STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2013
v	No. 297769 Oakland Circuit Court
JASON RICHARD ROSE, Defendant-Appellant.	LC No. 2009-229124-FH

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant Jason Richard Rose appeals by right his jury convictions of burning a dwelling house, MCL 750.72, and burning personal property with a value of $1,000 or more, but less than $20,000, MCL 750.74(1)(c)(*i*). The trial court sentenced Rose as a habitual offender, MCL 769.13, to serve 17 to 40 years in prison for his burning a dwelling house conviction and to serve 5 to 10 years in prison for his burning personal property conviction. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

This case has its origins with the burning of a Honda Odyssey owned by Shawn Smolinski in the early morning hours on October 16, 2008. Testimony established that the van was parked in Smolinski's driveway at the time and that the fire also damaged her home. At trial, there was no dispute that someone intentionally set fire to Smolinski's van; the sole question was whether Rose was the person who set the fire. Testimony also established that Rose had had a tumultuous relationship with Smolinski and had lived with her in her home until their relationship ended in late August 2008.

Brian Salenik testified that he was a detective fire investigator with the Oakland County Sheriff's department. He investigated the fire that originated with Smolinski's van. Salenik stated that the damage inside the van was consistent with the side window behind the driver's seat having been broken first; the burn pattern showed that the fire was more intense at that location and vented through that window before any of the other windows were broken. He also noted that there was what appeared to be a landscape rock from the yard that had been thrown into the van through the side window.

Salenik testified that there was a gas can in the van with a partially burned cloth that "had an odor of gasoline that was right next to the gas can." He characterized the cloth as a "wick" and opined that the gas can and wick were thrown or placed into the van. He explained that the wick appeared to have gone out:

> [T]he gasoline could have actually put out the fire that was on top of the cloth. Either that, or the fumes inside that built up to the point to where it either had to be re-ignited and/or delayed prior to the explosion happening because the—the wick shoved inside the gas can either fell out or when the gas can was over started pouring out and did not immediately ignite . . . .

At that point, he related, the fumes would begin to build up in the van. And, if someone tried to reach in and reignite the gas, there would be an explosion; it would be a "flash burn" and, because the oxygen in the confined space of the van would be consumed right away, the fire would "funnel out through that window." He stated that a person exposed to the flash burn would have suffered superficial burns.

Salenik concluded that the evidence was consistent with the fire originating behind the driver's seat, at or near the floor, by means of an "open flame ignition of gasoline fumes." This vapor explosion would then ignite the combustibles in the van, which caused the van to burn.

Linda Travis testified that she lived next door to Smolinski. On the morning of the fire, Travis woke to the sounds of arguing. She looked out of her bedroom window, which faced Smolinski's driveway, and saw two men and a woman. She recognized that one of the men was Smolinski's former boyfriend and saw him take something from the woman. She later heard a crash and glass breaking. She again looked out her window and saw Smolinski's van burning.

Travis admitted that she was not able to identify Rose at the preliminary examination as the man she saw in the driveway, but she stated that she did see that man in the parking lot immediately after the preliminary examination.

Stephanie Martin-Brown testified that she was Rose's supervisor at FedEx Supply Chain. She stated that he was originally a temporary worker, but that he had been promoted to be a permanent employee on October 13, 2008, and transferred to a facility in Memphis, Tennessee. His first day in Memphis was scheduled for October 20, 2008. She flew down to Memphis to meet with Rose and another FedEx employee at that facility, Kim Carter, on October 20. When she first saw Rose she immediately noticed that he looked different: he had shaved his hair off, had a burn on the side of his face, and was missing an eyebrow. She described the burn as "horrendous"; she clarified that the burn was the size of her hand and that the skin appeared to have pealed and was "bright pink." Martin-Brown testified that Rose told her that he was burned while cleaning a gas grill.

Carter also testified that he noticed something on Rose's face; he said it looked like a red mark on the side of his face and he also appeared to have a singed eyebrow and hair. Carter said that Rose told him he got burned after he tried to jump a grill while drunk at a party.

Salenik testified that the burns described by Martin-Brown and Carter were consistent with the type of injuries that he would expect a person to suffer in a flash burn.

Rose testified that he had nothing to do with the fire. At the time of the fire, he was sleeping at home in St. Clair Shores. Contrary to Martin-Brown and Carter's testimony, he said he did not have any burns on his face and never told them that he had been burned by a grill.

Rose stated that he had had an affair with Martin-Brown and that he broke it off after he was transferred to Memphis. He also said that he and Carter butted heads because they disagreed about how to manage the account in Memphis. Rose further testified that it was not uncommon for him and Smolinski to have a gas can in the van because they used gas operated tools in their cleaning business. He also stated that one of Smolinski's previous boyfriends had damaged the vehicle that she owned before buying the van.

In her closing, Rose's lawyer argued that the evidence did not show that Rose started the fire. She noted that Travis had been unable to identify Rose as the man who started the fire. She also suggested that Martin-Brown and Carter were not credible given their biases against Rose.

The jury rejected Rose's identity defense and found him guilty as charged.

Rose then appealed to this Court.

In his appeal, Rose stated that he informed his trial lawyer about several potential witnesses that could testify that he did not have burns on his face in the days after the fire. Despite this, his lawyer failed to investigate the witnesses and failed to file a witness list. As a result, he was unable to call any witnesses to support his defense. Rose contended, in part, that his lawyer's failure to investigate these witnesses and to file a witness list constituted ineffective assistance of counsel that prejudiced his trial. In support of this contention, Rose attached affidavits from witnesses who averred that they could have testified that Rose did not have burns on his face as well as other documentary evidence tending to show that he provided his lawyer with information on these witnesses.

Rose's evidence, however, conflicted with statements that his lawyer made on the record. At trial and a subsequent hearing, Rose's lawyer told the trial court that she had difficulty getting witness information from Rose. She told the court that Rose only gave her sufficient information on the day of trial.

As this Court explained, the conflict between Rose's submissions and his lawyer's statements on the record had to be resolved before this Court could consider this claim of error:

> If [Rose] provided his trial lawyer with sufficient information to warrant an investigation into the witnesses, his trial lawyer's decision not to investigate the witnesses might have fallen below an objective standard of reasonableness. Similarly, depending on the timing and extent of [Rose's] trial lawyer's knowledge about these proposed witnesses, her decision to refrain from filing a witnesses list—even if just a preliminary list—might have fallen below an objective standard of reasonableness. On the other hand, if [Rose] did not provide his trial lawyer with timely and adequate information with which to conduct the investigation before trial, she cannot be faulted for failing to file a witness list or investigate. [*People v Rose*, unpublished order of the Court of Appeals, entered July 23, 2012 (Docket No. 297769).]

For that reason, this Court remanded this case to the trial court for an evidentiary hearing to resolve the conflict in the evidence. Specifically, we asked the trial court to make findings concerning whether Rose "gave his trial lawyer timely and adequate information with which to investigate each of the proposed witnesses and with which to file a witness list." *Id.*

The trial court conducted the evidentiary hearing over two days and entered its findings of fact and conclusions of law in February 2013. It found that Rose's trial lawyer's testimony was "consistent, forthright, and believable" and "should be afforded great weight." In contrast, the court found Rose and his witnesses' testimony to be either incredible or of little evidentiary worth; indeed, the trial court characterized Rose and some of his witnesses as liars.

The trial court also dismissed Rose's documentary evidence. The trial court specifically found that Rose fabricated his witness list: "On the last day of the evidentiary hearing, February 1, 2013, he produced a handwritten witness list which he claimed he had provided to his counsel on January 6, 2010 but was never presented to this Court or the prosecutor until February 1, 2013—it was not produced earlier because it was fabricated by him to bolster his testimony." The trial court similarly rejected Rose's copy of an e-mail attachment that he purportedly sent to his trial lawyer on February 6, 2010; the court found that the original e-mail either had "no attachment or it was purposefully unreadable" and that the copy produced at the hearing was "fabricated for (or at best, first produced in a readable fashion at) this hearing."

After remarking generally on the testimony and evidence, the trial court made the specific findings requested by this Court. The trial court found that Rose's trial lawyer had repeatedly asked Rose to provide her with the names of potential witnesses beginning on January 6, 2010, which was before the deadline for submitting a witness list. Despite these repeated requests and despite the fact that he clearly had contact information for several of his witnesses—namely, his friend, Jeremy Burr, Burr's wife, and his own ex-wife, Rebekka Kristick—Rose did not provide his lawyer "with any information by which to list any witnesses" prior to the deadline for the submission of a witness list. The court further found that, even after the deadline passed, Rose still did not provide his trial lawyer with timely information on any potential witness. It was not until the trial itself that Rose provided his trial lawyer with any useable information.

On the basis of these findings, the trial court determined that Rose's trial lawyer could not be faulted for failing to file a witness list before the January 15, 2010 deadline or failing to investigate the witnesses that Rose identified on appeal. Therefore, it concluded that Rose failed to show that his trial lawyer's conduct fell below and objective standard of reasonableness under prevailing professional norms.

We shall now examine Rose's appeal.

II. IDENTIFICATION TESTIMONY

A. STANDARDS OF REVIEW

Rose first argues that the trial court erred when it permitted Brian Batten to testify that Travis told him on the morning of trial that she recognized Rose as the man she saw in the driveway on the morning of the fire. Rose argues that this testimony was inadmissible hearsay and violated his right to confront the witnesses against him. This Court reviews a trial court's

evidentiary decisions for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). A trial court, however, necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Roper*, 286 Mich App at 91. This Court reviews de novo whether a rule or statute bars the admission of evidence as a matter of law. *Id.* This Court also reviews de novo questions of constitutional law such as whether the defendant was denied his right to confront the witnesses against him or her. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010).

B. HEARSAY OBJECTION

As already noted, Travis testified that she saw Smolinski's former boyfriend in the driveway on the night at issue, but was unable to specifically identify Rose during the preliminary examination or at trial. She did, however, testify that she saw the man in the parking lot outside the court after the preliminary examination. The prosecutor later tried to more clearly connect Travis' testimony about her earlier identification with Rose by soliciting testimony from another witness, Brian Batten.

Batten testified that he was a fire marshal for the city of Ferndale. Batten stated that he responded to the fire and later assisted Salenik with his investigation. He testified at the preliminary examination and recalled seeing both Travis and Rose at the hearing. He related that Rose was wearing a suit at the preliminary examination with a blue striped shirt. The prosecutor then asked Batten about his interaction with Travis on the first day of trial and he said that he picked her up and brought her to court.

Batten explained that, as he was driving her to the court, Travis began to discuss her problems with identification and mentioned her diabetes and said she did not feel well. At that point, Rose's trial lawyer objected to Batten's testimony on the grounds that it was hearsay. The prosecutor explained that he intended to ask Batten about Travis' identification, which would be admissible under MRE 801(d)(1)(C). Rose's trial lawyer again objected to the prosecutor's efforts to rehabilitate Travis' testimony: The prosecutor "seems to be trying to rehabilitate her testimony through—through another witness. If she couldn't identify my client on that particular day then he has to accept that fact." The trial court overruled the objection.

The prosecutor asked Batten to relate what Travis had told him about her identification of the man who set the fire after the preliminary examination:

> A She told me that during the preliminary exam that she could not identify the person inside the courtroom but that she saw the person out in the hallway as the person walked by her, she said she knew that that was the person she identified him, tried to get the attention of the prosecutor but could not. She said he was wearing a blue striped shirt.
>
> Q Did she say whether she knew what that person did?
>
> A She said that—she said that was the guy that set the fire.

Q Now, did you see anybody else wearing a blue striped, shirt?

A Not that I can recall.

Hearsay is generally not admissible. MRE 802; *People v Yost*, 278 Mich App 341, 363; 749 NW2d 753 (2008). However, a statement is not hearsay, even when the statement is offered by one other than declarant and for the truth of the matter asserted, if the declarant testified at trial and was subject to cross-examination and the statement is "one of identification of a person made after perceiving the person." MRE 801(d)(1)(C); see also *People v Malone*, 445 Mich 369, 385-386; 518 NW2d 418 (1994) (holding that third-party testimony about a witness' prior statement of identification is not hearsay under MRE 801(d)(1)(C)).

Citing *People v Sykes*, 229 Mich App 254; 582 NW2d 197 (1998), Rose argues that Travis' statements to Batten do not constitute a statement of identification because she merely related a description of the man she saw at the preliminary examination. In *Sykes*, the declarant purportedly gave a police officer a description of some men and the officer testified that the declarant's description matched only the defendant. *Id.* at 272-273. However, the declarant could not recall what she told the officer and could not identify any of the three men that she saw; she did, however, recall talking to the officer. *Id.* at 267-269. Because the declarant only provided an unknown description and did not specifically identify anyone as the person at issue, this Court determined that the officer's testimony that he recalled that the declarant's description only matched the defendant did not constitute a prior identification within the meaning of MRE 801(d)(1)(C). *Sykes*, 229 Mich App at 272-273.

Here, Travis testified that, although she did not see the man from the driveway in court on the first day of the trial and was not able to identify him at the preliminary examination, she did see him immediately after the preliminary examination. She said she was diabetic and did not see too well but looked him right in the face after the preliminary examination and tried to tell the prosecutor. At trial, the prosecutor asked for a clarification: he asked her whether Travis was testifying that the person she saw "in the court" at the preliminary examination was in fact "one and the same person" that she saw "in the driveway arguing." Travis responded, "Yeah."

Unlike the situation in *Sykes*,[1] the declarant here—Travis—actually identified someone from the preliminary examination as the man she saw in the driveway on the night at issue—that is, there was an actual identification within the meaning of MRE 801(d)(1)(C). The only question was whether the man she identified from the preliminary examination was Rose. And the prosecutor asked her to clarify whether the man she saw in court at the preliminary examination was the same man that she saw in the driveway on the night at issue and she agreed

[1] As the Court in *Sykes* noted, the officer did not actually testify that the declarant identified anyone: "Officer McDonald did *not* testify about the content of the [declarant's] description (which he said he could not recall), but rather, in essence, testified that he had previously concluded that the description matched the defendant. This certainly did not constitute testimony concerning a 'statement of identification' by [the declarant]." *Sykes*, 229 Mich App at 272.

that it was the same man. Thus, despite all the deficiencies in her testimony, the jury could reasonably infer that Travis had identified Rose after she left the preliminary examination.

Similarly, Batten testified that Travis reiterated that she saw the man from the driveway at the preliminary examination. Although Batten did not testify that Travis identified Rose as that man, he stated that she confirmed that she had encountered the man after the preliminary examination and explained that he was wearing a blue striped shirt. Batten's testimony did not involve a mere description by a third-party; rather, he testified that Travis actually identified the man at issue as having been present at the preliminary examination. Because this was a statement of identification made after the declarant perceived the person, it was not hearsay even though Travis' statement included a description and despite the fact that she did not specifically identify Rose. MRE 801(d)(1)(C); *Sykes*, 229 Mich App at 266-267 (noting that the identification testimony may go beyond the simple facts and circumstances of the prior out-of-court statement of identification). Moreover, Batten could properly offer his own independent recollection regarding Rose's attire at the preliminary examination, which the jury could use to infer that the man Travis identified after the preliminary examination was Rose. MRE 401; MRE 402.

In addition, to the extent that Rose argues that the statement of identification had to be at or around the time of perception, we note that MRE 801(d)(1)(C) provides no such temporal limitation. And any delay in making the statement is a matter of weight and credibility to be given the statement, which is for the jury to determine. *Malone*, 445 Mich at 384-385.

Finally, Rose argues that it was error to permit Batten to testify about Travis' statement of identification because the prosecutor did not establish that Travis was available for cross-examination. Because Rose did not object on this basis, our review is limited to whether there was plain error warranting relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order for there to be plain error warranting relief, the defendant must show that the trial court committed an obvious error and that the error affected the proceeding's outcome. *Id.*

In order to present testimony concerning a prior statement of identification under MRE 801(d)(1)(C), the proponent must establish that the declarant is available for cross-examination on the statement. *Malone*, 445 Mich at 377 (stating that the only foundational requirements are that the "witness is present and found to be available for cross-examination."). After Rose's lawyer's objection, the prosecutor argued that Batten could testify because Rose had had an opportunity to cross-examine Travis about her prior identification when she testified on the day before. Assuming that Travis' earlier presence on the stand was insufficient to satisfy the foundational requirements on the next day, Rose failed to show that Travis was not present on the day Batten testified. As such, there is no evidence that she would not have been available to recall to the stand. In the absence of such evidence, we cannot conclude that the trial court plainly erred.

The trial court did not err when it overruled Rose's trial lawyer's hearsay objection to Batten's testimony.

C. CONFRONTATION

Rose also argues that the trial court should not have permitted Batten's testimony because its admission violated his right to confront the witnesses against him. Specifically, he argues that, even though Travis testified at trial, she had completed her testimony by the time Batten testified. Rose did not object on this basis before the trial court. Accordingly, we shall review this claim for plain error. *Carines*, 460 Mich at 763.

A defendant has the right to confront the witnesses who testify against him or her. *Yost*, 278 Mich App at 369-370. The right to confront witnesses "ensures not only a personal examination of the witness, but also that the witness will testify under oath, that the witness will be subject to cross-examination, and that the jury will have the opportunity to observe the witness's demeanor." *Rose*, 289 Mich App at 513, citing *Maryland v Craig*, 497 US 836, 845-846; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

Here, Travis testified under oath at trial and was subject to cross-examination concerning her statement of identification after the preliminary examination. And, although Batten testified after Travis, Rose failed to establish that Travis was not available for recall or was otherwise unavailable for cross-examination concerning the details related by Batten. Under these circumstances, we cannot conclude that the trial court plainly erred. *Carines*, 460 Mich at 763.

III. RIGHT TO REMAIN SILENT

A. STANDARD OF REVIEW

Rose next argues that the prosecutor violated his right to remain silent by repeatedly referring to the fact that Rose chose not to speak with Salenik during Salenik's investigation of the fire. Because Rose did not object to the prosecutor's remarks, we shall review this claim for plain error affecting Rose's substantial rights. *Carines*, 460 Mich at 763.

B. ANALYSIS

At trial, the prosecutor questioned Salenik about his efforts to contact and meet with Rose. The prosecutor also cross-examined Rose about why he chose not to meet with Salenik. In his closing, the prosecutor suggested that Rose chose not to speak with Salenik because he had a guilty conscience.

Generally, the prosecution cannot refer to a defendant's post-arrest, post-*Miranda*[2] silence to impeach the defendant or as substantive evidence of his or her guilt. *People v Shafier*, 483 Mich 205, 212-215; 768 NW2d 305 (2009). However, when a defendant "takes the stand and testifies the privilege against self-incrimination is waived and the defendant may be impeached with both prearrest silence and postarrest pre-*Miranda* silence without violating the

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

Fifth Amendment." *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). Where, as here, the defendant never received a *Miranda* warning or otherwise invoked his right to remain silent, "no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence." *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004).

The prosecutor did not violate Rose's right to remain silent by eliciting testimony that Rose did not speak with investigators and using that testimony as evidence that Rose had a guilty conscience.

IV. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Rose also argues that the trial court deprived him of his right to present a defense when it precluded him from calling certain witnesses. This Court reviews a trial court's decision to deny the late endorsement of witnesses for an abuse of discretion. *Yost*, 278 Mich App at 379.

B. ANALYSIS

As this Court has explained, a defendant has a constitutionally guaranteed—albeit not unlimited—right to call witnesses in his or her defense:

> A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. US Const, Am VI; Const 1963, art 1, § 20; see also *People v Hayes*, 421 Mich. 271, 278–279, 364 NW2d 635 (1984) (noting that an accused has the right to present his or her own witnesses to establish a defense). But this right is not absolute: the "accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Nevertheless, the sanction of preclusion is extreme and should be limited to only the most egregious cases. *People v Merritt*, 396 Mich 67, 82; 238 NW2d 31 (1976) (discussing whether the trial court erred when it precluded the defendant from presenting an alibi defense after the defendant failed to comply with the alibi notice requirements). [*Id.* at 379-380.]

The trial court entered a pretrial order—dated November 5, 2009—requiring the parties to disclose their witnesses as set forth in MCR 6.201. On February 8, 2010, before jury selection, Rose's trial lawyer informed the court that Rose had just disclosed that he wanted to call four witnesses: Will Murray, Carlos Rodriguez, Shannon Zepeda, and Blair Wilson. The prosecutor objected because he was not familiar with any of these witnesses and they were not disclosed on a witness list. The trial court agreed with the prosecutor that there was no good cause to allow the late endorsement of these witnesses:

MS. MCKELVY [Rose's Trial Lawyer]: Your Honor, as —pursuant to the bench conference we had on Thursday there was [a] strong indication that this trial was not going to proceed today. I did inform the court on that Thursday that I was having difficulty getting this information from Mr. Rose. He's been in Memphis. We've been trying to get ready for this trial. This really was an unexpected speed bump in the road—road of life I guess so he just provided that information to me today.

I'll be honest with you, I haven't spoken with them [the witnesses] either.

THE COURT: People?

MR. PERNICK [The Prosecutor]: Judge, that still would have violated the court's order. The order says twenty-eight days before trial the parties are required to file their witness list, and filing it last Thursday would not have been in compliance with it.

I was the one who asked for the adjournment and as the court no doubt recalls the court denied my request for an adjournment. I disclosed that I was having problems with witnesses. Ms. McKelvy did indicate that she had been in touch with her client and had asked for the names of witnesses, he hadn't been forthcoming. And now at this late date to spring these witnesses on me in violation of the court's order I think ought to be denied. That's the correct—(undecipherable)—I think the court should not allow those witnesses to be called.

THE COURT: I agree with the People. The court's order has been outstanding since November 5th of 2009 setting this case for trial on today's date. We had a pretrial on . . . December 16th, but I believe it was, or we had an earlier pretrial. We also had a pretrial earlier last week. The question, People, was not in connection with production of witnesses but witness statements and that shouldn't have mattered. That would have been within—as People pointed out would have been within a week.

There is no good cause, these witnesses—I know nothing about them, there's no—been no proffer of proof. It certainly eviscerates the rule of court as well as the timing of discovery as set forth in the Michigan Court Rules and there's been no—no good cause shown that—to permit the introduction of additional witnesses so I will deny the request—

Even considering the record only as it existed on the first day of trial, we cannot conclude that the trial court's decision to refuse Rose's request was outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379. Although Rose might have thought that his trial was going to be postponed, he nevertheless knew about the scheduled trial date months in advance. In addition, despite his lawyer's efforts to get him to disclose the names and contact information for his potential witnesses, Rose elected not to disclose those witnesses until the day of trial—and he did this despite the evidence that he had the names and contact information for several witnesses before trial. Accordingly, he failed to establish any basis for excusing his

tardiness. See *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997) (stating that, before exercising its discretion to fashion a discovery sanction, the court should examine "all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'") (citation omitted). Likewise, as the trial court correctly noted, Rose did not make an offer of proof as to the proposed testimony by these witnesses. Under these circumstances, the trial court might legitimately conclude that Rose's failure to timely disclose the existence of these witnesses was willful and designed to give him a prejudicial advantage. *People v Lucas (On Remand)*, 193 Mich App 298, 303; 484 NW2d 685 (1992) ("The closer to the date of trial the evidence is offered, the more this factor suggests willful misconduct designed to create a tactical advantage and weighs in favor of exclusion."). The trial court did not abuse its discretion when it denied Rose's request for the late endorsement of these witnesses.

V. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Rose next argues that his trial lawyer did not provide him with effective assistance of counsel. Whether a defendant's trial lawyer was ineffective involves mixed questions of fact and law. *People v Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864. This Court reviews de novo whether a particular act or omission fell below an objective standard or reasonableness under prevailing professional norms and prejudiced the defendant's trial. *Id.* at 19-20. However, this Court reviews the trial court's findings of fact underlying a claim of ineffective assistance for clear error. *Id.* at 20.

B. ANALYSIS

In order to establish ineffective assistance, Rose had to show that his trial lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *Id.* at 22.

Rose first contends that his lawyer's failure to investigate his witnesses and failure to file a witness list fell below an objective standard of reasonableness under prevailing professional norms. As we have already explained, there was a question of fact as to whether Rose provided his lawyer with adequate information with which to conduct an investigation into these potential witnesses. However, after the evidentiary hearing, the trial court resolved this fact-question. The trial court emphatically found that Rose failed to give his trial lawyer any useable information with which to identify and investigate these witnesses; indeed, the court found that Rose fabricated evidence and procured false statements in an effort to cast his trial lawyer's performance in a false light. And there was sufficient support for these findings in the record. See *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Moreover, to the extent that these findings depended on an assessment of witness credibility, we will defer to the trial court's superior ability to judge such matters. *Gioglio*, 296 Mich App at 24. Accordingly, we cannot conclude that the trial court's findings were clearly erroneous.

Rose failed to provide his trial lawyer with any useable information about his potential witnesses; accordingly, his trial lawyer cannot be faulted for failing to contact and investigate those witnesses. See *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (stating that a trial lawyer has a duty to conduct a reasonable investigation or make a reasonable decision that no investigation is necessary). Similarly, given that Rose's lawyer did not have adequate knowledge about the witnesses, she cannot be faulted for failing to file a witness list before the deadline.

Rose also argues that his trial lawyer's failure to object to the prosecutor's inappropriate questions concerning Rose's decision to remain silent and her failure to object to the prosecutor's closing remarks on Rose's silence fell below an objective standard of reasonableness under prevailing professional norms. However, as we have already explained, the prosecutor could properly solicit testimony about Rose's decision to avoid Salenik and could properly suggest that Rose's decision was motivated by a guilty conscience. *Sutton*, 436 Mich at 592. As such, Rose's trial lawyer had no obligation to object. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

VI. PROSECUTORIAL MISCONDUCT

Rose also argues that the prosecutor engaged in misconduct that deprived him of a fair trial. See, e.g., *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Specifically, Rose contends that the prosecutor improperly solicited testimony and remarked on his decision to refuse to speak with the investigator. As we have already determined, the prosecutor could properly solicit testimony regarding Rose's failure to meet with the investigator. *Sutton*, 436 Mich at 592. And the prosecutor was free to argue the reasonable inferences that could be made from this evidence. *Bahoda*, 448 Mich at 282. Therefore, these acts were not misconduct.

VII. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Rose argues too that this Court must reverse the verdicts against him because there was insufficient evidence to establish that he set the fire.[3] In reviewing a challenge to the sufficiency of the evidence, this Court "reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Roper*, 286 Mich App at 83.

B. IDENTITY

At trial, the parties did not dispute that someone intentionally set Smolinski's van on fire with the requisite intent, that the van had the requisite value, or that the fire spread to Smolinski's house. The parties only disputed the identity element of the charged crimes. See

[3] We note that Rose titled this claim as one involving the great weight of the evidence; however, he actually presented the claim as one involving the sufficiency of the evidence.

Yost, 278 Mich App at 356 (stating that identity is an element of every offense). To prove Rose's identity as the person who set the fire, the prosecutor elicited testimony from the only eye witness: Travis. She testified that she recognized the man who set the fire as Smolinski's onetime boyfriend and fiancée. Although she stated that she did not see him in the courtroom at trial and recalled that she was unable to point him out at the preliminary examination, she nevertheless testified that she saw the man who set the fire outside the court after the preliminary examination and realized that he was the same man that she had seen in the court during the preliminary examination. From this testimony, a reasonable jury could conclude that she was referring to Rose and, accordingly, that Rose was the man she saw on the night in question.

The prosecutor also presented evidence that the fire started as an "open flame ignition of gasoline fumes" and that it likely involved a "flash burn" of the gasoline vapors. The prosecutor's witness also stated that he would expect anyone exposed to the flash burn to have suffered superficial burns. The prosecutor also presented evidence from two witnesses who stated that they saw Rose within days after the fire and observed that he had burns on his face and had a singed eyebrow. When this evidence is considered with Travis' testimony and in light of the evidence that Rose had a motive to burn Smolinski's van, a reasonable jury could conclude that Rose did in fact suffer burn injuries and that he suffered those injuries after he set fire to Smolinski's van on the night at issue.

Although Travis' identification was problematic and Rose otherwise challenged the credibility of the witnesses who testified that he had burns, it was for the jury to determine the weight and credibility to be afforded to these witnesses. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Viewing the identification evidence in the light most favorable to the prosecution, there was sufficient evidence to establish Rose's identity as the man who set the fire at issue. *Roper*, 286 Mich App at 83.

VIII. CUMULATIVE ERROR

Rose also argues that the cumulative effect of all the errors he identified would collectively warrant reversal even if no one error would warrant reversal on its own. See, e.g., *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008). But only actual errors are aggregated to determine whether their cumulative effect might warrant relief. *People v Bahoda*, 448 Mich at 292 n 64. Because we have concluded that the errors he has identified under this claim were not in fact errors, it necessarily fails.

IX. SENTENCING ERRORS

A. STANDARDS OF REVIEW

Rose also argues that trial court erred in scoring offense variables (OVs) 10 and 14 and that these errors warrant resentencing. The interpretation and application of the sentencing guidelines is reviewed by this Court de novo; however, we review for clear error "the trial court's scoring of a sentencing guidelines variable." *People v Jones*, 299 Mich App 284, 286; 829 NW2d 350 (2013) (citation and quotation marks omitted). "A scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision." *Id.* (citation and quotation marks omitted).

B. OV 10

Under MCL 777.40(1), the trial court must score OV 10 for the defendant's conduct that involved the exploitation of a vulnerable victim. Here, the trial court found that Rose had engaged in predatory conduct and, accordingly, scored 15 points under OV 10. See MCL 777.40(1)(a).

"Predatory conduct" is "preoffense conduct directed at the victim for the primary purpose of victimization." MCL 777.40(3)(a). In *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008), our Supreme Court addressed the circumstances that permit a 15-point score for this variable. The Court noted that predatory conduct involves more than mere preparation; as such, "run-of-the-mill planning to effect a crime" will not justify a score of 15 points. *Id.* at 162. Rather, in order to conclude that the conduct was predatory, the trial court must be able to answer the following three questions in the affirmative:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Id.*]

More recently, in *People v Huston*, 489 Mich 451, 458-459, 463; 802 NW2d 261 (2011), our Supreme Court concluded that the preoffense conduct need not be directed at a particular victim, and that the primary purpose of victimization exists where the primary purpose directed at a victim is to cause that person to suffer from an injurious action. The Court explained that the phrase "predatory conduct" only encompasses preoffense conduct that is commonly understood to be predatory in nature, such as lying in wait and stalking. *Id.* at 462.

Here, the trial court found at sentencing that similar to the Court's example in *Cannon*,[4] which the trial court acknowledged to be dicta, Rose was not merely "wandering down the street throwing fire bombs at any particular person[.]" Rather, Rose sought the "weakest person[]" and targeted the victim by "wait[ing] until the victim was asleep and . . . vulnerable and then directed his pre-offense conduct for the purpose of victimizing the victim." The facts cited by the trial court establish that the conduct that was involved was committed "before the commission of the

[4] The Court's commentary in *Cannon* stated:

> A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim. However, a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim. [*Cannon*, 481 Mich at 160.]

offense," directed at a specific victim who "suffered from a readily apparent susceptibility to injury," and Rose had the "primary purpose [of] engaging in the preoffense conduct." *Cannon*, 481 Mich at 162. Therefore, the facts support scoring OV 10 at 15 points on the basis of the demonstrated predatory conduct. *Id*.; *Jones*, 299 Mich App at 286.

C. OV 14

Under MCL 777.44(1)(a), the trial court must score OV 14 at 10 points if Rose was "a leader in a multiple offender situation." The trial court determined that Rose was a leader within the meaning of MCL 777.44(1)(a) on the basis of the evidence that two other people accompanied him and that he directed the events.

When scoring this variable, the trial court must consider the "entire criminal episode." MCL 777.44(2)(a). Travis' testimony established that three persons went to Smolinski's house on the night at issue. Further, when Travis' testimony is considered with the evidence that Rose had burns that were consistent with exposure to a flash burn in the days following the fire, there is evidence to conclude that he was the one who ignited the fire. Travis also testified that this man took an object from one of his accomplices, which suggests that that man took a leading or directing role. There was also evidence that the perpetrators deliberately targeted Smolinski's van (which she had acquired while involved with Rose) from among multiple vehicles. Finally, there was evidence that Rose had had a tumultuous relationship with Smolinski that had ended a few weeks earlier, that he had lived at her house, and that he was familiar with her van. Thus, out of the three perpetrators, Rose had the motive and the knowledge to direct the crime. These facts support the trial court's decision to score 10 points under OV 14.

X. ROSE'S PRO SE BRIEF

Rose also submitted on a brief on his own behalf. In his brief, he raises several additional claims of error, which, as we shall briefly explain, have no merit.

He argues that the prosecutor engaged in misconduct by knowingly allowing Batten to falsely testify that he was not present during Travis' testimony at the preliminary examination. A prosecutor may not knowingly use false testimony and has a duty to correct it when he or she is aware that the witness has testified falsely. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). Here, there is record evidence that Batten may have been present when Travis testified at the preliminary examination, but there is no evidence that he deliberately misstated this fact. Moreover, it was Rose's lawyer who elicited this testimony on cross-examination and there is no evidence that the prosecutor realized the mistake. Finally, even assuming that the prosecutor had a duty to correct the misstatement, we conclude that any error would not warrant relief because there is no reasonable probability that the error affected the jury's verdict. *Id.* at 280.

We also disagree with Rose's contention that Batten must have been lying when he testified that Rose wore a suit and a blue striped shirt at the preliminary examination because another witness testified that Rose was wearing a green suit. Batten did not testify about the color of Rose's suit; he testified about the color of Rose's shirt.

Rose argues that the prosecutor also engaged in misconduct by stating that the evidence would show that Rose's motive for setting the fire was that he was upset by Smolinski's decision to end their relationship because it "defeated his plan to gain custody of his daughter." The opening statement is the time for the prosecutor to state facts that will be proven at trial. *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). At trial, there was evidence that Rose hoped to use his relationship with Smolinski to establish that he was stable, which might have improved his likelihood of obtaining custody of his child, and that this plan was frustrated by the breakup. And the fact that he lost the custody dispute before the breakup does not preclude the possibility that he hoped a stable relationship might benefit his chances at getting custody in the future. Consequently, this remark was not improper.

Rose next argues that the prosecutor misstated evidence when questioning Travis and Batten. While the prosecutor may have misstated a question or questions, the jury was instructed that the "lawyers' questions to the witnesses are also not evidence" and that it "should consider those questions only as they give meaning to the witnesses' answers." We presume that the jury followed the court's instruction. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Therefore, these questions did not amount to evidence. In any event, we conclude that the prosecutor's questions did not unfairly prejudice Rose.

Rose argues that his trial lawyer should have objected to the conduct he identified in his brief and that the failure to do so amounted to ineffective assistance. However, even assuming that his lawyer should have objected—which we do not decide, Rose has failed to establish the failure to object prejudiced his trial. See *Gioglio*, 296 Mich App at 23. Therefore, he is entitled to no relief.

We also reject Rose's claim that his lawyer was ineffective because she did not more fully raise his alibi defense. Although Rose testified that he was at home and asleep at the time of the fire, the evidence primarily turned on the identification evidence. And, for that reason, it was perfectly understandable that Rose's lawyer would focus on that evidence at trial, even to the exclusion of his purported alibi. See *id.* at 22-23 (stating that a reviewing court "must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.")

Rose also raises a claim that Batten's testimony concerning Travis' identification was inadmissible, that there was insufficient evidence to support his convictions, and that the cumulative effect of the errors warrants reversal. For the reasons we have already discussed, each of those claims is without merit.

XI. CONCLUSION

Rose has not established any errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2013
v	No. 297769 Oakland Circuit Court
JASON RICHARD ROSE, Defendant-Appellant.	LC No. 2009-229124-FH

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

I concur fully with the majority's analyses and conclusions on every issue except the analysis of the trial court's decision to score 15 points under offense variable (OV) 10. See MCL 777.40. I conclude that the trial court clearly erred when it found that the prosecutor had established by a preponderance of the evidence that defendant Jason Richard Rose engaged in predatory conduct under MCL 777.40. Because this error altered Rose's minimum sentence range, he is entitled to resentencing. Accordingly, I would affirm his convictions, but vacate his sentences and remand for resentencing consistent with this opinion.

I. THE STANDARD OF REVIEW

As a preliminary matter, I feel compelled to address the conflicting recitations of the standard of review applicable to a trial court's scoring of offense variables under the legislatively mandated sentencing guidelines.[1]

A. THE DISCRETION TO SCORE

This Court frequently states that it reviews a trial court's decision to score a particular offense variable for an abuse of discretion. See, e.g., *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) ("A sentencing court has discretion in determining the number of points

[1] Although I discuss the review applicable to the scoring of offense variables, this same standard would apply to the scoring of prior record variables.

to be scored, provided that evidence of record adequately supports a particular score."). In reviewing the decisions applying the abuse of discretion standard to the current sentencing guidelines, I could not find one where this Court analyzed the statutory scheme to determine whether the Legislature actually gave trial courts the discretion to score offense variables as they see fit. Instead, it appears that in each case, this Court relied on authorities that can be traced back to the standard of review applicable to sentencing decisions prior to the Legislature's adoption of the sentencing guidelines, which became effective in 1999. See 1998 PA 317. This is problematic because a review of the applicable statutory scheme demonstrates that the Legislature did not give trial courts any discretion in the scoring of offense variables.

For all enumerated offenses committed on or after January 1, 1999, Michigan courts *must* impose a minimum sentence that is "within the appropriate sentence range under the" sentencing guidelines unless the court meets the stringent requirements for departing from the guidelines. MCL 769.34(2). To determine the sentencing range, the trial courts *must* find the offense category for the enumerated offense and *must* score the offense variables required for that offense category. MCL 777.21(1)(a); MCL 777.22. Turning to the variables themselves, the Legislature stated that the trial court *must* score each variable using the highest applicable score, which—for each variable—may be zero. See MCL 777.31(1); MCL 777.32(1); MCL 777.33(1); MCL 777.34(1); MCL 777.35(1); MCL 777.36(1); MCL 777.37(1); MCL 777.38(1); MCL 777.39(1); MCL 777.40(1); MCL 777.41(1); MCL 777.42(1); MCL 777.43(1); MCL 777.44(1); MCL 777.45(1); MCL 777.46(1); MCL 777.47(1); MCL 777.48(1); MCL 777.49(1); MCL 777.49a(1). Thus, although the Legislature provided trial courts with the discretion to select the specific minimum sentence from within the applicable sentencing range, see MCL 769.34(2), and to depart from the minimum sentence range under certain limited circumstances, see MCL 769.34(3), it did not provide them with the discretion to score offense variables as they see fit. Rather, trial courts must score the offense variables and must score them properly. See *People v Bemer*, 286 Mich App 26, 32, 34-35; 777 NW2d 464 (2009).

I am cognizant of the fact that this Court is bound to follow prior precedent—even if that precedent is erroneous—until corrected by a conflict panel or our Supreme Court. See MCR 7.215(C)(2); MCR 7.215(J). However, it is also evident to me that this Court, for all practical purposes, has been applying a de novo standard of review even when it recites an abuse of discretion standard. A trial court necessarily abuses its discretion when it exercises its discretion on the basis of an erroneous application of law. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Because the Legislature provided a comprehensive and integrated statutory scheme for the scoring of offense variables that provided the trial courts with no discretion in the scoring of those variables, a trial court's failure to properly score an offense variable will—as a matter of law—constitute an abuse of discretion. *Id.* Therefore, rather than continue to recite a standard of review that we do not in fact apply,[2] I would hold that whether a trial court has

[2] I cannot conceive a situation where this Court could meaningfully apply the abuse of discretion standard—if the score is correct, it will be correct as a matter of law, and if the score is incorrect, it will be incorrect as a matter of law. By way of example, suppose that a trial court found that the defendant used a knife and that a victim had a reasonable apprehension of an immediate battery at the time. The trial court would be required to score OV 1 at 15 points. See MCL

properly interpreted and applied the sentencing guidelines to the facts before it is a question of law that this Court reviews de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

B. THE ANY EVIDENCE STANDARD

While this Court's recitation of the abuse of discretion standard for the scoring of offense variables is—for all practical purposes—a matter of semantics, the same cannot be said of this Court's application of the "any evidence" standard of review. Under this standard, it is said that this Court will uphold a trial court's decision to score a particular variable if there is *any evidence* to support that score. See *Hornsby*, 251 Mich App at 468 ("'Scoring decisions for which there is any evidence in support will be upheld.'", quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996)). Again, this articulation of the standard invariably traces its origins to authorities that predate the enactment of the legislatively mandated sentencing scheme.

The "any evidence" appears to have arisen from this Court's reluctance to second-guess a trial court's application of the then non-binding sentencing guidelines:

> As noted above, this Court will not get bogged down in second-guessing the detailed calculations under the sentencing guidelines. In the overwhelming majority of cases, review of the sentencing guideline calculation should be perfunctory. Only in the very extreme case should there be any appellate review. Since here the trial judge had adequate evidence to score defendant as he did under the sentencing guidelines, resentencing of defendant is unnecessary. [*People v Clark*, 147 Mich App 237, 243; 382 NW2d 759 (1985).]

Similarly, this Court related that, because the former sentencing guidelines were merely a tool for the trial court in the exercise of his discretion to select a minimum sentence, it would uphold a trial court's scoring of the variables if there was any evidence to support it. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986). And, our Supreme Court agreed that the "any evidence" standard should apply where the defendant failed to raise the scoring error before the trial court. See *People v Hernandez*, 443 Mich 1, 16-17; 503 NW2d 629 (1993), abrogated by *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1993), citing *Green*, 152 Mich App at 18. Thus, the "any evidence" standard appears to have been applied to unpreserved challenges to a trial court's scoring of the sentencing variables. *Id.* at 16-17, 16 nn 23 and 25; see also *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987). Nevertheless, our Supreme Court also held that, where a defendant properly challenges the scoring of a variable at sentencing, the trial court must resolve the dispute by finding whether the prosecutor established by a preponderance of the evidence that the facts were as the prosecution asserted. *Walker*, 428 Mich at 267-269. That is, our Supreme Court recognized a distinction between an unpreserved challenge, which would be

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777.31(1)(c). If, despite its findings, the trial court elected to score OV 1 at 5 points for the display of the knife, see MCL 777.31(1)(e), this Court would undoubtedly conclude that the trial court abused its discretion. Why? Because the trial court erred *as a matter of law* when it failed to follow the Legislature's command that it apply the highest score applicable under the facts found. See MCL 777.31(1).

upheld if there were any evidence to support the score, and a preserved challenge, which would be reviewed to determine whether the prosecutor established the facts by a preponderance of the evidence. Hence, this Court may have misapplied these prior precedents to the current sentencing scheme.

In any event, with the enactment of the mandatory sentencing guidelines, the Legislature addressed this Court's ability to review a trial court's selection of a minimum sentence. First, the defendant must challenge the scoring at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10). Second, this Court must affirm a sentence that is within the guidelines range unless the trial court erred in scoring the sentencing guidelines (which would be a question of law) or relied on inaccurate information. MCL 769.34(10). And our Supreme Court has since stated that trial courts must score the sentencing variables on the basis of facts found by a preponderance of the evidence and that appellate review of those findings is for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Because the "any evidence" standard is incompatible with the clear error standard, I conclude that this Court must apply the clear error standard provided in *Osantowski* until our Supreme Court clarifies whether and to what extent the "any evidence" standard has continuing validity. See *Paige v Sterling Hts*, 476 Mich 495, 524, 720 NW2d 219 (2006) (stating that only the Supreme Court has the authority to overrule one of its prior decisions and "all lower courts and tribunals are bound by that prior decision and must follow it", even if the lower courts believe it was wrongly decided).

C. THE CORRECT STANDARD OF REVIEW

Accordingly, I would review de novo as a question of law whether the trial court properly interpreted and applied the sentencing guidelines to the facts of this case. *Cannon*, 481 Mich at 156. And I would review the factual findings underlying the trial court's application of the sentencing guidelines for clear error. *Osantowski*, 481 Mich at 111. I would also clarify that this Court will review a trial court's findings by examining the entire record to determine whether we are left with the definite and firm conviction that the trial court's finding was mistaken, notwithstanding that there was some evidence to support it. *In re JK*, 468 Mich at 209-210.

II. APPLYING THE STANDARD

Under MCL 777.40(1), the trial court had to score OV 10 using the highest applicable score. At sentencing, the trial court determined that Rose engaged in predatory conduct and, for that reason, scored OV 10 at 15 points. See MCL 777.40(1)(a). "Predatory conduct" is "preoffense conduct directed at the victim for the primary purpose of victimization." MCL 777.40(3)(a).

In *Cannon*, our Supreme Court stated that predatory conduct involves more than mere preparation; as such, "run-of-the-mill planning to effect a crime" will not justify a score of 15 points. *Cannon*, 481 Mich at 162. Instead, it determined that, in order to establish that the conduct was predatory under MCL 777.40(3)(a), the trial court must find that: (1) the offender engaged in conduct before the commission of the offense, (2) which was directed at one or more

specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and (3) that the victimization was the offender's primary purpose for engaging in the preoffense conduct. *Id*.

Here, there was some evidence that Rose engaged in stalking-type conduct before the night at issue, but there was no evidence that that conduct had any relation to this incident. Moreover, although the trial court found that Rose waited until Smolinski fell asleep before committing the crimes, the only evidence to support that finding was that Rose committed the arsons late at night. But the fact that he did not commit the arson until late at night does not give rise to an inference that the timing was deliberate or that he waited for the primary purpose of exploiting Smolinski's weakness.

There was also no evidence that Rose was lying in wait for the opportunity to commit the crime. Indeed, contrary to the conclusion stated by the author of the presentence report, there is no record evidence that Rose planned the crime in advance. Although one might infer that he brought a gas can with him, it is just as plausible that the gas can was already on site. The fact that he used a landscaping rock to break the van's window also tends to suggest that the events were rather impromptu.

Because the lateness of the events does not by itself support the finding that Rose engaged in predatory conduct and there was otherwise evidence that the arson was not planned in advance, I am left with the definite and firm conviction that the trial court erred when it found that Rose exploited Smolinski's weakness by waiting until she was asleep to commit the arson. As such, I conclude that the trial court erred when it scored OV 10 at 15 points. Because this scoring error affects the appropriate guidelines range, Rose is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

For these reasons, I concur in part and dissent in part.

/s/ Michael J. Kelly