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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD CALVERT COPELAND,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 351231
Wayne Circuit Court
LC No. 19-002436-01-FC

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to serve the statutorily required two years in prison. Defendant appeals as of right. We affirm.

I. BACKGROUND FACTS

This case arose out of a shooting that occurred in the early morning hours of December 27, 2018, outside the Horse Gentleman's Club in Detroit, where individuals had congregated after closing. Trial testimony established that the victim, Denard Burton, who was intoxicated, entered the car of defendant's female cousin and refused to leave. This upset the woman, prompting defendant to ask Burton to exit the car. Burton eventually did so, but a confrontation ensued between Burton and the women in defendant's party. The women argued with, and yelled at, Burton, and, according to defendant, Burton and Cortez Gardener, an associate of Burton's, started making threats. Defendant testified that he heard "I'm about to kill you and then [sic] bitches." Defendant further testified that he then saw Cortez flag down another car and Burton walk to that car, reach inside, and then "sprint" toward defendant with his hands up. Defendant stated that he believed that Burton had something in his hand as he was coming toward him, and that he heard a gunshot, turned, and saw Burton in front of him with an object "like an ice pick" in his hand. Defendant drew his handgun, fired one shot at Burton, and fled the scene. Burton sustained a graze gunshot wound to his outer left elbow and a fatal gunshot wound to his chest.

Defendant did not dispute that he fired the shot that killed Burton, but claimed self-defense at trial. The jury returned a seemingly inconsistent verdict, finding defendant not guilty of second-

degree murder and the lesser included offense of voluntary manslaughter, but guilty of felony-firearm. This appeal ensued.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the jury's verdict finding him not guilty of second-degree murder or voluntary manslaughter established that the jury found that he acted in lawful self-defense when he fired his gun at Burton. Thus, defendant argues, he could not have committed the underlying homicide offense to support his felony-firearm conviction, which requires the possession of a firearm during the commission of, or attempt to commit, a felony. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b(1). We disagree.

> This Court reviews de novo whether there was sufficient evidence to support a conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence—whether direct or circumstantial—in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses. Circumstantial evidence and any reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. The prosecution need not negate every reasonable theory of innocence; it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. All conflicts in the evidence must be resolved in favor of the prosecution. [*People v Kenny*, 332 Mich App 394, 402-403; 956 NW2d 562 (2020) (quotation marks and citations omitted).]

As an initial matter, it was within the jury's purview to find that defendant committed second-degree murder or voluntary manslaughter for purposes of the felony-firearm charge, while declining to render a guilty verdict for purposes of the underlying homicide charge. See *People v Lewis*, 415 Mich 443, 453-455; 330 NW2d 16 (1982). Michigan does not require consistency in jury verdicts. *Id*. at 449. Thus, the jury's rejection of the homicide offense here does not mean that the jury necessarily found that defendant acted in self-defense, thereby excusing his otherwise felonious conduct. Rather, the inconsistency in the verdict suggests that the jury exercised leniency. See *id*. Indeed, the jury's consideration of the predicate offense and the compound offense is separate and distinct. See *People v Goss*, 446 Mich 587, 597; 521 NW2d 312 (1994). Accordingly, the jury's finding on the homicide offense did not preclude it from reaching a different finding on the felony-firearm offense.

Our Supreme Court has held that, while the commission of, or the attempt to commit, a felony is an element of felony-firearm, actual conviction of the underlying felony is not an element of the offense and thus is not necessary. See *Lewis*, 415 Mich at 454-455. As this Court has explained, "in the compound-felony setting, the jury is fully instructed on the elements of both offenses and is therefore aware that conviction of a compound felony is logically inconsistent with acquittal of the predicate felony." *People v McKewen*, 326 Mich App 342, 354; 926 NW2d 888 (2018). If a jury nevertheless chooses to enter inconsistent verdicts, the conviction remains valid. See *Lewis*, 415 Mich at 448. Accordingly, that the jury found defendant not guilty of the

underlying homicide offense is not dispositive here, and its seemingly inconsistent verdicts did not invalidate the felony-firearm conviction.

The question then becomes whether a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could reasonably find beyond a reasonable doubt that defendant possessed a firearm during the commission of second-degree murder or voluntary manslaughter in light of his claim of self-defense. We conclude that there was sufficient evidence to support defendant's conviction.

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. The term 'malice' has been defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Henderson*, 306 Mich App 1, 9-10; 854 NW2d 234 (2014) (quotation marks and citations omitted), overruled in part on other grounds, *People v Reichard*, 505 Mich 81, 90 n 18; 949 NW2d 64 (2020).

"The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). "[T]he element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003).

However, "[o]nce a defendant raises the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exists, the prosecution must exclude the possibility of self-defense beyond a reasonable doubt." *People v Stevens*, 306 Mich App 620, 630; 858 NW2d 98 (2014) (quotation marks and citation omitted). Self-defense is " 'a complete defense to such crimes against the person as murder and manslaughter, attempted murder, assault and battery and the aggravated forms of assault and battery, and perhaps other crimes as well.' " *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), quoting 2 LaFave, Substantive Criminal Law (2d ed), § 10.4(a), pp 143-144. Pertinent here, self-defense is also a complete defense to felony-firearm. *People v Goree*, 296 Mich App 293, 303-305; 819 NW2d 82 (2012). In essence, "self-defense justifies otherwise punishable criminal conduct, usually the killing of another person, 'if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of great bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.' " *Dupree*, 486 Mich at 707, quoting *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). See also MCL 780.972. "[T]he touchstone of *any* claim of self-defense, as a justification for homicide, is *necessity*." *Riddle*, 467 Mich at 127 (emphasis in original). " 'The question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of losing his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger?' " *Id.*, quoting *People v Lennon*, 71 Mich 298, 300-301; 38 NW 871 (1888) (alterations omitted).

Clearly, there was sufficient evidence for the jury to conclude that the victim's death was caused by defendant's act of possessing and firing the gun. Defendant disputes neither that he

drew a handgun and fired it at Burton while Burton was coming at him, nor that in doing so he inflicted a fatal wound. That defendant knowingly fired a loaded gun at Burton at close range supported the inference that he acted with the intent to kill or cause great bodily harm, or, at a minimum, in wanton and wilful disregard of the likelihood that the natural tendency of such behavior was to cause death or great bodily harm. The jury could thus have reasonably concluded that defendant had the requisite malice to support second-degree murder. See *Henderson*, 306 Mich App at 9. Although defendant testified that he "was not trying to hurt anybody," only minimal circumstantial evidence is necessary to show that a defendant acted with the requisite intent, see *Stevens*, 306 Mich App at 629, and it was sufficient that defendant fired a deadly weapon at Burton at close range.[1] For the same reasons, if the jury believed that defendant acted in response to sufficiently dire threats to establish adequate provocation, the evidence was sufficient to support its conclusion that defendant committed voluntary manslaughter. The evidence was thus sufficient for the jury to find that defendant possessed a firearm during the commission of a homicide offense, unless there was insufficient evidence to overcome defendant's claim that he shot Burton in self-defense. See *Stevens*, 306 Mich App at 630.

Defendant described the circumstances immediately preceding the shooting that caused him to believe that he was in danger of death or serious harm: Burton was acting unruly when he went inside defendant's female cousin's car and would not get out; a confrontation ensued between defendant's cousins and Burton; Burton and Cortez were directing threats at defendant; defendant heard, "I'm about to kill you and then [sic] bitches"; Cortez signaled to a car that pulled up with "a lot" of people inside; Burton walked to that car and reached into the backseat and then "sprint[ed]" toward defendant with something in his hand; Cortez was talking "very aggressively"; and defendant heard a gunshot then saw Burton in front of him with some object "like an ice pick" in his hand. Defendant testified that he feared for his life and the safety of his cousins. We agree that these circumstances, if the jury believed them, reasonably supported defendant's claim that he acted in lawful self-defense when he shot Burton.

However, there was also evidence to discount key aspects of defendant's claim of self-defense. Significantly, witnesses did not corroborate defendant's testimony that Burton had a weapon in his hand when he approached defendant. Instead, Detective Kraszewski testified that he watched the surveillance video hundreds of times and that he did not see anything in Burton's hands.[2] Alonna McIntosh, defendant's cousin who tried to help Burton after the shooting, did not

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[1] This Court has recognized that "[m]erely pointing a loaded gun at another person is inherently dangerous; the notion that actually shooting a gun in the direction of another person, no matter how inaccurately, could reflect anything but an intent to cause serious harm is beyond comprehension." *People v Blevins*, 314 Mich App 339, 358; 886 NW2d 456 (2016) (emphasis omitted).

[2] Although Detective Kraszewski testified at the preliminary examination that he could not discern from the video if Burton had a weapon in his hands, he explained at trial that, afterward, he watched the video over and over again, and also enlarged it with a magnifying glass, and he did not see anything in Burton's hands. Kraszewski agreed, however, that defendant would not have had the benefit of such hindsight, considering that only approximately three seconds elapsed from the time Burton placed his hands inside the car and was "right back in front of" defendant.

recall seeing a weapon on Burton's body, although she admittedly was highly intoxicated and was not looking for anything. And Yordelis Petri, who was there with Cortez, testified that, although she did not actually see the shooting, she did not see anything in Burton's hands when they were outside the Club, and she did not see a weapon on Burton's body or on the ground, or Cortez take anything off of Burton, when she returned to the scene in hopes of rendering aid. Defendant himself admitted that he never saw Burton with a gun or a weapon until Burton came at him with what appeared to be an ice pick, nor did he see Cortez with a weapon.

Further, defendant's testimony that Burton or Cortez had threatened him was not entirely undisputed. Petri testified that she did not hear anybody, including Cortez or Burton, threaten to shoot or harm anyone, and no other witness testified to any such threats. However, the testimony clearly established that there was commotion, yelling, and arguing between the parties, an environment that reasonably would have been conducive to such behavior. But Petri also testified that she had "no clue" whether Burton was responding the argument.

There was also conflicting evidence regarding whether a gunshot was fired before defendant fired his gun at Burton. McIntosh testified that she heard a single shot,[3] as did Detective Kraszewski from his repeated viewing of the surveillance video and listening to its audio. And, during closing argument, the prosecution played the audio for the jury to illustrate that there was "one loud bang." But Petri testified that she heard multiple gunshots, although she did not know how many. It was also unclear from the physical evidence whether more than one shot was fired, as there was evidentiary support for both theories.

Thus, the evidence was not uncontradicted or entirely consistent regarding key aspects of the events preceding the shooting, including whether Burton had a weapon in his hand, whether Burton or Cortez had threatened defendant, and whether a shot was fired immediately before defendant fired his gun. Importantly, these factual matters had great bearing on the reasonableness of defendant's belief that his life was in imminent danger and that it was necessary to fire his gun at Burton to protect himself.

Resolving these conflicts in the evidence and credibility issues in favor of the prosecution, as we must, we hold that sufficient evidence existed to enable the jury to exclude the possibility that defendant acted in self-defense beyond a reasonable doubt. Given the inconsistencies in the evidence, particularly regarding whether Burton was armed when he came at defendant, the jury could have disbelieved defendant's testimony that he reasonably feared for his life or that it was necessary to fire his gun at Burton to protect himself, or others, from imminent death or serious injury. Additionally, defendant fled the scene after the shooting and did not go to the police, from which the jury might have inferred a consciousness of guilt.[4] And, as the prosecution points out,

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[3] Upon follow-up questioning regarding whether she heard a gunshot or gunshots, McIntosh specified "a gunshot."

[4] "[E]vidence of flight is admissible to support an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime." *People v Goodin,* 257 Mich App 425, 432; 668 NW2d 392 (2003) (citation omitted).

defendant's apparent evasiveness during his testimony about other facts might also tend to undermine his credibility.[5] This Court "must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses." *Kenny*, 332 Mich App at 403. Thus, viewing the evidence in a light most favorable to the prosecution, we find that it was sufficient to enable the jury to reasonably conclude that self-defense did not apply.[6] Accordingly, although the jury ultimately did not find defendant guilty of second-degree murder or voluntary manslaughter, there was sufficient evidence from which it could properly have done so.

For these reasons, we conclude that defendant is not entitled to relief on his claim that the evidence was insufficient to sustain his conviction of felony-firearm, despite the jury's having seemingly rendered an inconsistent verdict.[7]

III. JURY INSTRUCTION

Defendant next challenges the propriety of the trial court's instruction to the jury that it was not necessary that he be convicted of second-degree murder or voluntary manslaughter to convict him of felony-firearm. We conclude that defendant has waived appellate review of this issue.

In *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011), the Supreme Court explained waiver in the context of jury instructions:

> [B]ecause defense counsel here explicitly and repeatedly approved the instruction, defendant has waived the error. This Court has defined waiver as the intentional relinquishment or abandonment of a known right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. When defense counsel clearly expresses

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[5] For instance, defendant testified that he could not recall where he had stored the gun in the car, when he retrieved the gun from the car, or what he did with the gun after the shooting which was found still loaded in a community garden, or what hand Burton had the ice pick in, where he went immediately after the shooting, or when he left the Detroit area after the shooting.

[6] The jury also had the opportunity to view the surveillance video, which captured the shooting, and thus provided the jurors with further evidence to judge whether defendant was acting in self-defense.

[7] We note that the record offers no reason for the jury's inconsistent verdict, and it would be speculative to conclude that the jury's acquittal on the homicide charge was based on self-defense. Nor does the record establish, with respect to the concept of self-defense, "that the jury was confused, that they misunderstood the instructions, or that the jury engaged in an impermissible compromise," without which defendant is not entitled to reversal on the basis of an inconsistent verdict. *People v Putman*, 309 Mich App 240, 251; 870 NW2d 593 (2015). Thus, to the extent his claim challenges the inconsistency of the verdict, defendant, who raised no such challenge below, has not shown plain error that affected his substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver. [Quotation marks and citations omitted.]

Here, defense counsel three times explicitly indicated his approval of the trial court's instructions regarding felony-firearm, once in the context of the general instructions and twice in regard to the specific felony-firearm charge. First, at the completion of its general instructions, the trial court asked defense counsel if he was satisfied with the final jury instructions, and counsel responded, "Yes." Second, in response to the jury's question whether the felony-firearm charge was "tied" to the murder or manslaughter charge, the trial court explained that it planned to reinstruct the jury regarding the elements of felony-firearm, including that the jury must consider each charge separately, and that it was not necessary that defendant actually be convicted of the underlying felony. The trial court then asked, "Any objection from either side?" and defense counsel responded, "No, no objection." Third, after the trial court so reinstructed the jury on the felony-firearm charge, the trial court asked, "Okay. People and defense satisfied? and defense counsel responded, "Yes."

We hold that defense counsel's clear and repeated expressions of his satisfaction with the jury instructions, and in particular with those concerning the felony-firearm charge, constituted a waiver of any appellate objection to the instructions, and thus, there is no error to review. See *id.* at 503-504.[8]

Defendant's objection is without merit in any event. The trial court's instruction, which mirrored M Crim JI 11.34, properly reflected the elements of felony-firearm and otherwise explained the applicable law. See *id.* at 501. Moreover, as discussed below, the trial court properly instructed the jury generally on the theory of self-defense, including that "[i]f a person acts in lawful self-defense, his actions are excused and he is not guilty of any crime." Therefore, no instructional error occurred.

IV. COURT COSTS

Defendant next argues that the trial court erred by imposing excessive court costs of $1,300 and by failing to articulate the factual basis for doing so, and thus that remand is necessary to determine whether a reasonable relationship exists between the costs imposed and the actual costs incurred by the trial court. We disagree.

Defendant failed to object when the trial court ordered him to pay court costs, and thus has not preserved this issue for appellate review. See *People v Konopka (On Remand)*, 309 Mich App 345, 356; 869 NW2d 651 (2015). We review unpreserved claims for plain error. *Id.* "In order for a defendant to establish plain error, he must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Johnson*, 315 Mich App 163, 197; 889 NW2d 513 (2016). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*,

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[8] A defense attorney's affirmative statement that are no objections to an instruction constitutes express approval of that instruction. *Id.* at 505 n 28.

460 Mich at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Kowalski*, 489 Mich at 506 (cleaned up).

Under MCL 769.1k(1)(b), "if the court determines after a hearing or trial that the defendant is guilty," the court has the authority to impose various costs. *Konopka*, 309 Mich App at 357-358. Relevant here are the costs that a court may impose under MCL 769.1k(1)(b)(*iii*), which authorizes a trial court to impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case . . . ." Those actual costs include salaries and benefits for court personnel, goods and services necessary for court operations, and necessary expenses for the operation and maintenance of court buildings and facilities. MCL 769.1k(1)(b)(*iii*)(A) to (C). Although, under MCL 769.1k(1)(b)(*iii*), a separate calculation of the costs involved in a defendant's particular case is not required, "trial courts must 'establish a factual basis' from which this Court can 'determine whether the costs imposed were reasonably related to the actual costs incurred by the trial court.' " *People v Stevens*, 318 Mich App 115, 121; 896 NW2d 815 (2016), quoting *Konopka*, 309 Mich App at 359-360. If a trial court fails to articulate such a determination, the defendant is ordinarily entitled to a remand for that purpose. See *Stevens*, 318 Mich App at 121.

Here, the trial court assessed $1,300 in court costs without any explanation. However, on appeal, the prosecution presented documents from the State Court Administrative Office (SCAO) showing that the average cost of a criminal case in Wayne Circuit Court is $1,439.60.[9] To calculate the average costs per criminal case, information was compiled about the circuit's expenditures and caseload, and the actual court costs for the circuit, excluding expenses for court-appointed counsel, were multiplied by the percentage of workload attributed to the criminal division, and that result was divided by the number of criminal cases disposed. This Court has held that the calculation of the average cost of a felony case using SCAO's formula provides a sufficient factual basis for court costs imposed under MCL 769.1k(1)(b)(*iii*). *People v Cameron*, 319 Mich App 215, 225-226; 900 NW2d 658 (2017). Accordingly, the SCAO calculation presented by the prosecution on appeal, which applied a similar formula to determine the circuit court's average cost of a felony case at $1,439.60, establishes that the $1,300 in costs imposed in the instant case were reasonably related to the trial court's actual costs.

This Court recently addressed a similar issue in *People v Posey*, 334 Mich App 338; 964 NW2d 862 (2020). There, the defendant, who was convicted in the Wayne Circuit Court, argued for the first time on appeal that remand was necessary because of the trial court's failure to articulate a factual basis for its assessment of $1,300 in court costs. *Id*. at 363. As in this case, the

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[9] The prosecution attached this information to its brief on appeal, but it was not included in the lower court record. Generally, this Court does not allow expansion of the record on appeal to consider information that is not presented in the trial court. See *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013). However, under MCR 7.216(A)(4), this Court may permit additions to the record. In the interest of judicial economy, we will consider the exhibit, which the prosecution had no reason to produce until defendant raised this appellate objection.

prosecution, on appeal, provided information from SCAO "reflecting that the average costs per criminal case in the Wayne Circuit Court is $1,302." *Id*. at 363-364. Additionally, the trial court explained, in connection with a codefendant, that it was relying on the SCAO calculation for the imposition of court costs. *Id*. at 364. This Court declined to remand, holding that, "although the trial court plainly erred by failing to articulate the factual basis for the court costs imposed," the defendant "has not demonstrated any of the requisite prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* (quotation marks and citation omitted).

Similarly, in the present case, the trial court plainly erred by failing to articulate the factual basis for the costs imposed, but defendant neither objected to that assessment at sentencing, nor otherwise asserted how it was excessive or not reasonably related to the trial court's actual costs. However, because defendant did not raise objection until appeal, and the prosecution has responded by offering a plausible calculation of the cost of the Wayne Circuit Court's average case, we are satisfied that the trial court's imposition of $1,300 in costs against defendant was reasonably related to the trial court's actual costs.

For these reasons, we conclude that defendant has failed to demonstrate that the trial court's assessment was excessive, or that he was otherwise prejudiced by the trial court's failure to articulate a factual basis justifying the costs imposed.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his supplemental brief, defendant first raises a claim of ineffective assistance of counsel, arguing that his defense counsel's failure to request a self-defense instruction specific to the felony-firearm charge prejudiced him by depriving him of his right to present a complete defense.[10] We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) (quotation marks and citation omitted). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *Id*. Because no *Ginther*[11] hearing was held in this case, our review is limited to errors apparent on the record.[12] See *Putman*, 309 Mich App at 246.

"A criminal defendant has the fundamental right to effective assistance of counsel." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012); US Const, Am VI; Const 1963, art 1, § 20. "To prove that defense counsel was not effective, the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness

[10] This Court granted defendant's motion to file a supplemental brief. *People v Copeland*, unpublished order of the Court of Appeals, entered July 27, 2021 (Docket No. 351231).

[11] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[12] Defendant filed in this Court a motion for a remand to the trial court for a *Ginther* hearing, which this Court conditionally denied. *People v Copeland*, unpublished order of the Court of Appeals, entered September 29, 2021 (Docket No. 351231). We once again deny the motion.

and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Heft*, 299 Mich App at 80-81. "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81. Accordingly, we must apply these two prongs and ask whether defense counsel's failure to request specific instruction on felony-firearm self-defense "constituted prejudicial deficient performance." *People v Randolph*, 502 Mich 1, 18; 917 NW2d 249 (2018).

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). And, there is no question that the " 'trial court is required to instruct the jury with the law applicable to the case and fully and fairly present the case to the jury in an understandable manner.' " *Goree*, 296 Mich App at 301, quoting *Mills*, 450 Mich at 80. "[J]ury instructions must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence." *People v Kurr*, 253 Mich App 317, 328; 654 NW2d 651 (2002). "Instructional errors that directly affect a defendant's theory of defense can infringe on a defendant's due process right to present a defense." *Id*. at 326-327. "We consider the jury instructions as a whole to determine whether the court omitted an element of the offense, misinformed the jury on the law, or otherwise presented erroneous instructions." *Goree*, 296 Mich App at 301 (quotation marks and citation omitted).

Self-defense is an available defense to felony-firearm, and thus, defendant was entitled to proper instructions in this regard. See *Goree*, 296 Mich App at 304-305. M Crim JI 11.34c specifically addresses self-defense as it applies to felony-firearm, and states, in pertinent part, as follows:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be, with no duty to retreat, if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

As an initial matter, we do not see how defense counsel's failure to request M Crim JI 11.34c might be attributed to sound trial strategy. See *Randolph*, 502 Mich at 12 ("If counsel's strategy is reasonable, then his or her performance was not deficient."). While there may be conceivable reasons for not requesting even relevant additional instructions, defense counsel in the present case admitted in his postconviction affidavit that he was simply unaware of M Crim JI 11.34c and that he would have requested that instruction otherwise. However, even if we assume that defense counsel's performance was objectively deficient in this regard and thus that defendant satisfied the first prong to establish ineffective assistance, counsel's admission does not automatically establish constitutionally deficient representation because defendant must also demonstrate prejudice from counsel's deficient performance, i.e., "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Shaw*, 315 Mich App 668, 671; 892 NW2d 15 (2016). That is, defendant must show that defense counsel's "representation so prejudiced the defendant as to deprive him of a fair trial."

People v Pickens, 446 Mich 298, 338; 521 NW2d 797 (1994). We do not believe defendant has met this heavy burden.

First, we disagree with defendant's attempt to attribute the jury's inconsistent verdict—finding him not guilty of the homicide offense but guilty of felony-firearm—to the lack of any specific jury instruction on felony-firearm self-defense under M Crim JI 11.34c. Defendant admits that the record does not reveal the reasons for the seemingly inconsistent verdict, but asserts that the jury's rejection of the homicide charges shows that a "properly instructed jury would have applied the self-defense as a defense to felony firearm . . . and would have found [defendant] not guilty of felony firearm." But this is speculative and, moreover, Michigan does not require consistency in jury verdicts. See *Lewis*, 415 Mich at 449-450. More specifically, our Supreme Court has held that, while the commission, or attempted commission, of a felony is an element of felony-firearm, conviction of the underlying felony is not required. See *id*. at 454-455.[13] Accordingly, the jury's acquittal on the underlying homicide offense is not dispositive, and does not necessitate a finding that defendant acted in self-defense.

We further conclude that the instructions that the trial court actually provided adequately informed the jurors that self-defense was an available defense to the felony-firearm charge. First, the trial court's general self-defense instructions covered the substance of M Crim JI 11.34c by correctly explaining the applicable law of self-defense.[14] Further, a reasonable inference from the trial court's positioning of its general self-defense instruction, after instructing that defendant was charged with the separate crimes of second-degree murder and felony-firearm, but before instructing on the elements of those individual crimes, was that the self-defense instruction applied to all charged crimes. And, significantly, the trial court expressly and clearly stated at the beginning of the self-defense instruction that "[i]f a person acts in lawful self-defense, his actions are excused and he is not guilty of *any* crime." (Emphasis added). Jurors are presumed to follow the trial court's instructions, *Goree*, 296 Mich App at 305, and the only logical inference from these instructions was that self-defense was an available defense to all the charges, including that of felony-firearm.[15]

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[13] The trial court properly instructed the jury on the elements of felony-firearm, including that the jury need not find a defendant guilty of the underlying offense to find that defendant guilty of felony-firearm. See *Goree*, 296 Mich App at 304.

[14] The trial court's instruction was substantially similar to M Crim JI 11.34c, and contained all of the elements, including that defendant could properly use deadly force with no duty to retreat if he honestly and reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another person. See *Goree*, 296 Mich App at 304 (describing the elements of felony-firearm self-defense). "No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction." *Kurr*, 253 Mich App at 327.

[15] We disagree with defendant's attempt to distinguish the general self-defense instruction, reflecting M Crim JI 7.15, from M Crim JI 11.34c, on the basis that M Crim JI 7.15 applies to assaultive crimes and addresses a person's use of deadly force, but that M Crim JI 7.15 does not

We acknowledge that the jury's question to the trial court during deliberations evidences some level of confusion over the felony-firearm instructions. "Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a lucid statement of the relevant legal criteria." *People v Miller*, 326 Mich App 719, 730; 929 NW2d 821 (2019) (quotation marks and citations omitted). Nevertheless, the jurors did not ask about the concept of self-defense, nor does the record indicate that the jurors were otherwise confused on that issue as it applied to the felony-firearm charge. While defendant asserts that "[t]he jury wanted to know what should happen to the felony firearm charge if the killing was excused," that is not what the jurors asked. Instead, their question specifically concerned the connection between the homicide and felony-firearm charges—whether the felony-firearm charge was "tied" to the homicide charge and still stood if defendant was not guilty of the homicide offense. The jury's question thus did not specifically cover the concept of self-defense, and so did not prompt defense counsel to request additional clarifying instruction on self-defense as it applied to felony-firearm. While reinstruction on self-defense, along with the elements of felony-firearm, would have been appropriate, and arguably more complete, the trial court was not obligated to do so,[16] and, considering its earlier and proper instruction that a person acting in lawful self-defense is not guilty of any crime, defendant has not demonstrated that defense counsel's failure to request M Crim JI 11.34c "constituted prejudicial deficient performance." See *Randolph*, 502 Mich at 18.

Defendant attempts to liken this case to *Goree*, but that case is clearly distinguishable. In *Goree*, the jurors specifically asked the trial court whether self-defense applied to the felony-firearm charge. *Goree*, 296 Mich App at 299. Moreover, in *Goree*, the trial court erroneously responded that self-defense did *not* apply to felony-firearm. *Id*. at 300-301. In contrast, the jury in the present case did not ask about self-defense as it applied to the felony-firearm charge, but rather asked about the connection between the homicide and felony-firearm charges. And the trial court, unlike in *Goree*, did not instruct the jury that self-defense was not a defense to felony-firearm. To the contrary, again, the trial court instructed, as part of its general self-defense instructions, that a person acting in lawful self-defense is not guilty of any crime.

Viewing the instructions as a whole, we conclude that the trial court's general self-defense instructions fairly conveyed that self-defense was applicable to the felony-firearm charge. It is presumed that jurors follow their instructions. See *id.* at 305. Therefore, defendant has not shown that it is reasonably probable that the jury would have found defendant not guilty of felony-firearm

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address whether a person may possess or use a firearm while defending him- or herself. While this may be true, M Crim JI 11.34c also does not explicitly describe the possession or use of a firearm in self-defense. Instead, like the general self-defense instruction under M Crim JI 7.15, the specific felony-firearm self-defense instruction under M Crim JI 11.34c states that an individual "may use deadly force" if "[t]he individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual."

[16] "[W]hether to provide additional instructions at the jury's request is within the court's discretion." *Miller*, 326 Mich App at 731. And "[i]t is not an abuse of discretion for a trial court to fail to repeat instructions addressing areas not covered by a jury's specific request." *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998).

if defense counsel had requested, and if the trial court had given, additional instructions on felony-firearm self-defense under M Crim JI 11.34c. See *Kurr*, 253 Mich App at 327 ("Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights."). Accordingly, defendant is not entitled to a new trial on the basis that defense counsel rendered ineffective assistance.

V. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues in his supplemental brief that the great weight of the evidence preponderated against the jury's guilty verdict on the felony-firearm charge. We disagree.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). " 'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.' " *Id.* at 219, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). " 'Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination.' " *Musser*, 259 Mich App at 219, quoting *Lemmon*, 456 Mich at 645-646 (internal quotation marks omitted). Because defendant did not preserve his challenge to the jury's verdict, our review "is limited to plain error affecting defendant's substantial rights." *Musser*, 259 Mich App at 218, citing *Carines*, 460 Mich at 763-764.

We conclude that defendant has not established plain error affecting his substantial rights. First, contrary to defendant's argument, that the jury found defendant not guilty of the underlying homicide charges is not dispositive. A jury is permitted to render seemingly inconsistent verdicts, and, specifically, to reach inconsistent verdicts when deciding compound felonies such as felony-firearm. See *Lewis*, 415 Mich at 453-455.

The primary issue in this case was whether the jury accepted defendant's theory that he acted in self-defense when he shot and killed Burton. While there was evidence from which a jury could conclude that defendant's use of the firearm was justified because he honestly and reasonably believed deadly force was necessary to prevent his imminent death or great bodily harm, see *Goree*, 296 Mich App at 304, that evidence did not preponderate so heavily against the guilty verdict that it would be a miscarriage of justice to allow it to stand, see *Musser*, 259 Mich App at 219. The evidence that concerned the reasonableness of defendant's belief that his life was in imminent danger and the necessity of firing his gun to protect himself was not uncontradicted or entirely consistent. Such inconsistencies included whether Burton had a weapon in his hand, whether Burton or Cortez had threatened defendant, and whether a shot was fired immediately before defendant fired his gun. This case ultimately came down to credibility, and we may not repudiate a jury's verdict on that basis. See *Lemmon*, 456 Mich at 636. Instead, "the resolution of credibility questions is within the exclusive province of the jury." *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009). Here, defendant has not shown that the evidence supporting a finding that he committed second-degree murder or manslaughter, and thus that he did not act in self-defense, contradicted indisputable physical facts or was so "patently incredible" or "inherently implausible" that it was deprived of all probative value such that a reasonable juror

could not believe it. See *Lemmon*, 456 Mich at 643-646. Instead, some of the evidence, if believed, enabled the jury to exclude the possibility that defendant acted in self-defense and thus that he was guilty of felony-firearm. Therefore, the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand, and defendant is not entitled to a new trial.

VI. CONCLUSION

There were no errors warranting relief. We affirm.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford