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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 18, 2026 1:26 PM
v	No. 376171 Wayne Circuit Court
OUDONE DON THIENGTHAM, Defendant-Appellant.	LC No. 20-003056-01-FC

Before: CAMERON, P.J., and MALDONADO and WALLACE, JJ.

PER CURIAM.

Defendant appeals by right the order denying his motion for a new trial under MCR 7.208(B). A jury found defendant guilty of one count of second-degree murder, MCL 750.317, and he was sentenced to 13.5 to 30 years' imprisonment. We vacate defendant's conviction and sentence and remand to the trial court for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case were summarized by this Court in defendant's prior appeal:

> On May 14, 2020, defendant paid $10 to Anton Mason for marijuana at the Riviera Motel (the "Riviera"). After Mason did not return with the marijuana, defendant went to the upper corridor and knocked on Mason's door in an attempt to get his $10 back. One of the occupants of the room opened the door and engaged in a heated discussion with defendant. The exchange included one of the occupants shoving defendant, defendant kicking the door, and the victim, Raymond Kidd, seeming to fire a taser in defendant's direction. When defendant turned to leave and took a few steps away from the room, Kidd came after defendant and struck defendant with a chain. In response, defendant kicked Kidd in the chest. Shortly thereafter, Kidd dropped the chain and ran away from defendant. Defendant chased after Kidd, engaged in a physical fight, and ultimately stabbed Kidd multiple times in the abdomen. Defendant said he chased after Kidd because he was "pissed" at Kidd for hitting him with the chain. Next, defendant briefly fought with Mason, but after the two men engaged in a short standoff, Mason retreated to his room and

> defendant walked away. Kidd subsequently died from the stab wounds defendant inflicted.
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> Prior to the trial judge reading the jury instructions to the jury, defense counsel expressed satisfaction with the jury instructions. Included in the jury instructions was M Crim JI 16.8, the jury instruction for voluntary manslaughter as an independent offense. [*People v Thiengtham*, unpublished per curiam opinion of the Courts of Appeals, issued November 30, 2023 (Docket No. 361906), p 1.]

The jury found defendant guilty of second-degree murder, and defendant moved for a new trial and requested a *Ginther*[1] hearing. *Id*. at 2.

> Defendant argued he was entitled to a new trial because the jury instructions contained definitions of second-degree murder and voluntary manslaughter that were nearly identical, and the instructions did not apprise the jury of the situations which would reduce second-degree murder to voluntary manslaughter. Specifically, defendant claimed the instruction for voluntary manslaughter as a lesser included offense of second-degree murder should have been given instead of the independent voluntary manslaughter instruction because the independent voluntary manslaughter instruction is nearly indistinguishable from the second-degree murder instruction. Defendant claimed this prejudiced him because a properly instructed jury could have returned a verdict for voluntary manslaughter.
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> * * *
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> Alternatively, defendant argued defense counsel was ineffective for acquiescing to faulty jury instructions, and this deprived defendant of his right to a properly instructed jury because the jury was given instructions that did not outline the scienter difference between second-degree murder and voluntary manslaughter. Defendant concluded this error entitled him to a new trial, or, at a minimum, to a *Ginther* hearing to further develop the record.
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> * * *
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> The trial court . . . found defendant failed to prove defense counsel was ineffective. The trial court then denied defendant's motion. [*Thiengtham*, unpub op at 2-3.]

In his prior appeal, defendant argued, among other things, that he was entitled to a new trial because trial counsel rendered ineffective assistance by failing to object to the trial court's erroneous voluntary manslaughter instruction. *Id*. at 4. This Court agreed that the trial court erred by instructing the jury with M Crim JI 16.8 instead of M Crim JI 16.9. *Id*. at 6. Nevertheless, the Court concluded that defendant had not established his ineffective assistance claim, reasoning:

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> Although the trial court erroneously read M Crim JI 16.8 instead of M Crim JI 16.9, the voluntary manslaughter instruction defense counsel agreed to was still an available instruction. Furthermore, defense counsel may have strategically chosen not to request the alternative instruction because, if the jury had not been convinced defendant committed second-degree murder, having a voluntary manslaughter instruction that sounded almost identical to the second-degree murder instruction may have led the jury to acquit defendant altogether. . . . There appears to be at least one reasonable explanation supporting defense counsel's decision not to challenge the jury instructions; accordingly, defendant has not overcome the strong presumption that trial counsel's decision-making [was] the result of sound trial strategy. Therefore, we reject defendant's claim that he was denied the effective assistance of counsel. [*Id*. at 6-7 (quotation marks and citations omitted).]

Defendant appealed to our Supreme Court, which vacated this Court's opinion in part and remanded the case to the trial court for an evidentiary hearing. *People v Thiengtham*, 513 Mich 1061 (2024). During the hearing, defendant's trial counsel explained that she requested jury instructions for self-defense and voluntary manslaughter as a lesser included offense. She mistakenly failed to recognize that the wrong voluntary manslaughter jury instruction had been read to the jury. She further testified that her failure to object to the erroneous instruction was not a strategic decision.

Defendant again argued that he was entitled to a new trial because the jury was given the wrong instruction. He claimed that, because of this error, the instructions failed to explain the difference between the two offenses. Defendant argued that had the jury been given the correct instruction, it could have considered and convicted him of the lesser offense of voluntary manslaughter. Therefore, he claimed that his attorney's failure to object to the incorrect instruction—and the attorney's approval of it—constituted ineffective assistance of counsel. The trial court denied defendant's motion for a new trial. This appeal followed.

II. STANDARDS OF REVIEW

"This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion." *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *Id*. (citation omitted). "[W]hether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). Clear error occurs when this Court has a "definite and firm conviction that the trial court made a mistake." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citation omitted).

III. ANALYSIS

Defendant argues that he is entitled to a new trial because he was denied the effective assistance of counsel after trial counsel failed to challenge the incorrect, standalone voluntary manslaughter jury instruction. We agree that defense counsel's failure amounts to ineffective assistance of counsel and that a new trial is warranted.

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *Trakhtenberg*, 493 Mich at 51. To succeed on a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id*. A reasonable probability is one that undermines confidence in the result of the trial. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is presumed to be effective. *Id*. at 690. Furthermore, "a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy[,]" but strategic decisions must still be objectively reasonable, *Trakhtenberg*, 493 Mich at 52. The defendant bears the burden of proving any deficiency of counsel. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). "Trial counsel's failure to request a jury instruction may constitute an unreasonably deficient level of performance." *People v Yeager*, 511 Mich 478, 490; 999 NW2d 490 (2023).

Criminal defendants have the right to a properly instructed jury. *People v Ogilvie*, 341 Mich App 28, 34; 989 NW2d 250 (2022). Jury instructions must contain all elements of the charged crimes and may not exclude material issues or defenses supported by the evidence. *Id*. at 35. The instructions must "clearly present the case to the jury and instruct on the applicable law." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). But reversal is not required even if the instructions were "somewhat imperfect," so long as they fairly presented the issues and were sufficient to protect the defendant's rights. *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004).

In this case, defendant was charged with and convicted of second-degree murder. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, (4) that is not justified or excusable. *People v Spears*, 346 Mich App 494, 514; 13 NW3d 20 (2023). Malice may be established "by showing (1) the intent to kill, (2) the intent to cause great bodily harm, or (3) the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Gafken*, 510 Mich 503, 511; 990 NW2d 826 (2022).

Unlike second-degree murder, voluntary manslaughter does not require malice; instead, it contemplates "whether an intentional killing was provoked in a manner that explains or justifies the killing so as to mitigate criminal responsibility." *Yeager*, 511 Mich at 500. "[F]or an act to be considered voluntary manslaughter, the defendant must kill in the heat of passion, the passion must be caused by adequate provocation, and there cannot be a lapse of time during which a reasonable person could control their passions." *Id*. at 489. "The provocation must be sufficient to cause the defendant to act out of passion rather than reason, but it also must be sufficient to cause a reasonable person to lose control, not just the specific defendant." *Id*. Because voluntary manslaughter is a "necessarily included lesser offense[] and 'inferior' to murder under MCL 768.32, 'when a defendant is charged with murder, an instruction for voluntary . . . manslaughter must be given if supported by a rational view of the evidence.' " *Id*. at 490 (citation omitted).

At trial, defense counsel asked the trial court to instruct the jury that they could consider voluntary manslaughter as an alternative to the charged offense. The trial court agreed that the evidence was sufficient to allow the jury to consider voluntary manslaughter as a lesser included

offense. The prosecution agreed to add the instruction without objection. Because the trial court and parties agreed to the jury instruction, we need not address whether the agreed upon instruction was supported by a rational view of the evidence.[2]

Although the trial court agreed to instruct the jury on voluntary manslaughter as a lesser included offense, it instead read the instructions for voluntary manslaughter as a standalone offense, M Crim JI 16.8. The instruction defendant requested—and the trial court agreed to give—was the lesser included offense instruction, M Crim JI 16.9, which provides, in relevant part:

> (1) The crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. For manslaughter, the following two things must be present:
>
> (2) First, when the defendant acted, [his / her] thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide.
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> (3) Second, the killing itself must result from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and return to reason. The law does not say how much time is needed. That is for

[2] On appeal, the prosecution contends that defendant cannot establish his ineffective-assistance claim because "a rational view of the evidence did not support a voluntary manslaughter instruction," and because "no reasonable juror could conclude beyond a reasonable doubt that defendant killed [Kidd] in the heat of passion or that defendant's passion was adequately caused by provocation." But the prosecution agreed to the instruction at trial, and "a party may not harbor error at trial and then use that error as an appellate parachute." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

Regardless, we conclude that a rational view of the evidence supported an instruction for voluntary manslaughter as a lesser included offense. During defendant's confrontation with Kidd and Mason, one of the men repeatedly fired a taser at defendant. Defendant attempted to walk away from the motel room, but Kidd continued the confrontation by chasing after defendant and repeatedly swinging a metal chain at defendant. Additionally, both Kidd and Mason engaged in combat with defendant, and, at several points during the altercation, defendant was surrounded by the two men, reasonably limiting his ability to escape. Under these circumstances, a reasonable person could have acted out of passion when confronted by two larger men—who possessed weapons and continued the confrontation. Accordingly, defendant was entitled to a jury instruction for voluntary manslaughter as a lesser included offense. Additionally, on the basis of this evidence, it is reasonably likely that a jury could have convicted him of this offense.

you to decide. The test is whether a reasonable time passed under the circumstances of this case.

The "use notes" in M Crim JI 16.8 indicate that M Crim JI 16.9 should be used when voluntary manslaughter is being considered as a lesser included offense, as it was in this case.

The instructions actually read to the jury in this case, however, did not come from M Crim JI 16.9. Here, the trial court instructed the jury:

> The defendant is charged with the crime of second degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
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> First, that the defendant caused the death of Raymond Kidd. That is, that Raymond Kidd died as a result of the defendant stabbing him.
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> Second, that the defendant had one of these three states of mind: He intended to kill or he intended to do great bodily harm to Raymond Kidd or he knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his actions.
>
> Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.
>
> The defendant is charged with the crime of murder in the second degree. You may also consider the lesser charge of voluntary manslaughter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant caused the death of Raymond Kidd. That is, that Raymond Kidd died as a result of multiple stab wounds.
>
> Second, that the defendant had one of these three states of mind: He intended to kill or he intended to do great bodily harm to Raymond Kidd or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.
>
> Third, that the defendant caused the death without lawful excuse or justification.

The trial court's instructions concerning voluntary manslaughter were nearly identical to the instructions for second-degree murder in M Crim JI 16.5. Most importantly, the instructions failed to "present to the jury the differing states of mind required for murder and voluntary manslaughter." *Yeager*, 511 Mich at 501. By failing to meaningfully distinguish the two offenses, the trial court erred when it instructed the jury on M Crim JI 16.8.

Trial counsel's admitted failure to recognize and object to this error was not a matter of strategy and constituted deficient performance. Because trial counsel's performance fell below an

objectively reasonable standard, and because a reasonable jury could have convicted defendant of voluntary manslaughter as a lesser included offense, *Yeager*, 511 Mich at 501, defendant has established that he was denied the effective assistance of counsel.[3] Defendant, therefore, is entitled to a new trial.

We vacate defendant's conviction and sentence and remand to the trial court for a new trial. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Allie Greenleaf Maldonado
/s/ Randy J. Wallace

[3] The prosecution contends that even if the trial court had given the correct instruction, a reasonable jury still would not have found defendant guilty of voluntary manslaughter because the jury rejected his self-defense argument, which was essentially the same as his argument for provocation. Although murder mitigated by self-defense and voluntary manslaughter both contemplate an intentional action, see *Yeager*, 511 Mich at 500; *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), the prosecution overlooks a key distinction: second-degree murder requires malice, while voluntary manslaughter does not. See *People v Holtschlag*, 471 Mich 1, 10; 684 NW2d 730 (2004) (indicating that "the *sole element* distinguishing manslaughter and murder is malice.") (Quotation marks and citation omitted). It is entirely possible that a jury could reject defendant's self-defense argument but still find that defendant acted in the heat of passion caused by adequate provocation, thereby negating any malice, and warranting a voluntary manslaughter sentence instead of second-degree murder. *Yeager*, 511 Mich at 489-490.