STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No.: 155198

HAROLD WALKER,
Defendant – Appellant.

Court of Appeals No.: 327063
Third Circuit Court No.: 14-7222-01

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training, and Appeals

JONATHAN A. MYCEK (P74620)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine Street
Detroit, Michigan 48226
Phone: (313) 224-7616

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The People of the State of Michigan, through Kym L. Worthy, Prosecuting Attorney, County of Wayne, Jason W. Williams, Chief of Research, Training, and Appeals, and Jonathan A. Mycek, Assistant Prosecuting Attorney, respectfully ask this Court to deny Defendant's Application for Leave to Appeal.

1. Defendant's Application to this Court asserts four of five arguments originally presented to the Court of Appeals;
2. The People's Brief on Appeal from the Court of Appeals – Issues I through IV – adequately addresses Defendant's articulated positions;[1]
3. The Court of Appeals did not clearly err in rejecting the arguments Defendant now raises before this Court;[2]
4. Defendant's Application does not demonstrate any other ground for granting leave.[3]
5. In sum, Defendant's application raises no issues worthy of this Court's review and the application should be denied.

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[1] See Appendix A for the People's Brief on Appeal in the Court of Appeals.
[2] MCR 7.305(B)(5)
[3] MCR 7.305(B)(1)-(3)

Relief

WHEREFORE, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training, and Appeals

Jonathan A. Mycek

JONATHAN A. MYCEK (P74620)
Assistant Prosecuting Attorney
11th Floor, Frank Murphy Hall of Justice
1441 St. Antoine Street
Detroit, Michigan 48226-2302
Phone: (313) 224-7616

Date: January 31, 2017

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Supreme Court
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ATTACHMENT A

The People's Brief on Appeal in the Court of Appeals

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs. Court of Appeals No: 327063

HAROLD WALKER,
Defendant-Appellant.

Circuit Court No.: 14-007222-01-FH

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT NOT REQUESTED

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training, and Appeals

JONATHAN A. MYCEK (P74620)
Assistant Prosecuting Attorney
11th Floor, Frank Murphy Hall of Justice
1441 St. Antoine Street
Detroit, Michigan 48226-2302
Phone: (313) 224-7616

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COUNTERSTATEMENT OF JURISDICTION

The People do not contest jurisdiction for purposes of this brief on appeal.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

A prosecutor may fairly respond to arguments first raised by the Defendant in argument. Here, the Defendant raised witness Devon Williams's potential punishment for admitting to another crime in bolstering his credibility; in response the prosecutor attacked Williams' credibility with an on-the-record inferential analysis of the facts, law, and attendant circumstances. Was the prosecutor's reasonable inference a fair response to Defendant which constituted reversible error?

The People say: **No**

Defendant would say: **Yes**

The trial court was not presented with this question.

II.

Where a court departs from jury instructions with language which does not pressure, threaten, embarrass, or otherwise coerce a jury, the departure rarely constitutes reversible error. Here, the jury reported it was deadlocked after 88 minutes; the court (1) concluded this was insufficient for substantive deliberations to have occurred; (2) reminded the jury of their duty to evaluate the evidence; and (3) re-provided instructions to foster discussion. Has Defendant shown plain error where the court would not have caused a juror to abandon his or her dissent to defer to the majority solely for the sake of reaching agreement?

The People say: **No**

Defendant would say: **Yes**

The trial court was not presented with this question.

III.

A sentencing court may rely on record evidence and reasonable inferences therefrom when scoring sentencing guidelines. Here, the sentencing court scored OV 19 by relying on testimony from Defendant, defense witness Williams, and the arresting police officers, to conclude that Williams's testimony was a "sham" created by the Defendant and his witness to interfere with the administration of justice. Did the sentencing court err when it scored 10 points for OV 19?

The People say: **No**

Defendant would say: **Yes**

The trial court would say: **No**

IV.

MCL 750.227b(1) provides that "[a] person who carries or has in his possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a, or 230, is guilty of a felony, and shall be imprisoned for 2 years," and paragraph 2 provides that "[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." Defendant was convicted of violating MCL 750.224f – Felon in Possession of a Firearm. Is conviction for being a felon in possession of a firearm excluded from operation of MCL 750.227b – Felony Firearm?

The People say: **No**

Defendant would say: **Yes**

The trial court was not presented with this question.

V.

Absent authorizing statute, a consecutive sentence may not be imposed. Here, Defendant alleges that the judgment of sentence incorrectly shows his Felony-Firearm conviction runs consecutive to his Felon-in-Possession of a Firearm and Carrying-a-Concealed-Weapon convictions. If true, it is error since carrying a concealed weapon cannot serve as a predicate for felony-firearm; the consecutive sentences authorized by MCL 750.227b(2) is inapplicable. If true, is Defendant entitled to an amended Judgment of Sentence?

The People say: **Yes**

Defendant would say: **Yes**

The trial court was not presented with this question.

COUNTERSTATEMENT OF FACTS

The People rely on the facts adduced in Defendant's Brief on Appeal – other than those presented as argument – and upon those included in the following pages of the People's Brief.

ARGUMENT

I.

A prosecutor may fairly respond to arguments first raised by the Defendant in argument. Here, the Defendant raised witness Devon Williams's potential punishment for admitting to another crime in bolstering his credibility; in response the prosecutor attacked Williams' credibility with an on-the-record inferential analysis of the facts, law, and attendant circumstances. The prosecutor's reasonable inference was a fair response to Defendant which did not deprive Defendant of a fair trial.

Standard of Review

Where issues of prosecutorial error are preserved, as here, this Court reviews them *de novo* to determine whether the defendant was denied a fair and impartial trial.[1]

Discussion

Defendant claims prosecutor misconduct in the closing argument deprived him of a fair trial.[2] The term "prosecutorial misconduct" is an antiquated and needlessly inflammatory term of art which is better, and more accurately, termed "prosecutor error" in a recent case by this Court. In *People v. Cooper,* 309 Mich. App. 74 (2015), this Court held:

> …it is a misnomer to label claims such as this one as 'prosecutorial misconduct.' This concern for the proper phrase is not a case of mere political correctness, for the term misconduct has a specific legal meaning and connotation when it comes to attorney conduct, and is in general limited to instances of illegal conduct, fraud, misrepresentation, or violation of the rules of professional misconduct. See MRPC 8.4 and *Grievance Administrator v. Deutch,* 455 Mich. 149, 164; 565 NW2d 369 (1997). Although we recognize that the phrase prosecutorial misconduct has become a term of art in criminal appeals we agree that the term 'misconduct' is more appropriately applied to those extreme and rare—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct."[3]

---

[1] *People v. Bennett,* 290 Mich. App. 465, 475 (2010)
[2] Defendant's Brief on Appeal, beginning at page 8
[3] *People v. Cooper,* 309 Mich. App. 74, 87–88 (2015)

The Court of Appeals reasoned that the majority of claims that a prosecutor made a technical error or an inadvertent error at trial "might be better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.'"[4] Thus, the Court concluded, that the majority of prosecutorial misconduct claims may be more accurately labeled as claims of prosecutorial error, with only those claims involving illegal conduct or a violation of the Michigan Rules of Professional Conduct rising to the level of misconduct.[5] Accordingly, the terms "prosecutor error" or "prosecutorial error" will be used in place of "prosecutorial misconduct" for the following argument.

Prosecutorial error issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.[6] The test to determine whether a defendant is entitled to a new trial is to determine whether the prosecutor committed error that deprived the defendant of a fair and impartial trial.[7] That being said, it should be noted that the prosecution need not limit its argument to the blandest of terms[8] and prosecutors are afforded great latitude in arguments and conduct at trial.[9]

Defendant claims he is entitled to relief because the trial prosecutor – in rebuttal – erroneously claimed Defendant's witness, Darryl Williams, risked "practically nothing by confessing guilt"[10] and that he was "looking at probation."[11] It is true there was no testimony concerning this witness's punishment under a hypothetical criminal weapons charge. The

[4] *Id.* at page 88
[5] *People v. Cooper*, 309 Mich. App. 74, 87–88 (2015)
[6] See *People v. Brown*, 294 Mich. App. 377, 382–383 (2011)
[7] *Id.* at page 88
[8] *People v. Dobek*, 274 Mich. App. 58, 66 (2007)
[9] *People v. Unger*, 278 Mich. App. 210, 236 (2008)
[10] Defendant's Brief on Appeal, page 8
[11] *Id.* citing to *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015 at page 28

comment was, however, a reasonable professional analysis in fair response to the defense's closing argument and did not deprive Defendant of a fair trial.

A. The Prosecutor's fair response did not deprive Defendant of a fair trial.

The prosecutor's initial argument concerning Williams's credibility touched on his story, the prior conviction for armed robbery, and that he was already in MDOC.[12] Defendant's counter-position built upon the prosecutor's appropriate argument and referenced, for the first time, potential future punishment. Defendant argued that it made no sense for Williams, who was already serving a sentence with the Michigan Department of Corrections (MDOC), to attend court just to admit to another crime that would result in more punishment.[13] Defendant first referenced the issue of additional punishment and the prosecutor's rebuttal was in-kind. "A prosecutor may fairly respond to an issue raised by the defendant"[14] and the trial prosecutor did so here. The prosecutor's argument was an on-the-record extrapolation of what that charge and punishment could have been, given her analysis of the law, the witness, and the attendant factual circumstances provided in the trial record. Though this statement, alone, could have been erroneous, this Court has held that an otherwise improper remark by a prosecutor may not rise to error requiring reversal if it is responsive to defense counsel's argument.[15] Because Defendant's argument referenced what Williams's future punishment might be, it was appropriate for the trial prosecutor to respond. Accordingly, the prosecution's fair response did not deprive Defendant of a fair trial.

[12] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015 at pages 9-11
[13] *Id.* at pages 16-17
[14] *People v. Brown*, 279 Mich. App. 116, 135 (2008)
[15] *People v. Kennebrew*, 220 Mich. App. 601, 608 (1996)

B. Even if the Prosecutor's comment was inappropriate, Defendant did not receive an unfair trial.

Alternatively, if the prosecutor's fair response comment was inappropriate, Defendant's timely objection identified the error, kept the prosecutor from continuing, and protected Defendant's right to a fair trial. Moreover, the court's instruction further protected Defendant from any fair trial prejudice.

First, the record shows that after defense counsel objected to the prosecutor's comments, the prosecutor stopped the statement and shifted her focus from potential punishment to attacking the witness's failure to tell the police the gun was his when Defendant was arrested. The prosecutor concluded her argument by refocusing the jury's attention on the evidence presented – that being Williams' failure to come forward earlier, a summary of the arresting officers' testimony, the premise that in light of the officers' testimony, fingerprints were unnecessary, Williams's questionable identification of the recovered weapon's color, and a conclusory synopsis of the prosecution's case theory.[16] Though the "bell cannot be un-rung," the prosecutor's adherence to the objection and avoidance of the topic in the balance of the rebuttal essentially firewalled the brief reference. This fleeting reference, in light of the balance of the evidence presented did not deprive Defendant of a fair trial.

Second, the court twice instructed the jury that the lawyers' statements were meant to help the jury understand the way each side views the case[17] and that the arguments and statements were not evidence.[18] Moreover, the trial court instructed the jury that their decision should be based on all the admitted evidence, regardless of the side that produced it.[19] As jurors are presumed to follow their instructions, and they were properly – and repeatedly – instructed

[16] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015 at pages 28-29
[17] *Id.* at pages 4, 13
[18] *Id.* at pages 32, 13
[19] *Id.* at pages 33, 13

that the lawyers' arguments were not evidence, their decision in this matter was based upon the evidence and not a potentially erroneous comment from the trial prosecutor.[20] Accordingly, any error which might have occurred was cured by the trial court's instruction and the Defendant was not deprived of a fair trial.[21]

[20] See *People v. Mesik (On Reconsideration)*, 285 Mich. 535, 541-542 (2009) which notes that even when a prosecutor argues facts not in evidence, proper jury instructions cure most errors because jurors are presumed to follow the court's instructions.

[21] *People v. Unger*, 288 Mich. App. 210, 235 (2008)

II.

Where a court departs from jury instructions with language which does not pressure, threaten, embarrass, or otherwise coerce a jury, the departure rarely constitutes reversible error. Here, the jury reported it was deadlocked after 88 minutes; the court (1) concluded this was insufficient for substantive deliberations to have occurred; (2) reminded the jury of their duty to evaluate the evidence; and (3) re-provided instructions to foster discussion. Defendant has not shown plain error where the court would not have caused a juror to abandon his or her dissent to defer to the majority solely for the sake of reaching agreement.

Standard of Review

This Court reviews preserved claims of instructional error *de novo*.[22] This Court reviews a trial court's decision on whether a jury instruction was necessary based on the applicable facts for an abuse of discretion.[23] This Court defers to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion.[24] Where an instructional error is unpreserved, however, plain error review applies.

To preserve an issue of instructional error, a defendant is required object or request the provision of a different instruction before the jury deliberates.[25] Here, on the first day of deliberations, the jury sent a note saying they were "hung."[26] The trial court informed the respective counsels that she would provide an *ad hoc* instruction and if the jury so persisted, she would read the *Allen* deadlocked jury instruction.[27] The trial court gave the counsels an opportunity to object and neither did.[28] The court gave her *ad hoc* instruction and sent the jury

[22] *People v. Fennell*, 260 Mich. App. 261, 264 (2004)
[23] *People v. Gillis*, 474 Mich. 105, 113 (2006)
[24] *People v. Dupree*, 486 Mich. 693, 702 (2010)
[25] MCL 768.29; MCR 2.512(C); *People v. Hardin*, 421 Mich. 296 (1984); *People v. Gonzalez*, 256 Mich. App. 212, 225 (2003)
[26] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015 at pages 45, 47
[27] *Id.* at pages 45-46
[28] *Id.* at page 46

back to deliberate further.[29] Because the record clearly shows Defendant did not object to trial court's plan and action, the issue is unpreserved for appellate review. Accordingly, this Court should only reverse upon a plain error that substantially affects the fairness or integrity of the judicial proceedings.[30] Stated differently, a defendant has the burden of establishing that the (1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights; this generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. An error is outcome determinative if it undermined the reliability of the verdict.[31] Furthermore, once a defendant satisfies these three requirements, an appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.[32]

Discussion

Defendant argues under both the *de novo* and plain error standards of review that the trial court's *ad hoc* jury instruction concerning the "hung jury" note 1 hour and 28 minutes after being charged requires reversal.[33] Defendant alleges that the court's instruction substantially departed from the jury instruction and coerced the jury into a verdict.[34] Defendant failed to object or provide an alternative for the trial court's instruction; the issue is unpreserved and should not be examined *de novo*. Plain error analysis applies. Even under a plain error-analysis, however, Defendant is not entitled to relief because the court's *ad hoc* instruction was intended to remind

[29] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015 at pages 47-48
[30] *People v. Carines*, 460 Mich. 750, 761–764 (1992)
[31] *People v. Hawthorne*, 474 Mich. 174, 181-182 (2006)
[32] *Carines*, supra at 763
[33] Defendant's Brief on Appeal, pages 13 and 17
[34] *Id.* at page 12

the jury to evaluate the evidence presented and designed to generate discussion, nothing more. Since no coercion occurred, there was no error and without that error, Defendant cannot show prejudice. Defendant's argument should be rejected and his relief denied.

A. Defendant failed to object or provide an alternative for the trial court's instruction; the issue is unpreserved and should be examined for plain error.

Defendant's *de novo* analysis erroneously assumes the instructional claim was preserved because the trial court did not allow sufficient time for counsel to object.[35] As noted above, the record shows otherwise. The court explained her plan and asked the parties, "Is there anything else?"[36] Here she invited comment, objection, alternative suggestions and hearing none, she proceeded according to the articulated plan, without objection.[37] Without an objection or a request for a different instruction, Defendant's claim is unpreserved and should be analyzed according to a plain error standard. Accordingly, this Court should reject Defendant's *de novo* arguments and only address his plain error-based position.

B. The trial court's *ad hoc* instruction did not coerce the jury into a verdict, but was designed to remind the jury of the their deliberative duties.

In *People v Sullivan,*[38] this Court adopted the use of ABA standard jury instruction 5.4 as an appropriate instruction to provide in the event of a deadlocked jury. The Court cautioned that "[a]ny substantial departure therefrom shall be grounds for reversible error."[39] Michigan's Model Criminal Jury Instructions have incorporated the standard adopted in *Sullivan*.[40] M Crim JI 3.12 instructs the jury:

> (1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to

[35] Defendant's Brief on Appeal, page 12
[36] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015 at page 46
[37] *Id.* at pages 47-48
[38] *People v Sullivan,* 392 Mich. 324, 342 (1974)
[39] *Id.*
[40] *People v Pollick,* 448 Mich 376, 382, n 12 (1995)

> 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.
>
> (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 agreement.
>
> (5) If you think it would be helpful, you may submit to the bailiff a written list of the 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.

"Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered."[41] The instruction should be read in context.[42] Whether a trial court improperly foreclosed jurors from not reaching a verdict depends on the coercive nature of the instructions given.[43] "The

[41] *People v. Malone*, 180 Mich. App. 347, 352 (1989); *People v. Vettese*, 195 Mich. App. 235, 244 (1993)
[42] *Hardin*, supra at 321
[43] *Pollick*, supra at 384

optimal instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision."[44]

Though a trial court is not so required to give a deadlocked jury instruction,[45] when it does, the instruction to a deadlocked jury must substantially comply with the standard criminal deadlocked-jury instruction.[46] A departure from the standard criminal deadlocked-jury instruction is substantial only when it has an undue tendency to coerce a juror to abandon his conscientious dissent and defer to the majority solely to reach a verdict.[47] "Where additional language contains 'no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion,' …that additional language rarely would constitute a substantial departure."[48]

Here, upon finishing jury instruction, the trial court dismissed the jury at 11:19 a.m.[49] One hour and seventeen minutes later, at 12:36 p.m., the court went back on the record, with the attorneys present, to let them know, that the jury had deliberated approximately an hour before sending a note that they were "deadlocked."[50] Believing that the jury could not have "even attempted to deliberate," the court did not want to provide the deadlocked jury instruction.[51] The record suggests that based on the elapsed time between dismissal and the note, the trial court concluded that deliberations failed to substantively occur and the jury could not actually be deadlocked. Upon this inference, the court provided an *ad hoc* solution to what she believed occurred.

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[44] *People v. Hardin*, 421 Mich. 296, 316 (1984), quoting *People v. Sullivan*, 392 Mich. 324, 334 (1974)
[45] See *Renico v. Lett*, 599 U.S. 766, 775 (2010)
[46] *People v. Sullivan*, 392 Mich. 324, 342 (1974) (*Sullivan* holds that the ABA-approved instruction is the standard instruction which should be given to deadlocked juries. *Id.* The ABA-approved jury instruction is incorporated into CJI 2d 3.12. *People v. Pollick*, 448 Mich. 376, 381n 11 and n12 (1995)
[47] *Hardin*, supra. at 314
[48] *Hardin*, supra at 315, quoting *People v. Holmes*, 132 Mich. App. 730, 749 (1984)
[49] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015, page 45
[50] *Id.*
[51] *Id.* at 46

The trial court told the parties that the manner in which the jury had acted was "not the way this works, they [the jury] can't deliberate for an hour and give up."[52] The court indicated she would bring the jury out and tell them (1) "just that" and (2) 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."[53] The court finally stated that she would let them know they would have "to deliberate at least as long as it took to try the case" and that they would have to "come back tomorrow."[54] Though not offering any insight as to why, the court was reticent to read the "Allen Instruction" unless the jury continued their deadlock.[55] The court gave the prosecutor and defense counsel an opportunity to comment and neither had anything to say.[56]

At 12:37 p.m., the Court so stated to the jury:

> Okay, ladies and gentlemen, I received two notes from you. Your first note said that your wanted to see the gun, and Corporal McDougall came in and showed you the gun.
>
> Then, I received another note from you saying that you are... what does this say.
>
> "We are hung, and I don't believe there will an agreement with more time."
>
> Well, that's not the way this works. Your all heard a full day of testimony, and you deliberated for what a 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 time a part (sic) and 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

[52] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015, page 45
[53] *Id.* at pages 45-46
[54] *Id.* at page 46
[55] *Id.*
[56] *Id.*

> 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 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 the 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.
>
> I'll see you back at 1:40 p.m.[57]

At 12:41 p.m., the court concluded its *ad hoc* instruction and allowed the jurors to go to lunch.[58] Again, neither the prosecutor nor defendant provided an objection, alternative, or substantive addition or deletion to the court's charge.

When juxtaposed against CJI 2d 3.12, the court's language – that being the words themselves – substantially differed from the accepted jury instruction. Though this trial court's colloquial comments were not a verbatim recitation of the instruction, a trial court's statements to a jury will amount to a reversible substantial departure from the appropriate jury instructions if those statements are unduly coercive.[59] Where additional language "contains no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion…."[60]

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[57] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015, page 47
[58] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015, page 47
[59] *People v. Galloway*, 307 Mich. App. 164, citing to *People v. Hardin*, 421 Mich. 296 (1984)
[60] *Hardin*, supra at 315, quoting *People v. Holmes*, 132 Mich. App. 730, 749 (1984)

Here, though the trial court twice admonished the jury that they were deviating from process – "that's not the way this works"[61] – this did not coerce the triers of fact into a particular verdict. The court continued, twice saying she would send the jury to lunch and give them break to clear their heads so they could "review the evidence" they heard. Furthermore, the court reminded the jurors that if there were those amongst them not participating or if there were additional questions about anything, they should send a note.

None of the court's comments were threatening or embarrassing to the extent that they would have caused any of the jurors to abandon his or her dissent and defer to the majority solely for the sake of reaching agreement.[62] Instead, it is clear that the court's instruction was designed to remedy the problem the court saw – that fact the jury did not want to deliberate. The court's instruction was intended to remind the jury of their charge to evaluate the evidence presented and designed to generate discussion to foster a resolution to the case.[63] Here, no coercion occurred, and, so, no error arose from the trial court's instruction.

Another relevant factor in determining coercivity is "whether the trial court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals."[64] After the trial court gave the *ad hoc* jury instruction at 12:41 p.m. and – assuming *arguendo* the jury returned from lunch at 1:40 p.m., as instructed,[65] to resume substantive deliberations immediately – the jury had a verdict at 3:07 p.m.[66] Thus, the jury did not immediately arrive at a verdict upon the heels of the court's instruction. Evidence of

[61] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015, page 47
[62] See *Hardin*, supra 421 Mich. at 314
[63] See *Hardin*, supra 421 Mich. at 320
[64] *Hardin*, supra. at 316
[65] *People v. Harold Walker*, Jury Trial Transcript – February 26, 2015, page 47
[66] *Id* at 49

significant deliberations occurring after the jury instruction can negate a finding of coercion.[67] Here, the post-instruction deliberation time of 1 hours and 27 minutes is significant when compared against (1) the small amount of testimonial and physical evidence to be reviewed and (2) the few number of charges to be adjudicated. Relative to this matter, one-and-a-half hours of jury discussion is significant and negates any finding of coercion.

In light of the foregoing, the record shows no error in the trial court's instruction, plain or otherwise. A defendant, therefore, cannot be prejudiced from a plain error which does not exist. Defendant's argument, here, should be rejected and his relief denied.

[67] See *People v. Bookout* 111 Mich. App. 399, 403-404 (1981) and *People v. Rouse*, 272 Mich. App. 665, 676 (2007) (Jansen, J., dissenting), reversed *People v. Rouse*, 477 Mich. 1063 (2007)

III.

A sentencing court may rely on record evidence and reasonable inferences therefrom when scoring sentencing guidelines. Here, the sentencing court scored OV 19 by relying on testimony from Defendant, defense witness Williams, and the arresting police officers, to conclude that Williams's testimony was a "sham" created by the Defendant and his witness to interfere with the administration of justice. The sentencing court did not err when it scored 10 points for OV 19.

Standard of Review

Defendant preserved his challenge to scoring Offense Variable (OV) 19 at 10 points since counsel objected to it at sentencing and provided an alternative argument.[68] Accordingly, this Court reviews a trial court's factual determinations in scoring sentencing guidelines for clear error and it must be supported by a preponderance of the evidence.[69] "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews *de novo*."[70]

Discussion

Defendant challenges his score of 10 points for OV 19; OV 19 addresses a defendant's interference with the administration of justice. Defendant argues that the score was impermissibly based on his silence with the police and the court's unsupported determination that Defendant and defense witness Darryl Williams concocted false testimony in order to exonerate Defendant.[71] While the reference to Defendant's silence should not have been considered, the sentencing court appropriately relied on a preponderance of the record evidence –

[68] *People v. Harold Walker*, Sentencing Transcript – March 12, 2015, pages 5-6; See MCL 769.34 and *People v. Jackson*, 487 Mich. 783 (2010)
[69] *People v. Hardy*, 494 Mich. 434, 438 (2013)
[70] *Id.*
[71] *People v. Harold Walker*, Sentencing Transcript – March 12, 2015, pages 6-7

as well as reasonable inferences therefrom – to conclude that Defendant had interfered or attempted to interfere with the administration of justice when he and Williams created and provided false testimony. OV 19 was appropriately scored at 10 points and Defendant is not entitled to relief. Since Defendant is not entitled to resentencing, there is no need for resentencing in front of a new judge; Defendant's argument should be rejected and his relief denied.

A. Though Defendant's silence should not have been used against him, there was sufficient record evidence for the trial court to score OV 19 at 10 points.

At sentencing, the prosecutor noted the Defendant's silence at the time of his arrest as evidence of his obstructing the administration of justice.[72] After noting – then ignoring – Defendant's right to silence, the court stated she believed Defendant interfered with the administration of justice "by that sham of a testimony that he put forth."[73] The court opined that she believed Defendant and Williams "trumped up that phony, bogus testimony" given their time in the Wayne County Jail on different matters.[74] She found Williams's testimony ridiculous and persuaded by Defendant who used "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."[75] It was upon that basis, in addition "to the ones cited by the prosecutor," that she scored OV 19 at 10 points.

A trial court shall assess 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice."[76] A defendant interferes with the administration of justice by providing a false name to investigating police officers[77] or acting "so

[72] *People v. Harold Walker*, Sentencing Transcript – March 12, 2015, page 5
[73] *Id.* at page 6
[74] *Id.*
[75] *Id.* at pages 6-7
[76] MCL 777.49(c)
[77] See *People v. Barbee*, 470 Mich. 283 (2004)

as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process."[78]

In this case, the record shows that Defendant did not provide a false name to police officers or ignore their commands. Instead, he remained silent. "Whether his silence was prior to or at the time of arrest makes little difference—the defendant's Fifth Amendment right to remain silent is constant."[79] Due process is violated when a person is punished for asserting a constitutional right."[80] Accordingly, the People agree with Defendant that his silence should not have been used against him and the use of that silence in calculating OV 19 was improper. Even so, the other articulated basis – the judicially-found fact that defendant and defense witness Williams conspired to offer false exculpatory testimony – allows for the scoring.

This Court has recognized that perjury is a basis for assessing points under OV 19.[81] The elements of the crime of perjury are: "(1) the administration to the defendant of an oath authorized by law, by competent authority; (2) an issue or cause to which facts sworn to are material; and (3) willful false statements or testimony by the defendant regarding such facts."[82] Where a defendant elects to testify at trial, and thereby gives up his right to remain silent, he is obligated to testify truthfully.[83]

When challenged, a sentencing factor need only be proven by a preponderance of the evidence,[84] and the trial court may rely on reasonable inferences arising from any evidence in the record to support the scoring of an offense variable.[85] A preponderance of the evidence is the lowest standard of proof and requires a showing that a fact or proposition is more likely than

[78] *People v. Hershey*, 303 Mich. App. 330, 343 (2013)
[79] *People v. Bobo*, 390 Mich. 355, 360-361 (2012)
[80] See *People v. Ryan*, 451 Mich. 30, 35 (1996)
[81] *People v. Underwood*, 278 Mich. App. 334, 338 (2008)
[82] *People v. Honeyman*, 215 Mich. App. 687, 691 (1996)
[83] *People v. Adams*, 430 Mich. 679, 689 (1988)
[84] *People v. Wiggins*, 289 Mich. App. 126, 128 (2010)
[85] *People v. Johnson*, 298 Mich. App. 128, 131 (2012)

not.[86] Here, there was sufficient evidence to allow the trial court to directly and inferentially conclude Defendant and Williams created Williams's testimony.

First, there was sufficient record evidence to establish a lengthy superior and subordinate-style relationship between Defendant and Williams. Though witness Williams testified he last spoke with Defendant on the day of the crime and he was not related to Defendant,[87] Defendant and the witness had a long-standing relationship;[88] they grew-up together in the same neighborhood.[89] Williams saw Defendant as a role-model[90] and big brother figure who kept the neighborhood kids from trouble, but was close enough to call him over to listen to the witness's newly laid down track.[91] On the other side of the friendship, Defendant was tied enough to Williams to accept his close friend's[92] offer.[93]

Second, based off the record evidence of the relationship between Defendant and Williams, the Court could reasonably infer that Williams's self-inculpatory testimony was the result of that long friendship. Moreover, as Williams looked-up to Defendant, it is not unreasonable to conclude that Defendant used his role-model status to convince Williams to provide self-inculpatory testimony, especially – as the prosecutor noted in her closing rebuttal - where Williams was already doing prison time and admitting to another crime would not appreciably add to his punishment.

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[86] See *People v. Grant*, 470 Mich. 477, 486 (2004) which equates the preponderance of the evidence with "more likely than not"; *Miller-Davis Co. v. Ahrens Constr., Inc. (On Remand)*, 296 Mich. App. 56, 71 (2012) (reversed in part on other grounds not effecting this basic standard of proof)

[87] *People v. Harold Walker*, Jury Trial Transcript – February 25, 2015, at page 110

[88] *Id.* at page 106

[89] *Id.* at page 122

[90] *Id.* at page 106, 115

[91] *Id.* at page 106

[92] *Id.* at page 157

[93] *Id.* at pages 107, 133

Third, there was sufficient record evidence for the court to conclude that Defendant and Williams were together in the Wayne County Jail and knew of their cohabitation; Defendant and Williams admitted as much during their testimony.[94]

Fourth, despite the testimony claiming Williams's lack of direct and third-party familial communication with Defendant[95] – there was sufficient record evidence for the trial court to conclude Williams's testimony was collusive creative fiction.

One of the first record reasons the trial court could have concluded Williams' testimony was fiction was the coincidental choice of shrubs in which to hide inculpatory evidence of criminal activity; of all the hedges, in all the yards, of all the houses on the street, Williams *and* Defendant picked the same one. Both Williams and Defendant testified to this coincidence and defense counsel correctly noted that coincidences "happen in life,"[96] but the jury heard all of this and ultimately discounted it. The jury found Defendant guilty beyond a reasonable doubt. The trial court could just as easily doubted the plausibility of the claim and applied it to the less stringent preponderance of the evidence standard required to score OV 19.

Tangentially related to the implausibility of the coincidental use of the same bush is the relative credibility of the prosecution and defense witnesses. Defense witness Williams claimed to have placed the gun in the bushes before Defendant arrived. People's witnesses Detroit Police Officers Frank Marek,[97] Michael Jackson,[98] and Matthew Gnatek,[99] despite the inconsistencies noted by counsel[100] – i.e., whether Defendant walked quickly or sprinted up the porch – all noted

[94] *People v. Harold Walker*, Jury Trial Transcript – February 25, 2015, at pages 126, 151
[95] *Id.* at pages, 122, 126, 151-152
[96] *Id.* at page 15
[97] *Id.* at page 30
[98] *Id.* at page 59
[99] *Id.* at page 80
[100] *People v. Harold Walker*, Jury Trial Transcript – February 25, 2016, at page 93

each other's presence[101] that night and testified that the Defendant possessed a weapon – "a large frame revolver,"[102] "pistol,"[103] or "handgun"[104] – and threw that weapon into a bush.[105] Furthermore, Officers Marek and Jackson, clearly testified about the illuminated area[106] and respectively witnessed Defendant moving with a heavy weighted object in his pants pocket[107] clutching it in a manner "consistent with being armed."[108]

As before, the jury heard the testimony from both the People's and Defense witness, weighed them, and found the People's theory to be fact beyond a reasonable doubt. Given this, it was not unreasonable for the trial court to consider the Defendant's thin coincidence-based version of events in light of the established facts and find Williams's testimony lacking.

Concluding the record support for the trial court's assertion that Williams's testimony was fiction was failure to find a beer bottle in the oft-mentioned bush. Defendant outright claimed that the item he threw into the bushes August 5, 2015, was a beer bottle.[109] One would think that if this actually occurred, the police would have found the bottle when the firearm was recovered; this did not occur. Officer Gnatek recovered the Defendant's pistol from the bush and nothing else.[110]

Finally, there was sufficient record evidence for the sentencing court to infer that Defendant and Williams imagined the substance of Williams' firearm-hiding testimony. According to the record, only the Defendant and his witness knew that Williams owned and hid

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[101] *Id.* at pages 31, 32, 63, 81; please note that the transcript of Officer Marek's testimony (at p. 31) has his partner recorded as "Field" as opposed to "Fjolla"
[102] *Id.* at pages 38, 62
[103] *Id.* at page 55
[104] *Id.* at pages 83, 86
[105] *Id.* at pages 50-53, 70, 89, 90
[106] *Id.* at pages 35, 79
[107] *Id.* at page 36
[108] *Id.* at page 61, 69
[109] *Id.* at pages 137, 138
[110] *Id.* at pages 75, 86

the gun. This is an especially curious circumstance since Williams repeatedly testified – when asked by the attorneys and the trial court – that he never told anyone he owned and hid the gun found in the bushes.[111] If Williams's story was true, he should have been the only person to know why his gun was in the bush and, because he never told anyone what he allegedly did, he should never have been subpoenaed. Despite Williams's keeping his secret, he was inexplicably subpoenaed to give testimony on the very subject nobody was supposed to know anything about.[112]

Williams did not tell the police the gun was his, so there would have been nothing in the People's discovery to so educate defense counsel, Defendant, or anyone casually reading a police report. In fact, the record shows counsel first spoke with Williams when he came to the Wayne County Jail prior to testifying.[113] In order for Williams to have been subpoenaed, somebody else knew his story.

The record is silent on the issue of who else might have witnessed Williams hide his pistol in the same bush that Defendant would later use as a target when he allegedly discarded the incriminating evidence of a parole violation[114] – the beer bottle – from white guys[115] he concluded were police.[116] The record, however, informs us that in spite of Williams silence, Defendant miraculously knew what his witness did. Defendant testified that he learned of Williams's actions about three weeks after incarceration,[117] assumedly at the Wayne County Jail.

[111] *People v. Harold Walker*, Jury Trial Transcript – February 25, 2015, at page 109-110
[112] *Id.* at pages 123-124, 128
[113] *Id.* at page 126
[114] *Id.* at page 136
[115] *Id.* at page 137, 139
[116] *Id.* at page 135
[117] *Id.* at page 159

Defendant did not specify how or from whom he learned Williams's story;[118] these would have been important facts to include, especially since Williams never told anyone what he did. Since Defendant failed to provide full elaboration for his testimony, the trial court was left with the incredible reality that the Defendant knew information that he should not and could not have known if the claims of secrecy and non-communication were to be believed.

Therefore, in light of the officers' mutually corroborative testimony and the failure to find Defendant's beer bottle, the coincidental use of the same shrub to hide a firearm and beer bottle becomes implausibly unbelievable. When juxtaposed against the undisputed testimony that Defendant and Williams were not only longtime friends, but Williams looked-up to Defendant, the fact they knew each other were simultaneously in the Wayne County Jail takes on new significance. The sentencing court could have reasonably inferred that the implausibly unbelievable defense theory – as provided by Defendant and Williams – was tailored to provide context, and alternative explanation to the People's evidence, and, ultimately, reasonable doubt. The sentencing court, therefore, did not err when it found that a preponderance of the evidence, and reasonable inferences therefrom, suggested that (1) Defendant and defense witness Williams created their stories from whole cloth and (2) Defendant exercised his influence over Williams to get Williams to join in providing false testimony to the court. Thus, the sentencing court appropriately found Defendant had interfered or attempted to interfere with the administration of justice and scored 10 points for OV 19.

[118] Any response to this statement which points to information outside of this record, now, would not only be an improper addition to the record, but could only ever be seen as Defendant providing delayed retroactive continuity to bolster his factually deficient fictional position.

B. Since Defendant is not entitled to resentencing, there is no need to be resentenced in front of a new judge.

Relying on the argument in the above section establishing the validity of the sentencing court's evaluation of OV 19, Defendant's sentencing guidelines were appropriately scored and he is not entitled to resentencing. Accordingly, there is no need to seek a new judge to resentence Defendant when that resentencing will not occur.

IV.

MCL 750.227b(1) provides that "[a] person who carries or has in his possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a, or 230, is guilty of a felony, and shall be imprisoned for 2 years," and paragraph 2 provides that "[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." Defendant was convicted of violating MCL 750.224f – Felon in Possession of a Firearm. A conviction for being a felon in possession of a firearm is not excluded from operation of MCL 750.227b – Felony Firearm.

Standard of Review

The People agree that Defendant raises a question of law, but that question was not pressed in the trial court. Review, therefore, is for plain error; that is, whether the error was plain or obvious and whether, if it was, it seriously affected the fairness, integrity, or public reputation of the proceedings, or likely resulted in the conviction of an innocent person.[119]

Discussion

Defendant's sole claim is that MCL 750.227b is limited to felonies that appeared in the penal code at the time of its enactment, so that it does not mean what it says, but, to effectuate what defendant sees as the actual intent of the legislature, means something other than its words say. This argument is foreclosed by existing precedent—defendant argues that this court and the Michigan Supreme Court are wrong—and defendant's attempt to distinguish or prove wrong those precedents is unavailing.

The question is one of statutory construction. Michigan's statement of the task of the judiciary in statutory construction is orthodox:

[119] *People v. Carines*, 460 Mich. 750, 763 (1993)

- "Our primary aim is to effect the intent of the Legislature."

- "We first examine the language of the statute and if it is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of "legal art," are to be given their understood technical meaning.[120]

- "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent" and look to such aids as legislative history.[121]

When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which naturally leads one first to the principal expression of intent—the text of the statute. The "law" is what the "objective indication of the words" of the statute mean.[122] Further, "Where the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as

[120] Helpfully, Michigan has statutes on the point: MCL 8.3a provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"; see also MCL 750.2 regarding construction of penal statute: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

[121] See e.g. *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 60 (2001); *People v. Phillips*, 469 Mich. 390 (2003); *Gilbert v. Second Injury Fund*, 463 Mich. 866 (2000); *People v. Davis*, 468 Mich. 77 (2003); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 465 Mich. 872 (2001). This court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v. Guerra*, 469 Mich. 966 (2003).

[122] Antonin Scalia, *Matter of Interpretation* (Princeton University Press: 1997), at 29; and see *Maier v. General Telephone Co. of Michigan*, 466 Mich. 879 (2002) (Corrigan, J., concurring in the denial of leave): "we do not really look for subjective legislative intent. We look for a sort of 'objectified' intent the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris.* As Bishop's old treatise nicely put it, elaborating upon the usual formulation: '[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or, exactly, the meaning which the subject is authorized to understand the legislature intended.*' And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated" (emphasis in the original).

written." . . . . Similarly, *courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature*."[123]

The language of MCL 750.227b(1) and (2) are clear and unambiguous:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit *a felony, except a violation of section 223, section 227, 227a or 230,* is guilty of a felony, and shall be imprisoned for 2 years . . . . 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 (emphasis supplied).

Defendant here was not convicted for a violation of MCL 750.223, 227, 227a or 230, but for a violation of MCL 750.224f. By its express terms, MCL 750.227b does not exclude MCL 750.224f, as it is not one of the four exemptions; *all* other felonies are within the reach of the statute.

The Michigan Supreme Court—as well as this court—has spoken on this issue:

> This Court has previously discussed the history and legislative intent of the felony-firearm legislation. In *People v. Morton* . . . this Court said that "it [is] clear that *the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction*." In *People v. Sturgis,* . . . . this Court also concluded that "[t]he legislative history of the statute *also reflects a commitment to reach all but the excepted felonies*."

Further,

> In 1990, the Legislature amended the felony-firearm statute. *It added to the list of excepted felonies* § 223 (unlawful sale of a firearm) and § 230 (alteration of identifying marks on a firearm). 1990 P.A. 321. We find it significant that in this amendment the Legislature did not add the felony at question here today, § 535b, receiving or concealing stolen firearms or ammunition, to the list of excepted felonies. *Nor did it add any concluding catch-all phrase such as to trigger an ejusdem generis analysis*. Rather, the

[123] *Pohutski v. City of Allen Park*, 465 Mich. 675, 683 (2002) (emphasis supplied)

> Legislature *simply listed the four exceptions without using any language such as "or other similar statute" that would give a court an open door to expand the number of exceptions. The fact that such language was not included must be given meaning*. *That meaning is that the list of four exceptions is exclusive*. . . . We conclude that the Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute.[124]

Defendant would add to the statute language limiting its reach to the penal code as it existed at the time of the enactment of the statute, but the statute contains no such limitation, nor, as *Mitchell* states, no general "catch-all" phrase to give rise to some further analysis. The statute applies, as the Supreme Court has said, "whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." Defendant is not entitled to relief, here, and his convictions and sentence should be affirmed.

[124] *People v. Mitchell*, 456 Mich. 693, 697-698 (1998) (emphasis supplied); see also *People v Calloway*, 469 Mich. 448 (2003); *People v Dillard*, 246 Mich. App. 163 (2001)

V.

Absent authorizing statute, a consecutive sentence may not be imposed. Here, Defendant alleges that the judgment of sentence incorrectly shows his Felony-Firearm conviction runs consecutive to his Felon-in-Possession of a Firearm and Carrying-a-Concealed-Weapon convictions. If true, it is error since carrying a concealed weapon cannot serve as a predicate for felony-firearm; the consecutive sentences authorized by MCL 750.227b(2) is inapplicable. If true, Defendant is entitled to an amended Judgment of Sentence.

Standard of Review

Defendant did not challenge consecutive sentences for carrying a concealed weapon and felony-firearm in the lower court; the issue is unpreserved.[125] Even so, the record is unclear concerning the sentence Defendant received and Defendant did not provide a copy of the Judgment of Sentence with his brief. Accordingly, the People will use the qualifying conjunction "if" throughout this answer.

Because Defendant's issue is unpreserved, this court reviews unpreserved non-constitutional claim for plain error affecting Defendant's substantial rights.[126] In order to establish plain error, the defendant must demonstrate that "1) error must have occurred, 2) the error was plain, i.e., [it was] clear or obvious, 3) and the plain error affected substantial rights."[127] To show error affecting substantial rights, the Defendant must show prejudice which represented outcome determinative error.[128]

[125] See *People v. Metamora Water Serv. Inc.*, 276 Mich. App. 376, 382 (2007)
[126] *People v. Carines*, 460 Mich. 750, 763 (1999)
[127] *Id.*
[128] *Id.*

Discussion

Because the record is unclear and Defendant did not provide a copy of the judgment of sentence order from the sentencing court, if the lower court's imposed consecutive sentences for the Defendant's carrying a concealed weapon and felony-firearm convictions, this was error.

Carrying a concealed weapon, under MCL 750.227, cannot serve as the underlying predicate felony for felony-firearm.[129] Accordingly, as carrying a concealed weapon does not appear as a predicate in MCL 750.227b(1), the consecutive sentencing authorized by MCL 750.227b(2), does not apply. Absent authorizing law, a consecutive sentence may not be imposed.[130] If Defendant was subjected to consecutive sentences instead of concurrent sentences for felony-firearm and carrying-a-concealed-weapon convictions, the outcome of the event was affected.[131] If Defendant's recitation of the judgment of sentence is accurate, Defendant, therefore, is entitled relief; his sentence for felony-firearm should run prior and consecutive to the felon-in-possession sentence and the felon-in-possession and carrying-a-concealed-weapon sentences should run concurrent to one another.

Defendant, here, does not argue for resentencing,[132] only that the judgment of sentence be amended; if Defendant's categorization of the error in the judgment of sentence is accurate, in this, the People concur. If error occurred, this matter should be remanded to the sentencing court for an amendment of the judgment of sentence.

[129] MCL 750.227b(1); *People v. Clark*, 463 Mich. 459, 464 (2000); *People v. Cortez*, 206 Mich. App. 204, 207 (1994)
[130] *People v. Gonzalez*, 256 Mich. App. 212, 229 (2003)
[131] See *Carines*, 460 Mich. at 763
[132] See Defendant's Brief on Appeal, page 35

RELIEF

WHEREFORE, the above stated reasons, the People respectfully request this Court to deny Defendant's requested relief, affirm his convictions and sentences, and – if Defendant's assertion regarding the judgment is true – remand the matter for an amendment to Defendant's Judgment of Sentence reflecting that Defendant's felony-firearm sentence should run consecutive to the felon-in-possession sentence and concurrent to the carrying-a-concealed weapon sentences

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training, and Appeals

/s/ *Jonathan A. Mycek*
JONATHAN A. MYCEK (P74620)
Assistant Prosecuting Attorney
11th Floor, Frank Murphy Hall of Justice
1441 St. Antoine Street
Detroit, Michigan 48226-2302
Phone: (313) 224-7616

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