

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD MCCREARY,

Defendant-Appellant.

UNPUBLISHED

December 16, 2021

No. 352315

Wayne Circuit Court

LC No. 19-005766-01-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm (felon-in-possession), MCL 750.224f, and three counts of possessing a firearm during the commission of a felony (felony-firearm), third offense, MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to life imprisonment without the possibility of parole for his felony-murder conviction, 20 to 40 years' imprisonment for his home invasion conviction, and 4 to 10 years' imprisonment for his felon-in-possession conviction. The trial court sentenced defendant for each felony-firearm conviction as a third-time offender to 10 years' imprisonment. On appeal, defendant contends that the trial court erred when it (1) gave a defense-of-others jury instruction without also giving a self-defense instruction, (2) declined to give a limiting instruction related to MRE 404(b), and (3) permitted the prosecution to introduce other-acts evidence in violation of MRE 404(b). Defendant also argues that the cumulative effect of the alleged errors entitles him to a new trial, or alternatively, resentencing. We affirm.

I. FACTUAL BACKGROUND

This case arises from the shooting and killing of the victim, Lawrence Schmitz, early on the morning of April 26, 2019. On that day, defendant and his fiancé, Dajunna Shephard, went to a house in Inkster because Shephard had been hired as an escort. Shephard went inside while defendant waited in his vehicle. While inside, the victim purportedly robbed Shephard, wielded a machete and refused to allow Shephard to leave. At trial, defendant and Shephard both testified that defendant shot the victim to allow Shephard to escape. Defendant testified that he shot the

victim through the front door because the victim gestured and threatened Shephard with a machete causing defendant to fear for Shephard's safety. Then, as both Shephard and defendant were returning to their vehicle, Shephard informed defendant that the victim still had her phone. Defendant testified that he walked back to the house and retrieved the phone from another person inside the house without defendant himself having to go inside. Shephard, however, admitted at trial that she told the police that while being held by the victim, at some point, she found an opportunity to escape and ran out of the house to defendant's vehicle where she indicated to defendant that the victim remained inside the house with her phone, whereupon defendant walked to the house to retrieve the phone and the victim was shot and killed.

II. ANALYSIS

A. INSTRUCTIONAL ERRORS

Defendant first suggests that the trial court made two instructional errors by (1) giving only a defense-of-others instruction and not a self-defense instruction, and (2) failing to give a curative or limiting instruction related to the admission of evidence under MRE 404(b). We conclude that defendant has waived appellate review of both issues.

“This Court has defined ‘waiver’ as the intentional relinquishment or abandonment of a known right.” *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citation omitted). Regarding jury instructions, “[w]hen defense counsel clearly expresses satisfaction with a trial court’s decision, counsel’s action will be deemed to constitute a waiver.” *Id.* “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.” *Id.* (quotation marks and citation omitted). Here, after the trial court gave the jury instructions, it asked defendant whether he was satisfied with the instructions to which defense counsel responded in the affirmative. Defendant’s affirmative approval of the instructions, therefore, waived the right to appellate review. See *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009) (“Counsel’s affirmative expression of satisfaction with the trial court’s jury instruction waived any error.”).

Defendant suggests, with specific regard to the self-defense instruction, that waiver is irrelevant because the trial court’s omission of the instruction constituted a structural error. We disagree.

“Structural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal.” *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). Errors are structural and subject to automatic reversal “only in a very limited class of cases.” *Id.* at 52 (quotation marks and citation omitted). A trial court’s failure to instruct the jury on the basic elements of a charge or defense can be structural error requiring reversal. See *id.* at 52-53. In *Duncan*, this Court explained:

The trial court’s failure to instruct regarding *any* of the elements of felony-firearm, while allowing the jury to render a verdict on felony-firearm, sent the jury to its deliberative duties deprived of its essential tool: the law that was to be applied to the facts. Such a defect improperly left the jury to speculate, i.e., the absence of

any instructions regarding the elements of felony-firearm left the jury to guess what the prosecuting attorney might be required to prove. [*Id.* at 52-53.]

Defendant seeks to rely upon *People v Carter*, 462 Mich 206, 216 n 11; 612 NW2d 144 (2000), wherein our Supreme Court explained in a footnote that the failure to give an instruction that concerns an element of the crime or an affirmative defense like self-defense when applicable may be structural error because such an instruction may be “relevant to one of the very elements required to be established to sustain the plea of self-defense.”

Defendant, however, fails to square the caselaw he seeks to rely upon with the circumstances of this case and the evidence at trial. The trial court provided the jury a defense-of-others instruction because defendant raised the defense that his actions were motivated by fear that his girlfriend—and not himself—was in imminent danger. No testimony or evidence admitted at trial even suggested that defendant’s actions were motivated by any need to defend *himself*. Defendant testified only that he feared for the safety of Shephard. Although defendant and Shephard testified that, preceding the incident, armed individuals accosted defendant while in his car, they both testified that those individuals left before defendant chose to approach the subject-house. That evidence indicated that defendant no longer faced any personal danger at the time that he approached the house. Defendant has failed to adequately establish how a self-defense instruction would have been relevant given the facts established by the evidence presented at trial.

In *People v Guajardo*, 300 Mich App 26, 35-36; 832 NW2d 409 (2013) (quotation marks and citation omitted), this Court explained that a “defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense.”¹ Defendant has failed to do so. Therefore, defendant has failed to establish that a structural error occurred that requires automatic reversal despite his waiver.

B. EVIDENTIARY ERROR

Defendant next contends that the trial court erred by permitting the prosecution to question defendant about other-acts evidence in violation of MRE 404(b). We disagree.

¹ Defendant’s argument respecting the self-defense instruction is largely premised on the fact that the parties argued about a “self-defense” instruction and the trial court had agreed to give one. The trial transcript, however, reveals that the trial court and the parties occasionally used “self-defense” and “defense of others” interchangeably when discussing jury instructions outside the presence of the jury. The parties consistently referred to the “defense of others” in their closing arguments, and not to “self-defense.” The record reflects that after the trial court inadvertently used the term “self-defense” while reading the instructions, it immediately corrected the statement. In light of the evidence presented at trial and the record before this Court, we find no basis for concluding that either party or the trial court ever intended for a self-defense instruction to be given in this case and a structural error did not occur because the trial court misspoke outside the presence of the jury.

“To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.” *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001) (citations omitted). In this case, defendant objected to the prosecution’s line of questioning on relevance grounds and admissibility under MRE 403, but did not base his objection on MRE 404(b) grounds. Defendant, therefore, failed to preserve this claim of error. “Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant’s substantial rights.” *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). Defendant must establish that an error occurred, the error was clear or obvious, and that it affected his substantial rights. *People v Posey*, 334 Mich App 338, 346; 964 NW2d 862 (2020). An error affects substantial rights when it impacts the outcome of the proceedings. *Id.* at 346-347. “Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s innocence.” *People v Everett*, 318 Mich App 511, 526-527; 899 NW2d 94 (2017) (quotation marks and citation omitted).

In Michigan, we follow a rule of “multiple admissibility,” which means that “evidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded.” *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993) (citations omitted). Regarding MRE 404(b),² our Supreme Court explained the theory of multiple admissibility on which the rule is founded:

MRE 404(b)(1) does not require exclusion of otherwise admissible evidence. Rather, the first sentence of MRE 404(b)(1) reiterates the general rule, embodied in MRE 404(a) and MRE 405, prohibiting *use* of evidence of specific acts to prove a person’s character to show that the person acted in conformity with character on a particular occasion. The second sentence of MRE 404(b)(1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. The list is not, however, exhaustive. MRE 404(b)(1) thus reiterates that, under MRE 402, all relevant evidence *is* admissible, except as otherwise provided by the United States and Michigan Constitutions and other rules. That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes. Rather, the evidence is admissible for a proper purpose, subject

² MRE 404(b)(1) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

to a limiting instruction under MRE 105.^[3] [*People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000) (emphasis in original).]

In this case, the trial court permitted the prosecution to engage in the questioning at issue under MRE 608(b), which provides in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Under MRE 608, a prosecutor may ask a defendant questions "designed to elicit an answer contradicting any statements made by the witness on direct examination." *People v Wilder*, 502 Mich 57, 65; 917 NW2d 276 (2018). This form of "impeachment by contradiction can be a proper purpose for the admission of other-acts evidence." *Id.* at 63-64 (citations omitted). The record in this case reflects that the prosecution properly inquired regarding this line of questioning because it directly related to defendant's character for truthfulness, and the questions were designed specifically to elicit answers that would contradict statements made by defendant on direct examination.

Defendant testified that he came to inadvertently possess the gun he used to kill the victim only hours before the crime occurred. The prosecution indicated to the trial court outside the presence of the jury that it had evidence that defendant possessed and used the same gun one month before, and thus, sought permission to impeach defendant with that fact. The prosecution then asked two pointed questions designed to elicit a response from defendant that contradicted his earlier testimony. The prosecution asked defendant whether he possessed the subject-gun before the day of the victim's death, and asked defendant whether he had fired the gun the previous month. The prosecution otherwise gave no information for the jury to infer that defendant fired a gun in a violent manner or for an unlawful purpose. When the questions did not elicit the intended response, the prosecution immediately abandoned the line of questioning.

The prosecution's attempt at "impeachment by contradiction" constituted the type of questioning that is permitted by operation of both MRE 404(b) and MRE 608(b). See *Wilder*, 502 Mich at 65. Accordingly, defendant has failed to establish any clear and obvious error by the trial court in this regard.

³ MRE 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

C. CUMULATIVE ERROR

Defendant also contends that the cumulative effect of the above-alleged errors entitles him to a new trial. We disagree.

“The cumulative effect of several minor errors may warrant reversal where the individual errors would not.” *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). “Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.” *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). “[I]n order to reverse on the basis of cumulative error, the effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *Ackerman*, 257 Mich App at 454. Here, defendant has failed to establish either instructional or evidentiary errors by the trial court, and therefore, he has failed to show entitlement to relief on cumulative error grounds.

D. RESENTENCING

Defendant argues that he is entitled to resentencing because the trial court ordered consecutive sentences without authorization. We disagree.

To preserve sentencing issues for appellate review, a defendant must object to the sentencing issue at the sentencing hearing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); MCR 6.429(C). Defendant did not object to his consecutive sentences at sentencing or move for resentencing, nor did he raise the issue in his motion to remand filed in this Court. Accordingly, he failed to preserve this issue. “Unpreserved sentencing errors are reviewed for plain error affecting substantial rights.” *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005) (citation omitted).

Defendant relies upon the statements the trial court made at sentencing to argue that he received impermissible consecutive sentences. He does not reference the trial court’s judgment of sentence which sets forth his sentences. Further, he fails to specify which sentences he now claims are impermissible.

At sentencing, the trial court stated:

With regards to homicide felony murder it will be the sentence of this Court to sentence the defendant to the rest of his natural life in the Michigan Department of Corrections with no possibility of parole. It will be consecutive to ten years on three felony firearm counts, home invasion first degree, it’ll be the sentence of this Court to sentence the defendant to a guideline sentence of 20 to 40 years in the Michigan Department of Corrections. That will be consecutive to the homicide felony murder charge but that’ll be concurrent with the homicide murder charge and consecutive to the three felony firearm counts. And on the felon in possession of a firearm, it will be the sentence of this Court and sentence the defendant to four to 10 years in the Michigan Department of Corrections on felon in possession of a

firearm that will be concurrent with homicide felony murder and home invasion first degree but consecutive to the three counts of felony firearm.[⁴]

Defendant appears to contend in his argument on appeal that his sentences for felony murder and home invasion were ordered to run consecutively. His contention, however, is factually incorrect and the trial court's judgment of sentence clarifies the court's sentencing decisions. The trial court sentenced defendant to life without the possibility of parole for felony murder, 20 to 40 years' imprisonment for first-degree home invasion, and 4 to 10 years' for felon-in-possession. The trial court determined that these three sentences were to be served concurrently with one another, and not consecutively. Each of these three felonies, however, served as the predicate for his felony-firearm conviction. Because MCL 750.227b(3)⁵ requires sentences for felony-firearm convictions to run consecutively with the sentence for the predicate felony, the trial court properly ordered that each of defendant's 10-year sentences for felony-firearm shall run concurrently with one another but consecutively with the sentence imposed for the underlying predicate felony. See *People v Coleman*, 327 Mich App 430, 441; 937 NW2d 372 (2019) ("A felony-firearm sentence must . . . be served consecutively with the sentence for the . . . predicate felony."). Accordingly, the trial court did not err in this regard.

Defendant asserts that the trial court's description of his sentences was a "grabbed mess," and that the trial court's imposition of consecutive sentencing "creat[ed] the impermissible phenomenon of 'time' on top of 'time' on top of 'time' which is illegal in Michigan." Defendant, however, fails to explain his contentions or otherwise support them with authority. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and

⁴ The prosecution submits that any confusion related to the trial court's statements on the record is the result of transcription errors. The best way to identify the exact nature of defendant's sentence, however, is by reference to the judgment of sentence entered by the trial court. *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993) ("A court speaks through written judgments and orders rather than oral statements or written opinions.").

⁵ MCL 750.227b(3) provides:

A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

citation omitted). Defendant provides no argument and no authority to establish that the sentences which the trial court actually imposed were inappropriate or unauthorized. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ David H. Sawyer

/s/ Michael J. Riordan

/s/ James Robert Redford