STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 2, 2015
v	No. 319616 Macomb Circuit Court
DORIAN DELBERT-GERALD WILLIS, Defendant-Appellant.	LC No. 2013-000091-FH

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of arson of a dwelling house, MCL 750.72, and domestic violence, MCL 750.81(2).[1] Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 180 to 300 months' imprisonment for the arson conviction, and 93 days in jail for the domestic violence conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from a fire that was started in the closet of Vickie Lynn Danski's residence. Defendant and Danski were involved in a romantic relationship. On October 23, 2012, after drinking alcohol, the couple got into an argument. Defendant choked Danski, but she managed to run out of the home. Defendant followed and again assaulted her. She convinced him to let her go. Defendant returned to the porch of Danski's residence and instructed her to return to the home or he would kill her three ferrets. Danski remained outside her home and later heard someone running. When the person got to an illuminated area, she could see that it was defendant, who was yelling on a phone and asking someone to pick him up. Danski returned to her home, found that it was locked, but entered with her front door key. She was in the home for two minutes when she smelled smoke. When she opened a closet, flames rose out from inside. Danski managed to retrieve her three ferrets and went to a neighbor's home for help. Arson investigators determined that the fire originated inside the closet. There was no evidence that an accelerant was used to start the fire, but a propane torch was discovered inside

[1] Defendant was acquitted of three additional charges of attempted killing or torturing an animal, MCL 750.92 and MCL 750.50b.

the closet where the fire started. Investigators ruled out electrical, mechanical, gas, or other accidental causes of the fire. They concluded from the burn pattern that the fire was intentionally set with the propane torch.

Defendant testified that he was in a paranoid state and believed that Danski had called the police. Before the police arrived, he went into the closet to smoke crack cocaine with the propane torch because he did not want to be caught with it or seen through the windows. He denied intentionally starting the fire.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence of an intentional burning to support the arson conviction. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). In examining a sufficiency challenge, the evidence is reviewed in a 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. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). Circumstantial evidence and reasonable inferences arising from that evidence may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). This Court's review is deferential because the trier of fact, not the appellate court, properly determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *Malone*, 287 Mich App at 654. Thus, an appellate court does not interfere with the jury's assessment of the weight of evidence or the credibility of witnesses. *Dunigan*, 299 Mich App at 582; *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

At the time of the offense, MCL 750.72[2] provided:

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

To establish the burning of a dwelling house, the prosecutor must prove that the defendant burned a dwelling house by setting fire to it and "intended to burn the dwelling or its contents or intentionally committed an act that created a very high risk of burning the dwelling or its contents and that, while committing the act, the defendant knew of that risk and disregarded it." M Crim JI 31.2. The offense requires proof of an intentional criminal act. *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982).

[2] Effective April 3, 2013, MCL 750.72 was amended to provide for first-degree arson and changed the punishment to "life or any term of years or a fine . . . ."

The question of intent presents an issue for resolution by the trier of fact. See *People v Whittaker*, 187 Mich App 122, 128; 466 NW2d 364 (1991). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "A factfinder can infer a defendant's intent from his words or from the act, means or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

"It is the nature of the offense of arson that it is usually committed surreptitiously. Rare is the occasion when eyewitnesses will be available. By necessity, proofs will normally be circumstantial." *People v Horowitz*, 37 Mich App 151, 154; 194 NW2d 375 (1971). In *People v Nowack*, 462 Mich 392, 402-403; 614 NW2d 78 (2000), our Supreme Court noted that arson is generally premised on circumstantial proofs and a process of elimination:

> In arson cases, the trier of fact usually draws inferences from circumstantial evidence:
>
> "[T]here is rarely direct evidence of the actual lighting of a fire by an arsonist; rather, the evidence of arson is usually circumstantial. Such evidence is often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from an accidental cause." [*Fox v State*, 179 Ind App 267, 277; 384 NE2d 1159 (1979).]

When the evidence is circumstantial, the prosecutor is not required to negate every reasonable theory compatible with the defendant's innocence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). Rather, the prosecutor must submit evidence sufficient to convince a reasonable jury in light of any contradictory evidence introduced by the defendant. *Id*. at 424.

In the present case, Danski testified that defendant consumed alcohol and became very aggressive and agitated. He assaulted and threatened to kill her, demanded that she return to her residence, and threatened to kill her ferrets. Danski did not re-enter her home while defendant was still there. She testified that the ferrets' cage was difficult to open, and it was not open when she returned to her house. Danski later observed defendant running from the home and speaking on his phone requesting a ride. Shortly after she re-entered the home, she discovered smoke and a fire in the closet. Arson investigators determined that the fire originated in the closet and discovered a propane torch in the closet. Eastpointe Fire Marshal Szymanski rejected the defense theory that an accidental burning occurred. Rather, Szymanski's analysis of the charring and burn patterns caused him to conclude that the fire was intentionally set. He opined that the burn patterns indicated that someone held the propane torch to clothing hanging in the closet. An accidental dropping of the propane torch on the floor would have left burn patterns at the floor level. The burn patterns did not start until approximately two feet from floor level. Szymanski also examined the home to check for other mechanical, electrical, or gas issues, as well as accidental causes such as the failure to extinguish a candle or cigarette. He eliminated all other causes. The closet, where the propane torch was located, was the point of origin.

Defendant admitted that he went into the closet to smoke crack cocaine with the torch and a pipe because of his belief that the police were coming, and he did not want to be caught with the drugs. Although defendant denied intentionally starting the fire, the jury was free to believe or disbelieve in whole or in part the credibility of defendant's testimony. *People v Unger*, 278 Mich App 210, 228; 749 NW2d 272 (2008). The jury could find from the evidence that defendant was enraged at Danski because he was in a paranoid state from his use of drugs and believed that she had called the police, and because she refused to comply with his demands to return to the home. Whether or not defendant tried to open the ferrets' cage, the jury could find that he decided to use the propane torch to start a fire in the closet, where Danski kept her family mementos, because he was angry at Danski. Although defendant testified that he left the home, Danski testified that defendant fled the home despite his recent surgery and sought a ride away from the area. The circumstantial evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that a burning of the dwelling house occurred and that it was the result of an intentional criminal act by defendant.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues that the jury's verdict is against the great weight of the evidence, and was affected by the withholding of material evidence. We disagree.

The trial court's decision regarding a motion for a new trial premised on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *Unger*, 278 Mich App at 232. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). A trial court's decision regarding a discovery violation is also reviewed for an abuse of discretion. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006).

Defendant contends that the verdict is against the great weight of the evidence for mostly the same reasons raised in his challenge to the sufficiency of the evidence. Considering that the evidence showed that defendant threatened to kill Danski and her ferrets, that defendant was the only person in the home at the time the fire started, that defendant admittedly entered the walk-in closet with a propane torch where the fire was found to have originated, and that other accidental causes of the fire were eliminated, the evidence does not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. Although defendant asserted that he was merely in the closet to smoke his crack cocaine before the police arrived, Szymanski testified that the evidence of burning and charring indicated that the torch was used to set hanging clothes in the closet on fire. The jury was free to reject the credibility of defendant's testimony and find the testimony of Szymanski and Danski credible.

There is also no merit to defendant's argument that a discovery violation requires a new trial. "Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). The suppression of evidence favorable to the defendant violates due process when material to guilt or punishment regardless of whether the prosecutor acted in good or bad faith. *Brady v Maryland*, 373 US 83, 87; 83 S Ct

1194; 10 L Ed 2d 215 (1963). A *Brady* violation occurs when: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014).

The record discloses that the evidence in question, 130 photographs of Danski's home taken after the fire, was not suppressed. Rather, the photos were belatedly provided to the prosecutor, who promptly provided them to defense counsel. Defense counsel did not argue at trial that the prosecutor committed any discovery violation, but argued at trial that the photos should be excluded from evidence because of their late production. The trial court granted defense counsel's request to exclude the photos. Because defendant was granted the relief he expressly requested, he may not now argue on appeal that he was prejudiced by the trial court's exclusion of the photos. A party may not approve of a course of action taken in the trial court and then object on appeal because it would allow him to harbor error as an appellate parachute. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011).

Furthermore, defendant has failed to demonstrate that the photographs were favorable to him. *Chenault*, 495 Mich at 150. At the hearing on defendant's motion for a new trial, defendant asserted that the photographs "may have been helpful," but he did not submit any photos with his motion. Additionally, defendant summarily asserts on appeal that the photographs would "shed light" on whether there was any actual burning, a necessary element of arson, as opposed to the house merely being "blackened by smoke," but he has not submitted any photographs in support of this claim. Defendant bears "the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Although there was testimony that many areas of the home were damaged by smoke, Robertson and Szymanski both testified that there was evidence of burning and charring in the home, particularly in the closet. Defendant does not assert that any photos fail to depict burning or charring in the closet.

Accordingly, defendant's challenge to the great weight of the evidence and to the failure to provide the photographs before trial does not entitle defendant to appellate relief.

IV. SELF-REPRESENTATION

Next, defendant argues that he was deprived of his right of self-representation. We disagree. The trial court's factual findings regarding a knowing and intelligent waiver of the Sixth Amendment right is reviewed under the clearly erroneous standard, but questions of law are reviewed de novo. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

In *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), our Supreme Court explained the requirements to exercise self-representation:

> The Sixth Amendment provides that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of counsel for his defence." US Const, Am VI. This requirement was made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The right to counsel is considered fundamental because it is essential to a fair trial and attaches at the trial stage, which is clearly a critical stage of the proceedings. While a defendant

may choose to forgo the assistance of counsel at trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent. In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right to the assistance of counsel.

* * *

In sum, although the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, "is the standard, not the exception in the absence of a proper waiver.

* * *

[T]his Court . . . established requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself. Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

* * *

[I]f the trial court fails to substantially comply with the requirements . . . then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel. In addition, th[is] rule . . . provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel. [*Id*. at 187-192 (footnotes omitted).]

When the record does not establish an unequivocal request for self-representation, there is an insufficient basis to conclude that the right of self-representation was infringed. *Dunigan*, 299 Mich App at 587-588.

The record does not reflect an unequivocal request by defendant to represent himself. On the first day of trial, defendant questioned whether a conflict of interest existed with defense counsel because he failed to pay his attorney in accordance with their fee agreement. Defendant also expressed dissatisfaction with all three of his attorneys because he did not receive discovery. When pressed, however, defendant acknowledged that his discovery requests pertained to *other* cases. On the second day of trial, defendant sought to disqualify the trial court for commenting that he could appeal, which defendant maintained showed that the court had predetermined his guilt. Once defendant's request to disqualify the trial judge was denied, he sought to hold the proceedings in abeyance. When the trial court denied that request and refused to allow defendant to proceed before the chief judge,[3] defendant stated that his attorney had *jokingly* demanded to be paid and called him a "bitch," which defense counsel adamantly denied. The colloquy on the second day of trial likewise does not reflect a legitimate and unequivocal request for self-representation, but rather an attempt to disqualify the trial court.

It is evident that the trial court did not comply with MCR 6.005 by advising defendant of the charge, the maximum possible prison sentence, the mandatory minimum sentence, and the risks involved in self-representation. *Russell*, 471 Mich at 190-191. However, because representation by counsel is the standard, not the exception, *id.* at 189-190, and because defendant did not express concern with counsel's representation and did not unequivocally request to represent himself, defendant's right to self-representation was not violated.

V. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by failing to give M Crim JI 31.1, and that defense counsel was ineffective for failing to request the instruction. Jury instructions must include all elements of the charged offenses in addition to any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Imperfect instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

M Crim JI 31.1 provides:

> When there is a fire, the law assumes that it had natural or accidental causes. The prosecutor must overcome this assumption and prove beyond a reasonable doubt that the fire was intentionally set.

[3] Defendant does not challenge this ruling on appeal.

See also *People v Lee*, 231 Mich 607, 612; 204 NW 742 (1925) (observing that "if nothing appears but the mere fact that the house was consumed by fire, the presumption is that the fire was the result of accident or of some providential cause").

In the present case, the prosecution presented evidence to overcome the presumption of accident. The evidence showed that defendant made threats to harm Danski and her ferrets, was left alone in the home, and fled in a hurry and arranged to have someone pick him up from the area. When Danski entered the home shortly after defendant left, she smelled smoke, which she traced to a closet. Fire investigators determined that the closet was the point of origin for the fire, and they discovered a propane torch in the closet. The burn pattern indicated that hanging clothes in the closet had been set on fire. Other possible accidental causes of the fire were investigated and eliminated. Thus, the facts and circumstances did not involve a mere burning of Danski's residence, without anything more.

Defendant argues that M Crim JI 31.1 should have been given because it was the defense theory of the case that the fire was accidental, and because he testified that he merely went into the closet with the propane torch to smoke crack cocaine before the police arrived, and he denied any malicious intent to start a fire. Even assuming that defendant's testimony would have supported giving M Crim JI 31.1, the trial court's instructions fairly presented the issue to the jury and sufficiently protected defendant's rights. Although the trial court did not instruct the jury on the presumption of accident, it instructed the jury that to prove the crime of burning a dwelling house, the prosecutor "must prove . . . beyond a reasonable doubt . . . that when the defendant burned the dwelling or any of its contents, he intended to burn the dwelling or its contents, or intentionally committed an act that created a very high risk of burning the dwelling or its contents, and that while committing the act, the defendant knew of that risk and disregarded it." The court's instructions did not permit the jury to convict defendant of burning a dwelling house if it believed his testimony and found that he neither intended to burn the dwelling or its contents, nor committed an intentional act that created a very high risk of burning the dwelling or its contents and knowingly disregarded that risk. Accordingly, there was no error.

In addition, even if defense counsel would have been justified in requesting M Crim JI 31.1, because the trial court's jury instructions fairly presented the substance of the omitted instruction, defendant was not prejudiced by defense counsel's failure to request the instruction. Accordingly, we reject defendant's related ineffective assistance of counsel claim. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

VI. CORRECTION OF THE JUDGMENT OF SENTENCE

Defendant argues that remand for correction of the judgment of sentence is necessary because the judgment inaccurately states that he was convicted of the three counts of attempted animal torture. Plaintiff concedes that the April 18, 2014 amended judgment of sentence is inaccurate, but asserts that it has since been amended to correct this clerical error. An amended judgment of sentence has been provided to this Court by the prosecuting attorney, and it shows that the judgment of sentence has been corrected and is accurate.

VII. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

Defendant first challenges the magistrate's issuance of an arrest warrant. Defendant argues that the magistrate improperly issued the warrant without a proper showing of cause for defendant's arrest. Because defendant did not challenge the validity of his arrest in an appropriate motion in the trial court, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013).

A magistrate may issue an arrest warrant upon presentation of a complaint alleging the commission of an offense and a finding of reasonable cause to believe that the person named in the complaint committed the offense. MCL 764.1a. The finding of reasonable cause may be based on (1) factual allegations contained in the complaint, (2) the complainant's sworn testimony, (3) the complainant's affidavit, or (4) any supplemental sworn testimony or affidavits of other individuals presented to the magistrate. MCL 764.1a(2). Upon inquiry by defendant, the prosecutor offered to supply defendant with the information offered in support of his arrest. On appeal, defendant summarily asserts that proper cause for issuance of an arrest warrant was never shown, but he has failed to submit any documentary evidence to support any deficiency presented to the magistrate. Thus, defendant has not met his "burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *Elston*, 462 Mich at 762.

Defendant's reliance on the prosecutor's statements and evidence at trial in support of this argument is misplaced. Defendant contends that the arrest warrant must have been deficient because the prosecutor acknowledged at trial that he had no fingerprint evidence, photographs, videos, or audio recordings, and because no one could testify with certainty that he started the fire, intentionally or unintentionally. As previously explained, however, the prosecutor was not required to present direct evidence of defendant's guilt. Rather, arson may be proved by circumstantial evidence. *Horowitz*, 37 Mich App at 154. Considering that the circumstantial evidence presented at trial was sufficient to support defendant's arson conviction, neither the prosecutor's statements nor the trial evidence demonstrate any plain error in the issuance of the arrest warrant. And because defendant has not demonstrated any basis for concluding that his arrest was illegal, defense counsel cannot be deemed ineffective for failing to challenge the validity of the arrest. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

We also reject defendant's various pro se claims of ineffective assistance of counsel. Defendant's failure to raise these claims in a motion for a new trial or request for a *Ginther*[4] hearing limits our review to mistakes apparent from the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). To establish ineffective assistance of counsel, defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

that there exists a reasonable probability that absent counsel's errors, the result of the proceeding would have been different. *Armstrong*, 490 Mich at 289-290.

The record does not support defendant's claim that he was deprived of counsel of his choice. Defendant was represented by retained counsel at trial. Although defendant expressed an inability to pay counsel in accordance with their fee agreement, and the trial court declined to consider retained counsel's request to be appointed, retained counsel continued to represent defendant throughout the trial. There is no indication that defendant sought representation by different counsel. Thus, the record does not support this claim of error.

There is no merit to defendant's argument that trial counsel was ineffective for failing to object to the prosecutor's withholding of exculpatory evidence, that being the propane torch. The torch was produced and admitted at trial. We also reject defendant's argument that counsel was ineffective for failing to object to chain-of-custody issues regarding the propane torch. Regardless of the chain of custody, Danski identified the torch as the same one from her home, and defendant testified that the propane torch was the same one he took into the closet.

Defendant also complains that trial counsel failed to argue against the great weight of the evidence. The record discloses that defense counsel challenged the evidence in a motion for a directed verdict and by filing a postjudgment motion for a new trial premised on the great weight of the evidence. Thus, there is no merit to this argument.

Defendant also contends that trial counsel was ineffective for failing to call and interview witnesses, and by failing to request the appointment of an expert to contradict the findings of Robertson and Szymanski. However, defendant fails to identify the witnesses he believes should have been called, and he does not indicate what their testimony would have revealed. Moreover, he has not presented any affidavit or other offer of proof showing what testimony an expert could have provided. Given these deficiencies, there is no factual basis for concluding that defense counsel's representation fell below an objective standard of reasonableness, or that defendant was prejudiced by counsel's failure to call witnesses.

Defendant lastly argues that his civil liberties were violated by the failure to obtain a search warrant for the fire investigation, and by the prosecution's suppression of exculpatory photos of the fire scene. Because defendant did not challenge the validity of the fire investigation or the seizure of evidence from the fire scene, and he did not allege any discovery violation by the prosecutor, these issues are unpreserved. Therefore, defendant bears the burden of demonstrating a plain error. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). To qualify as a plain error, the error must be "clear or obvious." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Evidence obtained while firefighters are lawfully on the premises putting out a fire is admissible under the plain view doctrine. *People v Tyler*, 399 Mich 564, 578; 250 NW2d 467 (1977), aff'd sub nom 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978). However, a search warrant must be obtained after the exigency ends. *Id*. at 578-579. Although defendant argues that the fire investigation, conducted three days after the fire was extinguished, was illegally conducted without a warrant, he has not established factual support for this claim or shown that he has standing to challenge the search. The constitutional right to be free from unreasonable

searches and seizures is personal and may not be invoked by third parties. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). The record demonstrates that the home was leased by Danski, not defendant. Even if defendant's periodic presence at the house could be considered sufficient to confer standing, see *Minnesota v Olson*, 495 US 91, 96-97; 110 S Ct 1684; 109 L Ed 2d 85 (1990) (a person's status as an overnight guest in a home is sufficient to show that the person has a reasonable expectation of privacy in the home), it is not clear or obvious that a search warrant was necessary for the officers to investigate the fire scene and to seize evidence. A warrant is not necessary when a search is conducted pursuant to a property owner's consent. *People v Beydoun*, 283 Mich App 314, 337; 770 NW2d 54 (2009). It is unknown if Danski, as the tenant of the premises, gave her consent to search the premises. Because the record lacks the necessary detail regarding the circumstances surrounding the fire investigation and the basis for the investigators' presence on the property, there is no clear or obvious basis for concluding that the investigation was illegal. Thus, defendant has failed to demonstrate a plain error.

Defendant also contends that the prosecutor deprived him of a fair trial by failing to turn over the fire scene photographs, which defendant maintains were exculpatory. As previously indicated, the prosecutor promptly turned over the photographs after he obtained them from Szymanski. Thus, there is no merit to defendant's claim that the photos were suppressed. In addition, the prosecutor sought to admit the photographs, but it was defendant who successfully requested that they be excluded. Defendant cannot now argue on appeal that the exclusion of the photos entitles him to a new trial. *Kowalski*, 489 Mich at 504-505.

Defendant's convictions and sentences are affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood