

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

THEODORE PAUL WAFER

Defendant-Appellant.

Supreme Court No. 153828

Court of Appeals No. 324018

Circuit Court No. 14-0152-01

**DEFENDANT-APPELLANT'S
MOTION FOR RECONSIDERATION**

Defendant-Appellant **THEODORE PAUL WAFER**, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by **JACQUELINE J. MCCANN**, Assistant Defender, asks this Honorable Court to grant reconsideration of its March 9, 2018 order and states the following in support:

1. Following oral argument on the application, on March 9, 2018, this Court issued an order denying leave to appeal. (Appendix A, MSC order 3/9/18).

2. While this Court granted oral argument in relation to jury instruction issue raised in his application, Mr. Wafer seeks reconsideration on his conflicting verdicts/Double Jeopardy issue. (Appendix B, Appellant's Application for Leave to Appeal, Issue I). Being convicted and sentenced for both second-degree murder (requiring malice) and statutory manslaughter (statutorily defined as acting without malice), with their conflicting mens rea elements, for the same death, is unlawful and a double jeopardy violation.

3. Since the time Mr. Wafer's application was filed in this Court, the Court of Appeals has issued two published opinions that would entitle Mr. Wafer to relief on this issue.

4. Mr. Wafer filed a supplemental authority on *People v Davis*, 320 Mich App 484 (2017) in this Court. (Appendix C). *Davis* holds that convicting a defendant of offenses that have mutually exclusive mens rea requirements is unlawful and implicates a Double Jeopardy problem.

5. The prosecutor filed a response to that supplemental authority arguing that the Court of Appeals had wrongly decided an issue of first impression. (Appendix D).

6. More recently, the Court of Appeals decided *People v Williams*, ___ Mich App ___ (Docket #332834)(February 22, 2018) in a similar vein. The Court of Appeals vacated the larceny in a building conviction while affirming the larceny from a person conviction, finding them to be mutually exclusive offenses, citing *Davis, supra*.

7. Binding precedent issued while a defendant's case is still pending on direct appeal should be applied to that defendant's case. See *People v Lockridge*, 498 Mich 358, 394 (2015).

8. Below in the instant case, Judge Servitto dissented on this issue. She would have granted relief to Mr. Wafer. (Appendix E, COA opinion).

9. This issue is of great importance to Mr. Wafer because the invalid manslaughter conviction was scored in Prior Record Variable 7 as a concurrent conviction and by itself raised Mr. Wafer's sentencing guidelines range by two ranges from A-II (144-240) to C-II (180-300/life). The trial court judge imposed a sentence at the bottom of the inappropriately inflated sentencing guidelines range (180 months), believing that she could not depart downward for lack of a substantial and compelling reason, pre-*Lockridge*.¹ Mr. Wafer's requested relief on this issue is that the manslaughter conviction be vacated and resentencing granted on the second degree murder conviction under the recalculated lower sentencing guidelines range. (See application for leave to appeal and COA brief on appeal.)

¹ The Court of Appeals remanded for a *Crosby* hearing, and the prosecutor did not appeal from that decision. (See Appendix E). As Mr. Wafer filed an application for leave to appeal in this Court on his other claims, the *Crosby* hearing has not yet taken place.

WHEREFORE, Defendant-Appellant **THEODORE PAUL WAFER** respectfully requests that this Honorable Court grant reconsideration and grant leave to appeal or oral argument on the conflicting verdicts/Double Jeopardy issue or remand his case to the Court of Appeals for reconsideration of that issue in light of that court's recent binding opinions in *Davis* and *Williams*. Ultimately, Mr. Wafer seeks to have the manslaughter conviction vacated and resentencing on the second degree murder conviction.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Jacqueline J. McCann

BY:

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Date: March 30, 2018

APPENDIX A

Order

Michigan Supreme Court
Lansing, Michigan

March 9, 2018

153828

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

THEODORE PAUL WAFER,
Defendant-Appellant.

SC: 153828
COA: 324018
Wayne CC: 14-000152-FC

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

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On October 12, 2017, the Court heard oral argument on the application for leave to appeal the April 5, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, C.J. (*dissenting*).

Renisha McBride, the deceased, was shot and killed by defendant in the middle of the night on defendant's porch. In hindsight, it appears likely that she was seeking some aid after being involved in a nearby car accident a few hours earlier. Defendant, unfortunately, was unaware of these facts. Instead, understanding only that his home was under assault from one or more unknown individuals outside, he chose to meet the apparent threat at his front door.

Despite the tragic nature of this case, defendant was entitled to a fair trial with all the protections guaranteed to him by law. In my judgment, however, defendant was deprived of a critical protection at trial. This deprivation prejudiced the outcome, for which the only remedy is a new trial. Accordingly, I respectfully dissent from this Court's order denying leave to appeal.

I. FACTS AND PROCEEDINGS

Defendant lived alone in Dearborn Heights, close to the border of Detroit. He was aware that his neighborhood had recently suffered from an increase in crime. For instance, one of his neighbors had to display a handgun for protection against apparent drug users. In addition, defendant's vehicle had been vandalized a few weeks before the shooting at issue. As a result of this increase, defendant converted a hunting shotgun that he owned into a shotgun that was better suited for home defense by installing a pistol grip. His home had three doors—at the front, side, and back of the home. All doors were kept locked, including the screen door protecting the front door.

The deceased crashed her car in Detroit (near Dearborn Heights) at about 1:00 a.m. on November 2, 2013. Witnesses indicated that the deceased seemed “out of it,” and she declined to wait for an ambulance. Instead, she walked away from the scene. It is not clear what the deceased did between about 1:30 a.m. and 4:30 a.m., nor is it clear why she appeared at defendant’s home. In any event, at about 4:30 a.m., defendant was awakened by a loud banging.

Defendant testified that the banging started at the side door and then moved to the front door. Defendant looked out of the front-door peephole and saw a figure leaving the porch. The banging then resumed at the side door, increasing in intensity. Defendant said that he feared that the person or persons were trying to enter his home and that the side door was being “attacked.” He then obtained a baseball bat and went into the kitchen. The banging again resumed at the front door; this time, it sounded like metal hitting the door. Defendant decided to obtain his shotgun from the bedroom closet. By that point, the banging had again moved to the side door; defendant believed that it sounded like the person or persons were trying to kick in the door. When the banging at the side door stopped, defendant went to the front door to investigate, fearing that “they” were attempting to break into his home. He believed that if the person or persons outside saw him at the front door holding a gun, the person or persons might run away. By then, according to defendant, the front-door peephole was cracked and unusable from the pounding on the door.

Defendant testified that he unlocked the front door, opened it a few inches, and saw that the screen from the screen door was damaged or out of place. He then opened the front door completely, at which point someone suddenly rushed toward the door. Defendant explained that he immediately discharged his shotgun while assertedly fearing for his life, apparently with the screen door still closed, and the deceased was killed at close range. Experts later opined that she was two to eight feet away from the shotgun when it was discharged, but more likely at the short end of that range. Defendant said that it was only after he discharged the shotgun that he realized the person was a woman. He called the police at 4:42 a.m., stating that he had “just shot somebody on my front porch with a shotgun banging on my door.”¹

The trial court provided two self-defense instructions to the jury, CJI2d 7.15 and CJI2d 7.16, each of which is consistent with the Self-Defense Act, MCL 780.971 *et seq.*²

¹ A medical expert testified that at the time of this incident, the deceased had “very high alcohol levels,” “active marijuana in her system,” and likely suffered a concussion in the car accident a few hours earlier. In his opinion, these impairments “reduc[e] the ability to put forth good judgement.”

² CJI2d 7.15 is now titled M Crim JI 7.15, and CJI2d 7.16 is now titled M Crim JI 7.16.

However, the trial court refused defense counsel's requests to also give CJI2d 7.16a.³ Relevant to this case, CJI2d 7.16a would have instructed the jury that if an individual is "in the process of breaking and entering," and the homeowner honestly and reasonably believes that fact, then the jury should presume that the homeowner has an honest and reasonable belief of imminent death or great bodily harm. See MCL 780.951(1). The trial court reasoned that CJI2d 7.16a was inapplicable because "there is no evidence that [the deceased] was either breaking or entering."

Ultimately, the jury found defendant guilty as charged of second-degree murder, MCL 750.317, statutory manslaughter, MCL 750.329, and possession of a firearm during the commission of a felony, MCL 750.227b. The Court of Appeals affirmed his convictions, *People v Wafer*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 324018), and we directed the Clerk to schedule oral argument on the application, *People v Wafer*, 500 Mich 930 (2017).

II. STANDARD OF REVIEW

This Court reviews de novo claims of instructional error. *People v Dupree*, 486 Mich 693, 702 (2010).

III. DISCUSSION

A. COMMON LAW OF SELF-DEFENSE

"At common law, a claim of self-defense, which 'is founded upon necessity, real or apparent,' may be raised by a nonaggressor as a legal justification for an otherwise intentional homicide." *People v Riddle*, 467 Mich 116, 126 (2002), quoting 40 Am Jur 2d, Homicide, § 138, p 609. "[T]he killing of another person in self-defense is justifiable homicide only 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." *Riddle*, 467 Mich at 127. "[O]nce the defendant satisfies the initial burden of production, the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 155 (2012) (quotation marks and citation omitted; alteration in original).

As a general rule under the common law, a person exercising his right of self-defense is "bound, if possible, to get out of his adversary's way, and has no right to stand up and resist if he can safely retreat or escape." *Pond v People*, 8 Mich 150, 176 (1860). However, under the castle doctrine, "[i]t is universally accepted that retreat is not a factor

³ CJI2d is now titled M Crim JI 7.16a.

in determining whether a defensive killing was necessary when it occurred in the accused's dwelling[.]” *Riddle*, 467 Mich at 134. “The rule has been defended as arising from ‘an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.’” *Id.*, quoting *People v Godsey*, 54 Mich App 316, 319 (1974) (citations and quotation marks omitted).

B. STATUTES GOVERNING SELF-DEFENSE

“With the enactment of the Self-Defense Act (SDA), MCL 780.971 *et seq.*, the Legislature codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat.” *Dupree*, 486 Mich at 708. MCL 780.972(1)(a) of the SDA reads as follows:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

MCL 780.972 is consistent with the common law of self-defense to the extent that it allows a person to use deadly force in self-defense when (1) the person honestly and reasonably believes that there is a threat of imminent death or great bodily harm to himself, and (2) the person honestly and reasonably believes that the use of deadly force is necessary to prevent such an outcome.

Furthermore, MCL 780.951 provides heightened statutory protection for a person who uses deadly force in self-defense when the circumstances suggest that another person presents an imminent threat of death or great bodily harm to those within a dwelling. MCL 780.951(1) provides, in relevant part, as follows:

(1) . . . [I]t is a rebuttable presumption in a civil or criminal case that an individual who uses deadly force or force other than deadly force under [MCL 780.972] 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).

Thus, MCL 780.951(1) essentially provides that, when the evidence shows that both subdivisions (a) and (b) have been satisfied, the defendant is entitled to a rebuttable presumption that he possesses an honest and reasonable belief of imminent death or great bodily harm. The trial court here, despite repeated requests from defense counsel, refused to instruct the jury concerning MCL 780.951 by providing the jury CJI2d 7.16a. Its refusal to do so is dominantly at issue in this appeal. Put simply, defendant was *entitled* to such an instruction if the evidence supported both MCL 780.951(1)(a) and (1)(b). See *People v Rodriguez*, 463 Mich 466, 472 (2000) (“[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.”) (quotation marks and citation omitted); *People v Kolanek*, 491 Mich 382, 411-412 (2012) (“[I]f a defendant produces sufficient evidence of the elements of the defense, then the question whether the defendant has asserted a valid defense is for the jury to decide.”).

a. MCL 780.951(1)(a)

In relevant part, MCL 780.951(1)(a) is satisfied when either (1) the individual “is in the process of breaking and entering a dwelling” *or* (2) the individual “has broken and entered a dwelling . . . and is still present in the dwelling”

To constitute a “breaking,” the use of “any force” is sufficient. See *People v White*, 153 Mich 617, 621 (1908) (“[I]f any force at all is necessary to effect an entrance into a building, through any place of ingress, usual or unusual, whether open, partly open or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present.”). To constitute an “entry,” “it is sufficient if any part of defendant’s body is introduced within the house.” *People v Gillman*, 66 Mich App 419, 430 (1976), quoting 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1133, p 1528.

MCL 780.951(1)(a) *separately* refers to an individual who is “in the process of breaking and entering” and an individual who “has broken and entered.” Under the principle of statutory interpretation that “[c]ourts must give effect to every word, phrase, and clause in a statute,” *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002), the phrase “in the process of breaking and entering” must mean something different than “has broken and entered.” Otherwise, the first phrase would be nugatory.

The most straightforward meaning of “in the process of breaking and entering,” in light of the fact that the statute separately refers to “has broken and entered,” is that the breaking and entering must be in progress, although the breaking and entering is not yet complete. With that in mind, it is clear that under one entirely reasonable view of the evidence, the deceased here was “in the process of breaking and entering.” Evidence showed that the screen from the screen door had been pushed against the front door when defendant opened it.⁴ A reasonable inference, therefore, is that the deceased pushed the screen against the front door to pound on it. That is, the deceased was responsible for dislodging the screen and pushing her hand through the screen door to the front door. Logically, when an entrance to a building is protected by two doors, in order to access the building, the outer door must be broken before the inner door is broken. When a person breaks through the outer door, that person is quite literally “in the process of” breaking and entering the building. Here, assuming that the deceased broke through the screen door to access the front door, as the evidence suggests, she had been *successful* in breaking one of two barriers to the home and thus was “in the process of” breaking and entering. Moreover, as defendant testified, the banging on the doors was exceedingly loud and forceful, to the extent that the peephole was damaged. And other evidence suggested that the deceased had damaged one of her boots and injured her hands as a possible result of her repeated banging on the doors. Certainly, one way to accomplish an entry into a home is to break down the door by the raw application of physical force. Simply put, the evidence, in my judgment, was sufficient to warrant a finding that the deceased was “in the process of” breaking and entering. Accordingly, the evidence showed that MCL 780.951(1)(a) was satisfied.

b. MCL 780.951(1)(b)

Having concluded that the evidence showed that the deceased may have been “in the process of breaking and entering,” thus satisfying MCL 780.951(1)(a), the next question is whether the evidence satisfied MCL 780.951(1)(b). Under MCL 780.951(1)(b), the individual using deadly force must “honestly and reasonable believe[]” that the other individual “is engaging in conduct described in subdivision (a).”

The evidence clearly shows that MCL 780.951(1)(b) was satisfied. Defendant testified that he was in fear, that he believed that the person or persons outside were trying to get inside his home in the middle of the night, and that when he pulled the trigger, it was “them or me.” Thus, he had an honest belief that the deceased was “in the process of breaking and entering.” Furthermore, that belief was reasonable as well, given

⁴ In particular, defendant testified that the screen was dislodged inward when he opened it, and another witness testified that the front door had small markings on it that were consistent with the screen pushing against it.

his testimony as to the loud and sustained banging in the middle of the night, his testimony that the banging on the front door was so forceful as to damage the peephole, and his testimony that the screen had been dislodged. It was altogether reasonable under these circumstances, including the recent criminal history of the neighborhood, for an individual to believe that the person or persons outside were in the process of breaking and entering the home. Accordingly, the evidence showed that MCL 780.951(1)(b) was satisfied as well.

Therefore, the evidence satisfied both MCL 780.951(1)(a) and (1)(b), such that defendant was entitled to a jury instruction on the rebuttable presumption set forth in that statute. The trial court, I believe, erred by ruling otherwise.⁵

C. PRESERVED ERROR

“Preserved, nonconstitutional errors are subject to harmless-error review, governed by MCL 769.26[.]” *People v Lyles*, 501 Mich 107, 117 (2017). Under MCL 769.26, “a defendant carries the burden of showing that ‘it is more probable than not that the error was outcome determinative.’” *Id.* at 117-118, quoting *People v Lukity*, 460 Mich 484, 495-496 (1999). For the following five reasons, I conclude that the failure to instruct the jury concerning the rebuttable presumption of MCL 780.951 was outcome-determinative error and, therefore, a new trial is warranted.

First, it is clear that a jury instruction on the rebuttable presumption of MCL 780.951, which concerns “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,” would have squarely supported defendant’s theory and undermined the prosecutor’s

⁵ I decline to address the prosecutor’s new argument in this Court that MCL 780.951, in a criminal case, merely serves as a mechanism for a defendant to satisfy his initial burden of production concerning one element of self-defense under the SDA. “The general rule is well established that upon appellate review, parties cannot assume a position inconsistent with or different from that taken at the trial and are restricted to the theory upon which the case was defended in the court below.” *Heider v Mich Sugar Co*, 375 Mich 490, 506 (1965) (opinion by KELLY, J.). In the trial court, the prosecutor argued that CJI2d 7.16a should not be given because it was not applicable to the particular facts at hand, *not* because MCL 780.951 is a burden-of-production statute. Furthermore, after opening statements, the prosecutor remarkably reached out to the Committee on Model Criminal Jury Instructions and obtained a favorable amendment of CJI2d 7.16a with immediate effect. By doing so, the prosecutor clearly evinced an understanding that the rebuttable presumption of MCL 780.951 was, in fact, appropriate to submit to the jury in certain cases. Under these circumstances, I do not believe that it would be appropriate to entertain the prosecutor’s new argument concerning that instruction.

theory with regard to the first element of self-defense set forth in MCL 780.972(1)(a) of the SDA, which requires an honest and reasonable belief of “imminent death or great bodily harm to himself.” In addition, a jury that affirmatively found in favor of defendant—as opposed to merely entertained reasonable doubt—as to the first element of self-defense would have also been inclined to find reasonable doubt as to the second element of self-defense set forth in MCL 780.972(1)(a) of the SDA, which requires an honest and reasonable belief “that the use of deadly force is necessary to prevent” that outcome. That is, a jury that found that defendant possessed an honest and reasonable belief of imminent death or great bodily harm would have been substantially more likely to entertain reasonable doubt as to whether he possessed an honest and reasonable belief that the use of deadly force was necessary to prevent such an outcome.

Second, a review of the prosecutor’s closing argument shows that he relied heavily on the theory that defendant was angry and frustrated, not afraid, when he confronted the apparent would-be intruder:

Yet she ended up in the morgue. With bullets in her head and in her brain. Because the defendant picked up this shotgun, released this safety, raised it at her, pulled the trigger and blew her face off. He heard knocks and he was mad.

He was angry. And he was full of piss and vinegar. And he was gonna find out what’s going on. And he took that shotgun, while mad, angry and full of piss and vinegar to find out what’s going on.

Why? Why? Why? Because some kids paint balled his car a few weeks earlier. Because he was fed up with the knocking. Why? Why?

He wanted a confrontation. He wanted the kids, the neighborhood kids to leave him alone. He wanted to show them a shotgun. Because he had had enough. Enough of the drug paraphernalia on his front yard.

Enough of the paint ball. Enough of the kids doing whatever to him. And he went and took a shotgun, in his words, to show it to ’em and scare them away.

Now the sound’s back at the front door. I’ve had enough. I’m going to find out what’s going on. He goes to where the sound is with the shotgun. He wants a confrontation.

And what he finds is a 19 year old unarmed teenager. Wet, probably cold, scared, disoriented, possible closed head injury. And based on the

evidence in this case and the reasonable inferences, looking for help. He raised up his gun at that person and shot her in the face.

* * *

He wanted to show the shotgun. He opened the door a bit. Then he opened it all the way. He saw a person. At that point he raised it up, he raised up the shotgun.

He may have even stopped and said something. Not sure what I said, because now I'm piss [sic] and mad. Not scared. Now I'm mad.

Simply put, the prosecutor argued that defendant was angry and aggressive, not fearful for his own life. But anger and aggression are not necessarily inconsistent with a belief that one's life is in danger.⁶ It is entirely possible that an individual such as defendant could be angry that the sanctity of his home was being violated, *and* sufficiently aggressive to affirmatively confront the situation, while still believing that his life is in danger. An individual can have a wide variety of reactions to believing that his or her life is being threatened, including anger, fear, resignation, and so forth. But so long as the *belief* is present, the *particular* emotional reaction to that belief is inconsequential. One need not react timidly or tentatively or by cowering in the face of the circumstances confronting defendant in this case in order that his response not be characterized as "angry and aggressive" rather than "fearful." Through MCL 780.951, the Legislature has expressed its intention that an individual who is confronted with a breaking and entering is entitled to additional legal protection concerning his *belief* of imminent death or great bodily harm. The jury should have been informed of that presumption, which would have necessarily made it much more difficult for the prosecutor to utilize defendant's asserted emotional reaction to assert that he did not possess such a belief beyond a reasonable doubt.

In addition, the prosecutor argued that the jury should find defendant guilty because he did not flee to a different part of the house:

How about shutting the door. How about keeping it shut. How about calling 911. *How about going into a different part of your house.* That's not retreating. *But going to a different part of your house.* [Emphasis added.]

The contention that "going to a different part of your house" is not tantamount to "retreating" is clearly a misstatement of the castle doctrine. See *Riddle*, 467 Mich at 134. By so arguing to the jury, however, the prosecutor encouraged the jury to find that

⁶ Indeed, MCL 780.972(1)(a) of the SDA does not use the word "fears." Rather, it uses the word "believes." Fear is not a requirement for lawful self-defense.

defendant did not possess an honest and reasonable belief of imminent death or great bodily harm because he did not go to a different part of the house. Had the jury been instructed on the rebuttable presumption of MCL 780.951, defendant would have been protected against such an improper argument.

Third, I find it difficult to believe that the jury found beyond a reasonable doubt that defendant did not act in self-defense when the apparent would-be intruder rushed toward the front door in the middle of the night, and he instinctively pulled the trigger of the shotgun in response. Instead, given the prosecutor's closing argument, the jury likely identified as absolutely critical the fact that defendant opened the front door to confront the would-be intruder or intruders, rather than staying behind closed doors. Instructing the jury on the rebuttable presumption of MCL 780.951 would have explicitly informed the jury that an individual who is in the process of breaking and entering may pose an imminent threat to the homeowner inside. Making that information explicit would have meant that the jury was required to presume, at all times relevant to this case, that defendant possessed an honest and reasonable belief of imminent death or great bodily harm unless rebutted by the prosecutor. Thus, the jury would have presumed that *before, during, and after* defendant opened the front door, he possessed such a belief. The only remaining question would then have been whether defendant possessed an honest and reasonable belief that "the use of deadly force [was] necessary to prevent the imminent death or great bodily harm." MCL 780.972(1)(a). If the jury's focus had been on that moment in time when the apparent would-be intruder rushed toward defendant, it would have been almost impossible to escape the conclusion that he had used necessary deadly force or, at a minimum, that there had been a reasonable doubt as to whether he had used necessary deadly force. In my view, it is only because the prosecutor was able to expand the jury's focus to the time before defendant opened the door that he was able to obtain a conviction. That time frame, however, was virtually irrelevant as to whether defendant had used "necessary" deadly force, given that defendant had no duty to retreat in his dwelling, which included the porch. See *People v Richardson*, 490 Mich 115, 121 (2011).

Fourth, the jury was instructed that "a person is [n]ever required to retreat if attacked in his home," which includes the "porch." The negative implication of this instruction was that defendant *himself* must be attacked in his home for the duty to retreat no longer to be a relevant concept. But the castle doctrine is not so limited. Rather, under the castle doctrine, the duty to retreat is simply not a relevant concept when, in addition to such circumstances, an individual is attempting an unlawful entry into the dwelling. See *Pond*, 8 Mich at 177 ("A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, *or to prevent his forcible entry*, even to the taking of life.") (emphasis added). And that is precisely what the facts showed here.

For this reason, I respectfully disagree with the Court of Appeals that the failure to instruct the jury concerning MCL 780.951 constituted harmless error because the jury found defendant guilty, thereby rejecting his self-defense argument beyond a reasonable doubt. See *Wafer*, unpub op at 4 n 2 (“[T]here was scant evidence of self-defense while, in contrast, the jury received detailed instructions on defendant’s self-defense theory and the prosecutor presented ample evidence to disprove defendant’s claim of self-defense beyond a reasonable doubt.”). Even if the presumption *itself* might not have affected the case, instructing the jury concerning MCL 780.951 would have assisted the jury in understanding that the duty to retreat simply is not implicated when the apparent would-be intruder is attempting to break through the doors of the home. Absent such an instruction, the jury was essentially informed of the opposite: that the duty to retreat *is* a relevant concept in such circumstances.

Fifth, during her opening statement, defense counsel discussed CJI2d 7.16a and told the jury that it should presume that defendant “had an honest and reasonable belief that imminent death or great bodily harm would occur” if “[t]he deceased was breaking and enter[ing] a dwelling.” However, defense counsel was unable to offer such an argument during her closing argument because the trial court had refused to instruct the jury concerning MCL 780.951. Given this discrepancy between the opening statement and closing argument, the jury was left either with the impression that the evidence introduced at trial did not show that defendant had an honest and reasonable belief that imminent death or great bodily harm would occur, or else failed to show that the deceased was in the process of breaking and entering, or both; otherwise, the jury would have received a final instruction consistent with the opening statement. In either event, defendant was prejudiced. If the jury was left with the first impression, defendant was prejudiced because he did, in fact, introduce evidence showing that he honestly and reasonably believed that imminent death or great bodily harm would occur to him, and the jury should not have been implicitly informed to preemptively disregard such evidence during its deliberations. If the jury was left with the second impression, defendant was prejudiced because whether the deceased was in the process of breaking and entering was undoubtedly a critical issue in this case, and the jury should not have been implicitly informed that the dispute had been resolved in favor of the prosecutor.

For these reasons, I conclude that the failure to instruct the jury concerning MCL 780.951 was not harmless error, and consequently, a new trial is warranted.

IV. DEFENSE OF HABITATION

Notwithstanding my conclusion that a new trial is warranted because of the erroneous failure to instruct the jury concerning MCL 780.951, my review of the record indicates that another error occurred at trial. This error, in my judgment, provides an *independent* basis for a new trial.

Under the common law, in addition to self-defense, a person within a dwelling could also avail himself of the defense of habitation in cases such as the instant case. See generally, 4 Blackstone, Commentaries on the Laws of England, p *180 (“If any person attempts a robbery or murder of another, or attempts to break open a house, *in the nighttime*, (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged.”). One scholar has explained the distinction between these two defenses as follows:

As an exception to the generalized duty to retreat, the Castle Doctrine sits at the intersection of two distinct but interrelated defenses: defense of habitation and self-defense. Defense of habitation is primarily based on the protection of one’s dwelling or abode, and stems from the common law belief that a man’s home is his castle. Essentially, the defense provides that the use of deadly force may be justified to prevent the commission of a felony in one’s dwelling, although there is considerable discussion on whether the intrusion must be accompanied by the intent to commit a violent felony. Some courts require that defense of habitation only be asserted as against an external threat, and if that is true, then the defense cannot be claimed as against a cohabitant in lawful possession. Because the threat is of the commission of a forcible felony in the home, courts agree that there is no duty to retreat when claiming the defense of one’s habitation. As stated forcefully by the Minnesota Supreme Court, “[m]andating a duty to retreat for defense of dwelling claims will force people to leave their homes by the back door while their family members are exposed to danger and their houses burgled.”

Derived from similar roots, and potentially overlapping, is self-defense in the home. Whereas in defense of habitation, deadly force may be used to prevent the commission of an atrocious felony, in self-defense, deadly force may be used when necessary in resisting or preventing an offense which reasonably exposes the person to death or serious bodily harm. The contemplated need for self-defense in the home, therefore, is in some sense broader—it can be an external or internal attack—but it is narrower in its requirement that the attacker intends death or serious bodily harm. [Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 Marq L Rev 653, 665-666 (2003) (citations omitted).]

This Court has recognized the distinction between these two defenses. See *People v Gonsler*, 251 Mich 443, 445 (1930) (“The defense of life or limb *or* of [the

homeowner's] habitation was not involved if the dying declaration was true.”) (emphasis added).⁷

The seminal case in Michigan concerning defense of habitation is *Pond*. The pertinent facts of *Pond* were as follows:

Pond went to the door and hallooed, “Who is tearing down my net-house?” to which there was no answer. The voices of a woman and child were heard crying, and the woman’s voice was heard twice to cry out “for God’s sake!” Cull’s voice was also heard from the net-house, not speaking, but hallooing as if he was in pain. Pond cried out loudly, “Leave, or I’ll shoot.” The noise continuing, he gave the same warning again, and in a few seconds shot off one barrel of the gun. Blanchard was found dead the next morning. [*Pond*, 8 Mich at 180-181.]

This Court reversed Pond’s conviction because had he properly used deadly force in defending the net-house, which comprised part of his dwelling, from attack:

A question was raised whether the net-house was a dwelling or a part of the dwelling of Pond. We think it was. . . .

* * *

Apart from its character as a dwelling, which was denied by the court below, *the attack upon the net-house for the purpose of destroying it, was a violent and forcible felony*. And the fact that it is a statutory and not common law felony, does not, in our view, change its character. Rape and many other of the most atrocious felonious assaults, are statutory felonies only, and yet no one ever doubted the right to resist them unto death. *And a breaking into a house with the design of stealing the most trifling article, being common law burglary, was likewise allowed to be resisted in like manner, if necessary*. [*Id.* at 181-182 (emphasis added).]

“We think there was error . . . in holding that the protection of the net-house could not be made by using a dangerous weapon . . .” *Id.* at 182.

⁷ More recently, in *Riddle*, this Court implicitly recognized that self-defense and defense of habitation are separate defenses. When agreeing with the prosecutor’s assertion that “*Pond* did not in any way purport to extend the self-defense castle exception to the curtilage area surrounding the dwelling,” we explained that “*Pond* considered the net-house to be a dwelling not for the purpose of the self-defense castle doctrine but instead for the purpose of *a completely different defense . . .*” *Riddle*, 467 Mich at 136 & n 27 (emphasis added). That “completely different defense,” as explained herein, was the defense of habitation.

Thus, *Pond* establishes that, wholly distinct from self-defense, deadly force may be used for defense of habitation when the assailant against the habitation apparently possesses the “design” (i.e., the intent) to commit a felony therein. See *id.* And furthermore, that felony to be committed need not itself be violent. Rather, “stealing the most trifling article” is sufficient. See *id.* See also 3A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 91:58, Defense of Habitation, p 376 (“*Force, including deadly force, may be used to repel an intruder or prevent forcible entry into a dwelling where under the circumstances the occupant would reasonably believe the intruder intended to commit a felony or to do serious bodily harm.*”) (emphasis added).⁸

Consistent with this common law is Michigan Criminal Nonstandard Jury Instruction § 25:8, titled “Defenses—Habitation,” which reads as follows:

(1) The defendant contends that the killing (use of deadly force, in the event death is not caused by use of force) was justified because it occurred under circumstances entitling [him/her] to use deadly force to prevent forcible entry into [his/her] dwelling, under circumstances where the defendant would reasonably believe the intruder intended to commit a felony or do serious bodily harm to one within the dwelling.

(2) If you have a reasonable doubt as to whether the defendant did indeed use deadly force against the intruder in an attempt to prevent forcible entry into [his/her] dwelling, under circumstances where the defendant would reasonably believe the intruder intended to commit a felony, or do serious bodily harm to one within the dwelling, then the defendant is not guilty of any crime.

(3) An individual is entitled to use deadly force to prevent forcible entry into [his/her] dwelling, under circumstances where the defendant would reasonably believe the intruder intended to commit a felony, or do

⁸ Footnote 11 of *Riddle* is consistent with this proposition. There, this Court stated that “[w]e specifically do not address whether a person may exercise deadly force in defense of his habitation, and our holding should not be misconstrued to sanction such use of force as it pertains to the defense of one’s habitation.” *Riddle*, 467 Mich at 121 n 11. Aside from the fact that this Court expressly declined to address the question of defense of habitation, it is certainly true that deadly force may not be used when a person is *only* seeking to defend his habitation. Rather, the assault against the habitation must be accompanied by circumstances indicating that the assailant intends to commit a felony therein.

serious bodily harm to one within the dwelling, only when all of the following circumstances exist:

(A) The evidence must show that a forcible intrusion into the dwelling was occurring.

(B) The evidence must show that the forcible intrusion was occurring under circumstances where it would be reasonable for an occupant to believe the intruder intended to commit a felony or do serious bodily harm to one within the dwelling; the use of deadly force is not permissible to expel a mere trespasser.

(C) The evidence must show that the defendant thus entertained an honest and reasonable belief that the use of deadly force was necessary to prevent the intruder from committing a felony or doing serious bodily harm to one within the dwelling.

(4) The defendant does not have to prove that [he/she] acted in defense of [his/her] dwelling. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in defense of [his/her] dwelling.

(5) Whether the evidence raises a reasonable doubt that, under these standards, the defendant was justified in using deadly force to defend [his/her] dwelling, is a question you must determine. [Murphy & VandenHomergh, *Michigan Nonstandard Jury Instructions—Criminal* (Eagan: Thomson Reuters, 2017), pp 388-389 (italics omitted).]

In my judgment, this jury instruction sets forth the common law of defense of habitation in Michigan with reasonable precision. Moreover, Comment 2 to this instruction in particular provides a thoughtful explanation of the distinction between self-defense and defense of habitation:

Defense of habitation is a different defense from self-defense, and differs from protection of other property. The dwelling is viewed as a place of special importance as a place of security, and thus defense of the dwelling permits the use of deadly force where the defender reasonably believes that the trespasser or intruder intends to commit a felony or to do harm to him or her or another within the house. *Unlike the defense of self-defense, it is not required that the defendant be in fear of imminent death or great bodily harm at the time deadly force is employed, as is required with self-defense.* [*Id.* at 389-390 (emphasis added).]

I am unable to locate any place in the instant record where defense counsel requested that the trial court give Michigan Criminal Nonstandard Jury Instruction § 25:8—or other instruction concerning the defense of habitation—to the jury.⁹ If defense counsel failed to do so, her failure arguably fell below an objective standard of reasonableness. See *Strickland v Washington*, 466 US 668 (1984). I can identify no trial strategy that would justify the failure to request that the trial court provide an instruction concerning a defense that is squarely applicable to the case and is arguably more likely to be successful than any other defense that might be argued. Once again, defense of habitation simply does not require that the defendant possess a belief of imminent death or great bodily harm. Rather, the defendant is only required to possess a belief that a forcible intrusion is occurring and that the intruder intends to commit a felony inside the habitation. Thus, an instruction concerning the defense of habitation would have fundamentally undermined the prosecutor’s case, which was premised upon the notion that defendant should be found guilty because he did not possess a belief of imminent death or great bodily harm. Furthermore, defense of habitation allows the defendant to repel a forcible intrusion *before* it is successful. See *Pond*, 8 Mich at 181-182.¹⁰ Thus, an instruction concerning the defense of habitation would also have undermined the prosecutor’s case to the extent that it relied on the notion that defendant should not even have opened the front door to confront the would-be intruder.

Such an instruction, if requested, should have been given by the trial court. The evidence showed that the deceased had broken through the screen door as a result of her pounding and banging. Thus, a forcible intrusion into the dwelling was occurring. Furthermore, given that the assault against the dwelling was occurring in the middle of the night in a relatively high-crime neighborhood, it was, in my judgment, reasonable for defendant to believe that the assailant intended to commit a felony therein. See, e.g., MCL 750.360 (“Any person who shall commit the crime of larceny by stealing in any

⁹ Michigan Criminal Nonstandard Jury Instruction § 25:8 was listed as Michigan Criminal Nonstandard Jury Instruction § 25.9 before 2014.

¹⁰ Michigan is hardly alone in this regard. See, e.g., *State v Blue*, 356 NC 79, 87 (2002) (explaining that “the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances . . . that the occupant reasonably apprehends death or great bodily harm . . . or believes that the assailant intends to commit a felony”) (quotation marks and citation omitted; emphasis in original); *State v Ivicsics*, 604 SW2d 773, 777 (Mo App, 1980) (explaining that defense of habitation “differs from self defense by authorizing protective acts to be taken earlier than they otherwise would be authorized, that is, at the time when and place where the intruder is seeking to cross the protective barrier of the house”) (quotation marks and citation omitted).

dwelling house . . . shall be guilty of a felony.”). And defendant further testified that this was his honest belief as well.

I have little doubt that such an instruction likely would have changed the outcome of the trial. Even if the jury found beyond a reasonable doubt that the prosecutor disproved self-defense, the jury still would have been obligated to acquit defendant if a forcible intrusion was occurring, it was reasonable to believe that the assailant of the dwelling intended to commit a felony therein, and defendant possessed an honest and reasonable belief of this fact. Given the significant evidence supporting each of these facts, an acquittal would have been almost inevitable.

Regardless of whether defense counsel raised the issue concerning defense of habitation in the trial court, the trial court failed to give any such instruction to the jury. Appellate counsel, in my judgment, should have argued on direct appeal that the instruction should have been given and, if appropriate, that defense counsel was ineffective for failure to so argue. This may well have constituted ineffective assistance of appellate counsel. Accordingly, in a motion for relief from judgment, I believe that defendant would be able to show both “good cause” for failure to raise the issue concerning defense of habitation on direct appeal, see MCR 6.508(D)(3)(a), and “actual prejudice” from the failure to instruct the jury on this defense, see MCR 6.508(D)(3)(b).

V. CONCLUSION

In the end, the fundamental question here is whether the alleged instructional error concerning the rebuttable presumption of MCL 780.951 warrants reversal. I believe that it does. Defendant was deprived of the legal *presumption* to which he was entitled by statute, that he acted in self-defense out of an honest and reasonable belief of imminent death or great bodily harm when the deceased apparently tried to break down the doors of his home in the middle of the night. Had the jury *presumed* that he possessed such a belief, it would have been far more likely to find that the prosecutor did not disprove self-defense beyond a reasonable doubt.

It is altogether tragic that Renisha McBride lost her life. However, I do not believe that defendant is properly held responsible, or that he *would* have been held responsible, but for the trial court’s failure to properly instruct the jury concerning the full gravity of the situation faced by defendant. Accordingly, I respectfully dissent.

CLEMENT, J., did not participate in the disposition of this matter because the Court considered it before she assumed office.



i0306

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 9, 2018


Clerk

APPENDIX B

He also acknowledged that a basic rule of firearm safety is to always assume a firearm is loaded, until it has been proven to you otherwise. (IX 82)

Balash criticized the way the police handled the crime scene, including the inadequate photographing, not properly preserving and collecting evidence, and not properly maintaining the security and integrity of the scene. (IX 71-81)

ARGUMENTS

- I. MR. WAFER CANNOT BE CONVICTED AND SENTENCED FOR TWO HOMICIDES IN THE DEATH OF ONE PERSON. BEING CONVICTED AND SENTENCED FOR VIOLATING BOTH MCL 750.317 AND MCL 750.329, WITH THEIR CONFLICTING MENS REA ELEMENTS, FOR THE SAME DEATH IS DOUBLE JEOPARDY. MANSLAUGHTER MUST BE SET ASIDE, AND THE CASE REMANDED FOR RESENTENCING ON SECOND-DEGREE MURDER.**

Issue Preservation/Standard of Review

This issue was preserved by defense counsel's objections made both during the discussion of jury instructions, where the prosecutors agreed one of the convictions would have to be set aside if the defendant was convicted of both counts, and additionally at sentencing, where the prosecutors changed their mind and opposed the defense's objection.¹⁶ (X 126-128, see also XI 9-12; S 14-21). At sentencing, defense counsel also objected to the scoring of PRV 7 at 10 points on the basis of the concurrent manslaughter conviction. (S 14-16) This Court reviews statutory construction and constitutional law questions de novo. *People v Miller*, 498 Mich 13 (2015).

¹⁶ The prosecutor charged Mr. Wafer with second-degree murder and statutory manslaughter; the prosecutor requested instruction on common-law involuntary manslaughter as a necessarily lesser included offense of second-degree murder. (See Felony Information; X 126-128)

Discussion

At this trial, over objection, Mr. Wafer was convicted and sentenced for second-degree murder, MCL 750.317, and statutory manslaughter, MCL 750.329, in the death of Ms. McBride. The Legislature does not intend that a person be convicted and sentenced for two homicide offenses for the death of one person.¹⁷ Mr. Wafer's convictions and sentences for second-degree murder and statutory manslaughter violate the state and federal prohibitions against Double Jeopardy. The convictions are also contradictory as the first requires the defendant acted with malice and the latter indicates the defendant acted without malice. This Court must vacate the lesser serious conviction/sentence and remand for resentencing on the greater one.

Double Jeopardy Violation

The United States and the Michigan Constitutions provide that no person may be put in jeopardy twice for the same offense. US Const, Ams V, XIV; Mich Const 1963, art 1, § 15. Double jeopardy is composed of a successive prosecution strand and a multiple punishment strand. See *North Carolina v Pearce*, 395 US 711 (1969); *Miller, supra*. This case involves the multiple punishments. See *Miller, supra*, slip op pg 4.

As this Court recently explained in *Miller, supra* at 17-18:

The multiple punishments strand of double jeopardy “is designed to ensure that courts confine their sentences to the limits established by the Legislature” and therefore acts as a “restraint on the prosecutor and the Courts.” The multiple punishments strand is not violated “[w]here ‘a legislature specifically authorizes cumulative punishment under two statutes....’” Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple

¹⁷ For instance, the Legislature does not intend for a defendant to be convicted and sentenced for both first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), for the death of one person. *People v Bigelow*, 229 Mich App 218 (1998); *People v Long*, 246 Mich App 582, 588 (2001). To remedy the Double Jeopardy violation in those situations, the courts modify defendant's judgment of sentence to specify that defendant's conviction and single sentence of life without parole is for one count of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.*

punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. “Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.” [Slip Op pp 4-5 (Footnotes omitted.)]

A court must first look to the statutory language and history. *Miller, supra* at 19. If the Legislature’s intent is clear, the courts must abide by it. Only if the Legislature’s intent is not clear, the courts should look to the *Blockburger/Ream*¹⁸ same elements test.¹⁹ *Id.*

In *People v Smith*, 478 Mich 64 (2007), this Court held that statutory manslaughter, MCL 750.329, is not a necessarily included lesser offense of second-degree murder.²⁰ The Court found that “because it contains elements—that the death resulted from the discharge of a firearm and that the defendant intentionally pointed the firearm at the victim—that are not subsumed in the elements of second-degree murder”, statutory manslaughter, MCL 750.329, is not an “inferior” offense of second-degree murder under MCL 768.32(1), which governs when a jury may be instructed on lesser offenses than those charged.²¹

¹⁸ *Blockburger v US*, 284 US 299, 304, 52 SCt 180, 76 LEd 306 (1932); *People v Ream*, 481 Mich 223 (2008).

¹⁹ It is not a violation of double jeopardy to convict a defendant of multiple offenses if “each of the offenses for which defendant was convicted has an element that the other does not....” This means that, under the *Blockburger/Ream* test, two offenses will only be considered the “same offense” where it is impossible to commit the greater offense without also committing the lesser offense. *Miller, supra* at 19-20.

²⁰ Appellant asserts that *Smith* was wrongly decided. In *People v Mendoza*, 468 Mich 527 (2003), the Michigan Supreme Court unequivocally held that manslaughter in all of its forms is an inferior, i.e. necessarily included lesser offense, of murder. Manslaughter is simply murder without malice. *Id.* at 534. The *Mendoza* court specifically referenced MCL 750.329 as one of the forms of manslaughter that was inferior to murder, pursuant to MCL 768.32(1), at p 536, n 7. *Smith* improperly strayed from *Mendoza*.

²¹ In *Smith*, the defendant was charged with second-degree murder and felony-firearm. The trial court instructed the jury on the lesser offense of common-law involuntary manslaughter based on gross negligence. The trial court denied defendant's request to instruct on statutory manslaughter under MCL 750.329. In *Smith*, the Supreme Court referred to MCL 750.329 as statutory *involuntary* manslaughter.

Appellant asserts that this Court wrongly decided *Smith*. In *People v Mendoza*, 468 Mich 527 (2003), this Court unequivocally held that manslaughter in all of its forms is an inferior, i.e. necessarily included lesser offense, of murder. Manslaughter is simply murder without malice. *Id.* at 534. The *Mendoza* court specifically referenced MCL 750.329 as one of the forms of manslaughter that was inferior to murder, pursuant to MCL 768.32(1), at p 536, n 7. *Smith* improperly strayed from *Mendoza*.

Regardless, *Smith* is not applicable to the present question as it did not involve a double jeopardy question. In *Smith*, this Court faced the analytically distinct question of whether an offense was a cognate lesser or a necessarily included lesser offense of another. This Court found that it was not error for the trial court to deny the defense's request for an instruction on statutory manslaughter where the defendant had been charged with second-degree murder.

Here, the question is whether the Legislature intended multiple punishments under these statutes. And, because the answer is plain from the statutes that it did not so intend, the *Blockburger/Ream* same elements test does not come into play. *Miller, supra*.

MCL 750.317 provides:

Second degree murder--All other kinds of murder [meaning other than first-degree, MCL 750.316] shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

Because MCL 750.317 proscribes "murder" without providing a particularized definition, MCL 750.317 retained the elements from the common law. *People v Reese*, 491 Mich 127, 140-142 (2012); *People v Riddle*, 467 Mich. 116, 125-126 (2002). Thus, the elements of second-degree murder are: (1) death, (2) caused by defendant's act, (3) **with malice**, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534 (2003), citing *People v Goecke*, 457 Mich 442, 463-464 (1998).

In contrast, statutory manslaughter requires that there be an absence of malice. In MCL 750.329, the Legislature provided, in relevant part:

“(1) A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally **but without malice** at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.” (Emphasis added).

The Legislature did not intend for a person to be convicted and punished under both MCL 750.317 and MCL 750.329, as evidenced by the statutory language. The convictions for both these homicide offense are contradictory. As this Court noted in *People v Doss*, 406 Mich 90, 98 (1979): “(I)t is manifestly impossible for an act to be at the same time malicious and free from malice.” This Court further observed that: “‘Malice’ or ‘malice aforethought’ is that quality which distinguishes murder from manslaughter. *Doss, supra* at 99.

Court of Appeals’ Opinion

Here, the majority in the Court of Appeals disagreed with Appellant, holding that “[n]either statute includes language that plainly indicates whether or not the Legislature intended to authorize multiple punishments.” (Appendix A - COA majority opinion, p 9). The majority went on to find that the two offenses were not the same for double jeopardy purposes under the *Blockburger/Ream* same elements test. (*Id.*)

In a footnote, the majority opined that Appellant is merely complaining of inconsistent verdicts. The majority then noted that inconsistent jury verdicts are permissible. (Appendix A – COA majority opinion, p 9, n 3.)

However, the jury in this case had no idea that it was entering inconsistent verdicts – one finding that Mr. Wafer acted with malice (second-degree murder) and one finding that he acted without malice (statutory manslaughter). This was because, consistent with this Court’s hold in *Doss, supra*, the jurors were not instructed in a manner that would allow them to discern that. In

Doss, while noting that it is impossible to act both with malice and without malice, this Court held that the prosecutor is not required to prove an absence of malice. *Doss, supra* 406 Mich at 98-99. Thus, the only mens rea that the criminal jury instructions inform jurors of for statutory manslaughter is that the defendant “intended to point the firearm at” the deceased and that is how the jurors in this case were instructed. MI Crim JI 16.11;²² (X 167).

This Court should adopt the dissent of Judge Servitto on this issue, who wrote:

I disagree, however, with the majority’s conclusion that neither the statute governing second degree murder, MCL 750.317, nor the statute governing involuntary manslaughter, MCL 750.329(1), plainly evince a legislative intent with respect to multiple punishments. Because of my disagreement, I would further find that the test articulated in *Ream, supra*, need not be utilized.

There would have been no need to add the limitation “but without malice” in the manslaughter statute had the Legislature intended to authorize dual punishments for both second degree murder and manslaughter under these circumstances. Rather, the Legislature would have simply remained silent on the mens rea element. The fact that it did not do so supports a conclusion that the Legislature expressed a clear intent in the manslaughter statute to prohibit multiple punishments for manslaughter and murder. See *Miller*, 498 Mich at 18. And, we must presume that the Legislature “knows of the existence of the common law when it acts.” *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012). Thus, in enacting the manslaughter statute, the Legislature was well aware that second degree murder, at common law and continuing today, required a malice element and expressly and purposely

²² MI Crim JI 16.11:

(1) [The defendant is charged with the crime of _____ / You may also consider the lesser charge of] involuntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant caused the death of [name deceased], that is, [name deceased] died as a result of [state alleged act causing death].

(3) Second, that death resulted from the discharge of a firearm. [A firearm is an instrument from which (shot / a bullet) is propelled by the explosion of gunpowder.]

(4) Third, at the time the firearm went off, the defendant was pointing it at [name deceased].

(5) Fourth, at that time, the defendant intended to point the firearm at [name deceased].

[(6) Fifth, that the defendant caused the death without lawful excuse or justification.]

excluded this element from the manslaughter statute as a distinguishing feature.

Given the Legislature's awareness of the requisite element of malice for second degree murder and its express exclusion of a malice element in the manslaughter statute, I would find that the Legislature expressed a clear intent in MCL 750.329(1) to prohibit multiple punishments for these two crimes. Defendant's convictions of and punishments for both second degree murder and manslaughter in the death of one person thus violated the multiple punishments strand of double jeopardy. *Miller*, 498 Mich at 18. [Appendix A, COA partial dissent, pp 1-3 (emphasis added)].

Remedy

The usual remedy for a double jeopardy violation in the multiple punishment strand is to vacate the lesser offense, but in this case it also requires a remand for resentencing on the remaining greater offense because the imposition of that sentence was affected by the consideration of the other invalid conviction, i.e. affected by inaccurate information or based on a constitutionally impermissible ground. *People v Jackson*, 487 Mich 783 (2010); MCL 769.34(10); *People v Francisco*, 474 Mich 82 (2006); *People v Miles*, 454 Mich 90, 96 (1997); see also *People v Moore*, 391 Mich 426, 436-440 (1976) and *People v Buck*, 197 Mich App 404, 431 (1992), rev'd in part on other grounds 444 Mich 853 (1993). Mr. Wafer is additionally entitled to resentencing on the second-degree murder conviction because the sentencing guidelines range for it was raised from A-II (144-240) to C-II (180-300/life) by the scoring of PRV 7 at 10 points for the concurrent manslaughter conviction,²³ a separate and distinct ground for resentencing under MCL 769.34(10). *Jackson, supra*. This Court must vacate the statutory manslaughter conviction, MCL 750.329, and remand for resentencing on the remaining second-degree murder conviction.

²³ See MCL 777.61 (second-degree murder sentencing grid); Sentencing Information Report, filed as Appendix B. Mr. Wafer was sentenced at the bottom of the range used.

APPENDIX C

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

THEODORE PAUL WAFER

Defendant-Appellant

Supreme Court No. 153828

Court of Appeals No. 324018

Lower Court No. 14-0152-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant

SUPPLEMENTAL AUTHORITY

People v Davis, ___ Mich App ___ (No. 332081), decided July 13, 2017

STATE APPELLATE DEFENDER OFFICE

BY: JACQUELINE J. McCANN (P58774)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

This supplemental authority pertains to the double jeopardy issue in Mr. Wafer's pending application for leave to appeal. (Issue I). Being convicted and sentenced for both second-degree murder (requiring malice) and statutory manslaughter (statutorily defined as acting without malice), with their conflicting mens rea elements, for the same death, is a double jeopardy violation.

People v Davis, ___ Mich App ___ (No. 332081), decided July 13, 2017, illustrates that convicting a defendant of mutually exclusive offenses is a double jeopardy violation. In *Davis*, the defendant was convicted of assault with intent to commit great bodily harm (AGBH) and aggravated domestic violence. The aggravated domestic violence statute, MCL 750.81a, provides, in pertinent part, that "an individual who assaults ... an individual with whom he or she has had a dating relationship...*without intending to commit murder or to inflict great bodily harm* is guilty..." of that offense. (Emphasis added) The AGBH statute, MCL 750.84(1)(a), provides in relevant part, that a person is guilty of that offense if he or she assaults another "*with intent to do great bodily harm, less than the crime of murder.*" (Emphasis added) The Court of Appeals held that "these two offenses are mutually exclusive from a legislative standpoint." *Davis*, slip op p 3. The court explained that "the plain language of the statutes reveals that a defendant cannot violate both statutes with one act as he or she cannot both intend and yet not intend to do great bodily harm less than murder." *Id.* Relying on *United States v Powell*, 469 US 57 (1984), the court explained why this situation did not fit the mold of inconsistent-verdict jurisprudence but rather is a double jeopardy violation. *Id.* pp 4-6.

For the reasons explained in the remedy section of this issue in his application, the proper remedy is to vacate the manslaughter conviction and remand for resentencing on 2nd degree murder.

STATE APPELLATE DEFENDER OFFICE

Date: July 27, 2017

BY: /s/ Jacqueline J. McCann
JACQUELINE J. McCANN (P58774)
Assistant Defender

APPENDIX A

People v Davis, ___ Mich App ___ (No. 332081), decided July 13, 2017

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL EUSEVIO DAVIS,

Defendant-Appellant.

FOR PUBLICATION

July 13, 2017

9:10 a.m.

No. 332081

Wayne Circuit Court

LC No. 15-005481-01-FH

Before: GLEICHER, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of aggravated domestic assault (second offense), MCL 750.81a(3), and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant raises a meritless challenge to the admission of certain photographic evidence. He also raises a legitimate concern over his convictions for two offenses with mutually exclusive provisions. We vacate defendant’s domestic assault conviction but otherwise affirm.

I. BACKGROUND

Defendant and SS were romantically involved and lived together in Dearborn Heights. At around 4:00 a.m. on June 10, 2015, defendant woke SS to ask her where their ashtray was. Defendant took offense at SS’s displeasure over being roused. He pulled SS to the floor by her shirt collar and struck her about the face with his fist and open hand. SS begged defendant to stop, but he told her to “shut up” and threatened, “you’re gonna make me have to kill you.”

Defendant eventually terminated the beating and SS escaped to the bathroom. She rinsed blood from her mouth, but could not examine her injuries because her eyes were swollen shut. In the meantime, defendant took SS’s truck and left the house. He also carried away SS’s purse containing her keys, phone, and \$400 cash. Defendant did not stay gone long, however. When he pulled back into the driveway, SS fled the home through a back door. She ran to a neighbor’s house and called 911.

The responding officer described SS’s face as “almost unrecognizable” due to significant swelling, bruising, and bleeding. Defendant had left the couple’s home again and could not be immediately arrested. SS’s mother took her to the hospital, where she underwent X-rays and a CAT scan. A doctor prescribed pain medication and placed SS in a neck brace. Someone at the hospital took photographs to document her injuries.

The following day, SS and her mother drove past the house and saw her vehicle parked in the driveway. They summoned the police, who forcibly entered and arrested defendant. The prosecution charged defendant with larceny and theft of SS's vehicle, but the jury acquitted him of those charges. The jury convicted defendant of aggravated domestic assault and assault with intent to do great bodily harm less than murder (AWIGBH).

II. PHOTOGRAPHIC EVIDENCE

Defendant first contends that the trial court should not have admitted two photographs of SS lying in a hospital bed with a severely bruised face and wearing a neck brace. Defendant contends that although these photographs otherwise accurately depict SS's condition, they were overly prejudicial because SS did not actually suffer a spinal injury requiring a neck brace.

We review for an abuse of discretion a trial court's decision to admit evidence, including photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Evidence is generally admissible if it is relevant, i.e., has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; MRE 402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. The "[g]ruesomeness" of a photograph standing alone is insufficient to merit its exclusion. The proper question is "whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 76.

The photographs of SS's bruised and swollen face were highly relevant and probative to establish an essential element of aggravated domestic assault—a "serious or aggravated injury." MCL 750.81a(1). The nature of SS's injuries also tended to establish that defendant acted with the intent to do great bodily harm as required by MCL 750.81(1)(a)—with the "intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and citation omitted). Accordingly, this evidence was admissible under MRE 402.

And the photographs were not so prejudicial as to warrant exclusion under MRE 403. All relevant evidence "is prejudicial to some extent." *Mills*, 450 Mich at 75 (quotation marks omitted). In *Mills*, the Michigan Supreme Court ruled that photographs graphically depicting a burn victim were relevant, probative and not overly prejudicial where "[t]he photographs [were] accurate factual representations of the injuries suffered by [the victim] and the harm the defendants caused her." *Id.* at 77. Here, the nature and placement of SS's bruises and lacerations corroborated her testimony about the assault and depicted the seriousness of her injuries. Even if the neck brace was "precautionary" only as argued by defendant, this precaution was required by defendant's actions. It was part and parcel of the medical treatment SS received for injuries sustained after defendant repeatedly punched her in the face. We discern no error in the admission of these photographs.

III. MUTUALLY EXCLUSIVE VERDICTS

Next, defendant argues that his convictions for both AWIGBH and aggravated domestic assault violated his right to be free from multiple punishments for the same offense under double jeopardy principles. We agree that defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions. However, the issue is more nuanced than expressed by the defense and double jeopardy is not the proper initial focus.

The jury convicted defendant of aggravated domestic assault, which is proscribed, in relevant part, by MCL 750.81a:

(2) Except as provided in subsection (3), an individual who assaults . . . an individual with whom he or she has or has had a dating relationship . . . without a weapon and inflicts serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both.

(3) An individual who commits an assault and battery in violation of subsection (2), and who has 1 or more previous convictions for assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household, in violation of any of the following, is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$5,000.00, or both
[Emphasis added.]

The jury also convicted defendant of violating MCL 750.84(1)(a), which makes it a 10-year felony to “[a]ssault[] another person *with intent to do great bodily harm, less than the crime of murder.*” (Emphasis added.)

Clearly, these two offenses are mutually exclusive from a legislative standpoint. One requires the defendant to act with the specific intent to do great bodily harm less than murder, *Brown*, 267 Mich App at 147; the other is committed without intent to do great bodily harm less than murder. We must give effect to the plain and unambiguous language selected by the Legislature. See *People v Miller*, 498 Mich 13, 22-23; 869 NW2d 204 (2015). And the plain language of the statutes reveals that a defendant cannot violate both statutes with one act as he or she cannot both intend and yet *not* intend to do great bodily harm less than murder.

But may this Court grant relief? As a general rule, juries are permitted to reach inconsistent verdicts and appellate courts may not interfere with their judgments. The deliberative process of the jury is secret and no court is privy to the rationale leading to inconsistent verdicts. Unlike a court’s judgment following a bench trial, the jury is held to no rules of logic and is not required to explain its ruling. The verdicts may be the result of jury compromise or the jury’s inclination to be lenient. See *Dunn v United States*, 284 US 390, 393-394; 52 S Ct 189; 76 L Ed 356 (1931); *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980).

This case does not fit the mold of inconsistent-verdict jurisprudence. Precedent regarding the jury's right to reach inconsistent verdicts focuses on situations in which acquittal on one charge renders it seemingly impossible for the jury to have found the existence of all elements of the charge on which it acquits. For example, appellate review is not permitted when the jury acquits a defendant of an underlying felony charge and yet convicts the defendant of felony-firearm or felony-murder. See *People v Goss*, 446 Mich 587; 521 NW2d 312 (1994); *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1981). In these circumstances, it is easily surmised that the jury did its job but acted leniently.

This was just the case in *United States v Powell*, 469 US 57, 59-60; 105 S Ct 471; 83 L Ed 2d 461 (1984), in which a jury convicted the defendant of facilitating the sale of narcotics by phone but acquitted her of conspiring to possess with intent to deliver those same narcotics. Relying on *Dunn* and its progeny, the Supreme Court reasoned:

[W]here truly inconsistent verdicts have been reached, “[the] most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt.” *Dunn*, [284 US] at 393. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant’s expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury’s error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution’s Double Jeopardy Clause. . . .

Inconsistent verdicts therefore present a situation where “error,” in the sense that the jury has not followed the court’s instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . [N]othing in the Constitution would require such a protection. . . . For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant’s behest. This possibility is a premise of *Dunn*’s alternative rationale—that such inconsistencies often are a product of jury lenity. Thus, *Dunn* has been explained by both courts and commentators as a recognition of the jury’s historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch. . . . [*Powell*, 469 US at 64-66.]

“[T]he best course to take,” the *Powell* Court concluded, “is simply to insulate jury verdicts from review on this ground.” *Id.* at 69.

As noted, the issue now before this Court is not a typical inconsistent-verdict matter. Rather, it fits within an exception to this rule as “a situation ‘where a guilty verdict on one count necessarily excludes a finding of guilt on another,’ ” rendering the two “mutually exclusive.” *United States v Randolph*, 794 F3d 602, 610-611 (CA 6, 2015). Indeed, the United States Supreme Court specifically recognized this scenario in *Powell*, 469 US at 69 n 8, noting:

Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other. Cf. *United States v Daigle*, 149 F Supp 409 (DC), aff’d per curiam, 101 US App DC 286; 248 F2d 608 (1957). . . .

In *Daigle*, 149 F Supp at 411, the jury convicted the defendant of embezzlement and grand larceny of certain funds owned by “Mrs. Thrasher,” despite the trial court’s instruction to only reach the larceny charge if it found the defendant not guilty of embezzlement. The offenses were mutually exclusive because the embezzlement statute proscribed the taking of another’s funds that were lawfully in the defendant’s possession while the larceny statute related to unlawfully taking funds from another’s possession. *Id.* at 414. The guilty verdict on the embezzlement charge required a finding that the defendant initially lawfully possessed the funds; this finding “negative[d]” a “fact essential” to the second convicted offense—that the defendant initially unlawfully possessed the funds. *Id.*

Our sister states have reached the same conclusion in similar circumstances. In *Dumas v State*, 266 Ga 797, 799; 471 SE2d 508 (1996), for example, the Georgia Supreme Court held that a jury could not convict a defendant of two offenses “that not only were inconsistent, but also were *mutually exclusive*.” (Emphasis in original.) *Dumas* was convicted by a jury of “malice murder,” which required “malice aforethought,” and vehicular homicide, which was statutorily defined as a killing “without malice aforethought.” *Id.* at 800. The Georgia Supreme Court held, “in its first verdict, the jury in this case convicted *Dumas* of killing with malice aforethought and without malice aforethought; of killing both with *and* without an intention to do so. Obviously, the two verdicts were mutually exclusive. . . .” *Id.* (emphasis in original).

The Tennessee Court of Criminal Appeals found unsustainable mutually exclusive guilty verdicts on reckless homicide and second-degree murder. To enter such verdicts, the appellate court noted, “the jury would have had to find that the Defendant simultaneously acted both knowingly and recklessly with regard to the same act and the same result, i.e., the death of the victim.” *State v Davis*, 2013 Tenn Crim App LEXIS 431, p 23 (2013).

Here, the statutory language clearly presents two mutually exclusive offenses; one cannot assault another with intent to do great bodily harm less than murder and at the same time assault another without the intent to do great bodily harm less than murder. However, a unique wrinkle exists in this case because the jury did not actually make contradictory findings in reaching two mutually exclusive guilty verdicts. The trial court did not instruct the jury that in order to convict defendant of aggravated domestic assault it had to find that defendant did not act with intent to great bodily harm. The only intent mentioned by the court was “either to commit a battery, or to make [SS] reasonably fear an immediate battery.”

The trial court did not instruct the jury regarding the lack of intent to do great bodily harm necessary to meet the statutory definition of aggravated domestic assault because the Michigan Supreme Court has directed that such provisions are not elements of an offense. *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979). The defendant in *Doss*, 406 Mich at 97, was charged with manslaughter pursuant to MCL 750.239, which defined the offense as causing death by certain acts done “intentionally but without malice.” “ ‘[W]ithout malice’ is the absence of an element.” *Id.* at 99. Accordingly, the prosecution was not required to establish the lack of malice beyond a reasonable doubt. “ ‘Elements are, by definition, positive. A negative element of a crime is a contradiction in terms.’ ” *Id.*, quoting *People v Chamblis*, 395 Mich 408, 424; 236 NW2d 473 (1975) (emphasis omitted). Statutory language describing such negatives is a hallmark of lesser included offenses. The lack of malice cited in the manslaughter statute rendered the offense a cognate lesser offense of murder, the Court held. *Doss*, 406 Mich at 99, quoting *Chamblis*, 395 Mich at 424.

MCL 750.81a includes a negative, just like the manslaughter statute. The lack of intent to commit great bodily harm less than murder is not an affirmative element. The prosecution was not required to prove this absence of intent and the trial court was not required to instruct the jury in this regard. This does not nullify the error of convicting defendant of mutually exclusive offenses, however.

The error in this case stems from two sources. First, the prosecution should not have independently charged defendant under two statutes with irreconcilable provisions stemming from one assault. The prosecution should have levied the charges as alternative grounds for conviction. Second, after the jury reached mutually exclusive verdicts, the trial court should have either reinstructed the jury to elect conviction under one or the other or vacated one of the convictions.

We need not remand to remedy the error. The jury affirmatively found that defendant acted with the intent to do great bodily less than murder when it convicted defendant of AWIGBH. As the court did not inform the jury that a lack of such intent accompanied the aggravated domestic assault charge, the jury never found a lack of intent on defendant’s part. We therefore know which charge is supportable by jury-found facts and can affirm defendant’s AWIGBH conviction. As an improperly entered mutually exclusive verdict, we vacate defendant’s conviction and sentence for aggravated domestic assault.

We affirm in part and vacate in part.

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly

/s/ Douglas B. Shapiro

APPENDIX D

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

RESPONSE TO DEFENDANT'S CITATION OF SUPPLEMENTAL AUTHORITY
People v Davis, ___ Mich App ___ (No. 332081, 7-13-2017)

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Defendant says that his supplemental authority“ illustrates that convicting a defendant of mutually exclusive offenses is a double jeopardy violation.” But *Davis* did not find a violation of double jeopardy, but posited a doctrine of “mutually exclusive” offenses that can bar conviction of multiple offenses *apart* from and *in addition to* the jeopardy protection, and on a claim not raised by the defendant in that case, and on which the court did not request briefing.

In *People v. Doss*, 406 Mich 90, 99 (1979) this court said that “ Elements are, by definition, positive. A negative element of a crime is a contradiction in terms, holding that the term “without malice” regarding the assault described in MCL 750.329 “is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt.” It is quite possible, then, for one to be convicted of this form of manslaughter (or any form) even if the proofs show that the killing *was* accomplished with malice. Though the panel in *Davis* paid lip-service to *Doss*, it nonetheless treated words of limitation as though they are elements in determining that the offenses of aggravated domestic violence and assault with intent to do great bodily harm are “mutually exclusive” because an aggravated domestic violence can be committed without proof of intent to do great bodily harm—“an individual who assaults ... an individual with whom he or she has or has had a dating relationship ... without a weapon and inflicts serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm* less than murder.” This is no different than the “without malice” language in MCL 750.329, and the Court of Appeals could only find the offenses irreconcilable by treating this negative as though it were an element. This Court should deny leave on this issue, or, grant leave on it, as the Court of Appeals raised an issue of first impression in this State.

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

April 5, 2016

Plaintiff-Appellee,

v

No. 324018

Wayne Circuit Court

THEODORE PAUL WAFER,

LC No. 14-000152-FC

Defendant-Appellant.

Before: STEPHENS, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, statutory involuntary manslaughter (discharge of an intentionally aimed firearm resulting in death), MCL 750.329, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 15 to 30 years for the second-degree murder conviction and 7 to 15 years for the manslaughter conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons explained in this opinion, we affirm defendant's convictions but remand for *Crosby*¹ proceedings in accordance with *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

On November 2, 2013, at approximately 4:30 a.m., defendant shot and killed 19-year-old Renisha McBride on the front porch of defendant's home in Dearborn Heights. McBride had been in a car accident before the shooting, and it is uncertain how or why she came to be at defendant's home. She had marijuana in her system and her blood alcohol level was .218. Defendant admitted that he shot McBride, but he asserted at trial that he did so in self-defense because he thought McBride was trying to break into his home. However, the evidence showed that McBride was not armed at the time of the shooting, and she possessed no burglary tools. The jury convicted defendant of second-degree murder, statutory involuntary manslaughter, and felony-firearm. The trial court sentenced defendant as noted above. Defendant now appeals as of right.

¹ *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

I. JURY INSTRUCTIONS

Defendant first argues that the trial court erred when it denied his request for a jury instruction based on MCL 780.951(1), which would have afforded him the benefit of a rebuttable presumption that he had an honest and reasonable belief that imminent death or great bodily harm would occur. Specifically, defendant maintains this instruction was warranted because there was evidence to support the assertion that McBride was in the process of breaking and entering at the time of the shooting.

We review *de novo* questions of law, and we review for an abuse of discretion a trial court's determination whether a jury instruction applies to the facts of the case. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *Id.* Thus, "[r]eversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

A successful claim of self-defense "requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *Dupree*, 486 Mich at 707 (citation and quotation marks omitted). The Self-Defense Act (SDA), MCL 780.971 *et seq.*, "codified the circumstances in which a person may use deadly force in self-defense . . . without having the duty to retreat." *Dupree*, 486 Mich at 708. MCL 780.972(1)(a) provides:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

In this case, the trial court instructed the jury on self-defense, including the grounds for self-defense, the prosecutor's burden of proof regarding self-defense, the fact that an individual in his home has no duty to retreat, and the fact that a porch is considered part of a home. In addition to the instructions given, defendant argues on appeal he was also entitled to a jury instruction based on MCL 780.951(1), which provides a rebuttable presumption that a defendant who uses deadly force acted with "an honest and reasonable belief that imminent death . . . or great bodily harm to himself . . . 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 added.]

Considering the plain language of the statute, these two subsections differ in that subsection (a) focuses on the conduct of the person against whom deadly force is used, whereas subsection (b) focuses on the state of mind of the person using deadly force.

In light of defendant's testimony about his fear arising from the extent of the banging and pounding noise he heard at two different doors of his home, the fact that the banging occurred at such an early hour of the morning, and the fact that there had been other criminal incidents in the neighborhood that summer, we agree that there was sufficient evidence to support a finding that defendant may have honestly and reasonably believed that a person was in the process of breaking and entering his home. See MCL 780.951(1)(b). However, the fact that defendant may have reasonably perceived McBride as attempting to break into his home does not establish that she was actually trying to do so. Cf. *People v Mills*, 450 Mich 61, 83; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) ("People can appear one way to someone else when in actuality there is something else causing them to act the way they are being observed."). In other words, the principal dispute in this case concerns whether there was evidence to support the occurrence of conduct required under subsection (a).

Given the evidence presented at trial, we conclude that the trial court did not abuse its discretion when it determined that the evidence did not support the assertion that McBride was actually in the process of breaking and entering when the shooting occurred. "A breaking is any use of force, however slight, to access whatever the defendant is entering." *People v Heft*, 299 Mich App 69, 76; 829 NW2d 266 (2012). There was evidence that McBride was "banging" on defendant's front and side doors, which would potentially constitute a "use of force." Nonetheless, the evidence did not support a finding that McBride was attempting to access the house so as to be considered "in the process of breaking and entering a dwelling." See MCL 750.115(1); *Heft*, 299 Mich App at 75-76. On the evening in question, McBride was extremely intoxicated and she crashed her car. Appearing disorientated, McBride wandered away from the crash site and she somehow made her way to defendant's home. McBride had no burglar tools with her at defendant's house, and there was no damage to the locks, door handles, or doors of defendant's home. At best, the evidence showed that McBride loudly pounded on defendant's doors and that the screen in the outer front door had "dropped" down. But, without more, loud ineffectual banging on a door does not support the claim that McBride was in the process of breaking and entering. Moreover, at the point in time when defendant actually fired the lethal shot, McBride had apparently stopped pounding on the door. Defendant testified that he went to the front door, even though he had last heard banging at the side door. When he opened it, McBride came around the side of the home and defendant shot her before she could explain her presence. On this record, the evidence does not support the assertion that McBride was in the process of breaking or entering when she was shot by defendant. Consequently, the trial court

did not abuse its discretion by denying defendant's request for a jury instruction based on MCL 780.951(1).²

II. PROSECUTORIAL MISCONDUCT

Defendant next argues that several alleged instances of misconduct by the prosecutors denied him a fair trial. A defendant must "contemporaneously object and request a curative instruction" to preserve a claim of prosecutorial misconduct for appellate review. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant objected to the prosecutor's handling of the murder weapon during the prosecutor's cross-examination of defendant. Accordingly, that issue is preserved. However, he did not object to the remaining instances of alleged misconduct or he did not object on the same basis now presented on appeal. Therefore, the majority of defendant's claims of misconduct are unpreserved. See *id.*

Generally, issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *Id.* However, unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Gaines*, 306 Mich App 289, 308; 856 NW2d 222 (2014). Under this standard, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329-330.

"[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *Bennett*, 290 Mich App at 475. The propriety of a prosecutor's remarks will depend on the particular facts of the case, meaning that "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Callon*, 256 Mich App at 330. "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

Defendant first argues that one of the prosecutors committed misconduct when she held the murder weapon in an unsafe manner such that it was pointed in the direction of the jurors during her cross-examination of defendant. The gun in question was admitted into evidence, it was unloaded at the time of the incident, and, as noted, prosecutors are typically afforded great

² We note briefly that, even if the trial court should have instructed the jury on the presumption found in MCL 780.951(1), defendant has not shown that it is more probable than not that this error affected the outcome of the proceedings. *McKinney*, 258 Mich App at 163. Defendant admitted that he shot McBride and his only claim was that he did so in self-defense. However, there was scant evidence of self-defense while, in contrast, the jury received detailed instructions on defendant's self-defense theory and the prosecutor presented ample evidence to disprove defendant's claim of self-defense beyond a reasonable doubt. On this record, there is not a reasonable probability that the instruction at issue would have affected the outcome.

latitude regarding their conduct at trial. *Id.* Nonetheless, defendant argues that the prosecution's "grandstanding with the weapon" was improper and deprived him of a fair trial because at least one of the jurors appeared startled by the prosecutor's handling of the gun. However, in the course of the trial as a whole, we cannot see that the incident deprived defendant of a fair and impartial trial. The incident was brief and isolated, there was no apparent intended purpose to scare anyone, and the trial court ordered the attorneys not to point the gun at the jurors during closing arguments. Moreover, defense counsel in fact used the incident to defendant's advantage by reminding the jury of the prosecutor's actions, and the jury's reaction, during closing argument, in the context of emphasizing his position that defendant had brought the gun to the door with him in order to frighten the intruder away because the weapon was "scary." Under the circumstances, this isolated incident did not deny defendant a fair trial. Cf. *People v Bosca*, 310 Mich App 1, 35; 871 NW2d 307 (2015) (finding that the prosecutor's demonstration with a circular saw used to threaten the victims did not deprive the defendant of a fair trial).

Defendant also argues that the prosecutor misstated the law during closing argument when commenting on the necessary mens rea to support convictions for the different charged offenses. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id.* In the instant case, defendant was charged with second-degree murder, common-law manslaughter as a lesser included offense, and statutory manslaughter under MCL 750.329. When discussing the charged crimes during closing argument, the prosecutor incorrectly commented that, had the discharge of the weapon been accidental, defendant would still be guilty of second-degree murder. This was not a correct statement of the law because the malice necessary to support second-degree murder "is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Contrary to the prosecutor's framing of the issue, an act done accidentally, or even with gross negligence, would not constitute malice. See *id.* at 466-467; *People v Holtschlag*, 471 Mich 1, 21; 684 NW2d 730 (2004); CJI2d 7.1.

However, any error in the prosecution's explanation of the law in this regard did not deprive defendant of a fair trial because the trial court properly instructed the jury on the elements of second-degree murder and the lesser included offense of common-law manslaughter and, in particular, the specific mens rea necessary to support a second-degree murder conviction as opposed to the lesser offense of common-law involuntary manslaughter. The jury was further instructed that if there was a conflict between the trial court's explanation of the law and that offered by the attorneys, the jury must follow the trial court's instructions. Under these circumstances, any misstatement of the law by the prosecutor did not affect defendant's substantial rights. See *Grayer*, 252 Mich App at 357.

Defendant next argues that the prosecutor misstated the law when discussing the elements of statutory involuntary manslaughter by failing to acknowledge that self-defense could be used as a defense to this charge and suggesting that there was "no dispute" that the elements of this offense had been shown. Our review of the record reveals that the prosecutor merely argued that the elements of the offense had been established, and we see nothing improper in this argument.

Moreover, while the prosecutor did not discuss self-defense in relation to this charge, the trial court instructed the jury on self-defense and defense counsel argued for the applicability of this defense. Defendant has not shown plain error and he is not entitled to relief on this basis.

Defendant also asserts that, with respect to self-defense, the prosecutor misstated the law when she asserted that defendant had other options such as keeping the door shut and going to "a different part of [his] house" rather than engaging with McBride. Troublingly, the prosecutor asserted that going to a different part of the house could not be characterized as "retreating." To the extent the prosecutor suggested that defendant had an obligation to retreat to another area of his home, this was improper because a person does not have a duty to retreat in his or her own home. *People v Richardson*, 490 Mich 115, 121; 803 NW2d 302 (2011). However, this potentially misleading remark does not entitle defendant to relief because elsewhere the prosecutor expressly acknowledged that there is no duty to retreat in a person's own home, the trial court instructed the jury that a person does not have a duty to retreat while in his or her own home, and the jury was informed that a porch is considered part of a home. Given the proper instruction by the trial court, any misstatement by the prosecutor did not affect defendant's substantial rights. See *Grayer*, 252 Mich App at 357.

Next, defendant argues that the prosecutor improperly vouched for defendant's guilt when she stated that she had seen "more homicide cases than [she] care[d] to recall," that "this case is no different than a typical murder case," that defendant was "no different than a typical murder defendant," and that "[m]urder defendants try to deflect, try to lie[,] [t]ry to get themselves out of trouble." In a related argument, defendant also argues that the following statements by the prosecutor during closing argument were improper:

Because our job, ladies and gentlemen, is to see that justice is served. Our job is to prosecute the guilty. And your job is to make that determination. You decide whether or not we've done our job properly. That's your decision.

You have to tell us whether or not we've met our burden. We don't run away from our burden. It's our burden. That's what our constitution says. We don't take it lightly that we would charge a home owner. We don't take that lightly.

There's plenty of home owners that haven't been charged. We look at the law. We are guided by what the law requires. And the law in this case required a charge of murder in the second degree. And the intentionally aiming that gun.

You guys get to make the final call. There's no self-defense here. Where's the fear? Where's the fear?

It is improper for a prosecutor to use the prestige of the prosecutor's office to inject personal opinion or for the prosecutor to ask the jury to suspend its power of judgement in favor of the wisdom or belief of the prosecutor's office. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). In this case, viewed in isolation, some of the prosecutor's remarks could be understood as an invitation for the jury to suspend its own critical analysis of the evidence and accept the prosecutor's assurances of the defendant's guilt. Viewed in context, however, the

remarks constituted an argument, albeit unartfully presented, that the prosecution had met its burden in overcoming defendant's self-defense claim. The prosecutor repeatedly stated that it was up to the jury to decide whether the prosecution had met its burden of proving defendant guilty. Moreover, any improper prejudicial effect could have been cured by an appropriate instruction, upon request. Accordingly, there was no outcome-determinative plain error. *Unger*, 278 Mich App at 235.

Defendant next argues that a prosecutor improperly denigrated defense counsel when she discussed the fact that defendant had changed his initial claim that the shooting was accidental to a claim that he acted in self-defense. A prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Likewise, the prosecutor may not personally attack the defendant with "intemperate and prejudicial remarks," and may not suggest that a defendant or defense counsel is trying to manipulate or mislead the jury. *People v Light*, 480 Mich 1198; 748 NW2d 518 (2008); *Bahoda*, 448 Mich at 283; *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411(2001). Viewed as a whole, the thrust of the prosecutor's argument was to properly suggest that defendant should not be believed when he stated that he was in fear when he shot McBride because he had earlier implied to the police that the shooting was "accidental." But in doing so, the prosecutor improperly accused defense counsel of having "coached" defendant to change his story to one of self-defense. This type of attack on defense counsel was wholly inappropriate. See *Light*, 480 Mich at 1198. However, because an appropriate jury instruction could have cured any perceived prejudice, reversal is not required. *Unger*, 278 Mich App at 235.

Defendant also argues that the prosecutor improperly appealed to the jurors' sympathy for McBride and mischaracterized the defense counsel's self-defense argument as an attack on the victim's character. "Appeals to the jury to sympathize with the victim constitute improper argument." *Watson*, 245 Mich App at 591. However, an otherwise improper remark may not require reversal when offered in response to an issue raised by defense counsel. *Dobek*, 274 Mich App at 64. Such is the case here. That is, the prosecutor's rebuttal argument was responsive to defense counsel's earlier argument that focused on the victim's actions. Defense counsel argued that McBride was in the process of "changing" because she was "coming down" from her intoxication, and claimed that "alcohol is what caused all of this." The prosecutor's rebuttal argument, essentially that 19-year-old McBride did not deserve to die simply because she was drunk and high, was responsive to defense counsel's argument. Moreover, any prejudicial effect could have been cured with a jury instruction upon request, meaning that defendant has not shown plain error. *Unger*, 278 Mich App at 235.

For these reasons, defendant is not entitled to reversal on the basis of this issue. The prosecutor's conduct did not deny defendant a fair trial.

III. DOUBLE JEOPARDY

Defendant next argues that his convictions for both statutory involuntary manslaughter and second-degree murder, arising from the death of one victim, violate the double jeopardy prohibition against multiple punishments for the same offense. In particular, defendant argues that double jeopardy principles should prevent convictions for both second-degree murder and statutory manslaughter under MCL 750.329 because the crimes contain contradictory elements

insofar as murder requires malice while MCL 750.329(1) specifies that statutory manslaughter must be committed “without malice.”

We review this question of constitutional law de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The Double Jeopardy Clause of the Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb. . . .” US Const V. In *People v Miller*, 498 Mich 13, 17-19; 869 NW2d 204 (2015), our Supreme Court recently provided a comprehensive overview of the constitutional double jeopardy protections, and, in particular, the analysis to use when determining whether dual convictions violate the “multiple punishments” strand of double jeopardy:

The multiple punishments strand of double jeopardy “is designed to ensure that courts confine their sentences to the limits established by the Legislature” and therefore acts as a “restraint on the prosecutor and the Courts.” The multiple punishments strand is not violated “[w]here ‘a legislature specifically authorizes cumulative punishment under two statutes. . . .’” Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. “Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.”

The Legislature, however, does not always clearly indicate its intent with regard to the permissibility of multiple punishments. When legislative intent is not clear, Michigan courts apply the “abstract legal elements” test articulated in [*People v Ream*, 481 Mich 223; 750 NW2d 536 (2008),] to ascertain whether the Legislature intended to classify two offenses as the “same offense” for double jeopardy purposes. This test focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if “each of the offenses for which defendant was convicted has an element that the other does not. . . .” This means that, under the *Ream* test, two offenses will only be considered the “same offense” where it is impossible to commit the greater offense without also committing the lesser offense.

In sum, when considering whether two offenses are the “same offense” in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream* to discern legislative intent. [Footnotes omitted.]

Consequently, to determine whether there is a double jeopardy violation in this case, we first consider whether the statutory language evinces a clear intent with respect to the

permissibility of multiple punishments. *Id.* In particular, the two statutes at issue are MCL 750.317 and MCL 750.329(1). Second-degree murder is codified at MCL 750.317, which states:

All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

In comparison, statutory involuntary murder is set forth in MCL 750.329(1), which provides:

A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.

Neither statute includes language that plainly indicates whether or not the Legislature intended to authorize multiple punishments. Cf. *Miller*, 498 Mich at 22-23. In *Miller*, the Court found that the express authorization of multiple convictions in one section of the OWI statute in context of a multi-section statute where other sections were silent as to multiple convictions was, in fact, clear evidence of an intent to exclude multiple convictions for violations of other sections of the same act. *Id.* at 24-25. No such argument is offered in this case. Instead, defendant argues on appeal that the legislative intent to prohibit multiple punishments is expressed in the inconsistency between second-degree murder and MCL 750.329(1), insofar as second-degree murder requires a finding of malice while MCL 750.319(1) involves a crime committed “without malice.” See *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Defendant cites no authority for this proposition, nor are we aware of any. To the contrary, when an offense requires criminal intent, the necessary *mens rea* is simply an element of the offense. See, generally, *People v Kowalski*, 489 Mich 488, 499 n 12; 803 NW2d 200 (2011). And, when comparing elements under the abstract legal elements test, if offenses contain differing elements, conviction under both does not constitute a double jeopardy violation.³ See *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007); *People v Werner*, 254 Mich App 528, 535-536; 659 NW2d 688 (2002). In short, the abstract legal elements test applies in this case and, given that the offenses at issue obviously involve different elements, there was no double jeopardy violation. See *Smith*, 478 Mich at 70 (detailing differing elements of second-degree murder and statutory manslaughter); *Strawther*, 480 Mich at 900.

IV. SENTENCING

³ Indeed, while defendant frames his argument as one involving double jeopardy principles, in actuality his complaint is that the jury reached inconsistent verdicts insofar as it convicted him of both second-degree murder requiring malice and statutory involuntary manslaughter under MCL 750.329(1), which must be committed without malice. As noted, this claim of inconsistency does not amount to a double jeopardy violation. See generally *People v Wilson*, 496 Mich 91, 102; 852 NW2d 134 (2014). Moreover, “inconsistent verdicts within a single jury trial are permissible and do not require reversal.” *People v Putman*, 309 Mich App 240; 870 NW2d 593 (2015). “Juries are not held to any rules of logic nor are they required to explain their decisions.” *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).

Defendant lastly argues that he is entitled to resentencing because the trial court sentenced him at the low end of the sentencing guidelines range, based on its erroneous belief that it was bound to sentence him within the guidelines range absent a substantial and compelling reason for a departure. In keeping with this Court's decision in *People v Terrell*, __ Mich App __; __ NW2d __ (2015) (Docket No. 321573), we remand for *Crosby* proceedings in accordance with the procedures set forth in *Lockridge*.

In *Lockridge*, 498 Mich at 364, our Supreme Court held that “the rule from *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient” “the extent to which the guidelines *require* judicial fact-finding beyond the facts admitted by the defendant or found by the jury to score offense variables that *mandatorily* increase the floor of the guidelines minimum sentence range” To remedy the constitutional violation, the Court severed MCL 769.34(2) “to the extent that it is mandatory” and held that “sentencing courts will hereafter not be *bound* by the applicable sentencing guidelines range[.]” *Lockridge*, 498 Mich at 391-392. The Court also struck down MCL 769.34(3), which required a “substantial and compelling reason” to depart from the guidelines range, and held that a court may exercise its discretion to depart from the guidelines range without articulating substantial and compelling reasons. *Id.* Following *Lockridge*, a departure sentence need only be reasonable. See *People v Steanhouse*, __ Mich App __; __ NW2d __ (2015) (Docket No. 318329), slip op at 21-24.

With respect to a defendant's entitlement to relief on appeal, in *Lockridge*, the Court specified that unpreserved claims of error involving judicial fact-finding were subject to plain error analysis and that plain error cannot be established when “(1) facts admitted by the defendant and (2) facts found by the jury were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced.” *Lockridge*, 498 Mich at 394-395. Conversely, a defendant will have made a threshold showing of error if there is no upward departure involved and “the facts admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentence.” *Id.* at 395. A defendant who makes this threshold showing of potential plain error is entitled to a *Crosby* remand for further inquiry. *Id.*

Following *Lockridge*, this Court has addressed preserved claims of sentencing error and determined that a *Crosby* remand is appropriate, even in the absence of evidence that judicial fact-finding increased the minimum sentence, if the trial court's use of the sentencing guidelines was mandatory at the time of sentencing. Most notably, in *Terrell*, this Court explained:

In [*People v Stokes*, __ Mich App __; __ NW2d __ (2015)] this Court concluded that where judicially-found facts increased the minimum sentence guidelines range, the proper remedy was to remand for the *Crosby* procedure to be followed to determine whether the error was harmless. In this case, however, any judicial fact-finding did not increase the minimum sentence guidelines because the scoring was supported by the jury verdict. Nonetheless, we adopt the remedy crafted in *Stokes* as the appropriate remedy here, because regardless of the fact that judicial fact-finding did *not* increase defendant's minimum sentence

guidelines range, the trial court's compulsory use of the guidelines was erroneous in light of *Lockridge*. Here, the trial court was not obligated to sentence defendant within the minimum sentence guidelines range and, instead, was permitted to depart from the guidelines range without articulating a substantial and compelling reason, so long as the resulting sentence was itself reasonable. Therefore, we conclude that a remand for the *Crosby* procedure is necessary to determine whether the error resulting from the compulsory use of the guidelines was harmless. [*Terrell*, slip op at 9 (footnotes omitted).]

In this case, the sentencing guidelines as scored resulted in a recommended minimum sentence range of 180 to 300 months or life. The trial court imposed a sentence at the lowest end of that range. In doing so, the court commented that it "cannot go below the guidelines." Defendant did not object at sentencing, and he does not argue on appeal that judicial fact-finding altered the minimum guideline range as required to establish plain error under *Lockridge*. But, defendant did move this Court for a remand for resentencing under *Lockridge*. Under *Terrell*, this was sufficient to preserve his *Lockridge* challenge. See *Terrell*, slip op at 8 & n 38. Moreover, as in *Terrell*, defendant was sentenced before the Supreme Court decided *Lockridge*, which significantly altered the manner in which a trial court is to consider and apply the statutory sentencing guidelines. Consequently, because the trial court's compulsory adherence to the guidelines range was erroneous, in keeping with *Terrell*, we remand for *Crosby* proceedings. Defendant has the option of avoiding resentencing by promptly notifying the trial court of that decision. *Lockridge*, 498 Mich at 398. If notification is not received in a timely manner, the trial court should continue with the *Crosby* proceedings as described in *Lockridge*.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

April 5, 2016

Plaintiff-Appellee,

v

No. 324018

Wayne Circuit Court

THEODORE PAUL WAFER,

LC No. 14-000152-FC

Defendant-Appellant.

Before: STEPHENS, P.J., and HOEKSTRA and SERVITTO, JJ.

SERVITTO, J. (*dissenting in part and concurring in part*).

I respectfully dissent from the majority's conclusion that defendant's convictions for both statutory involuntary manslaughter and second-degree murder, arising from the death of one victim, do not violate the double jeopardy prohibition against multiple punishments for the same offense. In all other respects, I concur with the majority.

The majority sets forth the correct analysis to use in order to determine whether dual convictions violate the "multiple punishments" prohibition of double jeopardy. As stated in *People v Miller*, 498 Mich 13, 18; 869 NW2d 204 (2015), the multiple punishments strand of double jeopardy is not violated if the Legislature specifically authorizes cumulative punishment under two statutes. And, where the Legislature expresses a clear intention in a statute to prohibit multiple punishments, "it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial." *Id.* Thus:

when considering whether two offenses are the "same offense" in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in [*People v Ream*], 481 Mich 223; 750 NW2d 536 (2008)] to discern legislative intent. [*Miller*, 498 Mich at 19].

I disagree, however, with the majority's conclusion that neither the statute governing second degree murder, MCL 750.317, nor the statute governing involuntary manslaughter, MCL 750.329(1), plainly evince a legislative intent with respect to multiple punishments. Because of

my disagreement, I would further find that the test articulated in *Ream, supra*, need not be utilized.

MCL 750.317 states, simply, that “[a]ll other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.” While this statute itself does not define what, exactly, constitutes second degree murder, or articulate the specific elements necessary to convict a defendant of the crime, it is long familiar that second degree murder finds its genesis in the common law. See, *People v King*, 58 Mich App 390, 401; 228 NW2d 391 (1975). Indeed, at common law, “murder” embraced all unlawful killing done with malice aforethought. *People v Scott*, 6 Mich 287, 292 (1859). As explained in *Scott*,

Murder under our statute embraces every offense which would have been murder at common law, and it embraces no other crime. But murder is not always attended with the same degree of wicked design, or, to speak more accurately, with the same degree of malice. . . .

The statute, recognizing the propriety of continuing to embrace within the same class all cases of malicious killing, has, nevertheless, divided these offenses into different grades for the purposes of punishment, visiting those which manifest deep malignity with the heaviest penalties known to our law, and punishing all the rest according to a sliding scale, reaching, in the discretion of the court, from a very moderate imprisonment to nearly the same degree of severity prescribed for those convicted of murder in the first degree. Each grade of murder embraces some cases where there is a direct intent to take life, and each grade also embraces offenses where the direct intent was to commit some other crime. . . .

. . . we hold murder in the first degree to be that which is willful, deliberate, and premeditated, and all other murders to be murder in the second degree

[*Scott*, 6 Mich at 292-294]

Thus, it is hardly a new principle that both at common law and today, one of the elements of second degree, or common-law, murder is malice. *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). The malice necessary to support second-degree murder “is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 466.

The manslaughter statute, MCL 750.329(1), provides that “[a] person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.” The clear language in MCL 750.329(1) clearly and specifically excludes a mens rea of malice. And, the common-law definition of manslaughter is “the unintentional killing of another committed with a lesser mens rea [than the malice required for murder] of gross negligence or an intent to injure[.]” *People v McMullan*, 284 Mich App 149,

152; 771 NW2d 810 (2009) (internal quotations and citation omitted), aff'd 488 Mich 922 (2010).

There would have been no need to add the limitation “*but without malice*” in the manslaughter statute had the Legislature intended to authorize dual punishments for both second degree murder and manslaughter under these circumstances. Rather, the Legislature would have simply remained silent on the mens rea element. The fact that it did not do so supports a conclusion that the Legislature expressed a clear intent in the manslaughter statute to prohibit multiple punishments for manslaughter and murder. See *Miller*, 498 Mich at 18. And, we must presume that the Legislature “knows of the existence of the common law when it acts.” *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012). Thus, in enacting the manslaughter statute, the Legislature was well aware that second degree murder, at common law and continuing today, required a malice element and expressly and purposely excluded this element from the manslaughter statute as a distinguishing feature.

Given the Legislature’s awareness of the requisite element of malice for second degree murder and its express exclusion of a malice element in the manslaughter statute, I would find that the Legislature expressed a clear intent in MCL 750.329(1) to prohibit multiple punishments for these two crimes. Defendant’s convictions of and punishments for both second degree murder and manslaughter in the death of one person thus violated the multiple punishments strand of double jeopardy. *Miller*, 498 Mich at 18. I would therefore vacate defendant’s manslaughter conviction on double jeopardy grounds and, on remand, direct the trial to consider (in addition to the *Lockridge*¹ sentencing issue) what effect, if any, vacating the manslaughter conviction has on defendant’s appropriate sentence.

/s/ Deborah A. Servitto

¹ *People v Lockridge*, 498 Mich 358; 870 NW2d 502(2015).