

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

COA# 340328  
LCT# 17-000304

Plaintiff-Appellee

v.

**CHRISTOPHER LOUIS SINDONE**

Defendant-Appellant. \_\_\_\_\_ /

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**DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL PURSUANT TO  
MCR 7.302**

**Orders of the Court Below**

**PROOF OF SERVICE**

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**DEFENDANT'S STATEMENT OF QUESTIONS PRESENTED**

- I. Did Trial Counsel provided constitutionally ineffective assistance of counsel when she:
- A. Failed to argue that the trailer was not a dwelling as required by MCL 750. 73(1) and MCL 750. 79(1)(d)(vi)?
  - B. Failed to obtain and use an arson investigator who would have been able to gather evidence rebutting the prosecution's contention that you set the fire, and other allegations?
- II. Where Defendant's convictions for both 2<sup>nd</sup> degree Arson, MCL 750.73(1) and Preparation to Burn MCL 750.79(1)(d)(vi) violate double jeopardy provisions of the US and State Constitutions, must one must be vacated?
- III. Was the Woodhaven Trailer was not habitable and thus did it not qualify as a *dwelling* pursuant to MCL 750. 73(1) and MCL 750.79(1)(d)(vi), and must Defendant's convictions must be vacated?
- IV. Must Defendant be resentenced where his guidelines were miscored and his trial counsel was ineffective, failing to object to the many errors in his Presentence report, resulting in a sentence based on inaccurate information as well as an improper guidelines range?

Defendant answers "YES" to the Questions posed above.

The Court of Appeals below answered "NO" to Issues I, II, and III-except Judge Shapiro would have vacated the Preparation to Burn Conviction as violating double jeopardy principles.

The Court of Appeals below answered "YES" to issue IV, finding some OV errors and ordering resentencing, but failing to find that all of the Defendant's OV challenges had merit.

**STATEMENT OF JUDGMENT APPEALED AND RELIEF SOUGHT**

Christopher Louis Sindone was convicted on July 3 , 2017 of 2<sup>nd</sup> Degree Arson, MCL 750.73(1) and Arson, Preparation to Burn a Dwelling, MCL 750.79(1)(d)(vi) after a bench trial held before the Honorable Kelly Ramsey in Wayne County Circuit Court. He was sentenced on August 1, 2017 to serve 12 – 40 years in prison with a concurrent 5-10 years in prison, with credit for 218 days. The Court Below affirmed on April 11, 2019 and thus this Application is timely, MCR 7.302.

## STATEMENT OF FACTS

Christopher Louis Sindone was convicted on July 3 , 2017 of 2<sup>nd</sup> Degree Arson, MCL 750.73(1) and Arson, Preparation to Burn a Dwelling, MCL 750.79(1)(d)(vi) after a bench trial held before the Honorable Kelly Ramsey in Wayne County Circuit Court. He was sentenced on August 1, 2017 to serve 12 – 40 years in prison with a concurrent 5-10 years in prison, with credit for 218 days.

This case arose of a dispute during the holidays between Mr. Sindone and his estranged wife, Jennifer Sindone. Their familial dispute turned into a criminal case when Defendant was charged with starting a very small fire that he argued was accidental inside an unoccupied, stripped out trailer.

Prior to trial, Defendant was represented by the public defenders' office, Mr. Rene A. Cooper. Mr. Cooper advised Mr. Sindone to waive his preliminary examination on January 10, 2017, which he did. Mr. Sindone appeared with Mr. Cooper before Judge Michael Callahan for the first calendar conference in his case on January 20, 2017. Mr. Cooper requested that the court amend the bond order, but his request was denied.

The case was a subject to blind draw for trial and assigned to Judge Kelly Ramsey. A pretrial hearing was held in her courtroom on February 10, 2017. The defense requested a forensic evaluation, and Judge Ramsey ordered that a competency evaluation be conducted.<sup>1</sup> The prosecutor requested that the Defendant's phone privileges be limited, and that he not be allowed to phone Jennifer Sindone. The Court, noting a standing no-contact order, agreed and

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<sup>1</sup> Defendant has not received discovery from trial counsel and thus does not yet have this report. Defendant was forced on appeal to request that the trial court order Ms. Slomski to produce the discovery materials for the Defendant on appeal. See attached.

admonished the Defendant not to phone, write, or otherwise contact Jennifer. (Pretrial Hearing 2/10/17 p. 9)

At the next hearing, the Court had received the competency report and was about to address its contents, but defense counsel Rene Cooper moved to withdraw because Mr. Sindone had filed a grievance against him, and the Court granted that motion.

On June 6<sup>th</sup>, a final pretrial was held before Judge Ramsey in this case. Judge Ramsey noted that she had received a tremendous amount of paperwork from the Defendant, several inches worth. Defendant Sindone's new counsel, Patricia Slomski, admitted that the Defendant had filed three Pro Se motions, including a Motion for an Investigator, a Motion to Quash or Dismiss and a Motion to Suppress evidence. (Pretrial 6/6/17 p. 4) The Court, Judge Ramsey, agreed to appoint an investigator<sup>2</sup>, but she noted that a Motion to quash was not appropriate since the Defendant had waived the preliminary examination. So, Ms. Slomski agreed that the Motion to Quash would be withdrawn, but noted that Judge Ramsey as factfinder at the upcoming bench trial could determine that the search was tainted<sup>3</sup> and grant the motion to suppress. Mr. Sindone then waived his right to a jury trial on the record. (Pretrial 6/6/17 p. 8-12)

The prosecutor presented numerous letters, which had been written by Mr. Sindone to Jennifer Sindone, specifically asking her not to testify, in spite of the no contact order, and the Judge agreed to actually block letters going forward so that Ms. Sindone would not receive any more such letters. (Pretrial 6/6/17 p. 16)

Trial commenced on June 29th, 2017. Jennifer Sindone testified first. She was married to the Defendant Christopher Sindone for six years. She did not want to be part of the marriage anymore and she claimed that she and the Defendant separated at various times. They lived

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<sup>2</sup> Defendant does not have any investigative reports as trial counsel has refused to turn over discovery.

<sup>3</sup> Ms. Slomski did not argue that there was reason to suppress the search at trial.

together in a trailer in Monroe for a while, but Jennifer told the Court she bought a used trailer on Middlessex Street in Woodhaven on November 28, 2016. (TT 6/29/17 p. 12) Jennifer stated that she and the Defendant never lived in that mobile home; but she claimed she had stayed there and that she had personal effects there including clothing and bedsheets. (TT 6/29/17 p. 12) She admitted the trailer needed repair but had not been fire damaged when she bought it. Jennifer claims she paid “about” \$1,200.00 for the trailer, plus she would owe \$585.00 per month, plus other fees. (TT 6/29/17 p. 14) Jennifer stated also that water and electricity were hooked up to the mobile home. No receipts were provided.

On December 22, 2016 Jennifer claimed she slept at the Woodhaven trailer and left at 6:30am on December 23, 2016 for work. She also asserted that Defendant Sindone did not have permission to be in the Woodhaven trailer. (TT 6/29/17 p. 17) She stated that during that part of December 2016 Defendant Christopher Sindone was living at the trailer in Monroe.

Jennifer went on to tell the court that Christopher Sindone had been sending her letters and calling her. In one letter, the Defendant reportedly admitted there was a fire when he lit a candle and fell asleep, but he woke up and put the fire out. (Which was consistent with his trial testimony) (TT 6/29/17 p.20)

On cross-examination, Jennifer stated that she and the Defendant have a set of twin girls, eight years old, together. (TT 6/29/17 p. 22) A third child, who is the biological child of the Defendant only, lived with them and received \$683.00 per month in SSI survivor benefits . Jennifer claimed she had separated from the Defendant on November 28, 2016, and the Defendant and the children continued to stay at the Monroe trailer. She claimed that she went to the Monroe trailer to visit her children on the afternoon of December 23, 2016 but when she arrived the children were not home. She arrived around 4pm, and she and the Defendant left to

go Christmas shopping around 6pm. She and the Defendant returned and then they were drinking fireball whiskey. They were arguing. Defendant reportedly was yelling and threatening to go out into the cold and commit suicide so she called 911. The police came and took him away, sometime before 11pm that night.<sup>4</sup>

Jennifer did not return to the trailer in Woodhaven that night, but spent the night elsewhere. She received threatening text messages from the Defendant later that night. She agreed that the Woodhaven trailer needed work; the floors needed fixing and it needed drywall. It had no working kitchen, all the cabinets and other kitchen items were torn out. (TT 6/29/17 p. 28, 35, 44,46, 48, 51)

Defendant Sindone, not Jennifer, had initiated the divorce proceedings, and the divorce papers indicated that Jennifer had been living in **Monroe County ( not Woodhaven)** from December 20th, 2016 until December 30th, 2016.(TT 6/29/17 p. 28-32) Jennifer testified that Defendant initiated the divorce because she asked him to. She first stated that she never gave him a key and kept the trailer locked but she knew, since the Defendant told her, that he had a key to the trailer because he had made a copy, apparently after she had given him a key. (TT 6/29/17 p. 36-40)

On the morning of December 24<sup>th</sup>, she received a phone call telling her that there had been a fire at the trailer. She arrived at the trailer between 3 and 5 pm. (TT 6/29/17 p. 38)

The next witness was the Defendant's estranged mother, Laurie Stasa. She was watching the children of Christopher and Jennifer Sindone on December 23, 2016 at her home in Flat Rock. The children spent that night with her. At about 8am the next morning, December 24<sup>th</sup>, Defendant Sindone came to her house to pick up the three kids, he seemed to be in a hurry. (TT

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<sup>4</sup> The parties stipulated the police took Defendant Sindone to the Monroe County Hospital, psychiatric department, where he was evaluated but released by 3am. (TT 6/29/17 p. 57)

6/29/17 p. 60). Defendant reportedly told Ms. Stasa that: “ he lit a candle to burn that place down (the Woodhaven trailer) so she won’t [have] nowhere to live (sic)” (TT 6/29/17 p. 63) Ms. Stasa asked the Defendant when he did this and he said “4am”. Ms. Stasa decided she should drive to the to the Woodhaven trailer. When she arrived, Ms. Stasa called 911. The 911 call was played for the Court. Defendant’s counsel Slomski indicated that she thought the tape of the call exceeded the basic 911 call information, and she objected, but the court said she would admit it, and consider the entire call. (TT 6/29/17 p. 66)<sup>5</sup>

Woodhaven Police Sergeant Nick Grunwald testified that he received a call to investigate a fire at about 11am on December 24<sup>th</sup>, 2016. When he arrived at the Sindone trailer, Woodhaven fire was on the scene. (TT 6/29/17 p. 76) The front window of the trailer appeared to have some soot on it. He noted and photographed many views of the interior, including what appeared to be a deflated air mattress on the floor. (TT 6/29/17 p. 76-86) Woodhaven Fire Chief Michael Clark also testified. He testified as to his various certifications and trainings and the Court qualified him as an expert.

Chief Clark was called in on December 24<sup>th</sup>, 2016. He and his team found light smoke in the air in the living room. Heavier smoke was present in the bedroom, but no fire or flames. There was “some” evidence of something burning. (TT 6/29/17 p. 99) He determined that there must have been some flames at the head of the bed due to marks on the wall. There was no evidence that the fire had been electrical in origin. There was no accelerant used and the cause of ignition was “undetermined”. It appeared that the fire was not extinguished with water or a fire extinguisher. (TT 6/29/17 p. 99-107) The bedroom windows were closed and soot was present; Clark postulated that the fire used up the available oxygen in the closed bedroom and snuffed itself out.

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<sup>5</sup> Defendant on appeal has not yet been provided the 911 call.

The prosecution rested and Defense counsel waived her previously reserved opening statement. Defendant Sindone chose to testify on his own behalf. Defendant Sindone and Jennifer Sindone had twin daughters, eight years old. They lived in the Monroe trailer during their marriage. In late 2016, the marriage fell apart and Mr. Sindone filed for divorce on December 21, 2016. Defendant Sindone and Jennifer Sindone purchased the Woodhaven trailer for \$100.00. (TT 6/29/17 p. 120) He was at home with their children on December 23<sup>rd</sup>, 2016. He picked up his wife Jennifer from work around 5:30pm- 6pm and they went out to dinner and then went to finish their Christmas shopping. His mother Laurie Stasa picked up the three children as he was leaving, so they were not home when he returned with Jennifer.

Jennifer called the police because they began arguing. Defendant was drinking and he was also taking pain medicines that had been prescribed and using medical marijuana. He admitted that he was drunk. The police took Defendant to the Monroe County hospital where he was evaluated, found to be fine, and released. In fact, the hospital mental evaluator gave Defendant Sindone a ride back to the Monroe trailer at about 3am. (TT 6/29/17 p. 124-127)

Defendant Sindone had a key to the Woodhaven trailer; Jennifer had given him a key. After arriving back at the Monroe trailer at 3:15am and finding Jennifer gone, he stayed there for a half an hour and then drove to the Woodhaven trailer, because he thought Jennifer might be there. (TT 6/29/17 p. 130) She was not there. He was tired and under the influence of the medication and alcohol. He went into the bedroom and lit candles to have a night-light and counter the smell of the marijuana. He passed out. He awoke to find a fire on the floor next to the bed. (TT 6/29/17 p. 132) The fire caused the air mattress to burst, which blew out most of the fire. He slapped the fire and did not see any more flames. There was now no place to sleep, so

he left the Woodhaven trailer. The fire was out, so there was no need to call the fire department. (TT 6/29/17 p. 133) He went back to the Monroe trailer and fell asleep until 8am. Then he went to Laurie Stasa's, his mother's, to pick up the kids. He was not rushing and there was no disagreement with his mother, and Defendant Sindone denied telling his mother that he had started a fire.

Trial continued on Monday, July 3<sup>rd</sup>, 2018. Defendant Sindone reiterated that the fire was set by accident, that he was drunk and high at the time. (TT 7/3/17 p. 10) On cross-exam he agreed that he placed a candle on the floor next to the bed, he was not thinking right. He woke up and the blankets were on fire. He admitted he told Jennifer the whole thing was "god's work" because the accidental fire forced them to not ever live in Woodhaven where the water was contaminated. (TT 7/3/17 p. 14) Defendant Sindone stated that at the time of the accidental fire, he was hoping to someday live in the trailer in Woodhaven with his wife. They had scheduled marriage counseling for January. (TT 7/3/17 p. 14)

The parties gave closing arguments. The trial court, Judge Ramsey, stated first that intoxication is not a defense. (TT 7/3/17 p. 35) She noted that the pictures of the bedroom showed it was damaged beyond the need for mere cleaning, and as such met the requirement of "damage" or "destroyed".

The trial court said that Ms. Stasa testified that she thought he [Defendant] was going to hurt me" *but there was no such testimony found in the transcript.* (TT 7/3/17 p. 37) The trial court indicated that the Defendant's testimony that the fire was three feet wide and that the air from the mattress put it out was not believable. (TT 7/3/17 p. 39) The court noted that since there was no evidence of water used to put the fire out, she believes the fire was intentionally set. (TT 7/3/17 p. 40) The court then stated that it found evidence satisfying the elements of Arson, 2<sup>nd</sup>

degree. Furthermore, because the Defendant put a candle next to something flammable, the elements of “Preparation to burn” were also met. The property damage charge was also met. The prosecutor noted that this is a habitual third case, not habitual fourth, and that she would amend the information. The sentencing was set for August 1, 2017. (TT 7/3/17 p. 42 )

At sentencing, the victims made statements and then the Judge considered guidelines challenges. (ST 8/1/17 p. 12)

First, OV1 was considered; the prosecution asked for 20 points. The Judge ultimately agreed. (ST 8/1/17 p. 32 ) Defense counsel argued against that score. The prosecutor asked for OV4 to be scored at 10 points, but defense counsel argued that in fact the victim noted that she did not suffer any injury, including psychological injury. (ST 8/1/17 p. 18) The Judge ruled that she would allow the 10 points for OV4.

Next, arguments were heard about the number of victims (OV9) and defense counsel argued there were actually no contemporaneous victims. The Judge disagreed given that the first responders and neighbors were placed in danger, and scored 10 points. . (ST 8/1/17 p. 24)

The prosecution also argued that the proper score for OV12 would be 5 points, because the Defendant entered the Woodhaven trailer without Jennifer Sindone’s permission and committed a felony inside. The defense argued that in fact Jennifer had allowed him to have a key. (ST 8/1/17 p. 25) The prosecutor also argued that the Defendant interfered with the administration of justice because Defendant Sindone sent letters to his wife regarding this case. The Judge found a score of 10 points for OV19 would be appropriate. (ST 8/1/17 p. 31) The score that the Court found to be correct was thus V-D, 78- 195 months (habitual 3<sup>rd</sup>). (The score in the original SIR was V-C, 51-127 months).

Defense counsel noted that Defendant's prior convictions were decades old, and that he had never been to prison, never charged with child abuse, and no protective orders had been entered against him. Defendant Sindone disputed his PSR which indicated that he pleaded guilty to domestic violence, he claimed that was not true and that the conviction was only a resisting and obstructing. (ST 8/1/17 p. 39)

Mr. Sindone told the Court that this fire was an accident, he lit a candle and fell asleep. Judge Ramsey told Mr. Sindone that he was selfish, unpredictable and dangerous. She imposed a 12- 40 year (144 months minimum) sentence for the arson, 2<sup>nd</sup> degree, with a concurrent sentence of 5-10 years for the preparation to burn conviction. (ST 8/1/17 p. 47)

Defendant Sindone appealed as of right. MCR 7. 203 and moved for remand, which was denied, and affirmed his convictions in an unpublished per curiam opinion dated April 11, 2019. Judge Shapiro wrote separately indicating that he believed that the Defendant's convictions for both preparation to burn and arson of a dwelling violated the principles of double jeopardy, and he would have vacated the preparation to burn conviction.

The court below generally affirmed Mr. Sindone's convictions, but ordered that he be resentenced. They held: "A defendant is entitled to be sentenced according to accurately scored guidelines and on the basis of accurate information." *People v McGraw*, 484 Mich 120, 131.(2009). When a sentencing court relies on an incorrectly scored guidelines range, the sentence imposed is invalid. The trial court improperly assessed 20 points for OV 1 and 10 points for OV 9 when no points were warranted. Lowering the total OV points from 65 to 35, the corrected guidelines range would be 72 to 180 months. See MCL 777.63. Consequently, this matter must be remanded for resentencing." Defendant now files this timely Application for Leave.

## ARGUMENTS

- I. Trial Counsel provided constitutionally ineffective assistance of counsel when she:
  - A. Failed to argue that the trailer was not a dwelling as required by MCL 750. 73(1) and MCL 750. 79(1)(d)(vi)
  - B. Failed to obtain and use an arson investigator who would have been able to gather evidence rebutting the prosecution's contention that Defendant Sindone intentionally set the fire.

*Issue Preservation:* This Court has held repeatedly that where the Defendant provides credible evidence in the form of an offer of proof, combined with legal arguments supporting a claim of ineffective assistance, **that ineffective assistance may be preserved as an appellate issue via a properly filed and timely Motion to Remand for a *Ginther*<sup>6</sup> hearing, MCR 7.211.** Defendant Sindone argues below that just such a remand is necessary, and has filed a Motion to Remand as is required. (See, by way of example, *People v James Everett Frison*, COA# 331457 decided in an unpublished per curiam opinion of this Court on 12/5/2017)

*Standard of Review:* *People v LeBlanc*, 465 Mich 575, 579 (2002) This Court reviews *de novo* whether a defendant was deprived of the effective assistance of counsel as a question of constitutional law.

*Discussion:*

Reviewing courts generally presume that counsel has provided effective assistance, and the defendant has the burden to overcome this presumption. *People v Davis*, 250 Mich App 357,

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<sup>6</sup> *People v Ginther*, 390 Mich 436 (1973).

368-369 (2002). A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. *People v Armstrong*, 490 Mich 281, 289-290 (2011); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]“ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ It is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’ ” *Harrington v Richter*, 562 US 86, 104; 131 S Ct 770; 178 L Ed 2d 624 (2011), quoting *Strickland*, 466 US 668 at 693-694.

The reviewing court must make every effort “to eliminate the distorting effects of hindsight,” *Strickland*, 466 US at 689, including being mindful that no expectation should exist “that competent counsel will be a flawless strategist or tactician,” *Harrington*, 562 US at 110. “[A]n attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Id.* A reviewing court should “affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did.” *Cullen v Pinholster*, 563 US 170, 196; 131 S Ct 1388; 179 L Ed 2d 557 (2011)

Furthermore, defense counsel's decision regarding the choice of legal theories to present is presumed to be an exercise of trial strategy—and “a particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *People v Davis*, 250 Mich App 357, 368 (2002); see also *People v Matuszak*, 263 Mich App 42, 61 (2004).

While the failure to present evidence can be deemed ineffective assistance of counsel if it

deprives defendant of a substantial defense, *People v Hyland*, 212 Mich App 701, 710 (1995), vacated in part on other grounds, 453 Mich 902 (1996), the trial court should determine whether the threshold has been met in this case. Defendant Sindone is arguing here that if the Judge had been presented by his counsel with certain arguments and documents, they would have corroborated his version of events, and therefore, the a trial court needs to hold a *Ginther* hearing to determine why his trial counsel did not present specific arguments.

Normally, appellate courts defer to trial counsel's judgment and avoid "second guessing" tactical decisions and strategies, particularly with the benefit of hindsight, 562 US at 105-111. Here, however, trial counsel did not employ any specific strategy to defend her client, as will be discussed below.

**A. Trial counsel failed to argue that the trailer was not a dwelling as required by MCL 750. 73(1) and MCL 750. 79(1)(d)(vi).**

Defendant Sindone was convicted of burning a dwelling house pursuant to MCL 750.72 after he accidentally started some blankets on fire. The blankets were near an air mattress in a dilapidated trailer without a kitchen, flooring or drywall. There is no statutory definition of "dwelling house." But the Michigan Supreme Court has defined the term as "any house intended to be occupied as a residence, and would include any such residence, even though not occupied by the complaining witness at the time of the burning." *People v Reeves* 448 Mich 1, 17 (1995), as recognized in *People v Nowack*, 462 Mich 392, 400 (2000) (quotation omitted). In determining whether a structure was a dwelling house, the *Reeves* court held that there was a distinction between a structure uninhabitable to the point of abandonment and one that was merely unoccupied. *Reeves*, 448 Mich at 19. Specifically, the *Reeves* court held that [i]f a dwelling is simply *unoccupied* at the time it is burned, arson has been committed. If a dwelling

house is *unoccupied and dilapidated to the extent that it is deemed abandoned*, then the structure is no longer considered a dwelling house. [Id.]

Defendant Sindone's trial counsel never argued that the dilapidated Woodhaven trailer that is the subject of this case was not a dwelling as required by statute and attendant case law. This omission was ineffective assistance of counsel, given that at trial the prosecution's own witness presented enough evidence that the trailer was not a dwelling at is necessary to convict the Defendant of 2<sup>nd</sup> degree arson. Instead, the Judge should have found only that real property was burned, and convicted the Defendant of the lesser included offense pursuant to MCL 750.73 (3<sup>rd</sup> degree arson) or 4<sup>th</sup> degree arson, as there was no proof entered by the prosecution that the dilapidated trailer here was worth over \$1,000. . Defendant Sindone stated that he and Jennifer purchased the Woodhaven trailer for \$100.00. (TT 6/29/17 p. 120) Defendant's counsel at trial failed to argue that under the current building codes the trailer was uninhabitable.

This failure, especially given the fact that Ms. Slomski counseled the Defendant to chose a bench trial, is hard to fathom. Bench trials are appropriate where technical arguments about the statute are expected. Ms. Slomski should have made this argument, and a *Ginther* hearing is necessary. <sup>7</sup>

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<sup>7</sup> Defendant has attached photos of the Woodhaven trailer.

**B. Trial counsel failed to obtain and use an arson investigator who would have been able to gather evidence rebutting the prosecution's contention that Defendant Sindone intentionally set the fire.**

Defendant Sindone moved In Pro Per prior to trial for an investigator and the transcripts reveal that one was appointed, but apparently no investigation was done and nothing was admitted at trial to substantiate Defendant's assertion that the fire here was accidental. This is a case where a independent fire investigator was essential to the defense proposed: accident. The Woodhaven Fire Chief testified that lack of oxygen in the room caused the fire to go out. (TT 6/29/17 p. 99-107) Judge Ramsey believed the fire was intentionally set simply because there was no evidence of water used to put it out. (TT 7/3/17 p. 40) Defendant asserts that a *Ginther* hearing is necessary question defense counsel Slomski as to why an independent investigation was not conducted. This is not a trivial case; Defendant Sindone is serving a minimum of twelve years in prison, at a cost of hundreds of thousands of taxpayer dollars.

**II. Defendant's convictions for both 2<sup>nd</sup> degree Arson, MCL 750.73(1) and Preparation to Burn MCL 750.79(1)(d)(vi) violate double jeopardy provisions of the US and State Constitutions, and one must be vacated.**

*Issue Preservation:* Defendant did not present a double-jeopardy argument to the trial court; however, a double-jeopardy issue involves a significant constitutional matter that will be considered on appeal regardless of whether the defendant raised it before the trial court.

*People v Colon*, 250 Mich App 59, 62 (2002).

*Standard of Review:* A double-jeopardy argument presents a question of constitutional law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599(2001).

*Discussion:* In *Colon*, supra this Court, addressing a double-jeopardy issue, stated: The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v Squires*, 240 Mich App 454, 456 (2000).

However, our Supreme Court in *People v Denio*, 454 Mich 691, 706 (1997), stated that the intent of the Legislature is the governing factor under the double jeopardy clause of the United States and Michigan constitutions. In *Denio*, supra at 709, the Court further stated: Thus, if the Legislature desires, it may specifically authorize penalties for what would otherwise be the "same offense." *People v Sturgis*, 427 Mich 392, 403 (1986). "[C]umulative punishment of the same conduct under two different statutes in a single trial does not run afoul of the Double Jeopardy Clause in either the federal or state system." *Id.*

Thus, this case presents questions of law regarding statutory interpretation and the application of our state and federal Constitutions, which should also be reviewed *de novo*. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb” US Const, Am V. The prohibition against double jeopardy protects individuals in three ways: “(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.” The first two protections comprise the “successive prosecutions” strand of double jeopardy, while the third protection is known as the “multiple punishments” strand. Because defendant was convicted of and sentenced for both **2<sup>nd</sup> degree Arson, MCL 750.73(1) and Preparation to Burn MCL 750.79(1)(d)(vi)** arising from the same conduct at the same trial, this case involves the multiple punishments strand of double jeopardy.

The multiple punishments strand of double jeopardy “is designed to ensure that courts confine their sentences to the limits established by the Legislature” and therefore acts as a “restraint on the prosecutor and the Courts.” The multiple punishments strand is not violated where a legislature specifically authorizes cumulative punishment. Const 1963, art 1, § 15. As our Supreme Court stated “we have been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15. . . .” *People v Smith*, 478 Mich 292, 302 n 7 (2007). Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.”

The Legislature, however, does not always clearly indicate its intent with regard to

the permissibility of multiple punishments. When legislative intent is not clear, Michigan courts apply the “abstract legal elements” test articulated in *Ream* 481 Mich 283 (2008) to ascertain whether the Legislature intended to classify two offenses as the “same offense” for double jeopardy purposes. This test focuses on the statutory elements of the offense. *Missouri v Hunter*, 459 US 359, 368-369; 103 S Ct 673; 74 L Ed 2d 535 (1983). See *Garrett v United States*, 471 US 773, 779; 105 S Ct 2407; 85 L Ed 2d 764 (1985) Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if “each of the offenses for which defendant was convicted has an element that the other does not . . . .” This means that, under the *Ream* test, two offenses will only be considered the “same offense” where it is impossible to commit the greater offense without also committing the lesser offense.

This is exactly the case here. MCL 750.79 prohibits this conduct: “1) A person who uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance or any device in or near a building, structure, other real property, or personal property with the intent to commit arson in any degree” . To be convicted of MCL 750.79 (known colloquially as ‘preparation to burn’) you must first place something flammable ( a candle) with the intent to commit arson. To be found guilty of 2<sup>nd</sup> degree arson, MCL 750.73, a person must “ 1) willfully or maliciously burn[], damage[], or destroy[] 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”. A person cannot cause something to burn without placing something that will start that fire. I person cannot commit the burning without a flame. There is no way to be an arsonist without preparing to burn. MCL 750.79 was designed by the legislature to apply to those individuals who readied an accelerant but never actually committed the arson. If the

dual conviction suffered by Defendant Sindone here is allowed by this Court, *every person in Michigan convicted of arson should also be convicted of preparation to burn*. MCL 750.79 should have been treated by Judge Ramsey as an alternative charge. It was most likely used here by the Wayne County prosecutor as a failsafe in case Judge Ramsey was not convinced that the miniscule fire which was completely extinguished by the time anyone arrived at the dilapidated trailer was *insufficient to be considered a fire* for purposes of the arson statute. Defendant's conviction on both counts cannot stand, and this Court should vacate one of them, or order a new trial where the prosecutor is specifically advised that the Defendant may only be convicted of one or the other.

**III. The Woodhaven Trailer was not habitable and thus it did not qualify as a dwelling pursuant to MCL 750.73(1) and MCL 750.79(1)(d)(vi), and Defendant's convictions must be vacated.**

*Issue Preservation:* Where the prosecution has failed to prove, and cannot prove, one or more elements of the crime, the Defendant's convictions are based upon insufficient evidence and must be vacated.

*Standard of Review:* Challenges to the sufficiency of the evidence are reviewed *de novo*. *People v Ericksen*, 288 Mich App 192, 195 (2010). Due process requires, that when the evidence is viewed in the light most favorable to the prosecution, a reasonable trier of fact could find each element of the crime was established beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257 (2002). It is the trier of fact's role to judge credibility and weigh the evidence. *People v Jackson* 292 Mich App 583, 587 (2011).

*Discussion:* Defendant Sindone was convicted of burning a dwelling house for the fire in the bedding on the air mattress of the trailer without a kitchen, flooring or drywall, pursuant to MCL 750.72. There is no statutory definition of "dwelling house." But the Michigan Supreme Court has defined the term as "any house intended to be occupied as a residence, and would include any such residence, even though not occupied by the complaining witness at the time of the burning." *People v Reeves* 448 Mich 1, 17 (1995), superseded by statute on other grounds as recognized in *People v Nowack*, 462 Mich 392, 400 (2000) (quotation omitted). In determining whether a structure was a dwelling house, the *Reeves* Court held that there was a distinction between a structure uninhabitable to the point of abandonment and one that was merely unoccupied. *Reeves*, 448 Mich at 19. Specifically, the *Reeves* Court held that [i]f a

dwelling is simply *unoccupied* at the time it is burned, arson has been committed. If a dwelling house is *unoccupied and dilapidated to the extent that it is deemed abandoned*, then the structure is no longer considered a dwelling house. [Id.]

Defendant Sindone's trial counsel never argued that the dilapidated Woodhaven trailer that is the subject of this case was not a dwelling as required by statute and attendant case law, but the trier of fact, Judge Ramsey, was presented with enough evidence that she should have found that the trailer was not a dwelling at is necessary to convict the Defendant of 2<sup>nd</sup> degree arson. Instead, the Judge should have found only that real property was burned, and convicted the Defendant of the lesser included offense pursuant to MCL 750.73 (3<sup>rd</sup> degree arson) or 4<sup>th</sup> degree arson, as there was no proof entered by the prosecution that the dilapidated trailer here was worth over \$1,000. Defendant's counsel at trial failed to argue that under the current building codes the trailer was uninhabitable. Both convictions should be vacated.

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**IV. Defendant must be resentenced. His guidelines were miscored and his trial counsel was ineffective, failing to object to the many errors in his Presentence report, resulting in a sentence based on inaccurate information as well as an improper guidelines range.**

*Issue Preservation:* Trial Counsel properly objected at sentencing to the improper scores, but she did not object to all of the inaccurate information contained in the PSR.

*Standard of Review:* The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo. *People v Cannon*, 481 Mich 152, 156 (2008); *People v Francisco*, 474 Mich 82, 85 (2006). Guideline variables may only be scored if the underlying facts are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, supra at 438.

Our Supreme Court restated the standards for reviewing sentences again in 2017, in *People v Steanhouse* and *People v Masroor*. \_\_\_ Mich \_\_\_ (July 24, 2017) Justice McCormack stated that in "*People v Lockridge*, 498 Mich 358 (2015) this Court, applying binding United States Supreme Court precedent, held that Michigan's sentencing guidelines scheme violates the Sixth Amendment of the United States Constitution. To remedy the constitutional violation, we held that the guidelines would thereafter be merely advisory rather than mandatory. In these consolidated cases, we address residual issues stemming from our decision in *Lockridge*. We hold the following:

- (1) In *Lockridge*, we held, and today reaffirm, that the legislative sentencing guidelines are advisory in all applications.
- (2) We affirm the Court of Appeals' holding in *People v Steanhouse* [313 Mich App 1(2015)] that the proper inquiry when reviewing a sentence for reasonableness is whether the trial court

abused its discretion by violating the “principle of **proportionality**” set forth in *People v Milbourn* [citation omitted] “which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” Further, defendants are entitled to be sentenced based upon accurate information. US Const, Am XIV; Const 1963, art 1, § 17. Under the sentencing guidelines, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy, supra*. “ ‘Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.’ ” *People v Fawaz*, 299 Mich App 55,60, (2012)

*Discussion:*

At Defendant Sindone’s sentencing, the victims made statements and then the Judge considered guidelines challenges. (ST 8/1/17 p. 12) *The court below ordered that OV1 should not be scored zero, not at 20 points, and ordered that OV9 should also be scored at zero. Defendant Sindone does not, therefore, ask this Court to review that part of the court’s order.*

The prosecutor asked for OV4 to be scored at 10 points, but defense counsel argued that in fact the victim noted that she did not suffer any injury, including psychological injury. (ST 8/1/17 p. 18) The Judge ruled that she would allow the 10 points for OV4.

The prosecution also argued that the proper score for OV12 would be 5 points, because the Defendant entered the Woodhaven trailer without Jennifer Sindone’s permission and committed a felony inside. The defense argued that in fact Jennifer had allowed him to have a key. (ST 8/1/17 p. 25)

The prosecutor also argued that the Defendant interfered with the administration of justice because Defendant Sindone sent letters to his wife regarding this case. The Judge found a score of 10 points for OV19 would be appropriate. (ST 8/1/17 p. 31)

Defense counsel noted that Defendant's prior convictions were decades old, and that he had never been to prison, never charged with child abuse, and no protective orders had been entered against him. Defendant Sindone disputed his the validity of his PSR which indicated that he pleaded guilty to domestic violence, he claimed that was not true and that the conviction was only a resisting and obstructing. (ST 8/1/17 p. 39)

Mr. Sindone told the Court that this fire was an accident, he lit a candle and fell asleep. Judge Ramsey told Mr. Sindone that he was selfish, unpredictable and dangerous. She imposed a 12- 40 year (144 months minimum) sentence for the arson, 2<sup>nd</sup> degree, with a concurrent sentence of 5-10 years for the preparation to burn conviction. (ST 8/1/17 p. 47)<sup>8</sup>

**OV score challenges remaining on appeal:**

**OV 2** addresses the lethal potential of a weapon possessed or used during the commission of the offense, and directs a trial court to assess 15 points if the offender possessed or used an incendiary device. MCL 777.32(1)(b); *People v Young*, 276 Mich App 446, 451 (2007). Under both OV 1 and OV 2, an "incendiary device" is defined as "gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device." MCL 777.31(3)(b); MCL 777.32(3)(d).

Defendant admitted that he lit a candle. Under MCL 777.31(3)(b) and MCL 777.32(3)(d) the trial court should not have concluded that the candle was an incendiary device. The idea behind the OV1 and OV2 scores is to give a Defendant *points when there are aggravating circumstances and increase his sentence* if he or she did something *more dangerous than the mere crime itself*. A candle is not an aggravating factor. **Arson by definition does not involve spontaneous combustion.** Fires must start somehow. Under that rationale a flint and steel to

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<sup>8</sup> Defendant was only given his uncorrected PSR, absent the corrected SIR with his trial packet from the Circuit Court; he has requested the corrected documents. The uncorrected PSR has been filed with these pleadings.

generate a spark is an incendiary device. Points should be assessed only if Defendant did something more dangerous than merely lighting a candle- use of gasoline, another accelerant, or firebomb etc.

Similarly, no victims were exposed to the candle even if it could be considered an incendiary device. *No one*. The fire was out, as was the candle itself, hours before anyone came to the dilapidated trailer in Woodhaven. Laurie Stasa called 911 when she arrived.<sup>9</sup> Curiously, she told the 911 operator that she observed flames- but the Woodhaven Fire Chief testified that there was **absolutely no fire and that any fire had long been extinguished when he arrived**. Indeed, Defendant Sindone's testimony that he put the fire out hours before *is consistent* with the Fire Chief's testimony. If no one was exposed to the incendiary device, because the fire was out, then OV2 must be scored at zero. Judge Ramsey abused her discretion and the court below erred.

**OV 4:** The issue in this case is whether the trial court erred by assessing 10 points for Offense Variable (OV) 4 ("serious psychological injury" to a victim occurred) when the PSR clearly noted that the victim, Defendant's wife, told the presentence investigator that she did not suffer a psychological injury and she denied seeking treatment at sentencing. Our Supreme Court has recently held that points for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a "serious psychological injury" would normally occur as a result of the crime perpetrated against the victim. Accordingly, the trial court's ruling assessing 10 points for OV 4 was an abuse of discretion. *People v White* \_\_\_Mich\_\_\_ (Dec 26, 2017)

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<sup>9</sup> Defendant Sindone was forced to request a Court order for the production of all discovery, including the 911 calls, since trial counsel Ms. Slomski has refused to produce that evidence for appeal.

**OV12**

At sentencing the prosecution argued that the proper score for OV12 would be 5 points, because the Defendant entered the Woodhaven trailer without Jennifer Sindone's permission and committed a felony inside. The defense argued that in fact Jennifer had allowed him to have a key. Indeed, Jennifer had testified that she had allowed the Defendant to have a key a some point, because she knew he had made a copy of the key for himself. Her testimony that he was not granted permission to enter the property was not credible. (TT 6/29/17 p. 36-40)  
(ST 8/1/17 p. 25)

Our Supreme Court, in *People v. Francisco*, 474 Mich. 82 (2006) stated: "[W]hen scoring OV12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light* 290 Mich App 717, 723 (2010). To find that Defendant Sindone committed home invasion and give him points under OV12 when he had a key to the trailer was an abuse of discretion. OV12 should have been scored at zero.

*Summary: The court below has ordered a complete resentencing, but Defendant Sindone requests that this Court address the still- erroneous scores given for OV4, OV2, OV12. He was sentenced pursuant to inaccurate information, including information put forth in the erroneously scored guidelines. Further Resentencing is necessary.*

**RELIEF REQUESTED**

Defendant Sindone respectfully requests that this Court grant the specific relief requested in each of the issues raised herein.

Respectfully submitted,

BY: -s-Kristina L. Dunne -s-  
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P.O. Box 97  
Northville MI 48167  
248 895-5709 Attorney for Defendant Sindone

DATED: June 5, 2019

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LOUIS SINDONE,

Defendant-Appellant.

UNPUBLISHED

April 11, 2019

No. 340328

Wayne Circuit Court

LC No. 17-000304-01-FH

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Before: SHAPIRO, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Christopher Sindone, appeals as of right his bench trial convictions of second-degree arson, MCL 750.73(1), and preparation to burn a dwelling, MCL 750.79(1)(d)(vi). Defendant’s convictions arise out of a dispute during the holidays between defendant and his estranged wife, Jennifer Sindone (Sindone), which led to defendant setting fire to Sindone’s trailer on December 24, 2016. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 12 to 40 years’ imprisonment for second-degree arson and 5 to 10 years’ imprisonment for preparation to burn a dwelling. We affirm defendant’s convictions but reverse and remand for resentencing.

**I. SUFFICIENCY OF THE EVIDENCE**

Defendant challenges his convictions on grounds that the prosecution failed to prove beyond a reasonable doubt that the trailer<sup>1</sup> at issue is a “dwelling”; therefore, the prosecution

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<sup>1</sup> Sindone described her home as a “mobile home,” however the prosecutor and others repeatedly refer to it as a trailer. We deem the distinction irrelevant under the circumstances. We also note that defendant contradicted Sindone’s testimony and claimed that he and Sindone purchased the trailer together; however, we view the evidence for a sufficiency of the evidence argument in the light most favorable to the prosecution. And in any event, ownership of the trailer is not relevant for purposes of the statutes under which defendant was convicted.

failed to prove each and every element of second-degree arson and preparation to burn a dwelling pursuant to MCL 750.73(1) and MCL 750.79(1)(d)(vi), respectively. Defendant contends that the trailer was dilapidated and uninhabitable. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). “When reviewing a claim of insufficient evidence following a bench trial, this Court must review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). It is the role of the fact-finder, rather than this Court, to determine the weight of the evidence and the credibility of witnesses. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). “Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime.” *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014). This Court resolves any evidentiary conflicts in favor of the prosecution. *Id.*

To be guilty of second-degree arson, the prosecution must prove beyond a reasonable doubt that the defendant “willfully or maliciously burne[d], damage[d], or destroye[d] by fire or explosive a dwelling, regardless of whether it [was] occupied, unoccupied, or vacant at the time of the fire or explosion, or its contents.” MCL 750.73(1). With respect to preparation to burn a dwelling, MCL 750.79 provides in pertinent part:

(1) A person who uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance or any device in or near a building, structure, other real property, or personal property with the intent to commit arson in any degree or who aids, counsels, induces, persuades, or procures another to do so is guilty of a crime as follows:

\* \* \*

(d) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$15,000.00 or 3 times the combined value of the property damaged or destroyed, whichever is greater, or both imprisonment and a fine:

\* \* \*

(vi) The property is a dwelling. This subparagraph applies regardless of whether the person owns the dwelling.

MCL 750.71(d), which is applicable to the offenses at issue, defines a “dwelling” as including, but 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.”

Sufficient evidence supports a finding that Sindone’s trailer constitutes a dwelling within the meaning of MCL 750.71(d). The prosecution presented ample evidence that Sindone had

been living in the trailer for approximately one month when the fire occurred. Sindone testified that she purchased the trailer on November 29, 2016 in order to move out of the family home and remove herself from the marriage with defendant. She spent the night in the trailer between the time of its purchase and the night of the fire. She ate meals in the trailer. She kept her clothing, her children's clothing<sup>2</sup>, Christmas decorations, shovels, and bedding at the trailer. There was a couch in the living room, a working bathroom, and three bedrooms. She also had water and electricity hooked up to the residence, both of which were working on the night of the fire.

Laurie Stasa, defendant's mother, testified that Sindone lived in the trailer. Woodhaven Police Sergeant Nick Grunwald testified that he observed an air mattress and bedding inside the trailer. Defendant also testified that he slept on an air mattress in Sindone's bedroom inside the trailer on December 24, 2016. While there was evidence that the trailer needed repairs and lacked a functioning kitchen, the prosecution presented sufficient evidence that it was "adapted for human habitation" and that Sindone "actually lived in or reasonably could have" lived in the trailer at the time of the fire. See MCL 750.71(d). Accordingly, the prosecution presented sufficient evidence that Sindone's trailer constituted a dwelling for purposes of second-degree arson and preparation to burn a dwelling.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to argue that Sindone's trailer did not qualify as a dwelling, failed to utilize an arson investigator, and did not object to the prosecution's use of evidence that was obtained illegally. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must make a motion in the trial court for a new trial or an evidentiary hearing. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant raised his claims of ineffective assistance of counsel for the first time on appeal, they are unpreserved. When no *Ginther*<sup>3</sup> hearing is held, this Court reviews claims of ineffective assistance of counsel based on the facts contained in the existing record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Whether effective assistance of counsel has been denied is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews questions of constitutional law de novo, and factual findings, if any, are reviewed for clear error. *Jordan*, 275 Mich App at 667.

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 N.W.2d 136, 143 (2012). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have

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<sup>2</sup> Defendant and Sindone have twin children together.

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

been different.” *Id.* Counsel’s performance is presumed to be effective, and the defendant bears a heavy burden of demonstrating otherwise. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). There is also a strong presumption that defense counsel’s decisions constitute sound trial strategy. *People v Foster*, 319 Mich App 365, 391; 901 NW2d 127 (2017).

Defendant first claims that his counsel was deficient in failing to argue that Sindone’s trailer was not a dwelling within the meaning of MCL 750.79(1) and MCL 750.79(1)(d)(vi). For the reasons we have already addressed with respect to the sufficiency of the evidence, defendant’s argument lacks merit. The prosecution presented ample evidence to establish that Sindone’s trailer was a dwelling for purposes of second-degree arson and preparation to burn a dwelling. Had defense counsel raised the issue, she would have been unsuccessful. Trial counsel’s failure to raise a meritless argument or a futile objection does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Moreover, it is apparent from the record that defense counsel was aware of the trailer’s condition and made the strategic decision to pursue a defense that defendant accidentally started the fire, rather than one that focused on the condition or state of the trailer. This Court does not second-guess counsel on matters of trial strategy, *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012), and it does not substitute its own judgment for that of trial counsel regarding strategy, “even if that strategy backfired.” *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Accordingly, defendant fails to demonstrate that he was denied the effective assistance of counsel on this ground.

Defendant also argues that defense counsel was ineffective because she failed to utilize an arson investigator to present evidence that defendant did not intentionally start the fire, despite the trial court’s appointment of an arson investigator on behalf of defendant. However, defendant fails to meet his burden of establishing a factual predicate to support his claim. See *People v Douglas*, 496 Mich 557, 593; 852 NW2d 587 (2014), citing *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant does not provide an affidavit indicating what an arson investigator’s testimony would have been. Nor does he explain how an arson investigator would have shown definitively that the fire was accidental. Chief Clark testified that samples taken from Sindone’s trailer did not indicate that accelerant was used to start the fire and that the cause of ignition was undetermined. Sergeant Grunwald also testified that he did not know what was used to start the fire. Presumably, defense counsel made the strategic decision not to use an arson investigator because the prosecution’s evidence was consistent with the defense theory that defendant accidentally started the fire. Accordingly, defendant fails to demonstrate that defense counsel was ineffective on this ground.

Finally, defendant contends that defense counsel was ineffective because she failed to argue at trial that the police seized certain evidence in violation of his Fourth Amendment rights.<sup>4</sup> Defense counsel was clearly aware of this potential argument because the trial court addressed defendant’s pro se motion before trial. Presumably, defense counsel made the

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<sup>4</sup> Defendant raised this issue in a Standard 4 brief. A “Standard 4” brief refers to the brief a defendant may file in propria persona pursuant to Standard 4 of Michigan Supreme Court Administrative Order No. 2004-6, 471 Mich c, cii (2004).

strategic decision not to raise the issue at trial because defendant did not have a possessory right to the trailer or to the items taken from it, and therefore, he did not have standing to challenge the constitutional validity of the search. See *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999) (noting that an individual's rights against unreasonable search and seizures is personal and can only be invoked by the person whose protections were infringed by the search or seizure), citing *People v Smith*, 420 Mich 1, 17-19; 360 NW2d 841 (1984). A defendant has standing "to challenge a search or seizure if, under the totality of the circumstances, he has a subjective expectation of privacy in the object of the search or seizure and the expectation of privacy is one that society is prepared to recognize as reasonable." *Zahn*, 234 Mich App at 446.

Sindone testified that she purchased the trailer herself and defendant's name was not on the deed, the contract, the landlord tenant agreement, or anything associated with the property. She also testified that defendant was not allowed inside the trailer, but at some point, without her permission, he had made a copy of her key. Defendant admitted that he was not personally involved in the purchase of the trailer, did not live at the trailer, and his name was not on any of the utility bills. Because defendant did not own the trailer or have any legal right to enter the property, he did not have a reasonable expectation of privacy in the trailer and therefore, he does not have standing to challenge the search and seizure of items from the trailer. Accordingly, defense counsel was not ineffective by failing to raise a meritless argument. See *Ericksen*, 288 Mich App at 201.

### III. DOUBLE JEOPARDY

Defendant argues that his convictions of second-degree arson and preparation to burn a dwelling must be vacated as a violation of double jeopardy because his convictions arise from the same conduct and involve multiple punishments. We disagree.

Defendant failed to preserve this claim of error by raising it in the trial court. See *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003) (concluding that the defendant failed to preserve his argument on appeal that his convictions for burning real property and burning a dwelling home violated double jeopardy because the defendant raised the issue for the first time on appeal). Our review of unpreserved constitutional error is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999). To avoid forfeiture under the plain-error rule, the defendant must meet three requirements: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). The third element generally requires the defendant to demonstrate "prejudice, i.e., that the error affected the outcome of the lower court proceeding." *Carines*, 460 Mich at 763. Even if the defendant can show all three elements, "[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." *Carines*, 460 Mich at 763-764.

Both the United States and the Michigan Constitutions protect a criminal defendant from being twice put in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *Barber*, 255 Mich App at 291-292. This prohibition against double jeopardy protects individuals in three ways:

(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. The first two protections comprise the “successive prosecutions” strand of double jeopardy, while the third protection is known as the “multiple punishments” strand. [*People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015) (quotation marks and citation omitted).]

This case involves the multiple punishments strand of double jeopardy because defendant’s convictions and sentences for second-degree arson and preparation to burn a dwelling concern the same conduct and the same trial. See *id.* at 17

The purpose of the multiple punishments strand of double jeopardy is “to ensure that courts confine their sentences to the limits established by the Legislature” and therefore acts as a “restraint on the prosecutor and the Courts.” *Id.* at 17-18 (quotation marks and citation omitted). A double jeopardy violation does not occur when the Legislature “specifically authorizes cumulative punishments under” two separate statutes. *Id.* (citations and internal quotation marks omitted). However, when a statute’s plain language clearly expresses the Legislature’s intent to prohibit multiple punishments, a trial court violates the multiple punishments strand by cumulatively punishing “a defendant for both offenses in a single trial.” *Id.* Accordingly, the Legislature’s intent is a decisive factor in determining whether multiple punishments for the same offense violate double jeopardy. *Barber*, 255 Mich App at 292.

The proper test to determine whether multiple punishments are barred by Const. 1963, art 1, § 15 is the test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007); see also *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008) (“[T]he *Blockburger* test is a tool to be used to ascertain legislative intent.”) The *Blockburger* test “ ‘focuses on statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.’ ” *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004), quoting *Iannelli v United States*, 420 US 772, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975). In addition, to reiterate, “[b]ecause the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements.”<sup>5</sup> *Ream*, 481 Mich at 238 (also referring to the *Blockburger* test as an “abstract legal elements” test).

In the instant case, the trial court convicted defendant of second-degree arson, MCL 750.73, and preparation to burn a dwelling, MCL 750.79(1)(d)(vi). A person is guilty of second-degree arson if he or she: 1) willfully or maliciously 2) burns, damages, or destroys by fire or explosive; 3) a dwelling or its contents. MCL 750.73(1). A person is guilty of preparation to burn a dwelling if he or she: 1) uses, arranges, places, devises, or distributes, 2) an inflammable, combustible, or explosive material, liquid, or substance or any device, 3) in or near a dwelling, 4)

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<sup>5</sup> The *Ream* Court also refers to the *Blockburger* test as an “abstract legal elements test.” *Reams*, 481 Mich at 239.

with the intent to commit arson in any degree. MCL 750.79(1)(d)(vi). Each crime “requires proof of a fact that the other does not.” *Nutt*, 469 Mich at 576, quoting *Iannelli*, 420 US at 785 n 17. Second-degree arson requires the prosecution to prove that the defendant actually burned, damaged, or destroyed a dwelling by fire or explosive, whereas preparation to burn a building has no such element. Preparation to burn a dwelling only requires that the defendant used, arranged, placed, devised, or distributed something that could have caused arson near a dwelling with the intent to cause arson. MCL 750.79(1)(d)(vi). Nothing in the plain language of MCL 750.79(1)(d)(vi) requires the defendant to burn, damage, or destroy the dwelling, and nothing in the plain language of MCL 750.74(1) requires the defendant to undertake any specific preparations for burning the dwelling. Because each statute requires proof of an element that the other does not, the *Blockburger* test is satisfied, thus revealing the Legislature’s intent that multiple punishments for the same criminal transaction do not violate the prohibition against double jeopardy. In short, defendant’s convictions of second-degree arson and preparation to burn a dwelling do not violate double jeopardy.

#### IV. SENTENCING

Defendant argues that the trial court erred when assessing points for offense variables (OVs) 1, 2, 4, 9, and 12, and that he is entitled to resentencing based on a resulting change in the guidelines. We agree that the trial court erred when assessing 20 points for OV 1 and 10 points for OV 9, which changes the guidelines and entitles defendant to resentencing.

This Court reviews a sentencing court’s factual findings regarding scoring variables for clear error; the court’s factual findings must be supported by a preponderance of the evidence. *People v Gloster*, 499 Mich 199, 204; 880 NW2d 776 (2016). “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 this Court reviews de novo. *Id.* (quotation marks and citation omitted). Clear error exists if this Court is “left with a definite and firm conviction that a mistake has been made.” *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). Further, the “trial court may consider all evidence in the record, including but not limited to” the presentencing investigation report (PSIR) as well as any “admissions made by a defendant during a plea proceeding.” *People v Jackson*, 320 Mich App 514, 519; 907 NW2d 865 (2017).

##### A. MCL 777.31 (OV 1) AND MCL 777.32 (OV 2)

OV 1 considers the aggravated use of a weapon. MCL 777.31(1). The trial court assessed 20 points for OV 1, which is appropriate if, “[t]he victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device.” MCL 777.31(1)(b). When “[n]o aggravated use of a weapon” has occurred, a zero-point assessment is appropriate. MCL 777.31(1)(f). OV 2 concerns the lethal potential of a weapon possessed or used. MCL 777.32(1). Under 777.32(1)(b), the trial court may assess 15 points for OV 2 when “[t]he offender possessed or used an incendiary device, an explosive

device, or a fully automatic weapon.”<sup>6</sup> MCL 777.32(1)(b). OV 1 and OV 2 both define an incendiary device as including “gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device.” MCL 777.31(3)(b); MCL 777.32(3)(d).

A candle constitutes an incendiary device because it falls within the category of “other similar device.” MCL 777.31(3)(b); MCL 777.32(3)(d). Defendant admitted that he started a fire—accidental or not—by lighting a candle and placing it near Sindone’s air mattress in her bedroom. Although the prosecution did not establish at trial what defendant used to light the candle that started the fire, a candle falls within the category of “other similar device” because it is similar to a Molotov cocktail and fire bomb—both of which require an individual to set them on fire before being used to start a fire elsewhere. Even if a candle is not an incendiary device, there is sufficient evidence that defendant lit the candle with an incendiary device such as matches or a lighter.

Unlike OV 1, OV 2 does not require the trial court to find that a victim was involved. MCL 777.32(1)(b). Therefore, the trial court did not clearly err in assessing 15 points for OV 2 because there is a preponderance of the evidence that defendant possessed and used an incendiary device on December 24, 2016. However, the trial court clearly erred in assessing 20 points for OV 1 because a preponderance of the evidence does not support the trial court’s finding that victims were exposed or subject to an incendiary device. See MCL 777.31(1)(b).

OV 1 requires that a victim be exposed to an incendiary device. MCL 777.31(1)(b). MCL 777.31(2)(a) defines a victim as a “person who was placed in danger of injury or loss of life.” Although a first responder can be a victim, *People v Fawaz*, 299 Mich App 55, 62; 829 NW2d 259 (2012), the first responders in this case were not placed in danger of physical injury or loss of life. The fire was extinguished by the time the first responders entered Sindone’s trailer. In fact, Sergeant Grunwald testified that the trailer was already secured when he arrived at the scene. Contrary to the prosecution’s assertions, there was no evidence that the fire caused damage that compromised the structural integrity of the trailer. There was also no evidence that any neighbors were actually placed in danger. Accordingly, there was no evidence that anyone was placed in danger of injury or loss of life to warrant 20 points for OV 1.

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<sup>6</sup> The trial court may also assess 15 points if “[t]he offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device.” MCL 777.32(1)(a).

B. MCL 777.34 (OV 4)<sup>7</sup>

OV 4 contemplates the psychological injury to a victim. MCL 777.34(1). The trial court assessed 10 points for OV 4, which is appropriate if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). The trial court may assign 10 points for OV 4 if the victim suffered “personality changes, anger, fright, or feelings of being hurt, unsafe, or violated.” *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014). The fact that the victim did not seek treatment is not conclusive, MCL 777.34(2), and a trial court’s observations of the victim’s demeanor at trial can support a finding of psychological injury, *People v Schrauben*, 314 Mich App 181, 197; 886 NW2d 173 (2016). A trial court may not assign points “solely on the basis . . . that a ‘serious psychological injury’ would normally occur as a result of the crime perpetrated against the victim.” *People v White*, 501 Mich 160, 162; 905 NW2d 228 (2017).

Because OV 4 concerns the “psychological injury to a victim,” a victim is required in all cases in which OV 4 is scored. However, MCL 777.34 does not define “victim.” This Court has not yet addressed whether an individual who suffered property loss as a result of the defendant’s criminal offense but who was not physically present during the offense constitutes a victim within the meaning of MCL 777.34.<sup>8</sup> In *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012), our Supreme Court defined a “victim” for the purposes of scoring OV 3, because MCL 777.33 does not define a “victim.”<sup>9</sup> Turning to common dictionary definitions, our Supreme Court determined that “‘a victim’ is any person who is harmed by the defendant’s criminal actions” for the purposes of scoring OV 3. *Id.* at 348-349.<sup>10</sup>

The trial court determined that Sindone and the children were victims for purposes of scoring OV 4. When considering the definition of “victim” as adopted in *Laidler*, there is a preponderance of the evidence that Sindone suffered serious psychological injury requiring professional treatment. At trial, Laurie Stasa, defendant’s mother, testified that defendant came to her house before 8:00 a.m. on December 24, 2016, the date of the offense. He was hurried and agitated, and he insisted that the kids leave with him immediately even though they were not wearing shoes. Stasa insisted that they dress due to the cold. Defendant told Stasa that he had

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<sup>7</sup> MCL 777.34 has been amended, effective March 28, 2019. See 2018 PA 652. Under the new version of the statute, the trial court may assess five points for OV 4 if defendant was convicted under section 50b of the Michigan penal code and “serious psychological injury requiring professional treatment occurred to the owner of a companion animal.” MCL 777.34(b) as amended by 2018 PA 652.

<sup>8</sup> We do note, however, that MCL 777.39 (OV 9) includes among its description of victims those who were placed in danger of property loss.

<sup>9</sup> OV 3 contemplates physical injury to a victim. MCL 777.33(1).

<sup>10</sup> *Laidler* limited its definition of a victim to MCL 777.31, acknowledging that the specific individual in that case may constitute a victim for purposes of scoring OV 3, but may not constitute a victim for the purposes of any other statute. *Laidler*, 491 Mich at 347 n 3.

“lit a candle to burn the place down so she won’t no [sic] where to live.” She asked him to repeat what he had just said, and he did. He told her that he had done so at 4:00 a.m. It was clear to Stasa that defendant was talking about Sindone’s trailer. At sentencing, Sindone stated that she had been thinking about the event for months, that she and the children remained “very scared,” that her daughter was having “nightmares” and that it “is very hard to calm her down.” She expressed ongoing fear of defendant by herself and defendant’s children.<sup>11</sup> This Court has previously held that a victim’s statements of fear and anger support a score of 10 points for OV 4. See *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012) (concluding that the victim’s statements that he felt angry, hurt, and fearful were sufficient to support an assessment of 10 points for OV 4). Therefore, the trial court did not clearly err in finding that Sindone suffered a psychological injury to warrant an assessment of 10 points for OV 4.

C. MCL 777.39 (OV 9)

OV 9 considers the number of victims. MCL 777.39. In pertinent part, MCL 777.39(1) provides:

(1) offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

\* \* \*

(b) there were ten or more victims who were placed in danger of physical injury or death, or twenty or more victims who were placed in danger of property loss..... 25

(c) there were two to nine victims who were placed in danger of physical injury or death, or four to nineteen victims who were placed in danger of property loss..... 10

(d) there were fewer than two victims who were placed in danger of physical injury or death, or fewer than four victims who were placed in danger of

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<sup>11</sup> In a letter written to the Court for purposes of sentencing, Stasa wrote that defendant’s son asked if they could still keep the knives hidden so that defendant’s older son, who was 14 years old, could protect them from defendant if he ever came home. She noted that defendant’s daughter expressed similar fear of defendant. It is not clear from the record whether the children spent time at the trailer, so we decline to consider whether the children were victims, but we can review the entire record to examine the psychological impact of the incident on Sindone.

While defendant points out that the victim’s impact statement in the presentence investigation report (PSIR) indicates that Sindone said counseling was not necessary, she also said she would be at the sentencing and may want to address the court; in light of the statements Sindone and Stasa made at the sentencing hearing, as described above, a preponderance of the evidence supports the trial court’s finding.

property loss..... 0

Under MCL 777.39(2)(a), a “person who was placed in danger of physical injury or loss of life or property” constitutes a victim for the purposes of scoring OV 9. A person may be considered a victim “even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice.” *People v Gratsch*, 299 Mich App 604, 624; 831 NW2d 462 (2013), vacated in part on other grounds 495 Mich 876 (2013). However, a victim must be a direct victim of the crime, rather than a member of the community that was indirectly affected by the commission of the crime. *People v Carrigan*, 297 Mich App 513, 515-516; 824 NW2d 283 (2012).

Sindone constitutes a victim for the purposes of scoring OV 9 because she suffered a loss of property when defendant lit her bedroom on fire. MCL 777.39(2)(a). The prosecution presented ample evidence that there was significant damage to Sindone’s trailer, including smoke damage, burned walls and ceilings, a melted air mattress, and damage to other personal property.

Beyond Sindone, a preponderance of the evidence does not support the trial court’s finding that there were “2 to 9 victims placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss.” See MCL 777.39(1)(c). As discussed, a first responder can be a victim for the purposes of scoring OV 9. *Fawaz*, 299 Mich App 55, 62; 829 NW2d 259 (2012). In *Fawaz*, two firefighters responded to a fire at the defendant’s home and suffered actual physical injuries as a result of entering the house. *Id.* at 58, 63. The defendant’s elderly neighbor, who lived only four feet away from the defendant’s house, was escorted from her home to ensure her personal safety. *Id.* This Court held that all three individuals were “ ‘placed in danger of physical injury or loss of life’ because of the fire that [the] defendant started” and therefore, were victims for the purposes of scoring OV 9. *Id.*, citing MCL 777.39(1)(c).

The trial court clearly erred in assessing 10 points for OV 9 because the first responders were not placed in danger of physical injury or loss of life. By the time anyone stepped inside Sindone’s trailer, the fire had been extinguished. The prosecution did not present any evidence that the fire was ongoing or that anyone who entered the house was injured or at risk of injury. Nor did the prosecution present any evidence that the structural integrity of the trailer was compromised such that it placed the first responders in danger. Moreover, a neighbor’s concern for their safety does not mean that he or she is a victim. See *Fawaz*, 299 Mich App at 58, 63. A neighbor must be within a close proximity to a physically threatening situation. *Gratsch*, 299 Mich App at 624. There was no evidence that any of Sindone’s neighbors were actually placed in danger of physical injury or loss of life. Therefore, the trial court clearly erred in assessing 10 points for OV 9. The trial court should have assessed zero points because Sindone was the only victim of defendant’s conduct.

Defendant contends that the trial court clearly erred in assessing five points for OV 12. OV 12 considers contemporaneous felonious acts. MCL 777.42(1). However, the trial court actually assessed zero points for OV 12, and therefore, it is unnecessary to address this issue.

## D. RESENTENCING

“A defendant is entitled to be sentenced according to accurately scored guidelines and on the basis of accurate information.” *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). When a sentencing court relies on an incorrectly scored guidelines range, the sentence imposed is invalid. *Id.* The trial court improperly assessed 20 points for OV 1 and 10 points for OV 9 when no points were warranted. Lowering the total OV points from 65 to 35, the corrected guidelines range would be 72 to 180 months. See MCL 777.63. Consequently, this matter must be remanded for resentencing.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Michael J. Kelly

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STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LOUIS SINDONE,

Defendant-Appellant.

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UNPUBLISHED

April 11, 2019

No. 340328

Wayne Circuit Court

LC No. 17-000304-01-FH

Before: SHAPIRO, P.J., and BECKERING and M. J. KELLY, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority in all respects except the double-jeopardy issue. I conclude that one cannot commit second-degree arson, MCL 750.73(1), without also committing preparation to burn a dwelling, MCL 750.79(1)(d)(vi). Accordingly, I would hold that defendant's conviction for both of these offenses violates the Double Jeopardy Clause's protection against multiple punishments for the same offense.

"Both the United States and the Michigan constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments, for the same offense." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008), citing US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). Because defendant's convictions arose "from the same conduct . . . , this case involves the multiple punishments strand of double jeopardy." *People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015). "When legislative intent is not clear, Michigan courts apply the 'abstract legal elements' test articulated in [*People v Ream*, 481 Mich 223; 750 NW2d 536 (2008)] to ascertain whether the Legislature intended to classify two offenses as the 'same offense' for double jeopardy purposes." *Id.* at 19.

Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if "each of the offenses for which

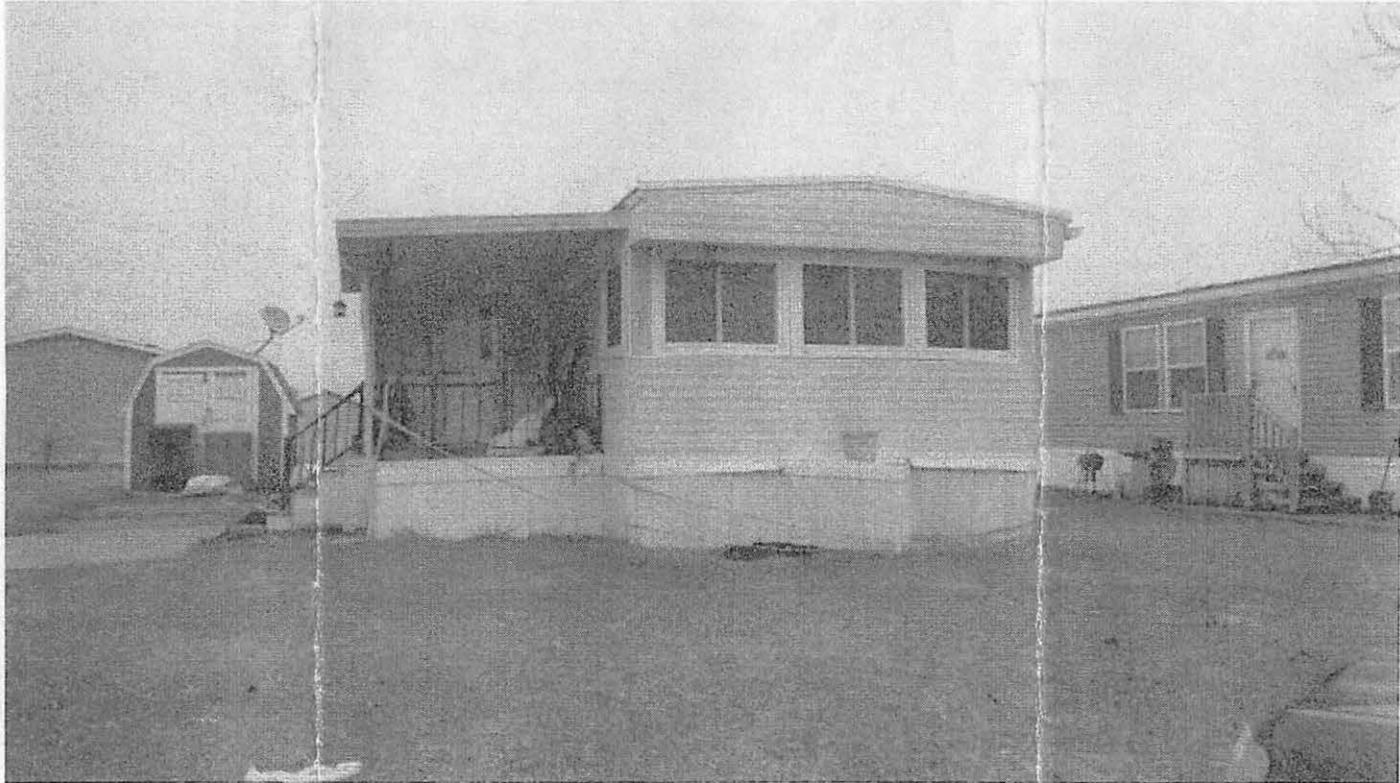
defendant was convicted has an element that the other does not . . . .” This means that, under the *Ream* test, two offenses will only be considered the “same offense” where it is impossible to commit the greater offense without also committing the lesser offense. [*Id.* (citation footnotes omitted).]

As provided in MCL 750.73(1), to convict a person of second-degree arson, the prosecution must prove that the defendant “willfully or maliciously burns, damages or destroys by fire or explosive a dwelling . . . .” To convict a person of preparation to burn a dwelling, it must be proven that the defendant 1) uses, arranges, places, devises, or distributes, 2) an inflammable, combustible, or explosive material, liquid, or substance or any device, 3) in or near a dwelling, 4) with the intent to commit arson in any degree. MCL 750.79(1)(d)(vi).

I agree with the majority that second-degree arson contains an element that preparation to burn a dwelling does not, i.e., that the defendant actually burned or damaged a dwelling by fire. However, preparation to burn a dwelling does not contain an element that second-degree arson lacks. My colleagues reason that second-degree arson, unlike preparation to burn a dwelling, does not “require[] the defendant to undertake any specific preparations for burning the dwelling.” However, neither the prosecution nor the majority explain how it is possible to burn a building without taking some action to start the fire. Indeed, the word “burn” is defined in relevant part as “setting fire to, or doing any act that results in the [intentional] starting of a fire . . . .” MCL 750.71(b). One cannot set fire to a dwelling absent action constituting the offense of preparation to burn a dwelling. Because the elements of preparation to burn a dwelling are fully incorporated in the elements of second-degree arson, conviction for both offenses violates the double jeopardy protection against multiple punishments. Accordingly, I would vacate defendant’s conviction for preparation to burn a dwelling as it is the lesser offense. See *People v Meshell*, 265 Mich App 616, 633-634; 696 NW2d 754 (2005).

/s/ Douglas B. Shapiro

Christopher Sindone  
# 331371



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Christopher Sindone

# 331371



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Christopher Sindone  
# 331371



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STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

COA# 340328  
LCT# 17-000304

Plaintiff-Appellee  
v.

CHRISTOPHER LOUIS SINDONE

Defendant-Appellant. \_\_\_\_\_/  
KRISTINA LARSON DUNNE P45490  
Attorney for Defendant-Appellant  
P.O. Box 97  
Northville MI 48167  
248 895 5709

**PROOF OF SERVICE**

STATE OF MICHIGAN)  
COUNTY OF OAKLAND)

I, KRISTINA L. DUNNE hereby affirm that on 6/5/19 I served a copy of the Defendant-Appellant's **APPLICATION FOR LEAVE TO APPEAL**, AND THIS Proof of Service upon:

Prosecuting Attorney, Wayne County

electronically

s/s Kristina L. Dunne \_\_\_\_\_

Dated:6/5/19