

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH FITZGERALD NIXON,

Defendant-Appellant.

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UNPUBLISHED

March 1, 2007

No. 266033

Wayne Circuit Court

LC No. 05-005711-01

Before: O’Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant firebombed a home in which Naomi Vaughn lived with her five children and her boyfriend, Ronrico Simmons, and two of the children died. A jury convicted defendant of two counts of felony murder, MCL 750.316(1)(b), four counts of attempted murder, MCL 750.91, and arson of a house, MCL 750.72. Defendant appeals his convictions, and we affirm.

I. Newly Discovered Evidence

Defendant contends that he is entitled to a new trial on the grounds of newly discovered evidence. Specifically, defendant claims that his codefendant and girlfriend, Latoya Caulford, who was acquitted of all charges in a separate jury trial, came forward after defendant’s trial and stated that defendant did not commit the crimes because, when they occurred, he was with her in her room at a different home.<sup>1</sup>

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<sup>1</sup> Defendant failed to preserve this issue by moving for a new trial or by moving for relief from judgment. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Defendant filed a motion with this Court to remand for an evidentiary hearing and a motion for a new trial on this basis, but this Court denied the motion. *People v Nixon*, unpublished order of the Court of Appeals, entered June 16, 2006 (Docket No. 266033). Therefore, review is limited to the existing record. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

We review unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: (1) an error must have occurred, (2) the error must be clear or obvious, (3) and the error must have affected substantial rights, meaning it affected the outcome of the trial. *Carines*, *supra* at 763, citing *United States v Olano*, 507 US

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To obtain a new trial on the basis of newly discovered evidence, a defendant must prove that “(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.” *Cox, supra* at 450 (citation omitted). Evidence is newly discovered if defendant or his counsel did not know about it at the time of trial. *People v Burton*, 74 Mich App 215, 222-223; 253 NW2d 710 (1977).

There is no new information in this case. First and foremost, both defendants obviously were aware of this evidence at the time of defendant’s trial. Also, in his closing argument, defense counsel asserted that defendant was in Caulford’s room with her at the time of the crime, and several witnesses corroborated that assertion.<sup>2</sup> Accordingly, Caulford’s “new evidence” testimony would add very little to the testimony that defendant already presented. The jury heard three witnesses testify that defendant was in Caulford’s room with her and did not find them credible. It is highly unlikely that the jury would have believed the same assertion if it was also given by Caulford, who was defendant’s girlfriend and was tried for the same offenses. Such evidence would be merely cumulative, and there is no likelihood that it would result in a different outcome. Defendant has failed to establish plain error affecting his substantial rights, and he is not entitled to a new trial.

## II. Audio Tapes

Defendant says that the trial court abused its discretion when it allowed the prosecutor to play portions of defendant’s telephone calls from jail. We review a trial court’s decision whether to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court defers to the trial court’s judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).<sup>3</sup>

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725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.’” *Carines, supra* at 763-764, citing *Olano, supra* at 736-737.

<sup>2</sup> Mario Mahdi, Caulford’s cousin who also lived in the house, testified that he saw defendant playing a video game, probably around midnight. Later in his testimony, Mahdi stated that he believed defendant and Caulford were in Caulford’s bedroom at the time of the fire, around midnight, but he did not see defendant. Basim Alyais, Caulford’s neighbor, testified that he was on his porch drinking beer from 7:00 p.m. to 12:30 a.m. on the night of the incident, and defendant did not leave the house after 10:00 p.m. Lisa Anne Caulford-Zaatari, Caulford’s aunt, also testified that she was at Caulford’s home from 4:00 p.m. to 12:10 a.m., and defendant and Caulford went in the bedroom at 9:30 p.m. According to Caulford-Zaatari, defendant did not leave while she was there.

<sup>3</sup> In general, evidence is admissible if it is relevant. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); MRE 402. Michigan Rule of Evidence 401 provides, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to

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Stanley J. January, Jr. was in the Wayne County jail at the same time as defendant. January testified that, on May 23, 2005, defendant told him he was the one who perpetrated the firebombing but he thought only Naomi was home and he felt sorry that the children were killed. The same day, defendant made a phone call from the jail to January's daughter so that January could talk to her. The prosecution played this phone call for the jury to corroborate January's testimony, and January identified defendant's voice as he handed the phone to January, his own voice, and his daughter's voice. According to January, he also heard defendant tell someone over the phone that he hoped to get out of jail on bond so that he could disappear. Moreover, January claimed that he did not talk to defendant after May 23, 2005, because defendant was moved to a different cell that evening, and this was corroborated by the second phone call that was played for the jury, made by defendant on May 24, 2005. These two calls were relevant because they were used to show that January's testimony was credible. *Mills, supra* at 72.

In another call played for the jury, defendant told someone that a police dog searched his clothes and his house. This evidence was relevant to establish that the clothes the police collected from a bedroom in Caulford's house were those defendant wore on the date of the crime. The call also established that the police dog correctly alerted officers to the clothing, which tested positive for the presence of gasoline.

In a fourth recording, defendant discussed "Mario [Mahdi]" "his girlfriend," "Lisa," and "Mario's daddy." Defendant told the person on the other end of the line not to offer "Mario's daddy" anything because he would tell. This phone call was relevant to demonstrate a possible reason for the inconsistencies between Mario Mahdi's statement to the police and his testimony at trial. On the day of the crime, Mahdi told police that, in either March or April 2005, Mahdi and defendant were driving past Simmons's home and defendant said, "He's going to get his." However, at trial, Mahdi claimed that defendant did not make that statement and Mahdi explained that he told the police otherwise because he was scared. Mahdi also testified at trial to facts that he did not tell police, but that supported defendant's alibi defense. In general, a defendant's threat against a witness is admissible to show consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). It is reasonable to conclude from Mahdi's inconsistencies and defendant's statements on the audiotape that defendant may have had friends

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the determination of the action more probable or less probable than it would be without the evidence." *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989). The evidence must be "material," or significant to the determination of the action, and it must be "probative," meaning it "makes a fact of consequence more or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995).

Even if relevant, the court may exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000); MRE 403. Unfair prejudice exists where a jury is likely to give marginally probative evidence undue or preemptive weight, and it would be inequitable to allow its admission. *Mills, supra* at 75-76.

or family members try to influence witness testimony. This evidence is both relevant and material.<sup>4</sup>

### III. Hearsay

Further, defendant claims that the trial court erred when it admitted Brandon Vaughn's statements that identified defendant as the person who started the fire. Defendant did not object to the testimony and, thus, this issue is unpreserved and we review it for plain error. *Knox, supra* at 508; *Carines, supra* at 763-764.

Pursuant to MRE 801(d)(1)(C), if a prior statement is one of identification and the witness is available for cross-examination, it is considered substantively admissible as nonhearsay. *People v Malone*, 445 Mich 369, 376-378; 518 NW2d 418 (1994). The rule "does not require laying a foundation other than that the witness is present and found to be available for cross-examination." *Id.*, p 377.

Brandon Vaughn is one of the children who survived the fire and he consistently identified defendant as the person who started the fire to his mother, Simmons, Lieutenant Frank Maiorana, the arson investigator, and at trial. Brandon also knew defendant for two years before the crime. Brandon testified that he was awake in his room when he heard something hit the house. Brandon ran downstairs to see what happened, he unlocked the door, saw defendant get into the passenger seat of Caulford's green Neon, saw Caulford driving, and chased the car. Brandon then ran back into the house, woke his mother, told her who he saw commit the crimes, and got his younger sister out of the house. Brandon told Simmons what happened after Brandon was outside. Simmons testified that Brandon was frantic and crying, and he kept walking off and coming back. Brandon told Simmons he saw Caulford and defendant drive up in a green Neon, defendant threw something at the house, jumped back in the car, and Caulford drove off.

At the scene, Brandon told Lieutenant Maiorana that he heard a loud boom in his brother, Raylond's, bedroom and saw defendant run from the front of the house, get into a green Neon that Caulford was driving, and take off down the street. Maiorana made small talk with Brandon before talking about the fire to make sure Brandon was calm and answered accurately. Maiorana found the cocktail in Raylond's bedroom after talking to Brandon. The police drove Brandon by

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<sup>4</sup> Defendant also maintains that probative value of the phone calls is substantially outweighed by the danger of unfair prejudice resulting from informing the jury that the calls were made from jail. However, before the tapes were even played, January testified that he met defendant and spoke with him in the county jail on May 23, 2005. Therefore, the jury already knew defendant was in jail, and based on the date given, defendant's incarceration was for the present case. Defendant relies on cases that find prejudice where there is a reference to a defendant's prior incarcerations or prior convictions, which is not the case here. See *People v Greenway*, 365 Mich 547, 549-550; 114 NW2d 188 (1962); *People v Fleish*, 321 Mich 443, 461; 32 NW2d 700 (1948); *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Defendant was not unfairly prejudiced by the introduction of the phone calls to the jury.

Caulford's home around 1:30 a.m., and Brandon identified the home and the green Neon as Caulford's and indicated that defendant was involved in the incident.

Defense counsel had the opportunity to cross-examine Brandon regarding his identification of defendant and, during cross-examination, Brandon specifically said he told Simmons that defendant started the fire. Defense counsel did not address Brandon's conversation with Maiorana. Therefore, Simmons' and Maiorana's testimony regarding Brandon's identification of defendant was admissible as nonhearsay under MRE 801(d)(1)(C).

Moreover, were we to consider the testimony hearsay, the statements would be admissible as excited utterances.<sup>5</sup> MRE 803(2). Surviving a devastating fire that killed two of his siblings clearly is a startling event. Brandon made his statements to Simmons during the fire, and Brandon was in a frantic state. Maiorana arrived at the scene while the house was still on fire and talked to Brandon only 15 to 30 minutes after that. Although Maiorana may have calmed Brandon down to get his statement, it is unlikely that a 13-year-old who had just escaped a house fire and had actually seen his brother on fire, would have the capacity to fabricate a story about who committed such a crime against his family. Brandon's statements qualify as excited utterances under the hearsay exception, and the court did not err in admitting this testimony.

#### IV. Ineffective Assistance of Counsel

Defendant says that he was denied the effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing before the trial court on this issue, and therefore, we review this issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).<sup>6</sup>

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<sup>5</sup> An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998); MRE 803(2). Such a statement is considered more reliable because the declarant does not have the opportunity for reflection necessary for fabrication. *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988). There is no express time limit for an excited utterance. *Smith, supra* at 551. Rather, the focus of the exception is the “lack of capacity to fabricate, not the lack of time to fabricate.” *Straight, supra* at 425.

<sup>6</sup> The determination whether defendant received ineffective assistance of counsel is a question of both fact and constitutional law. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions, in order to protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove counsel's actions were not sound trial strategy. *LeBlanc, supra* at 578. To prevail on a claim of ineffectiveness of counsel, defendant must show: (1) “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) “that counsel's errors were so

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Defendant maintains that defense counsel should have objected when the prosecutor asked Trevor Hill, defendant's business partner, if he had threatened or assaulted any of the witnesses in this case, or if defendant paid Hill for his testimony. According to defendant, the prosecutor presented no evidence linking him to any alleged threats, assaults or pay-offs of any witnesses. However, as discussed, the prosecutor presented evidence in the fourth phone call played for the jury, in which defendant discussed "Mario," "his girlfriend," "Lisa," and "Mario's daddy" and told the recipient of the phone call not to offer Mario's daddy anything because he would tell. This phone call was relevant and admissible to demonstrate a possible reason for the inconsistencies between Mahdi's statement to the police and his testimony at trial, and that defendant may have had friends or family members try to influence witness testimony. Trial counsel's decision not to object to every statement that surfaced throughout the course of the trial was a matter of strategy that is presumed reasonable. *Strickland, supra* at 689.

Defendant also asserts that trial counsel was ineffective for not objecting to the admission of Brandon's identification statements during other witnesses' testimony. We have concluded that such statements were admissible. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). In addition, trial counsel used the inconsistencies in the details of all Brandon's statements to argue that his testimony was not believable and may have come from Simmons, creating reasonable doubt that defendant was the perpetrator. This demonstrates that counsel's decision was the result of calculated reasoning, and this Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant clearly was not deprived of a fair trial.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Henry William Saad  
/s/ Michael J. Talbot

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serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland, supra* at 687; *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). A defendant must show that, but for trial counsel's errors, there would have been a different outcome. *Pickens, supra* at 314.