

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

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
August 19, 2014

v

DEANDRE LAJUAN MOORE,  
Defendant-Appellant.

No. 313565  
Wayne Circuit Court  
LC No. 12-001279-FC

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

KEITH LARON DURR,  
Defendant-Appellant.

No. 313567  
Wayne Circuit Court  
LC No. 12-001279-FC

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Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendants Deandre Lajuan Moore (Moore) and Keith Laron Durr (Durr) were tried jointly, before a single jury. The jury convicted both defendants of first-degree felony murder, MCL 750.316(1)(b), and arson of a dwelling house, MCL 750.72. The trial court sentenced Moore to concurrent terms of life imprisonment for the felony-murder conviction and 13 to 25 years' imprisonment for the arson conviction. The court sentenced Durr to concurrent terms of life imprisonment for the felony-murder conviction and 7½ to 25 years' imprisonment for the arson conviction. Moore appeals as of right in Docket No. 313565, and Durr appeals as of right in Docket No. 313567. We affirm the convictions and sentences of both defendants.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

Defendants' convictions arise from a dispute between Durr and his ex-girlfriend, Loretta Smith (Smith). The couple ended their relationship in 2009, but encountered each other at a block party on July 10, 2010. The testimony by witnesses at the party varied regarding the

number and timing of encounters between the two. However, following one physical encounter, Durr threatened to kill Smith; one witness heard Durr threaten to burn Smith's home down. Durr left the party with Moore. Shortly after the defendants' departure, Smith left the party and returned to her home to find it on fire. A two-year-old child in the home died from smoke inhalation. Detroit fire investigators labeled the cause of the fire as "undetermined."

A witness, Heather Warddell (Warddell), who was then the girlfriend of Durr's friend, Michael Branden Ayers-Ellis (Branden), testified that after Moore and Durr left the party, she and Branden followed them in her own car, with Branden driving. Defendants proceeded to a gas station, exited carrying a metal can of lighter fluid, and drove to the side street near Smith's home. They entered the alley near Smith's home with the lighter fluid, but she could not recall which defendant carried the fluid out of the gas station or into the alley. She fought with Branden to prevent him from proceeding into the alley with defendants. Three neighbors corroborated Warddell's testimony regarding the presence of men in the alley, and one of those neighbors identified Durr as one of the men in the alley. Shortly after defendants left the alley, witnesses saw smoke coming from Smith's home. Smith's daughter, Jessica Smith (Jessica), who was at the home babysitting the two-year-old victim and a four-year-old child, NT, testified that she was unable to rescue the victim from the smoke and fire. Other witnesses testified that Jessica was outside with NT, walking and talking on her phone, before the fire started. After learning of the death of the victim, Warddell spoke with Durr, who made statements to her to the effect that she should keep her mouth shut and that he had "a crazy family." She interpreted these statements as threats. The following day, after learning that a child had been killed in the fire, Warddell and Branden left the area for several months, because Branden felt that "his name was probably in the streets" as being involved with the fire. Despite alleging that they were falsely accused and challenging the credibility of Warddell's testimony, defendants were convicted as charged.

## II. DOCKET NO. 313565 (MOORE)

### A. SUFFICIENCY OF THE EVIDENCE

In Docket No. 313565, Moore first argues that there insufficient evidence to support his conviction for arson of a dwelling house, MCL 750.72, and in turn, the felony-murder conviction. We disagree. We review a challenge to the sufficiency of the evidence de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). In examining a sufficiency challenge, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). Conflicts in the evidence are resolved in favor of the prosecution, and circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). In reviewing a challenge to the sufficiency of the evidence, an appellate court will not interfere with the jury's assessment of the weight of evidence or the credibility of witnesses. *Dunigan*, 299 Mich App at 582. The review is deferential because the trier of fact, not the appellate court, properly determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *Malone*, 287 Mich App at 654.

## 1. ELEMENTS OF ARSON OF A DWELLING HOUSE

“It is the nature of the offense of arson that it is usually committed surreptitiously. Rare is the occasion when eyewitnesses will be available. By necessity, proofs will normally be circumstantial.” *People v Horowitz*, 37 Mich App 151, 154; 194 NW2d 375 (1971). The purpose of MCL 750.72 is to prevent the burning of dwellings and has been described as an offense against habitation. *People v Ayers*, 213 Mich App 708, 720; 540 NW2d 791 (1995). “In order to establish the corpus delicti of arson of a dwelling house, the prosecutor must show not only a burning of a dwelling house but also that the burning resulted from an intentional criminal act.” *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982). There is a presumption that the fire was accidentally caused when only a burning is established. *Id.*

## 2. ELEMENTS OF FELONY MURDER

The elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probably result, (3) while committing, attempting to commit or assisting in the commission of any of the felonies delineated in MCL 750.316(1)(b). *People v Bobby Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007); *Carines*, 460 Mich at 758-759. MCL 750.316(1)(b) includes arson.

## 3. AIDING AND ABETTING

The prosecutor’s theory at trial was that Moore was guilty as either a direct principal, or as an aider and abettor. The aiding and abetting statute, MCL 767.39, provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

“It is well settled that an aider and abettor may be indicted, tried, and on conviction punished as a principal and no denial of due process results from charging an aider and abettor as a principal.” *People v Hooper*, 50 Mich App 186, 191; 212 NW2d 786 (1973). “The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish that ‘(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.’” *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

In a prosecution for aiding and abetting a felony murder, the aider and abettor’s state of mind may be inferred from all the facts and circumstances, including the circumstances surrounding the killing, the weapon used, the acts, conduct and language of the defendant, the close association between the defendant and the principal, the defendant’s assistance in the planning and execution of the crime, evidence of flight following the crime, and any other circumstantial evidence. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995),

overruled in part on other grounds by *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001); *People v Hart*, 161 Mich App 630, 635; 411 NW2d 803 (1987).

“A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet.” *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). “To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony.” *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

When aiding and abetting felony murder, the defendant must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal. *Robinson*, 475 Mich at 14. To establish the malice necessary for aiding and abetting murder, it must be established “that the aider and abettor had the intent to kill, the intent to cause great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm.” *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). When the aider and abettor participates in the crime with knowledge of the principal’s intent to kill or cause great bodily harm, there is sufficient evidence of malice because the aider and abettor is acting with wanton and willful disregard. *Id.* at 278-279.

#### 4. APPLICATION TO THE INSTANT CASE

Viewing the evidence in a light most favorable to the prosecution, there was sufficient circumstantial evidence and reasonable inferences arising from the evidence to convict Moore of arson of a dwelling house premised on an aiding and abetting theory. Warddell, Chantey Anderson, Smith, and Taimisha Butler all testified that they attended a block party, during which Durr was present and continually tried to engage and curse at Smith. These incidents had to be broken up by attendees at the block party. Moore also attended this party. At one point, Durr made threats to kill and burn Smith’s home. Shortly thereafter, according to Warddell, Durr left the party with Moore. Warddell and Branden followed the two defendants to a gas station, and saw defendants come out of the station with a metal can of lighter fluid, although it was unclear who carried the fluid. From that location, the two defendants proceeded to the alley near Smith’s home.

The three men got out of the cars, but Warddell’s pleas to Branden to stay at the car resulted in a fight between Warddell and Branden, so only the two defendants proceeded into the alley with the lighter fluid. A short time later, the two defendants ran back from the alley. According to eyewitnesses, a man instructed Durr that they had to hurry, and defendants were purportedly laughing as they came from the alley. A neighbor identified Durr as one of the two men in the alley, and another neighbor corroborated much of Warddell’s testimony regarding the presence of two vehicles at the scene, including her car, a fight between Warddell and Branden, two men entering the alley, the men leaving the alley, and a fire occurring a short time later.

Although an accelerant could not be detected and the cause of the fire could not be determined, a cap to a lighter fluid container was found on the deck of the home. Moore contends that the plastic cap could not have originated from a metal can of fluid, but provided no evidence in support of this contention at trial. Furthermore, fire investigators acknowledged that fire suppression activities, such as water hoses, removal of the home's contents, and accelerant burn, may prevent the discovery of an accelerant in a particular fire. The fact that fire investigators were unable to detect an accelerant or classify the fire did not preclude the jury from determining that the fire was intentionally started.

The circumstantial evidence was sufficient for the trier of fact to convict Moore of arson for the intentional burning of Smith's home. The evidence of the altercations between Durr and Smith at the block party, that Durr and Moore left the block party together and proceeded to a gas station where they purchased lighter fluid, that the two defendants then proceeded to an alley next to Smith's house, that they entered the alley together with the lighter fluid in tow and emerged from the alley together, that one of the men remarked that they had to hurry as they were leaving the alley, that the fire was discovered shortly after the two defendants left the alley, and that a cap to a lighter fluid container was found on the deck of Smith's home, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that the fire was intentionally set and that Moore either started the fire or aided and abetted Durr in doing so.

Furthermore, there was also sufficient evidence to support the felony-murder conviction. A defendant is responsible for the crime he intends to aid and abet as well as the natural and probable consequences of that crime. *Robinson*, 475 Mich at 14-15. The natural and probable consequences of lighting a fire of a dwelling home at night is that occupants of the home may not be able to perceive or wake up from the fire and perish either from the fire or smoke inhalation. There was sufficient evidence that Moore acted with wanton and willful disregard. *Kelly*, 423 Mich at 278-279.

## B. MODIFIED FLIGHT INSTRUCTION

Moore next argues that the trial court erred by failing to provide a modified flight instruction relating to the alleged flight of Warddell and Branden. We disagree. Claims of instructional error are reviewed de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). “[A]n imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights.” *Id.* at 501-502. However, the trial court's determination that a requested instruction is inapplicable given the facts of the case is reviewed for an abuse of discretion. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). “An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.” *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

Evidence of flight may be probative of consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Flight includes actions such as “fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.” *Id.* However, evidence of flight may also have an intention or purpose consistent with innocence as well as guilt, and the issue presents a question for resolution by the jury. *People v MacCullough*, 281 Mich 15, 29-30; 274 NW 693 (1937).

The standard jury instruction governing flight, CJI2d 4.4, provides:

(1) There has been some evidence that the defendant [tried to run away / tried to hide / ran away / hid] after [the alleged crime / (he / she) was accused of the crime / the police arrested (him / her) / the police tried to arrest (him / her)].

(2) This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt.

(3) You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

Moore requested that the following modified instruction be presented to assist the jury in evaluating Warddell's departure from the area:

(1). There has been evidence that one (or two) of the witnesses who has accused DeAndre Moore of wrong doing, has run away, tried to or did go under ground in Lansing, Michigan after being accused of perpetrating the crimes that they allege DeAndre Moore of doing.

(2). A person may run away or hide because of consciousness of guilt.

(3) You may decide that if true, that the witness (or witnesses), did try to run away or hide or go underground, weather [sic] it shows that he, she (or they) had a guilty state of mind them self, that motivated her, him or them to falsely shift blame and falsely accuse DeAndre Moore.

The standard instruction is generally invoked when there is evidence that the defendant tried to flee after being accused of the crime, or after an arrest or attempted arrest. See *Coleman*, 210 Mich App at 4; Moore presents the novel argument that because Warddell heard that the couple had been "accused" by "the streets," a modified flight instruction was applicable. Moore fails to present authority in support of his argument that a flight instruction may be given related to testifying witnesses. Such failure could result in the abandonment of his claim. *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005).

Further, Moore's argument fails on the merits even if it had been properly presented. Moore's argument is essentially that Warddell or Branden falsely accused him to absolve the couple of their own wrongdoing. Warddell and Branden's flight from the area the following day was raised at trial; defense counsel cross-examined Warddell about her concerns that she or Branden would be blamed for the fire and her failure to go to the police at the time. The jury was instructed that it could consider "any bias, prejudice, or personal interest in how this case is decided" and a witness had "any special reason to lie" in determining witness credibility. We conclude that this instruction adequately protected Moore's rights, and the trial court did not

abuse its discretion by declining to give Moore's modified instruction with regards to Warddell.<sup>1</sup> *Kowalski*, 489 Mich at 501-502; *Hartuniewicz*, 294 Mich App 237 at 242.

### III. DOCKET NO. 313567 (DURR)

#### A. VOIR DIRE

Durr first argues that the trial court's jury voir dire was deficient because the court failed to question potential jurors regarding a defendant's exercise of the right to remain silent, and it failed to elicit sufficient information to allow the intelligent exercise of peremptory challenges or challenges for cause. We disagree. The trial court's decision regarding the conduct and scope of voir dire is reviewed for an abuse of discretion. *People v Orlewicz*, 293 Mich App 96, 100; 809 NW2d 194 (2011).

MCR 6.412 governs jury selection and provides, in relevant part:

#### (C) Voir Dire of Prospective Jurors.

(1) *Scope and Purpose.* The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.

(2) *Conduct of the Examination.* The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

“The purpose of voir dire is to afford counsel an opportunity to elicit sufficient information to develop a rational basis for excluding jurors for cause or by peremptory challenge.” *People v Smith (After Remand)*, 122 Mich App 202, 206-207; 332 NW2d 401 (1981). Voir dire is important because it is the only mechanism the defendant has to ensure the selection of an impartial jury, and it allows for the discovery of hidden bias that renders a potential juror incompetent. *People v Tyburski*, 445 Mich 606, 618-619; 518 NW2d 441 (1994) (Opinion by MALLETT, J.). “It is imperative, in securing the rights of the parties to an impartial jury, for the court to allow the elicitation of enough information so that the court itself can make an independent determination of a juror's ability to be impartial.” *Id.* at 620. However, “[a] defendant does not have a right to have counsel conduct the voir dire.” *People v Washington*,

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<sup>1</sup> Moore alleged that the flight instruction applied to both Warddell and Branden. However, Branden did not testify and was held in contempt. Therefore, any instruction related to his testimony would have been inapplicable.

468 Mich 667, 674; 664 NW2d 203 (2003). When the trial court conducts voir dire, an abuse of discretion occurs when it fails to adequately question jurors about potential bias to allow the parties to intelligently exercise challenges for cause. *Id.*

The record indicates that the trial court's voir dire process lasted 1½ days. On October 5, 2012, counsel for Durr filed a document requesting additional voir dire questions. The first question involved a baseball analogy. Counsel sought to use the baseball analogy to explore issues regarding inferences and the prosecutor's burden of demonstrating guilt beyond a reasonable doubt. The second question involved whether the jury would believe Durr set the fire simply because the prosecutor alleged that he did. The third question involved whether the potential jurors had family or friends who were fire fighters or arson investigators.

The court determined that the baseball analogy was confusing, and that it would instead use its own voir dire question regarding reasonable doubt. The court also rejected Durr's second question regarding setting the fire premised on an allegation, indicating that it had a question regarding the information that encompassed that request. Finally, the court noted that it would ask the jurors about their relationship to fire fighters or arson investigators. During voir dire, the court asked the venire: (1) if any juror knew the parties or the witnesses; (2) if any juror had any prior jury service; (3) if any juror had ever been a witness in a legal proceeding, (4) if any juror had any health issues that would prevent their service; (5) if the duration of the trial would present a hardship for any juror; (6) if any juror had a close friend or relative involved in law enforcement; (7) if any juror had a close friend or relative who was a fire fighter or arson investigator; (8) if the jurors could evaluate the testimony of a police officer to the same standards applied to other witnesses; (9) if any juror had any negative or unpleasant contacts with the police; (10) if any juror was related to anyone in the legal profession; (11) if the jurors, their relatives, or their close friends had been the victim of a crime; (12) if the jurors, their relatives, or their close friends had been arrested, charged, or convicted of a crime; (13) if any juror had any religious, personal, or philosophical beliefs that would prevent him or her from returning a verdict; (14) if any juror believed that defendants were guilty merely premised on the information; (15) if any juror had any knowledge or information about the facts of the case; (16) if any juror was familiar with the location; and (17) if the jurors could apply the legal principles of presumption of innocence, burden of proof, and reasonable doubt.

When jury selection continued the next day, the court asked the jurors about the city in which they resided, their occupation, and the occupation of their spouse or significant other. After challenging two jurors for cause, counsel for Durr objected to the trial court's conduct of voir dire as cursory rather than deep and probing. The court rejected the challenge, indicating that it felt it had conducted adequate voir dire to determine if each juror could be fair and impartial.

Durr contends that the most egregious shortcoming in the trial court's voir dire was its failure to explore the jurors' view of defendants who exercised their right to remain silent and whether a defendant's failure to testify would influence the juror's verdict. This Court addressed this issue in *People v Brown*, 46 Mich App 592; 208 NW2d 590 (1973), remanded on other

grounds 393 Mich 174 (1974),<sup>2</sup> and rejected the defendant's argument that the trial court erred by interrupting defense counsel's questions concerning "the jurors' feelings about defendant's right to remain silent and the presumption of innocence." *Id.* at 593-594. This Court stated:

By virtue of [the court rules], the examination of prospective jurors may be conducted by the court or, in its discretion, by the respective attorneys. The general rule is that the scope of voir dire examination of jurors rests largely in the discretion of the trial judge and his decision will not be set aside absent an abuse of discretion. *Corbin v Hittle*, 34 Mich App 631[; 192 NW2d 38] (1971). The purpose of voir dire is to enable the attorneys to elicit sufficient information as is necessary to develop a rational basis for excluding veniremen (whether for cause or by peremptory challenges). 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 465. The scope of voir dire herein was broad enough to enable counsel to obtain the information necessary to exercise defendant's challenges.

Much of the voir dire was personally conducted by the trial judge. He covered the subject areas which one would expect to be of greatest concern to counsel. When two potential jurors made positive responses to certain questions the trial judge carefully interrogated them with respect to possible disqualifying factors which their initial responses might indicate the existence of. Both veniremen were asked if they could afford defendant a fair and impartial trial based upon the evidence adduced at trial. They responded in the affirmative. Moreover, the trial court asked *all* jurors whether they knew of any reason which would preclude them [from] rendering a fair and impartial verdict in the case at hand. In *People v Lockhart*, 342 Mich 595[; 70 NW2d 802] (1955), the identical questions were asked by the trial court and the jurors' responses were held to reveal a want of prejudice. There the Supreme Court concluded the trial judge did not abuse his discretion in refusing to ask a certain question of the veniremen. *Lockhart, supra*, pp 599-600. By analogy, we think the trial judge did not act arbitrarily when he denied counsel the right to query the jurors with regard to two specific matters. Instead he stated what the law expected of jurors and then asked if they could conform to its dictates. This was proper. [*Id.* at 594-595 (emphasis in original, footnote omitted).]

Pursuant to *Brown*, the trial court's questioning is sufficient if it provides a rational basis to exclude veniremen.

Durr also asserts that the trial court's voir dire was "so superficial, broad, and un-insightful that it prevented the defense from making intelligent decisions" about which jurors to challenge because it did not engage in follow-up questions or present hypothetical questions. However, the trial court engaged the jurors in additional questioning when issues were raised

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<sup>2</sup> Opinions of this Court issued before November 1, 1990 are not binding upon future panels of this Court, but may be considered persuasive authority. See MCR 7.215(J)(1).

regarding their qualifications to serve. Consequently, when an emergency room nurse indicated that her daughter was a police officer, the trial court engaged in further questioning to determine whether that would have an impact on her ability to sit as a fair and impartial juror. The record indicates that the trial court fulfilled its duty of questioning jurors regarding potential bias so that defendants' challenges could be intelligently exercised. *Tyburski*, 445 Mich 606, 618-619. Although Durr contends that the trial court's questioning was deficient and did not raise potential hypothetical questions, he fails to delineate what additional questions should have been posed. Durr was not entitled to have the voir dire questions framed exactly as he would have liked; he was only entitled to a voir dire that allowed him to intelligently exercise his challenges, which he received. *Id.* Under the circumstances, the trial court's conduct of voir dire did not constitute an abuse of discretion. *Orlewicz*, 293 Mich App 96, 100.

#### B. MRE 803(24)

Durr next argues that the trial court erred by excluding a hearsay statement made by a four-year-old witness, NT.<sup>3</sup> The statement was offered under MRE 803(24), the catch-all exception to the hearsay rule. Durr argues that the exclusion of the statement deprived him of his constitutional right to present a defense. We disagree. The decision to admit or exclude evidence, including impeachment evidence, is reviewed for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012); *People v McCray*, 245 Mich App 631, 634-635; 630 NW2d 633 (2001). When a trial court excludes evidence, it is incumbent on the party seeking admission to make an offer of proof, and error may not be predicated on the exclusion of evidence unless a substantial right of the party is affected. MRE 103(a)(2); *People v Witherspoon*, 257 Mich App 329, 331; 670 NW2d 434 (2003). Whether a defendant suffered a deprivation of his constitutional right to present a defense is reviewed de novo. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

“A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. US Const, Am VI; Const 1963, art 1, § 20[.]” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). The right to present a defense may be limited by established rules of procedure and evidence to ensure both fairness and reliability in ascertaining guilt and innocence. *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), citing *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

The right to present a defense is not absolute or unfettered. A trial court may exclude evidence if its probative value is outweighed by factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. Therefore, a court may exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. Similarly, defendants are entitled to present witnesses in their defense, but again that right is not absolute. “To the contrary, it requires a showing that the witness' testimony would be both material and favorable to the defense.” The

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<sup>3</sup> NT was four years old at the time the statement was allegedly made, and was six years old at the time of trial.

underlying question is whether the proffered evidence or testimony is relevant and material, or unfairly prejudicial. [*Orlewicz*, 293 Mich App at 101-102 (citations omitted).]

A rule of evidence contravenes a defendant's right to present a defense when it infringes on a defendant's substantial interest or convincingly undermines an element of the defense. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

MRE 803(24) provides:

Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

In *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003), our Supreme Court explained:

[E]vidence offered under MRE 803(24) must satisfy four elements to be admissible: (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. Also, the offering party must give advance notice of intent to introduce the evidence. [*Id.* at 279.]

In *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), this Court delineated the following factors to determine whether certain statements have particularized guarantees of trustworthiness when considering the totality of the circumstances:

(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements were made. [Citations omitted].]

Here, we conclude that the trial court did not abuse its discretion by excluding the evidence. First, although Durr contends that three statements by NT are at issue, the only offer of proof pertained to a statement made to her father, Rickey Tennant (Tennant). Tennant related

this statement in his statement to Detective Foy on February 18, 2011. Tennant indicated that NT stated that she and Jessica were gone from the house and, when they returned, the house was on fire. However, the circumstances surrounding NT's statement were not delineated in the record. It appears that the statement was not spontaneous; Tennant stated that he "kept asking her the same question all day[.]" Additionally, the consistency of NT's other alleged statements to her mother and to the police is not a matter of record because there was no specific offer of proof regarding those statements. There was no assessment made regarding NT's ability to testify at trial. There is no indication that Durr sought to have her declared competent to testify or to compel her testimony to avoid any hearsay issue. NT was questioned by her father, and it is unclear if he asked her leading questions. Although NT arguably had personal knowledge about finding the fire upon returning to the home and would have no reason to lie to her father, the time frame of her statement is absent from Tennant's statement. Thus, in weighing the factors to determine whether the proffered statement had circumstantial guarantees of trustworthiness equivalent to those of categorical hearsay exceptions, the trial court did not abuse its discretion in declining to admit NT's alleged statement, because the statement did not present an underlying foundation to analyze whether the criteria for admission were met. *Lee*, 243 Mich App at 178.

Furthermore, contrary to Durr's contention, the exclusion of NT's statement did not deny him the right to present a defense. NT's statement was unnecessary to contradict Jessica's testimony regarding her location at the time of the fire, because Jessica's placement outside the home at the time of the fire was attested to by three other witnesses. Specifically, one neighbor testified that Jessica was walking up and down the street with NT while talking on the phone for 15 or 20 minutes. Another neighbor testified that she woke up, observed the fire, and saw two little girls walking toward the burning home. Furthermore, a third neighbor testified that he did not think anyone was present in the home where the fire occurred because he saw the two girls walking up the street. In light of the fact that NT's statement would have been essentially cumulative to the other witnesses (the placement of the girls outside the home at the time of the fire), the trial court did not abuse its discretion by excluding this evidence, *King*, 297 Mich App at 472, and the exclusion of this evidence did not deny Durr the right to present a defense, *Yost*, 278 Mich App at 379.

### C. ACCOMPLICE INSTRUCTION

Durr next argues that the trial court erred by failing to provide an accomplice jury instruction in relation to Warddell's testimony. Because Durr did not request such an instruction, his claim of instructional error is unpreserved. *People v Young*, 472 Mich 130, 132, 693 NW2d 801 (2005). Therefore, this claim "may be reviewed *only* for plain error that affects substantial rights." *Id.* at 143 (emphasis in the original). Durr also argues, however, that trial counsel was ineffective for failing to request the instruction. Because Durr did not raise an ineffective assistance of counsel claim in the trial court by moving for a new trial or *Ginther*<sup>4</sup> hearing in the

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<sup>4</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Although Durr did not separately move this Court to remand for a *Ginther* hearing, he does request such a remand in his

court below, appellate review of that issue is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). To establish ineffective assistance of counsel, the defendant must show “that counsel’s performance fell below an objective standard of reasonableness[.]” and that “but for counsel’s deficient performance, a different result would have been reasonably probable.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

The term “accomplice” is defined as a “person who knowingly and willingly helps or cooperates with someone else in committing a crime.” *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993) (citation omitted). The primary purpose of the accomplice instruction is to raise the jury’s awareness of the potential ulterior motives of the witness. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). To warrant the accomplice instruction, the witness must be an accomplice to the crime for which the defendant is on trial. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). An accomplice instruction is unnecessary when the witness does not qualify as an accomplice. See *McGhee*, 268 Mich App at 609.

We find *Young* to be instructive. There, the defendant shot and killed two people while robbing a drug house. The prosecution presented the testimony of two witnesses, Michael Martin and Eugene Lawrence, whom the defendant claimed were accomplices. *Id.* at 133. Martin testified that the defendant approached him for a gun to commit a robbery, but Martin did not have a gun. The defendant spoke to Martin’s brother-in-law, Lawrence, but Martin was not privy to the conversation. *Id.* Martin took the defendant to Lawrence, but did not hear their conversation. Lawrence testified that the defendant represented that he needed a gun because he had been threatened and did not mention his intent to commit a robbery. Lawrence did furnish a gun to the defendant. *Id.* Martin returned to his home with the defendant, but the defendant left, proceeding in the direction of a nearby drug house. The defendant admitted to Martin that he shot the two victims and told him where to find the gun. Martin and Lawrence were never charged with a crime. *Id.* at 133-134. Other witnesses testified that the defendant requested a gun from a man other than Lawrence, the defendant was seen in the drug house shortly before the murders, and a cigarette butt at the scene contained the defendant’s DNA. *Id.* at 134.

The *Young* Court rejected the claim that a cautionary accomplice instruction clearly applied and held that the plain error test was not satisfied:

Finally, applying the plain-error test to this case, we conclude that defendant has not met his appellate burden. A cautionary accomplice instruction was not clearly or obviously required in this case. As the Court of Appeals noted, it is not clear that Martin and Lawrence were accomplices in any event. Moreover, the prosecution presented evidence of guilt beyond the testimony of the alleged accomplices, including testimony from other witnesses and physical evidence that defendant was at the murder scene. Further, defense counsel thoroughly cross-examined Martin and Lawrence and challenged their testimony during closing argument, thereby exposing their potential credibility problems to

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appellate brief if this Court finds that further development of the record is necessary. We do not find that further development of the record is necessary to resolve this issue.

the jury. The court also instructed the jury to consider any bias, prejudice, or personal interest that a witness might have. For these reasons, defendant has not demonstrated a plain error that affected his substantial rights. [*Id.* at 143-144.]

In *People v Gonzalez*, 468 Mich 636; 664 NW2d 159 (2003), the defendant's conviction arose from the brutal rape and murder of the victim. The defendant and his friend, Woodrow Couch, visited the victim in her apartment. After visiting for a short time, both men left. However, the defendant later returned, sexually assaulted the victim, manually strangled her, and set her corpse on fire to conceal his crime. *Id.* at 638-639, 642. The defendant gave conflicting statements regarding his contact with the victim and claimed that Couch was in the apartment with the victim when he departed. *Id.* at 639 n 3.

On appeal, the defendant asserted that the trial court erred by failing to sua sponte provide a cautionary instruction regarding accomplice testimony and that trial counsel was ineffective for failing to request the instruction. *Id.* at 639. The Court held that neither plain error nor ineffective assistance of counsel was shown, *id.* at 643-645, stating:

We conclude that it was not error for the trial court to omit the cautionary accomplice instruction because there is no evidence that Couch, the alleged accomplice, was involved in the crimes at all. Significantly, the DNA evidence *excluded* Couch as a potential donor of the sperm found on the victim. Moreover, the cautionary accomplice instruction would have been inconsistent with defendant's theory. Defendant's theory was that he neither committed the charged crimes, nor was he involved in any way. In fact, defendant's own attorney claimed that someone other than Couch committed the offense during his closing argument.

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Here, defendant is unable to demonstrate ineffective assistance of counsel. As discussed above, a cautionary instruction regarding accomplice testimony was inappropriate because it was inconsistent with the evidence and it was inconsistent with defendant's theory at trial. Further, it is reasonable to presume that the attorney's failure to request the cautionary instruction was a matter of trial strategy. In addition to its inconsistency with defendant's theory, the instruction might have damaged defendant's case inasmuch as it would have suggested to the jury that defendant was involved in the crime. [*Id.* (emphasis in original.)]

In *Young*, our Supreme Court held that it was not "clear" that Martin and Lawrence were accomplices despite the fact that their actions ultimately allowed the defendant to obtain a gun. Similarly, in the present case, it is far from clear that Warddell could be deemed an accomplice. Although Branden may have initially intended on aiding and abetting an arson at Smith's home, he was thwarted by Warddell who implored him not to proceed into the alley and fought with him the entire time defendants were in the alley and until they returned. Under the circumstances, Durr has failed to demonstrate that the trial court's failure to sua sponte provide an accomplice instruction was plain error affecting his substantial rights.

Additionally, an accomplice instruction would have been inconsistent with the defense theory of the case. A review of closing argument by counsel for Durr reveals that he questioned the testimony about the assaults, threats, and timing of events at the block party by Smith, Anderson, Butler, and Warddell because of their lack of consistency. He also asserted that there was no arson because the fire investigators did not find an accelerant and could not determine the cause of the fire. Counsel further questioned the witnesses' veracity in light of the failure to call the police regarding Durr's alleged assaultive contact with Smith at the party. In fact, rather than arguing that Warddell was an accomplice to Durr, counsel argued that Warddell's departure from the area and failure to contact the police rendered her version of events not credible.

The impartial evidence by a neighbor who observed Warddell's fight with Branden to prevent him from entering the alley did not support the contention that Warddell was an accomplice to the fire. Furthermore, the defense theory of the case was not that Warddell was an accomplice of Durr. Rather, Durr's theory of the case was that arson could not be established by the fire investigation, that his involvement in the arson could not be established by credible evidence, that he was falsely accused by his ex-girlfriend Smith, and that Warddell's departure from the area was indicative of her lack of credibility and possible guilt.

Accordingly, failure to give an accomplice instruction was neither plain error nor affected Durr's substantial rights. Furthermore, because the defense strategy at trial was to deny any involvement by Durr in starting the fire, trial counsel was not ineffective for failing to request the instruction. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

#### D. MODIFIED FLIGHT INSTRUCTION

Like Moore, Durr also argues that the trial court erred by failing to provide a modified flight instruction in relation to Warddell's alleged flight. Again, we disagree. As stated above, Warddell's flight from the area was explored at trial, and the jury was instructed appropriately regarding its determination of witness credibility. Additionally, Warddell testified that she spoke to Durr after the fire. He told her to keep her mouth shut and that he had a "crazy family," which Warddell interpreted as a threat. In light of the evidence discussed in Section II(B), *supra*, and additionally in light of Warddell's testimony that she left the area because of threats by Durr and her fear for her safety, the trial court did not abuse its discretion by concluding that the evidence did not support the modified flight instruction. *Hartuniewicz*, 294 Mich App at 242.

#### E. MALICE ELEMENT OF FELONY MURDER

Durr next argues that there was no evidence indicating that he knew that anyone would be in the home and, thus, there was insufficient evidence of malice to support his felony-murder conviction. We disagree.

As previously indicated, the elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit or assisting in the commission of any of the felonies delineated in MCL 750.316(1)(b). *Bobby Smith*, 478 Mich at 318-319; *Carines*, 460

Mich at 758-759. MCL 750.316(1)(b) includes arson. The facts and circumstances of the killing may give rise to an inference of malice. *Carines*, 460 Mich at 759. “A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Id.*

In *People v Nowack*, 462 Mich 392, 395-396; 614 NW2d 78 (2000), the defendant survived an explosion in his apartment with only minor injuries, but two individuals who lived in an adjoining section of the apartments died from the explosion. The prosecutor theorized that the defendant attempted to commit suicide by releasing gas into his apartment, but the defense claimed that the cause of the gas release may have been the furnace and water heater. *Id.* The defendant was convicted of felony murder, premised on common-law arson, and our Supreme Court held that there was sufficient evidence to support the element of malice because “the jury could infer that defendant . . . intentionally set in motion a force likely to cause death or great bodily harm.” *Id.* at 394, 401.

Similarly, in the present case, there was sufficient evidence that Durr intentionally set the arson in motion that caused the death of the two-year-old victim. Durr had a history of violence with Smith, and throughout the evening at the block party, he cursed, threatened, and fought with her. The last physical confrontation resulted in a threat to kill Smith and a threat to burn her house down. Durr left the party angry, proceeded to a gas station where lighter fluid was obtained, went to the alley near Smith’s home, and emerged from the alley in a rush, laughing with Moore. Shortly thereafter, the fire was observed. The elements of felony-murder are satisfied because the two-year-old victim was killed from the arson fire and the malice requirement was satisfied by Durr’s actions in intentionally setting in motion the fire that caused the victim’s death. *Id.*

#### F. SUFFICIENCY OF THE EVIDENCE OF ARSON

Lastly, in a pro se Standard 4 brief,<sup>5</sup> Durr argues that there was insufficient evidence to convict him of arson of a dwelling house. We disagree.

Durr’s challenge to the sufficiency of the evidence focuses on evidentiary and instructional challenges that we have previously addressed and rejected. Durr first argues that NT’s statement should have been admitted. As previously discussed, the trial court did not abuse its discretion by refusing to admit this statement because the circumstances surrounding the statement were not contained in the offer of proof. Furthermore, the purpose of the statement, to show that she and Jessica returned to the home after the fire was started, was established through other witnesses.

Durr’s sufficiency challenge is also based on the credibility of Jessica and Warddell. However, this Court may not reweigh the credibility of witness testimony, which is within the province of the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

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<sup>5</sup> Filed pursuant to Supreme Court Administrative Order No. 2004-06.

Lastly, Durr relies on the fact that fire investigators could not conclude that the fire was intentionally set. However, the fire investigators testified that there were restrictions regarding the classification of a fire as arson. Specifically, a fire may be classified as undetermined if the physical evidence does not support arson. However, the testimony indicated that fire fighters in the course of dousing a fire engage in activities that may destroy evidence of arson, such as the use of a water hose, overhaul or hooks to look for hotspots, and discarding burning materials outside the home to stop the smoke. Testimony also indicated that an accelerant could burn in the fire, preventing its detection. Consequently, the inability of the investigators to conclude that the fire was the result of arson was not dispositive of the jury's ability to do so.

Durr also ignores the circumstantial evidence linking him to the fire, as discussed in other portions of this opinion. Although no one actually saw Durr start the fire, this evidence, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that Durr acted on his threat to harm Smith and burn her home after he left the party angry. *Dunigan*, 299 Mich App at 582.

Affirmed.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra