

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 22, 2014

v

CRAIG ALAN CLARK,
Defendant-Appellant.

No. 311946
Wayne Circuit Court
LC No. 11-004627-FH

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his convictions by a jury of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, domestic violence, MCL 750.81(2), and reckless use of a firearm, MCL 752.863a. He was sentenced to two years' imprisonment for the felony-firearm conviction and 14 days in jail for his misdemeanor convictions. We affirm.

Defendant first argues that the trial court erred when it denied his motion for a directed verdict on the felonious assault charge. Defendant contends that because the victim did not believe his gun was loaded, the elements for felonious assault were not met. Further, defendant argues that because the felonious assault charge should have been dismissed, the felony-firearm charge based upon felonious assault also should have been dismissed. We disagree.

“In reviewing a trial court’s decision regarding a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt.” *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

The elements of a felonious assault are “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013) (citation omitted). An assault occurs when an unlawful act places another in reasonable apprehension of receiving an immediate battery. *Id.* But “a particular victim’s subjective experience of fear” is not an element of the assault; rather, the defendant’s “intent to scare or intimidate the victim and whether an ordinary person facing the same conduct would reasonably perceive a legitimate threat of harmful contact” is the pertinent factor in the assault. *People v Davis*, 277 Mich App 676, 687; 747 NW2d 555 (2008), vacated in part on other grounds 482 Mich 978 (2008).

Further, a defendant is guilty of felony-firearm “whenever a person carries or has a firearm in his possession when committing or attempting to commit a felony.” *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004).

Defendant was ultimately not convicted of felonious assault; the jury convicted him of the lesser included misdemeanor of domestic violence. Defendant apparently argues that the felony-firearm conviction should be vacated because it was based on the felonious assault charge (and the felonious assault charge should have been dismissed via directed verdict). But taking the evidence in the light most favorable to the prosecution, although the jury did not do so, a rational jury could have found beyond a reasonable doubt defendant guilty of felonious assault. Therefore, the trial court did not err in denying defendant’s motions for a directed verdict.

The evidence supported finding the first element of felonious assault. Defendant retrieved a gun from his headboard, approached the victim waving the gun and pointing it at her as she retreated backwards, cocked the gun, and stated that he was going to shoot her and then himself. Though the victim stated that she did not believe the gun was loaded, the relevant fact is that defendant threatened to shoot her with the gun and cocked it; such an act is consistent with intent to scare or intimidate the victim. Further, under such circumstances, an ordinary person would reasonably perceive a legitimate threat of harmful contact. Taking the evidence in the light most favorable to the prosecution, a reasonable jury could have found beyond a reasonable doubt that defendant committed an assault.

Additionally, it is clear from the record that defendant brandished a pistol, waved it, and pointed it at the victim as he was threatening her. Accordingly, a reasonable jury could have found beyond a reasonable doubt that the second element of felonious assault was met. Finally, regarding the third element of felonious assault, we agree that defendant’s actions and words showed he intended to place the victim in reasonable apprehension of an immediate battery. As noted, defendant pointed his pistol at the victim, walked toward her, cocked the weapon, and told her he was going to shoot her. Taking the evidence in the light most favorable to the prosecution, a reasonable jury could have found beyond a reasonable doubt that the third element of felonious assault was met; consequently, the trial court properly denied the motion for a directed verdict. Accordingly, neither the felonious assault charge nor the felony-firearm charge should have been dismissed.

Defendant next argues that the trial court erred when it gave the jury inconsistent instructions, then failed to properly clarify those instructions before the jury deliberated. Defendant contends the trial court erred by instructing the jury that it could base a conviction for felony-firearm on either the felonious assault charge or the discharge of a firearm in or at a building charge. Further, defendant argues that the court’s re-reading of the instructions did not sufficiently clarify that the jury could not consider the discharge of a firearm in or at a building

charge in relation to felony-firearm. Defendant also argues that the jury's inconsistent verdicts are clear evidence of the jury's confusion from the jury instructions. We disagree.

Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant who has waived some right may not then seek appellate review based on an alleged error relating to that right because waiver extinguishes any error. *Id.* Counsel's affirmative expression of satisfaction with a court's jury instructions waives any error. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Here, after the trial court reinstructed the jury on the felony-firearm charge, defense counsel affirmatively stated that the rereading was satisfactory. Accordingly, this issue is waived. *Id.*

Even if the issue is not waived, defendant's argument does not warrant relief. An unpreserved claim of error is analyzed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "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." *Id.* at 763. To show that the plain error affected substantial rights, a defendant must demonstrate prejudice. *Id.* Specifically, a defendant must show that the plain error affected the outcome of the lower court proceedings. *Id.* Further, the defendant bears the burden of persuasion regarding the showing of prejudice. *Id.* Ultimately, reversal is only appropriate where the plain error results "in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.*

Michigan Courts employ a presumption that jurors follow the instructions that trial courts give them. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, it is settled that a jury may convict a defendant of felony-firearm while not convicting that defendant of any other felony. *People v Lewis*, 415 Mich 443; 453-454; 330 NW2d 16 (1982). A jury may convict a defendant of felony-firearm based on either an underlying felony charge of felonious assault, *People v Parker*, 133 Mich App 358, 364; 349 NW2d 514 (1984), or discharge of a weapon in or at a building, *People v Guiles*, 199 Mich App 54, 60-61; 500 NW2d 757 (1993).

The trial court's final jury instruction regarding felony-firearm provided:

[A]s to Count II, I am going to reread the instruction as to Weapons Felony Firearm. In order to prove this offense, the Prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant committed or attempted to commit the Felony in Count I which has been defined for you. That is Assault With A Dangerous Weapon Felonious Assault. It is not necessary that the Defendant, however, be convicted of that count.

Second, that at the time the Defendant committed or attempted to commit that crime, he knowingly carried or possessed the firearm. It does not matter whether or not the gun was loaded. A pistol is a firearm.

Contrary to defendant's arguments on appeal, the court clearly instructed the jury that it could only consider felonious assault as the underlying felony for a felony-firearm conviction. Though a felony-firearm conviction may be based on a charge of discharge of a weapon in or at a building, *Guiles*, 199 Mich App at 60-61, the felony information in this case listed felonious assault as the charge upon which the felony-firearm was based. Accordingly, the trial court re-read the instruction on felony-firearm to remove any reference to the discharge of a weapon in or at a building charge. Further, defendant's argument that the felony-firearm conviction is inconsistent with the defendant's conviction for the lesser included misdemeanor of domestic violence is foreclosed by *Lewis*. Although defendant argues that the jury was confused, we see no evidence in the record to demonstrate that the jury suffered from any confusion. A conviction on felony-firearm was permissible even though the jury chose not to convict defendant on the underlying crime felonious assault. Considering juries are presumed to follow their instructions and no errors are apparent on the record in the court's ultimate jury instructions, we must conclude that defendant has failed to demonstrate that plain error affected his substantial rights.

Defendant next argues that he is entitled to a new trial because the trial court improperly prevented his friends and family from attending voir dire. Specifically, defendant alleges the Wayne Circuit Court has adopted a policy of refusing to accommodate the public during voir dire proceedings, which constitutes structural error in this case. We disagree.

"[T]he failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). Here, defendant failed to object to the court's statements regarding public access to the voir dire proceedings. Accordingly, the issue is unpreserved. This Court reviews unpreserved, constitutional claims of error for plain error. *Carines*, 460 Mich at 752-753.

The United States and Michigan constitutions guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *Vaughn*, 491 Mich at 650. It is settled that "that the Sixth Amendment right to a public trial extends to voir dire." *Id.* at 665. But a court may limit public attendance at voir dire proceedings if narrowly tailored to serve an overriding interest. *Id.* at 653, 665; *In re Closure of Jury Voir Dire*, 204 Mich App 592, 595-596; 516 NW2d 514 (1994). Further, if plain error regarding the Sixth Amendment right to a public trial occurs, prejudice to the defendant is presumed. *Vaughn*, 491 Mich at 665-666.

Applying the three-prong plain error test to this case, we find that defendant has failed to demonstrate the trial court committed any error. First, defendant has failed to point to any evidence demonstrating the trial court erred in any way relating to his right to public voir dire. At the outset of voir dire proceedings, the trial court stated, "family, representatives or friends for the complaining witness and/or the defense can stay in during the jury selection." Defense counsel replied that defendant's father wished to be present for voir dire. No further objection or conversation was had regarding public attendance of voir dire. Before a second round of voir dire, the trial court stated, "We can have the representatives for the Defendant and for the Complaining Witness, if someone stays for them, we need you to sit on the short bench there." Again, there was no further objection or discussion regarding members of the public attending voir dire. So, although defendant argues "it is clear that it is the judicial policy of the criminal

bench in Wayne County Circuit Court to close voir dire and other proceedings to the public,” there is no support for defendant’s assertion in the record. The trial court explicitly stated that members of the public were permitted to attend voir dire, and they were directed to sit in a different area than the jury pool. The court directed any members of the public in attendance to sit on a specific bench in the courtroom, but any implied limitation on public access was narrowly tailored because the bench was long enough to accommodate all who wished to attend. Defendant has not shown that the courtroom was closed at all during voir dire; accordingly, defendant has not demonstrated the trial court committed plain error regarding this issue.

Defendant next argues that he received ineffective assistance of counsel when his trial counsel failed to object to closure of the courtroom for voir dire proceedings and for failing to inform defendant of the prosecution’s plea offer. Specifically, defendant argues that counsel’s failure to inform him of the prosecution’s plea offer was prejudicial because if defendant had been informed, he would have accepted the offer. We disagree.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The lower court’s findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

Criminal defendants have a right under the United States and Michigan constitutions to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *Vaughn*, 491 Mich at 669. To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel’s performance fell below an object standard of reasonableness, and (2) but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A defendant must overcome the strong presumption that the claimed deficiencies were part of a sound trial strategy. *Id.* at 52. This Court will not substitute its judgment for that of defense counsel on matters of strategy nor use the benefit of hindsight to assess the competence of defense counsel. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Further, depending on the circumstances, counsel’s decision not to pursue objections at trial may be sound trial strategy. *Id.* at 242.

As noted, defendant’s contention that the trial court closed the courtroom before voir dire is not supported by the record. Because there was no closure of the courtroom apparent on the record, there was nothing for counsel to object to.

Defendant’s argument that counsel failed to inform him of the prosecution’s plea offer are similarly without support in the record. Defendant states in his brief on appeal that the prosecution offered, in exchange for a guilty plea, one year in jail for felony-firearm and the dismissal of the remaining costs. But there is no evidence of this offer whatsoever in the record, nor does defendant provide a citation to where such evidence might be found. The prosecution does state that it made multiple plea offers to defendant before trial, but it denies it ever made the specific offer mentioned by defendant on appeal. While the right to effective assistance of counsel extends to the plea-bargaining process, *Lafler v Cooper*, 566 US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012), a defendant has no right to be offered a plea bargain. *Id.*, 132 S Ct 1387. Furthermore, a “defendant has the burden of establishing the factual predicate for his

claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because defendant has not met his burden of demonstrating the prosecution offered the plea bargain, he cannot show counsel was ineffective in failing to inform him of it.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder