

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 1, 2014

v

AUDREY DEVONNE PRUITT,

Defendant-Appellant.

No. 313065
Saginaw Circuit Court
LC No. 11-035597-FH

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals from her jury convictions of arson of a dwelling house, MCL 750.72,¹ burning of insured property, MCL 750.75,² and insurance fraud, MCL 500.4511(1). The trial court sentenced defendant to 30 months to 20 years in prison for arson of a dwelling house, five months to 10 years for burning insured property, and 17 months to four years for insurance fraud. Because defendant has not established error requiring reversal, we affirm.

I. FACTS

In December 2008, Mary Liddell sold defendant a home located in Buena Vista Township, Michigan. Defendant purchased the home on a \$9,000 land contract, putting \$700 down and making payments of \$350 per month. The land contract required defendant to obtain renter's insurance and Liddell to maintain her homeowner's insurance on the property. The contract also indicated that if anything happened to the home, defendant would not receive any proceeds from Liddell's insurance. While the land contract did not require defendant to obtain homeowner's insurance, she nonetheless entered into a homeowner's insurance policy with State Auto Insurance (State Auto) on September 4, 2009, insuring the home for \$87,000 and personal property for \$60,900.

Two months later, on November 10, 2009, the home caught fire. Diana Diaz, who lived across the street from defendant, was looking through her living room window when she saw

¹ This offense is now called first-degree arson. See 2012 PA 531.

² The Legislature recodified this offense to MCL 750.76. See 2012 PA 532.

defendant's truck go by and then saw smoke billowing from defendant's roof. Diaz called 911. Patrick Brown, who resided next to Diaz, was outside smoking a cigarette on the morning of the fire and saw defendant drive to a stop sign at the end of the street. Brown went inside, got something to eat, and when he came back out, saw smoke coming from defendant's home.

Another neighbor, David Thomas, was also outside that morning when he looked up and saw black smoke coming from defendant's home. As Thomas started toward defendant's home, he saw defendant driving down the street. Thomas ran toward defendant's car and tried to get her attention by yelling her name and waving, but defendant kept driving. Thomas then walked over to Diaz, who was in her front yard and confirmed that she had already called 911. According to Thomas, fire trucks arrived 10 to 15 minutes later.

Firefighters received a call from dispatch at 9:37 a.m. and arrived at defendant's home at 9:53 a.m. Upon arrival, grayish-brown smoke was escaping from eaves and soffits of defendant's home, suggesting that a "heavy working structure fire" was inside. According to one of the firemen, the fire had spread to the living room along the ceiling but was most intense along the back wall of the kitchen between the refrigerator and the stove; a burnt "v" pattern on the wall at that location indicated the fire's point of origin. The firefighters extinguished the fire and the fire captain conducted an investigation of the property that same day.

Fire Captain Craig Gotham, qualified as an expert in fire cause and origin, testified that he investigated the cause of the fire after it was extinguished. He testified that he ruled out accidental causes because the refrigerator's electrical wiring and the stove's gas fitting were "clean." He found a can of aerosol starting fluid (ether) by a loveseat that was burnt at its spray-nozzle. Gotham also testified that he talked to defendant on the day of the fire. She told him that she left her home around 9:30 that morning to go shopping with her mother and that she had cooked breakfast sandwiches approximately an hour earlier. She also indicated that she did not smoke or use incense or candles.

Keith LaMont, a Michigan State Police forensic analyst, testified that he tested some charred remains taken from the home, but found no ignitable liquid within the samples. LaMont explained that ignitable liquid, such as the starter fluid found in defendant's home, could have been used but been completely consumed by the fire. This was because the ether contained in the starter fluid found at the scene was "very volatile" and could either evaporate or be quickly consumed by the fire, thereby decreasing the likelihood of its detection.

David Row testified that he had been involved in nearly 2,000 fire investigations since 1991 and had acquired 2,500 hours of training in fire investigation, some of which included "fire testing," where a fire is created and extinguished in a controlled setting for educational purposes. Based on this training and experience, Row was qualified as an expert in the field of fire investigation. Row testified that there are "four processes" used in conjunction to establish the origin of the fire, including witness information, burn pattern analysis, arc mapping, and fire

dynamics evaluation.³ Row indicated that he began his investigation by questioning defendant regarding her activities on the day of the fire.⁴ Row said that defendant told him that she left the home around 9:30 on the morning of the fire. Row also took into consideration the observations of Diaz.

Row then recounted to the jury his visual observations of the exterior and interior of the home, displaying photographs he had taken during his investigation. He testified that both the gas and electric meters were intact and that neither could have caused the fire. Row said that, once inside the home, he systematically went through the rooms and observed evidence of fire damage. According to Row, he was able to rule out certain rooms as the origin of the fire based on the level of damage to personal belongings in the rooms. Based on his observations of low-level burn damage in the kitchen, Row testified that the origin of the fire was an empty “Rubbermaid or Hefty style 33 gallon” garbage can between the stove and refrigerator at or near floor level. The fire damage in this area extended all the way to the floor, where the trashcan had “melted down into a big blob of plastic.” Row testified that analysis of the refrigerator cord indicated that it was not the cause of the fire.⁵

Having determined the origin of the fire, Row explained that his next task was to determine its cause. Row testified that two considerations are relevant in this regard, including what material was ignited and what ignition source is hot enough to start the fire, as well as witness statements. Row then stated:

So in this particular case, what I believe was ignited was the trashcan and whatever contents there may have been in the trashcan. This is a pretty thick plasticized material. I’ve done quite a bit of testing on these garbage cans to see, you know, how easily they burn versus, you know, how difficult it is to keep them burning, and part of it depends on what was put inside the trashcan in order to help the trashcan catch fire.

³ Row explained that “burn pattern” analysis includes an evaluation of burn patterns and how and where burning affected the materials present. Row further explained that “arc mapping” is a process used to detect the origin of the fire; in spots where fire “attacks” wires, those wires come together to form an “arc.” By flagging the arcs, fire investigators can “triangulate” the origin of the fire based on the arcs. Finally, Row said that “fire dynamics evaluation” looks at what types of substances burn more readily. Once witness statements are collected, burn pattern and fire dynamics are conducted; arc mapping is then used to confirm the origin of the fire.

⁴ Row said he asked defendant a multitude of questions, including: whether she had turned everything off when she left the home, had poured grease into the trashcan, or had had any circuit breaker trips recently; whether there had been any problems with the stove; whether she had to use a match to light the pilot, and; whether there were candles or incense in the home.

⁵ Jason McPherson, qualified as an expert in the field of electrical engineering, testified that he assisted Row with the origin and cause study by evaluating the power cord to the refrigerator. According to McPherson, the cord showed no signs that it was the origin of the fire; rather, the condition of the cord merely indicated that it had been burnt by the fire.

But the biggest issue in this particular circumstance is that I have been able to, by my process of elimination here, and by my scientific methodology that I've followed, I have been able to establish that there is no electrical, mechanical or chemical causation for this fire, so the only other plausible explanation is there had to be some kind of an introduction of an open flame to this trashcan and the contents of this trashcan in order for it to be able to ignite.

Row then repeated that defendant told him she left her home at 9:30 a.m. and that Diaz saw smoke emanating from the home's soffit area as defendant drove away. Row then explained:

Now, this is a 1,090 square foot house So I'm going to give them the benefit of the doubt and say this is approximately 9,000 cubic feet of air that now has to be displaced with smoke to the point where the smoke is now under pressure and it's forcing itself out through the eaves. . . .

So, what then could generate 9,000 cubic feet of smoke in that short of a period of time? And based upon my observations of where the origin of the fire is and what the causation of the fire is, i.e. an open flame application to the trashcan, that trashcan could not have generated 9,000 cubic feet of smoke in the time it would have taken her to basically get into her car and drive down the street It just isn't physically possible.

. . . [T]he fire would have had to have been in progress generating that kind of smoke at the time when [defendant] left the house

On February 9, 2010, defendant submitted a claim to State Auto, estimating the amount of loss from the fire at \$118,035 and claiming \$500.⁶ State Auto deemed this statement of loss inadequate and requested another, which defendant submitted on March 19, 2010. This time, defendant estimated the amount of loss to be \$116,025 and claimed \$116,025. State Auto and defendant completed an inventory of defendant's personal items, which was composed of multiple pages of personal property less than one-year old and listed several expensive items such as a sewing machine, commercial meat slicer, and a DJ mixing table. The inventory did not, however, list any sewing-related materials, like needles, thread, or cloth, and did not include the amplifier necessary for the DJ table to function. Upon further investigation, State Auto found that defendant's reported income in 2009 was only \$5,800, while the inventory indicated that defendant had purchased personal property totaling approximately \$23,000 within the past year. State Auto's investigation also determined that the fire was intentionally set and that witnesses had seen defendant driving away from her burning home.⁷ Because an intentional act was not covered under the policy, State Auto denied defendant's claim. Subsequently, defendant

⁶ After the fire, Liddell received \$13,000 from her insurer.

⁷ State Auto deposed defendant as part of its investigation; she told State Auto that she left her house on the morning of the fire at 8:50 a.m., contrary to the testimony of her neighbors.

was charged with and convicted of arson of a dwelling house, arson of insured property, and insurance fraud.

II. EXPERT TESTIMONY

Defendant first argues that Row's expert testimony was admitted in violation of MRE 702. We review this unpreserved claim of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant also argues that her trial counsel's failure to object to Row's testimony on these grounds constituted ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

A. MRE 702

MRE 702 controls the admission of expert testimony and provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A trial court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and its principal duty is to ensure that all expert testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782, 789; 685 NW2d 391 (2004). Specifically, MRE 702 requires "a court evaluating proposed expert testimony [to] ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012). This inquiry, however, is a flexible one and must be tied to the facts of the particular case; thus, the factors for determining reliability may be different depending upon the type of expert testimony offered, as well as the facts of the case. *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 591, 594; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Khumo Tire Co v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999).⁸ In this regard, the Michigan Supreme Court has explained:

⁸ Indicia of reliability relevant to scientific fields include testability, publication and peer review, known or potential rate of error, and general acceptance in the field. *Daubert*, 509 US at 593-594. However, the United States Supreme Court has explained that reliability concerns may

“MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.” [*People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007), quoting *Gilbert*, 470 Mich at 782.]

Stated differently, MRE 702 calls for fact and data based conclusions and the question is whether the expert’s opinion can reliably follow from the facts known to the expert and the methods used. It follows that if an opinion is drawn from unsupported speculation or beliefs, then the opinion is necessarily unreliable.

Defendant does not dispute that special knowledge would assist the trier of fact or that Row was qualified in the field of fire investigation. Rather, defendant’s argument is that Row’s method of determining the cause of the fire, allegedly “negative corpus,” is not reliable because it is untestable, and, thus, inconsistent with the scientific method, and has been rejected by the fire investigation community.

We agree that there is a fundamental problem with “negative corpus,” an analytical approach frequently employed in arson-related expert testimony. Broadly, the approach provides that after the elimination of any accidental causes of a fire, it is reasonable to infer that the fire was arson. The doctrine has been rejected by the National Fire Protection Association as “not consistent with the Scientific Method” and because “it generates un-testable hypotheses[.]” NFPA 921 § 18.6.5 (2011).⁹ Thus, the application of negative corpus as the sole basis for a finding of arson violates MRE 702.

differ depending on the type of expertise offered, and whether that expertise is based on personal knowledge, experience, or skill. *Khumo Tire Co*, 526 US at 150.

⁹ NFPA 921 § 18.6.5 (2011), provides:

The process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source for which there is no evidence of its existence, is referred to by some investigators as “negative corpus.” Negative corpus has typically been used in classifying fires as incendiary, although the process has also been used to characterize fires classified as accidental. This process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates un-testable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited. Any hypotheses formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts. Those facts are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis.

As applied to defendant's case, the MRE 702 violation is extremely limited in scope. Defendant fails to acknowledge that Row's opinion as to the location of the fire's origin was not formed solely through application of negative corpus, but through a combination of scientific analyses, personal observations, witness investigation, and a recreation of a timeline of events, all based on the facts of this case, which when considered in the context of Row's training and experience, formed the basis for his ultimate opinion that the fire was caused by an application of open flame to the trashcan. Specifically, to determine the origin of the fire Row relied on four separate processes, including primarily burn pattern analysis and arc mapping. This led to the conclusion that the fire had originated between the stove and refrigerator in a trashcan. The fire's origin was then relevant to determining cause, the analysis of which considered the material that was ignited and what source would be hot enough to ignite that material. Gas and electrical sources had been eliminated as possible causes based on analysis of those elements, suggesting that there had to be some other application of an open flame given that the material ignited was a heavily plasticized 33-gallon trashcan.

While these conclusions do not rely on negative corpus and are within Row's expertise, his ultimate conclusion as to the source of the fire's origin, and his veiled implication that defendant was responsible for the fire, was inadmissible as it rested on a combination of negative corpus and a reliance upon circumstantial evidence not within the purview of his qualification as an arson expert. See MRE 702.

However, there was no objection to this portion of Row's testimony and its admission did not constitute plain error affecting defendant's substantial rights. "Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant. Generally, the third factor requires a showing of prejudice – that the error affected the outcome of the trial proceedings." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Assuming that the admission of Row's conclusion constituted error, defendant cannot establish that the error affected the outcome of the proceedings.

There was ample admissible evidence, independent of Row's inadmissible testimony, to support the jury's guilty verdicts. Row offered admissible testimony that an open flame in the trashcan started the fire. Row also testified that the smoke analysis and witness testimony regarding when defendant left the home allowed for the conclusion that defendant was in the home when the fire started. Multiple witnesses testified that they saw defendant driving away from her home as smoke billowed from the home's eaves – the inference being that defendant was in the home for a somewhat extended period after the fire started. Consistent with these witness statements, defendant told Captain Gotham on the day of the fire that she left home at 9:30 a.m. Later, defendant attempted to dispel the inference that she had been in the home when the fire started by telling State Auto that she left the home at 8:50 a.m. Such arguably false exculpatory statements may be considered as evidence of guilt. See *People v Seals*, 285 Mich App 1, 5-6; 776 NW2d 314 (2009).

In addition, just two months before the fire, defendant obtained an insurance policy ensuring the home for \$87,000, an amount far in excess of the \$9,000 defendant agreed to pay for the home under the land contract, suggesting a motive for arson. Moreover, several expensive non-functioning items, including a commercial meat slicer and sewing machine, were

found in defendant's home, likewise suggesting that defendant put them there so that she could collect insurance proceeds from their loss. Indeed, defendant's insurance policy with State Auto insured \$60,900 worth of personal property and defendant's personal property inventory indicated that defendant had purchased \$23,000 of personal property in the past year, even though defendant had only made about \$5,000 in 2009. Finally, Captain Gotham testified that neither the stove nor the refrigerator caused the fire. Thus, the admission of Row's ultimate conclusions regarding the fire did not affect the trial's outcome or otherwise affect defendant's substantial rights. *Carines*, 460 Mich at 763.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.* As there was no *Ginther*¹⁰ hearing held below, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

As discussed above, Row's ultimate conclusions regarding the fire were inadmissible under MRE 702. The trial court would therefore not have abused its discretion by sustaining an objection by trial counsel. Accordingly, defendant's trial counsel's failure to object fell below an objective standard of reasonableness. *Swain*, 288 Mich App at 643. However, to obtain reversal, defendant must show that, but for counsel's error, there is a reasonable likelihood that the outcome of her trial would have been different. For the same reasons discussed above, i.e., the ample evidence of defendant's guilt independent of Row's conclusions, we find that defendant has failed to make the required showing. Accordingly, defendant cannot establish that, but for her trial counsel's failure to object to Row's inadmissible testimony, the outcome of her trial would have been different. Thus, defendant is not entitled to reversal on her claim of ineffective assistance of counsel. *Id.*

III. SENTENCING

Defendant argues that the trial court erred in its scoring of offense variables (OVs) 12 and 19. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

¹⁰ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

A. OV 12

Defendant first argues that OV 12 was misscored at 10 points and should have been scored at zero. OV 12 scores points for “contemporaneous felonious acts.” An act qualifies as a contemporaneous felonious act if “the act occurred within 24 hours of the sentencing offense” and “the act has not and will not result in a separate conviction.” MCL 777.42(2). OV 12 is to be scored

by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Three or more contemporaneous felonious criminal acts involving crimes against a person were committed 25 points
- (b) Two contemporaneous felonious criminal acts involving crimes against a person were committed 10 points
- (c) Three or more contemporaneous felonious criminal acts involving other crimes were committed 10 points
- (d) One contemporaneous felonious criminal act involving a crime against a person was committed 5 points
- (e) Two contemporaneous felonious criminal acts involving other crimes were committed 5 points
- (f) One contemporaneous felonious criminal act involving any other crime was committed 1 point
- (g) No contemporaneous felonious criminal acts were committed.
. 0 points. [MCL 777.42(1).]

Defendant was convicted of arson of a dwelling, burning of insured property, and insurance fraud. Defendant argues that no other contemporaneous felonious acts occurred within 24 hours of the sentencing offense (arson of a dwelling) for which defendant was not convicted. The trial court did not explain its basis for scoring OV 12 at 10 points and defendant’s presentence investigation report (PSIR) likewise does not contain any explanation. While it is possible to envision other felonious crimes for which defendant may have been charged and convicted, e.g., arson of personal property, MCL 750.74, 1998 PA 312,¹¹ arson of insured personal property, MCL 750.76(3)(c), or preparing to burn personal property, MCL 750.77(1)(c), 1998 PA 312,¹² it is clear that these convictions would be based on the same act as the sentencing act. Indeed, the act of setting fire to the home is the same act that would form the

¹¹ 2012 PA 532 rewrote this section and designated it “third-degree arson.”

¹² 2012 PA 534 deleted this section and replaced it with “fifth-degree arson.”

basis for these other forms of arson. In other words, there is no evidence that defendant undertook a separate felonious act as her sentencing offense includes all acts committed in the commission of that crime, i.e., the preparing to burn and the burning of both the home and the personal property. “[T]he language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense.” *People v Light*, 290 Mich App 717, 726; 803 NW2d 720 (2010). Accordingly, the trial court erred by scoring OV 12 at 10 points.

However, removing 10 points from defendant’s total OV score does not change her minimum guidelines range. Accordingly, sentencing relief is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

B. OV 19

Defendant next argues that OV 19 should have been scored at zero points. Specifically, defendant argues that the trial court erred by scoring this variable at 10 points based on defendant’s allegedly false statements to the “investigators” because OV 19 is not implicated where neither the Captain Gotham nor State Auto were involved in the administration of justice.

“Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services.” MCL 777.49. Ten points are properly assessed under this variable if “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice” MCL 777.49(c). The Supreme Court has explained that the phrase “administration of justice” encompasses not just interference with judicial processes, but the investigation of crimes. *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). This is because, as the Court explained, “[l]aw enforcement officers are an integral component in the administration of justice.” *Id.* at 288. Further, such interference or attempt to interfere need not rise to the level of obstruction of justice. *Id.* at 286-287. In this regard, it is sufficient to score 10 points under this variable if a defendant lies to law enforcement officers or private persons who are authorized to investigate a crime, such as by providing police a false name or providing a false statement in a police report. *Id.* at 287 n 3, 288. In addition, self-serving deceptive actions designed to lead the police astray or to divert suspicions to others also constitutes interference with the administration of justice. *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010). As defendant correctly notes, the trial court did not specify which investigations supported the 10-point score. Rather, it generally stated that defendant interfered with “investigators.”

The fire captain was involved in the administration of justice, i.e., the government investigation of a possible arson. Captain Gotham testified that he had extensive investigative training, including training in vehicle theft and arson, and that his role as fire captain is to make determinations regarding the cause and origin of fires, which would include arson. The fire prevention code, MCL 29.1 *et seq.*, defines “firefighter” as “a member of an organized fire department” whose responsibilities include “the enforcement of the general fire laws of this state.” MCL 29.1(n). The code also specifically creates a bureau of fire services, with duties including “[c]oordinat[ing] with the fire investigation unit of the department of state police activities relating to fire investigations, fire investigator training, and the provision of related assistance to local law enforcement and fire service agencies.” MCL 29.1c(1)(b). In addition,

the act grants the state fire marshal the discretion to undertake criminal investigation of fires. In particular, MCL 29.7 provides in part:

(1) If the state fire marshal has reason to believe that a crime or other offense has been committed in connection with a fire, the state fire marshal may conduct an inquiry with relation to the fire. . . .

(2) The state fire marshal may issue subpoenas to compel the attendance of witnesses to testify at the inquiry and for the production of books, records, papers, documents, or other writings or things considered material to the inquiry, may administer oaths or affirmations to witnesses, and may cause testimony to be taken stenographically and transcribed and preserved. Willful false swearing by a witness is perjury.

(3) If a subpoena is disobeyed, the state fire marshal may invoke the aid of the circuit court in requiring the attendance and testimony of witnesses

Thus, in the context of a possible arson, the fire captain is essentially acting as law enforcement officer by investigating the crime. And, given the presence of certain burn patterns, the lack of evidence that the fire was caused by the fire or stove, the can of starter fluid found at the scene, and the presence of non-functioning expensive personal property in the home, the captain had cause to believe that the fire may have been a criminal act. Because the “administration of justice” encompasses law enforcement officers’ investigation of crimes, *Barbee*, 470 Mich 287-288, the captain was clearly involved in the administration of justice in the case at hand.

Defendant alternatively argues that, even if the fire captain was involved in the administration of justice, the evidence does not support a finding that defendant engaged in deceitful acts. Although defendant made no deceitful statements during her first interview with the captain, her PSIR indicates that, during her second interview, she told the captain that she regularly used a non-functioning sewing machine found in the home.¹³ When the captain pointed out that the sewing machine was non-functional, defendant ended the interview. There was also testimony from multiple witnesses that the machine was missing its cord, that no personal property associated with sewing machine was found in the home, and that other items of personal property seemed out of place. The trial court apparently found defendant’s statements lacking in credibility and lying to law enforcement during an investigation amounts to an interference with the administration of justice.

¹³ Defendant implicitly suggests that the trial court improperly relied on the PSIR because the jury never heard this evidence. Defendant cites no authority that a trial court cannot rely on the PSIR when scoring the offense variables and Michigan courts have regularly upheld scores based on evidence contained in a defendant’s PSIR. See, e.g., *People v Lee*, 391 Mich 618, 635; 218 NW2d 655 (1974) (“The presentence report has been widely regarded as an effective method of supplying information essential to an informed sentencing decision.”).

By contrast, defendant's false statements to her insurer did not interfere with the administration of justice in the context of OV 19. Insurance investigators are not law enforcement officers and their investigation is not integral to the functioning of the justice system. As defendant notes, an insurance company's main objective in investigating a possible arson is to determine whether it is required to pay a claim under a policy, not to enforce criminal laws. Nonetheless, because defendant lied to Captain Gotham, a law enforcement officer involved in the investigation of a crime, the trial court did not err by scoring OV 19 at 10 points.

IV. CRIME VICTIM RIGHTS ASSESSMENT

Finally, defendant argues that the trial court's imposition of a \$130 crime victim rights assessment violated the ex post facto clauses of the United States and Michigan constitutions, which prohibit inflicting a greater punishment for a crime than that which was in effect at the time of the crime's commission. US Const, art I, § 10, cl 1, art I, § 9, cl 3; Const 1963, art 1, § 10. Defendant's crimes occurred in November 2009, February 2010, and April 2010. On those dates, the Crime Victims Rights Act (CVRA), MCL 780.751 *et seq.*, permitted a \$60 assessment. The Legislature raised the assessment to \$130 on December 16, 2010. Defendant argues that the imposition of a \$130 assessment, instead of the \$60 assessment permitted at the time of the crimes, violates the ex post facto clauses.

We addressed this exact issue in *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012), lv gtd 493 Mich 945-946; 828 NW2d 359 (2013). We held that the imposition of a \$130 assessment, even though the underlying crimes were committed when the CVRA only provided for a \$60 assessment, was not restitution, punitive, nor affected a matter of substance and, accordingly, did not violate the ex post facto clauses. *Id.* at 113-114. Bound by *Earl*, MCR 7.215(J)(1), we therefore conclude that the trial court's imposition of a \$130 assessment did not violate the ex post facto constitutional clauses.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro