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# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 17, 2026<br>11:26 AM |
| v | No. 367119<br>Jackson Circuit Court |
| LEANDREW MARTIN,<br><br>Defendant-Appellant. | LC No. 2022-001050-FC |

Before: O'BRIEN, P.J., and CAMERON and MALDONADO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The circuit court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 50 to 80 years' imprisonment for second-degree murder, to be served consecutive to a mandatory sentence of 2 years' imprisonment for felony-firearm. Defendant appeals his convictions and sentence as of right. We affirm.

## I. BACKGROUND

It is undisputed that defendant fatally shot and killed Markeithis Smith outside Greenwood Food and Beverage in Jackson, Michigan. The circumstances surrounding the shooting were contested, however.

Witnesses agreed—and security footage confirmed—that two group of women got into a verbal altercation inside of the Greenwood store, which continued after they left the store. On one side of the altercation was, among others, Jennifer Martin (defendant's former wife), and on the other side was, among others, Quintella Cleve. Witness testimony differed about when the victim, Smith, arrived at the store, and what happened shortly before he was shot. But security footage from outside the store showed that, seconds after Jennifer and her friends walked out of the store to Jennifer's vehicle parked right in front of the store's entrance, Smith walked into the store. At that time, Cleve was still inside the store. Seconds after Smith entered the store, he can be seen on the security footage leaving the store with Cleve. Cleve was still yelling at Jennifer and her friends, and Smith tugged at Cleve's shirt and escorted her and her group around the front of Jennifer's

vehicle. Jennifer can be seen exiting her vehicle and walking towards Cleve and Smith, then following them as they continued walking away. All the while, the two sides appear to be continuing to exchange words. The security footage shows that Cleve's group then turned to face Jennifer, at which time Jennifer's group (which included defendant) coalesced around Jennifer.

From there, it is not entirely clear from the security footage what transpired. Although the area where the groups were was dimly lit, Jennifer's bright clothing was still visible. Jennifer can thus be seen walking around the two groups, pushing and throwing a punch, and then falling to the ground. While unclear from the security footage, the witnesses all agreed that Smith did something that caused Jennifer to fall, though accounts differed as to what. Cleve testified that Smith pushed Jennifer, while others from Jennifer's group insisted that Smith punched Jennifer. Regardless, in the security footage, after Jennifer falls to the ground, Smith can be seen walking away. At that point, defendant can be seen pulling something from his waistband that turned out to be a firearm. Defendant then takes a few steps after Smith, lifts his arm holding the firearm, and starts shooting at Smith—a muzzle flash can be seen on the security footage. After that, everyone began scattering and leaving the scene.

Following the shooting, defendant fled the state. United States Marshalls eventually arrested defendant in Mississippi and extradited him to Michigan, where he was charged with open murder, MCL 750.316, and felony-firearm.

Before defendant's trial, the prosecution filed a notice of intent to introduce evidence that, in 2018, defendant and a group of friends got into a fight in a strip-club parking lot with another group of individuals that ended when defendant took out a firearm and started shooting, after which he claimed that he fired the gun in self-defense. The prosecution sought to admit evidence of the 2018 shooting to show, in relevant part, a common plan or scheme and to rebut defendant's claim that the shooting in this case was self-defense. Defendant objected, and at the ensuing hearing, the trial court ruled that the other-acts evidence was admissible under MRE 404(b). The court recounted the facts of this case and the facts of the 2018 shooting and concluded that "there is clearly a striking similarity between" the two. The court further reasoned that the evidence was material and probative of "an intermediate inference other than impermissible character inference," such as "a common plan or scheme by this particular defendant," and that the probative value of the evidence was not outweighed by the danger of unfair prejudice. The court accordingly concluded that the other-acts evidence could be admitted under MRE 404(b), but the court said that it would—and it later did—give a limiting instruction to the jury about the other-acts evidence.

Defendant testified in his own defense at his trial. Defendant claimed that he had known Smith for years and knew Smith to carry a gun. Defendant testified that after the altercation between Jennifer's group and Cleve's group turned physical, defendant saw Smith shoulder his way between the groups and punch Jennifer in the face, knocking her down. Defendant claimed that he then took a few steps towards Smith, intending to punch him. But before defendant could do so, he saw Smith back up into the shadows and act as if he was reaching for something. Upon seeing this, defendant instinctively reached for his gun and shot Smith, fearing that Smith was reaching for a weapon of his own. Defendant admitted that he never actually saw Smith pull a gun, and that he intended to shoot Smith's "center mass" to ensure that Smith could not shoot defendant

first.[1] Defendant claimed that, after the initial burst of fire, Smith was still standing and reaching for something, so defendant fired two more rounds.

Defendant was convicted and sentenced as stated above. This appeal followed.

## II. OTHER-ACTS EVIDENCE

Defendant first argues that the trial court erred by admitting evidence of the 2018 incident under MRE 404(b) because the prosecution did not establish a proper intermediate inference and the danger of unfair prejudice substantially outweighed its probative value. We disagree but conclude that, even if the trial court erred by admitting the evidence, the error was harmless.

### A. STANDARD OF REVIEW

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). Preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

### B. MRE 404(B)

The admission of other-acts evidence is generally governed by MRE 404(b). At the relevant time, that rule provided:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court articulated the following test for lower courts to apply when determining whether other-acts evidence is admissible under MRE 404(b)(1):

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

[1] No firearm was found on Smith.

1. PROPER PURPOSE

The prosecution here plainly identified a proper purpose for admitting evidence of defendant's involvement in the 2018 shooting at defendant's trial in this case—the prosecution claimed that it was admitting the evidence to prove that defendant's conduct was part of a common scheme or plan, and to rebut defendant's claim of self-defense. These nonpropensity purposes were plainly proper under MRE 404(b).

2. LOGICAL RELEVANCE

The next question is whether the other-acts evidence was logically relevant to these stated purposes. Evidence is logically relevant if it is material and probative. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Evidence is material if it is related to a fact that is of consequence to the action. *Id*. at 388-389. "[T]he elements of the offense are always 'in issue' and, thus, material." *Id*. at 389. Additionally, because defendant here claimed self-defense, the prosecution had the burden of disproving that claim beyond a reasonable doubt. *People v Denson*, 500 Mich 385, 399; 902 NW2d 306 (2017). When other-acts evidence is admitted to rebut a claim of self-defense, it is "best understood as an attempt to rebut a defendant's claimed state of mind, that is, to show that a defendant did not have an honest and reasonable belief that his or her use of force was necessary to defend himself or herself or another." *Id*.

Defendant did not contest that he killed Smith—the dispute in this case centered around whether defendant's killing of Smith was self-defense. This placed defendant's claimed state of mind "in issue," making it material. *Crawford*, 458 Mich at 389.

The crux of the dispute on appeal is whether the 2018 shooting was probative of this material fact. As *Crawford* explains:

> The probative force inquiry asks whether the proffered evidence tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The threshold is minimal: "any" tendency is sufficient probative force. MRE 401. In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [*Crawford*, 458 Mich at 389-390 (quotation marks and citations omitted.)]

While other-acts evidence can be used to establish both (1) a defendant's state of mind and (2) that the defendant acted in accordance with a common plan or scheme, each theory of relevance is probative of a different nonpropensity intermediate inference. In *Crawford*, our Supreme Court explained how a defendant's past conduct could be relevant to proving a defendant's state of mind "on the premise that the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." *Id*. at 393 (quotation marks and citation omitted.) When other-acts evidence is submitted under this theory of relevance, "[t]he intermediate inference is an objective likelihood under the doctrine of chances rather than a subjective

probability based on the defendant's character." *Id*. at 394 (quotation marks and citation omitted.) In *People v Sabin*, 463 Mich 43, 64 n 10; 614 NW2d 888 (2000), our Supreme Court explained how evidence that the defendant acted in accordance with a common plan or scheme relied on a different intermediate inference to prove the charged conduct:

> [T]he jury is asked to infer the existence of a common system and consider evidence that the defendant used that system in committing the charged act as proof that the charged act occurred. The logical relevance of the evidence is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act.

The prosecution here argued that evidence of the 2018 shooting was relevant to show a common plan or scheme and to rebut defendant's claim of self-defense due to its similarity with the current offense. "If the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, we require a 'striking similarity' between the two acts to find the other act admissible." *Denson*, 500 Mich at 403 (citation omitted). We must therefore start with the similarities between the 2018 shooting and the conduct charged in this case—the other-acts evidence must be "strikingly similar" to be admissible.

We agree with the trial court that the two acts were strikingly similar. In both instances, defendant was in public with a group of friends when that group became involved in an altercation with another group. In each instance, defendant was not directly involved in the altercation; he instead largely hung back, and once the altercation turned physical, defendant pulled out a firearm and started shooting. And following both shootings, defendant claimed that he only fired at the other group in self-defense.

We likewise agree with the trial court that, from these similarities, the jury could infer the existence of a common system in which, if the group that defendant was with became involved in an altercation with others, defendant would wait for the altercation to turn physical, then immediately pull out a firearm and claim that his use of the weapon was self-defense. From the use of this system, the jury could reasonably question whether defendant was truly acting in self-defense when he shot Smith.[2]

Defendant contends that the underlying facts of this case and the 2018 shooting cannot show a common plan or scheme because both incidents involved unexpected events—defendant asks, "How could two unplanned events ever be part of a common plan or scheme?" It is true that defendant did not *plan* for either event to occur, but people come up with plans to deal with potential events all the time. Owners of public buildings do not *plan* to have fires, but they all have

[2] We acknowledge that there were differences between the 2018 shooting and the shooting in this case, but we conclude that the differences are not so significant that they require this Court to hold that, as a matter of law, the other-acts evidence should have been excluded. Rather, this is a case in which, at most, "reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts." *Sabin*, 463 Mich at 67. In such cases, the trial court's decision to admit the evidence "ordinarily cannot be an abuse of discretion." *Id*. That is true here.

evacuation plans in place in case a fire occurs. In the same way, defendant did not need to plan for a physical altercation to occur to have a plan or system in place for dealing with one if it did.

We also agree with the prosecution's argument that the 2018 shooting could be admitted to question defendant's claimed state of mind—whether he had an honest and reasonable belief that his use of force was necessary to defend himself or another. In the context of a defendant repeatedly getting into physical altercations and then claiming that he acted in self-defense, some federal courts have recognized that "[a]t some point, the court may reasonably begin to question whether the defendant actually acted in self-defense and whether his use of force was justified." *United States v Henthorn*, 864 F3d 1241, 1253 (CA 10, 2017).[3] See also *United States v Charley*, 1 F4th 637, 650 n 9 (CA 9, 2021) (explaining that, if a defendant "had been involved in several physical confrontations and had routinely claimed self-defense in every single one," then "the similar circumstances underlying the prior claims of self-defense—and, with it, the prior assaults—would reveal a suspicious pattern of thin excuses and thus acquire the requisite similarity to the charged offense"). That reasoning is fully applicable here.

Defendant contends that the 2018 shooting could not be admitted to raise questions about defendant's claimed state of mind by relying on the doctrine of chances because self-defense is a matter of reasonableness, and "the probability of [defendant] being involved in two shootings is irrelevant to whether his actions in either were reasonable." It is not merely defendant's involvement in two shootings that makes the 2018 shooting relevant, however—it is the similarities between the two shootings and that, following each shooting, defendant claimed that he discharged his firearm in self-defense. It is a common-sense observation that the objective likelihood of these improbable incidents happening twice is not the result of chance. And it is that intermediate inference that makes the 2018 shooting relevant to defendant's claimed state of mind.

3. MRE 403

The third part of the *VanderVliet* test indicates that courts "should employ the balancing process under Rule 403." *VanderVliet*, 444 Mich at 74-75. MRE 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." All evidence submitted by the prosecution is "presumably . . . prejudicial [to the defendant] because it attempt[s] to prove that [the] defendant committed the crime." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). MRE 403 does not exclude all prejudicial evidence, only *unfairly* prejudicial evidence. *Pickens*, 446 Mich at 336-337. Evidence is unfairly prejudicial if it has a tendency "to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Id*. at 337. "The trial court is in the best position to make MRE 403 determinations on the basis of a contemporaneous assessment of the

[3] *Henthorn* recognized that its "logic may be—but is not necessarily—viewed as an application of the so-called 'doctrine of chances,' " opining that the doctrine was "merely one name to call a common sense observation that a string of improbable incidents is unlikely to be the result of chance." *Henthorn*, 864 F3d at 1252 n 8.

presentation, credibility, and effect of testimony." *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010) (quotation marks, citation, and alteration omitted).

Evidence of the 2018 shooting was probative for the reasons explained in the previous section. This evidence, like most of the prosecution's evidence, was prejudicial to defendant. *Pickens*, 446 Mich at 336-337. Defendant contends that the evidence was *unfairly* prejudicial because it "could only be understood by the jury as showing a *propensity* to be involved in shootings." If defendant is correct, then the evidence would indeed be unfairly prejudicial. See *Crawford*, 458 Mich at 398. But defendant is not correct because that was not the *only* purpose that the evidence served, as explained in the previous section.

Defendant is nevertheless correct in that there was a possibility that the jury could still rely on the other-acts evidence to make improper inferences about defendant's character. But that concern was addressed by the limiting instruction that the trial court gave to jurors. That instruction was consistent with the fourth part of the *VanderVliet* test, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). To any extent that there was a lingering danger of unfair prejudice, relevant evidence can only be excluded under MRE 403 if its probative value is *substantially* outweighed by the danger of unfair prejudice. Considering the probative value of the other-acts evidence against the risk of unfair prejudice to defendant (as minimized by the trial court's limiting instruction), the trial court did not abuse its discretion by concluding that the other-acts evidence was not barred by MRE 403.

Defendant alternatively argues that evidence of the 2018 shooting should have been excluded under MRE 403 because it constituted acquitted conduct. The basis for this argument stems from the fact that defendant was charged in relation to the 2018 shooting, and a jury acquitted defendant of assault with intent to murder but found him guilty of, among other counts, assault with intent to do great bodily harm. See *People v Martin*, unpublished per curiam opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 348584), pp 1-2. Defendant's convictions for the 2018 offense were later vacated, however, and the case was remanded for a new trial (which had not yet occurred at the time of trial in this case). See *id*. at 6-7.

Contrary to defendant's argument, his conduct underlying the 2018 shooting does not constitute acquitted conduct. Indeed, defendant does not dispute that he engaged in the conduct from 2018 as alleged; he argues instead that he was acquitted of having an intent to murder in 2018, so the prosecution could not use the 2018 shooting as evidence that defendant had an intent to murder in this case. That is not what the other-acts evidence was used for, however. Rather, the prosecution used the evidence to rebut defendant's claim of self-defense.[4]

[4] To the extent that defendant contends that this Court in *People v Hoskins*, 342 Mich App 194; 993 NW2d 48 (2022), held that use of acquitted conduct as other-acts evidence is disallowed, defendant's argument is misplaced. This Court in *Hoskins* explained that "evidence of acquitted conduct is not inadmissible as a matter of law when introduced as other-acts evidence in a subsequent trial for a different offense," and, instead, "the admissibility of evidence of a prior acquittal depends on the application of MRE 403." *Id*. at 212. For the reasons explained, evidence of the 2018 shooting was not barred by MRE 403.

Accordingly, because evidence of the 2018 shooting was not barred by MRE 403, and because the evidence was admitted for nonpropensity purposes and was logically relevant to those purposes, the trial court did not abuse its discretion by admitting the other-acts evidence under MRE 404(b)(1).

## 4. HARMLESS ERROR

Even if the trial court did err by admitting the other-acts evidence, however, we would still conclude that defendant is not entitled to relief because the error was harmless.

An error in the admission of evidence warrants reversal only if it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *Burns*, 494 Mich at 110 (quotation marks and citation omitted). "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Denson*, 500 Mich at 396-397 (quotation marks and citation omitted).

Reviewing the evidence that was presented in this case, we readily conclude that sufficient untainted evidence supported defendant's conviction of second-degree murder. The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Lange*, 251 Mich 247, 251; 650 NW2d 691 (2002). Malice is defined as the intent to kill or to cause great bodily harm, or wanton and willful disregard that the defendant's behavior might cause those things. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

It is undisputed that a death occurred and that defendant caused it. Record evidence also establishes the element of malice—defendant testified that he fired three bursts at Smith, aiming at center mass to make sure that he hit Smith, and then fired two more rounds at Smith because he was still standing after the initial three bursts. This testimony demonstrates that, at the very least, defendant acted with wanton and willful disregard that his behavior would cause Smith great bodily harm or death. See *Goecke*, 457 Mich at 464.

The remaining issue is whether the untainted evidence was sufficient to allow a reasonable factfinder to find beyond a reasonable doubt that defendant did not act in self-defense. See *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010). We conclude that it was.

Video of the shooting clearly showed that Smith was walking away when defendant pulled out his firearm and fired at Smith. Against this clear evidence that defendant did not kill Smith in self-defense, defendant testified that when he saw Smith recede into the shadows and appear to reach for something, instinct kicked in, and defendant fired at Smith's "center mass" because defendant was scared that Smith would take out a gun and shoot at defendant first. After defendant fired the initial three rounds, he fired two more rounds because Smith was still standing upright and appeared to still be trying to "get something out."[5] Although defendant did not see Smith with a gun, he claimed to be afraid of the possibility that Smith might have a gun. Defendant testified

[5] This portion of defendant's testimony was belied by the video of the shooting.

that the point of his actions was to shoot Smith before Smith could pull out a firearm and shoot defendant. But it is well-established in Michigan that "an initial aggressor (i.e., one who is the first to use deadly force against the other) . . . is generally not entitled to use deadly force in self-defense." *People v Riddle*, 467 Mich 116, 120 n 8; 649 NW2d 30 (2002). See also *People v Rajput*, 505 Mich 7, 12; 949 NW2d 32 (2020), as amended on reconsideration (June 5, 2020) (same). Thus, even defendant's testimony belied his claim of self-defense.

We accordingly conclude that any error in the admission of evidence concerning the 2018 shooting was harmless.

## III. DEFENSE OF OTHERS INSTRUCTION

Next, defendant argues that the trial court erred by denying his motion for a new trial because the record supported a defense-of-others instruction, and defense counsel's failure to request the instruction constituted ineffective assistance. Alternatively, he argues that the trial court's failure to give the instruction amounted to plain error affecting substantial rights. We disagree.

Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings, if any, are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Defendant concedes that whether the trial court should have sua sponte read the subject instruction is not preserved and, therefore, is subject to plain-error review. To prevail under plain-error review, a defendant must establish that error occurred, that the error was obvious, and that it affected the defendant's substantial rights. *People v Davis*, 509 Mich 52, 67; 983 NW2d 325 (2022). Reversal is warranted only if a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Bennett*, 290 Mich App 465, 475-476; 802 NW2d 627 (2010).

A criminal defendant has a state and federal constitutional right to present a defense. *People v Leffew*, 508 Mich 625, 643; 975 NW2d 896 (2022), citing US Const, Ams VI and XIV; Const 1963, art 1, § 13. "Instructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002).

Defense of others is a common-law affirmative defense. See *Leffew*, 508 Mich at 643. "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *Crawford,* 232 Mich App at 619. As applied to the facts of the present case, the essential elements of the use of force to defend another required defendant to have honestly and reasonably believed that, at the time that he used deadly force against Smith, Jennifer was in danger of being killed or seriously injured, and that shooting Smith was immediately necessary. See M Crim JI 7.21(3) and (4). If defendant's belief was honest and reasonable, then he could act to defend Jennifer, even if it turned out that he was wrong about how much danger she was in. See M Crim JI 7.21(3). "The reasonableness of a person's belief regarding the necessity of deadly force depends on what an

ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor." *People v Guajardo*, 300 Mich App 26, 42; 832 NW2d 409 (2013) (quotation marks and citation omitted).

As stated above, there was testimony presented at defendant's trial that Smith punched Jennifer, knocking her to the ground. One witness from Jennifer's group testified that she thought that Jennifer had been knocked out, and she agreed that Jennifer had suffered "great bodily harm" and needed protecting. Defendant testified similarly—he claimed that Smith punched Jennifer, and that Jennifer had been knocked out and needed protection. Defendant further testified that, after punching Jennifer, Smith backed into the shadows and appeared to be reaching for something, causing defendant to fear for his safety and the safety of the women around him. Other evidence that could factor into whether a defense-of-others instruction was warranted was that Jennifer shot at Smith two months earlier, and defendant asserted that he knew Smith to carry a gun.

Notwithstanding defendant's claimed concern for the safety of the women around him and his belief that Jennifer needed protecting, defendant presented no evidence that he honestly and reasonably believed at the time that he used deadly force against Smith that Jennifer was in danger of being killed or seriously injured or that shooting Smith was immediately necessary to prevent Jennifer's imminent death or serious injury. See *Crawford*, 232 Mich App at 619. By defendant's telling, Smith backed up after he punched Jennifer, appearing to abandon any further physical altercation with her. Although defendant was concerned about the possibility that Smith was reaching for something, nothing in defendant's testimony suggests that defendant's concern arose from an honest and reasonable belief that Smith was preparing to seriously injure or cause death to Jennifer. Indeed, defendant's recollection of what he was thinking when he used deadly force against Smith did not hint at any concern for Jennifer—defendant made clear that he believed that shooting Smith, whom defendant knew to carry a gun, was necessary to prevent death or serious injury *to defendant himself*.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Defendant has not established the first prong of his ineffective-assistance claim because he has not established that he was entitled to a defense-of-others instruction—defense counsel cannot be deemed to have performed deficiently for failing to request an instruction to which defendant was not entitled.

Even assuming for the sake of argument that defendant was entitled to a defense-of-others instruction, defendant could still not establish his ineffective-assistance claim because he cannot show that a different outcome would have been reasonably probable had the jury been given a defense-of-others instructions. The jury declined to find that defendant acted in self-defense, notwithstanding defendant's testimony that he believed that shooting Smith was necessary to avoid death or serious injury himself. As already discussed, that was the main thrust of defendant's testimony—there was scant evidence that, when defendant shot Smith, defendant honestly and reasonably believed that Jennifer was at risk of death or serious injury from Smith and that defendant's use of deadly force against Smith was necessary to avoid Jennifer's imminent death or injury. On this record, if the jury did not acquit defendant on the basis of self-defense, then we

cannot conclude that there was a reasonable probability that it would have acquitted him on the basis of the defense of others.

## IV. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor misrepresented facts in her closing argument and implied to the jury that defendant caused Jennifer's facial injuries. Defendant further argues that defense counsel rendered ineffective assistance when he failed to object to the inflammatory comments. Both arguments are meritless.

The test for prosecutorial misconduct is whether the criminal defendant has been denied a fair trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). See also *Darden v Wainwright*, 477 US 168, 181; 106 S Ct 2464; 91 L Ed 2d 144 (1986). The defendant bears the burden of demonstrating that prosecutorial misconduct resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Defendant argues that the following comments, which the prosecutor made during her closing argument, conveyed to the jury that defendant punched Jennifer in the face the night before the Greenwood Food and Beverage shooting:

> Who's in danger of serious injury when Markeithis [Smith] was walking away, [w]ho, LeAndrew, Jennifer. [Defendant] testified he thought if Jennifer had been knocked out when she was on the ground, he also testified if you were listening closely, he testified that he's [guessing] she must have been hit pretty hard and he referenced as to [her] size. Well she's approximately my size, maybe a little shorter, I believe he mentioned something about her being able to take a punch, how does he know that, she's got two black eyes, she's got a busted lip. Testimony on the record says those injuries [existed] before this incident happened. She's on the ground, she's also wearing sunglasses, what makes you think she's knocked out, he can't see her eyes, there's no reason to think that.

Defendant's claims of error for this issue center around his contention that, in this commentary, the prosecutor insinuated that defendant caused Jennifer's injuries. That is simply not a plausible reading of the prosecutor's comments in context, however.

"When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). "[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." *Id*.

Read in context and in light of the defense's arguments, the prosecutor's comments were clearly aimed at questioning whether defendant honestly and reasonably believed (1) that Smith's punch had seriously injured Jennifer, and (2) that any danger that Jennifer faced justified the use of deadly force. The context for the challenged comments was the prosecutor's argument that defendant's firing multiple rounds at an unarmed man who was walking away from the scene demonstrated that defendant deliberately killed Smith. The prosecutor speculated that "one gunshot to somebody is enough" if a shooter is feeling threatened; the shooter did not have to keep

shooting. The prosecutor prefaced the challenged comments by saying that "if we're arguing for use of deadly self-defense then [defendant] has to have believed that somebody was in danger of serious bodily [injury]. Who's in danger of serious injury[?]" And immediately after the challenged comments, the prosecutor said:

> She gets right back up, you can see that, that she's still in danger while Markeithis Smith is walking away, who's in danger, who's is [sic] being defended and what is a serious injury. Because if a serious injury is being pushed down, that's not a serious injury. That's an injury but its not serious, that entitles you to regular self-defense not deadly self-defense, you cannot use a weapon in a—in a—in a fistfight, that's not self-defense.

It is thus clear that, when the prosecutor's challenged comments are read in context, the prosecutor did not imply to the jury that defendant caused Jennifer's injuries. Rather, the challenged comments questioned (1) whether anyone was in danger when defendant shot Smith; (2) whether defendant could judge the severity of Jennifer's injury; and (3) whether what defendant could reasonably know about Jennifer's injuries justified the use of deadly force, i.e., whether defendant was justified in introducing a gun into a fist fight that had already ended. Perhaps taken out of context, one could read into the prosecutor's statement that defendant knew that Jennifer could take a punch because defendant had punched her. But in context, that is simply not a plausible reading of the prosecutor's argument, especially when such an implication had nothing to do with the issues at trial and did not fit with the theme and flow of the prosecutor's argument.

Accordingly, read in context, the prosecutor's comments were not inflammatory and did not suggest that defendant caused Jennifer's injuries. Defendant's claim of prosecutorial misconduct thus fails, and his claim that counsel rendered ineffective assistance by failing to object to the challenged comments also fails.

## V. SENTENCING

Defendant lastly contends that his within-guidelines sentence is disproportionate to both the offense and the offender, is inconsistent with the *Snow* factors, and is unreasonable. We disagree.

Sentencing decisions are reviewed for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471, 902 NW2d 327 (2017). A trial court abuses its discretion when it imposes an unreasonable sentence. *Id*. A sentence is unreasonable if it violates the principle of proportionality. *Id*. The "principle of proportionality requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Id*. at 474, quoting *People v Milbourn*, 435 Mich 630, 636, 461 NW2d 1 (1990). A within-guidelines sentence is presumptively proportionate, and the defendant bears the burden of demonstrating that the within-guidelines sentence was unreasonable. *People v Posey*, 512 Mich 317, 359; 1 NW3d 101 (2023) (opinion by BOLDEN, J.).

An appropriate sentence generally considers the *Snow*[6] factors, which consist of "the reformation of the offender, the protection of society, the discipline of the offender, and the deterrence of others from committing the same offense." *People v Boykin*, 510 Mich 171, 183; 987 NW2d 58 (2022). "[T]hese are not the only relevant sentencing criteria and trial courts are not required to consider each of these factors when imposing a sentence." *Id*. at 183-184. Defendant argues that consideration of these criteria demonstrate that his within-guidelines sentence is disproportionate. This argument is without merit.

Defendant contends that the circumstances of the shooting indicated that he is capable of reformation and that his sentence was not necessary for the protection of society because studies show that criminal acts begin to decrease when people reach his age. Weighing against defendant's argument is the trial court's observation that defendant had embraced a lifestyle that normalized violence and the record evidence that supported that observation. At trial, defendant distinguished between a law-abiding "civilian" and a "street dude," and he identified himself as the latter. Defendant's testimony suggested that "street dudes" lived by their own code rather than living within the bounds of the law. The trial court's finding that this thinking was ingrained into defendant was well-supported by the record, and it clearly signifies a lack of capacity for reformation. Whatever studies may show about the decline in recidivism among offenders of defendant's age and older, those studies say nothing about defendant. The trial court properly considered defendant's particular circumstances to deliver an individualized sentence rather than relying on general trends among individuals who are defendant's age or older.

Defendant also contends that other factors should weigh more heavily than retribution and that a lesser sentence would have the same deterrent effect that defendant's longer sentence had. But these conclusory arguments do not explain why defendant's within-guideline sentence is disproportionate given defendant's current conviction of second-degree murder, his significant criminal history involving weapons and violence, and his demonstrated inability to conform his conduct to requirements imposed by probation and parole.

For these reasons, we conclude that defendant has failed to overcome the presumption that his within-guidelines sentence was proportionate.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron
/s/ Allie Greenleaf Maldonado

[6] *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).