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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v KELLY NICHOLE BRAUN, Defendant-Appellant.	UNPUBLISHED November 17, 2025 12:47 PM No. 365738 St. Clair Circuit Court LC No. 22-002162-FH

Before: GARRETT, P.J., and PATEL and YATES, JJ.

PER CURIAM.

Defendant, Kelly Nichole Braun, lived with Randall Redlowsk for a brief period of time in September 2022. After a dispute arose between Braun and Redlowsk, she set fire to his house. A jury convicted her of second-degree arson, MCL 750.73, and the trial court sentenced her, as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years' imprisonment.[1] She appeals by right, alleging ineffective assistance of counsel, insufficiency of the evidence, prosecutorial error, trial court bias, and denial of her right to present a diminished-capacity defense. She also asserts that the trial court sentenced her under an incorrect sentencing guidelines range and denied her the right to allocute at sentencing. Because Braun's arguments lack merit, we affirm.

I. FACTS AND PROCEEDINGS

Braun and Redlowsk knew each other long before the incidents giving rise to this case, but had not been in contact for years before Braun telephoned Redlowsk in late August or early September 2022. Braun needed a place to live and asked Redlowsk if she could stay with him. He agreed to rent her a room in his home, and she arrived at his home in early September 2022, with her belongings. According to Redlowsk, Braun told him she would give him $450 when she moved in, but she was unable to pay him anything when she arrived, and it soon became apparent

[1] As discussed later in this opinion, the prosecution also charged Braun with assault with a dangerous weapon, but the jury deadlocked on that charge, and the trial court declared a mistrial with respect to that charge.

that the arrangement would not work out. She repeatedly told Redlowsk she would be able to pay him rent money, but always had an excuse for not being able to pay him. He ultimately asked her to leave his home. According to Braun, she decided to move out because of Redlowsk's unwelcome sexual advances and told him on September 15, 2022, that she was moving out. She had spent only two nights at the home because, whenever she was there, he harassed her "about wanting to do sexual things to [her]." She had slept in a friend's car on the nights she did not stay at Redlowsk's home.

Redlowsk never gave Braun a key to the home or the entry code for the door keypad. When she wanted to get into the house, she either knocked on the door and was let inside or she borrowed a ladder from a neighbor and climbed through an upstairs window. On September 16, 2022, Braun arrived at the house to collect her belongings. Redlowsk refused to let her inside and told her he was busy. Braun went to a nearby home that Brandy Johnston shared with her fiancé and asked to borrow a ladder. Braun stated that she had locked herself out of the home and needed to retrieve her medication from inside the house. According to Johnston, Braun's words were slurred and she "seemed just out of it." Johnston and her fiancé did not loan Braun a ladder. Braun then flagged down another neighbor, Michael Mann, as he was leaving his home to play disc golf. She asked to borrow a ladder, claiming that her boyfriend locked the doors when he went to work and did not realize that she did not have a key. Mann loaned Braun a ladder and left to play disc golf.

Thereafter, Redlowsk discovered Braun inside an upstairs bedroom in his home and saw a ladder propped up against the house leading to an open window. He told Braun she was not permitted inside the house and needed to leave. He maintained that Braun "started flipping out" and yelling at him. She told him that he could not kick her out and physically attacked him. He picked her up and carried her to a door that led to a balcony outside. He claims that he set her down outside on the balcony, went back inside, and locked the door. Braun then kicked in the door and had a one-by-four-inch board in her hands. She struck Redlowsk with the board, which he managed to take away from her. She also threatened to burn the house down and kill him if she did not get her belongings back.

According to Braun, Redlowsk dragged her to the balcony door, picked her up, and threw her outside on the balcony. She went down the steps leading to the ground, retrieved a board, and went back up the steps. She used the board to "nudge" open the door to the balcony, and Redlowsk was standing on the other side of the door. He ran toward her, and she ran backwards to avoid him. She denied striking him with the board. She asked him to give her her cell phone, which she heard ringing inside the house, but he refused. She then left.

Redlowsk called the police to report the incident, and City of Port Huron Police Officer Zachary Paye responded to Redlowsk's home. Redlowsk showed Paye the door that Braun had kicked in and the board she swung at him. Redlowsk told Paye that the board grazed his arm when Braun swung it. Paye did not observe an injury to Redlowsk's arm. Paye called Braun's cell phone, but his call went directly to voice mail. He drove around the area looking for a female wearing a pink shirt and jeans—the clothing Redlowsk indicated Braun was wearing—but was unable to locate anyone matching that description. Redlowsk packed up Braun's belongings and set them in front of his house as Paye directed. He did not include Braun's cell phone with her belongings because he had thrown it outside in his backyard.

Braun walked back to Redlowsk's house approximately one or two hours after she left to see whether he had placed her belongings outside his house. When she arrived, Redlowsk was throwing her things all over his yard and the street. She picked up what she could find and placed the items in a duffle bag. She was unable to locate her cell phone and left. She returned to Redlowsk's home again to look for her cell phone. She claims that she saw Redlowsk in his kitchen through a window and asked him for her cigarettes, which she had left in a bag inside the house. Redlowsk threw a lit cigarette out the window at her. She used the lit cigarette to light half of a cigarette she found on the ground because she did not have a lighter or matches with her. She dropped the lit cigarette Redlowsk threw at her and the half-cigarette she had smoked on the ground when she was done with them.

When Mann returned from playing disc golf, he saw Braun with what appeared to be luggage by her side. He walked over to her to ask about his ladder. Braun showed him bruises on both of her arms and her neck and told him that she should call the police on Redlowsk. According to Mann, she also stated that she should burn Redlowsk's house down and scoffed as if it was a joke. Mann did not take her seriously and went inside his house. Braun denied telling Mann that she should set Redlowsk's house on fire.

Approximately 30 minutes later, as Mann was washing dishes, he saw Braun walk past his house. Thereafter, James Drum saw a flickering light between the two houses located directly behind Drum's house. One of the houses belonged to Redlowsk. Drum saw the same flickering light five minutes later. Afterward, the lights inside Mann's and Drum's residences began flickering and both men saw Redlowsk's house on fire. Mann observed the utility wires above Redlowsk's house sparking. Redlowsk became aware that something was wrong when the lights inside his house began flickering and recalled that Braun threatened to burn down his house. He called 911 and heard screaming from his yard that sounded like Braun's voice. At 10:15 p.m., Paye was again dispatched to Redlowsk's house, this time because of a structure fire. As Paye approached, he observed Redlowsk's house fully engulfed in flames.

Officer James Campbell investigated the fire. He obtained video footage from Drum's surveillance camera positioned in the back of Drum's house. Campbell returned to Redlowsk's house a few days later at which time a police dog was transported to the home to detect possible accelerants. The dog did not indicate the presence of an accelerant. Campbell found Braun's cell phone in the yard, and Redlowsk told Campbell that he threw the phone out a window. Under the steps leading to the balcony, Campbell observed a woodpile that he believed was the first ignition point of the fire. At trial, the prosecutor played video clips from Drum's surveillance camera. As the videos played, Campbell testified about what they depicted. Apparently, the videos showed flickers of light, two ignition points, and a person whom Campbell identified as Braun walking around the area.[2]

[2] Because this Court was not provided with the video clips, it is unknown specifically what they showed or how clear the videos were. As we discuss later in this opinion, however, it appears that it was difficult to see what was occurring in the videos.

City of Port Huron Fire Marshal Kyle Brunk also investigated the fire. He testified that the fire had two points of origin: one near the doorway going into the garage and the other in the woodpile located under the steps. Brunk did not believe that a cigarette butt found in the woodpile was related to the fire because it was not burnt and was located in an area with leaves around it. He testified that if a cigarette causes a fire, it is usually consumed in the fire. Therefore, in most cases, a cigarette that causes a fire will not be found. Brunk opined that the cause of the fire was not accidental because the video clips showed a person walking near the house, and the fire had two points of origin that were not located near heat sources. Because no heat source was found, Brunk determined that the heat source, such as a lighter, was brought to the location and used to start the fire. He opined that the flare of light in the video clips was an open flame and that the fire was intentionally set with an open flame. He concluded that there was no other explanation for the cause of the fire and did not believe it was accidentally caused by a cigarette. Although Braun admitted that she was the person with "fluffy hair," a pink shirt, and ripped jeans in the video clips, she denied that she was the person with "fluffy hair," a black shirt, and ripped jeans in the video clips. She also denied setting fire to Redlowsk's house, threatening to set fire to the house, and seeing the fire before she left the area.

The prosecution charged Braun with second-degree arson and assault with a dangerous weapon for swinging the board at Redlowsk. The jury convicted Braun of the arson charge, but was deadlocked on the assault charge. The trial court declared a mistrial with respect to the assault charge. Following the verdict, the court revoked Braun's bond and ordered that she be held in jail pending sentencing. Braun then escaped from custody, fled the courthouse, and jumped into the St. Clair River. She was rescued and transported to the hospital.

The trial court sentenced Braun as previously described. Thereafter, she filed a motion for a new trial on the basis of ineffective assistance of counsel, which the trial court denied. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Braun first argues that her trial attorney, Frederick Lepley, rendered ineffective assistance of counsel for three reasons: (1) failing to request a referral to the forensic center for competency and criminal responsibility, (2) failing to object to Officer Campbell identifying her as the person in the video, and (3) failing to request a jury instruction on third-degree arson as a lesser included offense of second-degree arson. A defendant preserves a claim of ineffective assistance of counsel for our review by moving for a new trial or a *Ginther*[3] hearing in the trial court, *People v Head*, 323 Mich App 526, 538-539; 917 NW2d 752 (2018), or by filing a motion to remand for a *Ginther* hearing in this Court, *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020). Braun preserved her arguments for our review by moving for a new trial and a *Ginther* hearing in the trial court and moving to remand for a *Ginther* hearing in this Court. Because the trial court

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

denied her motion for a new trial, and this Court denied her motion to remand,[4] our review is limited to errors apparent on the record. *Id.*

"A claim of ineffective assistance of counsel presents a mixed question of law and fact." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). We review for clear error the trial court's findings of fact, if any, and review de novo the court's determination whether the defendant was denied the effective assistance of counsel. *People v Haynes*, 338 Mich App 392, 429; 980 NW2d 66 (2021). To establish the right to a new trial on the basis of ineffective assistance of counsel, "a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Abcumby-Blair*, 335 Mich App at 228. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted).

A. COMPETENCY AND CRIMINAL RESPONSIBILITY

Braun contends that Lepley rendered ineffective assistance of counsel by failing to refer her to the Center for Forensic Psychology (CFP) to assess her competency to stand trial. The provisions of the Mental Health Code, MCL 330.2020 *et seq.*, govern a criminal defendant's competency to stand trial. *People v Davis*, 310 Mich App 276, 288; 871 NW2d 392 (2015). "Under MCL 330.2020, a defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense." *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). MCL 330.2020(1) provides:

> A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

The defendant, the court, or the prosecution may raise the issue of the defendant's competence to stand trial. MCL 330.2024. "When the issue arises, the court must order the defendant's examination by the CFP or other qualified facility. MCL 330.2026(1)." *Davis*, 310 Mich App at 288. Following the examination and the examiner's submission of a written report, the trial court shall determine whether the defendant is competent to stand trial. MCL 330.2030.

Braun asserts that she informed Lepley she was hearing voices and receiving signs from God through birds. Along with her motion for a new trial in the trial court, she provided an affidavit averring that she was hearing voices while incarcerated in jail before and during trial.

[4] *People v Braun*, unpublished order of the Court of Appeals, entered November 1, 2024 (Docket No. 365738).

She claimed that she sent kites in the jail to see a doctor, but was never provided any mental-health services in response to the kites. She further averred:

> During trial, I told my trial attorney I was hearing voices and getting signs from God through birds. During my trial I was suffering from psychotic and emotional numbness and had difficulty thinking. I lacked the ability to follow my attorney's legal strategy, understand court procedures as well as the range and nature of the possible penalties. The day before my trial was to start, my trial counsel asked the court and prosecutor off record about a competency examination due to my mental state. I recall the court and prosecutor indicated that I seemed competent.

In addition, Braun stated in her affidavit that after she escaped from custody and jumped into the St. Clair River, she was transported to the hospital and diagnosed with bipolar disorder, borderline personality disorder, post-traumatic stress disorder, unspecified mood disorder, generalized anxiety disorder, and attention deficit hyperactivity disorder (ADHD). She maintained that the prosecution charged her with escape as a result of the incident, her trial attorney in that case filed a notice of insanity, and she was awaiting a forensic examination for criminal responsibility. Finally, Braun averred that she did not receive her medications for ADHD, depression, and anxiety before she attended trial in the instant case on February 22 and 23, 2023.

Although Braun asserts that Lepley requested a competency examination off the record, she argues that he should have made the request on the record and that his failure to do so fell below an objective standard of reasonableness. Alternatively, she contends that the trial court erred by failing to refer her for a competency examination. Braun's arguments lack merit because the record fails to indicate that she was not competent to stand trial. The trial court held three plea hearings in the eight days preceding trial, with the first occurring on Monday, February 13, 2023. Lepley, the prosecutor, and the trial court discussed the sentencing guidelines and the plea agreement that the prosecutor offered. The court then addressed Braun, who indicated she understood the sentencing guidelines and realized that she could serve less than half of the prison time she would otherwise serve if she accepted the plea offer. The conversation between Braun and the court continued, and Braun repeatedly indicated that she understood the trial process the court was explaining to her. Braun also stated that she had no questions of Lepley and wanted to think about the plea offer until Thursday, February 16, 2023.

At the beginning of the hearing on February 16, 2023, the trial court indicated that a plea agreement had been reached, but Braun then asked to speak with Lepley, which the court permitted. Lepley met privately with Braun both before and after the parties met with the court in chambers. Braun apparently told Lepley in the conference room that she wanted to accept the plea offer, but she stated on the record that she wanted to proceed to trial. Lepley explained that he advised Braun, because of the video evidence, that she would be in a much better position if she accepted the plea offer. When the court asked Braun whether she understood the plea offer, Braun responded, "No, I don't." When asked what she did not understand, Braun stated she did not understand why she had been charged with assaulting Redlowsk with the board because she did not assault anyone with a board. The trial court advised her not to argue the facts of the case or the evidence and asked whether she understood "the opportunity" she had been given. Braun

responded, "I don't understand why it's an opportunity to plead guilty to something I didn't do." The following exchange then occurred:

> *THE COURT:* Well, you understand the offer. You just don't want to plead guilty to it, correct? Am I right?
>
> *THE DEFENDANT:* Would you plead guilty—
>
> *THE COURT:* Ma'am.
>
> *THE DEFENDANT:* Yes, ma'am, yes, yes.
>
> *THE COURT:* Am I right?
>
> *THE DEFENDANT:* Yes.

The court again explained to Braun that she would serve twice as much time if she was convicted following trial than she would serve if she accepted the plea offer. Braun indicated she understood and wanted to go to trial.

The day before trial, the parties again appeared before the trial court. Lepley stated that they had reached a plea agreement and stated the agreement on the record. The trial court swore in Braun to provide the factual basis for the plea. Braun indicated that she understood, among other matters, the rights she was giving up, the habitual-offender enhancement, and her maximum possible sentence. She also stated that she was satisfied with Lepley's representation. She then became argumentative, however, and the court warned her to stop "monkeying around with and, and manipulating the Court and the court system." Thereafter, Braun stated that she wanted to proceed to trial.

Six minutes later, after Braun apparently again expressed a desire to accept the plea, the proceeding reconvened. When asked whether she intended to damage Redlowsk's property, Braun admitted that she threw a cigarette, but denied intending to damage the property. When Lepley asked her a second time whether she intended to damage the property, she responded, "No, I would not agree with that. I guess we're going to trial cause I didn't do that on purpose. I really didn't. I threw a freaking cigarette." The court explained to Braun that she could not plead guilty if she denied intending to damage the property. Braun then admitted that she intended to damage the property when Lepley asked her if she intended to do so. However, she again denied intending to damage the property when the prosecutor asked her the same question. The prosecutor questioned Braun as follows:

> *MS. WILSON* [the prosecutor]*:* And you're telling us the reason that you threw the cigarette was because you intended the house—
>
> *MR. LEPLEY:* Say yes.
>
> *MS. WILSON:* —or something connected to the house to catch fire?
>
> *MR. LEPLEY:* Yes.

THE DEFENDANT: No. That's the truth. Okay, yes, yes I did.

THE COURT: I don't think we have a plea, we don't. We're going to trial.

The record of the pretrial proceedings fails to indicate that Braun suffered from a mental infirmity. Although Braun was argumentative at times and waffled regarding whether she wanted to accept the plea offer, her statements were coherent and indicated she understood what was happening and was able to logically assess her choice. The record of the trial proceedings similarly failed to suggest any mental infirmity. Braun testified at trial and was able to answer questions appropriately and coherently. Her answers indicated her awareness of what was occurring and her logical thought process. The record fails altogether to show that she was unable to assist in her defense or lacked an understanding of the proceedings. See MCL 330.2020; *Mette*, 243 Mich App at 331. Braun's affidavit is self-serving, and she failed to provide any other evidence to substantiate her claimed mental impairment. Moreover, the fact that Braun escaped custody and jumped into the St. Clair River after the jury rendered its verdict fails to indicate that she was not competent to stand trial. Accordingly, on this record we conclude that Lepley's representation did not fall below an objective standard of reasonableness. Similarly, the trial court did not err by failing to refer Braun for a competency examination on its own accord.

Braun also contends that Lepley rendered ineffective assistance of counsel by failing to request a referral to the CFP for a criminal responsibility examination. She asserts that Lepley's failure denied her the ability to present a complete defense. Braun recognizes that Lepley could not argue diminished capacity as a defense as our Supreme Court determined in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), but she asserts that *Carpenter* did not preclude him from requesting a criminal responsibility evaluation. She further maintains that Lepley should have requested an evaluation because, at the time of trial, cases were pending before our Supreme Court asserting that *Carpenter* was wrongly decided.

MCL 768.21a states, in relevant part:

> (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400 of the mental health code, 1974 PA 258, MCL 330.1400, or as a result of having an intellectual disability as defined in section 100b of the mental health code, 1974 PA 258, MCL 330.1100b, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity.
>
> (2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.

In *Carpenter*, 464 Mich at 236-239, our Supreme Court analyzed the continued viability of diminished capacity as a defense in light of MCL 768.21a and related statutory provisions. The Court held that "the Legislature's enactment of a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation demonstrates the Legislature's intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id*. at 236 (emphasis in original).

Although Braun asserts that *Carpenter* did not preclude Lepley from requesting a criminal responsibility evaluation, his failure to do so did not fall below an objective standard of reasonableness considering that the result of the evaluation could not have been used to establish Braun's diminished capacity to commit the charged offenses. Notably, Braun does not contend that she was legally insane when the offenses occurred, and, although she testified she was under the influence of narcotics at the time of the offenses, her voluntary drug use did not render her legally insane as stated in MCL 768.21a(2). Finally, on this record, we reject Braun's claim that Lepley was remiss by failing to request a criminal responsibility examination on the chance that our Supreme Court opted to overrule *Carpenter*. The record fails to demonstrate that Braun lacked the mental capacity to commit the charged offenses. Therefore, Lepley did not render ineffective assistance of counsel by failing to request a criminal responsibility examination.

B. OFFICER CAMPBELL'S TESTIMONY

Braun next argues that Lepley's representation was deficient because he failed to object when Officer Campbell identified her in a video played during trial. MRE 701 governs the admission of lay opinion testimony. *People v Zitka*, 335 Mich App 324, 345; 966 NW2d 786 (2020). The evidentiary rule provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. [MRE 701.]

However, if the "jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *People v Perkins*, 314 Mich App 140, 162; 885 NW2d 900 (2016) (quotation marks and citation omitted), vacated on other grounds by *People v Hyatt*, 316 Mich App 368 (2016), affirmed in part and reversed in part by *People v Skinner*, 502 Mich 89 (2018).

In *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013), Sergeant Ron Gibson testified regarding individuals in surveillance video footage and still photos taken from the video footage. The purpose of the testimony was to establish whether two suspects involved in a murder at a gas station were at the gas station earlier in the evening before the murder. *Id*. at 49. Gibson explained the photos and video footage, including the identity of individuals in the photos and video footage, but did not identify any of the individuals as the defendant. *Id*. 49-51. This Court determined that "Gibson's testimony was properly admitted as lay opinion testimony under MRE 701," reasoning that it "was rationally based on his perception" because he watched the

surveillance video and prepared short video clips and photos from the video. *Id*. at 50-51. In addition, Gibson's testimony was intended to provide a clearer understanding of a fact at issue in the case—whether the two suspects depicted in the video were at the gas station previously. *Id*. at 51. This Court stated, "[b]ecause it can be inferred that Gibson viewed the surveillance footage and still photos several times to reach his conclusions and opinions, it can similarly be reasonably inferred that Gibson's testimony helped the jury to correctly and efficiently determine whether the two individuals seen earlier in the footage were the same individuals who were involved in the murder later depicted in the video." *Id*. at 52. Further, "Gibson's testimony did not invade the province of the jury" because he did not identify the defendant in the video or photos and created the photos himself. *Id*. at 52-53. This Court stated, "because Gibson was comparing the video surveillance video to still images that he himself had *created* from the six-hour long video, Gibson was in the best position to identify the individuals in the photographs as being the same as those depicted in the video." *Id*. at 53 (emphasis in original).

Unlike *Fomby*, the police officer in *Perkins* identified an individual depicted in surveillance footage as one of the defendants. Officer Terence Green testified at a joint trial of three defendants that video footage and still frames of the video depicted Kenya Hyatt, a defendant. *Perkins*, 314 Mich App at 160-161. This Court determined that "Green's testimony invaded the province of the jury." *Id*. at 161. Specifically, we noted, "There was nothing about the images (i.e. poor quality of the images, defendant wearing a disguise) that necessitated Green's opinion," and the trial court remarked, " 'I would have no trouble making an identification myself.' " *Id*. at 162.

In the instant case, the prosecutor questioned Officer Campbell as follows:

> *Q*. So this clip, number one starts at 9:23. Tell us what we're going to see.
>
> *A*. Basically, in this clip, you're going to see Miss. Braun approach from the left, right nearby the streetlight. She's going to pause for a second prior to walking through the alley to the sidewalk and then walking up along the bushes and to the back. If you look closely, you can see the outline of the garage. You're eventually going to see her walk right behind the, the garage where it's highlighted.
>
> *Q*. All right. So you said, Miss Braun, did you know the Defendant before this incident?
>
> *A*. I did not.
>
> *Q*. During this incident, did you have a chance to have personal contact with the Defendant?
>
> *A*. During this incident, no.
>
> *Q*. During or during [sic] the investigation of the incident?
>
> *A*. Yes.
>
> *Q*. And about how long did you have personal contact with her?

A. Approximately an hour and a half to an hour and 45 minutes.

Q. Okay. So when you say that this is Mrs.—this is Miss. Braun that we see in the video, what factors are you relying on when you say that?

A. Well, I look at the hairstyle. That particular day she had a particular hairstyle being pigtails. She also had the what appeared to be the same body physique, body style, along with the same clothing, being a bright colored shirt that she committed the, the crime earlier in the day and also the pants that appear to be ripped in the thigh area.

After Campbell's initial identification of the person in the video clips as Braun, he referred to the person as "she" or "her."

On cross examination, Lepley questioned Campbell regarding how he knew that Braun was the person in the video clips:

Q. Now, in terms of the video evidence that we reviewed earlier today, you'd agree that if you just look at that video evidence alone, you can't just look at that and, and anybody looking at that couldn't—when you first see the first video clip of somebody that's kind of walking in the alley, wearing kind of a dark colored clothing you, you can't tell if that's a male or a female at that point, correct?

A. Male or female?

Q. I mean, just looking at the video alone?

A. You can see the hairstyle.

Q. Okay. So can you tell—identify who the person is just looking at the video?

A. No.

Q. Okay. And so when, when you testified and you did that, you basically are testifying to what your opinions are based on, I guess, the—your investigation, correct?

A. Correct.

Campbell's identification of the person in the video as Braun did not invade the province of the jury as she contends. Campbell admitted that a person viewing the video would not be able to identify the person in the video. Because the video was not provided to this Court, it is unknown whether the video quality was unclear, it was too dark outside to easily see what the video depicted, or whether the events that occurred in the video were too far away. Notably, we stated in *Perkins*, 314 Mich app at 162, that nothing about the images in the video, "i.e. poor quality of the images," necessitated Officer Green's opinion regarding the identity of the person in the video. In the instant case, however, it appears that something about the video rendered Campbell's testimony

identifying Braun as the person in the video helpful to a clear understanding of his testimony or the determination of a fact in issue. See MRE 701(b).

In addition, Campbell's testimony was rationally based on his perception. See MRE 701(a). He testified that his opinion that Braun was the person in the video was based on the person's hairstyle, body type, and clothing, which matched the clothing Braun wore earlier in the day during the incident with the board. Campbell obtained and reviewed approximately 5½ hours of video footage taken with Drum's surveillance camera and interviewed Braun following her arrest. Considering the apparent difficulty of identifying the person in the video, he was in a better position than the jurors to determine whether the person in the video was Braun. See *Fomby*, 300 Mich App at 53. Further, Braun admitted that she was the person in the video wearing a pink shirt, although she denied being the person wearing a black shirt. Because Campbell's testimony was admissible under MRE 701, Lepley did not render ineffective assistance of counsel by failing to object to Campbell's identification of the person in the video as Braun.

C. JURY INSTRUCTION

Next, Braun argues that Lepley's representation was deficient because he failed to request a lesser included offense jury instruction on third-degree arson. "[J]ury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014) (quotation marks and citation omitted). "[A] jury instruction on a necessarily included lesser offense is appropriate if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Yeager*, 511 Mich 478, 490; 999 NW2d 490 (2023) (quotation marks and citation omitted). A necessarily included lesser offense is an offense "in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Everett*, 318 Mich App 511, 529; 899 NW2d 94 (2017) (quotation marks and citation omitted).

MCL 750.73(1) provides, in relevant part, that "a person who willfully or maliciously burns, damages, or destroys by fire or explosive a dwelling, regardless of whether it is occupied, unoccupied, or vacant at the time of the fire or explosion, or its contents, is guilty of second degree arson." A "dwelling" "includes, but is not limited to, any building, structure, vehicle, watercraft, or trailer adapted for human habitation that was actually lived in or reasonably could have been lived in at the time of the fire or explosion and *any building or structure that is within the curtilage of that dwelling or that is appurtenant to or connected to that dwelling*." MCL 750.71(d) (emphasis added). "In contrast to second-degree arson (requiring that damage be done to a dwelling), third-degree arson requires only that damage be done to buildings or structures." *People v Lewis*, 322 Mich App 22, 30; 910 NW2d 404 (2017). MCL 750.74(1)(a) states that a person commits third-degree arson if the person "[w]illfully or maliciously burns, damages, or destroys by fire or explosive any building or structure, or its contents, regardless of whether it is occupied, unoccupied, or vacant at the time of the fire or explosion."

Braun argues that Lepley rendered ineffective assistance of counsel by failing to request a third-degree arson jury instruction because evidence showed that the fire started at the garage, which was a building rather than a dwelling. Braun's argument lacks merit. The prosecution contends that Redlowsk's garage was attached to his dwelling. It is unclear from the record

whether the garage was attached to Redlowsk's dwelling or whether it was a detached garage, but the garage was included as part of the dwelling in either case. Under MCL 750.71(d), a "dwelling" includes a building or structure that is connected to a dwelling or that is within the curtilage of a dwelling. *Black's Law Dictionary* (12th ed) defines "curtilage" as "[t]he land or yard adjoining a house, usu. within an enclosure." Even if the garage was detached from the house, it was located on the land and in the yard adjoining the house and was therefore within the curtilage of the dwelling. Accordingly, a rational view of the evidence did not support a jury instruction on third-degree arson because the garage was part of the dwelling, and Lepley's representation was not deficient because he failed to request such an instruction.

III. SENTENCING

Braun next contends that she is entitled to resentencing because the trial court repeatedly interrupted her, interrogated her, and berated her during allocution, which denied her the right to allocute. Because Braun failed to preserve her argument for our review by objecting during sentencing, our review is limited to plain error affecting her substantial rights. *People v Bailey*, 330 Mich App 41, 66; 944 NW2d 370 (2019).

At the time of trial, MCR 6.425(D)(1)(c) required trial courts during sentencing to give the defendant "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]"[5] "The right of allocution allows a defendant to speak in mitigation of the sentence and offers defendants an occasion to accept responsibility and begin the process of atonement." *Bailey*, 330 Mich App at 66 (quotation marks and citation omitted). The trial court must allow the defendant "a meaningful opportunity to speak" and should refrain from interrogating the defendant or delivering a lecture. *People v Dixon-Bey*, 340 Mich App 292, 302; 985 NW2d 904 (2022).

The record shows that the trial court gave Braun a meaningful opportunity to speak. First, Braun apologized for her "erratic behavior" in court. The trial court questioned what Braun was referring to, and Braun responded that she was referring to her behavior on the day before trial concerning whether she would accept the plea agreement. The court stated as follows:

> *THE COURT:* Well, that has nothing to do with this. That is behind us. Okay.
>
> *THE DEFENDANT:* Well—just apologize—
>
> *THE COURT:* Hold on. Hold on. We went to trial. You knew the risks. You understood exactly what the upsides and the downsides were. You took that chance and you were found guilty. And now you're back before me for Sentencing. What would you like to say to me about that? About the sentencing part of it?

[5] Our Supreme Court amended MCR 6.425(D)(1)(c), effective May 1, 2024. We rely on the court rule in effect at the time of sentencing.

THE DEFENDANT: Sure.

Braun then stated that Redlowsk sexually assaulted her, but she did not "bring up" that issue during trial because she was informed "it would be used against [her] as motive." She also stated that Redlowsk did not pick her up and set her down outside on the balcony as he testified; rather, he nearly pushed her over the railing of the balcony. She continued:

> *THE DEFENDANT:* [H]e did take my cell phone from me. That was the whole purpose of coming back in to get it. And he wouldn't let me in, although I could hear it ringing.
>
> *THE COURT:* So, so what you're telling me is you say he did these things to you, and because of that, you set his house on fire with him in it?
>
> *THE DEFENDANT:* That's not what I'm saying. I'm saying I was very upset and distraught that day. I had no—
>
> *THE COURT:* What does that have to do with you setting his house on fire?
>
> *THE DEFENDANT:* I'm just trying to tell you my events because he, he spoke about the events.[6]
>
> *THE COURT:* Okay. I understand. But he's the victim of a crime.
>
> *THE DEFENDANT:* I understand.
>
> *THE COURT:* Hold on. You're the one who committed the crime. Okay. Now, what does, what does all of that have to do with the crime that you committed? That's my question.
>
> *THE DEFENDANT:* Nothing in general . . . . He did let me stay there. I did find somewhere else to go, so I was trying to get my stuff so I could go live somewhere else because he was constantly badgering me about wanting to do a sexual act with me. And the day I came to get my stuff, he wouldn't let me have it. I came in through a window. I regret that majorly. I wish I would have never did that because that opens the door for a whole bunch of things negative to happen.
>
> *THE COURT:* Well, and you did say—tell a neighbor you were so angry you wanted to set his house on fire.
>
> *THE DEFENDANT:* I don't recall saying that.
>
> *THE COURT:* Well didn't, did that person not testify to that?

[6] Redlowsk addressed the trial court at Braun's sentencing.

THE DEFENDANT: He also testified that he saw bruises on me, on my neck.

THE COURT: Sir, sir—did he—ma'am, did he testify to that?

THE DEFENDANT: I believe he said that, yeah.

THE COURT: Yes, that's my question.

THE DEFENDANT: Yes.

THE COURT: Now, we don't know if, if there were bruises we don't know where they came from. There is also testimony that the discoloration on your arms was consistent with drug use.

THE DEFENDANT: It wasn't.

THE COURT: Ma'am, do not interrupt me.

THE DEFENDANT: Okay.

THE COURT: I'm starting to see what the problem is here. Now, when I speak, you are not—your mouth closes. That's, that's the end of it. Now what—I'm not seeing any connection between what you say and the fact that you set somebody's house on fire with that person in the house. What on earth does this have to do with that? Are you saying it justifies it?

THE DEFENDANT: No.

THE COURT: Well, then why'd you do it? I don't hear you saying you're sorry you did it and that's an observation that Ms. Young made.[7] You kept on talking about yourself and you showed no remorse for having torched somebody's house. I don't see a whole lot of remorse today for doing that.

THE DEFENDANT: I have remorse.

THE COURT: Would you like to enlighten me maybe?

THE DEFENDANT: I don't have any memory of lighting anybody's house on fire.

THE COURT: I'm not surprised. Anything else you'd like to add?

THE DEFENDANT: No.

Much of the discussion between Braun and the trial court pertained to why Braun wanted the court to hear about Braun's dispute with Redlowsk. The court asked Braun whether she

[7] Probation agent Krista G. Young prepared the presentence investigation report.

thought Redlowsk's conduct justified Braun setting fire to his house. Although the court should not have referenced Braun's drug use, the court gave Braun an opportunity to allocute and even encouraged Braun to express some remorse for her actions considering that the presentence investigation report stated that "Braun did not seem to have any real remorse for commission of the offense." Finally, the court asked Braun if there was anything she wanted to add, and Braun replied, "No." Therefore, the record fails to show that the court denied Braun her right to allocute, and Braun has failed to establish plain error.

IV. STANDARD 4 BRIEF

Braun next raises several arguments in her Standard 4 brief. Specifically, she (1) challenges the sufficiency of the evidence to support her conviction, (2) raises several claims of ineffective assistance of counsel, (3) maintains that the prosecutor committed prosecutorial error, (4) argues that the trial court pierced the veil of judicial impartiality, (5) asserts that she had a due process right to present a diminished capacity defense and that *Carpenter* was wrongly decided, and (6) maintains that she was sentenced under an incorrect sentencing guidelines range. We conclude that Braun's arguments lack merit.

A. SUFFICIENCY OF THE EVIDENCE

Braun argues that the evidence was insufficient to support her second-degree arson conviction. We review de novo challenges to the sufficiency of the evidence. *People v Wang*, 505 Mich 239, 251; 952 NW2d 334 (2020). We must view the evidence in the light most favorable to the prosecution and determine whether the trier of fact could find that the prosecution proved the essential elements of the offense beyond a reasonable doubt. *Id*. "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Further, we defer to the jury's determination regarding the weight of the evidence and the credibility of witnesses. *People v Montague*, 338 Mich App 29, 45; 979 NW2d 406 (2021).

Braun contends that the evidence was insufficient to support her conviction because the prosecutor failed to present evidence that she "willfully" started the fire as set forth in MCL 750.73(1). As previously discussed, MCL 750.73(1) states:

> Except as provided in section 72 [regarding first-degree arson], a person who *willfully or maliciously* burns, damages, or destroys by fire or explosive a dwelling, regardless of whether it is occupied, unoccupied, or vacant at the time of the fire or explosion, or its contents, is guilty of second degree arson. [Emphasis added.]

The statute does not define "willfully" or "maliciously." *Black's Law Dictionary* (12th ed) defines "willful" as "[d]one wittingly or on purpose, as opposed to accidentally or casually; voluntary and intentional, but not necessarily malicious." "When utilized in a criminal context, the term 'willfully' has been variously defined in the caselaw as meaning and embodying evil intent, guilty knowledge, or a bad purpose, and it indicates a purpose and knowledge to do wrong." *People v Waterstone*, 296 Mich App 121, 138; 818 NW2d 432 (2012). "Of course, 'willful' also describes conduct that is intentional, purposeful, voluntary, deliberate, and knowing." *Id*. *Black's Law*

Dictionary (12th ed) defines "maliciously" as "[i]n a spirit of ill will" and "[w]ith malice aforethought." "Malice," in turn, is defined as "[t]he intent, without justification or excuse, to commit a wrongful act;" "[r]eckless disregard of the law or of a person's legal rights;" and "[i]ll will; wickedness of heart." *Black's Law Dictionary* (12th ed); see also *People v Harris*, 495 Mich 120, 136; 845 NW2d 477 (2014).

Consistent with these definitions, the trial court instructed the jury that it must find as follows regarding the intent element of second-degree arson:

> Third, that when the Defendant burned, damaged or destroyed the dwelling or any of its contents, she intended to burn damage or destroy the dwelling or its contents or intentionally committed an act that created a very high risk of burning, damaging or destroying the dwelling or its contents and that while committing the act, the Defendant knew of that risk and disregarded it.

The prosecution presented sufficient evidence to show that Braun intended to burn Redlowsk's house or intentionally created a very high risk of burning his house and disregarded the risk. Video evidence showed Braun walking around Redlowsk's house shortly before the fire began. Braun admitted she was the person in the pink shirt shown in the video, and that person was wearing the same clothing that Braun wore earlier in the day. Although Braun denied that she was the person in the video wearing the black shirt, Officer Campbell testified that the woman in the pink shirt appeared to have removed a black hoodie or sweatshirt, which the woman carried with her. He also testified that, after the fire started at the second location, the woman no longer had the black shirt with her and was seen jumping over a fence. The evidence also showed that Braun got into an argument with Redlowsk earlier in the day, and the argument became physical when he threw her out of the house and she confronted him with a board. In addition, both Redlowsk and Mann testified that Braun threatened to burn down Redlowsk's house, and Redlowsk testified that, after the fire began, he heard screaming in his back yard that "sound[ed] like her." Finally, Fire Marshal Brunk testified that the fire began in two locations and was likely caused by an open flame rather than a discarded cigarette. Based on the video evidence, he opined that the sweatshirt was used to start the fire at the second location. Therefore, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to establish that Braun "willfully or maliciously" burned Redlowsk's house as required under MCL 750.73(1).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Braun next contends that Lepley rendered ineffective assistance of counsel for several reasons. She asserts that Lepley's representation was deficient because he: (1) failed to request an expert and perform an investigation relevant to her defense, (2) failed to request public funds for an independent psychological examination, (3) failed to exercise a peremptory challenge to excuse a juror, (4) failed to request disqualification of the prosecutor, and (5) failed to object to the admission of the video evidence. Braun preserved her claims of error for our review by moving to remand this case to the trial court for a *Ginther* hearing. *Abcumby-Blair*, 335 Mich App at 227.

Because this Court denied her motion[8] and a *Ginther* hearing was not held, our review is limited to errors apparent on the record. *Id.*

1. EXPERT WITNESS

Braun argues that Lepley should have called an expert witness to rebut Fire Marshal Brunk's testimony, and his failure to do so deprived her of a substantial defense. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure to call a witness can constitute ineffective assistance of counsel, however, if it deprived the defendant of a substantial defense. *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015). "A substantial defense is one that could have affected the outcome of the trial." *Id.*

Braun submits that Redlowsk's electrical system could have caused the fire because Redlowsk testified that he noticed problems with the electricity. Redlowsk testified that he noticed the problems, however, after the fire started. His lights started flickering, and his fans "just started spinning." Drum testified that his lights "started flickering real bad," and he looked out his window and saw that Redlowsk's house "was ablaze." Mann also testified that his lights started flickering. He looked outside and saw a "pretty large" fire at Redlowsk's house. He further testified that the wires above Redlowsk's house were sparking. Brunk opined that the fire was not an electrical fire because "[t]here's no electrical systems that are down low in, in the area of origins." Thus, the record shows that the fire was not caused by an electrical system problem.

Braun also submits that an expert would have discovered flaws in Brunk's reasoning and methodology, but she fails to articulate the purported flaws. In addition, she identifies R.J. Trenkle as an expert who could have testified, but she fails to state the substance of his purported testimony. She asserts that Trenkle provided her former appellate attorney with a report that was favorable to her, but she fails to indicate the substance of the report other than to state that Trenkle "would have performed arc mapping in the analysis of the fire." Moreover, Braun has not provided this Court with the report. Accordingly, she has not satisfied her burden of establishing the factual predicate for her ineffective assistance of counsel claim, *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014), and has failed to overcome the presumption that Lepley's decision not to retain an expert witness constituted sound trial strategy, *Payne*, 285 Mich App at 190.

2. PSYCHOLOGICAL EXAMINATION

Braun next contends that Lepley erred by failing to request public funds for an independent psychological examination. She asserts that Lepley's failure left her "without a possible defense." In order to obtain public funds for an expert, the defendant must establish a reasonable probability "that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *People v Kennedy*, 502 Mich 206, 228; 917 NW2d 355 (2018) (quotation marks and citation omitted).

[8] *People v Braun*, unpublished order of the Court of Appeals, entered May 7, 2025 (Docket No. 365738).

Braun has failed to show that she would have been entitled to public funds to retain an expert. As previously discussed, *Carpenter* precluded her from presenting a diminished-capacity defense. In addition, the record fails to show that Braun may have been insane at the time of the offense. Although she asserts that she told Lepley she was hearing voices and receiving signs from God through birds, her affidavit states that occurred while in jail before trial and during trial. Nothing indicates that occurred at the time of the offense or that Braun may have been insane when the offense occurred. Because she has failed to show that an expert would have assisted her defense and that proceeding to trial without expert assistance resulted in a fundamentally unfair trial, we conclude that Lepley did not render ineffective assistance of counsel by failing to request funds for an independent psychological examination. The defendant bears the burden of establishing the factual predicate for her ineffective assistance of counsel claim. *Douglas*, 496 Mich at 592.

3. REMAINING INEFFECTIVE ASSISTANCE CLAIMS

Braun has likewise failed to establish the factual predicates for her remaining claims alleging ineffective assistance of counsel. She maintains that Lepley should have exercised a peremptory challenge to excuse juror Sarah Enders Mertz. She asserts that she knew Mertz because Mertz was her ex-boyfriend's sister and that Mertz's juror questionnaire was the only juror questionnaire Lepley failed to give her after trial. Braun also asserts Lepley should have requested disqualification of the trial prosecutor, Cailin Wilson, because of a conflict of interest. Braun maintains that Wilson is Redlowsk's sister as well as Officer Campbell's wife. Further, Braun asserts that Lepley should have objected to the admission of the video evidence because the trial court allowed Wilson to admit edited clips of the full video, but Wilson never provided the defense with the full video.

Braun has failed to provide *any* evidence substantiating her claims, and, regarding Mertz, the record shows that Braun's claim is not true. Neither Mertz nor any of the other jurors indicated during voir dire that they knew Braun when the trial court asked if they did. Because Braun has not established the factual predicates for her claims, she has not shown that Lepley's representation fell below an objective standard of reasonableness. *Abcumby-Blair*, 335 Mich App at 228. Further, because no individual error exists, there can be no cumulative effect of errors that warrants reversal as she contends. See *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) ("The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not").

C. PROSECUTORIAL ERROR

Braun next asserts that Wilson committed prosecutorial error[9] by bolstering Redlowsk's testimony and vouching for his credibility, misrepresenting the facts and testimony, and

[9] Although Braun uses the term "prosecutorial misconduct," that term is more appropriately reserved for the rare instance when a prosecutor violates the rules of professional conduct or engages in illegal conduct. *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015).

denigrating Braun. A defendant must object and request a curative instruction to preserve a claim of prosecutorial error for appellate review. *People v Isrow*, 339 Mich App 522, 529; 984 NW2d 528 (2021). Because Braun's argument is not preserved for appellate review, our review is limited to plain error affecting her substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 475-476 (quotation marks and citation omitted).

Claims of prosecutorial error are reviewed on a case-by-case basis. *Isrow*, 339 Mich App 529. "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007) (quotation marks and citation omitted). We review the entire record and examine the prosecutor's remarks in context. *Isrow*, 339 Mich App 529. "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Dobek*, 274 Mich App at 64. "Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel." *Id*. Prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Although a prosecutor cannot vouch for their witnesses' credibility to the extent that special knowledge regarding a witness's truthfulness is implied, they are free to argue that the evidence, and reasonable inferences from the evidence, supports a witness's credibility. *Isrow*, 339 Mich App at 529. A prosecutor may also comment on their own witnesses' credibility during closing argument, but cannot mischaracterize the evidence. *Id.* at 529-530. Further, they may "argue from the facts that defendant or defendant's witnesses were unworthy of belief." *Dobek*, 274 Mich App at 67.

Braun contends that Wilson improperly bolstered Redlowsk's testimony and vouched for his credibility during her opening statement when she stated, "[o]ut of kindness he let her stay overnight, let her leave her stuff there while she worked on obtaining the rent money." Braun also takes issue with the following statement Wilson made during sentencing: "Again, this victim really did nothing but be kind to her, gave her a place to stay, allowed her to continue to stay when she didn't pay, pay the rent, left her stuff there and gave her multiple chances to come and get it." Braun asserts that the characterization of Redlowsk as a kind person was not accurate as evidenced by his statement at sentencing that he changed his mind about letting her stay at his home and by the following statement he made at sentencing: "And a lot of ways I feel like I should have killed her when she came through my home, invaded me. Definitely the third time or the fourth, you know, I don't know when. I was pretty scared."

Wilson's comments were not improper. Her statement that Redlowsk allowed Braun to reside at his house although she was unable to pay any rent when she arrived with her belongings did not vouch for his credibility. Her characterization of Redlowsk's conduct as an act of kindness was not inaccurate or improper. Similarly, Wilson's comment about Redlowsk's kindness during sentencing was not improper, and the fact that Braun disagrees with Wilson's statements does not

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In the majority of cases, as in this case, the conduct complained of does not rise to that level and instead involves alleged error occurring during trial. *Id*. at 88.

render them improper. Redlowsk's statement about killing Braun pertained to him discovering her inside his home after she broke into the home three or four times. Notably, Wilson did not condone the statement and made no comment about it.

Braun also asserts that Wilson improperly vouched for Redlowsk's credibility during her rebuttal closing argument when she argued as follows:

> Credibility. You can judge for yourself. But Randall Redlowsk came across as incredibly credible. Doesn't necessarily answer questions quite the same way that I might answer questions. But he's so consistent and I asked him the same question four times and he gives you the same answer. And he's so detailed. He may even have given you more detail than you needed to know. But what's really clear about why he's credible is because he tells you the good and the bad, both. He told the police and he told us I was furious. I wanted to break her phone. I chucked it out the window. He's not sugarcoating any part of this. Any conversation he had with her, any of his own anger or behavior. He, he's, not—he's telling you the whole truth. And you can believe him. You can take his word for what happened in the assault that she was swinging the board at him and struck him.

Wilson's argument was not improper. She did not imply that she had special knowledge regarding Redlowsk's truthfulness; rather, she argued, based on the content of his testimony, that he was credible. See *Unger*, 278 Mich App at 240 ("A prosecutor may argue from the facts that a witness is credible . . ."). Moreover, Wilson's argument was responsive to Lepley's argument regarding Redlowsk's purportedly incredibility. Lepley argued during closing argument, "I can't tell you strongly enough that I just don't think he's credible about any of this stuff that that [sic] he was telling you." The prosecutor is permitted to address arguments raised by defense counsel. *Dobek*, 274 Mich App at 64.

Braun also contends that Wilson committed prosecutorial error by misrepresenting the facts and testimony. Braun asserts that Wilson mischaracterized Fire Marshal Brunk's testimony by stating during her rebuttal argument that Brunk repeatedly testified the fire was not accidental and was caused by an open flame. She relies on the following portion of Brunk's testimony:

> *Q.* Was this fire accidentally set by a cigarette?
>
> *A.* I don't—I can't say that it was or wasn't because I don't have other than [sic] I believe that there was some open flame *and likelihood [sic] not a cigarette that could have created that fire*. [Emphasis added.]

Braun omits the italicized portion of Brunk's testimony. In addition, Wilson did not misrepresent the record. She argued as follows regarding Brunk's testimony:

> The expert told you over and over and over and over that fire is incendiary. The fire is not accidental. The fire was caused with an open flame. Yes, Mr. Lepley at the very end got him to say well, you know, I guess it's possible for a cigarette

> to start that kind of fire. But that wasn't his opinion. That wasn't what he told you. And it wasn't what he explained to you.

Therefore, Wilson stated that Brunk repeatedly testified the fire was not accidental and was caused by an open flame. Our review of the record demonstrates that Wilson's argument accurately characterized Brunk's testimony.

Braun also argues that Wilson misrepresented the record at sentencing when she stated that Braun had a warrant for her arrest at the time of the offense and was arrested on the warrant at the same time she was arrested for the arson. Braun maintains she did not have a warrant for her arrest when she was arrested for the arson. Braun's argument lacks merit because Wilson's statement was consistent with the record. Outside the jury's presence, the parties and the trial court discussed with Mann the fact that Braun told him on the day of the incident that she would have called the police on Redlowsk, but she had an outstanding warrant. Thus, she had a warrant on the day of the arson. Officer Campbell testified that he searched for Braun after the fire, and she was taken into custody on September 22, 2022, following a traffic stop of a vehicle in which she was a passenger. At sentencing, the trial court asked whether Braun was an absconder from probation when the arson occurred. Wilson responded affirmatively and stated that Braun had a warrant for her arrest and was arrested on the warrant at the same time that she was arrested for the arson. Although Braun may have been arrested on the warrant during the traffic stop, and therefore arrested on the warrant before she was arrested for the arson, Wilson's statement at sentencing is consistent with the record indicating that Braun was taken into custody for the warrant and the arson at the same time.

Further, Braun contends that Wilson improperly denigrated her at trial and sentencing by characterizing her as a liar and a drug user. Regarding Braun's drug use, Wilson argued during closing argument:

> And remember what [Redlowsk] is saying, he is saying at this time that she is screaming profanities at him, that she's making threats to him. She—he actually says that she looks possessed, that he's never seen her like this before, which doesn't seem inconsistent with the fact that she admits to us that she was using marijuana and methamphetamine ten to twelve times throughout that day.
>
> Certainly, drug use could have affected her decision making or her behavior.

Because Braun admitted using drugs on the day of the incident, Wilson's remark about Braun's drug use was a proper comment on the evidence. *Unger*, 278 Mich App at 236.

Also during closing argument, Wilson stated that Braun lied about her name to the police during the traffic stop that led to her arrest. Wilson also remarked that Braun "tends to play a little fast and loose with the truth." Wilson argued:

> And we know she doesn't want to be found because he tells you on that traffic stop she gave a bad name. She didn't say, oh, yeah, I'm Kelly Braun what's up?

> She lied about her name because she knew that she had committed these crimes and that it was likely that the police are looking for her.
>
> What about her, what about her testimony? Well we know that she tends to play a little fast and loose with the truth. We know that she told Brandy Johnson that she had locked herself out of her apartment and that she had to get in to get her medication and that there was a window open and could she borrow a ladder. And within five minutes, she tells Michael Mann, my boyfriend went to work and didn't realize I didn't have my key and has locked me out. Even when it doesn't matter, she can't even tell the same story.

In addition, during her rebuttal argument, Wilson argued:

> But I think the biggest problem is that the Defendant lied to you. She said, well, it looks like I'm swinging a board in the video but I was really just picking it up so I could drop it. That's absurd.

Further, Wilson stated at sentencing that Braun lied during her trial testimony. Because all of Wilson's statements constituted proper commentary on the evidence, Braun's claims of error lack merit. A prosecutor may argue that, based on the evidence, the defendant is not worthy of belief. *Dobek*, 274 Mich App at 67. For these reasons, Lepley did not render ineffective assistance of counsel by failing to object to Wilson's comments. "Defense counsel was not ineffective for failing to make a futile objection." *Unger*, 278 Mich App at 256.

D. TRIAL COURT BIAS

Next, Braun argues that the trial court denied her a fair trial by displaying its bias and interjecting its beliefs regarding the relevancy of testimony, interrupting Lepley's cross-examination of prosecution witnesses, denigrating Lepley, and commiserating with Redlowsk during sentencing. Because Braun failed to raise this issue in the trial court, it is not preserved for our review. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Under the plain-error test for unpreserved claims of error, a defendant must show that " (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Davis*, 509 Mich 52, 67; 983 NW2d 325 (2022) (quotation marks and citation omitted). "[R]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 67-68 (quotation marks and citation omitted). However, a claim of judicial misconduct alleges a structural error, *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015), to which a modified plain-error standard applies, *People v King*, 512 Mich 1, 10; 999 NW2d 670 (2023). Under the modified standard, there exists a "formal presumption" that the third prong of the test has been satisfied. *Davis*, 509 Mich at 75. "The formal rebuttable presumption in cases of forfeited structural error will shift the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding." *Id*. at 76. "In such instances, the prosecutor must present specific facts that affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved." *King*, 512 Mich at 10 (quotation marks and citation omitted).

"A criminal defendant is entitled to a neutral and detached magistrate." *Jackson*, 292 Mich App 583 (quotation marks and citation omitted). "A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality." *Stevens*, 498 Mich at 164. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id*. Factors to consider when making this determination include

> the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial. [*Id*.]

This list is not exhaustive, and a reviewing court may consider additional factors relevant in a particular case. *Id*. at 172. In order to establish "a reasonable likelihood that the judge's conduct improperly influenced the jury," the defendant need not establish that each factor weighs in favor of that conclusion. *Id*. Rather, "[t]he reviewing court must consider the relevance and weigh the significance of each factor under the totality of the circumstances of the case." *Id*.

Braun maintains that the trial court improperly interjected its own beliefs regarding the relevance of evidence when the court limited Lepley's cross-examination of Redlowsk. Lepley questioned Redlowsk about Redlowsk offering to perform a sexual act on Braun. Wilson objected, and the trial court determined that the issue was irrelevant and directed Lepley to "move on."[10] The trial court also questioned the relevancy of Lepley's inquiry regarding whether his property was insured. Lepley responded, "Judge, I can move on. I can strike that." The trial court did not improperly constrain Lepley's cross-examination of Redlowsk and acted within the scope of its discretion to limit the evidence to relevant matters. See *People v Biddles*, 316 Mich App 148, 153; 896 NW2d 461 (2016) ("[A] court has wide latitude to impose reasonable limits on cross-examination to ensure relevancy . . . .").

Braun also contends that the trial court interrupted Lepley's cross-examination of Redlowsk on multiple occasions and denigrated Lepley. The record fails to establish that the court denigrated Lepley at any point, but the court did, on a few occasions, ask Lepley to "move on" when Lepley asked questions that Redlowsk had already answered. A trial court may properly impose reasonable limits on cross-examination to avoid repetitiveness. *Id*. The record also reflects that the court repeatedly directed Redlowsk to answer the attorneys' questions because he oftentimes provided rambling narratives that did not answer the question asked or provided additional details that were not relevant. This Court has repeatedly recognized that a trial judge has wide discretion in controlling proceedings in their courtroom, including controlling the questioning of witnesses to "make the interrogation and presentation effective for the ascertainment of the truth" and "avoid needless consumption of time." *Id*. at 153-154 (quotation

[10] Lepley was able to question Redlowsk about whether he pulled a blanket off Braun, exposing her bare chest.

marks and citation omitted). Because Redlowsk's responses were often lengthy and unfocused, the trial court appropriately attempted to focus his answers on the questions asked and limit his unnecessary editorializations.

Further, Braun argues that the trial court improperly commiserated with Redlowsk at sentencing. She asserts that after engaging in a lengthy dialogue with Redlowsk, the court remarked, "I understand." Under MCL 780.765 of the crime victim's rights act, MCL 780.751 *et seq*., Redlowsk had a right to speak at Braun's sentencing. The record shows that, similar to trial, the court's dialogue with Redlowsk at sentencing was primarily aimed at focusing his statements on what he was trying to express and what he wanted the court to know. The record does not reflect that the court commiserated with Redlowsk or that its statements were indicative of judicial bias. Rather, our review of both the trial and sentencing proceedings belies Braun's argument that the court's conduct pierced the veil of judicial impartiality and denied her a fair trial. *Stevens*, 498 Mich at 164.

E. DIMINISHED CAPACITY

Braun next asserts that she had a due process right to present a diminished-capacity defense, and *Carpenter* was wrongly decided. In *Carpenter*, 464 Mich at 240-241, 223; 627 NW2d 276 (2001), our Supreme Court rejected the defendant's argument that precluding him from presenting a diminished-capacity defense would violate his due process rights. We are of course bound to follow decisions of our Supreme Court unless they have been overruled or superseded. *People v Robar*, 321 Mich App 106, 117; 910 NW2d 328 (2017). Because *Carpenter* has not been overruled or superseded, it is binding on us, and Braun's argument is unavailing.

F. SENTENCING

Finally, Braun argues that the trial court sentenced her under an incorrect sentencing guidelines range because offense variable (OV) 13 was erroneously scored and she was erroneously sentenced as a fourth-offense habitual offender. In order to preserve a sentencing issue for our review, the defendant must raise the issue at sentencing, in a motion for resentencing, or in a motion to remand filed in this Court. *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018). At sentencing, Lepley agreed with Wilson that OV 13 should be assessed 10 points instead of zero points. Because Braun contends that Lepley rendered ineffective assistance of counsel by failing to challenge the assessment of 10 points for OV 13, and she raised this argument in a motion to remand filed in this Court, she preserved her claim of error for our review.

We review a trial court's factual determinations with respect to the sentencing guidelines for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Clear error exists if we are left with a definite and firm conviction that a mistake was made. *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). The court's factual determinations must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

At sentencing, Wilson and Lepley agreed that Braun should be assessed 10 points for OV 13 regarding a continuing pattern of criminal behavior. MCL 777.43(1)(d) directs that OV 13 be

assessed 10 points if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403." MCL 777.43(2)(a) states that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

Braun argues that her presentence investigation report (PSIR) prepared regarding an unrelated offense that occurred before the arson indicates that her criminal history includes a February 2018 conviction of attempted stealing or retaining a financial transaction device, MCL 750.157n. Braun asserts that the previous PSIR indicates that the prior conviction was a misdemeanor rather than a felony, although she admits that her updated PSIR following her arson conviction lists the prior conviction as a felony. She asserts that the prior conviction should not have been counted as one of the three or more crimes committed within a five-year period for purposes of OV 13 because the previous PSIR indicated it was a misdemeanor. Because Braun's criminal history includes three felony convictions within a five-year period aside from her attempted stealing or retaining a financial transaction device conviction, she is not entitled to resentencing. Braun's PSIR indicates that in April 2022 she was convicted of assaulting or resisting a police officer, a Class G offense against a person, MCL 777.16d, and in February 2018 she was convicted of attempted larceny in a building, a Class H offense against property, MCL 777.16r and MCL 777.19(3)(b). The PSIR also indicates that Braun committed those two offenses within five years of the sentencing offense. Accordingly, she was properly assessed 10 points under OV 13, and she was properly sentenced as a fourth-offense habitual offender.

Affirmed.

/s/ Kristina Robinson Garrett
/s/ Sima G. Patel
/s/ Christopher P. Yates