

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 15, 2015

v

SHAWN NICKOL WILEY,
Defendant-Appellant.

No. 322813
Wayne Circuit Court
LC No. 13-005868-FH

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ Defendant was sentenced to the mandatory two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecutor’s conduct in this trial denied her of her right to a fair trial. Specifically, defendant contends that the prosecutor engaged in repeated behavior that was designed to evoke the sympathy of the jury toward the victim regarding her medical condition. We disagree.

To preserve a claim that the prosecutor acted improperly during trial, a defendant is required to advance a contemporaneous objection and seek a curative instruction from the trial court. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant concedes in her brief on appeal that defense counsel did not object to the prosecutor’s conduct in the trial court. Therefore, the issue is unpreserved. See *id.*

Where defense counsel did not object to the prosecutor’s conduct in the trial court, any error is unpreserved and is reviewed for plain error affecting the defendant’s substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). “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*

¹ Defendant was acquitted of felonious assault, MCL 750.82.

Carines, 460 Mich 750, 763; 597 NW2d 130 (1999). With regard to the third element, the defendant must show prejudice. *Id.*

Finally, once a defendant satisfies these three requirements, an appellate court must 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 an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id.* (citation and quotation marks omitted; alteration in *Carines*).]

“ ‘Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect.’ ” *Bennett*, 290 Mich App at 476, quoting *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003) (alteration in *Bennett*).

To assert a successful claim that a prosecutor acted improperly, a defendant must make a showing that she was denied a fair and impartial trial. *People v Cooper*, 309 Mich App 74, 88; 867 NW2d 452 (2015). Prosecutors are given significant latitude with their arguments and conduct at trial. *Id.* at 90. Prosecutors are not permitted to appeal to the jury's sympathy for the victim. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

In support of her claim, defendant points to several instances during the prosecutor's questioning of the victim that she alleges were intended to evoke the sympathy of the jury. Defendant contends that this conduct was particularly prejudicial because the trial involved a credibility contest between defendant and the victim concerning their version of the events on the day in question. The conduct defendant complains of involves questioning by the prosecutor when the victim first took the stand concerning whether something happened to the victim that caused her speech to be slow, to which the victim responded that she had suffered a stroke on November 13, 2013. Defendant also refers to a portion of the record in which the prosecutor stated, “Yes, we can wait,” after the trial court stated, “Take your time, ma'am.” Defendant also refers to the prosecutor's request to the trial court to ask the victim some leading questions because of the victim's health condition. In response to this, defense counsel expressed that he had no objection to the prosecutor leading the victim with regard to “preliminary matters.” Defendant also cites a portion of the record in which the prosecutor asked the victim if she needed some water. In support of her argument that such conduct improperly influenced the jury, defendant points to a question from the jury to the victim, in which the jury asked if the stroke was caused by the incident. The question was not presented to the victim to be answered.

Citing *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), defendant correctly notes that it is considered improper argument for a prosecutor to appeal to the sympathy of the jury. Defendant also cites *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988), and *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), in support of her argument that the prosecutor's conduct deprived her of a fair trial. We have reviewed both *Dalessandro* and *Wise* and find both cases clearly distinguishable. In *Dalessandro*, the prosecutor made repeated blatant appeals of sympathy for the young victim in that case, and this Court found the prosecutor's repeated references to “ ‘the poor innocent baby’ ” to be an improper injection of sympathy into the case. *Dalessandro*, 165 Mich App at 581. In *Wise*, this Court also found an improper appeal to the jury's sympathy where the prosecutor, during what is

referred to in that opinion as the first closing statement, pointed out that a victim of sexual assault had been at home in her bed with her husband and further asked the jury, what, if anything, she had done wrong. *Wise*, 134 Mich App at 104.

We conclude that the prosecutor's conduct reflected nothing more than a concern about the victim's health condition and general welfare during her testimony, and there is nothing in the record to reflect an overt and blatant appeal to the jury's sympathy such as was seen in *Dalessandro* and *Wise*. Even if we were to accept defendant's contention that the prosecutor's behavior was improper, the curative instruction from the trial court alleviated any prejudicial effect, and, therefore, reversal is not warranted. See *Bennett*, 290 Mich App at 476. The trial court instructed the jury during its final instructions that the comments, statements, and arguments of the lawyers are not evidence, and that the jury could not allow sympathy or prejudice to influence its decision. "[J]urors are presumed to follow their instructions." *Unger*, 278 Mich App at 237. Therefore, any prejudice to defendant was alleviated. See *Bennett*, 290 Mich App at 476. In sum, defendant has not demonstrated that the prosecutor's conduct during trial amounted to plain error affecting her substantial rights. See *Carines*, 460 Mich at 763.

Defendant next asserts that by failing to object to the prosecutor's improper comments at trial, defense counsel was ineffective. We disagree.

To properly preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). If a defendant does not do so, this Court's review is limited to mistakes apparent from the record. *Id.* at 410. Because defendant did not move for a new trial or an evidentiary hearing on the basis of ineffective assistance of counsel, this issue is not preserved, and our review is limited to mistakes apparent on the record. See *id.*

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Petri*, 279 Mich App at 410. We review a trial court's findings of fact for clear error and the constitutional issues de novo. *Id.*

To prevail on a claim of ineffective assistance of counsel, a defendant must first establish that her defense counsel's conduct in the trial court did not meet an objective standard of reasonableness. *People v Lopez*, 305 Mich App 686, 694; 854 NW2d 205 (2014). A defendant also bears the onus of showing that she was prejudiced, specifically that "but for" her defense counsel's errors, there exists a reasonable probability that the result of her trial would have been different. *Id.* Further, a defendant bears a significant burden of rebutting the presumption that defense counsel acted in conformance with sound trial strategy. See *Unger*, 278 Mich App at 242. This Court will not interfere with defense counsel's judgment regarding matters of trial strategy or second-guess defense counsel's decisions with the benefit of hindsight. *Id.* at 242-243. Finally, defense counsel is not required to raise a meritless objection. *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014).

Defense counsel did not render ineffective assistance when he declined to raise objections to the prosecutor's treatment of the victim. As discussed above, the prosecutor did not improperly attempt to evoke the sympathy of the jury toward the victim. Therefore, defense

counsel did not render ineffective assistance since any objection would have been meritless. See *Chelmicki*, 305 Mich App at 69.

Defendant next argues that she was deprived of her right to a fair trial before a neutral and detached magistrate. Defendant complains that the trial court's comments and conduct regarding (1) the victim's health condition and (2) the need for the jury to deliberate and decide its verdict in a swift manner pierced the veil of judicial impartiality and undermined defendant's right to a fair trial. We disagree.

Defendant did not raise timely objections to the trial court's conduct and comments. Where a defendant failed to raise a claim of judicial bias in the trial court, the issue is not properly preserved for this Court's review. See *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Therefore, the issue is unpreserved. See *id.*

We review an unpreserved claim of judicial bias for plain error affecting a defendant's substantial rights. *Id.* Judicial bias is a structural error. *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000). A structural error automatically prejudices the defendant. *People v Vaughn*, 491 Mich 642, 666; 821 NW2d 288 (2012). However, the error must have “ ‘resulted in the conviction of an actually innocent defendant’ ” or seriously affected the fairness, integrity, and public reputation of the trial proceedings. *Id.* at 666-667 (citation omitted). The issue is examined on a case-by-case basis and on the basis of the facts of each case. *People v Cain*, 498 Mich 108, 121; 869 NW2d 829 (2015).

In determining whether a trial judge's comments and conduct rise to the level of judicial impartiality, we consider whether the “trial judge's conduct pierces the veil of judicial impartiality.” *People v Stevens*, 498 Mich 162, 170; 869 NW2d 233 (2015). “A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party.” *Id.* at 171. This is a fact-specific inquiry, and we consider the totality of the circumstances to determine the issue. *Id.* at 171-172. A single instance of misconduct generally does not create an appearance that the trial judge is biased, unless the instance is “so egregious that it pierces the veil of impartiality.” *Id.* at 171.

In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. [*Id.* at 172.]

Having closely reviewed the record, we simply do not agree with defendant's assertions that the trial judge's benign expressions of empathy and concern for a witness testifying in court rose to such a level that they unduly influenced the jury and deprived defendant of her right to a fair trial. See *Stevens*, 498 Mich at 170-172. Instead, the trial judge merely inquired into whether the victim had access to water and informed the victim that she could take her time and take a breath. Before jury questions were presented to the victim, the trial judge empathized with

the victim having to climb steps since the trial judge had a bad knee. The trial judge said to the victim, “I can’t imagine what you’re going through.” However, the comment was made outside of the presence of the jury. Therefore, defendant fails to meet her burden to show that the trial court was biased. See *id.*

Additionally, defendant argues that the trial court “created an atmosphere where everyone felt that the trial had to be completed within a prescribed period of time, mainly three days.” In support of this claim, defendant contends that the trial court essentially pressured the jury to deliberate within a specific time. This is a mischaracterization of the record, which instead reflects that the trial court went to great lengths to accommodate both the prosecutor’s preferences and defense counsel’s preferences regarding the timing of jury deliberation, as well as the jury’s schedule. Our review of the record also confirms that the jury was instructed in a fashion that encouraged careful, thoughtful, and proper deliberations. In conclusion, we reject defendant’s claim that the trial court’s conduct and comments concerning the timing of jury deliberations amounted to judicial bias, as this claim is wholly devoid of legal and factual merit. Where the trial court’s conduct and comments were not of such a nature to unduly influence the jury and deny defendant of her right to a fair trial, her claims of judicial bias are without merit. See *Stevens*, 498 Mich at 170-172.

Defendant next argues that the trial court erred in denying her motion for a new trial or a directed verdict of acquittal. Defendant contends that the fact that the jury rendered an inconsistent verdict was the result of juror confusion and a misunderstanding and misapplication of the law. According to defendant, the jury was also subjected to inappropriate extrinsic influences. We disagree.

“For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant filed a motion seeking a new trial or a directed verdict of acquittal in the trial court, and the trial court decided this motion during the sentencing. It must be noted that defendant argued the issue of the inconsistent verdict below, and the trial court addressed and decided this issue, but defendant did not advance the argument concerning extrinsic influence of the jury that she argues in this Court. Accordingly, this issue was not properly preserved for appellate review. See *id.* In sum, the issue whether the jury impermissibly rendered an inconsistent verdict is preserved, while the issue concerning extraneous influences on the jury deliberations is not. See *id.*

We review for an abuse of discretion a trial court’s decision in response to a motion seeking a new trial. *People v Terrell*, 289 Mich App 553, 558; 797 NW2d 684 (2010). “An abuse of discretion occurs when the trial court’s decision is outside the range of principled outcomes.” *Id.* at 559. Relevant underlying questions of law are reviewed de novo, and factual findings are reviewed for clear error. *Id.* A trial court’s decision concerning a defendant’s motion for a directed verdict is reviewed de novo. *People v Martin*, 271 Mich App 280, 319; 721 NW2d 815 (2006), *aff’d* 482 Mich 851 (2008). In reviewing a decision regarding a motion for a directed verdict, we determine “whether the prosecutor’s evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.* at 319-320. To the extent defendant raises the unpreserved issue whether the jury’s deliberations were subject to impermissible

extraneous influences, this presents a constitutional issue. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). This Court reviews unpreserved constitutional issues for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763.

We will first address defendant's contention that the trial court should have granted her motion for a new trial because the jury rendered an inconsistent verdict by finding defendant guilty of felony-firearm but acquitting her of felonious assault. Defendant moved for a new trial pursuant to MCR 6.431(B), which provides as follows:

On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

In denying the motion for a new trial on the basis of an inconsistent verdict, the trial court looked to Michigan Supreme Court precedent for the propositions that an inconsistent verdict is permissible and that a defendant may be found guilty of felony-firearm even when not convicted of the underlying felony. The trial court's decision was well-reasoned and grounded in the law. For example, in *People v Vaughn*, 409 Mich 463, 464, 466; 295 NW2d 354 (1980), the Michigan Supreme Court held that reversal of a defendant's conviction is not warranted when the jury rendered inconsistent verdicts. Subsequently, in *People v Lewis*, 415 Mich 443, 453-455; 330 NW2d 16 (1982), our Supreme Court recognized that the felony-firearm statute requires only the commission or the attempt to commit an underlying felony as a necessary element of the offense of felony-firearm, and "it does not make conviction of a felony or of an attempt to commit a felony an element of the offense." Subsequent case law is in line with the holding in *Lewis*. See *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983) (recognizing that a fact-finder need not convict a defendant of the underlying felony in order to sustain a conviction for felony-firearm, and a conviction for felony-firearm "may stand alone").

Finally, to the extent that defendant asserts that a letter from the jury foreperson to the trial court evidences that the jury was subjected to improper extraneous influences and that the jury reached its verdict as a result of confusion and a misunderstanding and misapplication of the law, the record does not support this unpreserved assertion. Defendant relies on *Budzyn*, in which the Michigan Supreme Court held that in order to establish a claim of extrinsic influence warranting reversal, the defendant must show "that the jury was exposed to extraneous influences," and "that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Budzyn*, 456 Mich at 88-89 (citations omitted). This Court has recognized that extrinsic influences are limited to matters that are clearly outside the trial proceedings and the jury's deliberative process. See *People v Fletcher*, 260 Mich App 531, 540-541; 679 NW2d 127 (2004). Indeed, the *Fletcher* Court stated that "[a]ny conduct, even if misguided, that is inherent in the deliberative process is not subject to challenge or review." *Id.* at 540.

In the instant matter, defendant refers to the jury foreperson's letter to the trial court, in which the jury foreperson stated that the jury found defendant guilty of felony-firearm because of how the law is drafted. The jury foreperson went on to observe that "[t]hough many jurors felt

that they didn't agree with the law, I reminded them that it is not our job to legislate from the jury room and we have to base our verdict on the evidence." Defendant argues that this is evidence of jury confusion, misunderstanding, and misapplication of the law. She further argues that the jury foreperson's admonition to the jury constituted an extraneous influence. As a preliminary matter, our review of the record does not yield any evidence of juror confusion, misunderstanding, or misapplication of the law. Indeed, the jury foreperson's letter reflected only that the jury may have disagreed with the law.

We reject defendant's argument that the jury foreperson's conduct in admonishing the other jurors to follow the law as detailed in the letter amounted to an extraneous influence. This Court has observed that the jury's deliberative process is closely guarded absent a showing of an influence extraneous to the trial proceedings. *Fletcher*, 260 Mich App at 540. Put another way, defendant's allegation pertaining to the jury foreperson's admonition to the other jurors is one "intrinsic to the jury's deliberative process." *Id.* at 541, quoting *Budzyn*, 456 Mich at 91. Accordingly, defendant has not demonstrated that the jury was exposed to extraneous influences, and we are not persuaded by her assertion that a new trial or evidentiary hearing is necessary. In sum, defendant has not demonstrated that the trial court abused its discretion in denying her motion for a new trial on the basis of an inconsistent verdict, and defendant has not made a showing of plain error affecting her substantial rights concerning the issue of extraneous influences on the jury's deliberations. See *Carines*, 460 Mich at 763; *Terrell*, 289 Mich App at 558.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher