[2] MCL 768.20(1) provides that "[i]f a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense."

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's limiting instruction concerning the other-acts evidence on the ground that it was too broad. A trial court is only required to give a limiting instruction with respect to other-acts evidence if requested. MRE 105; *Sabin*, 463 Mich at 56. Jury instructions are generally read as a whole to determine if error occurred. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Even if instructions are imperfect, reversal is not warranted where the instructions fairly present the issues and adequately protect the defendant's rights. *Id.* at 501-502. We reject defendant's argument that the jury would have concluded that the limiting instruction applied to evidence other than the evidence of defendant's involvement in the September 2007 arson fire. Moreover, a more specific instruction might have highlighted the evidence of defendant's involvement in the prior arson. This Court will not substitute its judgment for counsel on matters of trial strategy. *Unger*, 278 Mich App at 242.

We also reject defendant's argument that counsel was ineffective for not objecting to certain purposes of the evidence that the jury could consider pursuant to the limiting instruction. Contrary to defendant's argument on appeal, his general denial of the charges placed all elements of the charges, including his state of mind, at issue. *Sabin*, 463 Mich at 60. Examined as whole, the limiting instruction fairly presented the issues and adequately protected defendant's rights. Therefore, defendant has failed to establish that counsel was ineffective for not objecting to the instruction.

Defendant also argues that defense counsel wrongfully withdrew an argument regarding the scope of his cross-examination of the prosecutor's arson expert. Defendant argues that counsel should have responded to the trial court's inquiry regarding the relevancy of his cross-examination of the expert, with respect to his prior testimony at the preliminary examination, by offering to show that the expert was exaggerating the number of fires that he had responded to as a firefighter and an investigator and, accordingly, lacked credibility. But considering the preliminary examination testimony and the distinctions that were made by the expert with respect to his experience as a firefighter and as an investigator, we find no basis for concluding that further cross-examination would have revealed the exaggerated testimony suggested by defendant on appeal. In addition, considering that defendant was not contesting the origin and cause of the fire, but rather his participation in crimes, counsel reasonably could have concluded that it was unnecessary to try to persuade the trial court that the proposed impeachment evidence was relevant. Decisions regarding how to question witnesses are presumed to be matters of trial strategy. *Horn*, 279 Mich App at 39. Defendant has not overcome the strong presumption that counsel's decision not to pursue this matter was sound trial strategy, or shown any resulting prejudice.

Lastly, defendant argues that counsel was ineffective for failing to object to the scoring of the sentencing guidelines at sentencing. The record establishes that defendant was afforded an opportunity to raise any objections that were not made at sentencing in a motion for resentencing. Although the trial court denied the motion, considering defendant's opportunity to raise his objections, defendant cannot establish that he was prejudiced by his counsel's failure to object.

In sum, defendant has failed to establish any deficiency on the part of trial counsel that amounts to a denial of his right to the effective assistance of counsel at trial or sentencing.

VIII. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court erred in scoring the sentencing guidelines and improperly exceeded the sentencing guidelines range of 225 to 375 months for reasons that were not substantial and compelling and without justifying the extent of the departure.[3] We review a trial court's scoring decisions to determine whether the court properly exercised its discretion and whether there is any record evidence to support the decisions. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). We review the trial court's interpretation of the statutory sentencing guidelines de novo as a question of a law. *Id.*

Initially, we reject defendant's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to argue that he was entitled to a jury determination of all facts used to score the sentencing guidelines offense variables. It is well established that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); see also *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007).

Defendant challenges the trial court's scores of 20 points for OV 1, MCL 777.31, and 15 points for OV 2, MCL 777.32, on the basis that points were improperly awarded for the use and possession of an "incendiary device." The primary goal in construing a statute is to give effect to the Legislature's intent. *People v Wilcox*, 486 Mich 60, 64; 781 NW2d 784 (2010). "The first step in ascertaining intent is to focus on the language of the statute. If the language is unambiguous, we presume that the Legislature intended the meaning expressed." *Id.* Defendant's reliance on the definition of "chemical irritant device" in chapter XXXIII of the Penal Code, MCL 750.520h(2), to argue that gasoline does not qualify as an "incendiary device" for purposes of OV 1 and OV 2 is misplaced. The statutes that govern the scoring of OV 1 and OV 2 case expressly define an "incendiary device" as including gasoline. MCL 777.31(3)(b) and MCL 777.32(3)(d). Because the evidence established that the fire was set using gasoline, defendant has not established an error with respect to the scoring of OV 1 and OV 2.

Next, defendant acknowledges that the trial court's 25-point score for OV 3, MCL 777.33, is supported by our Supreme Court's decision in *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005), but argues that *Houston* was wrongfully decided. "[S]tare decisis dictates that a decision of the majority of the justices of our Supreme Court is binding upon lower courts." *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992); see also *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987). Because we are bound by the decision in *Houston*, we reject defendant's argument that OV 3 was improperly scored.

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[3] Although the sentencing information report discloses that defendant received 135 total offense variable points, the trial court incorrectly referred to defendant's score as 120 points. The discrepancy appears to be attributable to offense variable (OV) 5, which was scored at 15 points and was not challenged by either party at sentencing. This discrepancy does not affect the guidelines range because defendant was placed in OV Level III, which is the highest level of offense severity for second-degree murder, see MCL 777.16p and MCL 777.61, and requires a minimum score of only 100 points.

Lastly, defendant challenges the trial court's score of 25 points for OV 9, MCL 777.39(1)(b), which is appropriate where there were "10 or more victims who were placed in danger of physical injury or death." Conversely, a score of 10 points is proper where there were "2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). The instructions for OV 9 state that a court is to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). While a separate criminal offense with respect to each person is not required, each person must be in danger of injury or loss of life. *People v Sargeant*, 481 Mich 346, 350-351 n 2; 750 NW2d 161 (2008).

In this case, the trial court correctly rejected defendant's argument that zero points should be scored for OV 9 because a danger of physical injury is inherent in a firefighter's work. However, although there clearly was evidence that several firefighters were placed in danger of physical injury or loss of life by the fire, the trial court did not require the prosecutor to introduce evidence establishing that at least 10 firefighters were so endangered by the fire. Nonetheless, the evidence minimally established that at least three firefighters were in danger of physical injury or loss of life, thereby justifying a score of at least 10 points. Because a 15-point reduction in the scoring of OV 9 would not affect the ultimate guidelines range, any error in the scoring of OV 9 does not require resentencing. *People v Sims*, 489 Mich 970; 798 NW2d 796 (2011), mod 490 Mich 857 (2011).

Defendant next argues that the trial court erred by departing from the guidelines range of 225 to 375 months, and sentencing him to a prison term of 500 to 750 months for the second-degree murder conviction. A trial court may depart from the sentencing guidelines range if there is "a substantial and compelling reason for that departure and [the court] states on the record the reasons for departure." MCL 769.34(3). The trial court's reasons for departure must be objective and verifiable. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *Horn*, 279 Mich App at 43 n 6. To be substantial and compelling, the reasons for departure "must be of considerable worth in determining the length of the sentence and should keenly and irresistibly grab the court's attention." *Smith*, 482 Mich at 299. "For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history." *Id.* at 300.

We disagree with defendant's argument that the trial court improperly exceeded the guidelines range based on findings regarding his greed and motivation. A trial court is not precluded from drawing inferences regarding a defendant's behavior from objective evidence in determining if there are substantial and compelling reasons for departing from the sentencing guidelines. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). While the trial court used words like "greed" and "scofflaw" when addressing defendant's motivation, the thrust of its finding was that defendant had a financial motive for having Dove set the fire. Because objective evidence from the trial supports a reasonable inference that defendant had assumed responsibility for the house and had a financial incentive for the second fire, the trial court did not err in considering that evidence as a reason for exceeding the guidelines.

Defendant also argues that the trial court erred in considering the victim's status as a firefighter to exceed the guidelines. Defendant asserts that only vulnerable individuals are given

special status under the guidelines. He asserts that he could not have foreseen that a firefighter would be harmed under the circumstances of this case where, according to firefighter Hamm's trial testimony, the Detroit Fire Department changed its policy after the victim's death so that an "obviously vacant structure that is consumed by fire" will not be entered until the fire chief arrives at the scene.

We reject defendant's arguments because they fail to consider that a firefighter becomes vulnerable to injury because he or she is responding to the fire. The fact that a fire department might take additional precautions to protect firefighters does not make the risk of harm unforeseeable. Because the inferences drawn by the trial court regarding the foreseeability of harm are supported by objective and verifiable evidence, and could keenly and irresistibly grab the court's attention, it was not improper for the trial court to consider it as a reason for departing from the guidelines range. Cf. *People v Marshall*, 204 Mich App 584, 589; 517 NW2d 554 (1994) (defendant's act of shooting on-duty police officer attempting to make lawful arrest justified a departure from the former judicial sentencing guidelines).[4]

We also reject defendant's argument that the trial court erred in finding that he orchestrated perjury by Megan to support his alibi defense and in using that finding as a basis for departure from the guidelines. Perjury requires that there be a willful false statement under oath. See *People v Lively*, 470 Mich 248, 253-254; 680 NW2d 878 (2004) (discussing a statutory offense of perjury regarding matters for which an oath is authorized or required under MCL 750.423). A defendant's perjury can be an objective and verifiable basis for departing from the guidelines range. See *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007). A defendant's perjury may also be used to score OV 19, MCL 777.49, where the offender interferes with or attempts to interfere with the administration of justice. See *People v Underwood*, 278 Mich App 334, 338-339; 750 NW2d 612 (2008). Further, events occurring after the sentencing offense has been completed may be used to score OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

Here, while the trial court's departure reason was not based on defendant's perjury, it did involve defendant's interference with the administration of justice through the presentation of perjured alibi testimony. While we question the trial court's failure to consider this factor under OV 19, the court reasonably could infer that defendant willfully presented Megan's perjured testimony at trial to avoid responsibility for the arson. Thus, we find no error in the trial court's finding that Megan committed perjury or in its use of this factor to determine defendant's sentence.[5]

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[4] The legislative guidelines apply to felonies committed on or after January 1, 1999. See MCL 769.34(1).

[5] As further explained below, we conclude that resentencing is required because the trial court failed to justify the extent of the departure. At resentencing, the trial court shall consider whether any involvement by defendant in orchestrating Megan's perjury should be scored under OV 19 and, if so, limit its consideration of this conduct as a basis for departure consistent with MCL 769.34(3)(b).

In sum, the trial court departed from the guidelines for reasons that were objective and verifiable. The reasons for departure satisfy the requirement in MCL 769.34(3) that a court articulate substantial and compelling reasons for the departure. Contrary to defendant's argument on appeal, the trial court did not err by failing to treat the wanton and willful form of malice that supported his conviction for second-degree murder as a less culpable form of the offense. All forms of malice manifest contempt for human life. *Nowack*, 462 Mich at 408. "The same level of criminal culpability exists regardless whether a defendant wantonly and willfully disregards the consequences of his actions or intends to cause the prohibited harm." *Id.*

Nonetheless, when departing from the guidelines range, the trial court must also "explain why the sentence imposed is more proportionate than a sentence within the guidelines would have been." *Smith*, 482 Mich at 304. In this case, the trial court did not attempt to justify the extent of its departure independent of its reasons for the departure, either at sentencing or when denying defendant's motion for resentencing. Further, the trial court is required to evaluate both the nature of the offense and the defendant's criminal history in determining the proportionality of a sentence. *Id.* at 309, 318. Here, defendant has a minimal criminal history, although the trial court did find that defendant participated in a prior arson that did not result in a conviction. Although departures from the guidelines range are not determined with mathematical precision, because the trial court did not justify the extent of its departure in this case, resentencing is required. Accordingly, we vacate defendant's sentences and remand for resentencing and an explanation of the extent of any departure from the guidelines range. *Id.* at 319.

Finally, we have considered defendant's request for resentencing before a different judge, but conclude that reassignment is not warranted. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto