

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 18, 2014

v

JOSEPH MICHAEL MCINTYRE,

Defendant-Appellant.

No. 308394
Kent Circuit Court
LC Nos. 11-002153-FH
11-002154-FH
11-002222-FH
11-002223-FH
11-002224-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of one count arson of a building within the curtilage of a dwelling house, MCL 750.72, in lower court no. 11-002153-FH and lower court no. 11-002222-FH; four counts of arson of a dwelling house, MCL 750.72, and first-degree home invasion, MCL 750.110a(2), in lower court no. 11-002154-FH; and one count each of arson of a dwelling house and first-degree home invasion in both lower court nos. 11-002223-FH and 11-002224-FH. The trial court sentenced defendant to 10 to 20 years' imprisonment for each conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we vacate defendant's conviction and sentence for first-degree home invasion in lower court no. 11-002154-FH and remand for the ministerial task of amending the judgment of sentence accordingly, and in all other respects, we affirm defendant's convictions and sentences.

Eleven fires occurred in Grand Rapids, mostly on the southeast side of town and in garages, between July 18, 2010, and October 17, 2010. A task force was created to apprehend the arsonist. Shortly after its creation, the task force received an anonymous tip that defendant was the arsonist. After receiving the tip, task force members interviewed friends and members of defendant's family and then placed him under surveillance. In the early morning hours of October 17, 2010, task force members watched as defendant left his house and followed him to a home on 32nd Street in Grand Rapids. After defendant drove from the location, police officers moved in to the location and discovered a fire which had been set in an undetached garage. Defendant was stopped a short time later and taken into custody. He confessed to setting the fires, except for two of them, but claimed that he was insane at the time of the fires. He was convicted and sentenced as outlined above and this appeal ensued.

I. *MIRANDA*¹ WAIVER

Defendant argues that the trial court erred in denying his motion to suppress his statement given to ATF Special Agent Michael Marquardt and Detective Les Smith. According to defendant, because he never affirmatively stated that he waived his *Miranda* rights, his statement was inadmissible. We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, we will not disturb a trial court's factual findings unless those findings are clearly erroneous. *Id.*

At the hearing on defendant's motion to suppress, the prosecution played for the trial court the section of defendant's interview involving the giving and waiver of defendant's *Miranda* rights. Neither party disputed that the transcript provides an accurate recitation of the interview. According to the transcript, the following exchange occurred between Marquardt and defendant:

SA Marquardt. Because we arrested you, I gotta go through the formality of readin' your rights. And then we'll get into talkin' about it. Okay?

(S/A Marquardt refers to document.)

SA Marquardt. So, this, this is your Statement of Rights. You have the right to remain silent. You understand that.

(03:47:44 – McIntyre nods in the affirmative.)

SA Marquardt. Anything you say can be used against you in court. You have the right to talk to a lawyer before we ask you any questions, and to have a lawyer with you during questions, and to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you, if you wish, before any questioning begins. Ya understand that?

(03:48:00 – McIntyre nods in the affirmative.)

SA Marquardt. Is that “yes”?

McIntyre. Yes.

SA Marquardt. If you decide to answer any questions now without a lawyer present, you have the right to stop answering questions at any time. Ya understand that?

(03:48:10 – McIntyre nods in the affirmative.)

SA Marquardt. So, if we start talkin' right now,

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(03:48:12 – McIntyre nods in the affirmative.)

SA Marquardt. and at some point you, you don't want to,

(03:48:14 – McIntyre nods in the affirmative.)

SA Marquardt. you can stop it at any time. Okay? Ya understand that?

(03:48:15 – McIntyre nods in the affirmative.)

SA Marquardt. So, would you like to talk to us?

Det. Smith. And I, I,

McIntyre. (UI) some water?

SA Marquardt. Some water?

McIntyre. Yeah. [Int Tr, 13-14.]

Smith then asked defendant about a statement he had previously made about not wanting certain people to know what happened. The interview continued without defendant signing the waiver of rights form or expressly stating that he waived his rights under *Miranda*.

At the hearing, Marquardt testified that he read the *Miranda* rights from a waiver form, but he did not ask defendant to sign the form because the interview was being recorded. He explained that defendant, when asked if he understood a right, either gave a verbal “yes” or a nod of the head. Marquardt admitted that defendant never said that he agreed to speak with Marquardt and Smith, but he never indicated any reluctance or hesitation to speak. The interview lasted 3-1/2 hours, and defendant never indicated that he wanted the questioning stopped. In fact, when Marquardt asked defendant about fire 4, he asked defendant if defendant wanted to talk about that fire. Defendant sighed, and answered Marquardt’s questions about the fire. According to Marquardt, defendant was cooperative in the interview. He gave appropriate responses to questions asked of him, and explained the fires in great detail. Marquardt was even impressed with defendant’s recollection. The record reveals and defendant does not dispute that no threats or promises were made to him. Defendant never indicated that he suffered from a psychological impairment, delusions, or a mental disease or defect. According to Marquardt, defendant appeared to understand everything.

The trial court denied defendant’s motion to suppress, finding that defendant waived his *Miranda* rights. The trial court acknowledged that there was no “clear unequivocal waiver” by defendant, but explained that, pursuant to *Berghuis v Thompkins*, 560 US 370; 130 S Ct 2250; 176 L Ed 2d 1098 (2010), such a waiver was not necessary. According to the trial court, defendant gave an implied waiver of his rights because defendant was informed of his rights and expressed an understanding of them, as evidenced by him saying “yes” or by nodding his head, and there was no evidence of any undue influence or coercion. We concur with the trial courts findings and conclusions of law.

In *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court held that an accused, pursuant to the Fifth Amendment right against self-incrimination, must be given a series of warnings before being subjected to custodial interrogation. *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013). The accused must be told that he has the right to remain silent, that anything he says can and will be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him before any questioning. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). Absent a voluntary, knowing, and intelligent waiver of these rights by the accused, any statement of the accused during the custodial interrogation is inadmissible at trial. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). However, an affirmative or express waiver is not necessary to support a finding that an accused waived his *Miranda* rights. *North Carolina v Butler*, 441 US 369, 375-376; 99 S Ct 1755; 60 L Ed 2d 286 (1979). In *Butler*, the United States Supreme Court stated:

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. [*Id.* at 373.]

In *Berghuis*, 560 US at 384, the United States Supreme Court reaffirmed the rule that a prosecutor need not show that an accused expressly waived his *Miranda* rights. It stated, "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Id.*

In *Berghuis*, at the beginning of the interrogation, the interviewing officer presented the defendant with a waiver form. At the officer's request, the defendant read aloud the last warning listed on the form. The officer then read the other warnings to the defendant. The officer asked the defendant to sign the waiver form, but the defendant refused. An interrogation began. For the interrogation, which lasted nearly three hours, the defendant remained largely silent, giving only a few limited verbal responses. However, he never stated that he wanted to remain silent, that he did not want to talk to the police, or that he wanted an attorney. Near the end of the interrogation, the officer asked the defendant whether he believed in God and then, when asked if he prayed to God to forgive him for shooting the boy, the defendant said, "Yes." The interrogation soon ended, after the defendant refused to make a written confession.

The defendant claimed that his statement was inadmissible because he never waived his right to remain silent. The United States Supreme Court disagreed. *Id.* at 385. First, the Court stated that there was no contention that the defendant did not understand his rights. *Id.* It noted

the defendant received a written copy of the *Miranda* warnings; it was determined that the defendant could read and understand English; the defendant was given time to read the warnings; and the officer read aloud the warnings to him. *Id.* at 385-386. Second, the Court stated that the defendant's answer to the officer's question whether he prayed to God for forgiveness was "a course of conduct indicating waiver of the right to remain silent." *Id.* at 386 (quotation omitted). According to the Court, if the defendant wanted to remain silent, he could have said nothing in response to the question or invoked his *Miranda* rights and ended the interrogation. *Id.* Third, the Court stated that there was no evidence the defendant's statement was coerced. *Id.* It noted there were no facts indicating that the defendant was incapacitated, sleep or food deprived, or threatened or injured. *Id.* at 386-387. The Court concluded that, under the circumstances, the defendant knowingly and voluntarily made a statement to the police and, therefore, had waived his right to remain silent. *Id.* at 387.

We agree with the trial court's application of *Berghuis* to this case. The record supports the trial court's finding that defendant understood his *Miranda* rights. First, Marquardt read defendant his rights, and whenever Marquardt asked defendant if he understood, defendant either nodded his head in the affirmative or answered, "Yes."² Second, by answering the questions posed by Marquardt and Smith, defendant engaged in a course of conduct that indicated a waiver of his rights. *Berghuis*, 560 US at 386. Third, defendant has never claimed that his statement was coerced. Accordingly, because defendant was given and understood his *Miranda* rights, his uncoerced statement established an implied waiver of his *Miranda* rights. *Id.*

Additionally, defendant argues that his statement was involuntary because of his mental illness and the admission of his statement violated his right to due process. Defendant did not move the trial court to suppress his statement on this ground. Accordingly, the issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error is error that is clear or obvious. *Id.* at 763.

Defendant also argues that, even apart from the issue whether he waived his *Miranda* rights, his statement was involuntary because of his mental illness and the admission of his statement violated his right to due process. Defendant relies on *Malloy v Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964), where the United States Supreme Court held that the Fourteenth Amendment's guarantee of due process protected the Fifth Amendment's guarantee against self-incrimination in state prosecutions. Thus, a statement from an accused that was involuntary—one obtained by threats or violence, direct or implied promises, or the exertion of improper influence—was not admissible in state prosecutions. *Id.* at 7. Defendant also relies on *Fikes v Alabama*, 352 US 191, 197-198; 77 S Ct 281; 1 L Ed 2d 246 (1957), where the United States Supreme Court stated that, although there was no evidence of "physical brutality" against

² In his brief on appeal, defendant claims that "[h]ead motions such as nodding and/or shaking are routinely held to be expressions of either assent or disagreement." However, defendant makes no argument that he shook his head rather than nodded it, as found by the trial court.

the defendant, the defendant's confession was involuntary given the pressures that were applied to him and the fact that he was "weak of will or mind."

The United States Supreme Court decided *Malloy* and *Fikes* before it decided *Miranda* in 1966. This Court will not engage in a discussion regarding whether the Due Process Clause of the Fourteenth Amendment provides an alternative basis for the exclusion of his statement because, even assuming that a defendant's mental illness could render a statement involuntary and, therefore, the statement is inadmissible pursuant to the Due Process Clause of the Fourteenth Amendment, there was conflicting evidence whether defendant suffered from a mental illness. Because there was conflicting evidence whether defendant was mentally ill, there can be no clear or obvious error in the trial court's failure to conclude that defendant's statement was involuntary because of a mental illness. *Carines*, 460 Mich at 763. Accordingly, no plain error occurred when the trial court did not exclude defendant's statement on the basis that it was involuntary. *Id.* Defendant is not entitled to relief on this issue.

II. EVIDENCE OF UNCHARGED FIRES

Defendant argues that the trial court erred in admitting evidence of the uncharged fires. According to defendant, the evidence was unfairly prejudicial. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

The trial court concluded that the other acts evidence was presented for a proper purpose, finding in part:

[The Prosecution] suggests that the commonality between all of these fires strongly indicates that they were committed according to a standard or established scheme, plan or system in doing an act, and that they tend to establish, much more solidly than without them would be possible, the identity of the perpetrator, and the fact that these offenses were committed intentionally and not due to some inadvertence or, as suggested by the defense in the case, insanity.

I suppose it's possible for an insane individual to act in a somewhat orderly fashion, but if, as indicated, the evidence in these cases demonstrates that the crimes were committed in the early morning hours by a defendant dressed in dark clothing, taking great pains to be secretive about his comings and goings, there is a strong indication that he was attempting to avoid detection and commit the crimes in a very deliberate and careful pre-planned manner, so as to achieve the greatest impact with the lowest risk of apprehension.

These would seem to be factors that would militate against a viable insanity defense, since in order to have cognitive functioning at that level and to be conscious of a desire to avoid apprehension at all costs, one must be acting with a consciousness of guilt and knowledge of potential consequences, if apprehended. Certainly the trier of fact is free to arrive at other conclusions, but I think the prosecution's point certainly is well founded.

The trial court then found that the probative value of the other acts evidence, which it stated was “manifestly” present, was not substantially outweighed by the potential for prejudice. The trial court stated, in part:

...[B]ut to commit arson after arson after arson over a period of about three months does not seem to be the act of a rational mind, and there might be a stronger indication that the perpetrator is suffering from a mental disease or defect, such as possibly to cross the threshold into the realm of not being criminally responsible.

Certainly the jury will be confronted with the fact that the defendant apparently committed multiple arsons, but it seems to me that it gives the jury not only a better picture of who did these things and how, and what the intent or motive was, but it might also give the jury a better picture of the overall mental condition of the defendant as the perpetrator of these crimes, and might actually inure to the benefit of the defense.

Accordingly, the trial court held that “evidence of any and all arsons, charged and uncharged, committed by Defendant is admissible.” Thereafter, on the stipulation of the parties, the trial court consolidated the five lower court cases for trial.

We note that defendant is not arguing that the trial court erred in admitting evidence of the uncharged fires because the evidence was not offered for a proper purpose or was irrelevant to issues of consequence at trial. Rather, he contends that the trial court erred in admitting evidence of the uncharged fires because the evidence was unfairly prejudicial under MRE 403. Because defendant does not argue that the uncharged fires were admitted for the improper purpose of proving his character, this Court will not address the trial court’s determination that the evidence of the uncharged fires was admitted for a proper purpose under MRE 404(b).

Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. “All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded.” *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

Michigan follows the rule “that any and all conduct of an accused is admissible as evidence where the defense of insanity has been raised.” *People v Lipps*, 167 Mich App 99, 109; 421 NW2d 586 (1988). See also *People v Woody*, 380 Mich 332, 338; 157 NW2d 201 (1968) (“Testimony of prior arrests, convictions, assaultive and antisocial conduct, ordinarily completely inadmissible as bearing on the general guilt or innocence of the accused of the offense charged, became material and admissible as bearing on the issue of [the defendant’s]

sanity.”).³ Accordingly, evidence of the uncharged fires, which occurred in the same three-month time span of the charged fires, was relevant and admissible to aid the jury in evaluating defendant’s claim of insanity.

Defendant claims that it was unnecessary for the prosecutor to present the jury with evidence of the uncharged fires because he gave a full statement and confessed to setting the charged fires. According to defendant, evidence of the uncharged fires simply served to intensify to the jury the sense of terror felt by the community. However, the main issue at trial was whether defendant was insane at the time he set the fires. As articulated by the trial court, evidence of the uncharged fires could refute defendant’s claim of insanity. Some of defendant’s conduct in setting the uncharged fires, such as setting them in the early morning hours and in garages and setting fire 7 to the same set of garages that were subject to fire 1 because the media had reported that it was unknown whether the fires had been set by the same person, could be interpreted as deliberate and intentional action, thereby diminishing defendant’s insanity defense. We also agree with the trial court’s finding that evidence of the uncharged fires could support defendant’s insanity defense. Part of defendant’s claim of insanity was that, although he knew setting the fires was wrong, he only set them when he could no longer resist the urges to set a fire. The fact that defendant set numerous other fires, in addition to the charged fires, over the same three-month period, could support a conclusion that defendant was unable to resist his urges. Because evidence of the uncharged fires enabled the jury to better evaluate defendant’s claim of insanity, the evidence was significantly probative on the main issue in the case. We cannot find any record evidence which supports defendant’s assertion that the evidence of the uncharged fires was given undue weight. *Ackerman*, 257 Mich App at 442. Accordingly, the trial court’s decision not to exclude evidence of the uncharged fires under MRE 403 fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

We also find no merit to defendant’s argument that evidence of fire 4 and fire 8 was unfairly prejudicial because defendant did not admit to setting the two fires. Because this argument was not raised below, it is unpreserved, *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012), and reviewed for plain error, *Carines*, 460 Mich at 763. Evidence of these two fires was relevant only if defendant set them. “When the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.” MRE 104(b). A trial court must allow the jury to decide the conditional fact if the jury could reasonably find the conditional fact by a preponderance of the evidence. *Howard v Kowalski*, 296 Mich App 664, 682; 823 NW2d 302 (2012). A jury could find by a preponderance of the evidence that defendant set the two fires. MRE 104(b); *Howard*, 296 Mich App at 682. Fire 4 was set in the laundry room of defendant’s apartment building; it was set the same night as fire 3, which defendant confessed to setting; and defendant was in the apartment at the time the fire was discovered. Fire 8 was set in a garage; the garage door had been open; defendant’s telephone

³ MRE 404(b) is not implicated when evidence of a defendant’s other acts is introduced on the issue of the defendant’s sanity. *People v McRunels*, 237 Mich App 168, 183; 603 NW2d 95 (1999).

records showed that he was in the area of the fire; and defendant admitted that he had been visiting a friend in the area. Because fire 4 and fire 8 were set in the three-month period of the charged fires, evidence of the two fires, along with evidence of the other uncharged fires, enabled the jury to better evaluate defendant's claim of insanity. There was no plain error in the admission of evidence of the two fires that defendant denied setting. *Carines*, 460 Mich at 763.

We also find no merit to defendant's argument that there was error in the admission of evidence of the fires that he set in his grandparents' house in 2002 and 2003. A "[d]efendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Defense counsel deemed it proper for the jury to hear evidence about the two fires that defendant set at his grandparents' house. Counsel elicited testimony from defendant's grandmother about the two fires. Moreover, the two fires played a crucial part in defendant's expert's opinion that defendant was insane at the time of the charged fires. Accordingly, defendant cannot assign error to the admission of the evidence. *Id.*

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his conviction for first-degree home invasion in lower court no. 11-002154-FH was not supported by sufficient evidence. In an amended information, defendant was charged with home invasion of 2620 Ridgcroft Drive.⁴ He claims that, because the fire started in the garage to 2618 Ridgcroft Drive, there was no entry into 2620 Ridgcroft Drive. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.* We also review de novo issues of statutory interpretation. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

MCL 750.110(a) provides, in pertinent part:

(2) A person . . . who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

* * *

(b) Another person is lawfully present.

⁴ Defendant was originally charged with home invasion of 2618 Ridgcroft Drive. The information was amended during trial when the testimony showed that no one was home at 2618 Ridgcroft Drive at the time of the fire.

The term “dwelling” is defined as “a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.” MCL 750.110a(1)(a).

Each of the four condominium units on Ridgcroft Drive was a “dwelling.” The condominium units were individually owned and used as separate places of abode. The unit at 2618 Ridgcroft Drive was owned by Aubrey King’s father and used as a place of abode by King and Sarah Pletcher. The units at 2620 Ridgcroft Drive and 2622 Ridgcroft Drive were owned and used as places of abode by Brian Wesche and Dolores Fingleton, respectively.⁵ The conclusion that each condominium unit was a “dwelling” is consistent with the statutory definition of “without permission.” This phrase is defined as “without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.” MCL 750.110a(1)(c). Different persons owned or were in lawful possession of each of the four condominium units.

The word “appurtenant” is not defined by statute. Words undefined by statute are to be given their plain and ordinary meaning, *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007), and dictionary definitions may be consulted, *People v Barrera*, 278 Mich App 730, 737; 752 NW2d 485 (2008). “Appurtenant” is defined as “appertaining or pertinent; accessory,” *Webster’s New World Dictionary* (1982), or “subsidiary, auxiliary,” *Random House Webster’s College Dictionary* (2000). The garage to 2618 Ridgcroft Drive was not an “appurtenant structure” to the condominium unit at 2620 Ridgcroft Drive. The single stall garage was not an accessory to Wesche’s condominium unit. The garage belonged to King’s condominium unit, and King parked her car there. Wesche’s condominium unit had its own garage, where Wesche parked his vehicle.

The State argues that based on the particular lay-out of the structures at issue, the garage constituted an “appurtenant structure.” Accordingly, the State argues, on this particular lay-out, with these specific factors, this Court should affirm the conviction. However, based on the record before us, we cannot conclude that the garage where defendant set the fire was an “appurtenant structure” to the condominium unit at 2620 Ridgcroft Drive. The photographic evidence presented at trial clearly reveals that the garage where the fire was set was not an accessory to 2620 Ridgcroft. Each condominium had its own garage and while they were in close proximity to one another they do not fit the dictionary definition of “appurtenant” as stated above. In addition, the garage to 2618 Ridgcroft Drive was not a “structure attached” to the condominium unit at 2620 Ridgcroft Drive. Thus, because the garage where defendant set the fire was not an “appurtenant structure” to Wesche’s condominium unit, there was no entry into the unit at 2620 Ridgcroft Drive. Accordingly, defendant’s conviction for first-degree home invasion is not supported by sufficient evidence. We therefore vacate defendant’s conviction and sentence for first-degree home invasion in lower court no. 11-002154-FH.

IV. EXPERT TESTIMONY

⁵ There was no testimony regarding the unit at 2624 Ridgcroft Drive.

Defendant argues that the testimony of Kevin Kelm about the behavior of serial arsonists was not admissible under MRE 702. In part, Kelm testified that, based on his experience, serial arsonists were not insane and that research showed “less than 2/10ths of a percent” of serial arsonists are found insane at trial. He also testified that serial arsonists who are motivated by excitement thrills have many common characteristics in their background, and defendant shared many of them, and that many of these serial arsonists set fires to relieve stress and regain control. Because defendant did not object to Kelm’s testimony on the basis that it was improper expert testimony, the issue is unpreserved, *Metamora Water Serv, Inc*, 276 Mich App at 382, and reviewed for plain error affecting defendant’s substantial rights, *Carines*, 460 Mich at 763.

MRE 702 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.

Expert testimony is admissible if (1) the witness is an expert, (2) there are facts in evidence that require or are subject to examination and analysis by an expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man. *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). In addition, a trial court must act as a gatekeeper and insure that all expert testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 481; 685 NW2d 391 (2004); *People v Yost*, 278 Mich App 341, 391; 749 NW2d 753 (2008).

Defendant claims that there was no showing that Kelm was qualified to testify about arsonist behavior. Defendant has waived this claim of error. Waiver extinguishes any error. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). It occurs when a party expressly approves the trial court’s action. *Id.*; *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant expressly approved the trial court’s action in accepting Kelm as an expert when, after finishing his voir dire of Kelm, he stated that he had no objection to Kelm testifying as an expert. Regardless, there is no merit to defendant’s claim. An expert may be qualified by knowledge, skill, experience, training, or education. MRE 702; *Yost*, 278 Mich App at 393. Kelm had been a special ATF agent for 24 years. Before his current assignment as agent in charge of a field office in Kentucky, Kelm had worked in field offices in Minnesota and Wisconsin, investigating crimes, including arsons, and in the behavioral analysis unit of the FBI, where he was assigned to arson and bombing investigations. Over the course of his career, Kelm had investigated, reviewed, or supervised 700 fire scenes. He had received several hundreds of hours of training in fire investigation, fire setter behavior, and motives for arson. Kelm had previously testified as an expert in fire investigation and arsonist behavior. Based on Kelm’s experience and training, there was no plain error in the trial court’s acceptance of Kelm as an expert in arsonist behavior. *Carines*, 460 Mich at 763.

There is also no merit to defendant’s claim that Kelm’s testimony was inadmissible under MRE 702 because there was no showing of the data on which Kelm based his expert testimony

or that Kelm utilized any reliable principles or methods in opining on arsonist behavior. Kelm testified about human behavior of serial arsonists. Human behavior is not a subject matter that lends itself to the type of scientific testing performed in the hard sciences. *People v Beckley*, 434 Mich 691, 720-721; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.). Rather, testimony regarding human behavior “is really only an opinion of the expert based on collective clinical observations of a class of victims.” *Id.* at 721. Kelm’s testimony was based on research of serial arsonists and his own experience. Accordingly, there was no plain error. *Carines*, 460 Mich at 763.

Next, even assuming, but without deciding, that the substance of Kelm’s testimony about the behavior of serial arsonists was plainly improper expert testimony under MRE 702, defendant has not shown that the error affected his substantial rights. *Carines*, 460 Mich at 763.⁶ On cross-examination, Kelm admitted that he was not qualified to opine on the questions whether defendant suffered a mental illness or could conform his conduct to the requirements of the law at the time of the charged fires. In addition, to rebut defendant’s claim of insanity, the prosecutor did not rely solely on Kelm’s testimony about serial arsonists. She presented the testimony of Zmachinski and Clark, both of whom were qualified as experts in forensic psychiatry. Each had evaluated defendant, and each opined that defendant was not insane. The prosecutor argued that defendant’s statements in the interview, his conduct before, during, and after the fires, his lifestyle and employment, as well as the opinions of Zmachinski and Clark, showed that defendant was not insane at the time of the charged fires.

We also find there was strong support from the particular facts of the case for the jury’s conclusion that defendant was not insane. Defendant said that he set fires because setting fires gave him a sense of control. Defendant also said that he set fire 7 to the same apartment garages that were the subject of fire 1 because he wanted the media to know that one person was setting the fires and that he set fire 10 to a garage on the northeast side of Grand Rapids because the media always reported that the fires were set on the southeast side. Additionally defendant said

⁶ We agree with defendant that, if Kelm’s testimony was inadmissible under MRE 702, it was not admissible under MRE 701. MRE 701 allows the admission of lay opinion testimony, *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013), but Kelm did not testify as a lay witness. He was offered only as an expert witness.

However, we disagree with defendant that Kelm’s testimony violated MCL 768.20a(6). According to defendant, MCL 768.20a(6) specifically describes the persons who may opine on the ultimate issue of a defendant’s insanity and because the subsection does not list an ATF agent, a criminologist, a fire investigator, or an expert in arsonist behavior, Kelm was not permitted to give an opinion whether defendant was insane at the time of the charged fires. Contrary to defendant’s argument, MCL 768.20a(6) says nothing about who may testify at trial. It only states that, at the conclusion of an examination of the defendant, the Center for Forensic Psychiatry, the other qualified personnel, or the independent examiner must prepare a written report. Regardless, the factual premise of defendant’s argument, i.e., that Kelm opined on defendant’s insanity, is inaccurate. Kelm acknowledged that he could not offer an opinion on the issue whether defendant was insane. The question was beyond his area of expertise.

he believed he would have stopped setting fires if he knew he was being watched. These statements by defendant contradicted Wendt's opinion that defendant set a fire only when he could no longer resist the urges inside him to set a fire. Under these circumstances, any plain error in the admission of Kelm's testimony about arsonist behavior did not affect the outcome of defendant's trial. *Carines*, 460 Mich at 763.

Defendant also argues that trial counsel was ineffective for failing to object to Kelm's testimony under MRE 702. Because defendant did not move for a new trial or a *Ginther* hearing, our review of the claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonable and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation omitted). Based on our previous analysis, the proffered objections to Kelm's testimony would have been futile. Counsel is not ineffective for failing to make a futile motion or objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Moreover, even assuming, but without deciding, that trial counsel's performance fell below objective standards of reasonableness when he failed to object to the substance of Kelm's testimony, defendant has not shown that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Uphaus (On Remand)*, 278 Mich App at 185. We reach this conclusion based on our previous harmless error analysis. We cannot find, even assuming trial counsel's performance fell below a standard of reasonableness, that such deficiencies undermine this Court's confidence in the outcome of this trial. *Carbin*, 463 Mich at 600. Defendant is not entitled to relief on this issue.

V. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor denied him a fair trial with improper statements during closing arguments. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not object to the alleged improper statements. Yet, according to defendant, his later request that the jury be instructed regarding his disposition should he be found not guilty by reason of insanity preserved his claims of prosecutorial misconduct. We disagree. First, the instruction request was not contemporaneous to the alleged improper statements. *Id.* The request was made after closing arguments were completed and after the jury was dismissed for the day. Second, in requesting the instruction, defendant never claimed that the prosecutor's statements were improper. We review unpreserved claims of prosecutor misconduct for plain error affecting the defendant's substantial rights. *Ackerman*, 257 Mich App at 448.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful

conviction as it is to use every legitimate means to bring about a just one.” *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935). We review claims of prosecutorial misconduct on a case-by-case basis, examining the prosecutor’s challenged remarks in context. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

First, defendant claims that the prosecutor made a civic duty argument when she argued (1) that “[t]he only way [defendant] skates on this, gets off of this” is if he carries his burden to prove by a preponderance that he was insane, (2) that a finding that someone is insane “excuses his crimes,” “means he’s held not responsible,” and “his crimes go unpunished,” and (3) and “[t]hose are the people,” not defendant, that are “[e]ntitled to a walk,” treatment, and no punishment.

A prosecutor may not urge the jury to convict a defendant as part of its civic duty. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). A civic duty argument “unfairly places issues into the trial that are more comprehensive than a defendant’s guilt or innocence and unfairly encourages jurors not to make reasoned judgments.” *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). A jury is not to be concerned with the consequences of its verdict. *People v Goad*, 421 Mich 20, 36; 364 NW2d 584 (1985). Thus, counsel should not address the question of the disposition of the defendant after the verdict. *Id.* at 25; *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). It is improper for a prosecutor to capitalize on a jury’s fear that if a defendant is found insane that the defendant will be set free, *People v Staggs*, 85 Mich App 304, 310; 271 NW2d 211 (1978); *People v Lewis*, 37 Mich App 548, 552-553; 195 NW2d 30 (1972), and to disparage or denigrate the insanity defense, *People v Wallace*, 160 Mich App 1, 9; 408 NW2d 87 (1987).

We do not agree with defendant’s assertion that the prosecutor’s statements were virtually identical to the improper statements made by the prosecutor in *Hanna v Price*, 245 Fed Appx 538 (CA 6, 2007). Here, the prosecutor did not engage in any denigration or disparagement of the insanity defense. She did not state her personal beliefs about the defense, and she did not request the jurors to nullify the defense.

The prosecutor’s statement that the only way defendant “skates on this, gets off of this” is if he proves by a preponderance of the evidence that he was insane did not constitute plain error. *Ackerman*, 257 Mich App at 448. Before making this statement, the prosecutor explained to the jury that, because defendant agreed that he set the charged fires and did not dispute the location of them, there was really no dispute that she had proved the elements of the charges beyond a reasonable doubt. While the prosecutor’s statements are of concern to this Court, we cannot find, on an examination of the whole of her statements, that they constituted plain error.

The prosecutor’s statement that, if a defendant is found insane, the defendant is not held responsible for his actions and his crimes are excused and go unpunished also did not constitute plain error. *Id.* When examined in context, *McLaughlin*, 258 Mich App at 644, the prosecutor’s statement was part of an argument that the jury should not find defendant insane because it is obvious when a person has a mental illness, as the term is defined by statute, and it was not clear that defendant suffered from such an illness. Thus, although the jury may have learned through the prosecutor’s statement that defendants who are found not guilty by reason of insanity either get released or treatment, the statement was not clearly and obviously a comment on defendant’s

potential disposition should he be found insane. *Carines*, 460 Mich at 763. Moreover, the statement cannot be viewed as an attempt to persuade the jury to decide defendant's guilt based on its fears and emotions. The argument, of which the statement was a part, actually asked the jury to decide defendant's guilt on the facts and law.

Additionally, the prosecutor's statement that "[t]hose" people, rather than defendant, are the ones entitled to the insanity defense and to a walk or treatment did not constitute plain error. *Ackerman*, 257 Mich App at 448. When examined in context, the statement was part of an argument that the jury should not find defendant insane because it is obvious when a person has a mental illness, as the term is defined by statute, and it was not clear that defendant suffered from such an illness. Thus, although the jury may have learned that defendants who are found insane either get released or treatment, the statement was not clearly and obviously a comment on defendant's potential disposition should he be found insane. *Carines*, 460 Mich at 763.

Second, defendant claims that the statement in which the prosecutor compared him to persons with foot fetishes and to persons who enjoyed child pornography was improper. Defendant asserts that the statement was unsupported by any evidence and was a foul blow.

"A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich App at 241. The prosecutor did not make any statement of fact regarding the fires that was not supported by evidence presented at trial. Rather, using persons with foot fetishes and those who enjoy child pornography as examples, the prosecutor argued that a person is not insane merely because the person engages in weird, different, or odd behavior. The prosecutor's argument was not a "foul" blow. *Berger*, 295 US at 88. It was undisputed that defendant engaged in weird or odd behavior. He set garages on fire because it allowed him to feel in control. The prosecutor's statement was part of a larger argument that, even though he got enjoyment from setting fires, defendant was not insane, as defined by the law, because he was "living a normal life." When read in context, the prosecutor's statement was not plainly erroneous. *Ackerman*, 257 Mich App at 448.

We conclude our analysis of this issue by noting that in this case, the prosecutor extensively argued that the insanity defense should not be accepted for reasons unique to this case. Under these circumstances, any plain error in the prosecutor's statements about the insanity defense, did not affect the outcome of trial. *Carines*, 460 Mich at 763. Additionally, even if this Court were to find that any of the above statements constituted plain error, the error did not prejudice defendant. *Id.* The jury was instructed that its decision was not to be influenced by possible penalties. Specifically, the trial court instructed, "Possible penalties should not influence your decision, it is the duty of the judge to fix the penalty within limits provided by law." A jury is presumed to follow its instructions, and instructions are presumed to cure most errors. *Abraham*, 256 Mich App at 279. Accordingly, defendant is not entitled to relief on this issue.

VI. SENTENCING

Defendant argues that the trial court erred in scoring 20 points for offensive variable (OV) 1, MCL 777.31, and 15 points for OV 2, MCL 777.32, because a butane lighter is not an incendiary device. We review a trial court's factual determinations in scoring the sentencing

guidelines for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The application of the facts to the law is a question of statutory interpretation and is reviewed de novo. *Id.*

Twenty points may be scored for OV 1 if “[t]he victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device.” MCL 777.31(1)(b). Fifteen points may be scored for OV 2 if “[t]he offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon.” MCL 777.32(1)(b). An “incendiary device,” for both OV 1 and OV 2, “includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device.” MCL 777.31(3)(b); MCL 777.32(3)(d). We disagree with defendant’s assertion that it would stretch the limits of principled analogy to equate a butane lighter to a blowtorch, firebomb, or Molotov cocktail. All are instruments that use a flammable liquid which is stored in the instrument to create a fire or a spark. Accordingly, the trial court was correct to conclude that a butane lighter is a “similar device” to a blowtorch, fire bomb, or Molotov cocktail. Accordingly, this Court finds that the trial court did not err in determining that a butane lighter was an “incendiary device.” The trial court properly scored 20 points for OV 1 and 15 points for OV 2.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that trial counsel was ineffective for failing to move to suppress the evidence obtained from the GPS device that was placed on his sister’s vehicle. Because defendant did not move for a new trial or a *Ginther* hearing, review of defendant’s claim is limited to errors apparent on the record. *Davis*, 250 Mich App at 368. Defendant’s argument is predicated on *Jones*, ___ US ___; 132 S Ct 945, 949; 181 L Ed 2d 911 (2012), where the United States Supreme Court held that the government’s installation of a GPS device on the defendant’s car and its use of the device to monitor the vehicle’s movements constituted a “search” within the meaning of the Fourth Amendment.

A defendant has the burden to establish the factual predicate for a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The factual predicate for defendant’s claim is that (1) a GPS device was placed on his sister’s vehicle and (2) no warrant was obtained for the placement of the GPS device. However, neither part of the factual predicate is apparent from the record. There was no testimony from anyone involved in the surveillance of defendant that a GPS device was placed on defendant’s sister’s vehicle. Even assuming that a GPS device was placed on the vehicle, there was no trial testimony regarding whether a warrant was obtained for the placement of the GPS device. Accordingly, defendant has failed to establish the factual predicate for his claim. *Id.*

We deny defendant’s request for a remand pursuant to MCR 7.211(C)(1). First, because the remand request was made in a supplemental brief, rather than in a motion, it is not properly before the Court. See MCR 7.211(C)(1); *People v Jackson*, 487 Mich 783, 798; 790 NW2d 340 (2010). Second, and more importantly, in response to defendant’s request for a remand, plaintiff presented its own offer of proof: a search warrant, dated September 24, 2010, and signed by a magistrate of the 61st District Court, that authorized the placement of a GPS device on

defendant's sister's vehicle. Because a search warrant was obtained for the placement of the GPS device, defendant's claim is meritless.

VIII. DEFENDANT'S STANDARD 4 BRIEF

In his standard 4 brief, defendant raises 20 claims of ineffective assistance of counsel. Because none of these claims were raised in a motion for a new trial or a *Ginther* hearing, our review is limited to mistakes apparent on the record. *Davis*, 250 Mich App at 368.

Defendant claims that trial counsel was ineffective for failing to investigate and to proceed with a sound trial strategy. However, the record reveals that counsel proceeded with the trial strategy that defendant was insane and he obtained an expert witness who testified that defendant was insane at the time of the charged fires. The fact that the jury rejected the insanity defense does not mean that counsel was ineffective for having chosen the defense. See *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Our review of the record reveals that trial counsel had interviewed and retained expert witnesses and was well-prepared for examination and cross examination of all witnesses.

Defendant also claims that trial counsel was ineffective for failing to object when the "Psychotropic medication" that he was given each day of trial prevented him from rightfully participating in trial. Because there is nothing on the record to indicate that any medication given to defendant during trial prevented him from meaningful participation at trial, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6. Defendant has also failed to establish the factual predicate for several of his other claims of ineffective assistance of counsel. Defendant claims that trial counsel was ineffective because he failed to object when the prosecutor failed to inform him until after trial that a GPS device had been placed on his sister's vehicle. However, the fact that trial counsel was unaware of the GPS device until after trial is not apparent from the record. Defendant claims that trial counsel was ineffective because he failed to interview Neal Riley and his sister Jessica before trial, but the fact that counsel did not interview these siblings before trial is not apparent from the record. Defendant claims that trial counsel was ineffective for failing to object to the prosecutor's failure to produce the search warrants for his apartment and place of employment, but the fact that counsel requested and then did not receive copies of the warrants is not apparent from the record.

Defendant further claims that trial counsel was ineffective for failing to obtain the dash-camera video from Officer Bauer's marked police car. According to defendant, the video would have shown how long he was under arrest before he was given his *Miranda* warnings. The fact that trial counsel did not obtain a copy of the video is not apparent from the record. Accordingly, defendant has failed to establish the factual predicate for the claim. *Hoag*, 460 Mich at 6. Regardless, defendant fails to explain why the amount of time between his arrest and the giving of his *Miranda* warnings is even relevant. An accused must be informed of his *Miranda* rights before being subjected to custodial interrogation. *Elliott*, 494 Mich at 301. Defendant makes no claim that he was subjected to custodial interrogation before he was given his *Miranda* rights by Marquardt.

Defendant next argues that trial counsel was ineffective for failing to introduce into evidence the surveillance video from Access 42, a self-storage unit, on 32nd Street. According

to defendant, the surveillance video showed him pacing back and forth. Decisions regarding what evidence to present are matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and counsel is presumed to have engaged in sound trial strategy, *People v Russell*, 297 Mich App 707, 715-716; 825 NW2d 623 (2012). Because defendant's claim of what the surveillance video showed is not supported by the record, as established by the testimony of Detective Glen Culbert, defendant has not overcome the presumption that counsel's decision not to introduce the surveillance video into evidence was sound trial strategy. *Id.*

Defendant argues that trial counsel was ineffective for failing to argue a *Terry*⁷ violation based on the fact that he was falsely told that he was pulled over for failing to yield at a traffic light. Defendant provides no legal authority for his argument and, therefore, it is abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant argues trial counsel was ineffective because he failed to object when the prosecutor misled the trial court and the jury by not mentioning that GPS surveillance was conducted. Even assuming, without deciding, that counsel was ineffective for failing to object when the prosecutor failed to elicit an express statement from a witness that a GPS device was used, there is no reasonable probability that, but for the jury not hearing that a GPS device was used, the result of defendant's trial would have been different. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant additionally argues that trial counsel was ineffective for not filing a *Walker*⁸ motion because he was not given proper or complete *Miranda* warnings and he never signed a waiver form. A motion to suppress on either of these grounds would have been meritless. First, the record establishes that defendant was given proper and complete *Miranda* warnings by Marquardt. Second, as explained in section I, *supra*, a prosecutor need not obtain an express waiver from an accused, *Berghuis*, 560 US at 384; *Butler*, 441 US at 375-376, and the evidence showed that defendant gave an implied waiver of his rights. Trial counsel was not ineffective for failing to make this futile motion. *Fike*, 228 Mich App at 182. We also reject defendant's claim that trial counsel was ineffective for failing to file "[m]otions" on his behalf. Because defendant does not identify the motions that counsel should have filed, he has not shown that counsel's performance in failing to file them fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant asserts that trial counsel was ineffective for failing to object to the prosecutor's statements that he "was caught in the act lighting the last fire" and that he "wore all black during the commission of these fires." An appellant is required to support his argument with citation to the record. MCR 7.212(C)(7). Because defendant has not provided this Court with citations to the record for the prosecutor's alleged improper statements, we decline to address the arguments. See *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Defendant also claims that trial counsel was ineffective for failing to object when the trial court

⁷ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

⁸ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

gave an opinion as if it were a psychologist and when the prosecutor stood behind him during closing arguments and lit a lighter on the side of his head. However, the transcript lines that defendant cites do not support either of defendant's claims. Accordingly, defendant has failed to provide a factual basis for his claim, and we are not required to search the record to find a factual basis for them. *Id.*

Defendant argues that trial counsel was ineffective for failing to call Dr. Spahn and Mike Moran, both of whom treated him as a teenager, to testify about his mental problems. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *Rockey*, 237 Mich App at 76. “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). The jury learned, through the testimony of Wendt and defendant's grandmother, that defendant was treated by Spahn and Moran and of the events that led to the treatment. Wendt's conclusion that defendant was insane at the time of the charged fires was based, in part, on the events of defendant's childhood. Accordingly, trial counsel's failure to call Spahn and Moran as witnesses did not deprive defendant of a substantial defense. *Dixon*, 263 Mich App at 398.

Defendant argues that trial counsel was ineffective because he failed to object after receiving the prosecutor's “404(b) motion-notice” after trial had already commenced. The claim is not supported by the record. At the hearing on defendant's motion in limine, counsel acknowledged that an MRE 404(b) notice had been filed by the prosecutor.

Defendant further argues that trial counsel was ineffective because he failed to object to the testimony of Mark Rizik after it became known that the prosecutor knew Rizik. Counsel is not ineffective for failing to make a futile motion, *Fike*, 228 Mich App at 182, and defendant makes no argument that any objection to Rizik's testimony would have been granted. Moreover, defendant cannot show that, but for trial counsel's failure to object to Rizik's testimony, which concerned fire 9, there is a reasonable probability that the result of trial would have been different. *Uphaus (On Remand)*, 278 Mich App at 185. Three other witnesses testified about the fire, and defendant admitted to setting the fire.

Finally, we reject defendant's two remaining arguments. These arguments concern trial counsel either failing to obtain crucial evidence regarding the Riley siblings or to get crucial evidence about them omitted and failing to object to improper conduct of the arresting agencies in recording defendant. Defendant has simply failed to meet his burden to establish that counsel's performance fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

IX. CONCLUSION

We vacate defendant's conviction and sentence for first-degree home invasion in lower court no. 11-002154-FH, and remand for the ministerial task of amending the judgment of sentence accordingly. In all other respects, we affirm defendant's convictions and sentences.

Affirmed in part, vacated in part, and remanded for reasons consistent with this opinion.
We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering