

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 16, 2014

v

MAURICE WILLIAMS,

No. 306499  
Wayne Circuit Court  
LC No. 11-004382-FC

Defendant-Appellant.

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Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of armed robbery, MCL 750.529. Defendant was acquitted of one count of being a felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to life in prison. Defendant appeals as of right. We affirm defendant's conviction, but because defendant's sentence fell outside the appropriate sentencing guidelines range and because the trial court did not provide a substantial and compelling reason to depart from the guidelines, we remand for resentencing.

I. AMENDMENT TO DEFENDANT'S HABITUAL OFFENDER NOTICE

Defendant first argues that the trial court improperly allowed the prosecutor to amend the information to raise defendant's habitual offender notice from second habitual offender to fourth habitual offender status.

MCL 769.13(1) provides the following:

In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under [MCL 769.10, MCL 769.11, or MCL 769.12], by filing a *written* notice of his or her intent to do so *within 21* days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense. [Emphasis added.]

The purpose of providing a defendant with prompt notice of his status as a habitual offender is to apprise the defendant of the potential consequences, should the defendant be convicted. *People v*

*Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982). The 21-day-notice rule of MCL 769.13(1) is a “bright-line test” that must be strictly applied. *People v Morales*, 240 Mich App 571, 575-676; 618 NW2d 10 (2000); *People v Ellis*, 224 Mich App 752, 755; 569 NW2d 917 (1997). Accordingly, the prosecution may not amend an information after the 21-day period provided in MCL 769.13(1) if it would act to increase a defendant’s potential sentence. *People v Siterlet*, 299 Mich App 180, 186; 829 NW2d 285 (2012), vac’d in part on other grounds \_\_\_ Mich \_\_\_ (Docket No. 146713, entered December 26, 2013); see also *People v Hornsby*, 251 Mich App 462, 472-473; 650 NW2d 700 (2002) (recognizing that a “difference exists between an amendment that attempts to impose more severe adverse consequences to a defendant and one that does not”).

Defendant was arraigned on May 12, 2011, on a felony information that notified him that he qualified as a second habitual offender, and on August 25, 2011, approximately three months after the arraignment, the trial court granted the prosecutor’s oral motion to amend the habitual offender notice to fourth habitual offender status. This amendment increased the upper range of defendant’s sentencing guidelines range from 225 months to 360 months. Therefore, this is precisely the type of untimely amendment that is not permitted. See, e.g., *Hornsby*, 251 Mich App at 472-473; *Ellis*, 224 Mich App at 756-757. As a result, on remand, defendant is to be sentenced as a second habitual offender, as he was noticed in the original felony information.

On appeal, the prosecution concedes that allowing the untimely, oral amendment was erroneous and, in fact, constituted “plain error.” But it argues that under a plain-error analysis, reversal is not warranted because the error did not seriously affect the integrity of the judicial system. The prosecution relies upon this Court’s recent case, *Siterlet*, 299 Mich App at 184, for the proposition that the plain-error doctrine applies when a defendant fails to object to an untimely amendment instead of applying the bright-line test as described above. However, our Supreme Court has vacated that portion of *Siterlet* “addressing plain error.” *Siterlet*, \_\_\_ Mich at \_\_\_ (Docket No. 146713, entered December 26, 2013). Regardless, even if that portion of *Siterlet* were not vacated, it would not affect our decision.

Our Supreme Court has stated that even if a defendant establishes the three requirements under the plain-error doctrine,<sup>1</sup> “[r]eversal is warranted only when the plain, forfeited error . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . .” *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks omitted).

In *Siterlet*, the defendant initially was arraigned on a felony information that notified him as qualifying for fourth-habitual offender status. *Siterlet*, 299 Mich App at 183. During plea negotiations eight months later, the prosecution amended the felony information to charge the defendant as a third habitual offender. *Id.* However, the defendant rejected the plea offers, and four days after trial, the prosecution filed a second amended felony information to increase his habitual offender status back to fourth-offense status. *Id.* at 183-184. The *Siterlet* Court

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<sup>1</sup> “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

concluded that even if the error were “plain” under the plain-error doctrine, the defendant was not entitled to resentencing because the error “did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* The Court stressed that

[t]he original felony information notified defendant that he qualified as a fourth-offense habitual offender. It also informed him that the prosecution would initially pursue the fourth-offense enhancement. Significantly, the record illustrates that defendant knew that the prosecution would pursue a fourth-offense enhancement after he rejected the prosecution’s plea offer. [*Id.* at 191.]

Thus, in essence, the Court determined that because the defendant initially and *timely* was notified of the prosecution’s intent to pursue a fourth-offense sentencing enhancement, the subsequent, untimely notification to reinstate the fourth-offender status did not seriously affect the fairness or integrity of the proceedings. But in the instant case, defendant was originally charged as a second habitual offender – not a fourth habitual offender. As a result, within that critical 21-day period following his arraignment, defendant did not know that the prosecution intended to pursue a fourth-offense enhancement. The first time that it appears that the prosecution announced that it was going to seek the habitual fourth-offender status was at a July 15, 2011, conference, which was two months after defendant’s arraignment. Thus, even if the plain-error doctrine applied to this issue, we would nonetheless conclude that the subsequent amendment of the felony information to reflect the habitual fourth-offender status on the first day of trial did seriously affect the fairness, integrity, or public reputation of the proceedings, thereby entitling defendant to relief.

We also note that the fact that defendant may have contributed to the error because of his many fabrications regarding his identity and age, which in turn made it difficult for the prosecutor to determine precisely how many prior felony convictions existed in defendant’s criminal record, is not relevant. This Court has established that the 21-day rule in MCL 769.13(1) is a bright-line rule that must be followed, even where a defendant used aliases, causing difficulty in ascertaining all of the defendant’s prior convictions. *Morales*, 240 Mich App at 574-576.

## II. DEFENDANT’S SENTENCE

Defendant’s second argument on appeal is that the trial court erred by departing from the sentencing guidelines without providing a substantial and compelling reason justifying that departure. Defendant also argues that his life sentence constitutes cruel or unusual punishment. We agree that the trial court erred when it departed from the sentencing guidelines without providing a substantial and compelling reason justifying its departure. As it is necessary to remand the case to correct this error, we decline to decide if defendant’s life sentence constitutes cruel or unusual punishment.

“[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.” *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). This Court reviews the imposition of a sentence for an abuse of discretion. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008).

When announcing defendant's life sentence, the trial court stated:

With guidelines of 108 to 360 [months], the defendant will be sentenced to parolable life as – under both the Armed Robbery statute and the Habitual 4th statute. The sentence is not a departure. The guidelines are 30 years to begin with in this particular case, so parolable life is appropriate with the criminal history the defendant has in this case with [sic] going back all the way to 1977.

The sentencing information report also states that the trial court's sentence was not a guidelines departure.

Defendant's total prior record variable score was 55 points, and his total offense variable score was 26 points. Under the appropriate sentencing guidelines grid, defendant's minimum sentence guidelines range was 108 to 180 months. MCL 777.62. By operation of MCL 777.21(3)(c), the high end of this range increased to 225 months because of defendant's status as a second habitual offender.<sup>2</sup> However, cell II-E does not authorize a life sentence, even under any habitual-offender status, unlike other cells in the same grid, see e.g., cell VI-E. Thus, defendant's appropriate minimum sentencing guidelines range as a second habitual offender was 108 to 225 months and did not include life imprisonment, and the trial court abused its discretion in failing to recognize that a life sentence fell outside the guidelines range. Although both MCL 750.529 and MCL 769.12(1)(b) authorize a *maximum* penalty of life in prison, those statutes do not affect the *minimum* sentencing guidelines. For a life sentence to be within the minimum sentencing guidelines, the applicable sentencing grid cell itself must authorize a life sentence. *People v Greaux*, 461 Mich 339, 345; 604 NW2d 327 (2000); see also *People v Houston*, 473 Mich 399, 410 n 22; 702 NW2d 530 (2005).

Thus, defendant's sentence of life in prison fell outside the sentencing guidelines and was, in fact, an upward departure. "Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). In addition, "[t]he trial court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed." *Id.* at 318. As the trial court did not recognize that its sentence was a departure, the trial court did not articulate any reason for any departure. See *Smith*, 482 Mich at 318; *People v Johnigan*, 265 Mich App 463, 469-470; 696 NW2d 724 (2005). "[A]n appellate court cannot conclude that a particular substantial and compelling reason for departure existed when the trial court failed to articulate that reason." *Smith*, 482 Mich at 304. As a result, this Court must remand for resentencing or rearticulation. *People v Babcock*, 469 Mich 247, 259; 666 NW2d 231 (2003).

Therefore, in accordance with our prior determination, on remand, defendant is to be resentenced as a second-offense habitual offender, and if the trial court wishes to impose a

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<sup>2</sup> As we determined in Part I of our opinion, defendant should have been sentenced as a second habitual offender. But because defendant's felony information was amended to reflect fourth-offender status at trial, the range that the trial court referenced was 108 to 360 months.

sentence that is a departure from the appropriate guidelines range, then it must articulate one or more substantial and compelling reasons justifying the departure. Because we remand for resentencing, it is not necessary to consider whether defendant's prior sentence amounts to cruel or unusual punishment.

### III. DEFENDANT'S STANDARD 4 BRIEF

#### A. SUFFICIENCY OF THE EVIDENCE

The first issue presented by defendant in his Standard 4 brief on appeal is the sufficiency of the evidence. Defendant argues that, because the jury acquitted him of two firearms charges, the evidence was insufficient to convict him of armed robbery.

Challenges to the sufficiency of the evidence are reviewed de novo to determine if any rational trier of fact could determine that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). All conflicts in the evidence are resolved in favor of the prosecution. *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 750.529 provides the following:

A person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

MCL 750.530 provides the elements of robbery:

A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

Defendant disputes only the "armed" element of armed robbery; he does not dispute that his conduct, at a minimum, violated MCL 750.530. Defendant's sole argument on appeal is that the evidence did not support a finding that he was in possession of a firearm at the time he robbed the victim. However, armed robbery may be accomplished if one possesses any article, even if that article is not actually a dangerous weapon, and uses that article in a way that leads a reasonable person to believe that it is a dangerous weapon. MCL 750.529. In addition, an armed robbery may occur in the absence of any article whatsoever, if a defendant represents that he is in possession of a dangerous weapon. MCL 750.529. Here, the victim testified that defendant showed the victim the butt of a gun in defendant's pocket before demanding money from the victim. This testimony could lead to a rational conclusion that defendant was in possession of a

dangerous weapon. The victim also testified that, as defendant was showing him the butt-end of the gun, defendant stated, “Don’t make me hurt you.” Even if the object was not actually a gun, by presenting the object and threatening to harm the victim, a juror could rationally conclude that defendant used the object in a manner that would cause someone to reasonably believe that defendant possessed a dangerous weapon. Defendant’s statement, coupled with his demonstration to the victim, could also be rationally understood as a representation that defendant was in possession of a dangerous weapon, regardless of whether the object in defendant’s pocket was actually a gun. As defendant does not dispute the other elements of armed robbery, sufficient evidence was presented to satisfy the elements of an armed robbery under MCL 750.529. The fact that the jury did not convict him of being a felon in possession of a firearm or felony-firearm is of no consequence. As discussed, those other crimes require an actual firearm, while armed robbery does not. Moreover, even if the verdicts could be considered “inconsistent,” juries are allowed to render inconsistent verdicts. *People v Russell*, 297 Mich App 707, 722-723; 825 NW2d 623 (2012).

## B. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues that the verdict was against the great weight of the evidence. Defendant asserts that, due to inconsistencies in the victim’s testimony, and for the reasons stated in his sufficiency of the evidence argument discussed above, the verdict was against the great weight of the evidence. Defendant moved for a new trial on this ground, but the trial court denied the motion.

A trial court’s ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). An abuse of discretion occurs when the trial court’s decision falls outside the range of principled outcomes. *Id.* When a defendant asserts that the verdict was against the great weight of the evidence, this Court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). A jury’s verdict is against the great weight of the evidence “only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *Lemmon*, 456 Mich at 627. “[U]nless it can be said that directly contradictory testimony was so far impeached that it ‘was deprived of all probative value or that the jury could not believe it,’ or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury’s determination.” *Id.* at 645-646 (citation omitted).

Defendant first relies on discrepancies regarding the victim’s description of the gun’s color and caliber. Although the victim initially testified at trial that the gun was brown, the victim later corrected himself, stating that the butt of the gun was actually black, when presented with his statement to police on cross-examination. Of course, whether the gun was brown or black is immaterial to whether defendant possessed a weapon. The victim’s description of the gun to police as a .22 or .25 caliber weapon does not conflict with his trial testimony that he did not see the entire gun. The victim explained that because the butt of the gun was small, he concluded that the weapon likewise was of a small caliber, likely a .22 or .25 caliber weapon. Further, even if there are any minor discrepancies in the victim’s testimony, “[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v Cameron*, 291 Mich App 599, 619; 806 NW2d 371 (2011) (quotation and

citation omitted). These minor and explainable discrepancies do not “preponderate[] heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *Lemmon*, 456 Mich at 627.

Defendant’s argument that the jury’s decision to acquit him of both firearm counts renders the verdict as one against the great weight of the evidence fails for the same reasons as stated in Part III(A). Contrary to defendant’s position, actual possession of a firearm is not a required element of armed robbery. MCL 750.529.

### C. COUNSEL’S FAILURE TO CALL WITNESSES

Defendant next argues that his trial counsel was ineffective by failure to call three witnesses. To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or for a *Ginther*<sup>3</sup> hearing in the trial court. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). “Failure to so move usually forecloses appellate review unless the appellate record contains sufficient detail to support a defendant’s claims; if so, review is limited to the record.” *Id.* at 74. As defendant did not move for a new trial on this basis or for a *Ginther* hearing, the issue is unpreserved, and review is limited to the record.

“To establish ineffective assistance of counsel, a defendant must show: (1) that the attorney’s performance was not based on strategic decisions, but was objectively unreasonable in light of prevailing professional norms; and (2) that, but for the attorney’s error, a different outcome was reasonably probable.” *People v Terrell*, \_\_\_ Mich \_\_\_; 837 NW2d 277 (Docket No. 146850, entered October 2, 2013). “A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel’s tactics constituted sound trial strategy.” *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Further, defendant must establish the factual predicate for his claim. *Hoag*, 460 Mich at 6.

Because there is nothing on the record to substantiate how defendant’s proposed witnesses would testify, it is impossible for defendant to establish the factual predicate for his claim. Consequently, defendant cannot demonstrate how the outcome of the case would have been different had his counsel called these witnesses, and he is not entitled to any relief.

### D. IDENTIFICATION EVIDENCE

The next issue raised in defendant’s Standard 4 brief on appeal relates to the trial court’s decision, in a suppression hearing, to admit evidence of a photographic lineup conducted while defendant was in custody. Defendant argues that, because he was in custody, the use of a photographic lineup was improper.

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

“A trial court’s determination in a suppression hearing regarding the admission of identification evidence will generally not be reversed unless clearly erroneous.” *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). “Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made.” *Id.* “Issues of law relevant to a motion to suppress are reviewed de novo.” *Id.*

Defendant correctly asserts that, when a defendant is in custody, a corporeal lineup must be utilized, unless an exceptional circumstance justifying deviation from this rule is present. *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993). On April 15, 2010, Investigator Thomas Boyle conducted a photographic lineup, in which the victim identified defendant as the perpetrator, even though defendant was in police custody at the time. Thus, unless an exceptional circumstance existed, this was erroneous.

When a defendant is in custody, a photographic lineup may be used if “[t]here are [an] insufficient number of persons available with defendant’s physical characteristics.” *People v Anderson*, 389 Mich 155, 187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004); see also *People v Cain*, 299 Mich App 27, 47-48; 829 NW2d 37 (2012), vacated in part on other grounds \_\_\_ Mich \_\_\_ (Docket No. 146662, entered October 23, 2013). Boyle testified that a live lineup was not performed because he could not find enough individuals of a similar age and physical makeup to defendant in the jail population. Thus, a photographic lineup was performed to ensure that a fair lineup would be conducted. On the basis of Boyle’s testimony, the trial court determined that the photographic lineup was justified, as the jail population did not include enough individuals of a similar age and appearance to defendant to create a fair corporeal lineup.

Defendant argues that Boyle should have looked to other facilities to find enough individuals to create a fair corporeal lineup. But “[t]here is no authority that requires the police to make endless efforts to attempt to arrange a lineup.” *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). Here, Boyle testified that, as a general practice, he does call other precincts to look for additional persons to complete a fair corporeal lineup. Boyle was able to find only two possible candidates in the Detroit Police Department’s jails. In addition, Boyle’s efforts were hampered by defendant’s use of a false birth date. Boyle’s testimony shows that a sufficient effort was carried out in an attempt to create a fair corporeal lineup. As Boyle’s testimony demonstrated that an insufficient number of individuals were available to conduct a fair corporeal lineup, the trial court did not clearly err when it found that the photographic lineup was admissible, even though it was conducted while defendant was in custody.

#### E. SUGGESTIVENESS OF LINEUP

Defendant next argues that the photographic lineup was unduly suggestive and that his attorney, who was present at the lineup, was ineffective for failing to object to these suggestive procedures.

Although defendant moved to suppress evidence of the photographic lineup in the trial court, defendant did not argue the basis he now asserts, that being that the lineup was unduly suggestive. Thus, the issue of whether the photographic lineup was unduly suggestive is not preserved for appeal and is subject to plain error review. *Carines*, 460 Mich at 763-764. And, as

defendant did not move for a new trial on this basis or for a *Ginther* hearing, the issue of counsel's effectiveness is unpreserved, and review is limited to the record. *Armendarez*, 188 Mich App at 73-74.

“In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” *Kurylczyk*, 443 Mich at 302. “A suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification.” *Id.* at 306. “The relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification.” *Id.* Generally, a photo array is not suggestive if it contains some photographs that are fairly representative of the defendant's physical features, and thus, are sufficient to reasonably test the identification. *Id.* at 304.

Defendant's arguments regarding the lineup's supposed suggestive nature lack merit. Although defendant correctly states that the attorney present did not sign or initial the lineup documents, defendant cites no authority requiring an attorney to do so. A review of the lineup documents shows that the victim did initial his identification of defendant, contrary to defendant's assertion. At trial, the victim, after identifying his own handwriting, stated that he wrote “[t]hat's the guy that did it” on the same form. Contrary to defendant's assertion, the age of the other individuals depicted in the lineup reasonably matches his own. The last page of the array provides birthdates for each individual depicted. The birth years of these individuals ranges from 1957 to 1964. Although the document lists defendant's birth year as 1969, the year provided by defendant himself, defendant's true birth year is 1961—squarely within the range of the other individuals depicted. Finally, defendant's photograph does not appear to have been highlighted in comparison to other photographs in the array. In sum, the photographs were fairly representative of defendant's physical features, and we perceive no plain error in the admission of the photo array identification.

Likewise, defendant cannot show that he received ineffective assistance of counsel at the photographic lineup. As discussed above, there was nothing unduly suggestive about the lineup. Further, as previously discussed, use of a photographic lineup, as opposed to a corporeal lineup, was warranted by the circumstances. As a result, any objections to the lineup would have been futile, and counsel is not ineffective for failing to raise futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

## F. JURY COERCION

Defendant next argues that the trial court's instructions coerced the jury into rendering a guilty verdict. Generally, “[c]laims 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.” *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989); see also *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). However, because this issue was not raised at the trial court, we review it for plain error affecting defendant's substantial rights. *Carines*, 460 Mich 750, 763-764.

During its deliberations, the jury sent three notes to the trial court. One of the notes contained a tabulation of the jury's current vote. In response to this note, the trial court stated:

Now, I specifically told you yesterday not to inform the Court as to how your voting stands until you reach a verdict, all right? And the-obviously you didn't follow that instruction because you sent the note out telling us what your vote was, all right? So there's a little bit of concern by the attorneys that you're not following the instructions that I've given you during your deliberations, all right?

And so I'm going to caution you again that you're to follow the instruction and to pay attention to the instructions that I gave you. And if you're sending stuff out asking-you know, telling me what your voting is, then what happens is obviously you either didn't hear the instruction or you're not following it, so I'm cautioning you to follow my instructions.

\* \* \*

As you discuss the case, you should not let anyone, even me, know how your voting stands. Therefore, until you return with a unanimous verdict, do not reveal this to anyone outside the jury room. All right. Obviously you have violated that particular rule and instruction.

However, you're to continue with your deliberations in this particular matter, and when you do reach a unanimous verdict, you're to write us a note and let us know what that verdict is.

\* \* \*

Make sure that your deliberations are thoughtful, according to the law and based upon the evidence in this case. And you're to continue your deliberations at this time consistent with my instructions.

A trial court's instruction regarding the jury's duty to reach a unanimous verdict warrants reversal only if that instruction has an undue tendency of coercion. *People v Pollick*, 448 Mich 376, 385-386; 531 NW2d 159 (1995). Here, the trial court's comments had no such tendency. The trial court's comments were directed at the jury's failure to follow its instruction not to reveal its vote count to anyone, including the court, until a unanimous verdict was reached. The subject of a unanimous verdict was discussed only to inform the jury of at what point it was to reveal its vote. There is no evidence of coercion in the trial court's language. We also note that defendant's presumption that the disclosed vote count was in relation to his armed robbery count, is not supported by anything in the record. The vote tally easily could have been referring to the felony-firearm count or the felon in possession of a firearm count, of which defendant ultimately was acquitted. Consequently, defendant cannot demonstrate that any plain error occurred.

Because we have determined that the trial court's instruction was proper, any objection would have been futile. Thus, defendant's claim that defense counsel was ineffective for failing to object necessarily fails. See *Ericksen*, 288 Mich App at 201.

## G. PROVIDING EVIDENCE TO THE JURY BEFORE DELIBERATIONS

Defendant next argues that, by allowing the jury to retain an exhibit before being excused for deliberations, the trial court committed an error warranting reversal of his conviction. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Near the close of proofs, the prosecutor read into evidence a stipulation stating that, for purposes of the charge of felon in possession of a firearm, defendant was a convicted felon who was not entitled to possess a firearm. The trial court then took a recess, during which it allowed the jury to retain the written stipulation. The jury returned the document after the recess ended, and was later excused for deliberations.

At the time of defendant's trial, MCR 6.414(I) allowed the trial court to "permit the jury, on retiring to deliberate, to take into the jury room . . . any exhibits and writings admitted into evidence." Thus, because the court rule only allows for exhibits to go into the jury room upon the jury "retiring to deliberate," the trial court erred in allowing the jury to take the document before that time. However, defendant cannot establish any prejudice from this technical, minor error. The exhibit related only to the charge of felon in possession of a firearm. Defendant was acquitted of this charge. The record does not indicate, and defendant does not demonstrate, any conceivable way in which this error affected the outcome of the proceedings. As the error was not outcome determinative, reversal is not warranted. *Id.* at 763. Likewise, defendant's claim that defense counsel was ineffective for failing to object cannot prevail. Because the error had no prejudicial value, any objection it would not have affected the outcome of the trial.

## IV. CONCLUSION

We affirm defendant's conviction. But because defendant's sentence constituted an upward departure from the appropriate sentencing guidelines range as a second habitual offender and because the trial court did not articulate a substantial and compelling reason to justify any departure, we remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood