SECOND DIVISION
June 17, 2014

No. 1-12-1646

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2476
	)	
DEVIN GRAND,	)	Honorable
	)	Stanley J. Sacks, III,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on aggravated arson conviction affirmed, over defendant's claims that the State failed to prove that he knowingly caused the fire, that the testimony of the State's expert lacked foundation, that defendant received ineffective assistance of counsel, and that trial court improperly considered factors in aggravation at sentencing.

¶ 2 Following a jury trial, defendant Devin Grand was found guilty of aggravated arson and sentenced to nine years' imprisonment. On appeal, he contends that: (1) the State did not prove

that he knowingly caused the fire in his apartment; (2) the testimony of the State's expert should not have been admitted; (3) defendant's trial counsel provided ineffective assistance; and (4) the trial court considered an improper factor in aggravation during sentencing. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 During a Friday evening, on January 7, 2011, a fire broke out in defendant's apartment on the sixth floor of a 40-story, residential high-rise building located at 3450 North Lake Shore Drive in Chicago. Smoke from the fire poured into the hallway of the sixth floor. Firefighters, police officers, and paramedics arrived at the scene. Approximately 100 individuals—some dressed in pajamas and night clothes—were evacuated from the apartment building. Various common areas of the building sustained damage from the fire. When the firefighters attempted to rescue defendant, he resisted and told them that he wanted to die in the fire. As they carried him out, he told them to check the microwave oven. Inside the microwave oven were metallic items, batteries, part of a walkie-talkie radio, and a metal coffee can containing the remains of a bird. Defendant was subsequently charged with aggravated arson. The following evidence was adduced at his trial.

¶ 5 Jim Naylor testified that he is the building engineer at 3450 North Lake Shore Drive and also a resident of the building. At approximately 11:15 p.m. on January 7, 2011, Naylor responded to a call from the front desk regarding a fire in defendant's apartment. Naylor made his way to the sixth floor, where he found the hallway filled with smoke. He heard William Rosario, the building technician, pounding on the defendant's apartment door. Rosario was attempting to enter the apartment with a pass key, but was unable to open the door. Meanwhile, Naylor bumped into two elderly female residents in the hallway and helped them exit down the

stairwell. Upon hearing through his two-way radio that the Chicago Fire Department had arrived at the building, he and Rosario proceeded down to the first floor lobby to meet the firefighters.

¶ 6 According to Naylor, defendant was one of leasing agents for the apartment building, which contained 355 residential units. As part of his job, defendant used a two-way radio, or walkie-talkie, when he performed afternoon checks on the units. Naylor recalled working with defendant on January 6, the day before the fire; defendant, however, did not report to work the next day. Naylor also noted that defendant did not return the radio to the building office at the end of his shift on January 6, as he typically did after completing the building rounds. Naylor confirmed that the damaged walkie-talkie recovered from the microwave was the kind that defendant had used for work at the building.

¶ 7 Daniel Sheahan, a City of Chicago firefighter, was the first to reach defendant's apartment. Sheahan testified that the hallway of the sixth floor was filled with smoke when he arrived. He felt resistance when he pushed on the door of defendant's apartment and advised his captain of a possible "wind-driven" fire. Entering the apartment on his hands and knees, Sheahan crawled down a hallway of the smoke-filled apartment and observed flames from the kitchen area spreading towards the living room. He did not locate anyone inside the apartment during his initial search. During the search, however, he noticed that the furniture was upside-down and in disarray. This led him to think that "something was not right," so he conducted a second search. Sheahan then discovered defendant near the opening of a broken window in a corner far away from the kitchen. Defendant's face was positioned toward the opening. Defendant did not initially respond, but as Sheahan revived him, defendant held on to the window sash and told Sheahan that he wanted to "die in this fire."

¶ 8 Firefighter Kelly John Burns testified that he entered defendant's apartment with a thermal imaging camera to locate Sheahan and defendant. After finding Sheahan and defendant near the window, Burns and Sheahan attempted to move defendant away from the window. Burns testified that defendant resisted, became combative, and grabbed the window. Furthermore, defendant kept repeating "no, no, no" and told the firefighters that he "wanted to burn" in the fire. As the two firefighters carried defendant out of the apartment, Burns asked if anyone else was in the apartment. Defendant told him to check "in the microwave."

¶ 9 Jason Mardirosian, an Investigating Fire Marshal with the Office of Fire Investigations (OFI) of the Chicago Fire Department, testified that he arrived at the apartment building at approximately 11:35 p.m. on the night of January 7, after receiving a 911 dispatch to investigate a fire. The State sought to qualify Mardirosian as an expert as to the origin and cause of the fire.

¶ 10 Mardirosian is a Certified Fire and Explosion Investigator with the International Association of Arson Investigators and a fire investigator with the National Association of Fire Investigators. Since 2000, he has served as a Fire Marshal with the OFI. He served as a firefighter with the Chicago Fire Department from 1996 to 1999, and served on the Hazardous Materials Terrorist Response Team from 1999 to 2000. He has undergone classroom training and practical training, the latter of which involves field investigation. Additionally, he has taken courses to become a certified fire investigator through the State Fire Marshal. He has participated in federal law enforcement training on "advanced origin and cause investigation." Prior to this trial, he had investigated approximately 1700 fire scenes and had testified over 50 times regarding his investigation findings. After allowing defense counsel to cross-examine Mardirosian on his credentials, the court qualified Mardirosian as an expert on fire investigations.

¶ 11 Mardirosian first testified as to what he observed after he arrived at the apartment building. There were firefighters, police cars, ambulances and approximately 100 people outside in the area of the building. There were "[a] lot of residents out front" with some dressed in "night clothes and pajamas." Mardirosian also noticed defendant on a gurney, thrashing about and resisting the paramedics' efforts to treat him. At the time, Mardirosian did not know what defendant's "relationship to the fire was." Mardirosian proceeded to defendant's apartment unit, where the fire had already been extinguished.

¶ 12 Next, Mardirosian testified about what he found in defendant's apartment. When he arrived at the apartment, he interviewed Batallion Chief Annis, the incident commander in charge that evening. Chief Annis told Mardirosian that the fire was in the kitchen and appeared to have started in a microwave. Mardirosian learned that "[t]here was a victim removed from the unit in question who was combative and screaming that he wanted to die in the fire." During his investigation, Mardirosian observed extensive fire damage in the "southwest corner of the kitchen in the area above the cooking range," where the microwave had been before firefighters moved it into the living room. He determined that the microwave was in the "middle of the area of origin [of the fire]." When he examined the inside of the microwave, he found a metal Folger's coffee can, a metal fork, a metal disk, the remains of a walkie-talkie, cellphone batteries, what appeared to be the metal tops to salt and pepper shakers, remains of a speaker, and other unidentified melted metal. Inside the metal Folger's coffee can were the remains of a bird.

¶ 13 After conducting a fire-pattern analysis and damage assessment at defendant's apartment, Mardirosian concluded that "the fire originated within the microwave [oven] in the southeast corner of the kitchen above the range." As to the cause of the fire, Mardirosian testified that the fire resulted from the "arcing event" that occurred when the microwave was turned on with the

metal items inside. He explained that when a microwave oven containing metal items inside is turned on, the metal "becomes electrified *** [and] can cause electrical arcing." He further stated that this arcing reaction, if sustained, will cause combustible items left inside the microwave oven, such as plastic, or even parts of the microwave oven itself, to become ignited. In this particular case, he opined, the arcing caused the combustible materials in the microwave oven, *i.e.*, the plastic portions of the walkie-talkie radio and the components of the microwave oven itself, to ignite into a fire. Furthermore, he concluded, based on the amount of metal found in the microwave oven, the fire would have resulted "rather quickly" from the arcing event. Finally, Mardirosian characterized the fire as an "incendiary" fire, which, according to the OFI classification, means that the fire was "man-made" and "intentional." In his opinion, the fire was not the result of any accident or a microwave oven malfunction.

¶ 14 On cross-examination, Mardirosian admitted that he did not have a college degree nor did he have any particularized electrical training. He also admitted that he had not conducted any specific studies or taught courses related to microwaves. Mardirosdian explained that he had taken only a course on electrical fires which included a section on microwaves. Of the 1700 fires he has investigated, only 15 to 20 cases involved microwave ovens. When questioned about his internet search and the articles that he found, Mardirosian stated that he had conducted a Google or Yahoo search and reviewed four internet articles on microwave fires. Mardirosian explained that he knew that putting "metal objects within a microwave [would] create arcing, electrical arcing" and that "if any combustible material is within that arcing event, it's going to ignite and burn." What he sought to understand from the internet research was the "vehicle in which *** specifically the metal became energized," or the "actual scientific principle" of putting metal in a

microwave. He acknowledged that "if you don't have any combustible material adjacent to that arcing, there's a very good chance you would not get a fire."

¶ 15 On re-direct, Mardirosian explained how the combustibility of the microwave oven would differ if a person put a single metal item, versus, a large amount of metallic objects, inside the microwave oven:

> " *** I believe if you put, for instance a single fork in a microwave and turned it on, I think you will eventually have the arcing event and you may end up ruining your microwave. But *** I don't think it's going to arc enough to ignite the plastic insulation inside the microwave.
>
> However, if you put a large enough metal item or a lot of metal items inside, you're going to get multiple arcing *** all over the inside. And the likelihood of it arcing and igniting the inside of the microwave would become much greater."

¶ 16 At the conclusion of Mardirosian's testimony, the State rested. Defendant moved for a directed verdict, arguing that the State did not prove beyond a reasonable doubt that a person such as defendant "without specialized training would have knowledge that a fire would start in a microwave oven if items were placed in a fire [*sic*]." Noting that "[t]he key element of the crime here is knowledge," defense counsel argued that defendant "is not an expert, doesn't have scientific training," and "doesn't have knowledge to know that a fire would begin with practical certainty as a result of his actions conduct." He further argued that defendant's statement that he "wanted to die," after the fire had already started, was not evidence of any such knowledge.

¶ 17 The trial court denied the motion for directed verdict, and stated that "[k]nowledge of a material fact includes awareness of a substantial probability that the fact exists." 720 ILCS 5/4-5(a) (West 2010). The court noted that a person did not "have to be an expert to know, based on the evidence the jury has heard so far, that if you put all kinds of stuff in a microwave, metal and a coffee can, the walkie-talkie, the batteries, it doesn't take a scientist to let you know that that's likely to cause a fire in that microwave."

¶ 18 Defendant did not testify on his own behalf. Instead, he made an offer of proof for the testimony of his foster mother and a co-worker/friend. The trial court denied the offer of proof after finding that it had no relevance on the issue of defendant's conduct and motive.

¶ 19 Following deliberations, the jury returned a verdict of guilty on the charge of aggravated arson. The circuit court denied defendant's motion for a new trial.

¶ 20 At the sentencing hearing, the State contended that defendant "certainly caused or threatened serious harm" and that the court should consider, as aggravating factors, evidence of "the firefighters that had to respond to this and crawl into this burning apartment where their lives were in danger trying to rescue him ***." The State further contended that "a substantial sentence is necessary to deter others from attempting to commit suicide in such a fashion where they endanger the lives of so many people." The circuit court then asked about any "evidence also at the trial that it was a high rise building lived in by a lot of older people." The State explained that "[t]he firefighters observed elderly people *** exiting the building" and that the apartment complex was "a forty-story building." The court then stated that it could consider "how many people were there [in the building] and how old they might have been and [the] possible risk of people other than the people in the building as well, that being the firemen, et cetera." Furthermore, the court noted, the evidence showed that defendant "worked there in the

building," that it was "a large building on Lake Shore Drive," and that "[t]here was evidence that some people on [*sic*] floor he was at, some old ladies or whatever, were in the hallway *** [and that] [t]here [was] smoke in the hallway." The court determined that this was a "thought out situation," where the evidence indicated that defendant kept the two-way radio the day before the fire, "got a coffee can, *** batteries, all these things and put them in the microwave, along with his treasured parrot apparently."

¶ 21 The court sentenced the defendant to nine years' imprisonment on his aggravated arson conviction. Defendant timely appealed and, therefore, we have jurisdiction pursuant to Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009).

¶ 22 ANALYSIS

¶ 23 In this appeal, defendant contends that his conviction should be reversed because: (1) the State failed to prove beyond a reasonable doubt that he knowingly caused a fire in his apartment building; (2) Mardirosian's testimony that the fire was "intentional" was outside the scope of his expertise, lacked a scientific basis, and was not based on standard arson definitions; (3) defendant received ineffective assistance of counsel where counsel failed to object to the fire marshal's testimony that the fire was "intentional" and failed to tender instructions on the lesser-included offense of criminal damage to property; and (4) the trial court erred during sentencing when it considered the potential harm from the fire to others as a factor in aggravation. We address each of these contentions in turn.

¶ 24 I. Evidence of Knowledge

¶ 25 Defendant initially contends that the State failed to prove him guilty of aggravated arson beyond a reasonable doubt. He maintains that the evidence at trial did not establish that he "knowingly" started the fire when he placed the various metal and plastic items into his

microwave oven and turned it on.[1] He claims there was no evidence to support the finding that it was a "practical certainty" that turning on a microwave oven with the metal items inside would result in a fire and damage to the apartment building.

¶ 26 A defendant is guilty of committing arson "when, by means of fire" he "knowingly" causes damages to another person's real or personal property without that person's consent. 720 ILCS 5/20-1 (West 2010). To sustain a conviction of aggravated arson, the State must further prove that "in the course of committing arson [the defendant] knowingly damages, partially or totally, any building or structure, *** and (1) he knows or reasonably should know that one or more persons are present therein ***." 720 ILCS 5/20-1.1(a) (West 2010). A person "knows, or acts knowingly or with knowledge" of the "result of his or her conduct *** when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2010).

¶ 27 When reviewing a conviction challenged on the grounds that the evidence was insufficient to establish guilt beyond a reasonable doubt, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *** 'Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.' (Emphasis in original.)" *People v. Collins,* 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). The credibility of witnesses, the weight to be afforded to their testimony, and the reasonable inferences to be drawn from the evidence are the responsibilities of the trier of fact. *Id.* A

[1] Defendant did not admit or dispute the allegation that he placed the items into the microwave oven and turned the oven on; however, this was a reasonable inference for the jury to draw from the evidence.

conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *Id.*

¶ 28 Determination of defendant's mental state may be inferred from circumstantial evidence. *People v. Moore*, 358 Ill. App. 3d 683, 388 (2005). "The elements of aggravated arson, including the element of knowledge, need not be proven by direct evidence and instead may be inferred from the surrounding facts and circumstances." *People v. Stewart*, 406 Ill. App. 3d 518, 526 (2010). When an element sought to be proven is a mental state for which the only direct evidence is within the domain of the defendant, circumstantial evidence is as probative as direct evidence. *People v. Gonzalez*, 243 Ill. App. 3d 238, 241-42 (1993) (holding that the "[e]lements of aggravated arson may be shown by circumstantial evidence, and issues such as motive, opportunity or knowledge can be inferred from the surrounding facts of each case").

¶ 29 The jury found that defendant knowingly caused the fire. The facts and circumstances surrounding defendant's conduct support the inference that defendant acted with the mental state necessary to be convicted of aggravated arson. Here, the record shows that defendant used some degree of aforethought when he collected a walkie-talkie radio from the day before, other items containing metal and plastic, batteries, and a metal coffee can, and then placed them into the microwave oven. A jury could reasonably infer that defendant must have known that turning on the microwave oven with these items inside would produce an electrical charge, sparks or combustible reaction.[2] We conclude that any rational trier of fact could have found, beyond a reasonable doubt, that defendant knowingly caused the fire when he placed the items into his microwave oven and turned it on. There was no evidence to support a finding that the items were placed into the microwave oven by accident or as an experiment. Moreover, any rational

[2] There was no evidence regarding the amount of time defendant left the microwave oven after turning it on; however, the jury was free to infer from the evidence at trial that defendant did not turn off the oven when it began to overheat.

trier of fact could conclude that defendant, as a leasing agent who worked and resided at the 3450 North Lake Shore Drive building, was "consciously aware" that other tenants were present in the high-rise apartment building during a Friday night.

¶ 30 For all of the foregoing reasons, we find sufficient evidence in the record to support the jury's verdict of aggravated arson.

¶ 31 II. Mardirosian's Opinion that the Cause of the Fire was Intentional

¶ 32 Defendant next contends that the trial court erred by admitting Mardirosian's testimony that the cause of fire was "intentional" and not accidental. Defendant argues that Mardirosian was not qualified to give an opinion as to defendant's mental state, that Mardirosian's testimony was not based on industry standards for fire investigations, and that his opinions lacked a scientific basis.

¶ 33 First, we note that defendant concedes that his trial counsel failed to object to Mardirosian's testimony that the fire was intentional at any time during the trial or post-trial proceedings. Such failure generally results in a forfeiture of the right to raise the issues later on appeal. *People v. Herron*, 215 Ill. 2d 167, 177 (2006); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant nonetheless requests that his claim be reviewed for plain error.

¶ 34 The plain error doctrine is a narrow and limited exception to the general rule of procedural default. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He must then show either (1) that the evidence was closely balanced, or (2) that the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Naylor*, 229 Ill. 2d at 593. Under both prongs,

defendant bears the burden of persuasion. *Id.* "If the defendant fails to meet his burden, the procedural default will be honored." *Hillier*, 237 Ill. 2d at 545.

¶ 35 Defendant contends that Mardirosian's testimony regarding the "intentional" nature of the fire should not have been admitted at trial because Mardirosian was not qualified to render an opinion as to defendant's *mens rea*. He argues that Mardirosian's testimony "invaded the province of the jury and was reversible error." Furthermore, he argues, there was 'no evidence of any kind as to Mardirosian's expertise in the area of psychology or psychiatry, and thus Mardirosian was not qualified to offer an opinion as to Grand's mental state.' He cites to *People v. Covey*, 34 Ill. 2d 195 (1966), and *People v. Noble*, 42 Ill. 2d 425 (1969), as support. We find that *Covey* and *Nobel* are factually distinguishable and legally inapplicable to the case at bar. *Covey* involved the adjudication of the defendant as a "sexually dangerous person" that depended in part on the psychiatrist's determination of whether defendant had a mental *disorder*, (34 Ill. 2d at 197), and *Noble* dealt with the psychiatric evaluation of a defendant for purposes of determining whether he was sane or, instead, afflicted with a mental *condition*, at the time he committed the offense (42 Ill. 2d at 435). Neither of the cases supports defendant's proposition that a fire marshal is not qualified to render an opinion on the nature of a fire, whether it was caused by "man-made" or natural forces, and whether it was intentional or accidental.

¶ 36 Contrary to defendant's argument, Mardirosian's testimony was not offered to establish that defendant knowingly started the fire in his apartment. It was offered as an explanation of the cause and nature of the fire—whether it was likely started from an intentional act or an accident. He testified that the cause of the fire resulted from "man-made" and "intentional" acts. At no point in the trial did Mardirosian give an opinion that *defendant* had any specific "intent" or motivation. In fact, Mardirosian never testified as to who started the fire, why the fire was

started, or when the fire was started. Whether defendant was aware that an "arcing event" would result in a fire was not an issue that Mardirosian was asked to resolve. Mardirosian's opinion was limited to the origin and cause of the fire. Therefore, we find no clear or obvious error in admitting Mardirosian's testimony regarding the cause of the fire.

¶ 37 Defendant next argues that Mardirosian should have applied the National Fire Protection Association (NFPA) definition of an incendiary cause of fire, instead of relying on the OFI definition of an incendiary cause. Defendant asks this court to take judicial notice of these NFPA standards, which classify an incendiary cause of fire where a fire "is intentionally ignited under circumstances in which the person igniting the fire knows the fire should not be ignited." NFPA 921 Guidelines, Chapt. 3.2, Definitions, 3.3.103.

¶ 38 Defendant has not explained how the difference in definitions, if pointed out to the jury, would have diminished Mardirosian's credibility in any way. This court will not engage in any speculation about how the NFPA definitions, when compared to OSI definitions used by Mardirosian, would have impacted the findings reached by the jury. Based on the evidence that defendant gathered specific metal items together, placed them in the microwave oven with other combustible and flammable objects, turned the microwave oven on, and left it on long enough to cause a fire, we find that defendant cannot show that the outcome of the trial would have been different had the jury been given these two NFPA definitions. *People v. Mercado*, 397 Ill. App. 3d 622, 635 (2010).

¶ 39 Defendant also contends that Mardirosian's conclusion lacks scientific evidence and was based on "sheer conjecture." We disagree. Mardirosian testified that he conducted internet research to help *him* understand the scientific principle behind how metallic items spark when subjected to heat inside a microwave oven. This admission, however, does not amount to a

statement that his opinion as to the cause and origin of the fire was based on the internet research or "scientific" explanation behind putting metal in the microwave oven. "If an expert's opinion is derived solely from his or her observations and experiences, the opinion is generally not considered scientific evidence." *In re Marriage of Alexander*, 368 Ill. App. 3d 192, 196 (2006). Mardirosian's opinion was based on his observations of the fire pattern and damage analysis in defendant's apartment, his examination of the items in the microwave oven, and his other training and experiences as a fire investigator, including 15 to 20 previous investigations that involved microwave fires. Together with a layperson's understanding of the risks inherent in using the microwave oven to heat any items containing metallic properties, the jury was free to accept or reject the foundation on which Mardirosian based his explanation of how an electrical arcing event could cause a fire. Therefore, the trial court did not commit any error in permitting Mardirosian to testify about the arcing reaction—or, simply put, "sparks"—that resulted when metal is heated in a microwave oven. Together with the forensic evidence obtained from defendant's apartment, the jury had sufficient evidence in the record to conclude that defendant knowingly started the fire.

¶ 40 III. Ineffective Assistance of Counsel

¶ 41 Defendant claims that he received ineffective assistance of counsel where trial counsel failed to: (1) object to the State's fire expert's credentials; (2) object to portions of Mardirosian's testimony as not being scientifically-based; (3) object when Mardirosian characterized the fire as "intentional" or "intentionally set"; and (4) request a jury instruction on the offense of criminal damage to property as a lesser-included offense of aggravated arson. Finally, he contends that if none of the above bases for relief individually entitle him to a new trial, he is nevertheless entitled to a new trial due to the cumulative effect of counsel's errors.

¶ 42 In Illinois, claims of ineffective assistance of trial counsel are judged by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1986). *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). The right to effective assistance of counsel is safeguarded by both the United States Constitution and our courts. *Id.*; U.S. Const. Amend. VI. In order to prevail on his claim, defendant must satisfy the *Strickland* two-prong test, as follows:

> "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

¶ 43 There is a strong presumption that the action or inaction by a trial attorney was the product of sound trial strategy and not incompetence. *Coleman*, 183 Ill. 2d at 397 (quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989)). A reviewing court may not second-guess the tactical and/or strategic choices made by trial counsel unless those choices were uninformed due to lack of adequate preparation. *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 694. Therefore, the deficient-performance prong of the test is not satisfied unless "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Id.* at 688. The prejudice prong of the *Strickland* test is not

satisfied unless there is a showing of a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id*. at 697.

¶ 44 With the *Strickland* two-prong test in mind, we address each of defendant's complaints about his trial counsel, *seriatim*.

¶ 45 A. Failure to Object to Mardirosian's Credentials

¶ 46 Defendant contends that he was denied a fair trial because his trial counsel failed to object to Mardirosian's credentials as the State's fire expert. Defendant complains that his defense counsel should have objected to Mardirosian's qualifications. We find there was sufficient evidence of Mardirosian's qualifications as an expert to allow his testimony on the cause and origin of the fire. Furthermore, defense counsel's decision to refrain from challenging Mardirosian's credentials *prior* to the State's presentation of his testimony and expert opinions could have simply been a matter of trial strategy. The record shows that defense counsel in fact did elicit, on cross-examination, admissions by Mardirosian that he had no college degree. Defense counsel's election to challenge Mardirosian's expertise and experience in fire investigations during cross-examination, instead of in an attempt to exclude him as the State's expert, was a choice of strategy, and, given the admissions elicited from Mardirosian regarding his limited experience with microwave fires, counsel did so with thoroughness and competence. "[I]n order to establish deficient performance [of trial counsel], the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. [Citations.] Matters of trial strategy are generally immune from claims of

ineffective assistance of counsel. [Citation.]" *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Our review of the record in this case reveals that defendant cannot overcome the presumption that his counsel's performance was a "product of sound trial strategy." Defense counsel aggressively cross-examined Mardirosian in this case, eliciting testimony that he did not have a college degree and had limited knowledge of fires resulting from microwave ovens. Counsel's cross-examination also produced an admission by Mardirosian that he did not reach a conclusion as to whether this fire was the result of arson. We therefore find nothing in the record to indicate that counsel's strategy during Mardirosian's cross-examination was unsound or unreasonable.

¶ 47 B. Failure to Object to Mardirosian's Testimony

¶ 48 Defendant next contends that his trial counsel was ineffective for failing to object to Mardirosian's testimony as not being scientifically-based. He argues that Mardirosian's testimony concerning the scientific principle behind why and how putting metal in a microwave oven causes fire should have been challenged as it was obtained through an internet search.

¶ 49 We find defendant's argument to be misplaced. First, the record shows that counsel vigorously cross-examined Mardirosian and, thus, the jury was clearly aware of how he reached his conclusions. Second, there is no reason to believe that Mardirosian's analysis was unreliable merely because he used a Google search. Defendant fails to point to any concrete reason for excluding Mardirosian's opinion simply because he reviewed internet articles to help him understand and explain the scientific principle involved when metal is placed in a microwave oven. Finally, we do not believe that Mardirosian's explanation of the science behind why metals arc—or, essentially, spark—when subjected to heat inside a microwave oven, was essential to the verdict. Given the evidence presented in this case, any reasonable jury could have reached the same conclusion without an expert opinion in metallurgical properties. Anyone

who has used a microwave oven knows that turning it on with metal inside will very likely produce sparks or an explosive reaction. The warning labels on aluminum foil, microwaveable food packages, and other miscellaneous kitchen tools, are common, abundant and well-known.

¶ 50 Additionally, for the reasons already stated, we will not second-guess the effect of discrediting Mardirosian based on his use of the OFI standards versus the NFPA standards. We find no basis for concluding that the outcome would have been different had defense counsel objected to Mardirosian's testimony on the basis of a lack of scientific foundation or industry standards. Accordingly, we are not persuaded by defendant's argument on this point.

¶ 51 C. Failure to Object to Characterization of the Fire as "Intentional"

¶ 52 Defendant also contends that his counsel was also ineffective for failing to object to Mardirosian's characterization of the fire as intentional. It is apparent from the record that defense counsel made a strategic decision to not object to Mardirosian's direct testimony classifying the fire as "incendiary." Instead, he chose to wait and cross-examine the fire expert on his use of the term "intentional" when describing an incendiary fire. Such a tactical decision by defense counsel with which the defendant later disagrees is not a proper basis for a claim of ineffective assistance of counsel. Decisions regarding when, or whether, to object during trial are matters of trial strategy and professional judgment that are entrusted to defendant's trial counsel. *People v. Young*, 341 Ill. App. 3d 379, 383 (2003) (that another attorney, with the benefit of hindsight, would have handled the situation differently does not indicate that trial counsel was not effective). We find no prejudice in any event in light of defense counsel's questioning of Mardirosian's use of the word "intentional" which subjected it to adversarial scrutiny. We therefore reject this claim of ineffective assistance.

¶ 53 D. Failure to Request a Jury Instruction on a Lesser-Included Offense

¶ 54 Defendant contends that this court should remand the case for a new trial because his trial counsel did not request a jury instruction on the lesser-included offense of criminal damage to property. The State responds that defendant was properly charged and adjudicated guilty of aggravated arson and that a request for an instruction of a reduced offense to criminal damage to property was not appropriate as defendant's actions were committed knowingly and intentionally.

¶ 55 When there is evidence in the record which, if believed by the jury, would reduce the crime to a lesser-included offense, the lesser offense instruction should be requested. *People v. Bradley*, 256 Ill. App. 3d 514, 516 (1993). However, where there is no evidence that the arson committed by the defendant was not intentional, the request for a lesser-included offense instruction cannot form the basis of an ineffective assistance of counsel claim. See *People v. Parsons*, 284 Ill. App. 3d 1049, 1059 (1996).

¶ 56 Here, defendant was a professional leasing agent in his late forties with certain tenant responsibilities in a large 355-unit residential apartment building and, undoubtedly, was familiar with the general well-known hazards related to the intended misuse of electrical kitchen appliances. He nonetheless gathered together many metal objects, such as his work walkie-talkie, batteries, metal eating utensils, metal tops to his salt and pepper shakers and a metal coffee can containing his pet bird, among other metal items, and put them in the microwave in an attempt to commit suicide by fire. Defendant cannot be said to have acted recklessly where the evidence clearly showed that he acted knowingly in starting the fire in question. Under the circumstances, the trial court would have been within its discretionary authority to refuse defendant's request for the lesser-included offense instruction. *Id.*; see also *People v. Ryan*, 97 Ill. App. 3d 1071, 1074 (1981) (defendant charged with aggravated arson not entitled to jury

instruction on criminal damage to property); *People v. Kyles*, 303 Ill. App. 3d 338, 351 (1998) (if evidence shows that defendant acted intentionally, he "could not be found guilty of [criminal damage to property] because there was no evidence *** that defendant acted recklessly ***"). We thus find no merit to this claim of error regarding defense counsel's failure to seek a jury instruction on a lesser-included offense.

¶ 57 E. Cumulative Effect of Alleged Errors

¶ 58 Finally, defendant claims that he was denied effective assistance of counsel due to the cumulative effect of trial counsel's errors. Defendant is merely resubmitting, in bulk form, the five individual issues he has already presented and we have disposed of, *supra*. We disagree with his assertion that he is entitled to a new trial based on cumulative error because we have not found that even one of the five individual instances that defendant complains of rises to the level of ineffective assistance of counsel. Looking at these five instances together does not change our opinion. We find that defendant has failed to establish ineffective assistance of counsel.

¶ 59 IV. Sentencing Based On Double Enhancement

¶ 60 Defendant lastly contends that during the sentencing hearing, the trial court improperly considered, as aggravating factors in sentencing, the potential harm to other people in defendant's building. As a result, defendant argues, his sentence of nine years is excessive. Noting the trial court's references to "how many people" there were in the building and "how old they might have been," defendant argues that the potential harm to others should not have been considered because it is a factor inherent in the crime of aggravated arson. Defendant asks that we reduce his sentence or, alternatively, remand the case for resentencing.

¶ 61 The offense of aggravated arson is a Class X felony punishable by 6 to 30 years in prison; an element of the offense is the perpetrator's knowledge that one or more persons were present in

the structure he was setting on fire. 720 ILCS 5/20-1.1(b) (West 2012); 720 ILCS 5/20-1.1(a)(1) (West 2010).

¶ 62 "In imposing sentence upon a defendant, the trial judge may not consider in aggravation any fact implicit in the underlying offense for which defendant was convicted." *People v. James*, 255 Ill. App. 3d 516, 532 (1993). This rule against double enhancement is premised on the fact that our legislature already considered the elements of the offense in fashioning appropriate penalties and those same elements could not be used as an aggravating factor at sentencing. *People v. Rissley*, 165 Ill. 2d 364, 390 (1995).

¶ 63 Absent an abuse of discretion, a sentence will not be disturbed on appeal if it is within the statutory limits. *People v. Coleman,* 166 Ill. 2d 247, 258 (1995). Defendant admits that he failed to raise his double enhancement issue either at the sentencing hearing or *via* a motion to reconsider the sentence, as required. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Herron*, 215 Ill. 2d 167, 177 (2005). He nonetheless argues that this issue should be reviewed for plain error because his "fundamental right to liberty" is affected when a court relies on an improper element when imposing a sentence. *People v. Martin*, 119 Ill. 2d 453, 458 (1988)). In order to warrant a plain error analysis, defendant "must first show that a clear or obvious error occurred." *Hillier,* 237 Ill. 2d at 545.

¶ 64 Defendant relies on the court's rulings in *People v. James*, 255 Ill. App. 3d 516 (1993), and *People v. Gonzalez*, 243 Ill. App. 3d 238 (1993). In *Gonzalez*, the defendant's prison sentence for aggravated arson was reduced from ten years to six years, because the court's sentence was based on the fact that "[t]here were a number of people *** who had nothing to do with [defendant's] dispute *** and when [defendant] acted in the way [he] did, [he] threatened all of their lives as well." *Id.* at 244. In *James*, the defendant's conviction for aggravated arson was

reversed and the case was remanded for a new trial, after the court improperly considered in sentencing the fact that the defendant "placed in perile [*sic*] a number of innocent people." 255 Ill. App. 3d at 532. *Gonzalez* and *James* are factually distinguishable from this case. In each of the foregoing cases cited by defendant, the court found that the trial judge's sentence was based solely on the judge's finding that the perpetrator's actions threatened harm to other persons, which was a factor implicit in the offense itself. In contrast, the record in this case indicates that the trial judge took several factors into consideration.

¶ 65 Instead, we find the decision in *People v. Hunter*, (101 Ill. App. 3d 692, 694 (1981) (citing *People v. Tolliver*, 98 Ill. App. 3d 116, 117–18 (1981)) to be instructive. In *Hunter*, the defendant challenged the sentence imposed following his conviction for aggravated arson, contending that the trial judge improperly considered a factor implicit in the offense itself. 101 Ill. App. 3d at 693. Similar to the case at bar, the fire was set at around 10 p.m., when the potential victims were likely to be sleeping. *Id.* at 693-94. There, the trial judge in *Hunter* noted the fact that the fire "endangered the lives of an entire family, including a small child" and was motivated by defendant's desire to collect insurance proceeds. *Id.* at 694-5. The court agreed with the defendant's contention that the trial judge could not consider, as an aggravating factor, simply the mere fact that persons were exposed to serious harm because that is an element implicit in the offense of aggravated arson. *Id.* However, the court concluded, there was no abuse of discretion because the judge "did not necessarily depend on that fact to impose a sentence greater than the minimum." *Id.* Although "a specific act inherent in a charged offense [can] not be considered to aggravate a sentence, a judge may still consider 'the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant.' " *Id*. at 694.

¶ 66 In fact, the trial court specifically acknowledged it could not consider the elements of the offense when it stated, "I can't consider the fact that other people were [in the building]." Instead, the court explained that the factors taken into consideration involved the nature and circumstances of where the fire occurred and the ages of the people impacted by the fire and threat of harm, *i.e.*, that the fire was set in "a large building on Lake Shore Drive," or "a high rise building," where "a lot of older people" resided, and that the collection of the various items in the microwave oven arose out of a "thought out situation" by defendant. We find no basis in the record to substitute our judgment for the trial court's consideration during sentencing.

¶ 67 Therefore, defendant's nine-year sentence for aggravated arson must be affirmed.

¶ 68 CONCLUSION

¶ 69 For all the foregoing reasons, we affirm the judgment of the trial court.

¶ 70 Affirmed.