STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v FREDRICK KYLE YOUNG, Defendant-Appellant.	No. 325936 Wayne Circuit Court LC No. 14-006130-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v FELANDO DEMONE HUNTER, Defendant-Appellant.	No. 326092 Wayne Circuit Court LC No. 14-00613-02-FC

Before: TALBOT, C.J., and WILDER and BECKERING, JJ.

PER CURIAM.

These consolidated appeals[1] arise out of the robbery and murders of two victims in 2012. Defendants Fredrick Kyle Young (Fredrick) and Felando Demone Hunter (Felando) were tried before the same jury. The jury convicted Fredrick of two counts of first-degree premeditated murder,[2] two counts of felony murder,[3] torture,[4] armed robbery,[5] unlawful imprisonment,[6] felon

[1] *People v Young*, unpublished order of the Court of Appeals, entered March 4, 2015 (Docket No. 325936).

[2] MCL 750.316(a).

[3] MCL 750.316(b).

[4] MCL 750.85.

in possession of a firearm,[7] and possession of a firearm during the commission of a felony (felony-firearm).[8] Felando was convicted of two counts of first-degree premeditated murder, two counts of felony murder, torture, armed robbery, unlawful imprisonment, and felony-firearm. Both were sentenced to life in prison for each murder count and various terms of imprisonment for the remaining counts. The trial court then vacated the felony murder convictions. We remand for correction of both defendants' sentences, and affirm in all other respects.

I. FACTS

The victims in this case, Jacob Kudla (Jacob) and Jourdan Bobbish (Jourdan), were last seen alive on July 22, 2012. Their bodies were discovered in an empty field in Detroit on July 27, 2012. Jacob had been shot in the back and in the head, while Jourdan died from a single shot to the back of his head.

The testimony of several witnesses pieced together Jacob and Jourdan's final hours. Jacob and Jourdan had driven from Warren to Detroit, seeking to buy prescription drugs. They encountered Fredrick and Felando, who took them to a home in Detroit. There, Fredrick and Felando ordered the two to the ground, stripped them of their outer clothing, and robbed them of cash and prescription pills. They then forced Jacob and Jourdan into the trunk of a car and drove for approximately an hour before finding a suitable location. Once Fredrick and Felando found an empty field, they instructed Jacob and Jourdan to leave the vehicle and get on their knees. Felando shot Jourdan in the head with a revolver, and Fredrick shot Jacob in the back with a rifle. While Jourdan died instantly, Jacob did not. Jacob was then shot in the head. After killing the two young men, Fredrick and Felando picked up a bottle of liquor, took the car that had been driven by Jacob and Jourdan to another location, and doused it with bleach.

A short time later, Felando spoke with an acquaintance, Demerious Cunningham (Demerious). Felando explained his and Fredrick's involvement in the crimes to Demerious. Demerious later provided this information to police. Several other witnesses who had seen or heard the events that occurred at the home also came forward and testified at trial.

II. DOCKET NO. 325936

A. SUFFICIENCY OF THE EVIDENCE

In Docket No. 325936, Fredrick first argues that the evidence was insufficient to support a number of his convictions. We disagree. As this Court has recently explained:

> In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light

[5] MCL 750.529.

[6] MCL 750.349b.

[7] MCL 750.224f.

[8] MCL 750.227b.

> most favorable to the prosecutor. The question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. Because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented. To evaluate the sufficiency of the evidence, we must review the evidence in the context of the elements of the charged crimes.[9]

At the outset, Fredrick generally challenges the weight to afford certain evidence and whether the key witnesses against him were credible. He argues that although witnesses testified to certain events, because their testimony was not also supported by physical evidence, it is insufficient to support his convictions. It is well-established that it is for the jury to weigh the evidence and determine questions of credibility, and that these determinations will not be interfered with on appeal.[10] Moreover, physical evidence is not required to support Fredrick's convictions. A conviction may be based solely on witness accounts and circumstantial evidence.[11]

Fredrick argues that there was insufficient evidence of premeditation to support his convictions of first-degree murder. "Premeditation and deliberation, for purposes of a first-degree murder conviction, require sufficient time to allow the defendant to take a second look."[12] "Premeditation and deliberation can be established through (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide."[13] Taking the evidence in the light most favorable to the prosecutor, the two victims were made to kneel on the ground, facing away from Fredrick and Felando, with their hands on their heads before being shot from behind in the back and head. While this evidence alone easily supports a conclusion that the murders were premeditated, the testimony also established that prior to doing so, Fredrick and Felando drove for an hour with the victims in the trunk of their car, looking for a convenient location to kill them. Then, after killing the two young men, Fredrick and Felando obtained a bottle of liquor and attempted to destroy any evidence that might be found in the car that had been driven by Jacob and Jourdan. The circumstances before, during, and after the murders of Jacob and

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[9] *People v Bosca*, 310 Mich App 1, 16-17; 871 NW2d 307 (2015) (quotation marks, brackets, and citations omitted).

[10] *Id*. at 16.

[11] *People v Nowack*, 462 Mich 392, 400-403; 614 NW2d 78 (2000).

[12] *People v Orr*, 275 Mich App 587, 591; 739 NW2d 385 (2007) (quotation omitted).

[13] *Id*. (quotation omitted).

Jourdan provided ample evidence from which a rational juror could conclude that the killings were premeditated.

Fredrick next argues that there was insufficient evidence to support his armed robbery conviction. The elements of an armed robbery are "(1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a weapon described in the statute."[14] While Fredrick asserts that there was no evidence that the two victims were robbed at gunpoint, two witnesses testified to hearing Fredrick and Felando order Jacob and Jourdan to hand over their belongings. Demerious testified that Felando described the robbery to him, and indicated that Felando and Fredrick took cash and prescription pills from the victims after Felando struck one of the victims in the face with a rifle. At a bare minimum, there was sufficient evidence that Fredrick aided and abetted Felando in committing an armed robbery.[15] "A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense."[16]

Fredrick also argues that because there was no evidence of an armed robbery, his felony murder convictions must fail. As discussed, there was sufficient evidence to support Fredrick's armed robbery conviction. Accordingly, Fredrick has not demonstrated error requiring reversal.

Finally, Fredrick argues that there was insufficient evidence to support his torture conviction. "A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture . . . ."[17] Fredrick argues that no

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[14] *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000).

[15] As this Court explained in *Bosca*, 310 Mich App at 21:

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [(quotation omitted)].

Fredrick asserts that he was merely present when the robbery and murders were committed. However, the evidentiary record demonstrates that he was much more than merely present. According to Demerious, Felando explained that both he and Fredrick participated in the robbery. Both then drove the victims to the field. The testimony also established that Fredrick himself shot one of the victims in the back before Felando shot him in the head. And after the murders, both Fredrick and Felando disposed of the vehicle that had been driven by the victims.

[16] *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). See also MCL 767.39.

[17] MCL 750.85(1).

conduct attributed to him could be perceived as cruel or extreme.[18] In this case, Jacob and Jourdan were robbed and forced to strip to their underwear. They were then forced into the trunk of a vehicle. After an hour of driving, Jacob and Jourdan were required to exit the trunk, kneel down with their backs to the gunmen, and await their execution. From these facts, a rational juror could easily conclude that Felando and Fredrick intended to inflict cruel or extreme mental pain and suffering on their victims, and that both victims experienced severe mental pain and suffering. Fredrick's argument lacks merit.

B. DOUBLE JEOPARDY

Second, Fredrick argues that his convictions of torture and false imprisonment violate the double jeopardy clause. We disagree. "A double jeopardy challenge presents a question of law that we review de novo."[19]

Among its protections, "[t]he prohibition against double jeopardy protects individuals . . . against multiple punishments for the same offense."[20] "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."[21] Thus, "[t]he multiple punishments strand is not violated where a legislature specifically authorizes cumulative punishment under two statutes[.]"[22] But the Legislature does not always clearly state its intent.[23] In such cases, "Michigan courts apply the 'abstract legal elements' test articulated in [*People v*] *Ream*[24] to ascertain whether the Legislature intended to classify two offenses as the 'same offense' for double jeopardy purposes."[25] This test asks whether each offense requires proof of an element that the other does not.[26] Accordingly, to determine whether two convictions violate the double jeopardy clause, this Court must first ask "whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If

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[18] The statute defines "cruel" as "brutal, sadistic, or that which torments." MCL 750.85(2)(a). The term "extreme" is not defined by the statute. As such, this Court may consult dictionary definitions of that term. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). Common dictionary definitions of "extreme" are "existing in a very high degree" or "exceeding the ordinary, usual, or expected." Merriam-Webster's Collegiate Dictionary, 11th ed.

[19] *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

[20] *People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015) (quotation omitted).

[21] *Id*. at 17-18 (quotations omitted).

[22] *Id*. at 18 (quotations, brackets, and ellipses omitted).

[23] *Id*. at 19.

[24] *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

[25] *Miller*, 498 Mich at 19.

[26] *Id*.

the legislative intent is clear, courts are required to abide by this intent."[27] "If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream* to discern legislative intent."[28]

On appeal, the parties focus only on the second inquiry, the abstract legal elements test. No such inquiry is required because our Legislature has made its intent clear. The final subsection of the torture statute states, "[a] conviction or sentence under this section does not preclude a conviction or sentence for a violation of any other law of this state arising from the same transaction."[29] Similarly, the final subsection of the unlawful imprisonment statute states, "[t]his section does not prohibit the person from being charged with, convicted of, or sentenced for any other violation of law that is committed by that person while violating this section."[30] As the statutory language at issue clearly states an intent to permit multiple punishments, the double jeopardy clause has not been violated in this case.

Moreover, even applying the "abstract legal elements" test stated in *Ream* leads to the conclusion that Fredrick's convictions do not violate the double jeopardy clause. This Court must ask whether "each offense has an element that the other does not."[31] And "[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."[32] While both crimes contain an element of restraint, unlawful imprisonment requires restraint with the addition of an aggravating factor – the use of a weapon, secret confinement, or restraint to facilitate flight after committing another felony.[33] None of these aggravating factors are present in the torture statute.[34] Torture requires proof of injury, specifically, great bodily injury or severe mental pain or suffering.[35] Unlawful imprisonment contains no such element.[36] As such, Fredrick's convictions do not violate the double jeopardy clause, even under the "abstract legal elements" test.

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[27] *Id*.

[28] *Id*.

[29] MCL 750.85(4).

[30] MCL 750.349b(4).

[31] *Ream*, 481 Mich at 240.

[32] *Id*. at 238. Fredrick's argument focuses on the specific facts of this case. Under *Ream*, his focus is misplaced.

[33] MCL 750.349b(1).

[34] MCL 750.85.

[35] MCL 750.85(1).

[36] MCL 750.349b(1).

C. JUDGMENT OF SENTENCE

Third, Fredrick argues that his judgment of sentence must be corrected to reflect two convictions of first-degree murder, with each conviction supported by two different theories. In this regard, we agree. Because this issue was not raised below, our review is for plain error affecting substantial rights.[37]

While there are only two victims in this case, the jury convicted Fredrick of four counts of first-degree murder, two counts of premeditated murder and two counts of felony murder. "[D]ouble jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim . . . ."[38] The trial court addressed the constitutional problem by vacating the felony murder convictions. However, the proper way to address the issue is for the judgment of sentence to reflect two convictions for first-degree murder (one conviction for each victim), with each conviction supported by two alternative theories.[39]

Because this issue is not preserved, Fredrick must satisfy the plain-error rule.[40] To do so, he must first show that an error occurred, that the error was plain, and that the error affected the outcome of the lower court proceedings.[41] Fredrick has established that an error occurred. This error was plain, as *Bigelow* and *Williams* state the correct method of addressing his convictions. The error also affected the outcome of the lower court proceedings by resulting in an incorrect judgment of sentence.

Even though Fredrick has satisfied these requirements, this Court "must exercise its discretion in deciding whether to reverse. Reversal 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."[42] Correcting the error brings the judgment of sentence in line with the established law of this state, thereby preserving the integrity and public reputation of our courts. Accordingly, we exercise our discretion to remand the matter for this limited purpose. And while Felando has not raised the issue, his judgment of sentence contains the same error. To maintain consistency, we remand his case for the trial court to make the same correction.

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[37] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[38] *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005).

[39] *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). See also *Williams*, 265 Mich App at 72 (Where a defendant is convicted of both felony murder and premeditated murder "arising out of the death of a single victim, we will uphold a single conviction for murder based on two alternative theories.").

[40] *Carines*, 460 Mich at 763.

[41] *Id*. at 763.

[42] *Id*. (quotation marks, brackets, and citations omitted).

III. DOCKET NO. 326092

A. WITNESS INTIMIDATION

In Docket No. 326092, Felando first argues that his due process rights were violated because a police officer, Allen Williams, intimidated Demerious into implicating Felando in the murders. We disagree. Because the issue was not raised below, our review is for plain error affecting substantial rights.[43]

"Both our Supreme Court and this Court have strongly condemned prosecutorial intimidation of witnesses."[44] "Threats from law enforcement officers may be attributed to the prosecution."[45] On appeal, Felando claims that police officers intimidated Demerious with threats of criminal charges "contemporaneously with questioning [him] about the present case." This factual assertion is false. Even Demerious testified that he was not threatened or intimidated during the car ride where he was asked about the present matter. Further, the only "threat" of any sort that is found in the record is a threat that Demerious could face criminal charges if he lied to police. There is no prohibition against informing a witness of the potential consequences of making false statements.[46] Felando has failed to demonstrate error requiring reversal.

Felando also argues that trial counsel was ineffective for failing to object to the admission of Demerious's testimony on this ground. "[C]ounsel is not ineffective for failing to raise a meritless or futile objection . . . ."[47] Because any objection would have been futile, Felando is not entitled to relief.

B. JURY OATH

Felando's second and final contention of error is that because the trial court failed to administer an oath to the jury pool before beginning voir dire, he is entitled to a new trial. We disagree.

It is undisputed that the trial court did not administer an oath to the prospective jurors before voir dire began, contrary to MCR 6.412(B).[48] However, no one brought the error to the

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[43] *Id*.

[44] *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992).

[45] *Id*.

[46] See *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001) ("[A] prosecutor may inform a witness that false testimony could result in a perjury charge.").

[47] *People v Sardy*, ___Mich App___, n 11; ___NW2d___ (2015), slip op at 17 n 11.

[48] In criminal trials, MCR 6.412(B) states that the trial court "should give the prospective jurors appropriate preliminary instructions and must have them sworn."

trial court's attention at any point in the proceedings. Rather, after conducting voir dire and selecting a final panel of jurors, the trial court swore in the jury and began hearing testimony. It is only now, after his trial resulted in an adverse verdict, that Felando seeks a new trial based on this omission.

There is no dispute that the failure to swear in the jury prior to voir dire was erroneous. Felando implies that this Court should find the error structural, and relying on the decision of the Supreme Court of New York in *People v Hoffler*,[49] apply the rule of automatic reversal instead of considering the issue under the plain-error rule. Felando's argument is without merit. In *People v Cain*, our Supreme Court granted leave to consider whether "the failure to properly swear in the jury, even in the absence of a timely objection, is a structural error requiring a new trial."[50] The Court explained that whether the error was considered structural or nonstructural, because the error was unpreserved, the "defendant must satisfy the plain-error standard of *Carines* in either event."[51] Thus, regardless of whether the error that occurred in this case is considered structural or nonstructural, Felando, like the defendant in *Cain*, must satisfy the requirements of the plain-error rule.

Assuming that the first three prongs of the rule are fulfilled,[52] Felando has not satisfied the fourth prong. In *Cain*, our Supreme Court explained that appellate courts must, before ordering a new trial, "engage[] in a fact-intensive and case-specific inquiry under the fourth *Carines* prong to assess whether, in light of any 'countervailing factors' on the record, . . . leaving the error unremedied would constitute a miscarriage of justice, i.e., whether the fairness, integrity, or public reputation of the proceedings was seriously affected."[53] An examination of the record demonstrates no such miscarriage of justice in this case.

Before questioning the potential jurors, the trial court first explained the nature of the case, alerting the potential jurors to the gravity of the matter at hand. It then explained that the purpose of the questions that were to follow was to help the parties discover any bias or other

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[49] *People v Hoffler*, 53 AD3d 116; 860 NYS2d 266 (2008). *Hoffler* concerned a preserved claim that the trial court failed to administer an oath to jurors as required before voir dire began. *Id*. at 120-121. The New York Supreme Court held that the failure to do so was structural error that defied harmless error analysis. *Id*. at 123-124. Thus, *Hoffler* is distinguishable in that, unlike the present case, *Hoffler* involved a preserved claim of error.

[50] *People v Cain*, 498 Mich 108, 114; 869 NW2d 829 (2015) (quotation omitted). In *Cain*, after the jury was selected, rather than provide the proper oath as provided by MCR 2.511(H)(1), the trial court mistakenly asked the newly-selected jury to swear to provide true answers to the questions it would be asked regarding their qualifications to serve on the jury – the oath that jurors are to be given before beginning voir dire. *Id*. at 113. As occurred here, no one brought the error to the trial court's attention. *Id*.

[51] *Id*. at 117 n 4.

[52] The parties do not contest these prongs of the analysis.

[53] *Cain*, 498 Mich at 128 (quotation omitted).

reasons why a potential juror would not be qualified to hear the case. Thus, the jurors were informed of the importance of the questioning that was to follow, and were undoubtedly aware of the effect their answers would have on the proceedings. The bulk of the questioning was performed by the trial court itself. Under the circumstances, it is inconceivable that the jurors would believe that they were free to lie to the court. Nor is there any evidence that any of the 12 jurors who ultimately decided this case failed to truthfully answer any of the questions asked.

Further, "[t]he purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury."[54] In other words, the voir dire process is a means to obtaining an impartial, unbiased jury. Here, after being selected as the final jury, the jurors were sworn to "truly deliberate the case," and were later reminded that they had "taken an oath to return a true and just verdict based only on the evidence and [the trial court's] instructions on the law." The jury was also instructed not to allow "sympathy or prejudice" to influence its decision. Thus, the final jury was sworn and instructed to decide the case in an unbiased and impartial manner. Jurors are presumed to follow their instructions,[55] and there is simply no evidence that the jurors failed to do so in this case. This record does not support the conclusion that the trial court's failure to swear the jury before conducting voir dire seriously affected "the fairness, integrity, or public reputation of the proceedings . . . ."[56]

Felando argues that in the absence of the proper oath, jurors may not have answered questions truthfully, and thus, he may have lost the opportunity to challenge jurors for cause. Felando's argument focuses on the circumstances of two jurors, both of whom brought certain conflicts to the trial court's attention after they were sworn as members of the jury. Both of these jurors were eventually removed from the jury, and thus, played no part in deciding the case. Felando theorizes that other jury members may have "similarly failed to disclose facts that would have supported a challenge for cause." Felando's argument is purely speculation. There is simply no evidence in the record indicating that any juror that decided this case withheld any information that would have led to that individual being removed from the jury.

Moreover, our Supreme Court has explained that even in cases where information is discovered after a jury is sworn that *would* have allowed that juror to be excused for cause, a new trial is not automatically required.[57] Rather, "the proper inquiry is whether the defendant was denied his right to an impartial jury. If he was not, there is no need for a new trial."[58] Even assuming that any one of the 12 jurors that decided this case might have been excused for cause, Felando has not demonstrated any way in which his jury was rendered impartial. As discussed, the record demonstrates that the trial court properly instructed the jury regarding its duty to truthfully and justly decide the case based on the evidence it heard and the law as instructed by

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[54] *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994).

[55] *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

[56] *Cain*, 498 Mich at 128 (quotation omitted).

[57] *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008).

[58] *Id*.

the court, and not to allow sympathy or prejudice to interfere with its decision-making process. Thus, "[b]ecause the record before [this Court] indicates that [Felando] was actually ensured a fair and impartial jury," we conclude "that his constitutional rights were upheld and reversal is not warranted."[59]

Felando also argues that counsel was ineffective for failing to raise the issue in the trial court. "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 been different."[60] Even assuming counsel's performance was objectively unreasonable, Felando has not demonstrated that a different result was reasonably probable absent the error.[61] Other than speculation regarding whether he may have been able to challenge a juror for cause, Felando has offered no reason to conclude that the error had any result on the outcome of his trial. Speculation regarding the possibility of a different outcome is insufficient to warrant a new trial.[62] Moreover, he has failed to demonstrate that his jury was anything but impartial. Accordingly, he is not entitled to relief.

Both matters are remanded for correction of the respective judgments of sentence as explained in this opinion. Affirmed in all other respects. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Jane M. Beckering

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[59] *Cain*, 498 Mich at 128.

[60] *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

[61] Our Supreme Court has explicitly held that even when counsel fails to raise a structural error, this prejudice prong must be satisfied before a new trial is required. *People v Vaughn*, 491 Mich 642, 673-674; 821 NW2d 288 (2012). Thus, whether the underlying error is structural is, once again, irrelevant.

[62] See *People v Hoag*, 460 Mich 1, 8-9; 594 NW2d 57 (1999) (where the defendant's claim of prejudice was "purely speculative[,]" he could not establish a reasonable probability of a different outcome but for counsel's errors.