STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

THEODORE PAUL WAFER

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 324018

Circuit Court No. 14-0152-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____/

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION/ JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Wafer was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on September 3, 2014. A Claim of Appeal was filed on October 9, 2014 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated September 30, 2014, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A); MCR 7.204(A)(2). This Honorable Court now has jurisdiction to consider this application for leave to appeal. MCR 7.303(1); MCR 7.305(C)(2).

On April 5, 2016, the Court of Appeals affirmed the convictions, but remanded for *Lockridge/Crosby* proceedings. (Court of Appeals' Opinion, 4/5/16, attached as Appendix A). Appellant Wafer respectfully asks that this Honorable Court grant leave to appeal or other appropriate relief and, ultimately, reverse and remand for new trial (Issues II & III) or, if he fails in that request, then to vacate the manslaughter conviction/sentence and remand for resentencing on second-degree murder (Issue I). This application involves legal principles of major significance to the state's jurisprudence, including double jeopardy, interpretation of the self-defense act's rebuttal presumption for a home's occupants, and prosecutorial misconduct. MCR 7.305(B)(3). Further, the Court of Appeals clearly erred in affirming and its decision causes material injustice. MCR 7.305(B)(5)(a).

STATEMENT OF QUESTIONS PRESENTED

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

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. **DID THE TRIAL COURT'S DENIAL OF MR. WAFER'S REQUEST FOR A JURY INSTRUCTION ON THE REBUTTABLE PRESUMPTION OF MCL 780.951(1), OF THE SELF-DEFENSE ACT, VIOLATE MR. WAFER'S RIGHTS TO PRESENT A DEFENSE AND TO A PROPERLY INSTRUCTED JURY, REQUIRING REVERSAL?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

III. **DID NUMEROUS INCIDENTS OF PROSECUTORIAL MISCONDUCT VIOLATE MR. WAFER'S RIGHTS TO A FAIR TRIAL, REQUIRING REVERSAL?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Introduction

Defendant-Appellant Theodore Paul Wafer was jury convicted of second-degree murder, MCL 750.317; manslaughter - weapon aimed, MCL 750.329; and felony firearm, MCL 750.227b, on August 7, 2014, in the Wayne County Circuit Court, before the Honorable Dana M. Hathaway. The judge sentenced Mr. Wafer, on September 3, 2014, to concurrent prison terms of 15 years[1] to 30 years for the murder conviction and 7 years to 15 years for the manslaughter conviction, both consecutive to 2 years for the felony firearm conviction. (Judgment of Sentence).

There was no dispute that, in the early morning hours of November 2, 2013, Mr. Wafer shot Renisha McBride on his front porch, causing her death. The issues at trial concerned whether or not Mr. Wafer's actions were legally justified or excused and if they were not, then what was the level of his criminal culpability in killing her.

On direct appeal, Mr. Wafer raised claims relating to: 1) the trial court's denial of his request that it instruct the jury on the rebuttal presumption of MCL 780.951(1), contained in CJI 2d 7.16a, i.e. that a person possesses an honest and reasonable belief of sufficient imminent harm to justify defending himself with deadly force if another person is in the process of breaking and entering his home; 2) prosecutorial misconduct; 3) double jeopardy for the convictions of both second-degree murder and manslaughter; and 4) that the trial court was operating under a misconception of the law in that it believed the statutory sentencing guidelines scheme was constitutional and that it was bound to impose a guidelines sentence by that scheme's substantial and compelling requirement. (Appellant's COA Brief on Appeal).

[1] The 15-year minimum was at the bottom of the sentencing guidelines range as scored after the court resolved objections. (See SIR, Appendix B)

On April 5, 2016, the Court of Appeals affirmed the convictions, but remanded for *Lockridge/Crosby* proceedings. (Court of Appeals' Opinion, 4/5/16, attached as Appendix A). The Honorable Deborah A. Servitto dissented on the double jeopardy issue; she would have vacated the manslaughter conviction and remanded for further proceedings in that regard. (Court of Appeals' partial concurrence/partial dissent).

Mr. Wafer now seeks leave to appeal in this Honorable Court.

Theodore Wafer and his Fears

At the time of trial, Mr. Wafer was fifty-five years old. (IX 168)[2] He had worked doing maintenance for the Detroit Metro Airport Authority for the past thirteen years. (IX 168-169) As part of his employment, he had a security clearance and was required to pass drug tests. (IX 170)

Mr. Wafer lived alone in his house, which was approximately 1,100 sq. ft., located at the corner of Outer Drive and Dolphin Street in Dearborn Heights. He had lived there since 1994. (IX 173-174, 186-187) He was aware that there was crime in his neighborhood from talking to neighbors, from the local news, and from finding drug paraphernalia and alcohol bottles on his property. (IX 177-178)

There were three door entries to Mr. Wafer's home, one each at the front, the side and the back. (IX 174-175) Mr. Wafer habitually kept all of his doors locked, including the screen door before the main door to the front entry, but with the exception of the screen door before the main door to the side entry of his home. (IX 175)

The windows on the main floor of Mr. Wafer's home had vertical plastic blinds, with the exception of one big window in the back of the house that had glass block in it. (IX 188) The basement windows were glass block. *Id.* He chose the glass block, in part, for security. *Id.*

[2] The trial transcripts will be referred to by volume/day number.

Mr. Wafer testified that his neighborhood had once been called copper canyon, for its high occupancy rate by police officers and firefighters who needed to satisfy the City of Detroit's residency requirement and lived just within Detroit's border across Warren Avenue. (IX 181-182) That began to change in the middle to late 1990's when the residency requirement was removed. (IX 182-183)

Mr. Wafer testified that the number of crimes in the neighborhood rose after the residency requirement was no more. (IX 181-183) A nearby neighbor had his home broken into twice, once during the 1990's and once in the early 2000's. (IX 180-181) In more recent times his neighborhood was changing for the worse, with more people selling their homes, then foreclosures, more renters moving in, and stores closing. (IX 181-183) About once a month or so Mr. Wafer would need to clean up the drug paraphernalia and other litter from his lawn, more so on weekends. (IX 178)

Mr. Wafer did not have a security system because he could not afford one. (IX 174) He bought a Mossberg shotgun for home defense in 2008. (IX 183-185) He had hunted with a shotgun before, but was not an avid hunter and had not hunted recently. (IX 183; T X 71, 73) Shortly after he bought it, Mr. Wafer put the pistol grip that came with the shotgun onto it and removed the shoulder butt. (IX 185-186) He did this to make it more maneuverable inside his home, which had small entry ways. (IX 186-187) At trial, the state police firearm examiner agreed that this type of shotgun, particularly with a pistol grip, is an excellent choice for self-dense and home protection. (VI 92, 126-127)

Mr. Wafer purchased bird shot shells when he bought the shotgun. (IX 188) About a year later, Mr. Wafer bought a box of buck shot while he was shopping for something else at a sporting goods store. (IX 189)

Mr. Wafer kept the shotgun in its case inside one of the bedroom closets; he kept it unloaded from 2008 until October 2013. (IX 189-190; T X 64-65) He learned that around the end of summer in 2013 one of his nearby neighbors had to hold off three men with his handgun after confronting them about using drugs around his house. (IX 179-180) Then, in October 2013, Mr. Wafer's own vehicle was vandalized, shot with paintballs. (IX 191)

Mr. Wafer decided to load the shotgun after the paintball vandalism incident, which possibly occurred on October 19, 2013, knowing that his neighbor had needed to hold off the three drug users at gunpoint. (IX 191, 64-65) These events put him on "edge." (IX 191; X 67, 77-78) He did not know if someone "was targeting us or, or what." (IX 191) He left the safety on, but he put a round in the chamber and racked it. (IX 191-192)

Mr. Wafer acknowledged he had told the police that he did not know the gun was loaded when he shot it on November 2, 2013. (IX 192) At trial, he explained that at the time when he went to the door with it, he did not recall in that moment that he had loaded it after years of keeping it unloaded. (IX 192; X 68, 70) It was after he fired the shotgun on November 2nd, that Mr. Wafer would recall that he had loaded it after the paintball incident. (IX 192; X 63-64, 70)

Renisha McBride and her Mystery

Mr. Wafer's trial did not solve the mystery of how and why Renisha McBride came to be on his porch in the early morning hours of November 2, 2013.

Ms. McBride was 19-years-old when she was killed, and she lived with her mother, her grandmother, her older sister, and her sister's son. (III 60-61, 63) Their home was located near the intersection of Seven Mile and Greenfield in Detroit. (T III 61, 63). Ms. McBride drove a white Taurus. (III 61-62) She was employed by a temporary staffing agency. (III 62)

The evening of November 1, 2013, Ms. McBride hung out at home with her best friend, Amber Jenkins. (III 66, 77-78) Ms. Jenkins arrived around 7:30 or 8:30 pm.[3] (III 78, 90-92)

The two friends played a drinking game with a fifth of vodka. (T III 79). Between the two of them, they drank about half of the fifth-sized bottle. (III 80-81, 100-101) Jenkins testified that Ms. McBride was losing the game. (III 80-81, 83, 101, 104)

They also smoked three blunts of marijuana together. (III 82-83, 99-100) These blunts were 3 to 4" long and about ¼ to ½" thick each. (III 100) Jenkins testified when high and intoxicated Ms. McBride generally just chilled and laid back. (III 98, 107)

Jenkins left after they had spent about one and a half to two hours together, so sometime between around 9:00 or 10:30 pm.[4] (III 83-84, 90-92, 96) Jenkins left because they were bickering. (III 81, 83, 101, 104-107)

Davonta Bynes, a friend of Ms. McBride's, last spoke to Ms. McBride about 10 pm by phone. (V 19, 36) She had invited Ms. McBride to come over to her house that night, which was located in the area of W. Warren and Faust off of the Southfield freeway. (V 15-17, 30-31) During their 10 pm call Ms. McBride sounded really drunk to Bynes, so much so that she worried that someone had slipped something into Ms. McBride's drink. (V 35).

Renisha McBride was at home at 10:40 pm when her mother, Monica McBride, arrived home. (III 64-65) Ms. McBride's mother fussed at her for not having tended to her chores at home. (III 66, 74-75) They interacted for about five minutes, before Monica went upstairs. (III 66-67) Monica testified that her daughter did not appear to her to be intoxicated. (III 66-67) When she came back downstairs five to ten minutes later, Renisha was gone from the house. (III

[3] Jenkins originally estimated she arrive around 6 or 7 pm, but her memory was refreshed with text messages and the times they were sent; it appears those times on the text records were noted in Central Time, one hour earlier than Eastern Time. (III 90-93)

[4] Please see the prior footnote.

67) Monica estimated it was about 11:15 pm when she realized that Renisha and her car were gone. (III 67-68) Believing that Renisha was just miffed about her fussing at her and telling her to stay in for the night, Monica went upstairs and, exhausted, she fell asleep. (III 68-69, 75)

Renisha McBride is unaccounted for from about 11:15 pm to 1 am. Bynes' testimony indicated that if Ms. McBride travelled from Detroit using the Southfield freeway ending up in the area of Mr. Wafer's home, she would have gone past the area where Bynes lived. (V 31-33)

Around 1:00 am,[5] November 2, 2013, Ms. McBride, driving her Taurus at about 6 to 12 miles over the residential speed limit, hit a parked Dodge car at the curb on Bramell St. in Detroit, pushing it up over the curb and into a tree. (III 62, 74-77, 79, 112-115, 127, 140; IV 43, 62, 77; V 63) After the impact, witnesses observed a woman, later identified as Ms. McBride, exit the Taurus, walk away towards Warren Road and then return back towards the crashed vehicles. (III 113, 118-119, 123, 135, 140, 158; IV 43, 54-55, 81-82, 84, 86-87) Ms. McBride walked away and returned two or three times. (III 129-131, 133, 139, 147) Witnesses testified that Ms. McBride walked in a stagger with both of her hands up on the sides of her head. (III 53, 90, 93, 135, 158-159)

A few women spoke with Ms. McBride. One testified that while Ms. McBride answered a few basic questions by nodding and shaking her head and did not look injured, she still thought that Ms. McBride was out of it. (IV 88, 90, 93) Another testified that when she asked Ms. McBride if she was okay, Ms. McBride responded yes and that she needed to go home. (III 129) This woman noticed blood on Ms. McBride's right hand; she could not tell where the injury was located that produced that blood. (III 134-135, 151-153, 158) A third woman testified that she did not observe any injuries to Ms. McBride or any blood on her. (IV 52, 58) In her statement to

[5] Transcripts of the 9-1-1 calls related to the crash were admitted. (III 159) The first was made at 12:55 am. The second was made at 1:20 am. (People's Exhibits 9 & 13)

investigators, given in the days after the incident, this woman said she saw blood on the right side of Ms. McBride's face; but at trial, she did not recall seeing that. (IV 53-56)

At least once, Ms. McBride got back into her smashed up Taurus. (III 133, 136-138, 158; IV 47, 65-66) One of the women asked Ms. McBride about her cell phone. (III 133) Ms. McBride responded that she did not know where her cell phone was and patted her own body down looking for it. (III 134) One of the women tried to persuade Ms. McBride to wait for an ambulance, and Ms. McBride stated again that she needed to go home. (III 136-139, 151)

Ms. McBride got out of her car a final time, walked towards Warren Road and then headed east on Warren out of view. (III 139-140) One witness testified that Ms. McBride was babbling that she wanted to go home as she left. (IV 44, 46, 61)

By the time the ambulance and the police arrived, Ms. McBride was gone. (III 141) One of the women at the scene suggested to the first responders that they circle the block to look for Ms. McBride because she was moving slow and could not have gotten far yet. (III 142-143) EMS left then, but the police remained at the scene until a tow truck arrived and took the Taurus away. (T III 143-144)

About two hours after the crash, the wife of the owner of the struck car took him to work and she looked for Ms. McBride down Warren. (III 155) There was no sign of her. (III 155)

Ms. McBride's whereabouts are unknown from about 1:30 am to 4:30 am, when she awakened Mr. Wafer at his home located about a half mile from the crash scene. (VI 54, 56-57)

The Intersection of Mr. Wafer and Ms. McBride on November 2, 2013

Mr. Wafer was awakened from his sleep around 4:30 am, on November 2, 2013, by loud banging or knocking on the side of his house. (IX 198) He did not know what was causing it. (IX 198) He lay still and listened for a minute. (IX 199) The noise moved to the front of his

house, this time louder. (IX 199) Mr. Wafer turned off the television to try to conceal his presence. (IX 199) He reached for his cell phone but at the time, he could not find it. (IX 197)

Earlier, Mr. Wafer had fallen asleep in his recliner in a backroom of his home, which he used as a television room, around 10 to 10:30 pm, on November 1, 2013. (IX 188, 194-195) He awoke sometime around midnight or 12:30 am on November 2, 2013 to use the bathroom. (IX 195) He also removed his blue jeans, and put on sweatpants. (IX 195) Mr. Wafer hung his jeans up in the bathroom before falling back to sleep in the recliner. (IX 195, 198)

Mr. Wafer did not have a landline phone at home, only his cell phone. (IX 195) It was his habit to charge his cell phone at night in the charger kept beside his recliner. (IX 196, 198) But, on this night, he would learn too late that he had left the phone in one of the pockets of his jeans hanging up in the bathroom. (IX 197-199)

When Mr. Wafer did not find his cell phone in its usual place, he got out of the recliner and crawled into the hallway, turning off lights as he went. (IX 199) He crawled into the hallway so as not to give away his location, and then stood to turn off the light. (IX 199-200)

The loud noise moved to the front of Mr. Wafer's house. He could hear something slapping at the front window. (IX 200). Mr. Wafer testified that the floor was vibrating from the banging on the front door to his home. (IX 200).

Mr. Wafer stood in his kitchen and waited for the sound to stop. (IX 200) When the banging at the front door stopped, he went and looked out its peephole. (IX 200) He saw a figure leaving his porch.[6] (IX 200) The person jumped off the porch and went to the right. (IX 201) He could not discern whether it was a man or a woman nor the race of the individual. *Id.*

[6] Mr. Wafer testified that it is his habit to leave off the front porch light, with the front of his home being located on Outer Drive. (IX 175) He testified that there is a street light on the island

Mr. Wafer searched for his cell phone on the counters of in his kitchen and in his bathroom. (IX 201) He could not find it. (IX 201)

The banging started up again, now at the side of the house – a loud pounding. (IX 202) Mr. Wafer testified that each instance of banging grew more violent, escalated. (IX 202) He did not know exactly what was happening, but he believed that someone, maybe more than one person, was trying to get into his house and hurt him. (IX 202, 210)

There was a pause in the activity at the side door before it resumed. (IX 203) It sounded now like the side door was being "attacked." (IX 203) There was direct banging on the entry door itself. (IX 203) It caused the floor to vibrate and the windows to rattle. (IX 203)

Mr. Wafer testified that he did not try to look out any of the windows of his home to see what was happening. (IX 204) His front drapes or blinds were closed. (X 32) He did not want to give away his location, such as by the movement of the blinds. (IX 204)

Mr. Wafer felt frozen as he was in the kitchen by the side door. (IX 204) When the banging stopped again, he went down the landing of the stairs and looked out the peephole of the side door and saw no one. (IX 204-205)

Mr. Wafer was as scared as he had ever been. (IX 205) His heart was racing. (IX 205). He grabbed a baseball bat that he kept on the landing by the side door and took it with him into the kitchen. (IX 205) He clinched the bat in his hands. (IX 205-206)

After a few seconds, the banging started up again at the front door. Mr. Wafer testified that it was "intense" because now he could "hear some metal hitting the door." (IX 206)

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in the middle of Outer Drive that illuminates the cross street but that does not shine very much light on his front porch. (IX 175-176)

Mr. Wafer stepped into the living room and thought about going to the door with the bat. (IX 206). He decided instead that it would be better to get his gun. (IX 206)

Mr. Wafer retrieved the shotgun from its case in the bedroom closet. (IX 206) He did not check to see if it was loaded, and he could not recall disengaging the safety. (IX 206; X 70)

By the time Mr. Wafer retrieved the shotgun, the pounding had moved from the front door back to the side door. (IX 207) It sounded like someone was trying to kick in the side door. Mr. Wafer went towards the side door into the kitchen with the shotgun in hand down by his side. He was "frozen there." (IX 207) The banging stopped again. *Id.*

This whole time, whoever was out there doing this was not saying anything. (IX 208) This made Mr. Wafer more afraid that they were trying to gain entry to his home. (IX 208-209)

Mr. Wafer never called out to the suspected intruder(s), as he did not want to give away his location inside his home. (IX 209) Every time the banging stopped, Mr. Wafer hoped that the ordeal was over. (IX 207) He testified that he never wanted to shoot anyone. (IX 207)

Mr. Wafer testified that he also did not want to cower in his own home, and he did not want to be a victim. (IX 207, 214) He decided he needed to investigate what was going on, because he feared "they" were going to break into his house. (IX 207, 214)

Mr. Wafer went to the front door because the threat had last been at the side door. (IX 218) He hoped that if whoever was at the side door saw him at the front door with a weapon it would scare them away. (IX 215; X 49)

When Mr. Wafer returned to the front door and looked out the peephole, he noticed that the glass in the peephole was damaged – it was "cracked or something" – such that his view through it was now distorted. (IX 208) He could not really see out. (IX 208)

Mr. Wafer unlocked and opened his main steel front door a few inches, shotgun in hand but pointed down. (IX 209; X 50) He could see that the screen door was damaged with the screen dropped down. (IX 210) The screen door to the front entry was still locked but the screen insert itself was broken out of the door, pushed in. (X 84, 87) He knew that the damage meant trouble, so he opened the main front door all the way. (IX 210)

Mr. Wafer testified that as he opened that door wider, a "person came out from the side of my house so fast." (IX 210) The person must have been on the porch already when he opened the door to come at him that fast. (X 44) Mr. Wafer testified that at that moment, fearing for his life, he raised the shotgun and shot it. (IX 210-211) He did not believe that he really even aimed the shotgun, he just shot reflexively and immediately toward the figure which was only a couple feet away from him. (X 45-47, 90-91, 94) He could not even recall disengaging the safety, whether he did it instantly at the time or inadvertently when he removed the shotgun from the case. (IX 206; X 70-71)

Ms. McBride was hit in the face by that shot and died immediately. (VIII 116-117) Mr. Wafer looked at the fallen body for a second, and realized that it appeared that he had shot a short-statured female. (IX 210; X 94)

Mr. Wafer put the gun down inside near the front door, and immediately searched his home again for his cell phone, leaving the front main entry door open. (IX 211; X 18-19, 86) He would eventually find it in his pants' pocket in the bathroom. (IX 211)

Ray Murand, who lived directly across from Mr. Wafer on Dolphin St., testified that he was in his office in the back of his house, when he heard the nearby gunshot. (V 40-43) Murand testified that it was a windy and rainy night. (T V 38, 48-49) Before the gunshot, he heard noise from outside, which at the time he believed was tree branches striking his car or "someone was

around my house." (V 42, 48-49) He looked out the window and went outside to check on his car; he did not see anything going on outside, including when he looked over at Mr. Wafer's house. (V 42-43) Murand returned into his house, and 10 to 15 minutes later heard that gunshot. (V 43) He looked out his door then but did not see anything. (V 44) A few minutes later, the police arrived at Mr. Wafer's house. (V 44-45)

Mr. Wafer called the police at approximately 4:42 am and reported that he "just shot somebody on my front porch with a shotgun banging on my door." (IX 211-212; IV 102; People's Exhibits 38&39) He called the Dearborn Heights Police's direct number, programmed into his cell phone, rather than 9-1-1, hoping it would lead to a quicker response.[7] (IX 212)

Mr. Wafer acknowledged that he had used the term accident or said the gun discharged in describing what had happened to the police when they arrived,[8] but he testified that he had not meant that in the sense as if he had dropped the gun and it went off. (IX 219-220) He meant it in the sense that he had not intended for this to happen - - he had not gone to sleep that night "expect[ing] to have to fight for his life" or expecting that he would "end up shooting and killing someone." (IX 219) These were just the first descriptions that came out of him afterward. (IX 220) He shot the gun on purpose, pulling the trigger, out of fear but he was not really aiming and had not set out to kill anyone. (IX 210-211, 219; T X 46, 61)

[7] Mr. Wafer referenced news stories he had seen about slow or non-existent responses to 9-1-1 calls. (IX 212) However, at other points during the trial, references are made to this being a 9-1-1 call. In this call, Mr. Wafer also gave his street address. (People's Exhibits 38 & 39, admitted at IV 103) After Mr. Wafer reported the incident, the call became disconnected somehow and the 9-1-1 dispatcher almost immediately called Mr. Wafer back to get more information for the responding officers. (IV 102-106) The dispatcher assumed the disconnection was caused by Mr. Wafer hanging up, but acknowledged he did not know what caused the disconnection. (IV 103, 109-110) This outgoing call to Mr. Wafer was not recorded. (IV 110)

[8] See VII 155, 158; People's Exhibit 162. The transcript of the police car audiotapes also reveals that Mr. Wafer did reference self-defense, somebody wanting in, and that somebody tried to get in his house.

Mr. Wafer testified that night was one of fear, panic, and confusion for him. (IX 212) The pounding on his doors was "violent" and he thought the door may come down. (IX 218-219) Mr. Wafer allowed that he also felt mad or upset when he believed he was being attacked in his own home (IX 214; X 37-38), but he pulled the trigger as a "total, total reflex reaction. Defending myself…." when "somebody stepped in front of the door" close to him when he opened it. (IX 215) He had no time to assess whether the person was armed. (IX 47; X 92, 94)

Mr. Wafer pulled the trigger "[t]o protect myself, to save myself. To defend myself. It was, it was them or me. At that moment." (IX 220)(See also X 62.)

Mr. Wafer estimated the whole incident from the first banging noise to the shooting lasted one to two minutes. (X 24-25, 33) There were approximately 10 to 15 second intervals between the back and forth incidents of banging on the two doors. (IX 202)

Mr. Wafer cried during various parts of his testimony. (X 222-223) On cross-examination, the prosecutor pointed out that he had not cried during his interview at the police station. (IX 223) Mr. Wafer explained that at the police station that night he had not yet absorbed what had happened; he did not even know Ms. McBride's name then; his personal ordeal with the legal system had just begun; since the night of the shooting, he had nightmares about the incident; and he had had nine months to think about all the pain that it had caused to Ms. McBride's family and to live with the knowledge that he had killed her. (X 95-96) He testified regarding his regret for the loss of Ms. McBride's young life. (IX 211; X 96)

The Investigations

Upon their arrival at Mr. Wafer's house, around 4:46 am, on November 2nd, the police observed Ms. McBride's body lying on the front porch on her back "just beside the door" with her feet pointed towards the door of the house, obviously deceased from the gunshot wound to

her face. (III 170; IV 10, 119, 123) She was wearing a blue hooded sweatshirt, a black shirt, blue jeans with a belt, undergarments, a pair of black woman's boots, and socks. (IV 158; People's Exhibits 110-115) The boot on one of her feet had a damaged sole that was torn open at the bottom. (IV 129, 158; People's Exhibit 65)

The police did not find any weapons or burglary tools on or near Ms. McBride's body or around the porch. (III 179; VI 146, 159, 162; VII 156) When medical examiner staff arrived at the scene, they removed Ms. McBride's driver's license and $56 cash from her rear pant's pocket. (IV 137-139; VI 160) Later, a $100 bill that had been given to her by her mother on November 1st was also discovered apparently in Ms. McBride's clothing though no record was made of it and it is unclear by whom it was discovered.[9] (VII 50-51, 95-96, 145)

Officer Zawacki took photographs and acted as the evidence technician at the scene in the morning hours just after the shooting. (IV 120) Zawacki testified that he is a road patrol officer who can also "do basic evidence tech work." (V 117-118, 120) He was not a certified evidence technician. (IV 144-145) He did not take notes to help him identify the photos later, as it was pouring rain outside. (IV 140) He made no attempt to collect fingerprints that night, and he was not instructed to try. (IV 144) Zawacki only took photographs of the front entry doorway to Mr. Wafer's home that night, not the other doors. (IV 144-145)

Off. Zawacki observed a rip or hole in the screen of the front screen door at a height of approximately 5' 6". (IV 122, 124, 130) The screen door was locked. (IV 126; VI 156) He did not observe any signs of forced entry as it related to the handle of screen door.[10] (IV 126) Zawacki did not measure the distance from Ms. McBride's feet to the front entry; Sgt Gurka estimated it at about two feet. (IV 145-146; VI 146)

[9] The $100 bill was given to her mother on November 2nd, but not the other money. (VII 95-96)
[10] Likewise, Sgt. Gurka testified that he saw no damage to the screen door handle or the frame of the screen door, which he referred to as a storm door. (VI 147-148)

Off. Zawacki testified that the top of screen insert was off track or leaning out of the track and coming down from the frame of the screen door. (IV 131, 142, 148) He did not measure how far the screen had come down out of the frame. (IV 142)

Off. Zawacki did not examine the screen door to see whether the clips that normally hold the screen insert in the frame were still intact. (IV 147-148) He could not say whether the bottom half of the screen insert was inside the frame or not. (IV 148)

Sgt. Gurka, the officer-in-charge, testified that the screen insert was down about eight or nine inches, when he arrived at the scene. (VI 147, 156, 161; VII 89) It was leaning against the door frame, with nothing securing it to the door frame, and the bottom of it was on the porch ground. (VII 89-90) He testified that the screen itself it did not appear to him to have been pushed or kicked or stretched in. (VI 161) He popped the screen insert back into place to take measurements. (VI 157, 161) Sgt. Gurka testified that there were no clips on the side of the screen door frame; he fit the screen insert back underneath the only tab which was located at the top of the frame and slid it back into the track, where it stayed in place. (VI 157, 162; VII 91-92) With it in that position, he measured the middle of the hole in the screen as being approximately 60 inches (5 feet) from the floor on the inside of the house and as being approximately 65 inches (5’ 5”) from the outside of the house. (VI 157-158)

The main front entry door was open behind the screen door. (IV 127; VI 148) Zawacki testified that he did not observe any scratches or marks on the inner entry door. (IV 142) He did not look at the front entry door’s peephole. (IV 142-143)

Sgt. Gurka testified that he inspected the front doors (screen door and main door). (VI 160) He saw no pry or kick marks and no damage to the locks or handles. (VI 160-161) He saw

no damage to the frame of the screen door itself. (VI 161) Sgt. Gurka testified that he made the same observations of the side screen door and side main door.[11] (VI 161-162)

The police saw Mr. Wafer's shotgun lying "[j]ust inside the door area" of the front foyer the house where he told them he had left it. (III 170; IV 20, 121, 126-127, 152-153; VI 148) The police found the spent shotgun shell still inside the shotgun and they cleared it out of the shotgun. (IV 131-132; VI 155) The shotgun's safety was disengaged and there were no other rounds in it. (VI 158) Off. Zawacki observed a case for the shotgun inside the home on the floor in the bedroom, which was collected and placed into evidence. (IV 128; VI 159)

Mr. Wafer was cooperative and consented to the police searching his home. (III 178-179) Mr. Wafer spoke with the police multiple times regarding these events: his phone call reporting the incident in the immediate aftermath; to Sgt. McMannis when he arrived at the scene within five minutes of the shooting and at some point in the police car in which Mr. Wafer sat for about an 1 ½ hours at the scene; and with Lt. Serwatowski at the Dearborn Heights Police Department within 2 ½ to 3 hours after the shooting.[12] (IX 221-223)

Mr. Wafer asked the police before he left the station what he should do with the broken screen door - - if it was okay for him to switch it out for the glass door panel.[13] (X 98; VII 62) Sgt. Gurka testified that at that point he did not want to collect it until he got a search warrant even though Mr. Wafer was cooperating. (VII 62-63) When Mr. Wafer got home he switched it

[11] Sgt. Gurka did not examine the back door to the house in the same manner, but he did open it on November 2nd and did not notice any damage to it then; when Sgt. Gurka returned on November 8th and 11th he observed no damage to the back door. (VI 178)

[12] The transcript and the video of the interview at the police station were admitted at the trial. (IX 223-224) Portions of the interview relating to Mr. Wafer's family members had been redacted at the defense's request. (IX 226)

[13] See also the end of the police interview transcript, People's exhibit 183.

out the damaged screen insert for the glass insert, and put the screen insert in the basement. (X 98) He testified that he did not tamper with it. (X 99)

The prosecution challenged Mr. Wafer's credibility at trial by pointing out some omissions or inconsistencies between the various times he spoke to the police about these events and his trial testimony, e.g. he did not tell the police that he could not find his cell phone that night prior to the shooting; in his brief phone call to the police to the report the incident he said he shot someone who was banging on his door, but did not say that he believed the person was trying to break-in or that he was afraid;[14] at the police station interview: he said that the gun went off or discharged rather than that he pulled the trigger, he did not mention hearing metal hit his door, he did not tell the officer that he got a bat before he got the shotgun; while he was in the police car at the scene he used the word "knocking" and said that he had looked out his windows. (X 19-22, 35, 41-43, 54, 56, 58)

The defense countered that Mr. Wafer was still in shock and trying to process the traumatic incident when he spoke to the police. (X 97)

The morning of November 2, 2013, Dr. Kesha, an assistant medical examiner for Wayne County conducted the autopsy on Ms. McBride. (VII 100, 108-111) Dr. Kesha had been an assistant medical examiner since 2012, and estimated that he had performed just over 1,000 autopsies. (VII 100-102, 107) He was not board certified. (VII 102-103)

Dr. Kesha concluded the cause of Ms. McBride's death was the shotgun wound to her head and the manner of death homicide, i.e. death caused by another. (VII 125) Dr. Kesha described the shotgun wound to Ms. McBride's face. It was 3 ½ inches by 2 inches and located

[14] In his interview at the police station that night, Mr. Wafer did say that he feared someone was trying to break into his home. (People's Exhibit 183, pp 19, 28)

slightly to the left of the midline of her face. (VII 112) The shot entered her in the front traveling towards the back at a just slight right to left angle. (VII 115, 118)

Dr. Kesha opined based on the configuration of the shotgun wound that the barrel was less than three feet from Ms. McBride when fired. (VII 120, 149-150) He recovered some shotgun pellets, fragments of wadding, and the plastic cup from the shell in her brain. (VII 119-120, 151-153) He testified the shotgun wound was so catastrophic that he would not have been able to discern injuries to her head separately caused by the car crash. (VII 120, 132-133, 158)

Beyond the shotgun wound, Dr. Kesha observed no other injuries to Ms. McBride including to her hands though he found blood on them. (VII 112-114) He theorized the blood on her hands could have been from coming into contact with either blood coming from the shotgun wound or, if she had hit her head in the car crash, from wiping at a nosebleed. (VII 140)

Ms. McBride was 5' 4" inches tall and weighed 184 lbs. (VII 112, 142) The toxicology report showed her blood alcohol level as .218 and her vitreous fluid alcohol level at a higher level, meaning the alcohol level in her body had been decreasing. (VII 122-123) The report also showed the presence of very recent and more distantly past marijuana use. (VII 123, 154) Dr. Kesha estimated that Ms. McBride's blood alcohol level at the time of the crash to have been between .28 and .29, and concluded that she was also under the influence of marijuana during the relevant time frame. (VII 142, 156) Generally such an alcohol level would suggest severe intoxication, possibly resulting in staggering, slurred speech, and disorientation. (VII 124)

On November 4, 2013, the police went to the tow yard and recovered Ms. McBride's cell phone from her Taurus, still plugged into the charging port/cigarette lighter area in the front seat. (IV 159-160; I 170) A later forensic exam of the Metro PC records for her phone number and cell tower records indicated her phone was in the cell sector that included her home from about

6:30 pm on November 1st to 12:35 am on November 2nd; it could not be determined whether her phone moved within that sector. (lV 87-95) The records also revealed that Ms. McBride's phone was in the cell sector containing the car crash scene from approximately 12:35 am until her car was moved to the tow yard. (V 94-97)

Ms. McBride's Taurus had extensive damage to the front passenger side, cracks in the windshield on the passenger side, and a circular spider web pattern of cracks under the rearview mirror. (IV 163, 165; People's Exhibit 26; V 62) The air bag had deployed. (IV 164) The state police accident reconstructionist could not opine on whether Ms. McBride was wearing her seat belt; he opined that it was possible that she hit her head on the windshield causing the circular spider web pattern cracks if she was somewhat out of position at impact, such as leaning. (V 61-62, 65-67) Small smears and drops of her blood were found on the dash board in the area of the driver's seat and along the frame of the driver's side door. (IV 164-165; V 162, 171)

On November 7, 2013, a police evidence technician, Officer Parrinello, went to Mr. Wafer's home and took photos of the exterior. (IV 155, 171) He photographed a muddy footprint that was on top of an air conditioning unit (a/c unit) located at the rear of the house in the back yard underneath a window.[15] (IV 228, 231-232) The footprint had a "square check sole pattern." (IV 232) That window led to the back room where Mr. Wafer's had his recliner and tv. (IV 228-229)

Mr. Wafer testified that this a/c unit in his backyard was professionally installed about five years before and he would not have stepped on it for any reason. (IX 176-177) He did not know how a footprint came to be left upon the a/c unit. (IX 177)

[15] Parrinello testified that the footprint was in loose dirt that looked like it had been wet at one point but was now dry. (IV 230).

A state police trace evidence analyst, Ms. Rizk, testified that if a footprint impression had been collected or a photograph of the footprint submitted to her, she could have analyzed it and compared it to footwear. (V 151-155) Neither an impression nor the photograph of the footprint on the a/c unit was submitted to her to compare with Ms. McBride's boots. (V 151)

On November 8, 2013, a vigil for Ms. McBride was held outside Mr. Wafer's home. (VII 45-46, 48, 97) There was no police presence, and Sgt. Gurka acknowledged that from the photos it looked like people were all over Mr. Wafer's lawn, up by the porch, and possibly on the porch. (VII 45, 47-48)

On November 11, 2013, Off. Parrinello returned and applied fingerprint dust to all three of the main entry doors to Mr. Wafer's home and front screen/storm door. (IV 212, 216, 218) He collected three lifts. When he applied the dust to the main front entry door, he observed a "cross like pattern" on the right panel above the door knob, which he documented and submitted for analysis. (IV 173-174, 217) Rizk, the state police trace evidence analyst, testified that the cross-hatch pattern could have been from the screen in the screen door making contact with the main entry door, but it could not be said with any certainty. (V 141-151, 155-157)

Off. Parrinello also found two smudges on the side door, which he submitted for fingerprint analysis. (IV 217, 220-221) A latent print examiner, Ms. Maxwell, testified that one could have been a fingerprint but there were not enough ridges to make an identification, and that the other did not have a ridge pattern. (V 120-121, 134) Maxwell testified that not immediately dusting for fingerprints at a crime scene where it is raining and waiting several days to dust are not good ideas if one wants to obtain usable fingerprints. (V 130-131)

On November 11th, Parrinello also retrieved the front screen door frame and the screen insert. (IV 182-184) He took swabs of some areas of possible blood towards the top of the

hinged side of the frame and towards the top of the handle side of the frame. (IV 186, 188-189) Upon later analysis, it was found that two of the areas swabbed were not human blood, but that the DNA from the others matched Ms. McBride. (V 161-162, 171-174)

By November 11th, Mr. Wafer had already put the glass insert in the frame. (IV 190; VI 175; X 98) Parrinello observed that the glass insert was being held in the door frame by one plastic tab screwed it at the top of the frame. (IV 190) He collected the screen insert from Mr. Wafer's basement, where Mr. Wafer had placed it. (IV 220; VI 175; X 98-99) Parrinello testified that he also looked through the peephole of the main front entry door, and that he could see through it. (IV 189)

Mr. Wafer's 12 gauge shotgun was examined by Shawn Kolonich, a state police forensic firearms examiner, and by David Balash, a forensic firearms examiner and crime scene reconstructionist hired by the defense. (VI 65-66, 76-77, 86)

Kolonish testified that the shotgun passed his safety check examination, meaning it does not fire absent the trigger being pulled by an adequate force, and was properly functioning. (VI 98-99, 105-106) He opined that the average trigger pull weight necessary to fire the shotgun was 6.5 lbs. (VI 94-99) Kolonish testified that Mr. Wafer's shotgun has a safety mechanism, located on top of the receiver. (VI 91) To operate that safety, the user would slide the safety lever up or down. (VI 91) When down, the safety is engaged and the trigger cannot be pulled. (VI 91) In the up position, a small red dot is exposed to indicate that the shotgun is ready to fire and the trigger can be pulled. (VI 91) The safety would typically be operated by the user's thumb. (VI 92)

Kolonish estimated that Mr. Wafer was within eight feet of Ms. McBride when he fired, based on her wound and the parts of the shotgun shell that were found inside it, including wadding and buffer. (VI 112-113, 125) Kolonish could not opine on whether the screen insert to

the screen door was already down six to eight inches in the frame or intact normally when Mr. Wafer fired. (VI 119-120) He opined that the closer the shot was fired to the screen door, the less likely the shot itself was to dislodge the screen insert from the door frame. (VI 121-123)

The state police crime lab's firearms division is not accredited to do crime scene resconstruction. (VI 121) Kolonish was not allowed to test fire the shotgun though a screen to make any determinations regarding whether the shot dislodged the screen or it was already dislodged or to carry out tests to determine where within the estimated limit of the 8 foot range the shot was fired from. (VI 122-123, 125)

The defense challenged the efficacy of the police investigation. (See, e.g. VII 8-89) This case was Sgt. Gurka's fourth time being the officer-in-charge in a homicide case, and he had not attended a crime scene investigation class since 2001. (VI 11-12)

Sgt. Gurka countered that to him this was an open and shut case. (VII 12-13). He made up his mind quickly the night of the shooting that he was not investigating a burglary. (VII 12-14) He indicated that, therefore, he was uninterested in fingerprints, footprints, the additional investigation that the prosecutor's office requested and had its own investigators do, did not listen to the voicemails left on Ms. McBride's phone that night, etc. (VII 48-49, 64-65, 68-69) Sgt. Gurka was also uninterested when one of the defense attorneys tried to point out plastic clips in the area of Mr. Wafer's porch when the police returned to get the screen door insert on November 11th; Gurka testified that he did not want to even look at whatever it was because by that point he did not know where it would have come from. (VII 55-58)

Sgt. Gurka offered that if the footprint on the air conditioning unit indicated that someone else was at the back of Mr. Wafer's home probing for a way in while Ms. McBride distracted him, "[t]hen that's the person Mr. Wafer should have shot." (VII 21-22)

The defense presented Dr. Werner Spitz, an expert in forensic pathology, who over the span of 1972 – 2004 had been the chief medical examiner in Wayne or Macomb counties, was board certified, and had performed or supervised over 60,000 autopsies. (VII 176-185) Dr. Spitz did not quibble with Dr. Kesha's conclusions regarding cause and manner of death, but did find errors and omissions in other relevant parts of the autopsy. Dr. Spitz criticized Dr. Kesha for not properly examining Ms. McBride's hands and forehead. (VII 213-215) He disagreed somewhat with Dr. Kesha's opinion on the distance at which the shotgun was fired from Ms. McBride.

Dr. Spitz opined from his examination of the autopsy report and the photographs that Ms. McBride had injuries to her hands. Her left hand including the fingers was swollen, and had one small cut, the source of the fresh blood, and one abrasion. (VII 211-218; Defense Exhibit Q; People's Exhibits 45, 180-181; VIII 10, 16-17) Her right hand was also swollen to some degree. (VII 220; Defense Exhibit S; People's Exhibits 180-181; VIII 19-21) Dr. Spitz opined that these injuries to her hands were not caused by the shotgun blast or the car crash, due to the way blood clots and how swelling develops, and were consistent with her pounding on Mr. Wafer's doors. (VII 216-217, 220-221; VIII 7-10, 19-23, 85, 123).

Dr. Spitz opined from his examination of the autopsy report, the photographs, and other evidence, that Ms. McBride was not wearing her seatbelt and had hit her head on the windshield of her car in the crash. (VII 206-207; VIII 121). He cited, in part, to a silver-dollar sized discoloration on Ms. McBride's forehead and the lack of any injury or marks on her body from a seat belt. (VII 207; VIII 121). The trace amounts of blood in the car were probably from her nose after her head hit the windshield, possibly breaking her nose. (VIII 80-81). Dr. Spitz opined that she more than likely suffered a concussion as a result. (VII 209)

Dr. Spitz opined that the shotgun was fired from 2 feet or less away from Ms. McBride, rather than from within 3 feet, because there was evidence of white powder, filler, and gun powder on her face and because the shotgun cup was found in her brain. (VIII 35, 37-41, 93-98, 102) He also took into account the location of her body on the porch. (VIII 115-116)

Regarding Ms. McBride's toxicology report, while acknowledging some variance by person, Dr. Spitz opined that a person with that level of alcohol and marijuana in her system would be out of her normal mind, experiencing loss of coordination and loss of inhibition with almost no judgment left. (VII 203-204, 210; VII 105) The recent marijuana use, a concussion, and the alcohol level combine would leave a person with limited judgment and not acting like her normal self, with the alcohol level the biggest contributor to that. (VII 210-211) Strength, however, would not be impaired. (VIII 120-121) Dr. Spitz opined that Ms. McBride may have wondered aimlessly, sat, or slept, between leaving the crash and arriving at Mr. Wafer's home. (VIII 107)

In addition, Dr. Spitz testified regarding the physiological reactions of the human body to fear and the fear of impending death. (VII 185-193) He was not allowed to testify in specifics in this regard as to Mr. Wafer's behavior the night of the shooting. (VII 169) Dr. Spitz explained that when a person is in great fear the body experiences a rise in blood sugar, blood pressure, and pulse; the eyes dilate; the bowels move faster; and the autonomic nervous system kicks in, e.g. what lay people think of as the "fight or flight" reaction. (VII 190-193) As a result, a person can be confused, enter a state of shock, and feel like there is no time to think, instead reacting instantaneously and by instinct. (VII 191-193)

The defense also presented David Balash, an expert in crime scene reconstruction and examination of firearms, who had retired in 1992 from the Michigan State Police, having been in

charge of its Firearms, Tool Mark, Bomb, and Explosives crime lab unit, and worked as an independent consultant/expert since. (VIII 127-136, 141-142) Balash had reviewed all the case work, photographs, screen door and screen, ammunition, the shotgun, and the prior testimony of Dr. Kesha and Mr. Kolonish; he had been to Mr. Wafer's house on multiple occasions; and he had performed tests on Mr. Wafer's shotgun including four test fires of it at the police department's gun range using ammunition that the police seized from Mr. Wafer's home. (VIII 144-145, 151)

Balash opined that Mr. Wafer shot Ms. McBride from less than two feet away; that he fired straight and slightly downward; that the barrel of the shotgun was about a ½ inch to one inch from the screen when fired; and that the screen insert was out of screen door frame already when he fired. (VIII 145-146, 171-173, 175-179; IX 48, 61-68, 53-55) He based this opinions on comparison of the spread pattern of Mr. Wafer's shotgun during the test fires conducted at the varying ranges of two feet, one foot, and six inches, hole in the screen, and the wound to Ms. McBride's face produced by the shot; that the shotgun had a cylinder bore, meaning it had no choke to restrict the spread of the shot pellets; the position of Ms. McBride's body on the porch after the shot in relation to the door; and the only slight amount of material from the shell found on her skin/hair versus the amount and the particular pieces of the material from the shell found in her brain; a comparison of the heights of the hole in the screen, Ms. McBride's height in her footwear, and Mr. Wafer's height. (VIII 146-163, 171-173)

Balash opined that this shotgun fired at a trigger pull of 5 ¼ lbs – 5 lbs, 7 oz., well within the normal range. (VIII 183) He agreed that Mr. Wafer's shotgun would not fire with the safety on, and based on his testing of it that it would not fire unless the trigger was pulled. (IX 82-83)

He also acknowledged that a basic rule of firearm safety is too 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]

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[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.

II. THE TRIAL COURT'S DENIAL OF MR. WAFER'S REQUEST FOR A JURY INSTRUCTION ON THE REBUTTABLE PRESUMPTION OF MCL 780.951(1), OF THE SELF-DEFENSE ACT, VIOLATED MR. WAFER'S RIGHTS TO PRESENT A DEFENSE AND TO A PROPERLY INSTRUCTED JURY, REQUIRING REVERSAL.

Issue Preservation/Standards of Review

The trial court denied the defense's request for instruction on the rebuttal presumption of MCL 780.951(1), contained in CJI 2d 7.16a. (X 104-118, 124, 139-140, 143-146; see also XI 18-19) The trial court held that Mr. Wafer was not entitled to the instruction because it found that there was no evidence that Ms. McBride had entered his home or was actively breaking in when he shot her. (X 111-112, 116-118, 145; see also XI 18-19)

While this Court reviews a trial court's determination of whether a requested instruction applies to the facts of the case for an abuse of discretion, this Court reviews the underlying questions of law regarding what must be proved and at what level of proof to entitle a party to the instruction de novo. *People v Gillis*, 474 Mich 105, 113 (2006); *People v Rodriguez*, 463 Mich 466, 471 (2000). When a trial court refuses to give an instruction based on an improper interpretation of the law, the trial court by definition has abused its discretion. See *People v Lukity*, 460 Mich 484, 488 (1999); see also *People v Riddle*, 467 Mich 116, 124 (2002); *Rodriguez, supra* at 472-473. Whether a defendant was denied the right to present a defense is a question of law which is reviewed de novo. *People v Steele*, 283 Mich App 472, 480 (2009).

Discussion

The trial court reversibly erred in denying Mr. Wafer's request for a jury instruction on the rebuttable presumption that a person possesses an honest and reasonable belief of sufficient imminent harm to justify defending himself with deadly force if another person is in the process of breaking and entering his home, provided in MCL 780.951(1). In denying the request, the

judge made mistakes of law, imposing higher burdens of production and proof on the defendant than the law allows and improperly usurping the role of the jury. Mr. Wafer is entitled to a new trial as the general self-defense instruction did not adequately present his theory of defense and it did not given him the full protection that the Legislature intended for a homeowner.

A criminal defendant is entitled to a meaningful opportunity to present a complete defense and to have his jury be given proper instructions. US Const, Ams V, VI, XIV; Const 1963, art 1, §§ 13, 17, 20; *Crane v Kentucky,* 476 US 683, 690; 106 SCt 2142; 90 L Ed 2d 636 (1986), citing *California v Trombetta*, 467 US 479, 485; 104 SCt 2528; 81 L Ed 2d 413 (1984); *People v Vaughn*, 447 Mich 217, 226, 524 NW2d 217 (1994), abrogated on other grounds by *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999); *United States v Engl*and, 347 F2d 425, 430 (CA 7, 1965). Once a defendant has met his burden of production, the prosecution bears the constitutional burden of disproving the defense of self-defense beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 155 (2012).

The defense requested the jury be instructed with CJI 2d 7.16a, pursuant to MCL 780.951(1). The statute, MCL 780.951, provides in relevant part (emphasis added):

> (1) Except as provided in subsection (2), it is *a rebuttable presumption* in a civil or criminal case *that an individual who uses deadly force* or force other than deadly force under section 2 of the self-defense act *has an honest and reasonable belief that imminent death of, sexual assault of, or great bodily harm to himself* or herself or another individual will occur if both of the following apply:
>
> > (a) The individual against whom deadly force or force other than deadly force is used *is in the process of breaking and entering a dwelling* or business premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will.
> >
> > (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a).

The instruction, CJI 2d 7.16a, read in relevant part[24] at the time the trial court ruled on the defendant's request:[25]

> (1) If you find both that -
>
> (a) the deceased was breaking and entering a dwelling or business, or committing home invasion, or had broke and entered or committed home invasion and was still present in the dwelling or business, or is unlawfully attempting to remove a person from a dwelling, business, or vehicle against the person's will,
>
> and
>
> (b) the defendant honestly and reasonably believed the deceased was engaged in any of the conduct just described,
>
> - you must presume that the defendant had an honest and reasonable belief that imminent [death / great bodily harm / sexual assault] would occur.

The People argued that the statute required both breaking and entering, not just a breaking (X 109), and the trial court denied the request on the basis that:

> My concern, having read the statue as well as the new 7.16a, is that it does require the deceased was breaking and entering. Mr. Wafer was very clear that *no one ever entered his home*.
>
> I read the statute that says *in the process of. Which to me means, the process of. Doing something that is actively breaking and entering.*
>
> When Mr. Wafer testified and said that he shot because she came from the left side and right in front of him. *Which was not in the process of breaking and entering*. So either under the statute or 7.16a, I don't think its an appropriate instruction to give to the jury.
>
> Since there is no evidence that she was either breaking and entering. Based on his own testimony. Or in fact in the process of breaking and entering when she was shot. [X 111-112 (emphasis added)]

Defense counsel took exception to the ruling, arguing that there was evidence from which a reasonable jury could find that Ms. McBride was in the process of breaking and entering,

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[24] None of the provisions of Subsection 2, which states the circumstances under which the presumption does not apply, were applicable/at issue in this case.

[25] The instruction was changed the day before the defense requested the instruction; it was changed at the request of the prosecutor in this case unbeknownst to the defense until the prosecutor revealed it during argument. (X 106-108, 145-146) The court indicated that the change had no bearing on her decision to deny the defense's request that the instruction be given. (X 145) The instruction had directed that (1)(a) and (1)(b) were in the alternative rather than conjunctive.

listing such items of evidence, and arguing that the determination was one for the jury to make. (X 112-113, 143) Defense counsel additionally argued that the statute did not require that Ms. McBride have been successful in getting inside and that attempting to get inside the house was being "in the process of breaking and entering." (X 112-113)

The trial court responded that there were other plausible explanations for that evidence that were inconsistent with the theory that Ms. McBride was trying to break in. (X 117-118) The court gave an example that the screen door insert could have been dislodged before Ms. McBride arrived at the house for some other unknown reason or that was possibly dislodged by the shot. (X 117) The trial court then returned to the fact that "there was no entering." (X 118)

The Court of Appeals affirmed the trial court's ruling on direct appeal. (Appendix A, COA opinion). While the Court of Appeals found that "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", it nevertheless found the trial court was correct in refusing to give the instruction because "the evidence does not support the assertion that McBride was [actually] in the process of breaking or entering when she was shot by defendant." (Appendix A, majority opinion, p 3).

In refusing to give the instruction, the trial court made mistakes of law in interpreting the statute, imposing higher burdens of production and proof on the defendant than the law allows, and improperly usurping the role of the jury.[26] The statute does not require actual entry. And, the trial court was not free to refuse to give the instruction because it believed there were other plausible explanations for evidence that were inconsistent with the defense's theory. The Court of Appeals continued these mistakes in affirming the conviction.

[26] In contrast to its decision on the defense's request, when the People requested a special instruction on false exculpatory statement by a defendant the court recognized that were there is competing evidence it is for the jury to decide which evidence to believe. (X 140)

MCL 780.951(1) plainly provides that the presumption applies when the individual against whom force, deadly or otherwise, is used "is *in the process* of breaking and entering a dwelling" (emphasis added), not only after the individual has already physically entered the premises or just as the individual is literally crossing over the threshold of a door or window at the time deadly force is used. An attempted breaking and entering does not require entry. *People v Combs*, 69 Mich App 711, 714 (1976).

Subsection (1) also goes on to provide that the presumption applies when the individual against whom force is used "has broken and entered a dwelling. . . and is still present in the dwelling or business premises…", but it expressly did not limit it to that past tense circumstance. The Legislature did not say that force could only be used against someone who had *completed* a breaking and entering.

When a defendant requests a jury instruction on a theory or defense that is supported by "some evidence", the trial court must give the instruction. *People v Dupree*, 486 Mich 693, 709 (2010); *People v Lemons*, 454 Mich 234, 246-247 (1997); *People v Hoskins*, 403 Mich 95, 97, 100 (1978); see also *People v Riddle*, 467 Mich 116, 124 (2002); *Rodriguez, supra* at 472-473. In deciding upon a defendant's request for an instruction on a defense, a trial judge is charged with looking at the evidence in the light most favorable to the defendant. *People v Karasek*, 63 Mich App 706, 714 (1975); see *Rodriguez, supra* at 17 ["the statutory exemption would apply *if the evidence introduced by the defendant were believed by the jury*, and thus the circuit court erred in failing to give the requested instruction." (Emphasis added.)]. Where there is some evidence to the support the requested instruction, it is for the jury to decide the sufficiency of that evidence, not the judge. *Hoskins, supra* at 100.

Here, there was enough evidence to support the giving of the instruction, i.e. that Ms. McBride was in the process of breaking and entering and that Mr. Wafer honestly and reasonably believed that she was so engaged. This included the defendant's testimony regarding the escalating violent banging or pounding on his doors, which included metal hitting a door at one point and which he came to believe was someone trying to kick or knock down his doors to gain entry (IX 200, 202-203, 206, 210); the woven pattern found on main front door which was consistent with the screen being pushed against it (IV 173-174, 217; V 141-151, 155-157); the damaged sole of one of Ms. McBride's boots (IV 129, 158; People's Exhibit 65); the screen insert being found dislodged from the screen door frame (VI 147, 156, 161; VII 89-90); Mr. Balash's expert opinion that the screen was dislodged before the shot was fired (VIII 175-179; IX 61-68); Dr. Spitz's expert opinion that Ms. McBride's hands had injuries and that those injuries were consistent with her banging on the doors (VII 216-217, 220-221; VIII 7-10, 19-23, 85, 123); the smudge marks on the side door (IV 217, 220-221); the footprint on the air conditioning at the window in the back of the house (IV 228-232). The trial court was neither free to ignore this evidence nor to put its own spin on it when determining whether to give the requested instruction.

This error entitles Mr. Wafer to a new trial. It struck at the heart of his defense, and under the circumstances the general self-defense instruction was not enough to alleviate the harm.[27] Without the instruction on the presumption that he was entitled to, Mr. Wafer was left without the statutory protection that the Legislature intended to give a homeowner under attack against the prosecutor's arguments that Ms. McBride, being young, shorter, female, and possibly

[27] Similarly, the trial court found that the general witness credibility instruction would not adequately protect the People's interest when it granted the prosecutor's request for a special instruction on false exculpatory statement by a defendant. (X 140)

having a closed head injury, unbeknownst to the defendant, could not be deemed a sufficient threat to him to justify the use of force.[28] A properly instructed jury likely would have acquitted Mr. Wafer. "Not to give [the jury] an instruction that allowed them to agree with defendant's view of the events in this case undermines the reliability of the verdict." *People v Silver*, 466 Mich 386, 393 (2002). Here, the prosecutor argued that Mr. Wafer was not entitled to shoot "[e]ven if you believe, even if you believe his version of how the final events went down" (XI 52), and Mr. Wafer was left without the statutory protection that the Legislature intended to give a homeowner under attack against the prosecutor's argument.

This preserved, constitutional error was not harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18; 87 SCt 824; 17 L Ed 2d (1967); *People v Anderson* (After Remand), 446 Mich 392; 521 NW2d 538 (1994); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Further, even when the Michigan Supreme Court has applied the standard for preserved unconstitutional instructional errors, it has reversed where the instructional error related to a key issue in the case as it did here. *Dupree*, *supra* at 710-712; *Silver*, *supra* 393; *Rodriguez*, *supra* at 474-476. This Court must grant a new trial.

[28] See, e.g. XI 38 ("When you claim self-defense you have to get up there and say I killed someone because they were going to kill me."), XI 42 ("There was no imminent threat of someone coming into that home. Certainly not a 19-year-old, 5' 4" Renisha McBride."), XI 48 ("He may not, he cannot kill or seriously injure just to protect himself against what seems like a minor injury. He has to have a imminent fear of impending death or great bodily harm…The home doesn't provide you any extra benefit."), XI 49 ("Ms. McBride: disoriented, injured, stumbling around….With a likely closed head injury), XI 50 ("This is Ms. McBride. Five foot four. Nineteen years old. Injured. Disoriented. Unsteady on her feet."), XI 51 ("How about shutting the door. How about keeping it shut. How about calling 9-1-1. How about going into a different part of your house. **That's not retreating**. But going to a different part of your house. No what he does is engages.").

III. NUMEROUS INCIDENTS OF PROSECUTORIAL MISCONDUCT VIOLATED MR. WAFER'S RIGHTS TO A FAIR TRIAL, REQUIRING REVERSAL.

Issue Preservation/Standard of Review

This issue is preserved. The defense moved for a mistrial in regard to the prosecutor's handling of the shotgun in the courtroom in a frightening manner towards the jury during her cross-examination of Mr. Wafer. (X 143-148). In regard to the prosecutors' closing argument, the trial court discouraged objections during closing arguments. (XI 6). Defense counsel objected to many, but not all, of the prosecutors' arguments complained of below. (XI 37-38, 48, 93, 100) The trial court simply instructed the jury that the attorney's arguments were not evidence and that the court is the entity that instructs them on the law. Thus, any additional objections would have been futile and were unnecessary to preserve the other instances complained of herein. See MRE 103(a)("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal"); see *People v Moore*, 161 Mich App 615 (1987).

The standard of review for allegations of misconduct by a prosecutor is whether a defendant was denied a fair and impartial trial. *People v Green,* 228 Mich App 684, 693 (1998). For instance, the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether they constitute error requiring reversal. *People v Bahoda,* 448 Mich 261, 282 (1995). This amounts to de novo review of instances of prosecutorial misconduct.

As this issue was preserved and constitutional, this Court must decide if the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774 (1999). This requires that the court examine the record thoroughly "in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v*

Shepherd, 472 Mich 343, 348 (2005) citing *Neder v US*, 527 US 1, 19, 119 SCt 1827, 144 L Ed 2d 35 (1999); *Chapman v California*, 386 US 18, 24, 17 L Ed 2d 705, 87 S Ct 824 (1967). Those cases require a reviewing court to examine the entire record when making a harmlessness determination, not just the evidence and theory put forward by the prosecutor. See, e.g., *Chapman, supra*, at 24. Furthermore, the beneficiary of the error is required to prove that the error was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Discussion

A defendant's due process right to a fair trial is implicated when the prosecutor employs unfair tactics to gain an advantage. US Const Am XIV; Const 1963, art 1, §17; *Donnelly v De Christoforo*, 416 US 637, 642; 94 S Ct 1868; 40 L Ed 2d 431 (1974). As *quasi-judicial* officers, prosecutors have the solemn duty to ensure defendants are afforded a fair trial and to protect the interests of the people as well as the criminal justice system. *People v Burrell*, 127 Mich App 721, 726; 339 NW 2d 239 (1983). The Supreme Court has recognized that a prosecutor owes allegiance, not only to the government, but to the accused and to society at large. *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935), *overruled on other grounds*, *Stirone v United States*, 361 US 212; 80 S Ct 270; 4 L Ed 2d 252 (1960). This duty prohibits the prosecutor from using improper tactics to win convictions:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.*

The prosecutor must be especially cautious when the offense charged is highly inflammatory. *People v Brocato*, 17 Mich App 277 (1969).

Prosecutor's Improper Handling of the Gun During Cross-examination of Defendant

The defense moved for a mistrial in regard to Prosecutor Siringas' handling of the shotgun in the courtroom in a frightening manner towards the jury during her cross-examination of Mr. Wafer. (X 143-145). One of the jurors reacted during the incident with an audible exclamation. The court reporter noted the incident for the record as follows:

> Q: Isnt it true sir that you said that, you wanted to show that you were armed?
> A: Yes. But I don't, I'm not looking for a confrontation.
> Q: You opened the door to go outside to where these people were?
> A: I was hoping to end a confrontation.
> Q: And you sure ended it, didn't you Mr. Wafer? You sure ended it.
>
> MS. CARPENTER: Objection. Argumentative.
> THE COURT: Sustained.
>
> **(Ms. Siringas picks up weapon)**
>
> Q: Sir, would you just this gun--
> MS. CARPENTER: Okay. Could she not point it.
>
> **(One of the jurors says whoa whoa whoa)**
>
> MS. CARPENTER: Can she point it downward please. Yeah, and the jurors—and for the record, juror number—
> MS. SIRINGAS: Its been cleared.
> THE COURT: It has been cleared ladies and gentlemen.
> MS. CARPENTER: Yeah. But, your Honor, this is very important. And one juror—-
> THE COURT: Hold on. Hold on. Come on up.
> (At 12:04 p.m., conference at bench/off the record)
> [X 89 (emphasis added)]

Such inflammatory grandstanding with the weapon frightening the jurors was unfairly prejudicial to Mr. Wafer. See *People v Brocato*, 17 Mich App 277 (1969).

Improper Arguments in Closing

Patrick Muscat gave the prosecution's initial closing argument. Athina Siringas gave the prosecution's rebuttal closing argument. (XI 6, 89).

Prosecutor Muscat made several damaging misstatements of law improperly equating statutory manslaughter with second-degree murder and conflating second-degree murder with gross negligence (common law) involuntary manslaughter. He argued that pointing the rifle at someone by itself equates with the third prong of malice, conscious disregard of a very high risk of death or great bodily harm because the gun could go off. (XI 36, 39). He further argued in this manner (XI 39):

> Ladies and Gentleman, when you take a weapon that could have been loaded and you point it in an area where you know there is a person - - a place where anybody could be, and the gun goes off, and somebody gets hit that's murder in the second degree.
>
> If he had gone on to his porch, or excuse me. Gone to his door, pointed the weapon out the door *and then pulled the trigger because his alarm clock went off or something and hit a person on the sidewalk, it would be the same charge*. It would be the same charge. Because it's the same crime.
>
> That is a dangerous weapon. And the way he handled it, he handled it like a toy. And as a result, a 19-year-od is dead. The killing wasn't justified or excused on any other circumstances that reduce it.
>
> Now the law—you were instructed on state of mind. Everything I just told you about that prong of murder in the second degree, plays into this instruction.

Prosecutor Muscat briefly explained that Mr. Wafer was also guilty of gross negligence (common law) manslaughter along with second-degree murder, *for basically the same reasons*: he caused the death by pointing the gun and not making sure the safety was still engaged. (XI 43). However, he then immediately "suggested" that between those two, second-degree murder and the lesser included involuntary manslaughter, that the jury check the box for guilty of second-degree murder. (XI 43-44).

In discussing the second count, a separate charge of manslaughter (MCL 750.329), Prosecutor Muscat made further misstatements of the law and, in addition, mischaracterized the defense. He explained that the defendant was not disputing or challenging the elements of this manslaughter count: "the defendant caused the death"; "the death resulted of a discharge of a firearm"; "at the time it went off the defendant was pointing it at another person"; "the defendant intended to point it at another person". (XI 44). Implying that the defense had conceded guilty on the statutory manslaughter charge was a mischaracterization of the defense's position.[29] The prosecutor did not acknowledge that the self-defense defense that the defendant was claiming entitled him to acquittal applied to the statutory manslaughter count too, instead stating: "Mr. Wafer has not challenged any of these four elements for count 2. And he's guilty of count 2, as well." (XI 44). Mr. Muscat did not mention the fifth element of statutory manslaughter that the death was caused without legal justification or excuse. (See X 167, instructions for count 2).

Again equating the two charged homicide counts, the prosecutor continued: "Defendant also admit these same facts that I just argued to you for murder, also apply to count 2, obviously. *That's why I've repeated them.*" (XI 45, emphasis added). He suggested that the jury check the box for guilty of count 2's manslaughter. (XI 45).

Additionally, Prosecutor Muscat misstated the law of self-defense:

> How about shutting the door. How about keeping it shut. How about calling 9-1-1. *How about going into a different part of your house. That's not retreating. But going to a different part of your house.* No what he does is engages. (XI 51)(Emphasis added.)

Mr. Wafer did not have a duty to retreat within his own home. CJI 2d 7.16(2).

[29] The defense did not concede guilt on any count in opening argument; she asked for an acquittal on all counts pursuant to self-defense. (III 59) Likewise in closing, defense counsel asked for an acquittal on all counts pursuant to self-defense: "Find him not guilty on everything. He acted in lawful self-defense." (XI 89)

Prosecutors are not allowed to misstate the law and mischaracterize evidence to get a conviction. *People v Coy*, 243 Mich App 283 (2000); *People v Dalessandro*, 165 Mich App 569 (1988); *People v Rosales*, 160 Mich App 304 (1987); *People v Vaughn*, 128 Mich App 270 (1983); see *Hodge v Hurley*, 426 F3d 368 (CA6, 2005). It is no surprise that this jury reached inconsistent, contradictory verdicts given Mr. Muscat's arguments. (See Issue II, above).

In her rebuttal closing argument, Prosecutor Siringas improperly vouched for the defendant's guilt and improperly attacked his credibility on the basis of her person experience as a prosecutor in Wayne County and with other defendants. Just shortly into her remarks, she told the jurors:

> *I'm the head of the Homicide Unit. I've seen more homicide cases than I care to recall, than I care to describe to you ladies and gentlemen. But this case is no different than a typical murder case.*
>
> *This defendant is no typical, no different than a typical murder defendant. Murder defendants try to deflect, try to lie. Try to get themselves out of trouble. We have an expression that we use. He's gone all defendant on us*.
>
> And what that means is, the natural instinct to protect yourself. To protect yourself from what you think the law is about to inflict on you. Which is a conviction for murder in the second degree.
>
> And your instinct for self-preservation is to make up something to get you out of trouble. *So in that way he is no different than your typical defendant.* (XI 89-90)(Emphasis added).

Later she continued in this vain of vouching for Mr. Wafer's guilty based on her wealth of experience, though she did allow that the final call was with the jury:

> 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*…You guys get to make the final call. (XI 96)(Emphasis added).

And later, "He's just a typical defendant trying to protect himself." (XI 97).

Prosecutors are not allowed to make arguments that tend to induce the jury to suspend its own powers of critical analysis and judgment in deference to the experience and prestige of the prosecutor or the police. *People v Clifton Fuqua*, 146 Mich App 250 (1985), overruled on other grds by *People v Gray*, 466 Mich 44 (2002); *People v Humphreys*, 24 Mich App 411 (1970). The prosecutor may not base his or her argument on the credibility of witnesses or knowledge of facts and evidence not in the case, such as her experience as a prosecutor in other cases. *People v Burrell*, 127 Mich App 721 (1983); see *People v Couch*, 49 Mich App 69 (1973); *People v Erb*, 48 Mich App 622 (1973).

Ms. Siringas went even further out-of-bounds, actually accusing defense counsel of coaching Mr. Wafer to lie and to distort his testimony, to change it from accident to self-defense:

> He says I shot it accidently it doesn't off accidently. Therefore, the evidence is clear that he committed this murder. He gets charged.
>
> *His lawyer gets the information. His lawyer knows that the gun just doesn't go off accidently. And low and behold we have to come up with a whole new defense ladies and gentlemen.*
>
> We have to come up with the different theory so I can be acquitted. So you can send me home. (XI 93).
>
> * * *
>
> You know, *and when you read that instruction [self-defense] one of the things that I want to tell you is the self-defense came after it was clear that the accident wouldn't work*. After it was clear that all experts says the gun doesn't go off accidently. *And was that testimony kinda coached?* (XI 96-97)(Emphasis added.)

Later she went on in this vain, "The fact that we know he's making up evidence to try to kind of tailor it [to] what the jury instruction [says];..." (XI 98).

These outrageous accusations against defense counsel had no good faith basis and were based on a mischaracterization of the evidence. In Mr. Wafer's first call to the police, within minutes after the shooting, he stated simply: "I just shot somebody on my front porch with a shotgun banging on my door." (IX 211-212; IV 102; People's Exhibits 38&39). The first time

that Mr. Wafer mentioned "self-defense" was at 4:41 am, within 15 minutes of the shooting, in the back of a police squad car.[30]

When he testified at trial, Mr. Wafer acknowledged that in describing to the police that night what had happened there were times he used the words "gun discharged" and "accident", but he testified that he had not meant that in the sense as if he had dropped the gun and it went off. (IX 219-220). He meant it in the sense that he had not intended for this to happen - - he had not gone to sleep that night "expect[ing] to have to fight for his life" or expecting that he would "end up shooting and killing someone." (IX 219). He shot the gun on purpose, pulling the trigger, out of fear but he had not set out to shoot or kill anyone.[31] (IX 210-211, 219; X 46, 61).

There is no evidence that Mr. Wafer was familiar with the legal definitions/elements for accident or self-defense when he spoke to the police the night of the shooting on the scene or at the police station, or even later when he testified at trial beyond being present for court hearings. There is no evidence that defense counsel coached Mr. Wafer to lie or distort his testimony. In fact, Mr. Wafer testified that the only thing defense counsel had told him about what to say in court was to tell the truth. (XI 100).

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[30] From the police in-car audio recording, at 4:41 am, People's Exhibit 162:

"Officer 1: Come on over here bud. Come on over here. Where's your gun at?
Mr. Wafer: It's on the ground inside the door.
Officer 1: Okay.
Mr. Wafer: It's a little Mossberg, you know, shotgun, **self-defense**." (pg 3).

Mr. Wafer does later say "the gun discharged" and that he did not know there was a round in it. (pg 4). But it's the officers who then go on to characterize it as an accidental discharge in conversation between themselves. (pp 4-5).

[31] Mr. Wafer testified that he was being attacked in his own home, and he pulled the trigger as a "total, total reflex reaction. Defending myself…." when "somebody stepped in front of the door" close to him when he opened it. (IX 214-215; X 37-38). Mr. Wafer pulled the trigger "[t]o protect myself, to save myself. To defend myself. It was, it was them or me. At that moment." (IX 220, see also X 62)

It is improper for a prosecutor to accuse defense counsel of intentionally trying to mislead the jury or of coaching witnesses to perjure themselves. *People v Light*, 480 Mich 1198 (2008); *People v Unger*, 278 Mich App 210 (2008); *Hodge v Hurley*, 426 F3d 368 (CA6, 2005); *People v Wise*, 134 Mich App 82 (1984). Such conduct is "unbecoming of a representative of the state." *Light, supra*. Prosecutorial comments which repeatedly attacked defense counsel, and which characterized the entire defense as "a pack of lies" and "red herrings . . . in bushel baskets," were grounds for reversal even absent objection. *People v Dalessandro*, 165 Mich App 569 (1988).

Ms. Siringas made improper arguments that appealed for sympathy for Ms. McBride and mischaracterized defense counsel's on-point arguments in regard to self-defense as being an attack on Ms. McBride's character or discounting her humanity:

> But you know, she was drunk. She was high. She did this. She did that….
> If they're not trying to attack her, why are they telling you all that stuff. *They want you not to care about Renisha McBride.* They even had Dr. Spitz up there opining. And she said it in closing.
> This all happened because Renisha McBride was drunk. *The nerve. The victim deserved it.* This all happened because Renisha McBride was drunk and high. (XI 94)(Emphasis added).

Ms. Siringas indicated that lots of college age people get drunk and high, and asked: **"Do they all need to be executed**?" (XI 94-95)(Emphasis added).

Even though she knew the law of self-defense requires that the defendant had a subjective belief of the need to defend himself and that the circumstances be viewed from the defendant's perspective,[32] Ms. Siringas complained:

> And we kept hearing in this courtroom continuously. Its about him. Its just about Mr. Wafer. Well we've got a dead 19 year old. How dare you say that its only about him? How dare you? (XI 99-100).

Again, prosecutors are not allowed to misstate the law, mischaracterize evidence, and distort the defense's position to get a conviction. See citations above. Neither are prosecutors

[32] CJI 2nd 7.15(2)-(5).

allowed to make emotional appeals that distract the jurors from the issues to be determined and exploit sympathy for the decedent. *Hurley, supra*; *Dalessandro, supra*; *Unger, supra*.

Court of Appeals' Opinion

The Court of Appeals found multiple instances of misconduct, but affirmed anyway holding that these did not deny the defendant a fair trial. The Court of Appeals found that the prosecutor had misstated the law on the malice element of murder (Appendix A – majority opinion, p 5); that "[t]o 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" (*Id.* at 6); and that "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." (*Id.* at 7).

Appellant maintains that the Court of Appeals was wrong in finding that only some of the complained of areas were error. Further, Appellant maintains that the errors denied him a fair trial and that he is entitled to reversal.

Reversal is Required

There was never a dispute that Mr. Wafer shot Ms. McBride. The issues at trial concerned whether or not Mr. Wafer's actions were legally justified or excused and if they were not, then what was the level of his criminal culpability in killing her. Mr. Wafer's defense was largely dependent on his credibility and the credibility of his advocate, defense counsel, and his expert witnesses. The prosecutor faced a difficult task of disproving self-defense and, beyond that, in sustaining the highest charge, when the only eyewitness to the shooting was the defendant. This was a close case and the several instances of misconduct require reversal. The

"curative instructions" that the trial court issued were too tame, did not cure the harm and did not stop the misconduct in any way.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction, particularly in such a high profile case, by engaging in improper trial tactics unless they feel that such tactics are necessary to sway the jury in a close case. See *State v Fleming*, 83 Wn App 209, 215; 921 P2d 1076 (1996). Such unfair tactics will not stop and will only get worse when appellate courts allow prosecutors to get away with them. The prosecutors tactics here destroyed the reliability of the verdicts reached in this case. Reversal is required.

SUMMARY AND REQUEST FOR RELIEF

For the foregoing reasons, Appellant Wafer respectfully asks that this Honorable Court grant leave to appeal or other appropriate relief and, ultimately, reverse and remand for new trial (Issues II & III) or, if he fails in that request, then to vacate the manslaughter conviction/sentence and remand for resentencing on second-degree murder (Issue I).

Respectfully submitted,

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/s/ Jacqueline J. McCann

BY:_____

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