STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOMINIC WATSON,

Defendant-Appellant.

UNPUBLISHED
October 19, 2023

No. 360975
Macomb Circuit Court
LC No. 2019-003521-FC

Before: K. F. KELLY, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, felony murder, MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a(2), assault with a dangerous weapon (felonious assault), MCL 750.82, and four counts of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court imposed a single life sentence without the possibility of parole for the first-degree murder conviction, a sentence of 10 to 20 years for first-degree home invasion, and a sentence of two to four years for felonious assault. Defendant was also ordered to serve three two-year sentences for the four felony-firearm convictions, with one of the two-year sentences being supported by two convictions. For the reasons set forth herein, we affirm in part, vacate in part, and remand for correction of defendant's judgment of sentence.

I. BACKGROUND

This case arises from the death of Jovon Houston in September 2019. Reva Kovaleski testified that she moved to a home in Mount Clemens in February 2019. She met Houston around that time, they began dating over the summer, and Houston had been staying at her home frequently since then. Kovaleski had a romantic history with defendant, with whom she had two children. Kovaleski's relationship with defendant became volatile in 2017, and they started having problems with domestic violence. After they broke up, Kovaleski procured two personal protection orders (PPOs) against defendant. By September 2019, Kovaleski and defendant were no longer speaking to each other and they were in the midst of a custody dispute.

Kovaleski and Houston went to bed early on the night in question, but Kovaleski woke up around 11:15 p.m. As she walked through the kitchen on her way to the bathroom, Kovaleski heard a loud boom or bang. After a second loud boom, the side door that entered into her kitchen flew open, and Kovaleski ran into the nearby bathroom. The doorway was visible from the bathroom, and the light coming from the living room provided enough illumination for her to see. Kovaleski testified that she saw defendant enter the kitchen, lift a shotgun, cock it, and place the handle end against his shoulder. Defendant pointed the gun in Kovaleski's direction and stared at her, but did not say anything before turning to walk toward the bedroom with the shotgun raised. Kovaleski yelled to Houston that defendant was coming, then fled from the house. On her way out the side door, she heard a loud boom and Houston say, "Ow." As she glanced toward the bedroom, she saw defendant standing at the foot of the bed, with the shotgun pointed toward the bed.

Houston suffered multiple gunshot wounds and succumbed to his injuries within hours. The police recovered five shotgun shells from Kovaleski's bedroom, and an expert in forensic fingerprint analysis determined that there was strong support to conclude that a latent fingerprint found on one of the shells came from defendant.

II. DOUBLE JEOPARDY

As an initial matter, we must address a potential double-jeopardy issue arising from defendant's judgment of sentence that was not raised in the trial court or on appeal. The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. A double-jeopardy issue "presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). The prohibition against double jeopardy protects against multiple punishments for the same offense. *People v Fredell*, 340 Mich App 221, 231; 985 NW2d 837 (2022). Defendant was convicted of first-degree murder and felony murder for the killing of the same individual—Houston. "Multiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000).

At sentencing, the trial court stated that the judgment of sentence would reflect that defendant's "murder conviction was supported by two theories," so defendant would not be sentenced to life without parole for his felony-murder conviction. It also indicated that the felony-firearm conviction associated with the felony-murder count would be treated the same way. The language of the judgment of sentence states that no sentence was imposed for the felony-murder and corresponding felony-firearm convictions, with a note providing: "NOT DISMISSED, SUPPORTED BY TWO CONVICTIONS AND DEFENDANT IS SENTENCED TO ALTERNATE THEORIES."

The judgment of sentence reflects the trial court's attempt to alleviate double-jeopardy concerns when sentencing a defendant convicted of both first-degree premeditated murder and felony murder arising from the death of a single victim by "modify[ing the] defendant's judgment of conviction and sentence to specify that [the] defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder," *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998) (quotation marks and

citation omitted). "The defendant thus receives one conviction and one sentence for having committed one crime." *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006). Here, however, the note on the judgment of sentence indicates that the felony-murder conviction was "NOT DISMISSED," and defendant was convicted and sentenced for first-degree home invasion, which the felony information lists as the predicate felony for felony murder.[1] To ensure that defendant's conviction is in line with *Bigelow*, 229 Mich App at 220-222, we remand to the trial court to modify the judgment of conviction to clarify that defendant's felony murder and its related felony-firearm convictions are vacated.

We further conclude that the trial court properly did not vacate defendant's conviction for first-degree home invasion, the predicate felony used for felony murder. Although *Bigelow*, *id*. at 221-222, held that in situations like this, the predicate felony used for felony murder must also be vacated, our Supreme Court has implicitly reversed *Bigelow*'s holding in this respect. See *People v Ream*, 481 Mich 223, 240; 750 NW2d 536 (2008).

III. ANONYMOUS JURY

Turning to the merits of defendant's appeal, defendant first argues that he is entitled to a new trial because the trial court arbitrarily chose to refer to the venire and selected jurors by numbers, rather than names, which compromised the presumption of innocence. We disagree.

Defendant did not preserve this issue for appellate review by objecting below. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007). We review unpreserved issues for plain error, regardless of whether the issue has constitutional implications. *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019). Under plain-error review, "a defendant must prove that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Davis*, 509 Mich 52, 67; 983 NW2d 325 (2022) (quotation marks and citation omitted). "An error has affected a defendant's substantial rights when there is a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019) (quotation marks and citation omitted). Moreover, reversal is appropriate "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Thorpe*, 504 Mich at 252-253.

This Court first considered a constitutional challenge to the use of an anonymous jury in *People v Williams*, 241 Mich App 519; 616 NW2d 710 (2000). The *Williams* Court began its analysis by recognizing that withholding from the parties certain information regarding prospective jurors has the potential to interfere with the defendant's interest in meaningful voir dire, as well as the presumption of innocence. *Id*. at 522-523. Then, relying on precedent from other jurisdictions, *Williams* declared that, "[i]n order to successfully challenge the use of an 'anonymous jury,' the record must reflect that the parties had information withheld from them,

[1] The felonious assault charge related to defendant cocking the shotgun, and raising and pointing it in Kovaleski's direction.

thus preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id*. at 523.

Applying that standard, this Court noted that *Williams* did not involve "an 'anonymous jury,' in the strict sense of the term," because the record did not suggest that any information regarding the prospective jurors was actually withheld from the parties. *Id*. Rather, the "jurors were merely referred to at trial by number rather than name." *Id*. Moreover, the defendant admitted that he had access to the prospective jurors' biographical information, and the record of voir dire demonstrated that no information was withheld. *Id*. at 523-524. Thus, there was no indication that the defendant was left unable to effectively participate in voir dire. *Id*. at 524. This Court also found no evidence that the use of juror numbers in lieu of names undermined the presumption of innocence, reasoning that there was no reason to believe "that jurors understood the use of numbers rather than names to be anything out of the ordinary." *Id*. And absent any indication that the "defendant's trial was being handled in a special way," there was no corresponding implication that the defendant was "generally dangerous or guilty as charged." *Id*. This Court concluded that the defendant's right to due process was not violated by the identification of jurors only by number at trial. *Id*. at 525. Without outright restricting the circumstances in which a trial court may refer to jurors by number, rather than name, *Williams* "caution[ed]" trial courts against doing so, noting that "[t]he procedure should be employed only when jurors' safety or freedom from undue harassment is, in fact, an issue, and, when used, appropriate safeguards should be carefully followed to assure a fair trial." *Id*.

Applying the test set forth in *Williams*, defendant cannot establish plain error. Like in *Williams*, the record does not reflect that biographical information was withheld from defendant, thereby preventing meaningful voir dire. *Id*. at 523. Instead, the trial court used the same procedure at issue in *Williams* by referring to the venire only by their assigned juror numbers or seat numbers. In all other respects, voir dire proceeded as it normally would. The trial court questioned each prospective juror about his or her marital status; whether the prospective juror had children; his or her place of employment, as well as employment of significant others, if applicable; previous jury service; interactions with the criminal justice system; relationships with law enforcement officers; and the general ability to be a fair, impartial, unbiased juror. Defense counsel was also given a full opportunity to question the prospective jurors about any matters he deemed relevant. And although the parties followed the trial court's preferred practice of using juror numbers in lieu of names, there is no indication in the record that the names were actually withheld from defendant. The record reflects only that that the names were not used during trial, and defendant does not contend that his ability to meaningfully participate in voir dire was impacted.

Instead, defendant argues that the use of juror numbers compromised the presumption of innocence by implying that the jurors' anonymity was necessary for their own protection. In *Williams*, the defendant was unable to demonstrate that the presumption of innocence was undermined because the record was devoid of any suggestion that the jury understood the practice to be unusual. *Id*. at 524. In other words, there was no affirmative indication of prejudice. Here, the record goes one step further, in that jurors were explicitly told they would be identified by number as a matter of course. Explaining why the jurors would not be identified by name, the trial court said:

> I do apologize in advance I'm going to refer to you either by your juror number or your seat number. I've done that for almost 20 years in all my cases for two reasons; namely, because the jurors seen [sic] appreciate the anonymity and secondly because I would probably mispronounce your name and I don't want to do that. So to the extent that I ask the attorneys also to refer to you by number, please don't be offended by that.

Because the jurors were given a clear, plausible explanation for the use of numbers in lieu of names, there is no reason to believe that the jurors viewed the practice as implying that anonymity was necessary because defendant was guilty or particularly dangerous. Thus, under *Williams*, defendant is not entitled to appellate relief.

In apparent recognition of his inability to satisfy the test outlined in *Williams*, defendant urges this Court to adopt federal precedent that permits a trial court to impanel an anonymous jury only if there is "strong reason to believe that the jury needs protection" and the trial court takes "reasonable precaution . . . to minimize the effect that such a decision might have on the jurors' opinions of the defendants." *United States v Thomas*, 757 F2d 1359, 1365 (CA 2, 1985). Defendant further argues that in determining whether there is a sufficient basis to empanel an anonymous jury, Michigan courts should again look to federal precedent and consider:

> (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. [*United States v Ross*, 33 F3d 1507, 1520 (CA 11, 1994).]

But it is axiomatic that this Court is not bound by decisions of federal courts other than the United States Supreme Court, *People v Anderson*, 341 Mich App 272, 281 n 2; 989 NW2d 832 (2022), and the latter has not weighed in on this issue. Conversely, any persuasive value that this Court might otherwise be inclined to afford *Thomas* and *Ross* cannot overcome the binding nature of this Court's published opinion in *Williams*. See *People v Masi*, ___ Mich App ___, ___ n 6; ___ NW2d ___ (2023) (Docket No. 358922); slip op at 9 n 6 (rejecting "compelling arguments" that were contrary to published opinion). The rule announced in *Williams* implicitly begins with the premise that an anonymous jury is permissible, and only disallows the practice if it interferes with meaningful voir dire or the presumption of innocence. *Thomas* and *Ross* take the opposite approach by declaring that anonymous juries cannot be used, unless there is a strong reason to believe the anonymity is required for the juror's protection and appropriate precautions are taken to reduce any negative inferences that might be imputed to the defendant. Because the two tests clearly conflict, we are not at liberty to ignore *Williams*.

IV. MCL 768.27b

Defendant next argues that Kovaleski should not have been allowed to testify regarding past instances of domestic violence or the PPOs she obtained against him because MCL 768.27b,

the statute under which that evidence was admitted, violates separation-of-powers principles. We disagree.

This issue is unpreserved because defendant did not object to Kovaleski's testimony below. *Thorpe*, 504 Mich at 252. As noted earlier, unpreserved claims of error are reviewed for plain error affecting substantial rights. *Id*.

Defendant's position is unpersuasive, as the Michigan Supreme Court rejected this same argument in *People v Mack*, 493 Mich 1, 3; 825 NW2d 541 (2012), explaining:

> In *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), this Court addressed an issue very similar to that presented here. The statute at issue in *Watkins*, MCL 768.27a, addresses the admissibility of evidence that a defendant accused of certain sexual offenses against a minor has committed other sexual offenses against a minor. Though that statute also in certain circumstances expanded the admissibility of such evidence beyond the scope permitted by MRE 404(b)(1), we determined that it did not infringe on this Court's authority under Const 1963, art 6, § 5. We hold that the reasoning of *Watkins* fully controls in this case. For the reasons articulated in *Watkins*, we conclude that MCL 768.27b does not infringe on this Court's authority to establish rules of "practice and procedure" under Const 1963, art 6, § 5.

This Court has no authority to overrule the Supreme Court's judgment on this issue and we decline to address it further. See *People v DeRousse*, 341 Mich App 447, 463 n 7; 991 NW2d 596 (2022) ("[T]his Court is bound to follow decisions by our Supreme Court except where those decisions have clearly been overruled or superseded . . . .") (quotation marks and citation omitted).

V. JURY INSTRUCTIONS REGARDING BURDEN OF PROOF TO OBTAIN PPO

Defendant also argues that he is entitled to a new trial because the trial court refused to instruct the jury regarding the burden of proof in PPO proceedings. We disagree.

Claims of instructional error involving legal questions are reviewed de novo. *People v Robar*, 321 Mich App 106, 115; 910 NW2d 328 (2017).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "Jury instructions must set forth all of the elements of any charged offense and must include any material issues, theories, or defenses supported by the evidence." *Robar*, 321 Mich App at 115. "The Michigan Court Rules do not limit the power of trial courts to give additional instructions on applicable law not covered by the model instructions as long as the additional instructions are concise, understandable, conversational, unslanted, and nonargumentative and are patterned as nearly as practicable after the style of the model instructions." *People v Montague*, 338 Mich App 29, 38-39; 979 NW2d 406 (2021) (quotation marks and citation omitted). See also MCR 2.512(D)(4) (regarding additional instructions). But when standard jury instructions do not address an issue, "the trial court may only give a special jury instruction if the instruction properly informs the jury of the applicable law." *People v Bush*, 315 Mich App 237, 245; 890 NW2d 370 (2016). In

reviewing a claim of error alleging that the trial court failed to give an appropriate instruction, this Court should consider whether the requested instruction was "substantially correct," whether it was "substantially covered in the charge given to the jury," and whether it "concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Defendant requested a special instruction regarding evidence of the PPOs Kovaleski obtained against him, providing as follows:

> You have heard evidence and/or testimony that was introduced to show that Reva Kovaleski obtained a personal protection order, PPO, against Dominic Watson. The burden of proof to obtain a personal protection order is reasonable cause to [sic] which is a low burden of proof. In a criminal case the burden of proof to obtain a guilty verdict is beyond a reasonable doubt. You must not consider the evidence of the personal protection order to decide that it shows that Dominic Watson is a bad person or that he is likely to commit crimes. You must not convict Dominic Watson here because Reva Kovaleski obtained a personal protection order against him. All the evidence must convince you beyond a reasonable doubt that Dominic Watson committed the alleged crime or you must not [sic] find him not guilty.

Defendant maintains on appeal that this instruction was necessary because M Crim JI 4.11 (addressing the limited relevance of other-acts evidence) and M Crim JI 4.11a (addressing consideration of evidence regarding past domestic violence) did not explain the import, or lack thereof, of the PPOs to the jury. Defendant argues that it was pivotal for the jury to understand PPO procedure so that it did not attach undue significance to the PPOs by presuming that the allegations underlying the PPOs had been tested and proved in rigorous adversarial proceedings. Defendant's claim of error focuses only on PPO procedure, and offers no argument regarding the other matters addressed in the foregoing proposed instruction, namely, the high burden of proof in criminal proceedings and the purposes from which the PPO could be considered. Thus, to the extent defendant intended to challenge omission of the instruction in its entirety, he has abandoned review of any error regarding omission of the portion of the instruction concerning the latter topics. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (declaring that the defendant abandoned review of an issue that was not properly briefed).

While defendant provided a detailed explanation of PPO procedure in his appellate briefing, the only element of that procedure reflected in his proposed jury instruction concerns the applicable burden of proof. As it relates to that point, defendant's proposed instruction accurately states the law—the petitioner seeking a PPO need only establish reasonable cause to believe that the person named in the petition committed an act enumerated in MCL 600.2950(1). *SP v BEK*, 339 Mich App 171, 180-181; 981 NW2d 500 (2021). And as defendant emphasizes on appeal, none of the instructions provided to the jury addressed the lower burden of proof applicable to PPO proceedings. Nonetheless, the burden of proof in PPO proceedings was not so important to this case that failure to give the requested instruction "seriously impaired the defendant's ability to effectively present a given defense." *Moldenhauer*, 210 Mich App at 160.

Kovaleski first mentioned the PPOs while explaining the decline of her relationship with defendant in 2017. She agreed that their relationship grew "more volatile" and that there were issues of domestic violence that prompted her to seek a PPO in Wayne Circuit Court. She confirmed that the PPO was granted and that she later obtained a second PPO from Macomb Circuit Court. Kovaleski did not describe the basis for the PPOs, but her testimony regarding this issue, offered directly after she spoke of unspecified domestic violence, plainly implied that the two topics were related. We agree with defendant that the jury would likely infer that the issuance of the PPOs bolstered the credibility of Kovaleski's claim that there was a history of domestic violence between herself and defendant. But even if the jury assumed that defendant's past domestic violence had been firmly established in the PPO proceedings, he overstates the effect such a conclusion likely had on his defense.

Defense counsel's closing argument focused primarily on two themes: (1) Kovaleski's lack of credibility and (2) deficiencies in the police investigation. Defense counsel made no mention of the PPOs and characterized the allegations of domestic violence as unfounded character attacks motivated by Kovaleski's desire to regain custody of her children. Considering the omission of any reference to the PPOs and defense counsel's theory that Kovaleski was lying about the domestic violence and defendant's involvement in this case, there is no reason to believe that failure to instruct the jury about the burden of proof in PPO proceedings seriously impaired his defense.

Moreover, even if we concluded that the jury should have been instructed regarding the burden of proof in PPO proceedings, reversal is appropriate only if the defendant establishes that the omission of the instruction resulted in a miscarriage of justice. *Riddle*, 467 Mich at 124. "The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Id*. at 124-125. Setting aside any negative inference the jury may have derived from Kovaleski's brief testimony regarding the PPOs, the evidence of defendant's guilt remains overwhelming. Kovaleski testified that she was absolutely certain defendant was the person who broke into her home and shot Houston. She could see him from her position in the bathroom, and his face was not obscured by a mask or facial covering. She had a further opportunity to examine the intruder's face as he stared at her while pointing the shotgun in her direction. While it was admittedly dark in the kitchen and bathroom, Kovaleski testified that there was enough light coming from the living room to allow her to see. Considering Kovaleski's history with defendant, the jury likely inferred that Kovaleski was intimately familiar with defendant's appearance and could accurately identify him, even in poorly lit conditions and while experiencing extreme fear and stress.

Defense counsel ensured that the jury recognized and considered why Kovaleski's observations may have been unreliable, as well as the fact that she may have been motivated to falsely accuse defendant. But Kovaleski's testimony was not the only incriminating evidence linking defendant to these crimes. Two other witnesses described instances in which defendant explicitly threatened to kill Kovaleski or Houston. More importantly, defendant's latent fingerprint was discovered on one of the shotgun shells recovered from Kovaleski's home after the shooting. Defendant attempts to explain away the significance of this evidence by emphasizing that there is no way to determine when his fingerprint was placed on the shotgun shell and theorizing that it could have been left on the shell years earlier when he and Kovaleski lived

together. While not impossible, the alternative scenario proposed by defendant has little, if any, persuasive value. Kovaleski and defendant ended their relationship by the beginning of 2018, and Kovaleski moved to her Mount Clemens home in February 2019. Defendant never lived in that location, he did not have belongings there, and he had no permission to enter. It is highly improbable that defendant happened to handle a fired shotgun shell years before this incident, Kovaleski inexplicably maintained that spent shell for years without disturbing defendant's fingerprint, and the shell coincidentally ended up in the bedroom where Houston was later shot with the same ammunition. Under these circumstances, failure to instruct the jury regarding the burden of proof in PPO proceedings was not outcome-determinative.

VI. JURY INSTRUCTIONS DEFINING REASONABLE DOUBT

Lastly, defendant argues that the definition of reasonable doubt incorporated in the trial court's jury instructions did not adequately define the concept. We decline to consider this claim of error because defense counsel expressed satisfaction with both the preliminary and final instructions provided to the jury. "Waiver has been defined as the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). Unlike forfeiture by failure to assert a right in a timely manner, waiver extinguishes any error and precludes appellate review. *Id*. After the jury received its preliminary and final instructions, the court inquired whether the parties were satisfied with the instructions, and both attorneys answered in the affirmative. By expressing satisfaction with the instructions provided, counsel waived review of this claim of instructional error.[2] *Id*. at 215, 219.

VII. CONCLUSION

We remand this matter to the trial court to modify defendant's judgment of sentence to reflect that he was convicted of first-degree murder supported by alternate theories, and to vacate his conviction and sentence for the one count of felony-firearm that corresponded to felony murder. The remainder of defendant's judgment of sentence shall remain unchanged and is affirmed in all other respects. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Thomas C. Cameron

[2] Even if this issue was properly before us, this Court has consistently held that the language set forth in the model jury instructions "adequately convey the concepts of reasonable doubt, the presumption of innocence, and the burden of proof." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003) (citing multiple decisions upholding Michigan's standard definition of reasonable doubt).