

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMMEAN RAMANI MOSS,

Defendant-Appellant.

UNPUBLISHED

April 22, 2021

No. 353256

Wayne Circuit Court

LC No. 18-009225-01-FC

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of armed robbery, MCL 750.529, one count of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, one count of felon in possession of ammunition, MCL 750.224f(3), one count of carrying a concealed weapon (carrying a concealed pistol), MCL 750.227(2), two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and five counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to two terms of 315 to 630 months' imprisonment for both armed robbery convictions, 6 to 10 years' imprisonment for the felon-in-possession conviction, 6 to 10 years' imprisonment for the felon in possession of ammunition conviction, 6 to 10 years' imprisonment for the carrying a concealed pistol conviction, two terms of five to eight years' imprisonment for both felonious assault convictions, and two years' imprisonment for each of the five felony-firearm convictions. We affirm.

I. FACTUAL BACKGROUND

This case arises out of an armed robbery that occurred around 11:00 p.m. on August 26, 2018, in Dearborn Heights, Michigan. Moussa Soueidan and Hassan Hallal were inside Soueidan's vehicle outside of Hallal's home when defendant approached the driver's side door of the vehicle. Defendant put a handgun up to the window and told Soueidan to open the door. Soueidan opened the door and defendant proceeded to point the gun inside the vehicle and demand multiple things from Soueidan and Hallal including both of their phones, Soueidan's wallet, keys, and vaporizer pen, and Hallal's watch. Soueidan and Hallal turned over these items to defendant.

Defendant then told Soueidan to get out of the vehicle and get into the trunk. When Soueidan refused to get into the trunk, defendant demanded that he lie down in the grass. Soueidan obliged and defendant walked away. While walking away, Soueidan and Hallal heard a gunshot coming from defendant's direction.

Hallal provided the police information regarding the Find My Phone application on his phone, which is a GPS tracking application. The following morning, the police tracked the phone's location and located defendant in downtown Detroit. Officer Lee Willmuth and Corporal Matthew Greb arrested defendant. Defendant had a handgun, Hallal's phone, and Soueidan's vaporizer pen on him. Defendant was also wearing Nike sweats with the Nike swoosh on the side, which generally matched the description of his clothing given by Soueidan and Hallal.

On August 28, 2018, Soueidan and Hallal were both separately shown a photographic lineup of six possible suspects. Defendant's photograph was not included in this photographic lineup. However, both Soueidan and Hallal identified a different person, Corey Watts, as the person who robbed them. On September 13, 2018, Soueidan and Hallal were called to return to the police station to view another photographic lineup. Defendant's photograph was included in this second photographic lineup. During this photographic lineup, both Soueidan and Hallal identified defendant as the person who robbed them. Defendant was subsequently charged and convicted as outlined above. Defendant now appeals.

II. INCORRECT JURY INSTRUCTIONS

Defendant first argues that he is entitled to a new trial because the trial court incorrectly instructed the jury that defendant had the burden to prove, beyond a reasonable doubt, that the crime of carrying a concealed pistol occurred on, or about, August 26, 2018. We disagree.

"A party must object or request a given jury instruction to preserve the error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant did not object to the court's jury instruction regarding the elements of carrying a concealed pistol, but rather, agreed that the jury instructions were proper. "Claims of instructional error are generally reviewed de novo by this Court[.]" *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). This Court reviews an unpreserved challenge to the trial court's jury instructions for plain error. *People v Miller*, 326 Mich App 719, 725-726; 929 NW2d 821 (2019). "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). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

"Waiver extinguishes any error, leaving nothing for this Court to review." *Miller*, 326 Mich App at 726. "A defendant may waive his or her challenge to jury instructions." *Id.* Waiver is "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). "A defendant waives an issue by expressly approving of the trial court's action." *Miller*, 326 Mich App at 726. "When the trial court asks whether a party has any objections to the jury instructions and the party responds negatively, it is an affirmative approval of the trial court's instructions." *Id.*

The trial court read the jury instructions, which included the incorrect statement that defendant “must, also, prove beyond a reasonable doubt that the crime occurred on or about August 26th, 2018, within Wayne County.” As noted above, defendant did not object to this statement. Moreover, after reading the jury instructions, the court asked defendant whether he had any “objections, additions, corrections, [or] deletions to the jury instructions,” to which defendant answered in the negative. Therefore, defendant expressly approved of the jury instructions, and defendant waived his challenge to the error on appeal. However, because impermissibly shifting the burden of proof to defendant may implicate his constitutional rights against self-incrimination, we elect to briefly review the merits of defendant’s claim for plain error.

“A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense.” *Id.* at 727 (citation and quotation marks omitted). “A defendant is entitled to have the elements of the crime submitted to the jury in a way that is ‘neither erroneous nor misleading[.]’ ” *Id.* However, “[j]ury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury.” *Dobek*, 274 Mich App at 82.

Prior to the jury being impaneled, the trial court instructed the potential jurors of the following:

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty, unless you are satisfied beyond a reasonable doubt that he is guilty.

The court further instructed the jury that every crime is made up of elements and “[t]he prosecutor must prove each element of the crime beyond a reasonable doubt. The court then instructed that “defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt then you must find the defendant not guilty.” In addition, the trial court read the elements of each of the 12 charges, and when reading the elements of each of the charges, the court instructed that the prosecution had the burden of proving, beyond a reasonable doubt, the elements of each individual crime.

After the jury was impaneled, but prior to any testimony, the trial court again instructed the jury that “[b]y law, the defendant does not have to prove his innocence or produce any evidence.” The trial court again read the elements of the charges against defendant, and when reading the elements of each individual charge, the court instructed the jury that the prosecution had the burden to prove, beyond a reasonable doubt, the elements of each individual crime.

After the evidence was presented, and prior to the start of deliberations, the trial court instructed the jury again that each crime is made of elements, and “the prosecutor must prove each element of the crime beyond a reasonable doubt.” The court then instructed the jury that “[t]he defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt then you must find the defendant not guilty.” In addition, the court instructed that identification of defendant as the person who committed the crime was one of the issues in the case, and “[t]he prosecutor must prove beyond a

reasonable doubt that the crime was committed and that the defendant was the person who committed it.” The trial court again read the 12 charges against defendant, and while reading the elements of each of the charges, the court instructed the jury that the prosecution had the burden of proving, beyond a reasonable doubt, the elements of each of the individual crimes. The elements of carrying a concealed pistol were the last to be read to the jury, and after the trial court instructed the jury that the prosecution had the burden to prove the elements of the crime, the trial court erroneously stated that defendant “must, also, prove beyond a reasonable doubt that the crime occurred on or about August 26th, 2018, within Wayne County.”

While plainly erroneous, on the basis of the jury instructions as a whole, the trial court’s mistaken statement did not affect the outcome of the proceedings. The trial court thoroughly instructed the jury multiple times throughout the proceedings that the prosecution had the burden to prove all elements of the charged offenses, beyond a reasonable doubt, and defendant neither had to present evidence nor prove his innocence. “Juries are presumed to follow their instructions.” *People v Powell*, 303 Mich App 271, 274; 842 NW2d 538 (2013). The jury was also provided written jury instructions, and there is no indication on the record that the jury misunderstood that the prosecution had the burden to prove every element of the charged crimes. The following written jury instruction for carrying a concealed weapon—pistol, as stated in CJI 11.1, was admitted into evidence:¹

- (1) The defendant is charged with the crime of carrying a concealed pistol. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
- (2) First, that the defendant knowingly carried a pistol. It does not matter why the defendant was carrying the pistol, but to be guilty of this crime the defendant must have known that he was carrying a pistol.
- (3) Second that this pistol was concealed on or about the person of the defendant. Complete invisibility is not required. A pistol is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant.

The written jury instructions did not state that defendant had a burden to prove that the offense occurred on a specific date; in fact, they omitted any such element regarding the offense date. Furthermore, during deliberations, the jury sent multiple notes to the court, including a note requesting clarification on the elements of felony-firearm. There is no indication the jury was confused about the elements of carrying a concealed pistol.

In light of all of the above, there is no indication that the trial court’s erroneous statement affected the outcome of the proceedings.

¹ The trial court asked whether the prosecution or defendant had “any objection to the Court having these jury instructions marked and admitted as the Court’s Exhibit Number One.” Neither party objected and the written jury instructions were admitted into evidence. The trial court indicated that the jury would be given a written copy of the jury instructions.

III. LATE ENDORSEMENT OF A WITNESS

Defendant argues that the trial court abused its discretion by granting the prosecution's request to amend its witness list to endorse Officer Willmuth and Corporal Greb on the first day of trial. We disagree.

“A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *Id.*

MCL 767.40a(3) provides that “[n]ot less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.” “MCL 767.40a(4) permits a prosecutor to endorse a witness ‘at any time upon leave of the court and for good cause shown or by stipulation of the parties.’ ” *People v Herndon*, 246 Mich App 371, 403; 633 NW2d 376 (2001), quoting MCL 767.40a(4). “Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved.” *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). Moreover, in order to establish that a trial court abused its discretion in allowing the prosecution to amend its witness list, the “defendant must demonstrate that the court's ruling resulted in prejudice.” *Id.*

On the first day of trial, the prosecution requested that the court allow the prosecution to amend its witness list to endorse Corporal Greb and Officer Willmuth. The prosecutor explained that both Corporal Greb and Officer Willmuth were already on the witness list, but they needed to be endorsed.² Defendant objected to the amended witness list, but failed to provide a basis for the objection. The trial court thereafter granted the prosecutor's request to amend the witness list.

This Court has held that “inadvertence” can constitute good cause, particularly when the witness is critical to the prosecution's case. *Callon*, 256 Mich App at 327-328. In *Callon*, the trial court permitted the prosecutor to amend her witness list during opening statements to add as a trial witness the state police laboratory technician who tested the defendant's blood. *Id.* at 325. This Court further held the following:

The trial court did not abuse its discretion by finding “good cause” for granting leave to the prosecutor to amend her notice of witnesses based on “inadvertence” of the prosecutor to list . . . a witness critical to the prosecutor's case. An unprejudiced person considering the facts on which the trial court acted would be unable to say there was no justification or excuse for the ruling. Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved. [*Id.* at 327-328.]

² The prosecution did not provide a reason as to why Corporal Greb and Officer Willmuth were not previously endorsed.

Under the circumstances of this case, the trial court did not abuse its discretion in allowing the prosecutor to amend her witness list on the first day of trial. Corporal Greb and Officer Willmuth were both listed on the prosecution's witness list, which was filed approximately three weeks before the start of the trial despite the fact that they were not endorsed on the witness list. Moreover, Officer Willmuth and Corporal Greb were two of the four officers to personally arrest defendant the morning after the offense, and they were the only two of the four arresting officers listed on the witness list. Presumably, defendant knew about the witnesses. In addition, defendant had the opportunity to thoroughly cross-examine both witnesses, and he did not request a continuance.

Further, there is no evidence that the prosecution's failure to endorse the witnesses was intentional, and, as noted above, "[m]ere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved." *Id.* at 328. Corporal Greb and Officer Willmuth both provided important testimony, which linked defendant to the crime. Both provided relevant testimony as to how defendant was located the morning after the offense. Corporal Greb and Officer Willmuth were able to track defendant through the Find My Phone application on Hallal's phone, and both provided testimony regarding defendant's arrest and the items found on his person, which had been stolen from Soueidan and Hallal.

Moreover, defendant failed to establish that he was prejudiced by the endorsement of Corporal Greb and Officer Willmuth. On appeal, defendant merely argues that, because defendant represented himself at trial, the prosecution's decision to wait until the day of trial to endorse two important witnesses "created an unnecessary and unfair hardship for [defendant][.]" However, defendant provides no argument as to how the outcome of the proceedings would have been different but for the late endorsement. With that in mind, defendant has failed to establish that the trial court abused its discretion by permitting the late endorsement of Corporal Greb and Officer Willmuth.

IV. DEADLOCKED JURY INSTRUCTION

Defendant next argues that, by giving a deadlocked jury instruction, the trial court coerced the jury into reaching a verdict. We disagree.

"A party must object or request a given jury instruction to preserve the error for review." *Sabin*, 242 Mich App at 657. As with the previously discussed instructional error, defendant did not object to the deadlocked jury instruction, but rather, defendant agreed with the trial court reading the instruction. "Generally, [t]his Court reviews de novo claims of instructional error." *People v Spaulding*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348500); slip op at 7 (citation and quotation marks omitted). This Court reviews an unpreserved challenge to the trial court's jury instructions for plain error. *Miller*, 326 Mich App at 725-726. "However, [w]aiver extinguishes any error, leaving nothing for this Court to review." *Id.* at 726. As with the above jury-instruction issue, this issue is both unpreserved and waived on appeal. See *Miller*, 326 Mich App at 726. We nonetheless address the merits of defendant's argument to illustrate that no error was committed.

"When a jury indicates it cannot reach a unanimous verdict, a trial court may give a supplemental instruction . . . to encourage the jury to continue deliberating." *People v Walker*,

504 Mich 267, 276; 934 NW2d 727 (2019), citing *People v Sullivan*, 392 Mich 324, 329; 220 NW2d 441 (1974). “The goal of such an instruction is to encourage further deliberation without coercing a verdict.” *Walker*, 504 Mich at 276. In *Walker*, the Court explained that, in *Sullivan*, the Michigan Supreme Court adopted a standard deadlocked jury instruction that has been incorporated into the Michigan model jury instructions as M Crim JI 3.12. *Id.* at 277. The *Walker* Court further stated:

Although the model instruction is an example of an instruction that strikes the correct balance, it is not the only instruction that may properly be given. The relevant question is whether the instruction given [could] cause a juror to abandon his [or her] conscientious dissent and defer to the majority solely for the sake of reaching agreement[.] The inquiry must consider the factual context in which the instruction was given and is conducted on a case-by-case basis. [*Id.* at 277-278 (footnote, citations, and quotation marks omitted).]

M Crim. JI 3.12 provides:

- (1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
- (2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.
- (3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.
- (4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.
- (5) If you think it would be helpful, you may submit to the bailiff a written list of the issues that are dividing or confusing you. It will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.
- (6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.
- (7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

Here, when the jury indicated that it could not reach a unanimous verdict on 8 of the 12 counts, the trial court read M Crim. JI 3.12 to the jury. The trial court did not add or delete any

language which could be viewed as coercive. Nonetheless, defendant contends that, on the basis of the facts of this case, this jury instruction was coercive because (1) the jury deliberated for four days and could not come to a unanimous verdict on all counts, and (2) the jury immediately returned a guilty verdict on all counts, and therefore, members of the jury must have capitulated to the majority.

Defendant's contention that the jury deliberated for four days is misleading. The jury started to deliberate on March 13, 2019, at 10:04 a.m. During deliberations, the jury asked to see the transcripts from Soueidan's and Hallal's respective testimony. The court explained to the jury that it would take approximately three days to prepare the transcripts. The court also informed the jury that audio of the testimony could be played back in two days, on March 15, 2019. At 3:54 p.m., the jury was excused for the day. On Thursday, March 14, 2019, the jury started to deliberate at 9:00 a.m. At 10:09 a.m., the jury requested to hear the audio recordings of Soueidan's and Hallal's respective testimony, even if it was not available until the following day. The court gave the jury the option to continue deliberating or return the next day to listen to the audio recordings. Upon the jury's request to return the following day, the court excused the jury for the day at 10:30 a.m. On Friday, March 15, 2019, the jury listened to the audio recordings for the majority of the day, and started deliberations at approximately 2:30 p.m. The jury was excused for the day at 3:41 p.m. On Monday, March 18, 2019, jury deliberations resumed at 9:00 a.m., and the jury rendered its verdict of guilty on all counts at approximately 2:00 p.m. Thus, the jury deliberated for less than two full days when the deadlocked jury instruction was given.

Further, the jury did not render a verdict on all counts immediately after the trial court read the jury instruction. Rather, the jury deliberated for approximately 1½ more hours before rendering a guilty verdict on all counts. After the trial court read the deadlocked jury instruction, the jury continued to deliberate at 11:38 a.m. The jury was excused for lunch from 12:30 p.m. to 1:30 p.m. The jury deliberated from 1:30 p.m. to 2:03 p.m. when it indicated that it had rendered a verdict on all counts. There is nothing in the record to indicate that the jury was coerced into reaching a verdict as a result of the deadlocked jury instruction.³

V. HEARSAY AND OTHER-ACTS EVIDENCE

Defendant next argues that he was deprived of a fair trial because certain testimony from Detective Gary Cerroni constituted damaging hearsay and other-acts evidence. We disagree.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Id.* at 251. "The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls outside the range of principled outcomes." *Id.* at

³ We also note that "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Caddell*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 343750 and 343993); slip op at 4. "[T]rial courts are to exercise caution in discharging the jury before a verdict is reached." *Id.* Again, there is nothing in the record to indicate that an error occurred, let alone an error so egregious as to warrant a mistrial.

251-252 (citation and quotation marks omitted). “A decision on a close evidentiary question ordinarily cannot be an abuse of discretion.” *Id.* at 252.

“[H]earsay is ‘a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.’ ” *People v Shaw*, 315 Mich App 668, 672-673; 892 NW2d 15 (2016), quoting MRE 801(c). “Unless an exception exists, hearsay is inadmissible.” *Id.* at 673.

“MRE 404 governs the admissibility of other-acts evidence.” *People v Denson*, 500 Mich 385, 397; 902 NW2d 306 (2017). “The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts.” *Id.* MRE 404(b)(1) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

During trial, the prosecutor questioned Detective Cerroni about the course of the investigation and why Detective Cerroni created the first photographic lineup, which did not include defendant. Detective Cerroni testified that, when defendant was arrested and taken into custody, one of the items found on defendant was a set of keys belonging to a Chrysler Jeep, and the set of keys contained discount cards for Rite Aid and CVS. Detective Cerroni contacted the stores in an effort to identify to whom the keys belonged. Detective Cerroni obtained a phone number for the person who registered the discount cards. Detective Cerroni called this person and asked whether he was missing a set of keys, and the person “indicated to [Detective Cerroni] that he was actually robbed on August 4th.” Defendant objected to this statement on hearsay grounds. The trial court sustained the objection, explained that Detective Cerroni’s statement was stricken from the record, and instructed the jury to disregard the statement. The prosecutor then continued this line of questioning:

[Prosecutor]: So you had found out some information about these keys. Did these keys belong in any way to this incident or matter that we’re referring to at this point and time?

[Detective Cerroni]. No.

[Prosecutor]: Okay. So based on that did it lead you to do anything else beyond talking to this person?

[Detective Cerroni]: Yeah, I contacted the Detroit Police Department.

[Prosecutor]: Okay. And based on the Detroit Police Department, were the—Were you given any information?

[*Detective Cerroni*]: I was.

Detective Cerroni testified that the Detroit Police Department had provided him with the name Corey Watts. Further, Detective Cerroni testified that, because Hallal originally reported that defendant got into the passenger side of a vehicle that drove away, Detective Cerroni believed there could be two people involved in the armed robbery of Soueidan and Hallal. And on the basis of the information he received from the Detroit Police Department regarding Watts, Detective Cerroni decided to include Watts in the initial photographic lineup.

We can discern no abuse of discretion on the trial court's part concerning the statements of Detective Cerroni. The court ordered that the hearsay statement regarding the August 4th robbery be stricken from the record and the jury was instructed to disregard the statement, and "[j]uries are presumed to follow their instructions." *Powell*, 303 Mich App at 274. Thus, the danger of Detective Cerroni's statement, whether it be on hearsay grounds or other-acts, was mitigated by the jury instruction. Moreover, it was not clear from Detective Cerroni's testimony that defendant was directly implicated in the previous crime, but rather, further investigation and information from the Detroit Police Department led to Watts, not defendant.⁴

The other references to this prior robbery were elicited by defendant during his cross-examination of Detective Cerroni. While questioning Detective Cerroni about the first photographic lineup that included the photograph of Watts, defendant asked why Detective Cerroni chose to investigate Watts, and the following transpired:

[*Detective Cerroni*]: Based on the photo line up, itself, with the both victims picking out that individual and, also, from the information that I obtained from the Detroit Police Department I furthered my investigation on this other subject.

[*Defendant*]: Okay, so what was—I'm sorry, what was the information from DPD?

[*Detective Cerroni*]: There was a robbery that had occurred. I made contact with the victim of that robbery who were, was the owner of the set of keys that were found on you. The victim said he was robbed at gunpoint at his house, forced inside of the house, robbed of his jewelry, weapons, and he ultimately—

Following this statement from Detective Cerroni, defendant said, "Okay, objection. What— Would I be correct in saying that this suspect, also, was picked out of this line up, the, the, the line up [sic] for DPD?"

Defendant elicited this testimony regarding why Detective Cerroni investigated Watts despite Detective Cerroni's previous testimony that information obtained from the Detroit Police Department regarding a separate robbery led to the investigation of Watts. Further, defendant

⁴ As an aside, we note that defendant's Standard 4 brief refers to additional hearsay and other-acts evidence involving a "a home invasion and armed robbery." We did not find any additional statements made during trial that involved a separate home invasion or armed robbery.

specifically elicited Detective Cerroni's response regarding what he learned from the Detroit Police Department. On appeal, defendant now argues that Detective Cerroni's testimony constituted other-acts evidence and prejudiced defendant because of the similarity of the crimes, which could have led the jury to convict defendant on the basis of this testimony.

Because defendant elicited this response, it constitutes an "invited error" and he cannot now argue that the response warrants reversal. " 'Invited error' is typically said to occur when a party's own affirmative conduct directly causes the error." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). "Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *Id.* As an example of an "invited error," the *Jones* Court referred to its holding in *Vannoy v City of Warren*, 386 Mich 686, 690, 194 NW2d 304 (1972), in which "this Court explained that a party cannot seek appellate review of an instruction that he himself requested[.]" *Id.* In *People v McPherson*, 263 Mich App 124, 128; 687 NW2d 370 (2004), this Court applied the invited-error doctrine and concluded that the defendant waived his right to challenge a witness's opinion testimony given during defense counsel's cross-examination of the witness because defense counsel sought the opinion testimony, and "[t]he potential that [the witness] could provide an opinion harmful to the defense was affirmatively waived by defense counsel's conduct." *Id.* at 138-139.

Thus, because defendant elicited the testimony of Detective Cerroni, he cannot now claim an evidentiary error on appeal.

VI. IDENTIFICATION EVIDENCE

Defendant lastly argues that his due process rights were violated because (1) he was not provided counsel during the photographic lineup, and (2) the photographic lineup was unduly suggestive. We disagree.

To preserve for appeal a claim that a photographic identification procedure was unduly suggestive, and consequently, the witness's in-court identification was unduly suggestive, a defendant must object to the admission of the photographic identification procedure as well as the witness's in-court identification, or request a *Wade*⁵ hearing. *People v McCray*, 245 Mich App 631, 638-639; 630 NW2d 633 (2001). To preserve a challenge to a constitutional error, which implicates due process rights, a defendant must raise the issue in the trial court. *People v Williams*, 245 Mich App 427, 430-431; 628 NW2d 80 (2001). Although defendant moved to suppress the photographic lineup evidence, defendant did not move to suppress this evidence on the basis that the photographic lineup procedure was unduly suggestive because defendant stood out amongst the other individuals in the photographic lineup or because he was deprived of his due process rights. Defendant only argued that the evidence should be suppressed because he believed that photographs in the lineup contained the names of the individuals who were depicted in the photographs shown to Soueidan and Hallal. Soueidan and Hallal were questioned, and the court denied defendant's motion to suppress the identification evidence because the procedure was not unduly suggestive. Thus, defendant's particular arguments on appeal are not preserved.

⁵ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

“A trial court’s decision to admit identification evidence will not be reversed unless it is clearly erroneous.” *People v Blevins*, 314 Mich App 339, 348; 886 NW2d 456 (2016). “Clear error occurs if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.” *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018) (citation and quotation marks omitted). “A determination regarding whether a party has received due process is a question of law reviewed de novo.” *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). This Court reviews for plain error unpreserved claims of evidentiary error, *Benton*, 294 Mich App at 202, as well as unpreserved claims of constitutional error, *Kowalski*, 489 Mich at 505.

A. RIGHT TO COUNSEL

Defendant relies on *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled by *People v Hickman*, 470 Mich 602 (2004), to argue that he was entitled to counsel during the photographic line up. Defendant’s argument lacks merit. In *People v Hickman*, 470 Mich 602, 603-604, 607-609; 684 NW2d 267 (2004), the Michigan Supreme Court overruled *Anderson* and held that, consistent with the federal and state constitutions, counsel is not required until adversarial criminal proceedings have commenced. This Court addressed this issue in *People v Perry*, 317 Mich App 589, 597; 895 NW2d 216 (2016):

In *Anderson*, the Michigan Supreme Court ruled that when a suspect is in custody, investigators should not use a photographic identification procedure, and that a defendant has as much right to counsel during a photographic identification as he or she would have during a corporeal identification. *Anderson*, 389 Mich. at 186–187, 205 N.W.2d 461. But the Michigan Supreme Court subsequently overruled *Anderson*, stating that a defendant’s right to counsel “attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings.” *Hickman*, 470 Mich. at 603, 684 N.W.2d 267. See *Moore v. Illinois*, 434 U.S. 220, 226–227, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977). Although the *Hickman* decision was made in the context of a corporeal identification, the decision broadly overruled *Anderson* to the extent that the *Anderson* decision went “beyond the constitutional text and extend[ed] the right to counsel to a time before the initiation of adversarial criminal proceedings,” *Hickman*, 470 Mich. at 603–604, 684 N.W.2d 267 (emphasis added), and it also explained the consistency between the federal and state provisions providing the right to counsel, *id.* at 607–609, 684 N.W.2d 267. Therefore, applying *Hickman*’s reasoning to photographic identifications that occurred before the initiation of adversarial judicial proceedings is consistent with the *Hickman* decision as it pertained to corporeal identifications.

Adversarial judicial proceedings begin with a formal charge, preliminary hearing, indictment, information, or arraignment. *Hickman*, 470 Mich at 607. In *Perry*, the defendant was taken into custody on September 22, 2014, and the photographic lineup occurred on September 25, 2014. This Court held that “[b]ecause adversarial judicial criminal proceedings for the instant case had not been initiated when the photographic lineup occurred, defendant did not have a right to counsel—even under Michigan law.” *Perry*, 317 Mich App at 598, citing *Hickman*, 470 Mich at 603-604, 607-609.

It is not clear whether defendant was in custody at the time of the September 13, 2018 photographic lineup. Defendant was initially arrested on August 27, 2018, the morning after the incident. On October 1, 2018, a warrant for defendant's arrest was authorized. On October 3, 2018, the felony complaint was signed, charging defendant with 12 counts. With the above in mind, even if defendant was in custody on September 13, 2018, formal charges were not filed against defendant until October 3, 2018. Therefore, adversarial proceedings did not commence until more than two weeks after the photographic lineup. Defendant was thus not entitled to have counsel present at the photographic lineup.

B. UNDULY SUGGESTIVE PHOTOGRAPHIC LINEUP

“Due process protects criminal defendants against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.” *People v Sammons*, 505 Mich 31, 41; 949 NW2d 36 (2020) (citations and quotations marks omitted). “A photographic identification procedure violates a defendant's right to due process when it is so impermissibly suggestive that it creates a substantial likelihood of misidentification.” *People v Woolfolk*, 304 Mich App 450, 457; 848 NW2d 169 (2014). “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.” *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993).

As a general rule, physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness. . . . Differences among participants in a lineup are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up. . . . It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness' identification. [*People v Henry (After Remand)*, 305 Mich App 127, 161; 854 NW2d 114 (2014) (citation and quotation marks omitted).]

Defendant argues that the photographic lineup was impermissibly suggestive because he was the only person out of six individuals who had face and neck tattoos. Neither Soueidan nor Hallal recalled seeing defendant's tattoos on the night of the robbery, and as stated earlier, “[d]ifferences among participants in a lineup are significant only to the extent they are apparent to the witness.” *Henry*, 305 Mich App at 161. Because neither witness saw the tattoos, it diminishes the possibility that either chose defendant on the basis that he was the only suspect with tattoos.

Further, this Court has stated that, when looking at the totality of the circumstances to determine whether a pretrial identification was impermissibly suggestive, relevant factors are “the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.” *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). Both Soueidan and Hallal had an opportunity to view defendant at the time of the crime. Both testified that they were able to see his face and that his face was not covered. Hallal testified that the incident lasted for approximately 10 minutes, and he was able to see defendant for approximately half of that time. Soueidan not

only saw defendant while defendant stood next to the driver's side door, but he also stood outside near defendant as defendant tried to force Soueidan into the trunk of the vehicle. The original description provided of the assailant was a black male, 6 feet to 6 feet 4 inches tall with a slim build, in his early twenties, with his hair shaved on the side of his head. Hallal also described defendant as having "a short braided Afro kind of hairstyle." The descriptions provided describe defendant's basic features.

At the photographic lineup, Soueidan indicated that he was 80% to 100% sure that the photograph of defendant depicted the person who robbed him. Hallal indicated that he was 90% to 100% certain that the photograph of defendant depicted the person who robbed him. Although both Soueidan and Hallal initially identified someone other than defendant as the assailant, "[w]here there are other indicia of reliability, an initial inability to identify the defendant or a tentative false identification of another person will not invalidate a witness' identification of the defendant." *Kurylczyk*, 443 Mich at 309. Other indicia existed. The robbery lasted approximately 10 minutes. Both Soueidan and Hallal has ample time to see defendant's face. They both gave basic descriptions of defendant that match defendant's appearance. In addition, both Soueidan and Hallal testified that defendant was wearing Nike sweatpants. Defendant was arrested the following morning wearing Nike shorts. Further, and importantly, defendant was arrested with Hallal's phone and Soueidan's vaporizer pen that were stolen the night before. Looking at the totality of the circumstances, neither Soueidan's nor Hallal's photographic identifications were impermissibly suggestive.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica