STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUEL AKEEM SADLER,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 346793
Genesee Circuit Court
LC No. 14-036217-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEONTE RASHAAD SADLER,

Defendant-Appellant.

No. 348659
Genesee Circuit Court
LC No. 15-037634-FC

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, brothers Marquel Sadler and Keonte Sadler appeal as of right their convictions and sentences, following a jury trial. In Docket No. 346793, the jury acquitted Marquel of second-degree murder, but convicted him of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Marquel as a third-offense habitual offender, MCL 769.11, to consecutive prison terms of 36 to 120 months for the felon-in-possession conviction and five years for the felony-firearm conviction.[1] In Docket No. 348659, the jury acquitted Keonte of second-degree murder, but convicted him of the lesser offense of voluntary manslaughter, MCL 750.321,

[1] Marquel received five years' imprisonment because this was his second felony-firearm conviction. See MCL 750.227b(1).

as well as felon in possession of a firearm, MCL 750.224f, and two counts of felony-firearm, MCL 750.227b. The trial court sentenced Keonte as a second-offense habitual offender, MCL 769.10, to serve concurrent prison terms of 180 to 270 months for the manslaughter conviction and 42 to 84 months for the felon-in-possession conviction, which were to be served consecutively to concurrent two-year terms for each felony-firearm conviction. In both dockets, we affirm defendants' convictions but remand for resentencing.

Defendants' convictions arise from the shooting death of Greg Hodo on May 30, 2014, outside a party store in Flint, Michigan. Hodo had driven a Dodge Magnum to the party store that evening with six other individuals inside, including Hodo's 13-year-old son. Marquel and a person with him known as "Bug" were also at the party store. The evidence showed that after entering the party store, Hodo thought that "Bug" disrespected him by bumping into him. Hodo became quite upset. According to Marquel, Hodo threatened to kill him and Bug. In response, Marquel called his brother, Keonte, who arrived armed with a handgun, along with another armed person, a few minutes later and shot and killed Hodo. Rodrickus Weakley, who was one of the many people to accompany Hodo to the party store that night, had a license to carry a concealed firearm and fired at Keonte. Keonte was struck by a bullet[2] and ran from the scene to a Dodge Charger that Marquel was driving. Marquel proceeded to drive Keonte to a hospital.[3]

Both defendants were charged with first-degree premeditated murder, MCL 750.316(1)(a). In their first trial in 2016, defendants were acquitted of first-degree murder, but convicted of the lesser included offense of second-degree murder. However, after Marquel filed a claim of appeal with this Court, the parties stipulated to grant both defendants a new trial because of "unspecified insufficient jury instructions and incorrect verdict form." *People v Marquel Sadler*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2017 (Docket No. 333409), p 1 n 2 (quotation marks omitted). Because of the stipulation to grant a new trial, this Court only reviewed whether there was sufficient evidence to support Marquel's convictions, in which case a retrial would be barred on double-jeopardy grounds. *Id*. This Court held that there was sufficient evidence to support Marquel's convictions. *Id*. at 3-4. Thus, defendants were retried.[4]

After the second trial, the jury found Marquel not guilty of the second-degree murder charge and a related felony-firearm count, but guilty of felon in possession of a firearm and felony-firearm related to that conviction. The jury found Keonte guilty of voluntary manslaughter as a lesser offense of second-degree murder, and guilty of the felon-in-possession and felony-firearm counts. This appeal followed.

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[2] Keonte testified that Hodo had retrieved a gun and fired at him first, striking him.

[3] The events that transpired both inside and outside the party store were recorded on surveillance video, although without any audio.

[4] Consistent with double-jeopardy principles, defendants were not tried for first-degree murder because they were acquitted of that charge in the first trial.

I. DOCKET NO. 346793 (DEFENDANT MARQUEL SADLER)

Marquel argues that there was insufficient evidence to support his convictions. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo by viewing the evidence in a light most favorable to the prosecution to determine whether "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (citation omitted).

The prosecution's theory at trial was that Marquel was guilty of the charged counts under an aiding or abetting theory.[5] One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if the person directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a verdict that a defendant aided or abetted a crime, the prosecutor must prove 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 [the defendant] gave aid and encouragement.' " *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (citation omitted). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999) (quotation marks and citation omitted). Some of the factors that may be considered include the close association between the defendant and the principal and evidence of flight after the crime. *Id.*

Marquel contends that his conviction must have been based on conduct that occurred after the shooting. This is sheer speculation. Although the jury found that Keonte was guilty of manslaughter and Marquel was not guilty of murder or manslaughter, these verdicts did not preclude the jury from finding that Marquel nonetheless aided or abetted Keonte in possessing the gun before the shooting occurred.[6] Marquel admitted at trial that he told Keonte over the phone that Hodo was at the store with "guns" and that although he did not expressly ask Keonte to bring a gun, he fully "expected my brother to come" after being called. Furthermore, Marquel testified that he expected Keonte to come armed and that Keonte did everything he wanted him to do. Therefore, despite there being no evidence of an explicit request for Keonte to come to the store, the jury reasonably could infer that Marquel had made an implicit request. Therefore, contrary to his arguments on appeal, there was sufficient evidence to enable the jury to find that Marquel

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[5] In *Sadler*, unpub op at 3-4, in addressing Marquel's felon-in-possession and felony-firearm convictions, this Court concluded that the evidence at Marquel's first trial was insufficient to establish that he "personally possessed the gun, either directly or constructively," but was sufficient to "establish that [he] aided and abetted Keonte's possession of the gun and use thereof in the commission of a felony."

[6] Indeed, although not necessarily present in this case, juries are permitted to render inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).

specifically intended Keonte to bring, i.e., possess, a firearm and that he encouraged Keonte to do so.

Marquel's reliance on a purported lack of evidence that he had pointed in Hodo's direction after Keonte arrived at the scene is misplaced. First, contrary to his assertion on appeal, there was evidence that Marquel, while outside, did point at Hodo. Weakley testified that right before he noticed Keonte arriving, he saw Marquel pointing at the Dodge Magnum. Thus, there is no evidentiary "absence," as Marquel contends. Second, this evidence is somewhat immaterial to Marquel's present convictions. Evidence of Marquel pointing in Hodo's direction tends to show his intent to have Keonte shoot Hodo, which was relevant in his prior appeal because he was challenging the intent element of his second-degree murder conviction. See *Sadler*, unpub op at 2. But it does not speak to Marquel's intent to just have Keonte possess the firearm. Marquel's intent at the time he made the phone call to Keonte is the important consideration.

Marquel next argues that his trial counsel was ineffective by failing to request a duress or necessity jury instruction. We disagree. Generally, claims of ineffective assistance of counsel involve a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error, and any constitutional determinations are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, when no evidentiary hearing is held, as is the case here, this Court's review "is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish a claim of ineffective assistance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Trakhenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). However, such performance must be measured without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Marquel's position is that his counsel should have requested a duress or necessity instruction with respect to his conduct of driving Keonte to the hospital. Marquel's view here is premised on the belief that the jury convicted him of the firearm charges because of his conduct after the shooting—specifically that he must have been convicted based on his conduct of transporting Keonte to the hospital. As already explained, we disagree. The evidence instead allowed the jury to convict Marquel of felon in possession and felony-firearm because he encouraged the commission of those offenses when he called Keonte on the phone. Indeed, even if Keonte had brought a firearm into the vehicle, this would not support Marquel's firearm convictions. As this Court previously noted from the first trial:

> The evidence clearly does not show that [Marquel] ever had any personal control over the gun, either actual or constructive. Possession can be constructive if a defendant is aware of the location of a weapon and the weapon is reasonably

> accessible, and constructive possession may be established by circumstantial evidence. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). However, it is well established that mere presence with something is not sufficient to establish constructive possession thereof. *People v Meshell*, 265 Mich App 616, 621-622; 696 NW2d 754 (2005). There was no evidence that [Marquel] ever held any of the guns involved. There is no evidence that [Marquel] exercised any greater degree of control or dominion over the gun than giving his brother a ride to the hospital while his brother was still in possession of the gun. Although possession may be joint, the jury would have to engage in pure speculation to conclude that there was anything more than a possibility that [Marquel] personally possessed the gun, even constructively. [*Sadler*, unpub op at 3.]

The evidence in this trial likewise did not show that Marquel ever personally possessed a gun, either actually or constructively. It also did not show joint possession. Marquel merely driving Keonte, while Keonte presumably had a gun, is not evidence that Marquel had possession or control of the gun. Further, Marquel's act of driving Keonte to the hospital is not evidence that he specifically intended to aid or encourage Keonte's continued possession of the firearm. See *People v Slate*, 117 Mich App 501, 503; 324 NW2d 68 (1982) ("Mere presence is not enough to constitute aiding and abetting illegal possession; some direct or indirect act or encouragement coupled with criminal intent is necessary."). Although a jury could have inferred that Marquel's driving Keonte away was evidence of flight and consciousness of guilt, see *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), that consciousness of guilt for *past* behavior is not the same as evidence of a *present* intent to specifically aid or encourage the possession of a firearm.

Therefore, because Marquel's conduct after the shooting was insufficient to show that he possessed or encouraged Keonte to possess any firearm, any request for an affirmative defense instruction related to this postshooting conduct would not have been warranted. Only those jury instructions that are supported by the evidence are to be given. See *People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003). Duress is an affirmative defense. *People v Reichard*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket No. 157688, decided 3/30/2020); slip op at 6. "An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. . . . It does not negate selected elements or facts of the crime." *People v Guajardo*, 300 Mich App 26, 35 n 1; 832 NW2d 409 (2013) (quotation marks and citations omitted). Thus, with no evidence to show that Marquel had actually committed the crimes of felon in possession and felony-firearm after the shooting occurred, there was no need for the instruction. Indeed, the prosecutor never argued at trial that the firearm charges were related to any postshooting conduct. Accordingly, trial counsel's failure to request a duress or necessity instruction did not fall below an objective level of reasonableness. Likewise, because the jury could not have relied on Marquel's postshooting conduct in rendering its guilty verdicts, Marquel cannot show how the failure to ask for this instruction caused any prejudice. As a result, we reject Marquel's claim of ineffective assistance of counsel.

Marquel next argues that the trial court erroneously scored offense variables (OVs) 1, 3, and 9 of the sentencing guidelines. Although we reject Marquel's arguments related to OV 1 and OV 9, we agree that the trial court erroneously scored OV 3 and that the error requires resentencing.

OV 1 addresses the aggravated use of a weapon and requires a score of 25 points when, among other things, "[a] firearm was discharged at or toward a human being." MCL 777.31(1)(a). Marquel argues that he should not have been assigned 25 points because his conviction was based on his conduct of transporting Keonte after the shooting. As previously discussed, however, only the evidence related to Marquel's conduct before the shooting (i.e., when Marquel called Keonte on the phone and implicitly encouraged him to come to the store with a firearm) is relevant to his convictions. Thus, the premise for Marquel's position is without merit. Moreover, while OVs are to be scored by reference only to the sentencing offense unless the statute indicates otherwise, *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009), OV 1 requires that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b). Marquel does not suggest that he and Keonte were not "multiple offenders." Twenty-five points were properly scored for Keonte as a result of his shooting his gun at or toward Hodo. Therefore, the trial court did not err by similarly scoring OV 1 for Marquel as well.

OV 3 addresses "physical injury to a victim." MCL 777.33(1). If a victim was killed, 100 or 50 points may be scored for this OV. MCL 777.33(1)(a)-(b). A court is to "[s]core 100 points if death results from the commission of a crime and homicide is not the sentencing offense," MCL 777.33(2)(b), and is to "[s]core 50 points if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive" and the offender was under the influence of drugs or alcohol, MCL 777.33(2)(c). Twenty-five points are properly scored when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). But like OV 1, in multiple-offender cases, "all offenders must be assessed the same number of points."[7] MCL 777.33(2)(a).

In this instance, Marquel was assessed 50 points for OV 3. Although a death did occur, there was no evidence that the offense involved the operation of a vehicle or that any offender was under the influence of alcohol or drugs. Therefore, the trial court erred by assessing 50 points for OV 3. But that does not mean that zero points was the proper score for OV 3. As our Supreme Court has recognized, OV 3 requires that "the highest number of points possible" be scored. *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005); see also MCL 777.33(1). Because all offenders must be scored the same, it is easier to look at how Keonte, as the principal, should have been scored, and then apply that score to Marquel. The top score of 100 points is not viable because the statute expressly says that it is only applicable when homicide is not the sentencing offense, MCL 777.33(2)(b), and Keonte's sentencing offense of manslaughter is considered homicide under the sentencing provisions, see MCL 777.1(c). As already discussed, 50 points is not warranted because the operation of a vehicle was not involved and there was no evidence of any offender being under the influence of alcohol or drugs. The next category is 25 points, which is proper when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Despite there being an actual death—instead of a mere life-threatening injury—*Houston* and the statute require a score of 25 points.

[7] The trial court also assigned a 50-point score to OV 3 for Keonte.

In *Houston*, the defendant was convicted of murder. *Houston*, 473 Mich at 402. The Supreme Court affirmed the trial court's score of 25 points for OV 3. The Court explained that because the points for killing a victim were not applicable, a court must score the next highest category. *Id*. at 405 and n 13. The Court therefore held that "[b]ecause the statute directs the trial court to award the highest number of points possible under OV 3, the trial court was required to assess twenty-five points under MCL 777.33(1)(c)." *Id*. at 407. The Court explained that the gunshot wound to the victim was a life-threatening bodily injury requiring medical treatment. *Id*. The fact that the life-threatening injury also happened to cause death did not change this outcome.

Therefore, although the trial court erred by scoring OV 3 at 50 points, it should have scored it at 25 points, which is required as the highest number of points possible under OV 3.

Marquel also argues that the trial court erroneously scored OV 9. However, Marquel's sentencing information report shows that he received zero points for this OV.[8] Therefore, any argument regarding OV 9 is misplaced.

With the correction to OV 3, Marquel's total OV score is lowered from 80 to 55 points, which places him in OV Level V instead of OV Level VI. This results in a new guidelines range for a third-offense habitual offender of 14 to 43 months instead of the 19 to 57 months the trial court calculated. MCL 777.66. Because the scoring error affects the appropriate guidelines range, Marquel is entitled to resentencing. *People v Francisco*, 474 Mich 82, 88-90; 711 NW2d 44 (2006). Accordingly, we remand for resentencing.

II. DOCKET NO. 348659 (DEFENDANT KEONTE)

A. Trial Severance

Keonte argues that the trial court erred by failing to sever his trial from Marquel's trial. We disagree.

While counsel for both defendants orally requested separate juries at a pretrial hearing, the trial court explicitly told them that if they wanted separate juries, they had to file an appropriate motion. Neither defendant ever filed a motion for severance. Therefore, this issue is unpreserved. See *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). We review unpreserved issues for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. To succeed with this claim, Keonte must show that an error occurred, that the error was plain or obvious, and that the error affected his substantial rights. *Id*. at 763. An error affects substantial rights when it affected the outcome of the lower court proceeding. *Id*. Keonte has the burden of persuasion with respect to prejudice. *Id*.

MCR 6.121 governs joinder and severance of multiple defendants. MCR 6.121(C) states:

[8] Only three OVs were actually scored points: OV 1 at 25 points, OV 3 at 50 points, and OV 16 at five points.

> On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

Although Keonte's argument is unclear, he seems to maintain that his trial should have been severed because Weakley's testimony about what Marquel had said was inadmissible against Keonte. Specifically, Keonte highlights Weakley's testimony that Marquel told Hodo, "[Y]ou wanna die? I can make it happen." Keonte does not fully explain why this statement was not admissible in his trial. Without any elaboration, he seems to suggest that the statement was inadmissible because it was an "incriminating statement[] by one [co-defendant] against the other." But he does not provide any legal argument as to why such statements are inadmissible. Presumably, Keonte is relying on the *Bruton*[9] doctrine, which states that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating unredacted confession of a nontestifying codefendant is introduced at their joint trial." *People v Banks*, 438 Mich 408, 415; 475 NW2d 769 (1991). But *Bruton* is inapplicable for many reasons. For one, Marquel's statement to Hodo, as relayed by Weakley, was not a confession and did not facially incriminate Keonte. It was merely Marquel asking Hodo if he wanted to die and Marquel saying that he thought he could make it happen. There was no reference to Keonte in that statement. And secondly, any confrontation issues are alleviated because both defendants testified at trial. See *People v Pipes*, 475 Mich 267, 275; 715 NW2d 290 (2006) (stating that in the *Bruton* context, there is no error if the codefendant testifies). Therefore, any reliance on the principle of *Bruton* is misplaced.

Moreover, the statement was not inadmissible for any other apparent reason. At trial, Keonte's counsel objected on hearsay grounds. But Marquel's statement to Hodo is not hearsay. Hearsay generally is inadmissible, MRE 802, and is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," MRE 801(c). A "statement" is defined, in pertinent part, as "an oral or written assertion," MRE 801(a), where the assertion is an assertion of a fact that is capable of being true or false, *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204; 579 NW2d 82 (1998), mod 458 Mich 862 (1998). Thus, questions and commands generally are not assertions and cannot constitute hearsay. See *id*. at 204-205; *United States v Thomas*, 451 F3d 543, 548 (CA 8, 2006). Therefore, Marquel asking Hodo, "You wanna die?" is not an assertion and is not inadmissible hearsay. Marquel's statement to Hodo, "I can make it happen," however, qualifies as an assertion because it is an assertion of a fact that can be true or false. But the prosecutor was not offering the statement to prove the truth of the matter asserted, i.e., that Marquel could "make it happen" or that Marquel could cause Hodo's death. Instead, the testimony was offered to show Marquel's state of mind at the time and the effect the statement may have had on Hodo. Therefore,

[9] *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

the assertion "I can make it happen" is not hearsay.[10] In sum, Marquel's out-of-court statements to Hodo were not inadmissible hearsay.

Consequently, because Keonte has not shown how the failure to sever the trials prejudiced him, he is not entitled to a new trial. We further note that Keonte's assertion on appeal that Weakley's testimony was "critical" because the jury had to believe it in order to convict Keonte of manslaughter is perplexing. Weakley's testimony seems to suggest that a murder was contemplated by Marquel, but the jury *acquitted* both defendants of murder. Keonte was convicted of voluntary manslaughter, which requires the prosecution to prove "that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013) (citations omitted). As our Supreme Court has described, "[m]anslaughter is murder without malice." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Marquel asking Hodo if he wanted to die or his telling Hodo that he could make that happen do not address Keonte's state of mind, let alone Keonte being in "the heat of passion."

Consequently, we also reject Keonte's assertion that trial counsel was ineffective for failing to request a severance. Counsel does not render ineffective assistance when he fails to make futile or meritless objections or motions. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

B. Jury Instruction—Self-Defense and Defense of Others

Keonte argues that the jury was not properly instructed. However, his counsel expressed satisfaction with the instructions that were given. It is well established that when a party expresses satisfaction with jury instructions, that party has waived any claim of error with respect to those instructions. *People v Thorne*, 322 Mich App 340, 346; 912 NW2d 560 (2017); *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). And wavier extinguishes any error, foreclosing appellate review. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Assuming Keonte did not waive the issue, our review of this unpreserved issue would be for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001), citing *Carines*, 460 Mich at 761-764. This Court reviews jury instructions in their entirety to determine if any error requiring reversal occurred. *Aldrich*, 246 Mich App at 124. "The instructions must not be extracted piecemeal to establish error. Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. (quotation marks and citations omitted). "A court must properly instruct the jury so that [the jury] may correctly and intelligently decide the case. The instruction to the jury must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support

[10] Moreover, to the extent the statement could be viewed as hearsay, MRE 803(3) allows for the admission of hearsay if it shows the declarant's then-existing state of mind, including his "mental feeling."

them." *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018) (quotation marks and citations omitted).

At issue is the self-defense instruction and the defense-of-others instruction and how the jury could have viewed them. In particular, Keonte suggests that the instructions as given indicated to the jury that they only applied to the murder charge and not the lesser included charge of manslaughter.[11]

In discussing the charges, the trial court started with Count I, second-degree murder. After explaining the murder charge, the court instructed on aiding or abetting. Then the court gave the instruction for self-defense, including the comment, "If a person acts in lawful self defense, that person's actions are justified and he's not guilty of *second degree murder*." (Emphasis added.) Following that instruction, the court provided the instruction for defense of others, stating in pertinent part, "If a person acts in lawful defense of another, his actions are justified and he is not guilty of count one, *second degree murder*." (Emphasis added.) Both of these references to being not guilty of second-degree murder were duplicated in the final written instructions that were provided to the jury.

After giving the various self-defense and defense-of-others instructions, the court stated that the jury could "consider whether the defendants are guilty of a less serious crime, it's called voluntary manslaughter." As Keonte correctly points out, the self-defense instruction was not provided again for this lesser included crime.

After deliberations had begun, the jury submitted a question to the court, asking, "Does lawful self-defense mean it couldn't be during the commission of a crime; i.e. is this an option since Keonte is guilty of felon with arm [sic]?" After discussing the unclear question with the parties, the court wrote back to the jury:

> [T]he defense of self-defense and[/]or defense of others is available as a possible defense to *all four counts against both Defendants*; you must decide if the evidence supports that defense. You are the sole judges of the facts. What you decide is final, including your decisions regard of [sic] the asserted claim of self-defense and[/]or defense of others. [Emphasis added.]

The prosecution on appeal does not dispute that self-defense and defense of others applies to all of the charged and uncharged conduct. Instead, the prosecution maintains that the instructions, as given, adequately communicated to the jury that self-defense and defense of others

[11] The prosecution cites *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999), for the proposition that affirmative-defense instructions are only required for "charged" conduct, i.e., not uncharged, lesser included conduct. While the *Wess* Court did state that "[i]nstructions must cover each element of each offense charged," *id.*, the issue in *Wess* did not involve uncharged, lesser included conduct. *Id*. at 242-243. Further, the Court went on to say that instructions also must cover "all material issues, defenses, and theories that have evidentiary support." *Id*. at 243. So not only are "[all] defenses" expressly listed by the *Wess* Court, but it should be clear that a defense to lesser included conduct is a "material issue."

also applied to voluntary manslaughter. On the one hand, because the initial instructions expressly only referenced the murder charge, a jury might conclude that the defenses only applied to murder and not to manslaughter. On the other hand, the trial court's answer to the jury's question made it clear that the defenses applied to "all four counts," despite the earlier reference to only applying to murder. While this clarification would help instruct the jury that the defenses also applied to the charged felony-firearm and felon-in-possession counts, it is less clear that the defenses were to apply to manslaughter because manslaughter technically was not one of the "counts." Regardless, it was clear that manslaughter was only to be considered as a lesser included offense to the count of murder. Consequently, because manslaughter was captured under the general umbrella of "Count I" as a lesser included offense, the court's statement that the defenses applied to "all four counts" was sufficient to show that it applied to manslaughter as well. Indeed, in the verdict form, the option to find Keonte guilty of manslaughter is listed under the heading of "Count 1 – HOMICIDE-SECOND DEGREE MURDER."

Because this issue, if not waived, must be reviewed under the plain-error standard, we hold that Keonte has failed to establish the presence of any plain error. If there were any error, it was not clear or obvious. See *Carines*, 460 Mich at 763. Therefore, even if Keonte had not waived the issue, he would be precluded from obtaining any appellate relief.

We now turn our attention to Keonte's argument raised in his supplemental brief that trial counsel was ineffective for failing to request that the jury be expressly instructed that the self-defense and defense-of-others defenses applied to manslaughter as well. Although we have concluded that reversal is not warranted under the plain-error standard, that is not controlling in an ineffective-assistance claim because the analyses are different. *People v Randolph*, 502 Mich 1, 11-16; 917 NW2d 249 (2018); see also *United States v Carthorne*, 878 F3d 465 (CA 4, 2017). For example, "an error's lack of obviousness does not, without more, necessarily preclude an ineffective-assistance claim relating to the same issue." *Randolph*, 502 Mich at 12-13. "Simply because an error was unclear does not mean that counsel could let it pass without objection." *Id.* at 13.

Initially, we disagree with Keonte's characterization of why the prosecution agreed to grant him a new trial after his first trial. Keonte asserts that it was because the jury instructions did not make it clear that the affirmative defenses applied to the lesser included offenses of first-degree murder. The record does not support this conclusion. As this Court previously noted, although the reasons pertained to jury instructions and the verdict form, the reasons were otherwise "unspecified." *Sadler*, unpub op at 1 n 2.

As earlier discussed, to prove a claim of ineffective assistance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Trakhenberg*, 493 Mich at 51. Because the instructions for the affirmative defenses both explicitly only referenced "second-degree murder," we conclude that counsel's performance fell below an objective level of reasonableness. On their face, the instructions only pertained to the crime of second-degree murder and did not apply to the lesser offense of manslaughter. Further, there is no viable strategy in only having the defenses apply to murder. Although the instructions probably did not need to be repeated for each lesser

offense, the instructions should have at least mentioned that they applied to all counts, *including any lesser-included offenses*.[12]

For the prejudice prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. It is highly unlikely that the verdict was compromised because a rational view of the evidence does not support a claim of self-defense or defense of others. First, defense of others would not apply because at the time Keonte shot Hodo, Hodo was lying across the rear seat of his own vehicle, and Marquel and Bug were already in their vehicle. In fact, by the time Keonte approached the side of the Magnum and fired at Hodo, Marquel and Bug had already backed out of their parking spot in the Charger.[13] Thus, there was no immediate danger to Marquel and Bug at the time. See MCL 780.972(1)(a) (listing as one of the requirements of the defense-of-others defense is an honest and reasonable belief that use of force was necessary to prevent "the imminent death of or imminent great bodily harm" to another); *Guajardo*, 300 Mich App at 35-36. Second, even if the jury had accepted Keonte's self-serving testimony as true—that Hodo had retrieved a gun from the car—the evidence nonetheless shows that Keonte was the aggressor and was ineligible to invoke a claim of self-defense. See *People v Riddle*, 467 Mich 116, 119 n 8; 649 NW2d 30 (2002). The undisputed evidence was that Keonte and another individual with Keonte ran and arrived at the scene with guns drawn. Keonte also testified that Hodo did not make any move to obtain a gun until he arrived, i.e., Hodo was responding to Keonte (and another individual) approaching with drawn guns. While these types of issues generally are "for the jury to decide," *People v Rajput*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket No. 158866, decided 1/24/2020); slip op at 5, mod ___ Mich ___ (June 5, 2020) (Docket No. 158866), the evidence is not capable of any other rational interpretation. Therefore, because the evidence clearly did not support a defense of self-defense or defense of

[12] The prosecution has voiced a concern about how repeating defense instructions "would run the risk of confusing the jury that the defendant was charged with more than one crime." While we do not necessarily agree that it would create any confusion, it may be inefficient to repeat them numerous times when the instructions could be given once with the understanding that those defenses apply to *all* charged and lesser-included conduct.

[13] From the surveillance video, at 9:08:17 p.m., Marquel was looking at the direction of where Keonte was coming from and quickly sat in the driver's seat of the Charger. At 9:08:22, some exterior lights on the Charger turned on, indicating that Marquel had started the vehicle. At 9:08:25, both Bug and Hodo simultaneously tried to sit in their respective vehicles, which were approximately three parking spots away from each other with a van parked between them; while Bug was successful, Hodo did not realize that someone else was already seated in the driver's seat. At 9:08:27, Marquel started to back the Charger out. At 9:08:31, Hodo jumped into the back seat of the Magnum. At 9:08:40, Keonte made his way to the open rear passenger door of the Magnum with his arm extended, such that the handgun was inside the door opening. It appears from the video that Keonte fired his first shot at that time. Marquel and Bug had completely backed out of their parking spot by that time and were idling—seemingly waiting—in the parking lot. At 9:08:42, Keonte can be seen shooting his gun toward Hodo, which presumably was his second shot.

others, any failure to properly instruct the jury on the full applicability of those defenses did not have a *reasonable* probability of affecting the outcome of the trial.

Therefore, although Keonte's trial counsel waived any issue regarding the jury instructions, such waiver fell below an objective level of reasonableness. However, because there was not a reasonable probability that the outcome was affected, we reject Keonte's request for a new trial on the basis of the ineffective assistance of counsel.

C. Sentencing—Consideration of Acquitted Conduct

Keonte argues that the trial court impermissibly sentenced him on the basis of acquitted conduct. We agree that resentencing is required.

When sentencing, the sentencing guidelines are advisory. *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015). Nevertheless, a sentencing court must consult and consider the applicable sentencing guidelines range. *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019). A sentencing court may consider facts not admitted by the defendant or found beyond a reasonable doubt by the jury if it finds that those facts were proven by a preponderance of the evidence. *People v Beck*, 504 Mich 605, 626; 939 NW2d 213 (2019). However, a sentencing court is limited because, to maintain a defendant's presumption of innocence, a court cannot consider "acquitted conduct" while imposing a sentence. *Id*. at 626-627. " 'Acquitted conduct' means any 'conduct . . . underlying charges of which [the defendant] had been acquitted.' " *People v Roberts (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 339424, issued 3/24/2020); slip op at 4, lv pending. This Court has interpreted this broad definition to mean that "a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding the essential elements of any acquitted offense proved beyond a reasonable doubt." *Id.* at ___; slip op at 5.

Keonte's sentencing guidelines range was 58 to 142 months. The court imposed an out-of-guidelines minimum sentence of 180 months. The trial court stated:

> I'll deviate from the guidelines to some extent because in the Court's opinion *there is a showing of premeditation*. And also, because when I look at your history, you have two felonies, four misdemeanors, you absconded from bond once upon a time, you were on federal parole at the time this happened. And I am compelled by a term that the probation agent used when they said that you had yet to complete a term of community supervision, which says that all the efforts made by the system to reform you failed. [Emphasis added.]

Keonte takes exception to the trial court's reliance on premeditation because Keonte was convicted of manslaughter, which does not contain an element of premeditation. Keonte's argument is misguided because the focus is not whether the court's findings were supported by the elements of the offenses with which Keonte was convicted; the focus is whether the court's findings were based on acquitted conduct. Indeed, a court remains free to consider "uncharged conduct." *Id*. at ___; slip op at 4-5. However, Keonte was acquitted of first-degree murder in his first trial.

> "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (quotation marks and citation omitted). [*People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016).]

Consequently, under *Beck*, it would be improper for a sentencing court to sentence Keonte as if he had committed first-degree murder. Put another way, "[t]o allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Beck*, 504 Mich at 626-627 (quotation marks and citation omitted). Thus, it appears that the trial court's reliance on Keonte's "premeditation" runs afoul of *Beck* because premeditation is part of an essential element of a greater offense for which Keonte was acquitted.[14] The prosecution contends that the trial court's use of the word "premeditation" may not mean that the court thought that Keonte premeditated the killing and instead only premeditated an assault. With the court using a single word to describe its finding, it is impossible to ascertain precisely what the trial court meant. But because one of the likely interpretations is that the court thought Keonte premeditated the killing, resentencing is necessary.

We note that the trial court relied on *several* reasons—not just premeditation—for imposing the sentence it did. The court noted Keonte's extensive criminal history, noted how he has been unable to successfully complete a term of community supervision, and commented on his inability to be rehabilitated. Thus, even disallowing any consideration of Keonte's "premeditation," the court may still choose to sentence Keonte to the same term of imprisonment. But because it is not clear from the record that this would be the case, resentencing is necessary. Cf. *Francisco*, 474 Mich at 89 n 8 (stating that resentencing would not be necessary if the trial court had made it clear that it would have imposed the same sentence regardless of any error); *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003) (in the context of the mandatory sentencing guidelines, stating that when a trial court departs based on both valid and invalid reasons, a reviewing court is to determine if the trial court would have departed to the same degree based on the valid reasons alone); *People v Mutchie*, 251 Mich App 273, 274; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003) (deeming a sentencing scoring issue moot where the trial court made it clear that it would have imposed the same sentence regardless of any error).

D. Ineffective Assistance Of Counsel

Keonte argues that he was deprived of the right to the effective assistance of counsel. Keonte maintains that his counsel was ineffective when he failed to call Bug to testify, and when

[14] *Beck* was issued in July 2019, and Keonte was sentenced in November 2018, so the trial court did not have the benefit of the Supreme Court's decision.

he failed to interview the prosecution's witnesses before trial. The record does not support these claims.

As previously noted, in order to prove a claim of ineffective assistance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Trakhenberg*, 493 Mich at 51. Further, just because a defendant claims this his counsel was unprepared, he must still demonstrate prejudice resulting from this purported lack of preparation. *People v Bosca*, 310 Mich App 1, 37; 871 NW2d 307 (2015). When no evidentiary hearing is held, this Court's review of a claim of ineffective assistance of counsel "is limited to mistakes apparent on the record." *Riley*, 468 Mich at 139.

With respect to counsel's failure to call Bug as a witness, there is nothing in the lower court record to show whether Bug's testimony would have been helpful for Keonte. Therefore, Keonte cannot meet the requisite prejudice requirement because—without knowing what Bug would have said at trial—he cannot show that counsel's failure to have Bug testify caused any harm.

Keonte also argues that trial counsel was ineffective by failing to investigate any of the prosecution's witnesses before trial. Keonte has not established the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel."). Nothing in the lower court record supports Keonte's assertion that trial counsel did not interview or investigate the witnesses. Keonte's reliance on an e-mail from his trial counsel is not permitted because that e-mail is not part of the lower court record. See *Riley*, 468 Mich at 139; *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001) (declining to consider affidavit not contained in the lower court record), aff'd 468 Mich 233 (2003). In any event, the e-mail does not demonstrate that such interviews or investigation did not occur. Counsel simply stated that he did not "recall" interviewing the witnesses. See *Jewett v Mesick Consol Sch Dist*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348407, issued 6/4/2020); slip op at 2 (stating that someone saying he "did not recall" an event "is completely different" than a claim that the event never occurred). Secondly, nothing in trial counsel's performance at trial demonstrated that he was unprepared or that Keonte was in any way prejudiced by how he handled the witnesses. Indeed, counsel was successful in obtaining an acquittal of the more serious murder charge and a conviction on the lesser offense of manslaughter when Keonte's shooting and killing of Hodo—all while Marquel was out of danger—was captured on surveillance video.[15]

[15] Keonte in a separate issue also argues that this Court should remand for an evidentiary hearing for this claim of ineffective assistance of counsel. However, this type of request is to be done through a motion in this Court. See MCR 7.211(C)(1). Indeed, appellate counsel is fully aware of this requirement because, although it was denied, he previously filed a motion to remand in this Court. See *People v Keonte Sadler*, unpublished order of the Court of Appeals, entered March 12, 2020 (Docket No. 348659).

E. Verdict Form

Keonte next argues that the verdict form was faulty because it did not allow the jury to return a general not guilty verdict related to Count I. However, Keonte has waived this issue because both he and trial counsel affirmatively approved of the verdict form at trial, thereby extinguishing any error. *Carter*, 462 Mich at 215, 219; *Thorne*, 322 Mich App at 346; *Hall*, 256 Mich App at 679. Irrespective of any waiver, there was no error.

"[A] criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *People v Wade*, 283 Mich App 462, 450; 771 NW2d 447 (2009). Keonte asserts that his verdict form is indistinguishable from the verdict form that was found deficient in *Wade*. In Keonte's trial, the jury was given the following form, related to his Count I:

> WE, THE JURY, FIND THE DEFENDANT (select only one option for each count):
>
> **COUNT I – HOMICIDE-SECOND DEGREE MURDER**
>
> [ ] Not Guilty
>
> or
>
> [ ] Guilty of Second Degree Murder
>
> or
>
> [ ] Guilty of the lesser offense of Manslaughter

Keonte claims that the above form did not allow the jury to return a general verdict of not guilty and, more specifically, that the form did not permit the jury to return a not guilty verdict for the lesser included offense of manslaughter. His reliance on *Wade* is misplaced because the form in *Wade* is substantially different and stated for Count I:

> POSSIBLE VERDICTS
>
> YOU MAY RETURN ONLY ONE VERDICT FOR EACH COUNT.
>
> COUNT 1-HOMICIDE-MURDER FIRST DEGREE-PREMEDITATED (EDWARD BROWDER, JR)
>
> __ NOT GUILTY
>
> __ GUILTY
>
> OR

__ GUILTY OF THE LESSER OFFENSE OF-HOMICIDE-MURDER SECOND DEGREE (EDWARD BROWDER, JR.)

OR

__ GUILTY OF THE LESSER OFFENSE OF-INVOLUNTARY MANSLAUGHTER-FIREARM INTENTIONALLY AIMED (EDWARD BROWDER, JR.) [*Id*. at 465.]

In *Wade*, this Court found this form constitutionally deficient because it did not give the jury the opportunity to return a general verdict of not guilty. *Id*. at 468. The Court noted that the form "would not have been defective if it had included a box through which the jury could have found defendant not guilty of second-degree murder and not guilty of involuntary manslaughter." *Id*.

The form used in Keonte's trial is compliant because the jury could have found Keonte generally not guilty *or* guilty of murder *or* guilty of manslaughter. This is precisely what the law requires. This form is distinguishable from the one used in *Wade* because the "not guilty" option here was not placed solely with the primary or most severe offense. But in *Wade*, the not-guilty option was tied to the charge of first-degree murder, with the options for the lesser offenses set off with separate ORs and no not-guilty option associated with those lesser offenses. Thus, a straight-forward reading of the *Wade* form shows that it allowed for a not-guilty verdict with respect to the first-degree murder charge, but because the lesser offenses were set off and could be viewed independently, the not guilty option did not apply to these lesser offenses, which was impermissible.

Keonte also avers that his counsel was ineffective for failing to object to the verdict form. But because the verdict form was legal and allowed for a general verdict of not guilty, any objection would have been futile, and counsel is not ineffective for failing to raise a futile or meritless objection. *Ericksen*, 288 Mich App at 201.

F. Judicial Conduct

Keonte contends that the trial court's use of the word "victim" three times during trial—in reference to Hodo—impermissibly influenced the jury that Keonte had committed criminal acts, thereby depriving him of a fair trial. We disagree. Keonte failed to preserve this issue by objecting to the allegedly improper comments at trial. See *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

In *People v Stevens*, 498 Mich 162, 170-171; 869 NW2d 233 (2015), our Supreme Court held:

> A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly

influenced the jury by creating the appearance of advocacy or partiality against a party. [Citations omitted.]

Keonte cites three instances in the transcript where the trial court purportedly used the word "victim" while describing Hodo. Keonte asserts that such verbiage impermissibly invades the province of the jury because it influences the jury that a crime was committed and that the defendant committed the crime. There are several flaws with Keonte's argument.

First, two of the purported references to Hodo being a "victim" that Keonte cites were not made in the presence of the jury. Thus, they could not have influenced the jury in any manner. One reference occurred at the beginning of the third day of trial. While discussing an evidentiary issue, the trial court stated, "And I say that's interesting because the witness who's testifying right now said he heard Marquel Sadler make threats to the victim." The jury was not present during this discussion. Keonte's reliance on the transcript of the fifth day of trial is even more perplexing. Keonte cites a page in that transcript that is a table of contents for the exhibits. In that table of contents, the People's Exhibit #110 is labeled "Victim's clothing." Those words were not spoken by the trial court. Moreover, the jury never was made aware of this description in the transcript. Therefore, it is clear that these two references to Hodo being a "victim" had no effect on the jury, and therefore, cannot be used to show that it was "reasonably likely that the judge's conduct improperly influenced the jury." *Id*. at 171.

That leaves one incident, which occurred on the second day of trial. After an eyewitness, who was at a gas station across the street, was questioned by the attorneys, the trial court took questions from the jury. The trial court stated, "Now, I'm going to summarize these questions. One of the jurors is—said you initially said that the shooter had been standing in the parking lot and then later on there was a suggestion that he ran up to the victim to shoot him. Which—what's your version of it?" The trial court's use of the word "victim" in this instance did not make it reasonably likely that the jury was influenced. Although the trial court used the word "victim," it did so in the context of asking a question that came from a juror, so the statement clearly has less "authority" behind it. Put differently, because the trial judge merely was relaying a question from someone else, no listener could reasonably think that the judge was speaking for himself when he referred to Hodo as a victim.

Moreover, the mere reference to Hodo being a "victim" was not likely to impermissibly influence the jury because everyone involved knew that Hodo was indeed a victim—not necessarily a victim of *murder*, but a victim of a *homicide*. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "victim" as "one that is injured, destroyed, or sacrificed under any of various conditions" and providing "victim of cancer" as one of its examples). At trial, it was introduced to the jury that "homicide" merely meant the "death at the hands of another."[16] The

[16] This is consistent with a dictionary definition of "homicide," which is "[t]he killing of one person by another." *Black's Law Dictionary* (11th ed). *Black's* continues to state that "[t]he legal term for killing a man, whether lawfully or unlawfully, is 'homicide.' There is no crime of 'homicide.' "

medical examiner explained that "murder" on the other hand is a legal conclusion, unlike "homicide." (Tr IV, p 28.) Later, when the prosecutor used the term "murder" while questioning Hodo's son, both defense counsel objected. The trial court agreed that murder was a legal conclusion and that the term "homicide" should be used. Therefore, the jury was fully aware that Hodo was a victim of a homicide, which was not a disputed fact. Accordingly, Keonte cannot show how any such comments improperly influenced the jury.

Keonte's further reliance on *People v Laidler*, 491 Mich 339; 817 NW2d 517 (2012), is misplaced. Keonte quotes the following portion from *Laidler*, "[P]ursuant to common, and relevant, usage, a 'victim' is any person who is harmed by the defendant's criminal actions." *Id*. at 348. But the *Laidler* Court was addressing what a "victim" meant *in relation to OV 3*, which pertains to sentencing a convicted defendant and is statutorily "defined as 'physical injury to a victim.' " *Id*. at 343, quoting MCL 777.33(1). The Court only made its conclusion that a victim is a person who was harmed by the defendant's *criminal* actions after recognizing that the dictionary definition of "victim" is "a person who suffers from a destructive or injurious action or agency" and recognizing that "OV 3 is concerned with *criminal* punishment"—after a defendant has been convicted. *Id*. at 347-348 (citation omitted; emphasis added). Therefore, Keonte is reading more into *Laidler* than what it stands for. It was not a general pronouncement that a "victim" always implies that criminal action was involved.

To stress, the present case is not a situation in which the determination of someone's status as a victim is dependent on a finding of a criminal act. In this case, we have someone who was alive and then died after being shot with a gun. That person is a *victim* of a homicide, regardless of any defendant's criminal culpability. And Keonte never disputed that he shot and killed Hodo, or in other words, he never disputed that he had committed a homicide. His defense was that he killed Hodo, but that it was justifiable under the theory of self-defense or defense of others. Importantly, when the prosecutor during questioning described the behavior as "murder," the trial court corrected the reference.

Lastly, the trial court instructed the jury that it is to only consider the evidence in making its findings and that the court's comments and questions, as well as those of counsel, are not evidence. The trial court also instructed the jury that if it thought that the court did express any feelings, sympathies, or prejudices about the case, the jury was to ignore those and decide for themselves what actually happened in the case. Juries are presumed to follow their instructions. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). Given the circumstances

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Id. (quotation marks and citation omitted). This has been the rule in this state for more than 150 years:

> Homicide, or the mere killing of one person by another, does not, of itself, constitute murder; it may be murder, or manslaughter, or excusable, or justifiable homicide, and therefore entirely innocent, according to the circumstances, or the disposition or state of mind or purpose, which induced the act. [*Maher v People*, 10 Mich 212, 217 (1862).]

surrounding the trial court's single reference to Hodo as a victim in the jury's presence, it is insufficient to rebut the presumption that the jury followed their instructions.

G. Jury Instruction—Reckless or Careless Discharge of Firearm

Keonte argues that the trial court erred by failing to instruct the jury on the lesser offense of careless, reckless, or negligent discharge of a firearm causing death or injury, MCL 750.861. Keonte has waived this issue because he did not request an instruction on reckless or careless discharge of a firearm and his counsel expressed satisfaction with the jury instructions that were given. See *Thorne*, 322 Mich App at 346; *Hall*, 256 Mich App at 679. And wavier extinguishes any error, foreclosing appellate review. *Carter*, 462 Mich at 215, 219.

H. Right to be Present During Voir Dire

Keonte argues that automatic reversal is required because the trial court violated his right to be present and to have his counsel present when the court dismissed two jurors in their absence. We disagree. Because there was no objection on this basis at trial, this issue is unpreserved. Accordingly, we review this unpreserved claim of constitutional error for plain error affecting substantial rights. *Carines*, 460 Mich at 764. If a constitutional error is structural, then no showing of prejudice is necessary. *People v Cook*, 285 Mich App 420, 424; 776 NW2d 164 (2009).

A defendant has the right to be present during voir dire. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). But "a defendant may waive both his statutory and constitutional right to be present during his trial." *People v Kammeraad*, 307 Mich App 98, 117; 858 NW2d 490 (2014) (citation omitted). However, such a waiver must be done by the defendant, himself, and cannot be accomplished through counsel. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975).

On the first day of trial, during voir dire, the court recessed for a lunch break. The transcript shows the following:

> (At 12:38 p.m., court recessed)
>
> (At 2:31 p.m., court reconvened)
>
> *THE COURT*: --who broke down this morning and trembled and shook and shake and said she's been raped and she can't do this.
>
> *[Marquel's Counsel]*: I'm aware of those.
>
> *THE COURT*: And the other one is Juan Rodriguez whose wife is in intensive care at Henry Ford Hospital and she may be dying.
>
> *[Marquel's Counsel]*: I understand.
>
> *THE COURT:* So, I've excused those two.

> *[Marquel's Counsel]*: Did you talk to him about doing the three preempts at a time? Anybody?
>
> *[Keonte's Counsel]*: No, I was waiting for you to come back, Mike [Marquel's Counsel]. *I have no objection*. [Emphasis added.]

It is clear that the transcript did not pick up the entirety of the conversation that occurred after or during the lunch break. Regardless, it is apparent that the trial court had already dismissed two prospective jurors and was notifying the parties of its decision. Defense counsel clearly understood what had happened and stated that he had no objection. Although this normally would constitute a waiver extinguishing any error, see *Carter*, 462 Mich at 215, 219, this was insufficient because defendant himself had to invoke the waiver, *Montgomery*, 64 Mich App at 103.

We disagree with Keonte's suggestion that any error would require automatic reversal. Automatic reversal is only required in instances of structural, constitutional error. *Cook*, 285 Mich App at 424. "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id*. (quotation marks and citation omitted). Notably, Keonte on appeal does not identify any authority that shows that this type of error is a structural error. Indeed, in arguing that he was prejudiced, he implicitly acknowledges that the error was not structural. Moreover, the Sixth Circuit Court of Appeals has held that "the right to be present at voir dire is not one of those structural rights whose violation constitutes per se error." *United States v Riddle*, 249 F3d 529, 535 (CA 6, 2001). This is so because "[a]ny error in a defendant's voir dire absence is not a defect affecting the framework within which the trial proceeds, nor is it one of those errors that necessarily renders a trial fundamentally unfair." *Id*. (quotation marks and citations omitted).

Assuming that the trial court's dismissal of the two prospective jurors without Keonte's presence constituted plain error, Keonte cannot show that the error affected the outcome of the trial. First, it is evident from the record that had the trial court waited to raise the issue of dismissing the two prospective jurors until the parties all reconvened after the lunch break, the outcome would have been the same—the court still would have dismissed the jurors. Specifically, given that the trial court was of the mindset to dismiss these two jurors for cause, there is nothing to show that defense counsel would have objected had the court waited to make its decision in the presence of Keonte and his counsel. In other words, there is nothing in the record to suggest that had counsel been asked for his opinion before the court dismissed the jurors, he would have given a different response than the one he ultimately provided. Second, assuming that both jurors had not been dismissed, Keonte fails to show how the result of the proceeding would have been any different. He avers that one of the potential jurors was a "minority"[17] and cursorily avers that one of them would have harbored reasonable doubt and voted to acquit if they had remained on the

[17] The actual racial or ethnic makeup of these two potential jurors is unknown. While one juror had the last name "Rodriguez," the record does not reveal with certainty his race or ethnicity. Even if one assumes that Mr. Rodriguez is of Hispanic decent, that is not the same race or ethnicity as Keonte, who is African-American.

jury panel. There is nothing to show that either of these jurors would have harbored reasonable doubt. To the extent that Keonte suggests that this would have happened for the mere reason that one of the jurors was a minority, like himself, he unsurprisingly cites no authority for that proposition. See *Rosales-Lopez v United States*, 451 US 182, 190; 101 S Ct 1629; 68 L Ed 2d 22 (1981) ("There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.").

In sum, Keonte has not shown how any error affected his substantial rights, and as a result, he cannot prevail on this issue.

I. Errors in the Judgment of Sentence

Keonte argues that remand is necessary to correct several clerical errors in the judgment of sentence. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

The prosecutor asserts that Keonte waived this issue by stipulating to the entry of the amended judgment of sentence.[18] While Keonte stipulated to the reissuance of his original judgment of sentence, such a stipulation should not preclude him from challenging the accuracy of that judgment. The entire point behind the stipulation was to allow an appeal of right in this Court by "re-issu[ing]" the original judgment of sentence; the contents of the judgment were not the subject of that stipulation.

Keonte claims that there are three errors in the judgment of sentence that need to be corrected. He claims that the judgment erroneously states that all the sentences are to begin on November 27, 2018, when two of them are to start later because of consecutive sentencing. He also assets that the box for consecutive sentencing is not checked on the judgment and that the judgment erroneously says that he was credited with 346 days for time served. Regarding his last argument that the 346 days' credit for time served is inaccurate, Keonte makes no argument pertaining to how or why this number is incorrect. Therefore, that argument should be deemed abandoned. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.").

Keonte's first two claims of error relate to how the judgment of sentence captures, or fails to capture, that two of his sentences were to be served consecutively to the other two. At the outset, we are confused as to why Keonte would be raising these purported errors. If there was any error, such that it could be read that all of his sentences were to be served concurrently with each other, the error would inure to his benefit. Regardless, we discern no plain error that is affecting Keonte's substantial rights. As the prosecution notes, despite the box for consecutive sentencing not being checked on the judgment form, ¶ 12 states, in pertinent part:

[18] Keonte's initial judgment of sentence was entered on November 27, 2018, the day of sentencing. But because no attorney was appointed for Keonte until February 19, 2019, the judgment was reissued on April 3, 2019, to allow Keonte to file his claim of appeal with this Court.

> THE SENTENCES ON COUNTS ONE AND THREE ARE CONCURRENT TO EACH OTHER. THE SENTENCES ON COUNTS TWO AND FOUR ARE CONCURRENT TO EACH OTHER AND CONSECUTIVE TO COUNTS ONE AND THREE.

Because this pronouncement makes it clear that Keonte's two sentences pertaining to his felony-firearm convictions are to be served concurrently with each other but consecutive to the sentences for the predicate convictions, we do not see how Keonte is prejudiced.

Indeed, contrary to his argument that ¶ 9 on the judgment of sentence should have been utilized, a review of that provision shows that it does not apply to Keonte's particular sentences. Paragraph 9 states:

> ☐ 9. Sentence(s) to be served consecutively to (If this item is not checked, the sentence is concurrent.)
>
> ☐ each other. ☐ case numbers _____

With Keonte having two sentences that were to be served consecutively to the other two, the preprinted selections for ¶ 9 do not work. The only options for these boxes are for all of the sentences to be served consecutively *to each other* or consecutively to sentences from another case. Neither option applies to the instant situation because only two of the sentences were to be served consecutively with the other two sentences; all the sentences were not to be served consecutively to each other and were not to be served consecutively to another case.

Likewise, Keonte cannot show any prejudice for the purported error for the date the sentences were to begin. He claims that because two sentences were to be served after the completion of the two felony-firearm sentences, those should have different "begin dates." While it might have been technically more accurate to show that two sentences for felony-firearm had different starting dates compared to the other two sentences for the predicate offenses, no prejudice should result. As already indicated, any error would have inured in Keonte's benefit. Second, the judgment elsewhere clarifies that two of the sentences were to be served consecutively, so when read as a whole, it is clear how Keonte's sentences are to be served.[19]

Therefore, Keonte has not shown the existence of plain error in his judgment of sentence that affected a substantial right, and we decline to remand for any corrections.

[19] Keonte's reliance on *People v Beard*, 327 Mich App 702; 935 NW2d 118 (2019), is misplaced. In *Beard*, the defendant properly preserved the issue by moving in the trial court to amend the judgment of sentence. See *id*. at 705. Therefore, the plain-error analysis applicable in this case was not utilized in *Beard*. See *id*. at 706-710, 707 n 3.

III. CONCLUSION

We affirm both defendants' convictions. But in Docket No. 346793, Marquel has successfully challenged the scoring of OV 3, which affects his appropriate sentencing guidelines range. Therefore, we remand for Marquel to be resentenced. And in Docket No. 348659, the trial court's comments could be viewed as impermissibly sentencing Keonte on the basis of acquitted conduct. Therefore, we remand for Keonte's resentencing as well.

Affirmed in part and remanded for resentencing in each appeal. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering