STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN DEWAYNE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

No. 350055
Wayne Circuit Court
LC No. 15-006290-01-FC

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial,[1] defendant was convicted of two counts of first-degree criminal sexual conduct (CSC-I) (weapon used), MCL 750.520b(1)(e); one count of kidnapping, MCL 750.349; and one count of accosting a child for immoral purposes, MCL 750.145a.[2] The trial court sentenced defendant to 210 to 480 months' imprisonment for each of his convictions of CSC-I and kidnapping, as well as 12 to 48 months' imprisonment for his conviction of accosting a child for immoral purposes, with his sentences to run concurrently. Defendant now appeals as of right. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

At trial, AT testified that defendant grabbed her as she was walking to her high school, pulled her towards some trees and bushes, and sexually assaulted her. During the assault,

[1] This case has an extensive procedural history. In a previous appeal, this Court reversed the trial court's order denying defendant's motion to withdraw his guilty plea. *People v Johnson (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2018 (Docket No. 335014), p 1. The case then proceeded to trial and resulted in a hung jury. Defendant was subsequently convicted as detailed in the body of this opinion following his second jury trial, and defendant now appeals as of right the resulting convictions and sentences.

[2] Defendant was also acquitted of one count of felonious assault, MCL 750.82, and two counts of possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b.

defendant penetrated her vagina with his fingers and penis. AT testified that when defendant grabbed her and started pulling her toward the bushes, he was pointing a gun at her. Defendant was holding the gun in his hand, and AT saw it "[f]or a second." She described the gun as "black." AT testified that the gun touched her back. She further testified that as defendant was penetrating her vagina with his fingers, defendant was behind her and she felt the gun on her back. At some point, defendant told AT to "shut up" or he would "shoot" her. She believed him when he told her that he would shoot her, and she felt scared. AT no longer felt the gun once defendant put his penis in her vagina, but he was still behind her and she could not see him. She felt both his hands on her waist. Defendant told AT to put her mouth on his penis, and she refused.

After the assault, AT was crying and she told defendant that she would not tell anybody what happened. He released her, and she ran to school where she reported the attack. AT testified that she typically left her house around 7:15 a.m. to walk to school and that the school day began at 8:15 or 8:30 a.m. AT arrived at school on the morning of the assault just after the school day began. AT identified defendant as the attacker.

Defendant was arrested in the front passenger seat of his sister's car, which fit the description of the car AT previously witnessed defendant driving.[3] The car was searched, and a gun was recovered under the front passenger seat. Defendant's sister initially told police that the gun was hers, but she later told them that the black gun belonged to her brother.[4] Defendant's sister testified that in June 2015, defendant typically drove her car to take his girlfriend to work in the morning. Defendant's girlfriend had to be at work by 7:00 a.m. Laboratory testing determined that there was a DNA match between defendant and a sample of sperm collected from AT's vagina. Furthermore, AT identified a pair of underwear found in defendant's home as her underwear that she was missing after the assault. However, defendant's sister also claimed ownership of this pair of underwear during her testimony at trial.

As relevant to the issues presented on appeal, the trial court instructed the jury during final jury instructions that the elements of the two CSC-I charges required the jury to find that defendant "was armed with a weapon" at the time that he committed the acts in order to convict defendant of the CSC-I counts. The jury was also instructed that defendant had to have "a weapon, a pistol" to be convicted of the felonious assault charge[5] and that he had to have "carried a gun" to be convicted

[3] AT testified at trial that approximately one week before the assault, defendant had tried to talk to her as she was walking to school and had asked for her telephone number. She had told him that he was "too old" for her. Defendant was inside the car when he tried to talk to AT that day. AT described this car as being dark or navy blue with a white wave or stripe. AT also testified that she saw this same car pass her twice on the morning of the assault, before she was assaulted. However, she could not see the driver of the car that morning.

[4] Defendant's sister testified that defendant and another brother lived with her. She did not specify at trial which brother owned the gun.

[5] MCL 750.82.

of each of the two felony-firearm charges.[6] The jury convicted defendant of both CSC-I counts, but it acquitted him of the felonious-assault count and both counts of felony-firearm.[7] Defendant was sentenced as previously stated. This appeal followed.

II. OV 1 AND OV 2

On appeal, defendant argues that the trial court erroneously assessed points under offense variable (OV) 1 and OV 2 on the basis of acquitted conduct because defendant was assessed points under those OVs as if he had used a gun even though the jury acquitted him of felonious assault and the felony-firearm counts. Defendant raised these objections to the scoring of OV 1 and OV 2 at sentencing, and the trial court denied defendant's request to reduce the number of points assessed for those OVs. Therefore, these arguments are preserved. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004); *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006); MCL 769.34(10).

A. STANDARD OF REVIEW

This Court reviews the "interpretation and application of the statutory sentencing guidelines" de novo as questions of law. *Francisco*, 474 Mich at 85. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. 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." *People v Rodriguez*, 327 Mich App 573, 576; 935 NW2d 51 (2019) (quotation marks and citation omitted).

Finally, defendant's appellate argument primarily relies on our Supreme Court's holding in *People v Beck*, 504 Mich 605, 608-609, 629; 939 NW2d 213 (2019), in which the Court held that the due-process protections enshrined in the Fourteenth Amendment prohibit a sentencing court from finding by a preponderance of the evidence at sentencing that a defendant committed conduct for which the defendant was acquitted, or otherwise relying on acquitted conduct at sentencing, when sentencing the defendant for other crimes of which the defendant was convicted. Defendant's argument thus implicates issues of a constitutional nature that we review de novo. *Id.* at 618 ("The question whether the Sixth and Fourteenth Amendments permit the use of acquitted conduct to increase a defendant's sentence presents issues of constitutional interpretation, which we review de novo.").

B. ANALYSIS

In this case, defendant was assessed 15 points for OV 1, which provides in relevant part as follows:

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[6] MCL 750.227b.

[7] As previously noted, defendant was also convicted of kidnapping and accosting a child for immoral purposes.

(1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon …… 15 points

(d) The victim was touched by any other type of weapon ……... 10 points

(e) A weapon was displayed or implied …… 5 points

(f) No aggravated use of a weapon occurred ……. 0 points

(2) All of the following apply to scoring offense variable 1:

* * *

(c) Score 5 points if an offender used an object to suggest the presence of a weapon. [MCL 777.31]

Defendant was also assessed 5 points for OV 2, which provides in relevant part as follows:

(1) Offense variable 2 is lethal potential of the weapon possessed or used. Score offense variable 2 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(d) The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon ……... 5 points

(e) The offender possessed or used any other potentially lethal weapon …… 1 point

(f) The offender possessed or used no weapon …….. 0 points

* * *

(3) As used in this section:

* * *

(c) "Pistol", "rifle", or "shotgun" includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or

> after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle. [MCL 777.32.]

At the sentencing hearing, defendant objected to the scoring of both OV 1 and OV 2. He argued that 15 points should not have been assessed for OV 1 because defendant was acquitted of "the gun charge," and defendant further argued that "5 points where the weapon was displayed or implied is more accurate." The trial court ruled:

> The literal reading of the information is a gun used, used in any form or fashion to, or along with the accomplishment of the elements for criminal sexual assault. I believe that the evidence would support a finding of 15 as opposed to 5. So, I'll leave that at 15.

Next, defendant argued at the sentencing hearing that 0 points, rather than 5 points, should have been assessed for OV 2 because defendant was "acquitted of possession of a weapon." The trial court denied defendant's scoring request, stating that it was making the "[s]ame ruling" as it did for OV 1.

Defendant similarly argues on appeal that his scores for OV 1 and OV 2 were erroneous because he was acquitted by the jury of the "firearm charges" and that the trial court's scoring for OV 1 and OV 2 therefore violated the holding in *Beck*. Stated succinctly, the *Beck* Court held that "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." *Beck*, 504 Mich at 609.

In this case, defendant was acquitted of felonious assault and two counts of felony-firearm. The crime of felonious assault is defined in MCL 750.82(1), which provides in pertinent part that "a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony . . . ." "The elements of 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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). With respect to felony-firearm, "[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, 227, 227a, or 230, is guilty of a felony . . . ." MCL 750.227b(1). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Avant*, 235 Mich App at 505.

However, despite that defendant was acquitted of felonious assault and felony-firearm, the issue for this Court to resolve is not as simple as defendant contends because defendant completely ignores the effect of his two CSC-I convictions predicated on his being "armed with a weapon" where the only weapon of which there was any evidence was a gun. Defendant was convicted of two counts of CSC-I under MCL 750.520b(1)(e), which provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

During final jury instructions, the trial court instructed the jury that the elements of the two CSC-I charges required the jury to find that defendant "was armed with a weapon" at the time that he committed the acts in order to convict defendant of the CSC-I counts. The trial court also instructed the jury that its decision "should be based on the evidence," and the court explained the general concepts regarding what was considered evidence. The prosecution also argued in closing argument that the jury should find defendant guilty of the CSC-I counts because he was armed with a weapon, emphasizing the trial evidence related to defendant's use of a gun during the sexual assault and the discovery of the gun in defendant's sister's car.

Although the statute provides that a person may also be guilty of CSC-I under MCL 750.520b(1)(e) if armed with "any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon," the record in this case demonstrates that the theory of prosecution presented to the jury by the prosecutor and through the jury instructions was that defendant was guilty of CSC-I because he committed the sexual assault while "armed with a weapon" and the only weapon for which there was any evidence was a gun. AT testified that defendant pointed a gun at her when he grabbed her, that she felt the gun against her back during the assault, and that defendant threatened to shoot her. Thus, there was evidence that defendant was armed with was a gun when he sexually assaulted AT. Moreover, a handgun was recovered from the vehicle in which defendant was sitting when he was arrested, and his sister indicated that the gun did not belong to her.

Additionally, although the jury acquitted defendant of the crimes of felonious assault and felony-firearm, that does not necessarily mean that the jury did not find beyond a reasonable doubt that defendant was armed with a gun for purposes of his CSC-I convictions. In fact, as the case was presented to the jury, the jury could not have convicted defendant of CSC-I as it did unless it found beyond a reasonable doubt that defendant was armed with a gun. "Under Michigan law, each count of an indictment is regarded as if it were a separate indictment and consistency in jury verdicts is not necessary. Also, it is possible for a jury to reach separate conclusions on an identical element of two different offenses." *People v Russell*, 297 Mich App 707, 722-723; 825 NW2d 623 (2012) (quotation marks and citations omitted). "[J]uries are not held to any rules of logic nor are they required to explain their decisions." *People v Montague*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket Nos. 352089 and 352090); slip op at 10 (quotation marks and citation omitted; alteration in original). "Inconsistent verdicts within a single jury trial are permissible . . . ." *Id.*

Accordingly, because the jury in this case necessarily found beyond a reasonable doubt that defendant was armed with a gun to support its finding that defendant was guilty of two counts of CSC-I,[8] the trial court did not rely on *acquitted* conduct to support the scoring of OV 1 and OV

[8] Defendant does not argue that there is any record evidence to support a conclusion that any other theory, other than being armed with a gun, could have supported his CSC-I convictions under MCL 750.520b(1)(e). Defendant also does not argue that under the facts and circumstances of this

2 but instead relied on conduct for which defendant was found guilty beyond a reasonable doubt by the jury.[9] Defendant has thus failed to demonstrate any scoring error or violation of the Michigan Supreme Court's holding in *Beck*. *Beck*, 504 Mich at 609, 618; *Rodriguez*, 327 Mich App at 576.

III. OV 3

In his Standard 4 brief, defendant argues that OV 3 was also improperly scored at 10 points for a bodily injury to the victim requiring medical treatment even though a nurse who examined AT testified that she observed no injuries.

Defendant concedes on appeal that he failed to preserve this sentencing challenge by raising it at sentencing, in a motion for resentencing, or in a motion to remand, and that our review is thus for plain error. MCL 769.34(10); *Kimble*, 470 Mich at 311-312 (stating that plain-error review applies to unpreserved OV scoring challenges). Under the plain-error standard,

> defendant must show that
>
> > 1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement

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case as presented on the record to the jury, his being armed with a gun was not a required element of the CSC-I counts that the jury was required to find established beyond a reasonable doubt in order to support the convictions of CSC-I. Accordingly, any such arguments are abandoned. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Green*, 313 Mich App 526, 535; 884 NW2d 838 (2015) (quotation marks and citation omitted). Instead, defendant merely asserts that "the jury through its verdict made clear that use of an actual firearm for the CSC and felonious assault charges was not proven." However, this assertion ignores the legal principles that "each count of an indictment is regarded as if it were a separate indictment," that "consistency in jury verdicts is not necessary," and that "it is possible for a jury to reach separate conclusions on an identical element of two different offenses." *Russell*, 297 Mich App at 722-723 (quotation marks and citation omitted). Defendant's entire argument relies on his incorrect presumption that the jury's verdict cannot be inconsistent and that the acquittals somehow undermine the CSC-I convictions. Defendant is wrong. *Id*. By convicting defendant of CSC-I, the jury in this case necessarily found beyond a reasonable doubt that defendant was armed with a gun. As such, the trial court's scoring decision was based on conduct for which defendant was *convicted* and *not on acquitted*; thus, there was no *Beck* violation. *Beck*, 504 Mich at 609.

[9] As noted above and as will be addressed in more detail later in this opinion, to the extent the jury's concurrent decisions to acquit defendant of the felonious assault and felony-firearm counts are inconsistent, "[i]nconsistent verdicts within a single jury trial are permissible . . . ." *Montague*, ___ Mich App at ___; slip op at 10.

> generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.
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> In addition, defendant must show that the "error resulted in the conviction of an actually innocent defendant" or that the "error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . .' " [*Kimble*, 470 Mich at 312 (citations omitted; ellipses and alteration in original).]

OV 3 relates to "physical injury to a victim." MCL 777.33(1). Ten points are to be assessed for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). Five points are to be assessed if "[b]odily injury not requiring medical treatment occurred to a victim."[10] MCL 777.33(1)(e). Zero points must be assessed if "[n]o physical injury occurred to a victim." MCL 777.33(1)(f). " '[B]odily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). In the context of a criminal sexual conduct offense, a resulting pregnancy or infection may constitute a bodily injury for purposes of OV 3. *Id*. In determining whether medical treatment was required, courts must look only "to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3).

In this case, AT was medically examined after the assault by a sexual assault nurse examiner, and a sexual assault evidence collection kit was completed. The nurse who examined AT testified at trial, and the nurse's report based on that examination was admitted as an exhibit at trial. The nurse indicated that at the examination, AT was asked to describe the symptoms since the assault. In response, AT "complain[ed] of vaginal pain and being scared." The nurse observed no injuries during the examination, and she testified that an injury does not necessarily occur in every sexual assault.

The nurse testified that Section M of her report concerned "any medication" that AT was prescribed. Section M of the report indicates that AT underwent a pregnancy test, and was prescribed acetaminophen, which improved her pain. AT was also prescribed emergency contraception and two medications to prevent sexually transmitted infection. The trial court could properly consider this report in determining whether AT was injured and required medical treatment. "When calculating the sentencing guidelines, a court may consider all record evidence . . . ." *People v Barnes*, 332 Mich App 494, 499; 957 NW2d 62 (2020) (quotation marks and citation omitted).

In *Barnes*, 332 Mich App at 500, this Court held there was no clear error in assessing 10 points under OV 3 when the victim

> underwent a forensic medical examination. A specially trained nurse observed two injuries to PD's genital area: a point of tenderness measuring 3 by 1 inches on PD's perineum and a point of tenderness measuring about 1¼ by ½ inches on the area

[10] However, five points are not to be assessed "if bodily injury is an element of the sentencing offense." MCL 777.33(2)(d).

> just outside PD's anus. While the nurse could not testify with medical certainty that these injuries were the result of the sexual assault, the injuries were consistent with PD's description of the sexual assault. The nurse also prescribed PD emergency contraception to prevent pregnancy and prophylactic medication to prevent PD from contracting STIs. The nurse further instructed PD to follow up with her primary-care physician for HIV testing. [*Id.*]

Barnes thus stands for the proposition that prophylactic treatments, such as those received by AT in this case, are evidence that medical treatment was required after a sexual assault. See *id*.; see also *id*. at 500 n 2 (citing with approval a "long line of unpublished cases" for the proposition that "prophylactic treatment for pregnancy or STIs in the context of treating a victim of sexual assault justifies a score of 10 points for OV 3"); *People v Lampe*, 327 Mich App 104, 112-113; 933 NW2d 314 (2019) (considering treatment to prevent sexually transmitted diseases, among other evidence of medical treatment and the victim's injuries, as supporting assessment of 10 points for OV 3). The "point[s] of tenderness" in *Barnes* are also similar to AT's complaint of pain in this case, which was treated by medication during her visit to the hospital. There is evidence in the record of both AT's complaint of vaginal pain and her medical treatment.

On this record, we discern no error in assessing 10 points for OV 3 on the basis that AT "perceive[d] . . . some unwanted physically damaging consequence" from the sexual assault such that she suffered bodily injury requiring medical treatment;[11] hence, defendant has not shown plain error requiring reversal. *McDonald*, 293 Mich App at 298; see also *Barnes*, 332 Mich App at 500; *People v Whitney*, unpublished per curiam opinion of the Court of Appeals, issued May, 15, 2012 (Docket No. 303399), p 2 (holding that a score of 10 points for OV 3 was supported by evidence that the victim experienced vaginal pain following the sexual assault and that she received medical treatment as a result of the sexual assault that consisted of examinations and prescription of prophylactic medication to prevent or diminish the effects of sexually transmitted diseases).[12]

IV. INCONSISTENT VERDICTS

In his Standard 4 brief, defendant next argues that because he was acquitted of the "possession of a weapon charge," the possession-of-a-weapon element of the CSC-I counts were not met and his convictions for CSC-I were therefore not supported by sufficient evidence.

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[11] Defendant also makes a single sentence assertion that defense counsel was ineffective for failing to object to the scoring of OV 3. This is insufficient to properly present this argument for appellate review and we deem it abandoned. *Green*, 313 Mich App at 535. Moreover, defendant has not demonstrated that OV 3 was scored erroneously and therefore cannot show that defense counsel's failure to object constituted ineffective assistance of counsel because "Counsel was not required to make a meritless objection to the scoring . . . and the failure to object was not objectively unreasonable and did not reasonably affect the outcome of the proceedings." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

[12] Although we are not bound by unpublished caselaw, we may consider it persuasive. *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004).

We review challenges to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). This Court "view[s] the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id*. However, defendant's sufficiency-of-the-evidence challenge is premised on his contention that the jury's verdict was inconsistent. "[Q]uestions regarding inconsistent verdicts" are also reviewed de novo. *Russell*, 297 Mich App at 722.

Defendant's appellate argument appears to assume that a jury's verdict on all of the charged offenses must somehow be harmonious and consistent. This is an incorrect legal premise. As explained above, "each count of an indictment is regarded as if it were a separate indictment" under Michigan law, "consistency in jury verdicts is not necessary," and "it is possible for a jury to reach separate conclusions on an identical element of two different offenses." *Russell*, 297 Mich App at 722-723 (quotation marks and citations omitted). "[J]uries are not held to any rules of logic nor are they required to explain their decisions." *Montague*, ___ Mich App at ___; slip op at 10 (quotation marks and citation omitted; alteration in original). The mere fact that a jury's verdict is inconsistent does not undermine a conviction. *People v Vaughn*, 409 Mich 463, 465-467; 295 NW2d 354 (1980). This Court has further explained:

> Inconsistent verdicts within a single jury trial are permissible, and do not require reversal absent a showing of confusion by the jury, a misunderstanding of the instructions, or impermissible compromises. The burden is on the defendant to prove evidence of one of these three things. The defendant may not merely rely on the alleged inconsistency itself to support such an argument. [*Montague*, ___ Mich App at ___; slip op at 10 (citations omitted).]

As such, even assuming the jury's verdicts were fundamentally inconsistent, defendant's argument does not establish that his CSC-I convictions were not supported by sufficient evidence because defendant only relies on the alleged inconsistency in the jury's verdict and has not provided any evidence of confusion, misunderstanding, or impermissible compromise on the part of the jury. *Id*.

Moreover, AT testified that she saw a gun and felt a gun against her back during the sexual assault. There was also testimony that a gun was recovered under the seat in the car where defendant was sitting just before his arrest. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the armed-with-a-weapon element[13] of CSC-I (weapon used)[14] was proved beyond a reasonable doubt. *Meissner*, 294 Mich App at 452.

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[13] This is the only element challenged by defendant on appeal. As we have already explained, however, defendant only challenged this element on the basis that the jury allegedly reached an inconsistent verdict in simultaneously acquitting him of the felony-firearm and felonious assault counts.

[14] We have quoted the relevant statutory provision, MCL 750.520b(1)(e), earlier in this opinion.

V. PROSPECTIVE JUROR OATH

Next, defendant argues in his Standard 4 brief that the prospective jurors were not properly sworn in before voir dire because, according to defendant, the panel of prospective jurors was given the oath applicable to selected jurors rather than the oath that is to be given before voir dire to prospective jurors.

As defendant acknowledges on appeal, he did not object to the oath that was given to the prospective jurors, and this claim of error is therefore unpreserved and reviewed on appeal for plain error. See *People v Cain*, 498 Mich 108, 114-116; 869 NW2d 829 (2015) (holding that a claim that the trial court failed to properly swear the jury is unpreserved for appeal if the defendant does not contemporaneously object and that such an unpreserved error is reviewed on appeal for plain error). As previously discussed, the plain-error standard requires the proponent of the error to establish "that (1) an error occurred, (2) the error was 'plain'—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected." *Id*. at 116 (citation omitted). If these three elements are satisfied, we must exercise our discretion in determining whether to reverse, and reversal is justified only if "the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings . . . ." *Id*. (quotation marks and citation omitted; alterations and ellipsis in original).

Here, defendant's argument focuses on the differences between the two oaths that jurors receive at different times in the proceedings. By the time the trial starts, the individuals serving on the jury will have been sworn twice: once before jury selection and again before trial as selected members of the jury. See MCR 6.412(B) (indicating that prospective jurors must be sworn before the jury selection process begins); MCR 6.412(F) (indicating that "[a]fter the jury is selected and before trial begins, the court must have the jurors sworn."). Our Supreme Court has explained:

> Summoned individuals can get sworn at two points during judicial proceedings. First, if they are assigned to a venire, they are given the voir dire oath. MCR 6.412(B) ("Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn."). Second, the smaller group of the venire selected to serve on the jury receive their final oath for the trial. [*People v Wood*, 506 Mich 114, 129; 954 NW2d 494 (2020) (discussing meaning of the phrase "juror in any case" in the jury tampering statute).]

According to the Michigan Model Criminal Jury Instructions, before voir dire, prospective jurors should be asked: "Do you solemnly swear (or affirm) that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?" M Crim JI 1.4.

Defendant asserts that the prospective jurors in his case were instead sworn with the oath for the beginning of trial, as contained in M Crim JI 2.1, which does not include a promise to answer questions truthfully. M Crim JI 2.1(3) provides the following oath to be given before trial to the selected jurors: "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your

verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."[15]

However, defendant's appellate argument is based on an incorrect citation to the lower court record. In his Standard 4 brief, defendant cites to a transcript of proceedings on February 25, 2019. However, this proceeding was part of defendant's *first* trial, which ended in a hung jury. Defendant's second trial, which is the subject of the instant appeal, began on June 3, 2019. At defendant's second trial, the clerk addressed the prospective jurors before voir dire as follows: "Before I call your names I need you to stand and take an oath. Do you promise, swear or affirm that you will truthfully answer all questions put forward to you as to your qualifications to serve as jurors in this case?"

This oath substantially conformed to the oath provided in M Crim JI 1.4 and included the language defendant claims on appeal was necessary for this oath—a promise to answer "truthfully." MCR 6.412(B) only requires that prospective jurors be sworn; it does not require particular language. Moreover, defendant does not argue that it was erroneous for the oath to not conform exactly, word for word, with the language of M Crim JI 1.4, and we concluded that the substance of the oath contained in M Crim JI 1.4 was present in the oath given to the prospective jurors at defendant's second trial. Defendant also does not offer evidence that any jurors lied during voir dire. Defendant's sole claim of error is his contention that the prospective jurors were given the oath set forth in M Crim JI 2.1. Contrary to defendant's assertion, however, the prospective jurors were not incorrectly given the oath from M Crim JI 2.1 before the jury selection process began. Accordingly, defendant has not shown that a plain error occurred in the administering of the oath to the prospective jurors before voir dire. *Cain*, 498 Mich at 116.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, in his Standard 4 brief, defendant raises two claims of ineffective assistance of counsel.[16]

"A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Because there has not been an evidentiary hearing, our review is for mistakes apparent from the record. *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014). Questions of constitutional law are reviewed de novo, while any factual findings are reviewed for clear error. *Unger*, 278 Mich App at 242.

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the

[15] See also MCR 2.511(H)(1), which contains the same oath and is the "correct oath" for swearing in the selected members of the jury before trial. *Cain*, 498 Mich at 113 & n 3.

[16] This Court previously denied defendant's motion to remand for an evidentiary hearing related to these claims. *People v Johnson*, unpublished order of the Court of Appeals, entered July 19, 2021 (Docket No. 350055).

deficiency, the factfinder would not have convicted the defendant." *Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (quotation marks and citations omitted). "The defendant must show the factual predicates of his or her claims on appeal." *Lane*, 308 Mich App 38, 69; 862 NW2d 446 (2014).

Defendant first argues that defense counsel was ineffective for failing to object to the oath given to the potential jurors before voir dire. However, as discussed in Part V of this opinion, the record indicates that defendant's assertion that the potential jurors were given the wrong oath before voir dire is factually inaccurate. "[F]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010). Although the Michigan Supreme Court has cautioned the ineffective-assistance-of-counsel and plain-error tests are distinct and require independent analysis by courts, *People v Randolph*, 502 Mich 1, 11-16, 22; 917 NW2d 249 (2018), there is simply no factual basis for defendant's ineffective assistance argument based on the prospective juror oath in this case and we thus have not improperly conflated the plain-error and ineffective-assistance-of-counsel inquiries.

Next, defendant argues that defense counsel was ineffective for failing to have the pair of underwear that was found in his home tested for DNA to resolve the conflicting testimony between AT and defendant's sister regarding ownership of the underwear.

Defense counsel highlighted at trial that the underwear had not been tested for DNA as part of the criminal investigation. Defense counsel brought this fact out during cross-examination of the officer in charge. Defense counsel also argued during closing argument that the failure to perform DNA testing on the underwear suggested that an incomplete investigation was conducted, and defense counsel relied on this as part of his argument that there was reasonable doubt of defendant's guilt.

This Court addressed a similar argument in *People v Hieu Van Hoang*, 328 Mich App 45, 70; 935 NW2d 396 (2019). In that case, the defendant's convictions stemmed from an incident where he poured gasoline on the victim and attempted to light her on fire with a lighter or a match, starting a fire in the apartment where the defendant and the victim lived in the process. *Id*. at 49-50. The defendant argued on appeal that his trial counsel was ineffective for failing to have the lighter that was recovered from the scene tested for DNA or fingerprints because, the defendant asserted, such evidence would have shown that the fire was started by the victim rather than the defendant. *Id*. at 50, 70. This Court analyzed the appellate argument as follows:

> In his closing argument, trial counsel argued that the lighter was the only piece of evidence the police failed to test for DNA or fingerprints. Trial counsel made this argument after attacking [the victim's] credibility, arguing that she was jealous about an affair [the defendant] was having and stating that she should not have received the entire business [owned by the couple] because they were only married for one year before divorcing. Read in context, trial counsel's point in raising the police's failure to test the lighter was to plant a seed of doubt in the jurors' minds to argue for an acquittal. [The defendant's] argument on appeal is flawed because it presupposes that testing the lighter would return exonerating evidence. But [the defendant] has presented no factual basis to support this presupposition and to show

> that counsel was ineffective for not having the lighter tested, especially because counsel highlighted the police's failure to test the lighter as a point in Hoang's favor. [*Id*. at 70.]

This Court therefore concluded that the defendant had not shown that his trial counsel was ineffective in this respect. *Id*. at 63,70.

Like the defendant in *Hieu Van Hoang*, defendant here has not created a "factual predicate[]," see *Lane*, 308 Mich App at 69, to show that DNA testing would have provided him with helpful evidence because he has provided no evidence that his sister's DNA would have been found on the underwear as he speculates. Without such a showing, defendant cannot meet his burden to show prejudice, or to show that trial counsel's apparent strategy of undercutting the police investigation by emphasizing the failure to do DNA testing—instead of himself seeking to test the underwear—constituted deficient performance. *Hieu Van Hoang*, 328 Mich App at 70; *Unger*, 278 Mich App at 242. Defendant has presented no evidence to rebut the "strong presumption" that defense counsel's strategic decision was sound. *Unger*, 278 Mich App at 242-243.

Moreover, even if defendant could establish the underwear belonged to his sister rather than AT, he would not satisfy his burden of showing that his trial counsel's actions were not part of a sound trial strategy. Defense counsel could have believed it was better to undermine confidence in the police than to attack the credibility of the minor who reported she was sexually assaulted on the way to school, especially because proving AT was wrong about the underwear would not necessarily indicate she was *lying* about the underwear, or anything else. She could simply have been mistaken. In addition, defense counsel argued during closing argument that the size of the underwear would suggest to the jury that they belonged to defendant's sister rather than AT. Defendant has not indicated how remand would allow him to rebut the strong presumption that defense counsel employed sound trial strategy. *Id*. Defendant has not demonstrated that he received ineffective assistance of counsel based on his claim that defense counsel should have had the underwear tested for DNA. *Id*.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra