STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

HAROLD LAMONT WALKER

Defendant-Appellant
_____/

Supreme Court No. _____

Court of Appeals No. 327063

Lower Court No. 14-7222-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

ADRIENNE N. YOUNG (P77803)
Attorney for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: ADRIENNE N. YOUNG (P77803)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

I. DID THE JUDGE ERR WHERE THE JURY DECLARED IT WAS HUNG AND THE JUDGE RESPONDED WITH AN INSTRUCTION THAT NOT ONLY WAS MATERIALLY DIFFERENT FROM THE REQUIRED DEADLOCKED-JURY INSTRUCTION, BUT WAS ALSO COERCIVE?

Court of Appeals majority answers, "No"

Court of Appeals dissent answers, “Yes”

Defendant-Appellant answers, "Yes".

II. DID THE PROSECUTOR DENY DEFENDANT-APPELLANT HAROLD WALKER HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN SHE TOLD THE JURY, WITHOUT ANY EVIDENTIARY SUPPORT IN THE RECORD, THAT A KEY DEFENSE WITNESS RISKED ONLY PROBATION FOR ADMITTING THAT HE, NOT MR. WALKER, POSSESSED THE GUN IN QUESTION?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

III. IS MR. WALKER ENTITLED TO A RESENTENCING BEFORE A DIFFERENT JUDGE WHEN OV-19 WAS MISSCORED AFFECTING MR. WALKER’S GUIDELINES RANGE AND WHEN JUDICIAL REASSIGNMENT IS APPROPRIATE UNDER THE LAW?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

IV. WAS THE EVIDENCE INSUFFICIENT TO SUPPORT THE FELONY-FIREARM CONVICTION, BECAUSE THE LEGISLATURE DID NOT INTEND FELON-IN-POSSESSION TO BE USED AS THE BASIS OF A FELONY-FIREARM CONVICTION?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Mr. Harold Lamont Walker appeals from a December 1, 2016 unpublished 2-1 decision in the Court of Appeals affirming his convictions for carrying a concealed weapon (CCW),[1] felon in possession of a weapon (FIP),[2] and felony-firearm.[3]

In this "pretty straightforward case"[4] involving the unlawful possession of a weapon found in a bush at a small gathering, the jury could not, at first, reach a verdict. Rather than recognize a juror's right to "maintain his or her good-faith belief," [5] the trial court instead sought information regarding jurors' votes and preferences, labeling the dissenting jurors as those "refusing to participate in the process." [6]

"Given the climate of Judge Lillard's courtroom, a dissenting juror needed no weatherman to know which way the winds blew—if identified as the source of disunity, the juror risked the wrath of a vengeful judge." *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063) (Gleicher, J., *dissenting*), p 5.

The judge's instruction told the jury nothing that would aid their deliberations save the twice repeated suggestion to report those refusing to participate or follow instructions—in other words, the holdouts. It is all too likely that the jury's verdict was affected by the judge's coercive instruction. Mr. Harold Lamont Walker is entitled to a new trial or at the very least, resentencing before a different judge.

---

[1] MCL 750.227.
[2] MCL 750.224f.
[3] MCL 750.227b.
[4] 02/25/16 Jury Trial Transcript, p. 22.
[5] 02/26/15 Jury Trial Transcript, p. 47-48.
[6] *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984) (cited at *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063) (Gleicher, J., *dissenting*), p 4).

Mr. Walker also asks this Court to review the Court of Appeals' denial of the claims he made in his Standard 4 supplemental brief, a copy of which is attached.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Adrienne N. Young

ADRIENNE N. YOUNG (P77803)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: January 26, 2017

STATEMENT OF FACTS

Defendant-appellant Harold Lamont Walker stood trial in Wayne Circuit Court on charges of carrying a concealed weapon (CCW),[7] felon in possession of a weapon (FIP),[8] and felony-firearm.[9] A jury convicted him of each charge. Judge Qiana D. Lillard, who presided over the trial, later sentenced Mr. Walker to serve concurrent prison terms of 46-months-to-75-years for the CCW and FIP convictions, and a consecutive ten-year term for felony-firearm as a third offender.

****

On August 5, 2014, two Detroit Police squad cars were patrolling a residential area in Detroit, MI. Two newer police officers— Officers Marek and Fjolla— drove one squad car and two supervising sergeants— Sergeants Jackson and Gnatek— drove the other squad car. After hearing music coming from the car parked in front of 3486 Algonquin and seeing four adult individuals drinking on or near the sidewalk in front of the home, Officers Marek and Fjolla stopped their car at the house. Sergeants Jackson and Gnatek, who had been following behind, also stopped. Testimony at trial differed as to what happened next.

Mr. Walker testified that as the police officers were pulling up, he was headed toward the front door of 3486 Algonquin, intending to go inside and get cups for the beverages he and his three neighborhood acquaintances were sharing.[10] When he reached the porch, the porch light was not on[11] but Mr. Walker still could see two police officers "run up on [him] aggressively."[12]

---

[7] MCL 750.227.
[8] MCL 750.224f.
[9] MCL 750.227b.
[10] 02/25/14 jury trial transcript, p 135 L4-5.
[11] *Id.* at p. 139 L 13-14 and p 140 L 7-8.
[12] *Id.* at p 137 L 15-16.

Mr. Walker then turned to his side and tossed a beer bottle from his pocket into the bushes; he was on parole and was not supposed to be consuming alcoholic beverages.[13]

The officers' testimony varied regarding Mr. Walker's actions, drinking at the residence, and lighting at the home and on the street.[14] Marek testified that he and his partner Fjolla pursued Mr. Walker at a "fast walk"[15] and observed Walker pull a "large frame revolver"[16] out of his pants pocket and throw it in the bush on the side of the porch. Jackson[17] and Gnatek[18] also testified that they saw Mr. Walker toss a gun into the bush next to the porch.

Fjolla arrested Mr. Walker and Marek placed Mr. Walker in the squad car. Gnatek, who had also gotten out of his squad car with Jackson, recovered a gun from a bush in front of 3486 Algonquin.

The defense argued that the discovery of a gun by the police officers was not without explanation. Darryl Jevon Williams, a witness for the defense, and one of the adults present at 3486 Algonquin the evening of August 5, 2014, testified it was *his* gun that the police officer

---

[13] *Id.* at p 137.
[14] 02/25/15 Jury Trial Transcript,
- Mr. Walker's actions: p 38 (OFFICER MAREK: "He threw [the gun] as soon as he pulled it out, it was one quick motion."); p 89-90 (SERGEANT GNATEK: "…I don't know what the rationale was here, but the trajectory [of the gun] was extremely high…")
- Drinking: p 46 L17-19 (MS. ROLPH: Okay, but you could see that Mr. Walker is drinking? OFFICER MAREK: "Like I said, I don't know, I think he dropped it as he was running—walking, I'm sorry."); p.88 L10-15 (MS. ROLPH: "Were there bottles on the ground, like scattered about? SERGEANT GNATEK: I know there was one or two bottles."… MS. ROLPH: "Okay, and were all the individuals drinking that day?" SERGEANT GNATEK: "That I don't know.").
- Lighting: p 77 L12-14 (SERGEANT JACKSON: "I don't recall if all of [the street lights were working], but there was some artificial lighting…."); Jurors asked both Officer Marek and Sergeant Jackson about the presence/quality of the lighting that evening.

[15] *Id.* at p 36 L 19.
[16] *Id.* at p 38 L 13-15.
[17] *Id.* at p 62.
[18] *Id.* at 82-83.

discovered in the bushes. Mr. Williams explained that he hid his own gun in the bushes prior to Mr. Walker's arrival, knowing that Mr. Walker could not be around guns as a result of parole.[19]

On cross-examination, the prosecutor asked Mr. Williams about his criminal history:

> *Prosecutor*: All right. You would agree with me. Okay. Okay, so let's just say this, you're in the Michigan Department of Corrections, you're currently a prisoner of the Michigan Department of Corrections, right?
>
> *Witness*: Yes, ma'am.
>
> *Prosecutor*: And you are serving a prison sentence, is that correct?
>
> *Witness*: Yes, ma'am.
>
> *Prosecutor*: In fact, you're doing three to fifteen years on a [sic] armed robbery, correct?
>
> *Witness*: Yes, ma'am.
>
> *Prosecutor*: And you're doing some time for the weapon that you possessed?
>
> *Witness*: Two years.[20]

No evidence was presented to show what punishment Mr. Williams would have received if he were to be prosecuted for illegally possessing or carrying the gun alleged to have been Mr. Walker's.

Nevertheless, in closing rebuttal the prosecutor argued as follows:

Why would Mr. Williams come in here and say that the gun belonged to him. Because he told it, he had no prior record, *it's not like he's gonna get any type of additional time for having this gun. He was looking at probation*—in fact…[[]
Defense counsel objected and the trial court sustained the objection..[21]

---

[19] 02/25/15 Jury Trial Transcript, p 109 L 4-6 (MS. ROLPH: Okay. And there's something—an action you take before he [Mr. Walker] comes to the house? MR. WILLIAMS: I put a gun behind the bushes.) From the street view of the Google Maps, there appears to be one or two small bushes in which items could effectively be tossed or hid. https://www.google.com/maps/place/3486+Algonquin+St,+Detroit,+MI+48215/@42.3821783,-82.9642822,3a,15y,43.07h,82.83t/data=!3m6!1e1!3m4!1sPcxdnw845zIDIgMSCuscAw!2e0!7i13312!8i6656!4m2!3m1!1s0x8824d45b0364c0d1:0xa12e847d72534706!6m1!1e1

[20] 02/25/15 jury trial transcript, p 112, L 10-22.

About an hour and fifteen minutes into deliberations, the jury foreperson sent the judge a note that read: "We are hung, and I don't believe there will [be] an agreement with more time."[22]

Rather than consult with counsel about how to respond, the judge simply informed counsel of her plans. She announced she was "not prepared to read them the deadlock instruction, because I don't believe that they've even attempted to deliberate at this point."[23] Instead, she informed the jury "[t]hat's not the way this works, they can't deliberate for a [sic] hour and give up."[24] She also told them that "if there's someone back there, a member of the jury, any member of the jury who's not following the instructions, they can send a note and let us know that, too."[25]

Not pausing for input or objections, the judge asked counsel "Is there anything else?"[26] When counsel answered no,[27] the judge called the jury back to the courtroom and gave the following instruction:

> Well, that's not the way this works. Your [sic] all heard a full day of testimony, and you deliberated for what an hour and fifteen minutes, and now you just give up. That's not the way it works, I'm sending you all to lunch, maybe what you need is some nourishment, other than candy, to help you all, you know, have clear heads and review the evidence that you heard.
>
> Now, if there's someone among you who's failing to follow the instructions or there's someone who's refusing to participate in the process, you can send us a note and let us know that and we can address that, but at this point I'm not inclined to end your deliberations at this point because you had a full day of testimony and you've only been at this, discussing it, for one hour.
>
> So, I'm going to send you to lunch, maybe sometime apart will help you all to think about things, and then you'll come back in

---

[21] *Id.* L 17-18.
[22] 02/26/15 Jury Trial Transcript, p. 47.
[23] *Id.* at p. 46.
[24] *Id.* at p. 45.
[25] *Id.*
[26] *Id.* at p. 46.
[27] *Id.*

> one hour and resume your deliberations. If you have any questions, if there is anything that you don't understand or need clarification on send a note. And again, if there's one among you or two among you, three among you, who are refusing to follow instructions or participate in the process you can let us know that, too.
>
> Remember you are not to discuss this case, when you are anywhere other than in the jury room cause you're still a juror. So even if you go to lunch together some of you, you can not [sic] discuss this case cause you can only discuss it when you're all together and when you're in the jury room.[28]

After lunch, the jury resumed deliberations and reached a verdict of guilty on all three counts.[29]

****

At sentencing, the prosecutor argued that OV-19 should be scored 10 points for "interfer[ence] with the administration of justice"[30] because Mr. Walker "refused to provide his name to the police officers."[31] Defense counsel disagreed.[32] Judge Lillard adopted the prosecutor's rationale for the 10-point score:

> *The Court*: …I mean he does have a right to remain silent to a certain extent but, you know, I think he was intentionally not giving his name because he knew what kind of trouble he was in.[33]

The judge gave a second reason for the score: that Mr. Walker interfered with the administration of justice "by that sham of a testimony he put forth….I think he conspired with Mr. Williams while Mr. Williams was in custody in the Wayne County jail awaiting trial, and they trumped up that phony, bogus testimony."[34]

---

[28] 02/26/15 Jury Trial Transcript, p. 47-48.
[29] Per the request of defense counsel the jury was polled and each juror indicated that this was, in fact, their vote.
[30] MCL 777.49(c).
[31] 03/12/15 Sentencing Transcript, p 5 L18-22.
[32] 03/12/15 Sentencing Transcript, p 6, L1-3.
[33] *Id.* L7-10.
[34] *Id.* L16-19.

The 10-point OV-19 score changed Mr. Walker's guidelines range from 7 to 46 months to 10 months to 46 months.

During his sentencing hearing, Mr. Walker asserted his innocence and protested that he had never seen Mr. Williams in the Wayne County jail. Judge Lillard responded that she thought Mr. Walker "made up that whole story, because it didn't make any sense."[35] Communication between Mr. Walker and Judge Lillard quickly turned hostile:

> *Defendant*: Man, whatever, I'm thew (sic) talking, do what you goin' (sic) do.
>
> *The Court*: You think you can tell me what to do?
>
> *Defendant*: Do what you goin' to do. You telling me what to do, I'm grown.
>
> *The Court*: We can stay here all day, you realize that?
>
> *Defendant*: I'm grown, I'm grown, I don't talk.
>
> *The Court*: Do you realize that? You don't talk, what is that a threat?
>
> *Defendant*: I'm thew (sic) talking.
>
> *The Court*: Is that a threat, clown?
>
> *Defendant*: I'm thew (sic) talking.
>
> *The Court*: Is that a threat, clown?
>
> *Defendant*: I'm thew [sic] talking.
>
> *The Court*: Is that a threat, clown?
>
> *Defendant*: Clown.
>
> *The Court*: That's what you acting like.
>
> *Defendant*: Okay.
>
> *The Court*: That's what you're acting like, a

[35] *Id.* p 11, L7-8

> clown.
>
> I have done nothing, but be courteous to you. When they suggested that you might have some history of mental illness, I made sure that you went and got your evaluation. When your lawyer was sick, and she was willing to try your case, even though she was sick, and vomiting and asking for a basket so that she could throw up. I said that wouldn't be fair to you…
>
> *Defendant*: How about when you threatened my mother?
>
> *The Court*: … I'm talking now. I'm talking now, clown.[36]

The Court then acknowledged that this exchange would affect Mr. Walker's sentence:

> I've done nothing but be fair to you, but you know what cowards do, when cowards don't want to accept responsibility for their own foolish behavior, they make threats, they try to act like they're tough, and they wanna shift blame. And that's what you did and, you know, I'm [sic] don't blame you, but that's why you're getting maximum time because you acted like a clown today.
>
> I was inclined to give you the middle of the road, which is what Ms. Standford [the prosecutor] was asking for, but because you're so disrespectful and you just seem to want to go back to prison….[37]

Ultimately, Judge Lillard asked her deputies to remove Mr. Walker from the courtroom and said to him, "Goodbye, clown." Mr. Walker responded "fuck you," and the court replied, twice, "Oh, you wish you could."[38]

For the CCW and FIP convictions, Judge Lillard sentenced Mr. Walker at the high end of the guidelines range to a sentence of 46 months to 75 years for felon-in-possession and CCW, to be served consecutively to Mr. Walker's mandatory 10-year prison term for felony-firearm. In a 2-1 decision, the Court of Appeals affirmed Mr. Walker's convictions and sentence.[39] The

---

[36] 3/12/15 sentencing transcript, pp 14-15; *see also* Attachment 1.
[37] 3/12/15 sentencing transcript, 16, L12-22.
[38] 3/12/15 sentencing transcript, 19.
[39] On appeal, the Court of Appeals agreed that the "felony-firearm conviction should run consecutive to his felon-in-possession conviction only, not his CCW conviction." *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063) 6.

majority dedicated an entire section of the opinion to the trial court's "certainly inappropriate…name calling, taunting, and other inappropriate innuendos," but nevertheless found that Mr. Walker's convictions and sentences should stand. *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063), p 12. Judge Gleicher would have reversed the jury's verdict on the ground of coercive jury instruction. *Walker*, (Gliecher, J., *dissenting*) unpub op at 6.

I. THE JUDGE ERRED WHERE THE JURY DECLARED IT WAS HUNG AND THE JUDGE RESPONDED WITH AN INSTRUCTION THAT NOT ONLY WAS MATERIALLY DIFFERENT FROM THE REQUIRED DEADLOCKED-JURY INSTRUCTION, BUT WAS ALSO COERCIVE.

Standard of Review:

This Court reviews *de novo* claims of preserved instructional error.[40]

Claims of unpreserved instructional error are reviewed for plain error under the standards set forth in *People v Carines*, 460 Mich 750, 774 (1999). *People v Hawthorne*, 474 Mich 174, 176 n1 (2006).

Issue Preservation:

Although defense counsel did not object to the instructions provided to the jury after the jurors indicated they could not reach an agreement, the legal issue regarding these instructions is nevertheless preserved because the trial court announced its decision without giving counsel an opportunity to object. Whether counsel was given an "ample opportunity to object to the instructions" is a key factor in deciding whether an appellate court may consider an instructional-error claim.[41] After all, the purpose of issue preservation is to allow the trial court to have an opportunity to consider an issue and avoid the possibility of an appellate parachute.[42] Where the judge has already ruled, those considerations no longer apply. Because Judge Lillard failed to offer the attorneys an opportunity to object or request a different jury instruction, this Court should treat the issue as preserved.

---

[40] *People v Rouse*, 272 Mich App 665, 669, 728 NW2d 874 (2006); *United States v Adams*, 740 F3d 40, 45 (CA 1) *cert den* 134 S Ct 2739; 189 L Ed 2d 775 (2014) (" Generally speaking, we review a district court's construction of law de novo and its choice of language and emphasis for abuse of discretion. *See United States v. Sasso*, 695 F.3d 25, 29 (1st Cir.2012). Of course, "[e]ven an incorrect instruction to which an objection has been preserved will not require us to set aside a verdict if the error is harmless." *Id.*).

[41] *People v Coffey*, 42 Mich App 683, 688 (1972).

[42] *See People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Discussion:

After a three-day jury trial, jurors in Mr. Walker's case deliberated for over an hour, and then sent a note to the judge stating, "We are hung, and I don't believe there will [be] an agreement with more time."[43]

The judge called the jurors into the courtroom and, rather than read the standard deadlocked-jury instruction, told them "that's not the way this works, I'm sending you all to lunch." The judge added that the jury would have to "come back in one hour and resume your deliberations," and twice told them "if there's someone among you who's failing to follow the instructions or there's someone who's refusing to participate in the process, you can send us a note and let us know that and we can address that."[44]

No further instructions were provided to the jurors. At 3:07 p.m., about an hour after returning from lunch, the jury sent a note indicating they had reached a verdict.[45]

Judge Lillard erred by giving an instruction that not only was a substantial departure from the standard deadlocked-jury instruction, but was also coercive.

i. Judge Lillard gave an instruction.

In the first place, what Judge Lillard told the deadlocked jury was not simply a ministerial communication but instead an instruction. Any time the court reminds the deliberating and purportedly deadlocked jury of the principles of a thorough and complete deliberation, it has issued an instruction.[46] True, this Court once held that a judge's directive to a stalemated jury that it had not deliberated long enough and should continue deliberations did not amount to an

[43] 02/26/15 jury trial transcript, 47 L13-14.
[44] 2/26/15 jury trial transcript, pp 47-48.
[45] Judge Michael Hathaway, not Judge Lillard, took the verdict.
[46] *See People v Goldsmith*, 411 Mich 555, 557-58; 309 NW2d 182, 183-84 (1981); *People v Sullivan*, 392 Mich 324, 327-329, 220 NW2d 441 (1974).

instruction.[47] Here, though, the judge did more than that. By twice suggesting the jury should inform the court if a few jurors were "refusing to follow the instructions or participate in the process," the judge gave an instruction within the meaning of *Goldsmith* and *Sullivan*.

ii. Judge Lillard substantially departed from M Crim JI 3.12.

In *People v Allen* this court held that a substantial departure from the standard deadlocked-jury instruction was grounds for reversible error.[48] The instruction provided by the trial court in this case substantially departed from M Crim JI 3.12[49] such that reversal is warranted.[50]

M Crim JI 3.12 provides:

> (1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
> (2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.
> (3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.

---

[47] *People v Cook*, 130 Mich App 203, 205-206; 342 NW2d 628 (1983). *Cook* appears to have been motivated by concern that an instruction deviating from the standard deadlocked-jury instruction, even if not coercive, would still require retrial. *See id*. at 205 (emphasizing that reversal "is mandated even where, as in *Sullivan*, it cannot be objectively stated that the instruction given to facilitate resolution of the case was 'applied coercively' or resulted in a 'coerced verdict'). Our Supreme Court later clarified that the rule was not automatic reversal, but instead one that requires an appellant to show that the instruction "might have been unduly coercive." *People v Hardin*, 421 Mich 296, 316 (1984); see also the discussion that follows *infra*. This Court has since made clear that even a communication to "continue deliberations" is an instruction, though not necessarily an erroneous one. *People v Pannell*, 170 Mich 768, 771-72 (1988).

[48] *People v. Allen*, 102 Mich App 655, 659, 302 NW2d 268, 271 (1981) ("the only case-by-case inquiry necessary in trials taking place after *Sullivan* involves whether the instruction given is a 'substantial departure' from the ABA charge") (1981) (citing *Sullivan*, 392 Mich at 342).

[49] CJI2d 3.12 was previously codified as 3:1:18A. It was amended September 2011.

[50] *People v. Galloway*, 307 Mich App 151, 166, 858 NW2d 520, 529 (2014) (referring to a "reversible 'substantial departure'").

> (4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach an agreement.
> (5) If you think it would be helpful, you may submit to the bailiff a written list of issues that are dividing or confusing you. It will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.
> (6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.
> (7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

Judge Lillard's instruction, by contrast, failed to acknowledge that differences of opinion are part of the deliberation process. Instead the judge referred to jurors' disagreement as "giving up" and stated "that's not the way it works." Twice in her instructions, rather than encourage "talking things over in a spirit of fairness and frankness," the judge asked for the identities of those not cooperating in the process by which a verdict is reached. Finally, and arguably most importantly, the judge failed to emphasize that no juror should give up his or her honestly held beliefs. In fact, the instructions provided by the judge seemed to emphasize just the opposite.

iii. Judge Lillard's instruction was coercive.

Moreover, her instruction "might have been unduly coercive."[51] Ten years after the Michigan Supreme Court's decision in *People v Sullivan*, the Court explained that whether any deviation from ABA standard jury instruction 5.4 is substantial enough to require reversal depends upon whether the deviation renders the instruction unfair because it might have been unduly coercive.[52] Undue coercion occurs where the instruction could cause a juror to abandon

[51] *People v Hardin*, 421 Mich 296, 316 (1984).
[52] *Id.*

his conscientious dissent and defer to the majority solely for the sake of reaching agreement.[53] Put differently:

> If the charge has the effect of forcing a juror to surrender an honest conviction, it is coercive and constitutes reversible error. In order to determine whether the Allen instruction has such an influence on the jury, the charge must be examined in the factual context in which it is given.[54]

The supplemental instruction here was coercive. First, the "challenged instruction was given mid-deliberation [and] therefore had heightened coercive potential."[55] Second, the court sought information regarding jurors' votes and preferences, twice requesting information on those jurors "refusing to participate in the process."[56] Where a jury states that it cannot reach a consensus, and no other reports of foul play have emerged, the judge's reference to a failure to participate in the process could only be understood to mean a failure to acquiesce to the majority. That is, in essence, a request for jurors' votes. Under M Crim JI 3.14(b) the judge should have instructed jurors:

> As you discuss the case, you must not let anyone, even me, know how your voting stands. Therefore, until you return with a unanimous verdict, do not reveal this information outside of the jury room.

Instead, the judge in this case did just the opposite. When the judge suggests that the jury provide the court information on the identities of dissenting or non-majority jurors, the

---

[53] *Id.* at 314.
[54] *People v. Sullivan*, 392 Mich 324, 333-35, 220 NW2d 441, 445-47 (1974) (citations omitted); *see also People v Larry*, 162 Mich App 142, 150, 412 NW2d 674, 678 (1987) ("No note as to use is provided by the Criminal Jury Instruction committee in CJI 3:1:18 and we cannot find error in this case based on the failure of the trial judge to give the instruction where it is quite clear that the trial judge did not act coercively in instructing the jury relative to its deliberations.").
[55] *People v Galloway*, 307 Mich App 151, 166, 858 NW2d 520, 529 (2014); *People v Pollick*, 448 Mich 376, 385 n 13; 531 NW2d 159 (1995).
[56] 02/26/15 Jury Trial Transcript, p. 47-48.

instruction has the potential to "cause a juror to bend his or her will to that of the majority simply for the sake of reaching an agreement."[57]

Although the judge seemingly never discovered the actual numerical division among the jurors, there was undoubtedly "some coercive impact" from her requests.[58] Judge Lillard suggested there might be one, two, or three jurors "refusing to follow instructions."[59] By word and action, in no way did the trial court "stress[] to the jury the importance of engaging in full-fledged deliberation," as such deliberation acknowledges "differences of opinion" and adherence to "honest[ly] held beliefs…."

Where deliberations have reached an impasse, asking jurors to "report" those jurors in the minority is "impermissibly coercive with respect to the single reluctant juror. At the same time, the comment would have had the unhappy effect of confirming the eleven majority jurors in their tentative agreement."[60] As dissenting Judge Gleicher observed, that is arguably what happened here: "the judge's despotic atmosphere likely persuaded dissenting jurors to abandon their principles."[61]

These coercive instructions constitute reversible error.

Even if the Court deems the claim of error unpreserved it should nevertheless order retrial, because the error was plain. As our Supreme Court explained in *People v Shafier*, 483 Mich 205, 219-20 (2009) (internal footnote omitted):

> There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. *Carines*,

[57] *People v Allen*, 102 Mich App 655, 659-60, 302 NW2d 268, 271 (1981) (citations omitted)); *Sullivan* at 334, 220 NW2d 441 ("The optimum instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision.").
[58] *People v Bufkin*, 168 Mich App 615, 617, 425 NW2d 201, 202 (1988)
[59] 02/26/15 Jury Trial Transcript, p. 48 L11-14.
[60] *People v Wilson*, 390 Mich 689, 691-92, 213 NW2d 193, 195 (1973).
[61] *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063) (Gleicher, J., *dissenting*), p 4.

> 460 Mich at 763. First, there must have been an error. *Id*. "Deviation from a legal rule is 'error' unless the rule has been waived." [*People v*] *Grant*, 445 Mich [535,] 548 [(1994)] (quotation marks and citation omitted). Second, the error must be plain, meaning clear or obvious. *Carines*, 460 Mich. at 763, 597 N.W.2d 130. Third, the error must have affected substantial rights. *Id*. This "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. The defendant bears the burden of establishing prejudice. *Id*. Fourth, if the first three requirements are met, reversal is only warranted if the error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings...." *Id*. (quotation marks and brackets omitted).

As already demonstrated, the first two requirements are met: there was error, and it was obvious.

The third requirement is also met. At the time the jury sent the note at least one juror, maybe more, harbored doubt about conviction. After the judge's response, the jury quickly returned a verdict. Given that the judge's instruction told the jury nothing that would aid their deliberations save the twice repeated suggestion to report those refusing to participate or follow instructions—in other words, the holdouts—it is all too likely that the jury's verdict was affected by the judge's mistake.

This is exactly the sort of error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[62] This Court should reverse and remand for retrial.

[62] *Shafier*, 483 Mich at 220.

II. THE PROSECUTOR DENIED DEFENDANT-APPELLANT HAROLD WALKER HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN SHE TOLD THE JURY, WITHOUT ANY EVIDENTIARY SUPPORT IN THE RECORD, THAT A KEY DEFENSE WITNESS RISKED ONLY PROBATION FOR ADMITTING THAT HE, NOT MR. WALKER, POSSESSED THE GUN IN QUESTION.

Introduction and issue preservation:

Mr. Walker testified that he threw a beer bottle, not a gun, into the bushes by his friend's porch. The gun the police found there was someone else's.

Darryl Williams admitted it was *his* gun, and that he was the one who put it in the bushes. He hid it because he knew Mr. Walker was on parole and wasn't supposed to be around guns. He didn't immediately confess to the police because he hadn't been in trouble before and was scared. He was telling the truth now, though, even though it meant admitting a crime.[63]

The record contained no information at all about what would happen to Mr. Williams if here were prosecuted for and convicted of a firearms crime.

Nevertheless, the prosecutor attacked Mr. Williams's credibility by claiming he risked practically nothing by confessing guilt: "[I]t's not like he's gonna get any type of additional time for having this gun. He was looking at probation ...."

Defense counsel objected, and the judge sustained the objection but gave no cautionary instruction. The issue is preserved for review.

Standard of Review:

Preserved issues of prosecutorial error or misconduct are reviewed de novo "to determine if the prosecutor's statements denied defendant a fair and impartial trial."[64]

[63] 02/25/15 Jury Trial Transcript, p. 110.
[64] *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

Argument:

> The prosecutor's misconduct denied Mr. Walker his right to due process and a fair trial. A criminal defendant has a due process right to a fair trial that may be violated by a prosecutor's misconduct.[65] A prosecutor's duty is to seek justice, not merely convictions.[66] A prosecutor "may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike fair blows, he is not at liberty to strike foul ones."" *The prosecutor here erred by assuring the jury without any evidentiary support that key defense witness Darryl Williams was not credible because he risked very little—only probation—for admitting he, not Harold Walker, was the guilty party. During closing arguments, "[a] prosecutor may argue the evidence and all reasonable inferences arising from the evidence but may not make any statements of fact to the jury that are unsupported by the evidence.*"".""The prosecutor here "made statements of fact to the jury … unsupported by the evidence" when she assured them that Mr. Williams risked no additional jail time for admitting that he was the guilty one: "it's not like he's gonna get any type of additional time for having this gun. He was looking at probation …."[…"[] There was absolutely no evidentiary support for this assertion. The error was particularly damaging because it was made by a prosecutor. Misstatements made by a prosecutor have more of an impact than those made by other lawyers[t]he prosecutor is cloaked with the authority of the . . . [g]overnment; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a[n] official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be.[e.[e.[e.[

The prejudice here was compounded further by the nature of the prosecutor's assertion. Because she was a prosecutor, the jury likely deferred to her assessment of the penalties a would-be defendant might face. In other words, her argument suggested she had "special knowledge or facts indicating the witness' truthfulness."

---

[65] US Const, Ams V, IV.

[66] *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 2d 1314 (1935); *People v Farrar*, 36 Mich App 294, 299 (1971).

The harmfulness of the error was compounded even further by its timing—during rebuttal summation, when defense counsel no longer had the opportunity to respond. Prosecutorial misstatements made during rebuttal summation are particularly damaging. They are also harder to justify when, as here, they are unresponsive to any defense argumen[t.]nt..

And the harmfulness was compounded still further by the importance of the prosecutor's misstatement. This was not a trivial assertion. Mr. Walker's defense hinged on the credibility of Mr. Williams, his key witness. The prosecutor's unfounded broadside aimed at Williams's credibility thus struck at the heart of the defense... The court's instructions did not cure the prosecutor's error..[67] True, the judge gave the standard what-the-lawyers-say-is-not-evidence instruction at the beginning and end of trial.[68] But the prejudice was too great to have been cured by this generic instruction. Notably, the court gave no cautionary instruction at the time of the mistake. In other words, there was "no swift action to prevent prejudice, although defendant objected immediately."[69] A general instruction is a less effective means of eliminating prejudice.. The jury instructions were insufficient to remedy the miscarriage of justice..[70] The error was not harmless beyond a reasonable doubt.[71] Mr. Walker is entitled to retrial.

[67] Courts presume that jurors follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011).
[68] 2/25/15 jury trial transcript, p 13, L20-25; 2/26/15 jury trial transcript, p 32.
[69] *People v Leshaj*, 249 Mich App 417, 421 (2002).
[70] A prosecutor's improper summation remarks result in a miscarriage of justice where "an objection and appropriate curative instruction could not have eliminated the prejudice arising from the prosecutor's statements." *People v Hunt*, 68 Mich App 145, 149 (1978) (granting retrial despite lack of defense objection where prosecutor vouched for defendant's guilt and "made improper statements about the alibi defense and the alibi witnesses").
[71] *See Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

III. MR. WALKER IS ENTITLED TO A RESENTENCING BEFORE A DIFFERENT JUDGE WHEN OV-19 WAS MISSCORED AFFECTING MR. WALKER'S GUIDELINES RANGE AND WHEN JUDICIAL REASSIGNMENT IS APPROPRIATE UNDER THE LAW.

Standard of Review:

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear errors and must be supported by a preponderance of the evidence."[72]

Issue Preservation:

Trial counsel objected to the 10-point score for OV-19 and asked instead for a 0-point score. The issue is fully preserved for review.

Discussion:

Offense Variable 19 (OV-19) provides for a 10-point score for actual or attempted "interference with the administration of justice."[73] The court erred scoring Mr. Walker 10 points for OV-19 based on either Mr. Walker's lawful exercise of his right to remain silent or the court's supposition, unsupported in the record, that Mr. Walker and defense witness Darryl Williams colluded to present false testimony. Resentencing is needed because without 10 points for OV-19, Mr. Walker's OV- Level would drop from II to I and his guidelines range would decrease from 10 to 46 months to 7 to 46 months.[74] Furthermore, the resentencing should be before a different judge because Judge Lillard's intemperate behavior at the original sentencing

[72] *People v Hardy*, 494 Mich 430, 438 (2013).
[73] MCL 777.49(c).
[74] *People v Francisco*, 474 Mich 82 (2006); MCL 769.34(10); *United States v Conaster*, 514 F3d 508, 520 (6th Cir 2008) ("A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.").

smacks of bias she could not easily set aside.[75] Indeed, Mr. Walker conditions his request for resentencing upon reassignment to a different judge. He would rather not be resentenced than be resentenced by Judge Lillard.

A. A 10-POINT SCORE FOR OV-19 CANNOT BE BASED ON MR. WALKER'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT UPON HIS ARREST.

The prosecutor argued at sentencing 10 points, rather than 0, were appropriate where "the defendant refused to provide his name to the police officers. Never gave them that information, and they only obtained his name after having fingerprinted him."[76] Trial counsel argued that those actions did not interfere with the administration of justice because the police were ultimately able to "ascertain who he was and book him properly."[77] The Court agreed with the prosecutor that Mr. Walker should be scored 10 points for OV-19 based on the reasoning provided by the prosecutor, in part. This was in error.

Mr. Walker had a Fifth Amendment right to remain silent that attached at the time of his arrest.[78] A defendant's right to remain silent "prevents a criminal defendant from being made 'the deluded instrument of his own conviction'….as well from being made the 'deluded instrument' of his own execution."[79] An individual has a constitutional right to remain silent; he has no obligation to "willingly participate" in any investigation.[80] As the Michigan Supreme

---

[75] *People v Francisco*, 474 Mich 82 (2006); MCL 769.34(10); *United States v Conaster*, 514 F3d 508, 520 (6th Cir 2008) ("A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.").
[76] 3/12/15 sentencing transcript, p 5, L 20-23.
[77] *Id.* p 6, L 2-3.
[78] *People v Wright*, 431 Mich 282, 291-2 (1988) (discussing the purpose of *Miranda* warnings).
[79] *Id.* at 289 (citing *Estelle v Smith*, 451 US 454, 462-463 (1981).
[80] *People v Thompson*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2015 (Docket No. 318694). (Attachment D).

Court observed in *Wright*, it is not relevant whether the right to remain silent was exercised at a procedure prior to trial or at a procedure after trial if the information obtained is "used in determining the severity of defendant's sentence."[81]

In the present case, Mr. Walker was "handcuffed," and "walk[ed] back to [a] scout car and secured…in the back of the vehicle."[82] Mr. Walker refused to answer any questions that Officer Marek asked of him after Mr. Walker was placed under arrest.[83] Mr. Walker did not flee[84] or provide false information;[85] he merely exercised his constitutional right to remain silent. Mr. Walker's silence upon arrest was not reason to conclude he either interfered or attempted to interfere with the administration of justice. The Court of Appeals majority states that defendant claim[ed] that the scoring of OV-19 was based entirely on his refusal to provide a name." *People v Walker*, unpublished opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063), p 5. However, this ignores entirely the below argument that Mr. Walker also made plain in the Court of Appeals, garnering the support of dissenting Judge Gleicher: OV-19 cannot be scored based on the judge's supposition, unsupported by the record, that Mr. Walker colluded with a witness.

B. NOR CAN THE SCORE BE JUSTIFIED BY THE JUDGE'S SUPPOSITION THAT MR. WALKER COLLUDED WITH A WITNESS TO PRESENT FALSE TESTIMONY, WHERE THE RECORD PROVIDES NO SUPPORT FOR THAT CONCLUSION.

---

[81] *Id.* at 289.
[82] 2/25/15 jury trial transcript, p 39 L12-24 (testimony of Officer Frank Marek).
[83] *Id.* at p 40 L 5-6
PROSECUTOR: Did he answer any questions that you asked him?
OFFICER MAREK: No.
[84] *See*, for example, *People v Ratcliff*, 299 Mich App 625 (2013), reversed on other grounds at 495 Mich 876 (2013).
[85] *See*, for example, *People v Barbee*, 470 Mich 283 (2004) (Trial court correctly assessed 10 points for OV19 on the basis that defendant had provided a false name to the officer arresting him.).

Judge Lillard did not base her 10-point score for OV-19 solely on Mr. Walker's (lawful) failure to provide his name to the police; Judge Lillard believed 10 points was proper "not only because of his failure to provide his name…[b]ut, I think he also interfered with the administration of justice by that sham of a testimony that he put forth."[86] The Court went on:

> I think he conspired with Mr. Williams, while Mr. Williams was in custody in the Wayne County jail awaiting trial, and they trumped up that phony, bogus testimony. I don't think it's a coincidence that lo[]-and-behold after that young man spent some time in the Wayne County Jail, all of a sudden he decided he wanted to come to court and tell a ridiculous version of events. And I think that that was nothing more than a conspiracy between Mr. Walker and – using his influence over a young man from the neighborhood, who looked up to him, to try to get him to take the rap for him.
>
> And for those reasons in addition to the ones cited by the prosecutor, I'm scoring it at 10 points.[87]

The court used uncharged, unproven conduct as part of the underlying rationale for scoring Mr. Walker's OV-19 at 10 points. In its remand instructions, *People v Ewing* spells out the proper procedure by which a court may consider conduct for which the defendant was not sentenced:

> First, the trial court should explain with greater specificity which conduct, convictions, or charges played a role in determining the defendant's sentence. After this is done, the defendant should be given an opportunity to challenge the accuracy of those allegations regarding criminal acts for which no conviction has been obtained and upon which the original sentence was based. If the judge determines that the accuracy of the allegations has not been proven by a preponderance of the evidence, the original sentence should be vacated and the defendant resentenced.[88]

The sentencing judge cited to a "conspiracy" between Mr. Walker and Mr. Williams, his alleged "conduct." Mr. Walker challenged the judge on the accuracy of her allegation of perjury and

---

[86] 3/12/15 sentencing transcript, p 6 L 4-14.
[87] *Id.* p 6-7.
[88] *People v Ewing*, 435 Mich 443, 449, 458 NW2d 880, 882 (1990).

collusion.[89] The judge replied "well thank you for that, but … I don't believe you."[90] This process parallels the *Ewing* procedure in part: the judge explained what conduct played a role in determining Mr. Walker's sentence and Mr. Walker challenged the accuracy of those allegations. However, the record fails to show that the "accuracy of the allegations has…been proven by a preponderance of the evidence."[91]

The record provides no support for the judge's finding. In fact, the record indicates that Mr. Walker and Mr. Williams did not communicate prior to trial. There was no police testimony regarding any interaction between Mr. Walker and Mr. Williams. There was no evidence of phone calls, exchanged notes, or any communication between Mr. Walker and Mr. Williams while one or both individuals were housed in Wayne County Jail.

Mr. Williams testified that he was not related to Mr. Walker, he never spoke with any of Mr. Walker's family members or friends, and that he was issued a subpoena while he was already serving time in Jackson, MI.[92] At the time defense counsel subpoenaed Mr. Williams, Mr. Williams was serving time in a *different* prison/jail than Mr. Walker. Mr. Williams himself insisted he had not spoken to Mr. Walker since August 5, 2014.

Likewise, Mr. Walker testified that he did not have any contact with Mr. Williams while they were both under the jurisdiction of the Michigan Department of Corrections. Mr. Walker testified that at one point, while he was in Wayne County Jail, he learned of Mr. Williams "catching a case" (an unrelated armed robbery conviction), but that Mr. Williams was not

[89] 3/12/15 sentencing transcript p 9-10.
[90] *Id.* at 10, L 17-18.
[91] *Ewing*, 435 Mich at 449, 458 NW2d 880.
[92] *Id.* at p 123-124. Mr. Williams testified that he is currently serving 3 to 15 years on an armed robbery conviction with two years for possession of a weapon. 02/24/15 jury trial transcript, p. 112, L17-25 (cross-examination of Mr. Darryl Williams). Mr. Williams' conviction occurred after the incident on August 5, 2014 underlying Mr. Walker's present convictions.

anywhere near him during their time in Wayne County Jail.[93] Further, Mr. Walker testified that he made sure "everybody" was aware of the fact that he was on parole and could not be around guns, even Mr. Williams, whom he did not consider a close friend.[94] At sentencing Mr. Walker said:

> [T]his young man [Mr. Williams] don't have no reason to me – lie for me. I never seen this man in here, none of that, I don't even really deal with that guy. Me and him will never talk again because of the situation I'm in here for, you feel me? I just didn't wanna tell on nobody, that's all that was. A good guy is a good guy.[95]

The jury's guilty verdict is insufficient by itself to show that Mr. Walker lied when he testified or that he coerced a defense witness to lie on the stand.[96] The record fails to provide *any* evidence, let alone a preponderance of evidence, that Mr. Walker perjured himself or colluded with Mr. Williams.[97] Due process requires that a defendant's sentence be based on accurate information and that the defendant have a reasonable opportunity at sentencing to challenge that

---

[93] *Id.* at p 152 (cross-examination of Mr. Walker).
[94] *Id.* at p 155-157.
[95] 03/12/15 sentencing transcript, p 9 L 12-17.
[96] This the Court of Appeals' unpublished decision in *People v Baiz*:

> The jury in this case was presented with two differing versions of the event that led to defendant's arrest. By finding defendant guilty, the jury presumably found the testimony of the victim to be more credible than that of defendant and his stepdaughter. This does not necessarily equate, though, with a finding that defendant did, in fact, lie, when he testified at trial. We have no way of knowing the jury's thought process or reasoning behind finding defendant guilty, and that the jury chose to believe one version does not necessarily make that version the truth—it simply makes that version more believable. Moreover, the assessment of ten points under OV 19 for perjury based upon the mere fact that a defendant testified as to his innocence, but was ultimately found guilty, raises constitutional concerns.

People v Baiz, unpublished opinion per curiam of the Court of Appeals, issued January 9, 2007 (Docket No. 262912), p 2. (Attachment C).
[97] *People v Hardy*, 494 Mich 430, 438 (2013).

information.[98] Here, the record is without "a rational basis for the trial court's conclusions that the defendant's testimony amounted to willful, material, and flagrant perjury."[99]

In effect, the trial court punished Mr. Walker for presenting a defense, a practice totally in-keeping with Judge Lillard's courtroom management.[100] The court erred in scoring Mr. Walker 10 points for OV-19. Mr. Walker has a right to remain silent that he lawfully exercised without interfering with the administration of justice, and the record was devoid of evidence that Mr. Walker perjured himself or colluded with defense witness, Mr. Williams.

This mistake warrants resentencing. When Mr. Walker's OV-19 score is reduced by 10 points, his OV-Level decreases from II to I, and his guidelines range from 10 to 46 months to 7 to 46 months. He is entitled to be resentenced.[101]

Moreover, resentencing should be before a different judge. Notably, in *People v Yennoir,* 399 Mich 892, 282 NW2d 920 (1977), this Court implied that where a court based its sentence, even in part, on a defendant's refusal to admit guilt, resentencing before a different judge is warranted.[102] Mr. Walker is entitled to a judicial reassignment under the law and conditions his resentencing on this reassignment.

C. MR. WALKER IS ENTITLED TO A DIFFERENT JUDGE ON RESENTENCING AND CONDITIONS HIS RESENTENCING ON ASSIGNMENT OF A NEW JUDGE.

---

[98] *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997).
[99] *People v Adams*, 430 Mich 679, 693 (1988).
[100] *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2016, Docket No. 328477 .
[101] *People v Francisco*, 474 Mich 82 (2006); *People v Thompson*, 314 Mich App 703, 887 NW 2d 650, 653 n 4 (2016) ("When a defendant properly preserves a claim that a scoring error was made, and if a guidelines range is altered in any way because a scoring error was actually made by the sentencing court, remand for resentencing is ordinarily required, even when the minimum sentence falls within the altered guidelines range. *People v. Francisco*, 474 Mich. 82, 89–91; 711 NW2d 44 (2006).").
[102] *See also*, *People v Hicks*, 149 Mich App 737, 747-748, 386 NW3d 657 (1986) (relying on *Yennoir* to remand and resentence Mr. Hicks before a different judge).

The Michigan Court of Appeals has employed a three-part test when considering whether a resentencing should occur before a different judge:

> The three considerations may be stated as follows: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.[103]

In light of these considerations, Mr. Walker is entitled to resentencing before a different judge. Mr. Walker's request for resentencing "should not be viewed as any personal criticism of the trial judge, however, in our view it would be unreasonable to expect [her] to be able to put out of [her] mind previously expressed views and findings without substantial difficulty."[104] An illuminating example is *People v Pillar* where the Court of Appeals determined a new sentencing judge was necessary:

> Given the certainty and vigor with which the trial judge expressed her findings, which we have already determined to be devoid of any record support, as well as the unbending blame that she erroneously placed on everyone involved in this case with the exception of herself, we are convinced that the judge would have difficulty setting aside her previously expressed views and justly resolve the issue at a subsequent hearing. Cf. *People v Hill*, 221 Mich App 391, 398, 561 NW2d 862 (1997).[105]

Judge Lillard would likewise have substantial difficulty setting aside her prejudices or improper attitudes regarding Mr. Walker's testimony[106]:

- p 11 "…I believe you made up that whole story, because it didn't make any sense";

[103] *People v Evans*, 156 Mich App 68, 71-73, 401 NW2d 312, 314 (1986) (citing *United States v Sears, Roebuck & Company, Inc*, 785 F2d 777, 780 (CA 9, 1986).
[104] *People v Evans*, 156 Mich App 68, 71-73, 401 NW2d 312, 314 (1986).
[105] *People v Pillar*, 233 Mich App 267, 270-71, 590 NW2d 622, 624-25 (1998)
[106] 3/12/15 sentencing transcript.

- p 15 “Is that a threat, clown?... That’s what you acting like… That’s what you’re acting like, a clown”;
- p 15 “I’m talking now. I’m talking now, clown”;
- p 16 “I’ve done nothing but be fair to you, but you know what cowards do, when cowards don’t want to accept responsibility for their own foolish behavior, they make threats, they try to act like they’re tough, and they wanna shift blame...you’re getting maximum time because you acted like a clown today”;
- p 18 You don’t believe you had a fair trial, because you thought that you would hoodwink and bambo[o]zle this jury – by convincing that little boy to come here and lie for you, but enjoy your time that you’re about to spend in the Michigan Department of Corrections… If I could give you more time, I would.;
- p 18 “You can’t tell me what to do, why don’t you just take him in the back and we’ll finish the sentence without him. Goodbye, clown.”;
- p 19 [responding to Mr. Walker saying ‘fuck you’] “Oh, you wish you could.”

The trial court’s sentencing errors are not solely questions of law,[107] but rather “prejudices or improper attitudes regarding this particular defendant.”[108] Here, as in *People v Rivers*, “the record comes dangerously close to suggesting that the judge sentenced defendant for a crime [perjury and witness tampering] that he did not commit.”[109] And thus, reassignment is advisable to preserve the appearance of justice.

Finally, the evidentiary phase of Mr. Walker’s trial took one day. The testimony of all witnesses comprises 129 transcript pages. Therefore, “the advancement of the interests of preserving the appearance of justice and fairness outweigh considerations of waste and duplication, neither of which will result” from a resentencing before a different judge.[110]

---

[107] *Compare*, *Evans*, *supra*, and *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862, 865 (1997), *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127, 132 (2001).
[108] *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127, 132 (2001).
[109] *People v Rivers*, 147 Mich App 56, 62; 382 NW2d 731 (1985).
[110] *People v Evans*, 156 Mich App 68, 71-73; 401 NW2d 312, 314 (1986).

IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FELONY-FIREARM CONVICTION, BECAUSE THE LEGISLATURE DID NOT INTEND FELON-IN-POSSESSION TO BE USED AS THE BASIS OF A FELONY-FIREARM CONVICTION.

Introduction

Mr. Walker's felony-firearm conviction was based on the underlying offense of felon-in-possession-of-a-firearm.[111]

Standard of Review

Questions of law are reviewed de novo. *People v Feezel*, 486 Mich 184, 206; 783 NW2d 67 (2010). Insufficient-evidence claims are also reviewed de novo. *People v Wolfe*, 440 Mich 508 (1992). An insufficient-evidence claim is reviewable on appeal even when not raised below. *People v Wright*, 44 Mich App 111, 114 (1972).

Argument

The evidence does not support Mr. Walker's felony-firearm conviction, because the Legislature that enacted the felony-firearm law did not intend a crime such as felon-in-possession to serve as a predicate felony.

Mr. Walker acknowledges that, in the context of Double Jeopardy challenges, both this Court[112] and the Michigan Supreme Court[113] have decided the legislative-intent question differently. However, the rationale for both decisions has since been rejected by the Michigan Supreme Court. *People v Bobby Smith*, 478 Mich 292 (2007). The exclusive method for determining legislative intent for Double Jeopardy purposes, even in multiple-punishment cases, is now the *Blockburger* same-elements test. *Bobby Smith*, 478 Mich at 324. Because our Supreme Court

[111] See Count III of the amended felony information, filed 8/8/14, p. 14 of the lower court file. The only other possibility, CCW, is precluded by statute from use as a predicate felony. MCL 750.227b(1).
[112] *People v Dillard*, 246 Mich App 163 (2001).
[113] *People v Calloway*, 469 Mich 448 (2003).

has rejected the rationale for *Calloway* and *Dillard* in the context in which those decisions were made, that rationale can no longer bind in any other context, either.[114] Its power, if any, is purely persuasive.

This Court should not be persuaded by the rationale of *Calloway* or *Dillard*. Neither decision is at all persuasive in answering the dispositive question: the intent of the Legislature that enacted the felony-firearm law.

The felony-firearm statute criminalizes use or possession of a firearm during a felony, and punishes offenders with mandatory prison sentences of two, five, or ten years that must be served consecutively to the sentence for the underlying felony. The statute also provides a list of felonies exempted from use as underlying felonies.[115] To both this Court and the Supreme

---

[114] That the Court did not explicitly mention *Calloway* or *Dillard* in *Bobby Smith* is of course no indication that their holdings survive its reach. Decisions rejected *sub silentio* are no more viable than those more explicitly condemned. *See, e.g.*, *People v Stout,* 116 Mich App 726, 734-735 (1982) (refusing to following precedent that had been overruled *sub silentio*). *Sub silentio* repudiations may also deprive a rationale of its persuasive power. *See, e.g.*, *In re Request for Advisory Opinion*, 479 Mich 1, 41 n106 (2007) (persuasive value of precedent diminished by judge's change of analysis in later ruling, which "undercut[] the prior holding *sub silentio*").

[115] The felony-firearm statute as enacted in 1976 reads as follows:

> "(1) A person who carries or has in his possession a firearm at the time he commits or attempt to commit a felony, except a violation of section 227 or 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.
>
> (2) A term of imprisonment prescribed by this section shall be 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.
>
> (3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the

Court, that list of exemptions answered any question of legislative intent: if a felony is not on the list of exemptions, it was intended for use as an underlying felony, and punishment for both the underlying felony and felony-firearm does not offend state or federal constitutional double-jeopardy principles prohibiting multiple punishment for the same crime. *People v Calloway*, 469 Mich 448 (2003); *People v Dillard*, 246 Mich App 163 (2001).

However, both Courts were wrong in construing the legislative intent.

This Court was wrong because it completely overlooked a critical detail: that the crime of felon-in-possession was not conceived until *after* the enactment of the felony-firearm statute. *Compare* MCL 750.227b (felony-firearm; Eff. Jan. 1, 1977) *with* MCL 750.224f (felon-in-possession; added by PA 1992, No. 217, Eff. Oct. 13, 1992). This Court simply failed to consider that the Legislature could not have intended to exclude felon-in-possession from its list of exemptions *because that crime did not yet exist*. *See Calloway*, 469 Mich at 452 (noting that felon-in-possession does not appear on the list of exempted crimes without mentioning that the felon-in-possession statute had not yet been enacted when the felony-firearm firearm statute was enacted (or even when last amended)).

The Court of Appeals was wrong because it focused on the intent of the wrong Legislature: the 1992 Legislature that enacted the felon-in-possession law rather than the 1976 Legislature that enacted the felony-firearm law. The Court reasoned that "had the Legislature wished to exclude the felon in possession charge as a basis for liability under the felony-firearm

---

> mandatory term imposed pursuant to subsection (1)." MCL 750.227b (added by PA 1976, No. 6, § 1, Eff. Jan. 1, 1977).
>
> The 1990 Legislature amended the statute to include two more exemptions: MCL 750.223 (unlawful sales of firearms), and MCL 750.230 (altering firearms-identity marks). PA 1990, No. 321, § 1, Eff. March 28, 1991.

statute, the Legislature would have amended the felony-firearm statute to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f." *People v Dillard*, 246 Mich App 163, 168 (2001). While that arguably might have been true of the 1992 Legislature,[116] it was of course not true of the 1976 Legislature—and it

[116] However, the legislative history suggests the opposite. Nothing in that history indicates that legislators anticipated that those charged and convicted of felon-in-possession would be simultaneously charged and convicted of felony-firearm. House Legislative Analysis (Attachment 4) and Senate Bill Analysis (Attachment 5). The House Analysis explains that the legislation was spurred by a federal district court decision (subsequently overturned) that excluded the Michigan defendant from the coverage of the federal felon-in-possession-of-a-firearm law. The legislation was designed to clear up ambiguities in the law, and to ensure that a felon in possession of a firearm could be prosecuted under both federal and Michigan law. House Analysis, pp 1-2.

Part of the discussion in the legislative analyses concerned whether the five-year penalty was too severe, particularly for non-violent offenders:

> "Such penalties far exceed the misdemeanor penalties that would apply to a non-felon, and would be unnecessary: penalties for violating the federal gun law equal or exceed those proposed by the bill, and could be applied in federal prosecutions against serious criminals. The bills propose to write gun laws on the basis of a person's prior status; they make virtually no accommodation for individual circumstances." House Analysis, p 3.

The "Response" to the above answered that non-violent offenders would generally *not* be sent to prison, unmistakeably suggesting that the mandatory two-year prison term of a felony firearm charge was not anticipated or intended by the legislation:

> "While it may make some people uncomfortable to have to rely on prosecutorial discretion, the reality is that already-strained prosecutorial resources are not going to be used to attempt to put inconsequential offenders behind bars, and judges are not going to sentence nonviolent minor offenders to already-overcrowded prisons." House Analysis, p 3.

This analysis would be far different if the Legislature had intended for every felon-in-possession to face a consecutive two-year prison term for an automatic felony-firearm charge.

Further, the "Fiscal Implications" section of the House analysis provides that "[t]he bill's penalty provisions *could* result in additional costs for the Department of Corrections for incarcerating offenders" (emphasis added). There is no mention of the fiscal implication of adding a mandatory two-year prison term. House Analysis, p 3.

was the 1976 Legislature that mattered, because it was the felony-firearm statute, enacted in 1976, that was being interpreted. In determining legislative intent, the focus must always be the intent of the Legislature that enacted the law, not that of a subsequent Legislature. As Justice Markman explained in his concurring opinion in *Blank v Dep't of Corrections,* 462 Mich 103, 149; 611 NW 2d 530 (2000):

> "A long line of cases, state and federal, has recognized with respect to congressional intent that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 334 (1960). This Court's recent disapproval of legislative acquiescence in *Donajowski* [*v Alpena Power Co.*, 460 Mich 243, 258-61; 596 NW 574 (1999)], implicitly recognizes that **the only legislative intent that is relevant to interpreting a statute is the intent of the Legislature that enacted it. Consequently, subsequent inaction by a *different* Legislature, whether it be silence or the rejection of an alternative proposal, cannot properly serve as an indicator of what a prior Legislature intended**" (bold emphasis added).

See also Rapanos v United States, 547 US 715, 749; 126 S Ct 2208, 2231; 165 L Ed 2d 159 (2006) (Scalia, J.) (plurality op.) (reiterating "oft-expressed skepticism towards reading the tea leaves of congressional inaction"—including inaction of subsequent legislature as evidence of intent of earlier one).

The legislature that enacted the felony-firearm law never intended it to apply where the only "underlying" felony was possession of the same ordinary firearm said to support the felony-firearm charge. Because felon-in-possession was not yet a crime when the Legislature enacted felony-firearm, the fact that felon-in-possession does not appear on the felony-firearm list of exempted crimes cannot be dispositive of legislative intent. The operative question is whether the Legislature would have included felon-in-possession on felony-firearm's exemption list *if that crime existed in 1976.* The statutory language cannot answer that question, and so it is appropriate for the Court to make use of the various tools of legislative interpretation.

"[T]raditional means to determine the intent of the legislature" include examination of a statute's subject, language, and history. *People v Denio*, 454 Mich 691, 708 (1997).

Examination of felony-firearm's subject, language, and history strongly suggests that the 1976 Legislature would have exempted felon-in-possession from use as a predicate felony. The 1976 Legislature identified two felonies that could not be used as the underlying felony in a felony-firearm prosecution. Those two felonies were the only felonies then in existence that punished possession of ordinary weapons without unlawful intent to use them. The first was carrying a concealed weapon (MCL 750.227); the second, unlawful possession of a pistol by a licensee (MCL 750.227a). MCL 750.227b (PA 1931, No. 328, § 227b, added by PA 1976, No. 6, § 1, Eff. Jan. 1, 1977). Gun-possession felonies *not* exempted involved either exceptionally dangerous firearms[117] or possession coupled with unlawful intent to use.[118]

The Legislature thus indicated its intent *not* to allow prosecution for felony-firearm where the only underlying felony was possession of an ordinary firearm. Use of firearms possession as both a substantive crime and a basis for additional, felony-firearm punishment would be permitted only if the firearm was unusually dangerous or the defendant possessed the intent to use it unlawfully. Otherwise, the new felony-firearm law would not be used as a bootstrapping machine to automatically turn one possessory offense into a second possessory offense, and then make the "additional" offense subject to a mandatory, consecutive prison term.

If the felon-in-possession law were in existence in 1976, the Legislature would likely have added it to its list of felony-firearm exemptions. Because felon-in-possession requires

[117] Manufacture, sale, or possession of a machine gun or other automatic firearm (MCL 750.224); Manufacture, sale, or possession of a short-barreled shotgun or short-barreled rifle (MCL 750.224b).
[118] Carrying a firearm or dangerous weapon with unlawful intent (MCL 750.226).

neither proof of a dangerous firearm nor proof of unlawful intent, it more resembles the two exempted than the two non-exempted firearms-possession offenses.

To the extent that the legislative intent is hazy, the principle of fair warning expressed in the rule of lenity provides additional support for exempting felon-in-possession from the reach of the felony-firearm law. Where the scope of a criminal statute is unclear, the rule of lenity requires courts to err on the side of caution, and to limit the reach of the statute. *People v Meshell*, 265 Mich App 616, 633 (2005); *see United States v Lanier*, 520 US 259, 266; 117 S Ct 1219; 137 L Ed 2d 432 (1997).

Felon-in-possession cannot be the underlying felony in a felony-firearm prosecution. Because the felony-firearm verdict here was based on proof of felon-in-possession, the evidence to convict was legally insufficient.

* * * *

The remedy is to vacate the felony-firearm conviction and sentence.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court vacate Mr. Walker's convictions and remand for a new trial or grant a resentencing before a different judge.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Adrienne N. Young

BY:_____

ADRIENNE N. YOUNG (P 77803)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: January 26, 2017