

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

Supreme Court
No. 153828

THEODORE PAUL WAFER,

Defendant-Appellant.

Third Circuit Court No. 14-000152-FC
Court of Appeals No. 324018

SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF
JANUARY 24, 2017

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Counterstatement of the Question

I.

Where there was no evidence that the victim—who, at most, was banging on defendant’s side and front doors—was *actually in the process* of breaking into defendant’s home when defendant opened his locked and undamaged steel door and shot the unarmed victim in the face with a shotgun through the locked screen, and where, in any event, the presumed fact was rebutted and so any presumption would have disappeared, did Judge Hathaway abuse her discretion in refusing to instruct on the rebuttable presumption at MCL 780.951(1); in fact, should a “presumption” instruction ever be given?

The People answer: “No.”

Counterstatement of Facts

See the People's answer to defendant's application for leave to appeal.

Argument

I.

Where there was no evidence that the victim—who, at most, was banging on defendant’s side and front doors—was *actually in the process* of breaking into defendant’s home when defendant opened his locked and undamaged steel door and shot the unarmed victim in the face with a shotgun through the locked screen, and where, in any event, the presumed fact was rebutted and so any presumption would have disappeared, Judge Hathaway did not abuse her discretion in refusing to instruct on the rebuttable presumption at MCL 780.951(1); in fact, no “presumption” instruction should ever be given.

*“If the trial is properly conducted, the presumption will not be mentioned at all.”*¹

A. Introduction

The Court has directed that the parties file supplemental briefs on the question “whether the trial court’s denial of the defendant’s request for a jury instruction on the rebuttable presumption at MCL 780.951(1) of the self-defense act violated the defendant’s rights to present a defense and to a properly instructed jury.”² Professor McCormick has said that “‘presumption’ is the slipperiest member of the family of legal terms, except its first cousin ‘burden of proof,’” noting that “no less

¹ *Alpine Forwarding Co. v. Pennsylvania R. Co.*, 60 F.2d 734, 736 (CA 2, 1932)(Learned Hand, J.): “The presumption on which the bailor may rely is a mere rule for the conduct of the trial. It puts upon the bailee the risk of a directed verdict if he does not meet it, but it does no more; once he has done so, it disappears from the case. Thus, it can never concern the jury.”

² A trial court’s decision that the facts do not support the giving of a particular instruction is reviewed for abuse of discretion; that is, whether the trial court’s decision was within the range of principled outcomes. *People v. Gillis*, 474 Mich. 105, 113 (2006); *People v. Jones*, 497 Mich. 155 (2014).

than eight senses in which the term has been used by the courts” have been identified.³ Complicating matters is that involved here is an extremely uncommon presumption,⁴ a presumption against the prosecution in a criminal case.⁵ Even more perplexing is that the presumption concerns a burden-shifting affirmative defense, with the People, of course, having the burden of persuasion beyond a reasonable doubt to negate the defense when appropriate evidence is presented to satisfy the defendant’s burden of going forward.⁶

The People submit that there should never be an instruction employing the term presumption under the statute, and that the statute neither requires nor contemplates one; rather, under the statute certain procedural consequences occur depending on the facts adduced.⁷ Here there was no evidence presented sufficient to support a finding⁸ of at least the first of the basic facts that would trigger the

³ McCormick, *Evidence* (Cleary Ed.), § 342, p. 802-803.

⁴ See Wright and Miller, *2A Fed. Prac. & Proc. Crim.* (4th ed.) § 404, “Presumptions.”

⁵ The defendant’s presumption of innocence is not a true presumption, as before trial “no evidence has been introduced from which other facts are to be inferred.” McCormick, *supra*, § 342, p. 805-806. This so-called “presumption” is a substantive rule of law, called by McCormick the “most glaring example” of mislabeling of rules of law as presumptions, which ought better be called descriptively as the “assumption of innocence.” *Id.* See also Wright and Graham, *21B Fed. Pract. & Proc. Evid.* § 5144 (2d ed), fn 19 (the “presumption of innocence” is “not a presumption at all, but merely a colorful way of explaining the prosecution’s burden of proof”).

⁶ See B., *infra*.

⁷ “Under Rule 301 . . . neither the particular presumption nor the term presumption need be nor should be mentioned to the trier of fact. However . . . the jury may be instructed in terms of the procedural effects of the presumption.” 2 Michael H. Graham, *Handbook of Federal Evidence* (8th ed.), § 301.13, p. 563.

⁸ See MRE 104(b). See also Wright and Graham, *supra*, §5125.1, “Establishing Presumption; Showing Existence—Basic Facts”: “the evidence of the basic facts must be sufficient to support a finding of their existence” by a preponderance of the evidence, and where the facts are controverted, the proponent of the presumption must *persuade* the jury of the basic facts by a preponderance of

operation of the statute; that is, that the victim was actually “in the process” of breaking and entering into defendant’s dwelling. Further, even if there was, there was evidence from which a rational jury could find beyond a reasonable doubt that the defendant was not in honest and reasonable fear of death or great bodily harm, thus rebutting the presumed fact, and so the “bubble burst” and the presumption disappeared. No error, then, occurred, nor was defendant in any way deprived of a defense, for an instruction on self-defense was given by the trial judge that made clear defendant had no duty to retreat and that the People had the burden of proving beyond a reasonable doubt that defendant was *not* in honest and reasonable fear of imminent death or great bodily harm when he shot and killed the unarmed victim, Renisha McBride.

B. The context: self-defense is in its essence a burden-shifting affirmative defense

Self-defense is an affirmative defense in that the prosecution has no duty to negate it unless it is presented by the evidence, but not in the sense that the defendant has the burden of persuasion. This Court has held that “at common law, the affirmative defense of self-defense justifies otherwise punishable criminal conduct, usually the killing of another person, if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself.”⁹ And so, “once the defendant injects the issue of self-defense and satisfies *the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist*, the prosecution bears the burden of proof ‘to exclude the possibility that the killing was done in self-defense.’” In other words, “once the defendant satisfies the initial burden of

the evidence.

⁹ *People v. Dupree*, 486 Mich. 693, 707 (2010).

production, the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt.”¹⁰ Before the jury must be instructed that the prosecution has the burden of proving a homicide was not justified by self-defense, then, the trial judge must determine whether the defendant has “satisfie[d] the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist.”

What quantum of evidence does this prima facie showing require? It has been said that the burden of production requires that the defendant present “evidence sufficient for a reasonable jury to find” in the defendant’s favor, and that “because the government must disprove a defense of self-defense beyond a reasonable doubt . . . it follows that the defendant need only produce enough evidence to persuade the jury to have a reasonable doubt about whether the defendant acted in self-defense.”¹¹ But “a mere scintilla of evidence . . . is insufficient to require the instruction” on self-defense.¹² While a trial court “cannot refuse to give an instruction for which there is sufficient evidence in the record for a reasonable juror to harbor a reasonable doubt that the defendant did not act in self defense . . . the [trial] court is not required ‘to put the case to the jury on a basis that essentially indulges and even encourages speculations.’”¹³

It is here that the statutory presumption has, as will be explained, a procedural role to play.

¹⁰ *People v. Dupree*, 486 Mich. at 709–710 (emphasis added).

¹¹ *United States v. Barrett*, 797 F.3d 1207, 1218 (CA 10, 2015).

¹² *Hall v. United States*, 46 F.3d 855 (CA 8, 1995)

¹³ *United States v. Branch*, 91 F.3d 699, 711–712 (CA 5, 1996).

C. A rebuttable presumption leads to procedural consequences if the basic facts triggering it are established, those procedural consequences depending on the facts adduced at the trial

1. The statute contains evidentiary predicates that defendant must establish to trigger the statutory presumption

MCL 780.951 provides:

(1) Except as provided in subsection (2),¹⁴ it is a rebuttable presumption in a civil or criminal case that an individual who uses deadly force or force other than deadly force under section 2 of the self-defense act *has an honest and reasonable belief* that imminent death of, sexual assault of, or great bodily harm to himself or herself or another individual will occur *if both of the following apply*:

(a) The individual against whom deadly force or force other than deadly force is used *is in the process of* breaking and entering a dwelling or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will.

(b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a) (emphasis supplied).

Under (1)(a), then, the alternative basic facts that must be demonstrated to activate the presumption that the defendant had an honest and reasonable fear of imminent death, great bodily harm, or sexual assault are that the individual against whom deadly force or force other than deadly force is used:

- was in the process of breaking and entering a dwelling or business premises;
or
- was in the process of committing a home invasion; or

¹⁴ The exceptions are not involved here.

- had broken and entered a dwelling or business premises and was still present in the dwelling or business premises; or
 - had committed home invasion and was still present in the dwelling; or
 - was unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will;
- and
- that the defendant honestly and reasonably believed at the time that he or she employed deadly force that the individual against whom deadly force was used was engaging in the described conduct.

Subsection (a) clearly establishes evidentiary predicates to the existence of the statutory presumption, one being, in cases such as the present one, that the person against whom force is used must *actually* have been in the process of breaking and entering a dwelling or committing home invasion. This is clear from the text of (a), but that (a) does not simply establish that in order for the presumption to apply the defendant must only reasonably believe the person against whom force is used was in the process of breaking and entering a dwelling or committing home invasion is also made clear by subsection (b). That section provides that *additionally* defendant must have this reasonable belief. Reasonable belief alone is not enough; the person against whom force is used must *actually* be engaged in the conduct described—engaged in the process of breaking and entering a dwelling or business premises or committing home invasion—as a predicate to the applicability of the presumption. Under MRE 301, the proponent of a presumption must present evidence sufficient to support a finding of the basic facts by a preponderance of the evidence to trigger the procedural consequences of the presumption. As Wright and Graham note, “Rule 301 does not provide a standard of proof for evidence used to establish the basic facts of a presumption. However, in the absence of special statutory provision, the common law burdens in civil cases should apply. The

burden of producing evidence requires that in order to send the presumption to the jury the evidence of the basic facts must be sufficient to support a finding of their existence. Similarly the burden of persuasion requires that the jury find the basic fact proved by a preponderance of the evidence the burden of proving the basic fact falls on the proponent of the presumption.”¹⁵

2. **By operation of the statutory presumption, a sufficient showing of the basic facts makes out defendant’s prima facie showing that he was in honest and reasonable fear of imminent death or great bodily harm as a matter of law so as to raise self-defense in the case, which the prosecution must negate with proof allowing the jury to conclude beyond a reasonable doubt that defendant was *not* in honest and reasonable fear of imminent death or great bodily harm**

As indicated previously, statutory presumptions in favor of the defendant in a criminal case are a most uncommon and curious beast,¹⁶ given the accused’s presumption of innocence, and thus the burden of the prosecution to prove the elements of the crime beyond a reasonable doubt, and also the burden on the prosecution to negate burden-shifting affirmative defenses beyond a reasonable doubt upon the presentation of appropriate and sufficient evidence by the defense or by the circumstances of the case. Wright and Graham note that there is no federal rule of evidence concerning presumptions in favor of the accused in criminal cases, and very few state rules, and that those who look to “caselaw for guidance [will] find slim pickings,” as “[l]egislators seldom create

¹⁵ Wright and Graham, *supra*, § 5125.1, “Establishing Presumption; Showing Existence—Basic Facts. “ See also Note, “Developments in the Law,” 46 Harv. L. Rev. 1138, 1170 (1933): “the party claiming the benefit of this rule has the burden of proving by a preponderance of the evidence the basic facts necessary to create the presumption.”

¹⁶ MCL 780.951 is the only statute the People can locate in Michigan with such a presumption; there are many creating either a “rebuttable presumption” or a “prima facie” presumption against the accused. See e.g. MCL 750.50a; MCL 750.145a; MCL 750.411h; MCL 750.411i; MCL 750.535; MCL 750.540h; MCL 750.174; MCL 750.175; MCL 750.181; MCL 750.293; MCL 750.307; MCL 750.415; MCL 750.539i. There are dozens of rebuttable presumptions in non-criminal statutes.

statutory presumptions that work against the prosecution.”¹⁷ Several jurisdictions, however, have either adopted a provision applying Rule 301 regarding civil presumptions to presumptions in favor of the accused, or otherwise so held. Alaska, for example, in its Rule 303(1)(2) provides that “a presumption directed against the government shall be treated in the same manner as a presumption in a civil case under Rule 301.” Alaska’s Rule 301 is identical in relevant part to Michigan’s Rule 301 in providing that “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.” Vermont’s rule 303(a) similarly provides that “In criminal cases, a presumption operating in favor of the accused is governed by the provisions of Rule 301,” and under Vermont’s rule 301 a “presumption imposes on the party against whom it operates the burden of producing evidence sufficient to support a finding that the presumed fact does not exist, but a presumption does not shift to such party the burden of persuading the trier of fact that the presumed fact does not exist.” The Reporter’s Note says that the rule “makes clear that presumptions favoring the accused are to be treated *exactly like presumptions in civil cases*. Thus, as under Rule 301(a) and (c), such a presumption shifts the burden of production to the state *and vanishes when that burden is met*” (emphasis supplied). Michigan has no rule concerning statutory rebuttable presumptions favoring the accused, but though MRE 301 is not applicable on its face, applying by its terms to civil cases, nothing prevents applying its principles to presumptions in favor of the accused in criminal cases, and to do so makes sense. And in addition to the application of

¹⁷ Wright and Graham, *supra*, § 5144.

Rule 301 principles by some states, commentators have also suggested that Rule 301 principles should be applied to presumptions in favor of the accused.¹⁸

Under MRE 301, Michigan is a “bursting bubble” jurisdiction, for, as this Court has said, “[i]n 1978, Michigan adopted MRE 301, the language of which parallels FRE 301, which was, in essence, an adoption of the Thayer theory regarding the use of civil presumptions.”¹⁹ Thus, a presumption is a procedural device, not an instructional one:

instructions [on presumptions] *should be phrased entirely in terms of underlying facts and burden of proof*. That is, if the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.

. . . . *the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.*

Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence.²⁰

Chief Justice Young has similarly made the point, dissenting from a denial of leave, that “[o]nce a presumption is created, that presumption is a ‘procedural device which regulates the *burden of going forward* with the evidence and is dissipated when substantial evidence is submitted by the opponents

¹⁸ See e.g. Wright and Graham, § 5144, “Presumptions Against Accused—Presumptions Against the Prosecution”; 1 *Weinstein's Evidence* (2d ed.), § 303[01], p. 303-9; 1 Mueller & Kirkpatrick, *Federal Evidence* (2d ed.), p. 389; 2 Michael H. Graham, *supra*, § 303.4, p. 655.

¹⁹ *Widmayer v. Leonard*, 422 Mich. 280, 287 (1985).

²⁰ *Id.*, (emphasis supplied).

to the presumption.’ . . . If the [opponent of the presumption] fails to produce sufficient rebuttal evidence, then the presumption remains intact and establishes a *mandatory inference* . . . if rebutted, *the presumption is eliminated* and the fact-finder must assess all the evidence.”²¹ But there is no instruction on the presumption.

Though rules such as the Alaska and Vermont rules provide that Rule 301 should be applied identically to presumptions in favor of the accused in criminal cases as it is applied in civil cases, the rule must be adapted in some senses, for while Rule 301 provides that the burden of persuasion is never shifted, in a criminal case with a burden-shifting affirmative defense, where under the terms of the presumption establishment of certain predicate facts is allowed to satisfy automatically the defendant’s burden of production on the defense, the burden of persuasion *does* then fall on the prosecution to negative the presumed fact to the fact-finder. The prosecution must present evidence—which also of course may arise in the case-in-chief, and need not be presented by way of rebuttal—from which a reasonable jury could find the absence of self-defense beyond a reasonable doubt, taking the evidence in the light most favorable to the People.²² In the absence of such evidence from the prosecution, defendant would be entitled to a directed verdict of acquittal.

²¹ *In re Estate of Mortimore*, 491 Mich. 925, 927–928 (2012) (Young, CJ., dissenting from the denial of leave) (emphasis supplied).

²² See *People v. Buckner*, 486 Mich. 906, 906 (2010) (“The evidence, when taken in the light most favorable to the prosecution, showed that the defendant did not act in self-defense when he fired a series of deadly shots at the victim. Whether the victim was armed with a gun was a factual issue during the trial. A reviewing court must resolve all reasonable inferences and facts in favor of the verdict. . . . Hence, the Court of Appeals should have considered whether the defendant’s use of deadly force was justified *where the victim was unarmed*”) (emphasis supplied).

3. **“Under Rule 301 . . . neither the particular presumption nor the term presumption need be nor should be mentioned to the trier of fact”²³**

Professor Michael Graham has said that the “Rule 301 Thayer ‘bursting bubble’ approach to presumptions is simple for both the court and jury to apply.”²⁴ And the Wright and Graham treatise is instructive on the point, laying out the various possibilities, depending on whether the basic facts establishing a presumption are established, and on whether the presumed fact is itself rebutted by evidence:

- *basic fact established as a matter of law; opponent's evidence insufficient to rebut presumed fact:* the judge directs a verdict on the presumed fact by instructing the jury that they must find the presumed fact [or where appropriate granting a directed verdict in the case].
- *[the basic facts are disputed so that there is a] jury question on basic facts; opponent's evidence insufficient to rebut presumed fact:* . . . the judge must submit the issue to the jury with an instruction that if they find the basic fact, they must find the presumed fact as well.
- *[the basic facts are disputed so that there is a] jury question on basic facts; opponent's evidence sufficient to rebut presumed fact:* . . . evidence sufficient to support the nonexistence of presumed fact “bursts the bubble,” the presumption is gone, and judge need give no instruction.
- *basic fact established as a matter of law; opponent's evidence sufficient to rebut presumed fact:* once again, the contrary evidence suffices to burst the bubble, the presumption is gone, and no instruction given.²⁵

²³ Michael H. Graham, *supra*, § 301:13 “Presumptions: instructing the jury,” p 563.

M Crim JI 7.16a is thus erroneous and should never be given. The People would also note that the instruction on its own terms is erroneous, as it tells the jury that if it “finds” the predicate facts then “you must presume that the defendant had an honest and reasonable belief that imminent [death / great bodily harm / sexual assault] would occur,” with no reference whatever to the fact that the presumption is rebuttable. But again, no instruction of this sort should ever be given.

²⁴ Michael H. Graham, *supra*, § 301:13 “Presumptions: instructing the jury,” p. 564.

²⁵ Wright and Graham, *supra*, § 5127 “Instructions on Presumptions” (re-ordered from original; bracketed material and italics supplied).

With regard to a typical presumption, that of receipt of a properly mailed letter, under MRE 301, then:

- If the basic fact of proper mailing is not disputed, and if sufficient evidence as to nonreceipt of the letter to rebut is not introduced, the jury will be instructed to find receipt of the letter.
- If the basic fact is disputed but evidence sufficient to rebut the presumption has not been introduced, the jury would be instructed as follows: If you find it is more probably true than not true that the letter properly addressed and stamped was mailed and not returned, then you must find the letter was duly received.
- If the basic fact is disputed and evidence sufficient to rebut the presumption has been introduced, the presumption is gone and the judge gives no instruction.
- If the basic fact is not disputed and evidence sufficient to rebut the presumption has been introduced, the presumption is gone and the judge gives no instruction.²⁶

Whether the basic facts be established and undisputed, or established but disputed, then, if evidence sufficient to rebut the presumed fact is introduced *the presumption disappears*. An instruction is only required where there is insufficient evidence to rebut the presumed fact, and the basic fact or facts have been established. Then, an instruction is given—but not in terms of a “presumption”—which differs depending on whether the basic facts are undisputed or disputed, and in the former case the result may be a directed verdict rather than an instruction. After all, as this Court said in *Widmayer*, a presumption “is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.”

²⁶ See 2 Michael H. Graham, *supra*, § 301:13.

Here, with a burden-shifting affirmative defense, the defense has the burden of production to present evidence, or show that evidence has been presented, making out a prima facie showing that at the time of the use of fatal force defendant was in honest and reasonable fear of imminent death or great bodily harm. Under the statute, that burden is accomplished by evidence sufficient to support a finding that the individual against whom deadly force was employed was in the process of breaking and entering into defendant's dwelling. Then, under MRE 301:

- If the basic facts that the individual killed was in the process of breaking and entering into defendant's dwelling, and that defendant reasonably so believed, are not disputed, and if sufficient evidence to allow a reasonable jury to find beyond a reasonable doubt that the defendant was not in honest and reasonable belief of imminent death or great bodily harm is not introduced, a directed verdict of acquittal should be entered.
- If the basic facts that the individual killed was in the process of breaking and entering into defendant's dwelling, and that defendant reasonably so believed, are disputed, and if sufficient evidence to allow a reasonable jury to find beyond a reasonable doubt that the defendant was not in honest and reasonable belief of imminent death or great bodily harm is not introduced, the jury would be instructed as follows: If you find it is more probably true than not true that the individual killed was in the process of breaking and entering into defendant's dwelling, and that defendant reasonably so believed, you must acquit the defendant.
- If the basic facts that the individual killed was in the process of breaking and entering into defendant's dwelling, and that defendant reasonably so believed, are disputed, and if sufficient evidence to allow a reasonable jury to find beyond a reasonable doubt that the defendant was not in honest and reasonable belief of imminent death or great bodily harm is introduced, the presumption is gone and the judge gives the ordinary instructions on self-defense *if* under the circumstances a reasonable inference of honest and reasonable fear of

imminent death or great bodily harm exists under the circumstances so as to make out the prima face case of self-defense.²⁷

- If the basic facts that the individual killed was in the process of breaking and entering into defendant's dwelling, and that defendant reasonably so believed, are undisputed, and if sufficient evidence to allow a reasonable jury to find beyond a reasonable doubt that the defendant was not in honest and reasonable belief of imminent death or great bodily harm is introduced, the presumption is gone and the judge gives the ordinary instructions on self-defense *if* under the circumstances a reasonable inference of honest and reasonable fear of imminent death or great bodily harm exists under the circumstances so as to make out the prima face case of self-defense.²⁸

Nothing with regard to a statutory presumption is ever said to the jury, and where the presumed fact is sufficiently rebutted the procedural consequences from establishment of the basic facts disappear.

With the self-defense statute, this means that if the prosecution presents evidence from which a reasonable juror could find beyond a reasonable doubt that the defendant was not, at the time of the fatal shooting, in honest and reasonable fear of imminent death or great bodily harm, nothing is said with regard to the presumption, and what remains is that the evidence of the basic facts—that the victim was in the process of breaking and entering the defendant's dwelling, and that the defendant reasonably so believed—are ordinarily, though not always, relevant to the question of whether the

²⁷ For example, the basic facts are made out if a person has committed a breaking and entering and is still in the dwelling when deadly force is employed, and the defendant reasonably so believes. A presumption then arises that the individual using deadly force had an honest and reasonable fear of imminent death or great bodily harm. But if in a case the undisputed facts show that the individual who broke and entered was defendant's brother-in-law, who had then fallen asleep on the couch, and that defendant, enraged, had said "I'm sick of this," gotten his gun, and shot the sleeping brother-in-law, not only would the presumed fact have been rebutted and thus the presumption eliminated, but the basic facts in this situation would carry no logical inference that the defendant was in honest and reasonable fear of imminent death or great bodily harm at the time of the shooting, and *no* self-defense instruction would be given. In the present case, it is likely the case that a self-defense instruction could have been denied by the trial judge.

²⁸ See footnote 27.

prosecution has shown beyond a reasonable doubt that the defendant was not in honest and reasonable fear of imminent death or great bodily harm when deadly force was employed.²⁹

In the present case, the rebuttable presumption never arose because there was no evidence that the victim was actually in the process of breaking and entering defendant's dwelling when he shot her in the fact with a shotgun, as set out in the People's answer to the defendant's application for leave to appeal. And even if there was, there was sufficient evidence from which the jury could find beyond a reasonable doubt—as it did—that the defendant was not in honest and reasonable fear of imminent death or great bodily harm,³⁰ and so the presumption disappeared, and the question was one of “ordinary” self-defense, which defense counsel argued to the jury, and upon which the jury was properly instructed.

D. Conclusion: a properly instructed jury found beyond a reasonable doubt that defendant did not act in self-defense when he shot the unarmed Ranisha McBride in the face with a shotgun

A Louisiana statute³¹ contains virtually the same rebuttable presumption as MCL 780.951(1), as do a number of states' statutory schemes. As several Louisiana decisions have well put it, “the

²⁹ This Court said in *Widmayer* that “[a]lmost all presumptions are made up of permissible inferences,” so that when sufficient contrary evidence is introduced the rebuttable presumption disappears. But “the inference itself remains [if there is one] and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced.”

³⁰ See section II. B(ii) of the People's answer to the application for leave to appeal (attached), including, among other things, that the victim was unarmed, made no threat by word or gesture, and defendant himself said to the police that he did not fire because of fear, but accidentally (When he opened the door, he was “kind of like who is this and then the gun discharged.”). See transcribed recording attached to the People's answer to the application for leave to appeal as Attachment B.

³¹ La. R.S. 14:20(B).

presumption of reasonableness in La. R.S. 14:20(B) is not a license to kill.”³² Precisely so. The presumption that a person is in honest and reasonable fear of imminent death or great bodily harm if deadly force is not employed is not triggered in a case like the present one unless evidence sufficient to support a finding that the person against whom deadly force was employed was “in the process” of breaking and entering the defendant’s dwelling, and there is no evidence that the victim had done anything other than bang with force on defendant’s front and side doors. Further, when the presumption *is* triggered it simply satisfies defendant’s burden of going forward with a prima facie showing of self-defense, so that the prosecution must prove to the jury beyond a reasonable doubt that the defendant was *not* in honest and reasonable fear of imminent death or great bodily harm when deadly force was employed, and if the prosecution presents evidence sufficient to allow a reasonable jury to so conclude, the presumption *disappears*. The jury is instructed on self-defense in the ordinary fashion, assuming that from the basic facts establishing the presumption a reasonable inference arises of fear of imminent death or great bodily harm. No presumption ever arose here; in any event the prosecution presented evidence from which a reasonable jury could—and did—conclude that the defendant was not in reasonable and honest fear of imminent death or great bodily harm when he shot the unarmed victim in the face with a shotgun, so that any presumption would have disappeared.³³ And proper instructions on self-defense were supplied to the jury. No

³² See *State v. Ingram*, 71 So. 3d 437, 445 (La. App. 2 Cir., 2011).

³³ See, for example, with regard to a similar presumption concerning self-defense, *Korzep v. Superior Court In & For Cty. of Yuma*, 838 P.2d 1295, 1300 (Ct. App. 1991) (the statute “provides a presumption of reasonable conduct which, like other presumptions, requires defense evidence. . . *This presumption is rebuttable and vanishes when the state provides contradictory evidence*”) (emphasis supplied).

error of any sort, then, occurred here; MCL 780.951(1) did not supply defendant with a license to kill.

Relief

THEREFORE, the People ask this Honorable Court to deny defendant's application for leave to appeal.

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Attachment from answer to application for leave to appeal

have been any different had the rebuttable presumption instruction been given. Thus, defendant cannot show outcome-determinative error based on the totality of the instructions given.

- ii. Given the evidence presented at trial and defendant's conflicting versions of what occurred, he fails to demonstrate that the court's refusal to give the instruction was outcome-determinative.

In addition to the fact that the instructions as a whole protected defendant's rights, defendant is also unable to show that the court's refusal to read the rebuttable-presumption instruction was outcome-determinative based on the facts of the case. In conjunction with defendant's testimony, the People presented substantial evidence that defendant did not act in self-defense and the jury clearly found beyond a reasonable doubt that defendant was not justified in shooting the victim that night.

The People presented evidence that the 19-year-old victim—who had marijuana in her system and a .218 level of alcohol at the time of death—was in a car crash in a residential neighborhood around 1 a.m. on November 2, 2013. The three witnesses to the car crash all testified that they spoke with the victim before she eventually walked away from the scene. The witnesses said the victim was disoriented, scared, and wanted to go home, but that she was not acting belligerently. Given the cracks in the windshield, she may have had a concussion from hitting her head during the crash. Before police arrived on the scene, the victim had wandered away and was not seen again until she appeared at defendant's house around 4:40 a.m.

At 4:42 a.m., defendant called 911, saying he “shot somebody on my front porch with a shotgun banging on my door.” After the call abruptly ended, the dispatcher called him back to get more information. Defendant told him he shot by accident and that he thought the gun was

unloaded. When the police arrived, defendant then told the police what happened. He said there was a “consistent knocking” on the door. When he opened the door, he was “kind of like who is this and then the gun discharged.”

When he was taken to the police station that same morning, he said he heard banging noises on the side and front door. He said he should have called the police first, but he was mad and wanted to find out what was going on. “I’m piss and vinegar now,” he said about his state of mind when he went to the door. He said he opened the door, the gun discharged, and “unfortunately” a person was standing there. He did not know when he’d loaded the shotgun. The first thing he did after the shooting was to call the police. He did not say anything about not being able to locate his phone. Later in the interview, he said it was a “violent banging” on the door like maybe somebody was trying to get in or needed help.

He gave a different version of events at trial. At trial, he testified that he purchased the gun in 2008 to keep in his house for self-defense, but had just loaded it around October 19, 2013—about two weeks before the shooting—because his car had been paintballed. He had the gun “ready to go,” but kept the safety on. Around 4:30 a.m., he heard banging on the side of the house and then at the front door. He turned off his TV and all lights so that nobody would see him. He claimed he looked all around the house for his cell phone, but could not find it. He said the banging was so loud that the floor was vibrating. He originally got a bat, but then when the banging continued, he retrieved his shotgun from the closet. He did not remember taking the safety off. He testified that he opened the door to investigate because he was not going to cower in his house and be a victim. When he opened the door, a person came from the side of his house. He raised the gun and shot. “It was them or me,” he said.

Defendant's testimony about the loud banging was not corroborated by his neighbor, who testified that he was awake during the relevant time. About 10-15 minutes before he heard the shot, he went outside because he could hear what sounded like a tree hitting the top of his car and wanted to make sure nobody was outside his house. When he did not see anyone, he went back inside. He did not see anyone at defendant's house. He did not hear anything else from outside until he heard the gunshot. After he heard the shot, he saw the police at defendant's house within 2-3 minutes.

The police responded in two to three minutes after the 911 call was placed. When they arrived, there was a bullet hole in the screen of the front, locked screen door. The victim was dead on the front porch from an obvious shotgun wound to her face. The screen insert of the screen door was dislodged and hanging down roughly 8-9 inches. There was no damage to the doors or door handles and no evidence of forced entry. The victim was unarmed and her fingerprints were not found on any of the doors. The firearms expert who examined defendant's shotgun and concluded that the gun would not go off unless the safety was off and the trigger was pulled using approximately six pounds, five ounces of force.

Given these facts—especially that the victim was not acting belligerently just hours before her death, that the neighbor did not hear any noise, that there were no signs of forced entry, that defendant never mentioned not being able to find his phone until he got to trial, that the unarmed victim was found on defendant's porch with her feet at least a couple feet from the door, that defendant was mad when he opened his locked door, and that defendant could not make up his mind whether he fired accidentally or in self-defense—the rebuttable-presumption instruction would not have made any difference in the outcome of trial. The jury clearly found evidence beyond a reasonable doubt that defendant did not act with an honest and reasonable belief that the use of

deadly force was immediately necessary to defend himself. Thus, any alleged error in not reading the requested instruction was not outcome-determinative.