STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

THEODORE PAUL WAFER

Defendant-Appellant.
_____/

Supreme Court No. 153828

Court of Appeals No. 324018

Circuit Court No. 14-0152-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____/

APPELLANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

BY: JACQUELINE J. MCCANN (P58774)
ANGELES R. MENESES (P80146)
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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STATEMENT OF QUESTION PRESENTED

I. 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, AND WAS IT REVERSIBLE ERROR?

Trial Court answers, "No".

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. On September 3, 2014, the judge sentenced Mr. Wafer 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) the trial court 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)

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-defense 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)

After these events, Mr. Wafer decided to load the shotgun. (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 and 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 the 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 in 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 reconstruction. (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, 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 wandered 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)

I. 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, AND IT WAS REVERSIBLE ERROR.

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; *United States v Gaudin*, 515 US 506, 510-511, 522-523; 115 S Ct 2310; 132 L Ed 2d 444 (1994); *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 (1994), abrogated on other grounds by *People v Carines*, 460 Mich 750 (1999); *United States v Engl*and, 347 F2d 425, 430 (CA 7, 1965). Instructions that distort or eliminate elements, or that deny the defendant an accurate jury determination on self-defense, violate those constitutional protections. *People v Kurr*, 253 Mich App 317, 326-327 (2002)

In Michigan, 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.[16] *People v Reese*, 491 Mich 127, 155 (2012); *People v Jackson*, 390 Mich 621, 625 (1973). The jury is then instructed that the prosecutor must prove the "third" element of second-degree murder: "that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime." CJI 2d 16.5,[17] paragraph 4; see (X 166). As this Court has explained:

[16] The federal constitution does not require a State to prove the non-existence of an affirmative defense. However, a State is free to assign itself that burden. *Smith* v *US*, 133 S Ct 714, 719-720 (2013).

[17] Former CJI 2d 16.5 is now M Crim JI 16.5.

> *Once a plea of not guilty is entered, the defendant has an absolute right to a jury determination upon all essential elements of the offense*. . . . The trial judge must carefully ensure that there is no trespass on this fundamental right. *The instruction to the jury must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them.* [*People v Reed*, 393 Mich 342, 349-50, 224 NW2d 867 (1975) (internal quotations and citations omitted) (emphasis added)].

Here the defense requested the jury be instructed with CJI 2d 7.16a,[18] pursuant to MCL 780.951(1), in regard to self-defense. 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[19] at the time the trial court ruled on the defendant's request:[20]

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[18] Former CJI 2d 7.16 is now M Crim JI 7.16a.

[19] 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.

[20] 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.

(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, 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 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.[21] 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.

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

[21] 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)

the time deadly force is used. An attempted breaking and entering does not require entry. *People v Combs*, 69 Mich App 711, 714 (1976); see *Harris v People*, 44 Mich 305, 308 (1880)(defendant's insertion of a knife "between the upper and under sash" of a window of the house was sufficient to sustain a conviction for "attempted burglary").

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.

The trial court's and the Court of Appeals' interpretations render the statutory phrase "in the process of breaking and entering a dwelling" surplusage or nugatory, equating it with the next phrase, "has broken and entered a dwelling". But courts "must give effect to every word, phrase and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146, (2002).

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 Mills*, 450 Mich 61, 81 (1995); *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 473 ["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. Even if a judge might draw other inferences, "[i]t is neither the proper role for a [state court judge] . . . to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. Rather, it is for the jury, with the proper self-defense instruction, to decide . . . ." *Barker v Yukins*, 199 F3d 867, 874-75 (CA 6, 1999)

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 in the middle of the night,[22] 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,

[22] Although the present case involved much more than a polite knock on the door in the middle of the night, that fact alone has been recognized by the courts as a troubling event that could rightfully appear threatening to occupants of the home. "Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation." *Florida v Jardines*, __ US __, 133 S Ct 1409, 1422 (2013). The court went on: "We think a typical person would find it 'a cause for great alarm'…to find a stranger snooping about his front porch" under such circumstances. *Id.* at 1416 n 3. See also *United States v Young*, 877 F2d 1099, 1104 (CA 1, 1989)(Nighttime searches are limited in order to "prevent[] abrupt intrusions on sleeping residents in the dark."); *United States v Lundin*, 817 F3d 1151, 1159 (CA 9, 2016) ("unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours); *United States v Jerez*, 108 F3d 684, 690-91 (CA 7, 1997) ("when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution.")

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); and 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.

Mr. Wafer asserts the failure to give the requested instruction was a preserved, constitutional error requiring the prosecutor to show that it was harmless beyond a reasonable doubt before he could be denied relief. *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). However, this Court has decisions characterizing the failure to give a proper instruction on an affirmative defense, including self-defense, as non-constitutional error. E.g., *People v Dupree*, 486 Mich 693, 710-712 (2010); *People v Riddle*, 467 Mich 116, 124-125 (2002); *People v Rodriguez*, 463 Mich 466, 474-475 (2000); *People v Hawthorne*, 474 Mich 174 (2006)(downgrading the failure to give an instruction on the accident defense from structural error to non-constitutional error).

The characterization of the error as non-constitutional in those cases is at odds with other statements by this Court. As set forth at the beginning of this argument above, where the defense has met its burden of production, Michigan has chosen to make it the prosecutor's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense and incorporated

that as an element of murder.[23] *Reese, supra; Jackson, supra; Reed, supra;* see also CJI 2d 16.5/M Crim JI 16.5. In *People v Likine*, 492 Mich 367, 407 (2012), this Court characterized the failure to properly instruct on an affirmative defense as constitutional error:

> In a criminal proceeding, the defendant has a constitutional right to have the prosecution prove his or her guilt beyond a reasonable doubt and to have a jury determine his or her guilt or innocence, as well as the merits of the impossibility defense, if applicable, in accordance with that standard of proof. These protections are fundamental to a defendant's right to a jury trial.

And this Court has recently even recognized that if something is not formally labelled as an "element" of an offense that does not mean that it is not protected by the constitutional right to a jury trial. *People v Lockridge*, 498 Mich 358 (2015).

Self-defense in particular is constitutional in nature. See *Taylor v Withrow*, 288 F3d 846 (CA 6, 2002). In addition to the rights to present a defense, the right to jury trial, and Due Process, self-defense is also protected by the 2nd Amendment. *District of Columbia v Heller*, 554 US 570, 628, 128 S Ct 2783, 171 L Ed 2d 637 (2008) ("the inherent right of self-defense has been central to the Second Amendment right," and "the need for defense of self, family, and property is most acute" in the home); US Const, Am II, XIV.

Regardless, even when this Supreme Court has applied the standard for preserved non-constitutional error to 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*,

[23] The federal constitution does not require a State to prove the non-existence of an affirmative defense. However, a State is free to assign itself that burden. *Smith* v *US*, 133 S Ct 714, 719-720 (2013).

supra at 474-476. The error here struck at the heart of Mr. Wafer's defense, and under the circumstances the general self-defense instruction was not enough to alleviate the harm.[24]

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 having a closed head injury, unbeknownst to the defendant, could not be deemed a sufficient threat to him to justify the use of force.[25] But the Legislature does not require that a homeowner awoken in the middle of the night wait until an intruder has completed unlawful entry into his home and then make an assessment of the capabilities of that intruder before being allowed to use deadly force. The prosecutor's hindsight arguments regarding Ms. McBride's capabilities and arguments that the home offers no greater protection under the law would not have rebutted the presumption that Mr. Wafer had an honest and reasonable belief that imminent death or great bodily harm to him would occur.[26] A properly instructed jury likely would have acquitted Mr. Wafer.

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[24] 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)

[25] 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.").

[26] See prior footnote.

Further, not to give a jury an instruction to which the defendant is entitled and that would allow them to agree with defendant's view of the events in this case undermines the reliability of the verdict. See *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. Mr. Wafer is entitled to a new trial, whether the error is viewed as constitutional or non-constitutional.

Finally, if not convinced that the instructional error alone was so harmful that it entitles Mr. Wafer to a new trial, this Court can consider the harm from the instructional error in conjunction with the harm from other errors made in his case. The cumulative effect of multiple errors can constitute sufficient unfair prejudice to warrant reversal where the effect from one alone does not. *People v LeBlanc*, 465 Mich 575, 591 (2002). Mr. Wafer also raised several claims of prosecutorial misconduct during trial,[27] and the Court of Appeals agreed in regard to some, finding that the prosecutor erred in:

- Misstating the law regarding what constitutes malice, inappropriately stating that an act done accidentally or even with gross negligence would constitute malice. See Appendix A - Court of Appeals' Opinion, majority opinion, p 5). In fact, the prosecutor even further argued that pointing a 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).

[27] See Issue III of Defendant-Appellant's application for leave to appeal in this Court.

- Misstating the law regarding self-defense, suggesting that Mr. Wafer had an obligation to retreat to another area of his home. (XI 51) See Appendix A - Court of Appeals' Opinion, majority opinion, p 6)
- Improperly accusing defense counsel of having coached Mr. Wafer to change his story. (XI 93, 96-98). "This type of attack on defense counsel was wholly inappropriate." See Appendix A – Court of Appeals' Opinion, majority opinion, p 7.

The cumulative effect of the multiple errors in this case undermined the reliability of the verdict and Mr. Wafer must be granted a new trial.

SUMMARY AND REQUEST FOR RELIEF

For the foregoing reasons, and those in his application for leave to appeal, Defendant-Appellant **THEODORE PAUL WAFER** respectfully asks that this Honorable Court grant leave to appeal or take other action and, ultimately, reverse and remand for new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Jacqueline J. McCann

BY:_____

JACQUELINE J. MCCANN (P58774)
ANGELES R. MENESES (P80146)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: March 28, 2017

Appendix A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE PAUL WAFER,

Defendant-Appellant.

UNPUBLISHED
April 5, 2016

No. 324018
Wayne Circuit Court
LC No. 14-000152-FC

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

PER CURIAM.

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

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

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

I. JURY INSTRUCTIONS

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

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

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

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

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

> (a) The individual against whom deadly force or force other than deadly force is used is *in the process of breaking and entering a dwelling* or business

> premises or committing home invasion or has broken and entered a dwelling or business premises or committed home invasion and is still present in the dwelling or business premises, or is unlawfully attempting to remove another individual from a dwelling, business premises, or occupied vehicle against his or her will.
>
> (b) The individual using deadly force or force other than deadly force honestly and reasonably believes that the individual is engaging in conduct described in subdivision (a). [Emphasis added.]

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

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

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

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

II. PROSECUTORIAL MISCONDUCT

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

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

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

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

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

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

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

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

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

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

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

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

> Because our job, ladies and gentlemen, is to see that justice is served. Our job is to prosecute the guilty. And your job is to make that determination. You decide whether or not we've done our job properly. That's your decision.
>
> You have to tell us whether or not we've met our burden. We don't run away from our burden. It's our burden. That's what our constitution says. We don't take it lightly that we would charge a home owner. We don't take that lightly.
>
> There's plenty of home owners that haven't been charged. We look at the law. We are guided by what the law requires. And the law in this case required a charge of murder in the second degree. And the intentionally aiming that gun.
>
> You guys get to make the final call. There's no self-defense here. Where's the fear? Where's the fear?

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

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

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

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

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

III. DOUBLE JEOPARDY

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

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

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

> The multiple punishments strand of double jeopardy "is designed to ensure that courts confine their sentences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts." The multiple punishments strand is not violated "[w]here 'a legislature specifically authorizes cumulative punishment under two statutes. . . .'" Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."
>
> The Legislature, however, does not always clearly indicate its intent with regard to the permissibility of multiple punishments. When legislative intent is not clear, Michigan courts apply the "abstract legal elements" test articulated in [*People v Ream*, 481 Mich 223; 750 NW2d 536 (2008),] to ascertain whether the Legislature intended to classify two offenses as the "same offense" for double jeopardy purposes. This test focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if "each of the offenses for which defendant was convicted has an element that the other does not. . . ." This means that, under the *Ream* test, two offenses will only be considered the "same offense" where it is impossible to commit the greater offense without also committing the lesser offense.
>
> In sum, when considering whether two offenses are the "same offense" in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream* to discern legislative intent. [Footnotes omitted.]

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

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

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

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

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

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

IV. SENTENCING

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

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

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

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

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

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

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

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

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

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE PAUL WAFER,

Defendant-Appellant.

UNPUBLISHED
April 5, 2016

No. 324018
Wayne Circuit Court
LC No. 14-000152-FC

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

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

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

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

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

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

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

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

> Murder under our statute embraces every offense which would have been murder at common law, and it embraces no other crime. But murder is not always attended with the same degree of wicked design, or, to speak more accurately, with the same degree of malice. . . .
>
> The statute, recognizing the propriety of continuing to embrace within the same class all cases of malicious killing, has, nevertheless, divided these offenses into different grades for the purposes of punishment, visiting those which manifest deep malignity with the heaviest penalties known to our law, and punishing all the rest according to a sliding scale, reaching, in the discretion of the court, from a very moderate imprisonment to nearly the same degree of severity prescribed for those convicted of murder in the first degree. Each grade of murder embraces some cases where there is a direct intent to take life, and each grade also embraces offenses where the direct intent was to commit some other crime. . . .
>
> . . . we hold murder in the first degree to be that which is willful, deliberate, and premeditated, and all other murders to be murder in the second degree . . . .
>
> *[Scott*, 6 Mich at 292-294]

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

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

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

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

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

/s/ Deborah A. Servitto

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