THE WAYNE LAW REVIEW

VOLUME 56 SPRING 2010 NUMBER 1

THE IMPACT OF HEIDI'S LAW ON ALCOHOL-RELATED DRIVING OFFENSES AND OTHER RECENT DEVELOPMENTS IN MICHIGAN CRIMINAL LAW

STACEY M. STUDNICKI†
JOHN P. APOL‡

Table of Contents

† Deputy Defender, Federal Defender Office, Legal Aid and Defender Association, Detroit, Michigan. B.S., Wayne State University, 1987; J.D., *summa cum laude*, Detroit College of Law, 1991.

‡ Professor Emeritus, Michigan State University College of Law. B.A., Grand Valley State College, 1969; J.D., University of Michigan, 1972.

I. HEIDI'S LAW

Under current Michigan law, an individual is considered to be driving while intoxicated when the person's blood alcohol content (BAC) is .08 or above, or, driving under the influence of alcohol (visibly impaired driving) if their BAC is below .08.[1] These offenses are

---

1. MICH. COMP. LAWS ANN. § 257.625 (West 2006) provides, in part:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance;

(b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood. . . .

(3) A person . . . shall not operate a vehicle . . . when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired . . .

(6) A person who is less than 21 years of age, whether licensed or not, shall not operate a vehicle . . . if the person has any bodily alcohol content. . . .

(9) If a person is convicted of violating subsection (1) . . . all of the following apply:

(a) [T]he person is guilty of a misdemeanor punishable by 1 or more of the following:

(i) Community service for not more than 360 hours.

(ii) Imprisonment for not more than 93 days.

(iii) A fine of not less than $100.00 or more than $500.00.

(b) If the violation occurs within 7 years of a prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00 and 1 or more of the following:

misdemeanors, punishable by a sentence of up to 93 days in jail, for the first time offender.[2] If an offender has a second alcohol-related driving offense within seven years of a prior such conviction, the person can be imprisoned for up to one year.[3] Prior to January 3, 2007, if a person accumulated two or more alcohol-related offenses within ten years of one another, regardless of when during the ten-year period the previous convictions occurred, the person would be charged with a felony.[4]

On January 3, 2007, Michigan Governor Jennifer Granholm signed into law legislation that removed the ten-year limitation period for all alcohol-related driving offenses.[5] A driver arrested for an alcohol-related driving offense who has two prior convictions, regardless of when they occurred, will face felony charges.[6]

The new amendment, "Heidi's Law,"[7] was named for Heidi Steiner, a northern Michigan high school senior who was killed by a drunk driver in 1991.[8] That driver pled no contest to drunk driving causing death, and was sentenced to ten years in prison.[9] After he was released from prison in 2005, he was arrested again and charged with drunk driving, first offense, because the previous offense was committed more than ten years prior to the current one.[10] The driver had, over the years previous to

---

(i) Imprisonment for not less than 5 days or more than 1 year . . .
(ii) Community service for not less than 30 days or more than 90 days.
(c) If the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony.

2. MICH. COMP. LAWS ANN. § 257.625(9)(a), (11)(a).

3. MICH. COMP. LAWS ANN. § 257.635 (9)(b), (11)(b).

4. MICH. COMP. LAWS ANN. § 257.625(9)(c), (11)(c) (West 2004), which stated, in part:

(9) If a person is convicted of violating subsection (1) . . .
(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony . . .
(11) If a person is convicted of violating subsection (3) [and] . . .
(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony . . .

5. *See* 2006 Mich. Pub. Acts 564. *See also* Drunk Driving: Third Offense, First Analysis, *available at* http://www.legislature.mi.gov/documents/2005-2006/billanalysis/Senate/htm-/2005-SFA-1241-A.htm (last visited Nov. 21, 2009).

6. MICH. COMP. LAWS ANN. § 257.625 (West 2007).

7. *See* 2006 Mich. Pub. Acts 564.

8. Kenneth Stecker, Heidi's Law – Multiple Drunk Driving Convictions, www.paamtrafficsafety.com/.../newsletters/Green_Light_News_April_2008.pdf (last visited Nov. 21, 2009). *See also* http://www.legislature.mi.gov/documents/2005-2006-/billanalysis/Senate/htm/2005-SFA-1241-A.htm (last visited June 25, 2009).

9. *Id.*

10. *Id.*

1991, accumulated four previous convictions for drunk driving.[11] Heidi's Law would have allowed the prosecutor to charge him with felony drunk driving punishable by one to five years in state prison.[12]

Heidi's law not only eliminated the ten year window but also added language permitting the use of any previous conviction in enhanced sentencing, regardless of the time that elapsed between it and the offender's current offense.[13] The statute now provides that "[i]f a person is convicted of violating subsection (1) or (8) . . . and the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony."[14]

Other changes to the law include a relaxing of the proof necessary to establish a defendant's prior record, which could be difficult if a prior conviction was older.[15] The new law lists seven methods available to establish a prior conviction, including a copy of a court's register of actions, information contained in a presentence report, or a defendant's driving record.[16] A companion act to Heidi's Law requires the Michigan Secretary of State to maintain records of alcohol-related driving convictions for the life of the driver.[17]

Nine significant decisions of Michigan courts dealt with the application of Heidi's Law this *Survey* period.[18] *People v. Perkins*[19] is frequently cited as the seminal decision in settling the question of whether Heidi's Law is constitutional. The *Perkins* appeal involved two defendants, James Perkins and Joseph Lesage, whose cases were

---

11. Drunk Driving; Third Offense, *supra* note 5.

12. *See* MICH. COMP. LAWS ANN. § 257.625(9)(c) (West 2009).

13. *Id.*

14. *Id.*

15. *See* MICH. COMP. LAWS ANN. § 257.625(17) (West 2009), which provides:

> A prior conviction shall be established at sentencing by 1 or more of the following:
>
> (a) A copy of a judgment of conviction.
>
> (b) An abstract of conviction.
>
> (c) A transcript of a prior trial or a plea-taking or sentencing proceeding.
>
> (d) A copy of a court register of actions.
>
> (e) A copy of the defendant's driving record.
>
> (f) Information contained in a presentence report.
>
> (g) An admission by the defendant.

16. *See id.*

17. 2006 Mich. Pub. Acts 565 § 208(2), amending MICH. COMP. LAWS ANN. § 257.208(2) (West 2001) (effective Oct. 31, 2010).

18. June 1, 2008 through May 31, 2009.

19. 280 Mich. App. 244, 760 N.W.2d 669 (2008).

consolidated for appeal.[20] James Perkins was arrested on March 23, 2007, for driving while intoxicated.[21] He was charged with three crimes: operating a motor vehicle while intoxicated (OWI), third offense, possession of marijuana, and driving with a suspended license, second offense.[22] Perkins had four prior alcohol-related convictions, which included (1) operating while visibly impaired on September 21, 1990; (2) operating under the influence on February 3, 1992; (3) operating under the influence on May 19, 1993; and (4) operating while intoxicated on June 22, 2005.[23]

The other defendant, Joseph Lesage, was charged with OWI, third offense, on May 21, 2007.[24] Lesage had three prior alcohol-related convictions, namely OWI on April 8, 1975; operating while impaired on June 8, 1991; and impaired driving on July 16, 1991.[25]

The two defendants in *Perkins* had two or more prior alcohol-related convictions at the time they were before the court for their current arrests on OWI, third offense.[26] As a result, both defendants were subject to enhanced sentences under Heidi's Law.[27] In the trial court, the defendants argued that Heidi's Law was unconstitutional because it violated the ex post facto clauses of the federal and state constitutions, both of which prohibit legislative bodies from enacting laws that criminalize an act after it has been committed.[28]

The trial court denied the defendants' motions to quash based upon the ex post facto clause, and they filed motions for reconsideration.[29] The trial court granted the motions, finding that it had misinterpreted the caselaw and committed error.[30] The court reversed its earlier ruling, finding that Heidi's Law "does not apply to events that have been neutralized by the prior statute of limitations period."[31] The trial court held that "any conviction that occurred prior to January 3, 1997, is time barred and cannot be considered when Heidi's Law is applied to a case."[32] The government appealed.[33]

---

20. *Id.* at 247, 760 N.W.2d at 671.
21. *Id.* at 246, 760 N.W.2d at 671.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Perkins*, 280 Mich. App. at 246-47, 760 N.W.2d at 671.
26. *Id.* at 247, 760 N.W.2d at 671.
27. *Id.*
28. U.S. CONST. art. I, § 10, cl. 1; *see also* MICH. CONST. 1963 art. I, § 10.
29. *Perkins*, 280 Mich. App. at 247, 760 N.W.2d at 671.
30. *Id.*
31. *Id.*
32. *Id.* at 247-48, 760 N.W.2d at 671.
33. *Id.* at 248, 760 N.W.2d at 671.

The Michigan Court of Appeals reversed.[34] The court carefully examined the trial court's analysis and found it flawed.[35] The trial court had denied the defendants' motions to quash upon a finding "that the law was constitutional and that the Legislature had clearly intended to include convictions that would have been barred under the ten-year statute of limitations."[36] The trial court relied upon *People v. Russo*,[37] a case addressing the amendment of the statute of limitations in criminal sexual conduct cases.[38] In *Russo*, the defendant was charged in 1989 with criminal sexual conduct that had occurred between 1978 and 1982.[39] At the time of the acts, the statute of limitations on such prosecutions was six years; however, the Legislature amended the limitations period to allow charges to be filed within six years after the offense occurred, or by the victim's twenty-first birthday, whichever was later.[40] Russo argued that this amendment did not apply to him, and therefore, his prosecution was time-barred, because his offenses occurred prior to the effective date of the legislation.[41] The Michigan Supreme Court disagreed, and found no ex post facto violation in Russo's prosecution, since the statute of limitations was amended five months before the original six-year statute of limitations period had expired.[42]

In the *Perkins* case, the court of appeals found the amendment of the statute creating Heidi's Law did not "attach legal consequences to [the defendants'] prior offenses, which occurred before the amendment's effective date. Rather, the amendment made the consequences of their current offenses, which occurred after January 3, 2007, more severe on the basis of defendants' prior convictions."[43] Thus, the defendants were not being prosecuted for their prior offenses, but rather for actions that occurred after Heidi's Law took effect.[44] Therefore, the court concluded, there is no ex post facto violation.[45] The Michigan Supreme Court subsequently affirmed the court of appeals decision finding that Heidi's

34. *See id.* at 252, 760 N.W.2d at 674.

35. *Perkins*, 280 Mich. App. at 251-52, 760 N.W.2d at 673-74.

36. *Id.* at 248, 760 N.W.2d at 672.

37. 439 Mich. 584, 487 N.W.2d 698 (1992).

38. *See Perkins*, 280 Mich. App. at 248-49, 760 N.W.2d at 672.

39. *Id.* at 249, 760 N.W.2d at 672.

40. *Id.* (quoting *Russo*, 439 Mich. at 589, 487 N.W.2d at 698 (quoting MICH. COMP. LAWS ANN. § 767.24(2) (West 2000))).

41. *Id.* at 249-50, 760 N.W.2d at 672 (quoting *Russo*, 439 Mich. at 592, 487 N.W.2d at 698).

42. *Id.* at 250, 760 N.W.2d at 672 (citing *Russo*, 439 Mich. at 593, 487 N.W.2d at 698).

43. *Id.* at 251, 760 N.W.2d at 673.

44. *Perkins*, 280 Mich. App. at 252, 760 N.W.2d at 674.

45. *Id.*

law does not violate the ex post facto provisions of the federal and state constitutions.[46]

In *People v. Sadows*,[47] defendant Colleen Sadows was charged with felony operating a vehicle under the influence of liquor (OUIL).[48] She had two prior OUIL convictions in 1997 and 2001, which, under Heidi's Law, made her eligible for a felony charge for her third OUIL.[49] Defendant John Gale was charged with felony OUIL, after having previously been convicted of OUIL in 1994 and 2000.[50] Both defendants moved to quash the felony charge, and the trial court granted the motions upon concluding that M.C.L.A. section 257.625(9) as amended "were not merely sentencing enhancements because the subsections changed the charged offense from a misdemeanor to a felony and that the two subsections violated the constitutional prohibition against ex post facto laws and the constitutional guarantee of equal protection."[51] The government appealed.[52]

The court of appeals reversed, relying upon *People v. Perkins*, which held that the statute which penalizes OUIL in Michigan, as amended, did not violate the prohibition against ex post facto laws. The *Sadows* court noted that the Michigan Supreme Court upheld the *Perkins* decision and the rationale contained therein because MCLA section 257.625(9) does not punish a defendant's prior drunk driving offenses, "the change in the predicate offenses used to raise current conduct to the felony level does not constitute an ex post facto violation."[53]

Likewise, the *Sadows* court rejected the defendant's equal protection argument.[54] The court noted that the guarantee of equal protection requires that the government treat similarly situated persons alike.[55] However, "[u]nless the alleged discrimination involves a suspect class or impinges on the exercise of a fundamental right, a contested statute is evaluated under the rational basis test."[56] Here, the court found:

---

46. People v. Perkins, 482 Mich. 1118, 1118, 758 N.W.2d 280, 280 (2008).

47. 283 Mich. App. 65, 768 N.W.2d 93 (2009).

48. *Id.* at 66, 768 N.W.2d at 96.

49. *Id.*

50. *Id.* at 67, 768 N.W.2d at 96.

51. *Id.*

52. *Id.* at 66, 768 N.W.2d at 95.

53. *See Sadows*, 283 Mich. App. at 68, 768 N.W.2d at 96 (quoting *Perkins*, 280 Mich. App. at 252, 760 N.W.2d at 674).

54. *See id.* at 69, 768 N.W.2d at 97.

55. *See id.* (citing People v. Haynes, 256 Mich. App. 341, 345, 664 N.W.2d 225, 228 (2003)).

56. *Id.* (quoting *Haynes*, 256 Mich. App. at 345, 664 N.W.2d at 228).

> Defendants do not allege that MCL 257.625(9) and (11), as amended, targets a suspect class. Further, the disparate treatment of criminal offenders does not impinge on an individual's fundamental rights. Defendants have not established that the amendment of MCL 257.625(9) and (11) is arbitrary and not rationally related to a legitimate government interest. Rather, the enhancement provisions are tailored to OUIL repeat offenders and are rationally related to the government's interest in reducing habitual drunken driving and alcohol-related traffic fatalities.[57]

Accordingly, the trial court erred in finding that the statute violated the Equal Protection Clause.[58]

The defendants' final argument was that the amendment violated their due process rights under the federal and state constitutions.[59] The court of appeals rejected the due process challenge to the statute, finding the amendment was "rationally related to the Legislature's interest in reducing habitual drunken driving."[60] In addition, the court concluded that the defendants "had constructive notice, pursuant to the amendment, that their prior OUIL convictions would subject them to felony prosecutions if they operated a vehicle while under the influence of liquor" and thus, there was no due process violation.[61]

People v. Hall[62] involved the same issue as *Perkins*.[63] The defendant was charged with a felony based on an OUIL that occurred on October 15, 2007, which was several months after the effective date of the amendment.[64] His two prior convictions were used to enhance the current charge to a felony; one of his prior convictions was in 1990.[65] He moved the trial court to reduce the felony charge to a misdemeanor, arguing that the use of any prior OUIL convictions that occurred before January 3, 1997, was an ex post facto violation.[66] The trial court agreed with him, and the prosecution appealed.[67] The court of appeals reversed.[68] In

---

57. *See id.* (internal citations omitted).
58. *Id.*
59. *See Sadows*, 283 Mich. App. at 69, 768 N.W.2d at 97.
60. *See id.*
61. *See id.* at 69-70.
62. No. 283871, 2008 WL 5385883 (Mich. App. Dec. 23, 2008).
63. *See id.* at *1-2.
64. *Id.* at *2.
65. *Id.*
66. *Id.* at *1.
67. *Id.*
68. *Hall*, 2008 WL 5385883, at *3.

People v. Callon,[69] a prior panel of the court of appeals, the court addressed a previous amendment to the statute,[70] holding that the statute as amended "did not attach legal consequences to [the] defendant's prior impaired driving conviction, but attached legal consequences to [the] defendant's future conduct of driving under the influence or with an unlawful blood alcohol level."[71] In addition, *Perkins* had been decided.[72] The court concluded that *Perkins* controlled, and that the defendant was being punished for his present conduct which occurred after the effective date of the amendment, January 3, 2007.[73] Thus, the trial court erred in finding the statute unconstitutional as applied to the defendant.[74]

In *People v. Jones*,[75] the defendant had prior driving while intoxicated convictions from 1996 and 1997, thus, the prosecutor elevated the case to a felony after his drunk driving arrest in 2007.[76] The defendant moved to quash the information, citing the Ex Post Facto Clause, and the trial court agreed.[77]

The court of appeals reversed,[78] citing *Perkins* and noting that the Michigan Supreme Court explicitly affirmed the holding that Heidi's Law does not violate the ex post facto provisions of the federal and state constitutions.[79]

The defendant also argued that the use of his prior convictions is time-barred, "lest he be deprived of a vested interest."[80] In rejecting this argument, the court of appeals noted that the defendant was not being punished for his past conduct, merely his future conduct.[81] The court similarly rejected defendant's due process and equal protection arguments, noting that the amendment of the statute was not an arbitrary exercise of legislative power, but "a reasonable decision to deter recidivist drunk driving by making habitual offenders subject to

---

69. People v. Callon, 256 Mich. App. 312, 316, 662 N.W.2d 501, 507 (2003).

70. 1998 Mich. Pub. Acts 350, amending MICH. COMP. LAWS ANN. § 257.625 (adding impaired-driving convictions to those convictions that may be used to enhance a charge).

71. *Hall*, 2008 WL 5385883, at *1 (quoting *Callon*, 256 Mich. App. at 318, 662 N.W.2d at 508).

72. *See id.*

73. *Id.* at *2.

74. *Id.*

75. No. 280698, 2009 WL 153433 (Mich. App. Jan. 22, 2009).

76. *Id.* at *1.

77. *Id.* at *1.

78. *See id.* at *2.

79. *Perkins*, 482 Mich. at 1118, 758 N.W.2d at 280.

80. *Jones*, 2009 WL 153433, at *1.

81. *Id.* at *2.

enhanced punishment should they operate while impaired in the future."[82]

In *People v. Derr*,[83] the defendant was arrested on November 16, 2007, and charged with OUIL.[84] He had previously been convicted of operating a vehicle while impaired in 2000 and operating a vehicle under the influence of intoxicating liquor in 1981.[85] Basing its decision on *Perkins*, the court of appeals found the felony OUIL charge did not violate the constitution.[86]

In *People v. Hadley*,[87] the defendant had a prior OUIL conviction in 1985 and a 1982 conviction for unlawful blood alcohol level.[88] He pled guilty on March 19, 2007 to OUIL, third offense, and arguing that his prior convictions occurred more than ten years before enactment of the amendment to the law; therefore, the current charge should not be enhanced to a felony.[89] The court of appeals disagreed and relied on *Perkins*, holding that the amendment permits enhancement of impaired driving related offenses that occur after the date of its enactment.[90]

In *People v. Hale*,[91] the defendant was convicted of OUIL, third offense, following a jury trial and sentenced as a fourth habitual offender to two to twenty years of imprisonment.[92] He presented numerous challenges on appeal.[93] The court dismissed his ex post facto challenge under *Perkins*.[94] He also argued that the use of his prior convictions, which were more than ten years old, violated the principles of statutory construction.[95] The court also rejected this argument, citing *People v. Russo*, which approved of the lengthening of the statute of limitations as a procedural change, which does not affect the rights of the defendant or change the elements of the offense.[96]

Finally, the defendant argued that one of his prior offenses, a juvenile disposition, did not qualify as a prior conviction under the

---

82. *See id.*
83. People v. Derr, No. 283985, 2009 WL 485417 (Mich. App. Feb. 26, 2009).
84. *Id.* at *1.
85. *Id.*
86. *See id.*
87. No. 283280, 2009 WL 608403 (Mich. App. Mar. 10, 2009).
88. *Id.* at *1.
89. *Id.*
90. *Id.*
91. No. 282687, 2009 WL 1099732 (Mich. App. Apr. 23, 2009).
92. *Id.* at *1.
93. *See id.* at *1-5.
94. *Id.* at *2 (citing *People v. Perkins*, 280 Mich. App. 244, 760 N.W.2d 669 (2008)).
95. *Id.*
96. *See id.* at *3-4 (citing *Russo*, 439 Mich. at 595, 487 N.W.2d at 702).

amendment.[97] The prosecution argued that the motor vehicle code includes juvenile adjudications in the definition of "conviction."[98] The court concluded that defendant's argument lacked merit, noting that the Michigan Supreme Court, in *People v. Smith,* reaffirmed the concept that a sentencing court can consider a juvenile offense in imposing a sentence for an adult conviction.[99]

In *People v. Mix*,[100] the defendant was convicted of OUIL, third offense, following a jury trial.[101] He had two prior OUIL convictions, in 1987 and 1992.[102] He presented an ex-post-facto argument on appeal, contending that because his two prior OUIL convictions both occurred over ten years ago, they could not be used to enhance his sentence.[103] The court of appeals rejected his claim, citing *People v. Perkins.*[104] The court noted that the instant offense occurred on February 9, 2007, after the effective date of the amendment to M.C.L.A. section 257.625, which was January 3, 2007.[105] Thus, the amendment applied to Mix and he was properly charged by the prosecutor.[106]

In *People v. Kerr*,[107] the defendant pled guilty to OUIL, third offense, resisting and obstructing a police officer, and being a third habitual offender.[108] He had prior OUIL convictions in 1996 and 2001.[109] The trial court sentenced him to concurrent terms of 30 to 120 months for the OUIL, third offense, and 16 to 24 months for resisting and obstructing a police officer.[110] The court of appeals rejected his ex post

---

97. *Hale*, No. 282687, 2009 WL 1099732 at *5.

98. *Id.* The motor vehicle code, MICH. COMP. LAWS ANN. § 257.8a, defines "conviction" as:

> A final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication, probate court disposition, or juvenile disposition for a violation that if committed by an adult would be a crime, regardless of whether the penalty is rebated or suspended.

Id.

99. *Hale*, No. 282687, 2009 WL 1099732 at *6 (citing People v. Smith, 437 Mich. 293, 298-99, 470 N.W.2d 70 (1991) (noting that this principle was first set forth in *People v. McFarlin*, 389 Mich. 557, 575, 208 N.W.2d 504 (1973))).

100. No. 282948, 2009 WL 1362344 (Mich. App. May 14, 2009).

101. *Id.* at *1.

102. *Id.*

103. *Id.* at *3.

104. *See id.*

105. *See id.*

106. *Mix*, No. 282948, 2009 WL 1362344 at *3.

107. No. 285234, 2009 WL 1506666 (Mich. App. May 26, 2009).

108. *Id.* at *1.

109. *Id.*

110. *Id.*

facto arguments under *People v. Sadows* and *People v. Perkins*.[111] The court also rejected the defendant's argument that the amendment was not intended to apply retroactively.[112] *Perkins*, the court noted, held that the amendment does apply to offenses that occur after the date of its enactment.[113] In addition, the *Sadows* court, this panel concluded, found that applying the amended version of the statute would not result in undue administrative burdens.[114]

II. OFFENSES AGAINST PEOPLE

A. Felony Murder

The defendant in *People v. Ream*,[115] attacked and murdered his neighbor in her bedroom.[116] As a result, following a jury trial, he was convicted of first-degree felony murder and first-degree criminal sexual conduct.[117] The underlying felony for the felony murder charge was the criminal sexual conduct.[118] The court of appeals affirmed the felony murder conviction but reversed the criminal sexual conduct conviction on double jeopardy grounds.[119] The prosecution appealed to the Michigan Supreme Court.[120]

The Michigan Supreme Court had previously held in *People v. Wilder*[121] that sentencing a defendant for both felony murder and the underlying crime upon which the felony murder conviction was based violated the Double Jeopardy Clause[122] of the Michigan Constitution.[123] In the instant case, the Michigan Supreme Court was of the opinion it was time to reconsider *Wilder* and give more deference to the decision of the U.S. Supreme Court in *Blockburger v. United States*.[124]

Blockburger requires a comparison of the elements of the two offenses, for double jeopardy purposes, when a defendant has been given

---

111. *Id.* at *2.
112. *See id.*
113. *Kerr*, No. 285234, 2009 WL 1506666 at *2.
114. *Id.* (citing *Sadows*, 283 Mich. App. at 70, 768 N.W.2d at 97).
115. People v. Ream, 481 Mich. 223, 750 N.W.2d 536 (2008).
116. *Id.* at 226, 750 N.W.2d at 538.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. People v. Wilder, 411 Mich. 328, 308 N.W.2d 112 (1981).
122. MICH. CONST. 1963 art. I, § 15.
123. *Ream*, 481 Mich. at 228, 750 N.W.2d at 539.
124. *Id.* at 229, 750 N.W.2d at 540; Blockburger v. United States, 284 U.S. 299 (1932).

two separate sentences.[125] This places the focus on the abstract legal elements of the offenses.[126] In the instant case, the Michigan Supreme Court noted that felony murder requires as an element the killing of a human being, which criminal sexual conduct does not.[127] Criminal sexual conduct in the first degree, on the other hand, requires as an element a sexual penetration, which first-degree felony murder does not.[128] Because each offense contains an element that the other does not, the court concluded that the two offenses cannot be considered to be the same.[129] Thus, conviction and sentencing for both would not violate the Double Jeopardy Clause.[130] Accordingly, the court explicitly overruled the earlier *Wilder* decision.[131] The judgment of the court of appeals was reversed, and the conviction and sentence for criminal sexual conduct were reinstated.[132]

In *People v. Robinson*,[133] the court of appeals analyzed whether a defendant can be convicted of felony murder when there is a physical distance between the predicate felony and the scene of the murder, such as when a defendant is fleeing the police.[134] The defendant was convicted of first-degree felony murder following a jury trial.[135] In a separate case, he was convicted of first-degree home invasion and four counts of felonious assault.[136] He argued on appeal there was insufficient evidence of a connection between the home invasion and the murder.[137]

The defendant argued that the home invasion and the murder were unrelated, although they occurred close in time and physical distance to each other.[138] In *People v. Gillis*,[139] the defendant was similarly charged with a home invasion and a homicide that occurred several miles away and minutes after the defendant left the house which he had just broken into.[140] Gillis broke into the garage of a home, and the homeowner

125. *See id.* at 228, 750 N.W.2d at 539.
126. *Id.* at 235, 750 N.W.2d at 543.
127. *See id.* at 241, 750 N.W.2d at 546.
128. *Id.* at 241, 750 N.W.2d at 546-47.
129. *Ream*, 481 Mich. at 241-42, 750 N.W.2d at 547.
130. *Id.* at 242, 750 N.W.2d at 547.
131. *Id.*
132. *Id.*
133. Nos. 281530, 281531, 2009 WL 1506902 (Mich. App. May 28, 2009).
134. *See id.* at *3-7.
135. *Id.* at *1.
136. *Id.*
137. *Id.*
138. *Id.* at *2.
139. 474 Mich. 105, 712 N.W.2d 419 (2006).
140. *Id.* at 108, 712 N.W.2d at 422.

caught him and chased him for a brief period of time.[141] Gillis fled in a white car, and the homeowner gave the car description to the police, who located him minutes later.[142] The defendant was confronted by the police and a high-speed chase ensued, which ended with a collision, killing the occupants of another car.[143] Prosecutors charged Gillis with first-degree felony murder and the defendant moved to dismiss that charge, arguing the home invasion was a completed crime when he left the home.[144] The court of appeals agreed, holding that "[the] defendant had already escaped from the scene of the home invasion and therefore . . . the deaths were not 'part of the continuous transaction of or immediately connected to the home invasion.'"[145] The Michigan Supreme Court reversed, holding:

> [A] felon has not carried out or completed the felony for felony-murder purposes until the felon has escaped. A murder committed during the attempt to escape is committed "in the perpetration of" that felony, because the felonious transaction has not yet been completed. Accordingly, "perpetration" includes not only the definitional elements of the predicate felony, but also includes those acts that are required to complete the felony such as those that occur after the commission of the predicate felony while the felon is attempting to escape.[146]

The *Gillis* court also noted that a jury should consider "whether a murder has, in fact, taken place during the unbroken chain of events arising out of the predicate felony," such as time, place, causation and continuity of action.[147] A death that occurs during the defendant's flight from the scene of the felony qualifies under the felony-murder rule, the court found.[148]

In the instant case, the court noted, the murder victim had no connection to anyone at the scene of the home invasion.[149] However, the

---

141. *Id.* at 109-10, 712 N.W.2d at 423.
142. *Id.*
143. *Id.* at 111, 712 N.W.2d at 423.
144. *Id.* at 111, 712 N.W.2d at 423-24.
145. *Gillis*, 474 Mich. at 112, 712 N.W.2d at 424.
146. *Id.* at 116-17, 712 N.W.2d at 426.
147. *Id.* at 126-27, 712 N.W.2d at 432.
148. *See id.* at 128, 712 N.W.2d at 433 (citing People v. Oliver, 63 Mich. App. 509, 234 N.W.2d 679 (1975) (upholding felony murder of a police officer which occurred while defendant was fleeing from an armed robbery which had occurred thirty minutes prior)).
149. *Robinson*, 2009 WL 1506902, at *6.

murder occurred very close in time to the home invasion in "an uninterrupted chain of events."[150] After the defendant left the home he had broken into, he walked by foot to the location of the murder, threatened the victim and his brother, and fired a gun.[151] Although the *Gillis* court did not define "perpetration" as requiring hot pursuit by the police, there was sufficient evidence in the present case to find that Robinson was fleeing from law enforcement and had not yet reached a "place of safety" at the time he shot and killed the victim.[152] The court of appeals upheld the conviction holding the two crimes were connected and demonstrated a "continuity of action" on the part of the defendant.[153]

A dissent by Judge Elizabeth Gleicher shed light on more of the facts of the case.[154] She wrote to express her belief that the defendant was not "in the perpetration of" the home invasion when he killed the victim.[155] Here, Robinson entered the home of his ex-girlfriend and removed items belonging to him.[156] He brandished a gun and threatened to shoot one of the occupants of the home but was persuaded to lower the gun and leave.[157] He asked them for a ride but they refused, so the defendant just walked away carrying his belongings.[158] Twenty minutes later and less than two blocks away, Robinson shot and killed the victim, who he did not know.[159] While walking away from the home invasion of his ex-girlfriend's home, Robinson came upon the victim and his brother standing in the doorway of the apartment building where they lived.[160] The defendant walked straight toward them, altering his travel and crossing the street, and put the gun in their faces.[161] He then shot the victim.[162]

Judge Gleicher found that, unlike *Gillis*, there was no evidence the defendant was being pursued by the police when he shot the victim.[163] Rather, the defendant's own actions "asking for a ride home from the home invasion, altering his travel to threaten the victim showed he did

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *See id.* at *6-7 (Gleicher, J., dissenting).
155. *See Robinson*, 2009 WL 1506902, at *6.
156. *Id.*
157. *Id.*
158. *Id.* at *7.
159. *Id.*
160. *Id.*
161. *Robinson*, 2009 WL 1506902, at *7.
162. *Id.*
163. *Id.* at *9.

not perceive the police were chasing him."[164] In addition, it did not appear that the defendant shot the victim to prevent his identification at the scene of the home invasion, nor did the victim have any knowledge the defendant had just committed a home invasion down the street.[165] Judge Gleicher would have found no causal connection between the home invasion and the subsequent shooting.[166] She would reverse the defendant's felony murder conviction, failing to find the "unbroken chain of connected events" required to establish felony murder.[167]

B. Assaultive Offenses

In *People v. Mumin*,[168] the defendant argued that the evidence was insufficient to convict him of felonious assault.[169] A felonious assault requires (1) an assault, (2) with a dangerous weapon, and (3) the intent to injure or place the victim in apprehension of an immediate battery.[170] An assault requires "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery,"[171] that is an "intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person."[172]

In the instant case, there were two victims involved, both of whom testified that the defendant touched them with a handgun and threatened to shoot them.[173] The court of appeals found that this testimony supported the trial court's conclusion that the victims were in fear of "an imminent battery with a dangerous weapon,"[174] and that a battery had actually occurred when the victims were touched with the gun by the defendant.[175] The assault element for the crime of felonious assault was satisfied upon the commission of the battery.[176]

---

164. *Id.*
165. *Id.*
166. *See id.*
167. *See Robinson*, 2009 WL 1506902, at *9.
168. No. 283211, 2009 WL 1397142 (Mich. Ct. App. May 19, 2009).
169. *Id.* at *1.
170. *Id.* (citing People v. Davis, 216 Mich. App. 47, 53, 549 N.W.2d 1, 4 (1996)).
171. *Id.* (citing People v. Grant, 211 Mich. App. 200, 202, 535 N.W.2d 581, 582 (1995)).
172. *Id.* at *1-2 (quoting People v. Starks, 473 Mich. 227, 240, 701 N.W.2d 136, 143-44 (2005)).
173. *Id.* at *2.
174. *See Mumin*, 2009 WL 1397142, at *3 (citing People v. McConnell, 124 Mich. App. 672, 678-79, 335 N.W.2d 226, 229 (1983)).
175. *See id.* at *1.
176. *Id.* (citing People v. Nickens, 470 Mich. 622, 628, 685 N.W.2d 657, 662 (2004)).

The defendant's actions, the court noted, were evidence of his intent to place the victims in fear of an immediate battery.[177] He pointed a gun at them and threatened to shoot them for walking onto his lawn.[178] This was sufficient evidence, the court concluded, for the trial court to infer that the defendant had the requisite intent to commit a felonious assault, and thus the conviction was upheld.[179]

In *People v. Golden*,[180] the defendant challenged his conviction for assault with intent to do great bodily harm less than murder,[181] arguing he lacked the intent necessary for the jury to return such a verdict.[182] The trial testimony indicated that the defendant hit the victim in the face and head numerous times while the victim was lying on the ground unconscious.[183] The victim had numerous facial lacerations and injuries, including a broken nose, black eye, cuts and swelling to the left side of the head.[184] Due to the seriousness of the victim's injuries, the court concluded that there was sufficient evidence to enable a rational jury to conclude beyond a reasonable doubt that the defendant intended to commit great bodily harm less than murder.[185] Thus, the court rejected the defendant's argument and upheld his conviction.[186]

In *People v. Blunt*,[187] the defendant and the victim lived next door to each other in a Saginaw rooming house.[188] In late 2005, the defendant heated cooking oil in a pot.[189] He took the pot of heated oil to the victim's room, knocked on the door, and when the victim opened the door, threw the oil at the victim's face.[190] The defendant suffered severe burns, both internal and external. The defendant entered a plea of no contest to charges of assault with intent to do great bodily harm[191] and

177. *See id.*
178. *Id.*
179. *Id.*
180. No. 282604, 2009 WL 1397151 (Mich. Ct. App. May 19, 2009).
181. MICH. COMP. LAWS ANN. § 750.84 requires "(1) an attempt or threat with force or violence to do corporal harm to another and (2) a specific intent to do great bodily harm less than murder," which is defined as "a serious injury of an aggravated nature." People v. Parcha, 227 Mich. App. 236, 239, 575 N.W.2d 316 (1997); People v. Mitchell, 149 Mich. App. 36, 39, 385 N.W.2d 717, 718 (1986).
182. *Golden*, 2009 WL 1397151, at *1.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at *5.
187. 282 Mich. App. 81, 761 N.W.2d 427 (2009).
188. *Id.* at 83, 761 N.W.2d at 428.
189. *Id.*
190. *Id.*
191. *Id.* at 82 (citing MICH. COMP. LAWS ANN. § 750.84 (West 2009)).

unlawful use of a harmful chemical substance.[192] The defendant was sentenced to concurrent prison terms, with a longer term for the use of a harmful chemical substance.[193] The defendant was granted leave to appeal, and he contended he had been improperly convicted of violating the unlawful use of a chemical substance statute because cooking oil, according to defendant, is not a harmful chemical substance.[194]

The court of appeals stated that its duty was to consider whether heated cooking oil constitutes a harmful chemical substance.[195] The court concluded that cooking oil is indeed a chemical substance, but its properties are not the kind which cause death, injury or disease. On the contrary, cooking oil "is a common and everyday food stuff."[196] The court believed that the Legislature did not intend that ordinary and perfectly safe liquids become harmful chemical substances simply because they might be incorporated into the commission of an assaultive crime.[197] Rather, the court opined that harmful chemical substances are substances which are inherently "dangerous, noxious, or pernicious."[198] The court noted that any other interpretation of the statute would mean that virtually any liquid, from maple syrup to laundry detergent [or even water] could become a lethal weapon when boiled.[199] The court reasoned that the interpretation which would allow heated cooking oil to be considered a harmful chemical substance would mean the elimination of the word "harmful" from the statute.[200] The court concluded that heated cooking oil is not a harmful chemical substance and therefore vacated the defendant's conviction.[201]

Vacating the conviction for unlawful use of a chemical substance also impacted the sentencing for assault with intent to do great bodily harm.[202] The sentence for that offense had been enhanced because of the use of a harmful chemical substance.[203] The court found there was no such use, and therefore the matter had to be remanded to the circuit court

192. *Id.* (citing MICH. COMP. LAWS ANN. § 750.200i(1)(b) (West 2009)).
193. *Blunt*, 282 Mich. App. at 82, 761 N.W.2d at 428.
194. *Id.*
195. *Id.* at 85, 761 N.W.2d at 430.
196. *Id.*
197. *Id.*
198. *Id.* at 88, 761 N.W.2d at 431.
199. *Blunt*, 282 Mich. App. at 88, 761 N.W.2d at 431.
200. *Id.*
201. *Id.*
202. *Id.* at 89, 761 N.W.2d at 431-32.
203. *Id.*

for resentencing with no enhancement for use of a harmful chemical substance on the victim.[204]

C. Criminal Sexual Conduct

The defendant in *People v. Wilcox*[205] was convicted of first-degree criminal sexual conduct.[206] During the course of the trial and over the defendant's objections, evidence of a prior conviction involving sexual conduct with a person under the age of thirteen was admitted.[207] Defendant argued on appeal that the evidence in question should not have been allowed, "because the Legislature was not authorized to enact such a statute."[208]

The evidence in question was admitted pursuant to a recently enacted statute which was effective on January 1, 2006.[209] The statute provides that if a defendant is accused of committing a crime against a minor, then evidence that the defendant has previously committed such a crime against a minor is admissible.[210] The court noted that such evidence might be admissible under the statute even though previously it might have been inadmissible under Rule 404(b) of the Michigan Rules of Evidence.[211]

The court observed that the Michigan Supreme Court has "exclusive rulemaking authority with respect to matters of practice and procedure for the administration of [Michigan] courts."[212] Therefore, the legislature may not enact statutes that are procedural and relate only to the administration of judicial functions.[213] The court opined that the new statute making prior convictions against minors admissible in cases in which the new victim is also a minor is a substantive rule of evidence, not a procedural rule, and does not attempt to regulate the operation or

204. *Id.*
205. 280 Mich. App. 53, 761 N.W.2d 466 (2008).
206. *Id.* at 54, 761 N.W.2d at 468.
207. *Id.*
208. *Id.*
209. *Id.* at 55, 761 N.W.2d at 468 (citing MICH. COMP. LAWS ANN. § 768.27a(1) (West 2009)). M.C.L.A. section 768.27a(1) provides: "[I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."
210. *Id.*
211. *Wilcox*, 280 Mich. App. at 54-55, 761 N.W.2d at 468.
212. *Id.* at 55, 761 N.W.2d at 468.
213. *Id.*

administration of the courts.[214] Therefore, there was no error by the trial court in admitting the evidence, and the conviction was affirmed.[215]

III. OFFENSES AGAINST PROPERTY

A. False Pretenses

The defendant in *People v. Houthoofd*[216] was convicted of obtaining property by false pretenses.[217] On appeal, the defendant argued there was insufficient evidence to convict, contending the victim must intend to convey both title and possession of the property.[218]

The court noted that "false pretenses" consists of a false representation of existing fact that the defendant knows is false.[219] In addition, the defendant must intend to deceive a victim who relies detrimentally on the false representation.[220] The court found the evidence in this case showed the defendant used another person's identification to rent equipment from the victim intending thereby to defraud him.[221] There was, perhaps, no intent to pass title to the rented equipment, but the court noted that the crime does not require intent to pass title.[222] Historically, the court wrote, an intent to pass title is the distinction between the crime of larceny and the crime of false pretenses.[223] However, the Michigan Legislature had abolished, by statute, this particular distinction.[224] Regardless of what the common law requirement may have been, "intent to pass title is no longer a required element" of false pretenses.[225] The court concluded that the defendant had been

---

214. *See id.*

215. *Id.* at 57, 761 N.W.2d at 469.

216. No. 269505, 2009 WL 249459 (Mich. Ct. App. Feb. 3, 2009).

217. *Id.* at *1. The defendant was also convicted of intimidation of a witness and soliciting murder. *Id.*

218. *Id.* at *15.

219. *Id.* M.C.L.A. section 750.218 provides:

> A person who, with the intent to defraud or cheat makes or uses a false pretense to do 1 or more of the following is guilty of a crime punishable as provided in this section . . . [o]btain from a person any money or personal property or the use of any instrument facility, article, or other valuable thing or service.

MICH. COMP. LAWS ANN. § 750.218 (West 2010).

220. *Houthoofd*, 2009 WL 249459, at * 15.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at *15-16 (calling attention to *People v. Long*, 409 Mich. 346, 351, 294 N.W.2d 197, 199 (1980)).

225. *Id.* at *16.

properly charged and the conviction of obtaining property by false pretenses was affirmed.[226]

B. Unarmed Robbery

The defendant in *People v. Hoch*[227] was convicted of unarmed robbery, fleeing and eluding a police officer, larceny from a motor vehicle, and driving with a suspended license.[228] At all times during the course of the criminal prosecution, the defendant contended he did not assault the victim and therefore had committed larceny from a motor vehicle rather than unarmed robbery.[229] The trial was conducted by a visiting judge, and jury deliberations began on a Friday afternoon.[230] The jury did not reach a verdict on that Friday, and it returned the following Monday; the regular judge also returned from vacation that day and took over the trial.[231] Sometime during the day on Monday, the jury sent a note to the judge asking for more instruction on the concept of assault as an element of robbery.[232] Without consulting with any of the attorneys or the defendant, the judge addressed the jury.[233] The jury ultimately convicted the defendant of all charges.[234]

The conviction was reversed because jury instructions are a critical stage of the trial proceedings and a criminal defendant has a due process right to be present whenever the jury is instructed.[235] The court of appeals also found additional error because the judge who was present during jury instructions failed to properly reinstruct the jury regarding assault.[236] Indeed, it was possible that the jury had not received any assault instructions at all.[237] The defense of the case was structured around the legal definition of an assault committed during the

226. *Houthoofd*, 2009 WL 249459, at *21. The court also affirmed the witness intimidation conviction; it reversed for improper venue the conviction for solicitation to commit murder. *Id.*

227. No. 269739, 2008 WL 4762979 (Mich. Ct. App. Oct. 30, 2008).

228. *Id.* at *1.

229. *Id.*

230. *Id.* at *2.

231. *Id.* at *3.

232. *Id.*

233. *Hoch*, 2008 WL 4762979, at *4. The court stated there was nothing in the record as to what the judge said at that time to the jury. *See id.* Nor was a copy of the jury instructions made part of the record. *Id.*

234. *Id.* at *3.

235. *Id.* at *4-5.

236. *Id.* at *10.

237. *Id.* at *11.

commission of an unarmed robbery.[238] The court considered it "unsurprising that the jury might have been uncertain regarding the assault element of an armed robbery."[239] Thus, it was error for the court either to have failed to instruct the jury on this issue or to have failed to reinstruct the jury when the jury raised questions.[240] Accordingly, the defendant's convictions were reversed and the matter remanded for further proceedings.[241]

IV. OFFENSES AGAINST HABITATION

A. Home Invasion

In *People v. Kici*,[242] the defendant was convicted of third-degree home invasion and domestic violence, second offense.[243] He argued on appeal that he had express and implied permission to enter the residence of his ex-girlfriend, and therefore, the verdict was improper.[244]

The court of appeals examined the record and disagreed.[245] A third-degree home invasion occurs, the court noted, if a person does the following:

> Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons: (i) a probation term or condition, (ii) a parole term or condition, (iii) a personal protection order term or condition, (iv) a bond or bail condition or any condition of pretrial release.[246]

The key phrase in this case – "without permission" – is defined in the statute as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully or in control of the dwelling."[247]

---

238. *Id.*
239. *See Hoch*, 2008 WL 4762979, at *11.
240. *Id.* at *12.
241. *Id.*
242. No. 283058, 2009 WL 1362342 (Mich. Ct. App. May 14, 2009).
243. *Id* at *1.
244. *Id.*
245. *Id.*
246. *Id.* (citing MICH. COMP. LAWS ANN. § 750.110a(4)(b) (West 2004)).
247. *Id.* (citing MICH. COMP. LAWS ANN. § 750.110(1)(c) (West 2009)).

Here, the defendant's conditions of parole and a personal protection order prohibited him from having contact with his ex-girlfriend.[248] However, he argued, he had permission to enter her residence.[249] The court found the evidence from the preliminary examination contradicted this claim.[250] The testimony established that the defendant pushed his way into the residence.[251] The ex-girlfriend was not expecting him and did not give him permission to enter.[252] Although at trial the court found that the witnesses changed their stories to help the defendant, they were confronted with their prior sworn testimony, and therefore, there was evidence the defendant did not have permission to enter the residence on the night in question.[253]

In *People v. McClain*,[254] the defendant was convicted of first-degree home invasion.[255] He argued there was insufficient evidence to prove he was guilty of first-degree home invasion[256] as an aider and abettor.[257] A challenge to the sufficiency of the evidence is reviewed de novo.[258] Such claims are evaluated by the court "in a light most favorable to the prosecution," in order to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[259]

Defendant McClain was charged with first-degree home invasion, and the judge also instructed the jury on aiding and abetting.[260] There are

---

248. *Kici*, 2009 WL 1362342, at *1.

249. *Id.*

250. *See id.*

251. *Id.*

252. *Id.*

253. *Id.* at *2.

254. No. 282437, 2009 WL 1067375 (Mich. Ct. App. Apr. 21, 2009).

255. *Id.* at *1.

256. Under M.C.L.A. section 750.110a(2), a first-degree home invasion occurs when a person:

> Breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling . . . enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or . . . breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault . . . if at any time . . . either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon;
>
> (b) Another person is lawfully present in the dwelling.

MICH. COMP. LAWS ANN. § 750.110a(2) (West 2010).

257. *McClain*, 2009 WL 1067375, at *6.

258. *Id.*

259. People v. Wolfe, 440 Mich. 508, 515, 489 N.W.2d 748, 751 (1992).

260. *McClain*, 2009 WL 1067375, at *6. MICH. COMP. LAWS ANN. § 767.39 (West 2010) states: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its

three elements to aiding and abetting, and although the jury received instructions on an aiding and abetting theory, the jury verdict was not clear as to whether McClain was found guilty as a principal or as an aider and abettor.[261] The jury acquitted McClain of assault with intent to murder and felony firearm, which meant the jury did not believe he had a firearm with him during the home invasion.[262]

The court of appeals affirmed, finding sufficient testimonial evidence of McClain's involvement in the home invasion.[263] The co-defendant, Goodin, testified that McClain was with him inside the house and helped kick in the doors to the home and enter.[264] The court noted that other testimony from Goodin's wife, McClain's girlfriend, and McClain himself corroborated many of Goodin's assertions.[265] Moreover, the elements of aiding and abetting were met in this case.[266] First, there was a home invasion and assault, to which Goodin admitted his guilt.[267] Second, McClain assisted Goodin in the commission of that crime by lending Goodin his cell phone, and driving Goodin to the location.[268] In addition, McClain helped conceal the crime by agreeing on a story with Goodin, and further, McClain tried to dispose of the clothing and weapons which were used.[269]

The court also gave short shrift to McClain's argument that he did not have the requisite intent for aiding and abetting.[270] McClain argued he thought Goodin was buying drugs from the victim.[271] The court noted that there was evidence of McClain's intent as an aider and abettor, since he fled the state for several months, and Goodin testified it was McClain's idea to commit the home invasion to gain money.[272] The court upheld McClain's conviction and sentence, which was as a fourth habitual offender, of six to twenty years in prison.[273]

---

commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

261. *McClain*, 2009 WL 1067375, at *6.
262. *Id.*
263. *Id.* at *6, 14.
264. *Id.* at *2.
265. *See id.* at *7.
266. *See id.*
267. *McClain*, 2009 WL 1067375, at *7.
268. *Id.*
269. *Id.*
270. *See id.* at *7-8.
271. *Id.* at *7.
272. *Id.* at *8.
273. *McClain*, 2009 WL 1067375, at *1, *14.

V. OTHER OFFENSES

A. Failure to Report Nursing Home Neglect

William Devine, a nursing home resident, attempted to smoke a cigarette in the nursing home's designated smoking area, even though he was wearing an oxygen delivery device.[274] A nursing assistant turned off the oxygen and lit Devine's cigarette.[275] The oxygen ignited and burned Devine's hands and face.[276] The nursing home administrator, defendant Edenstrom, investigated the incident and concluded it was unnecessary to file any report, although some incidents must be reported to the Department of Public Health.[277] The family, however, reported the incident and an investigation followed.

Defendant Edenstrom was charged with a misdemeanor for failing to report the incident to state authorities.[278] Counsel for the defendant moved to dismiss the charge on the grounds that the incident was beyond the scope of the reporting requirements.[279] The district court disagreed and denied the motion.[280] The defendant appealed to the circuit court where he presented the same argument.[281] The circuit judge agreed with the defendant and ruled the reporting requirements apply only to "willful abuse, mistreatment or neglect, not to accidents."[282] The court of appeals granted leave for a delayed appeal.[283]

Michigan statutes require that residents of a nursing home not be "physically, mentally, or emotionally abused, mistreated or harmfully

---

274. People v. Edenstrom, 280 Mich. App. 75, 77, 760 N.W.2d 603, 604 (2008).
275. *Id.*
276. *Id.*
277. See M.C.L.A. section 333.21771, which provides:

> (1) A licensee, nursing home administrator, or employee of a nursing home shall not physically, mentally, or emotionally abuse, mistreat, or harmfully neglect a patient.
>
> (2) A nursing home employee who becomes aware of an act prohibited by this section immediately shall report the matter to the nursing home administrator or nursing director. A nursing home administrator or nursing director who becomes aware of an act prohibited by this section immediately shall report the matter by telephone to the department of public health, which in turn shall notify the department of social services.

MICH. COMP. LAWS ANN. § 333.21771 (West 2010).
278. *Edenstrom*, 280 Mich. App. at 77, 760 N.W.2d at 604.
279. *See id.* at 77-78, 760 N.W.2d at 604.
280. *Id.* at 78, 760 N.W.2d at 604.
281. *Id.*
282. *Id.* at 78, 760 N.W.2d at 604-05.
283. *Id.*

neglected."[284] Further, if such does occur, a report of the matter must be made immediately to the Department of Public Health.[285] The prosecution contended on appeal that the nursing assistant's conduct constituted harmful neglect and the defendant was required to immediately report the matter.[286]

The court of appeals noted the statutes do not define the phrase "harmful neglect."[287] The court examined the Complaint and Facility Reported Incident Manual prepared by the Bureau of Health Systems and found that neglect means "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness."[288] The Manual further defines neglect as "failure of a staff member to carry out his/her required duties."[289] Samples in the Manual, as articulated by the court of appeals, all related to the failure to do something.[290] In the instant case, the issue was not whether the nursing assistant had failed to do something; on the contrary, the nursing assistant had followed the smoking policy carefully and performed the duties she was assigned to do.[291] Accordingly, the court was unwilling to find that the resident had been injured because of anyone's neglect.[292] Neither the statute nor the Manual required reporting of all incidents.[293] The court did observe, however, that incidents resulting from harmful neglect must be reported, even if they are accidental.[294] However, it was clear to the court that the nursing assistant's act with regard to the lighting of the cigarette did not constitute harmful neglect.[295] Therefore, failure to report the incident did not fall within the scope of the reporting statute.[296] Accordingly, the court of appeals affirmed the circuit court's dismissal of the action.[297]

284. MICH. COMP. LAWS ANN. § 333.21771(1) (West 2009).
285. MICH. COMP. LAWS ANN. § 333.21771(1), (2).
286. *Edenstrom*, 280 Mich. App. at 79, 760 N.W.2d at 605.
287. *See id.* at 80, 760 N.W.2d at 606.
288. *Id.* at 81, 760 N.W.2d at 606.
289. *Id.*
290. *See id.* at 82-84, 760 N.W.2d at 607-08.
291. *See id.* at 83, 760 N.W.2d at 607.
292. *See Edenstrom*, 280 Mich. App. at 85, 760 N.W.2d at 608.
293. *Id.* at 87-88, 760 N.W.2d at 610.
294. *See id.* at 88, 760 N.W.2d at 610.
295. *See id.*
296. *Id.*
297. *See id.* at 89, 760 N.W.2d at 610.

B. Animal Torture

In March 2007, several horses owned by James Henderson and cared for by Matthew Mercier were found outside Henderson's farm.[298] Jackson County Animal Control conducted an inspection of the farm followed by an investigation.[299] The result was three felony charges of animal torture against each defendant.[300] The defendants were bound over to the circuit court after a seven-day preliminary examination.[301] In the circuit court, the defendants filed a motion to quash the charging information, which the court granted as to the three felony counts.[302] The circuit judge believed that, in an animal torture case, the prosecution must prove the defendant knew his actions were wrong and that the defendant intended to cause physical or mental harm to the animal.[303] The circuit court concluded that the district court had found mere negligence rather than an intent to cause harm to the horses.[304] The court of appeals then granted the prosecutor's application for leave to file an interlocutory appeal.[305]

The court of appeals began its analysis by examining the charge of animal torture.[306] More specifically, the "defendants were charged with three counts of willfully, maliciously, and without just cause or excuse torturing three horses."[307] The torture statute provides that a "person who willfully, maliciously, and without just cause or excuse . . . tortures . . . an animal . . . is guilty of a felony."[308] The very narrow issue for the court to decide was whether the statute is violated if the defendants act with conscious disregard of a known risk, as the prosecution contended; or whether the statute required proof the defendants intended to harm the animals, as the defendants contended.[309]

Both parties in the court of appeals relied on a recent animal torture case where the defendant threw a firecracker into a barn, which resulted

298. People v. Henderson, 282 Mich. App. 307, 309-10, 765 N.W.2d 619, 622 (2009).
299. *Id.* at 310, 765 N.W.2d at 622.
300. *Id.* There was also a misdemeanor charge of failure to adequately care for the horses and a forfeiture action against the owner. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 311, 765 N.W.2d at 622.
304. *Henderson*, 282 Mich. App. at 311, 765 N.W.2d at 622.
305. *Id.* at 311, 765 N.W.2d at 623.
306. *See id.* at 312, 765 N.W.2d at 623.
307. *Id.* at 313, 765 N.W.2d at 624.
308. MICH. COMP. LAWS ANN. § 750.506(2) (West 2004).
309. *See Henderson*, 282 Mich. App. at 313, 765 N.W.2d at 624.

in the deaths of nineteen horses.[310] The case, *People v. Fennell*, attempted to define the willfulness aspect of the animal torture statute and also the malice requirement.[311] There was some ambiguity in *Fennell* when the court wrote that an even earlier case, *People v. Iehl*,[312] required that the jury find the defendant to have committed the act and that he did so intentionally or with a conscious disregard of a known risk.[313] In *Fennell*, the jury was not instructed that conscious disregard of a known risk was a possibility in determining malice.[314] Thus, since the defendant was convicted, there was no possibility of error.[315] That did not mean, according to the court in the instant case, that disregarding a known risk was no longer a possible element of the offense.[316] On the contrary, the court held that the prosecution need not prove that the defendants intended to harm the animals.[317] Thus, an animal torture case can involve either an act done intentionally, or, an act done with conscious disregard of a known risk.[318]

The court then reviewed "a plethora of evidence" showing the condition of the farm was poor, unsanitary and hazardous; there had been a lack of quality food for the horses for a lengthy period; and there was a lack of water.[319] The horses were emaciated and were heavily infested with parasites, both internally and externally.[320] The court of appeals concluded that the record established probable cause to believe the defendants had willfully failed to seek necessary care and treatment for the animals in conscious disregard of the known risk that they would continue to decline in health.[321] Accordingly, the felony counts against the defendants were reinstated.[322]

---

310. *Id.* at 313, 765 N.W.2d at 624 (citing People.v. Fennel, 260 Mich. App. 261, 263-64, 677 N.W.2d 66, 68 (2004)).

311. *Id.*

312. People v. Iehl, 100 Mich. App. 277, 299 N.W.2d 46 (1980).

313. *Henderson*, 282 Mich. App. at 314, 765 N.W.2d at 624.

314. *Id.*

315. *Id.*

316. *Id.* at 316, 765 N.W.2d at 625.

317. *Id.*

318. *Id.*

319. *See Henderson*, 282 Mich. App. at 317, 765 N.W.2d at 625-26.

320. *Id.* at 317, 765 N.W.2d at 626.

321. *See id.* at 330, 765 N.W.2d at 632.

322. *Id.* The order reversing the forfeiture of the horses was also reversed. *Id.*

C. Delivery of a Controlled Substance Causing Death

In *People v. Plunkett*,[323] the defendant and his girlfriend were daily users of heroin and crack cocaine.[324] The girlfriend introduced her childhood friend, Tiffany Gregory, to heroin and taught her how to prepare the drug.[325] One night, the two smoked crack cocaine with another friend in the defendant's living room and then injected themselves with heroin.[326] Gregory collapsed and paramedics were called, but she was pronounced dead at the scene.[327] An autopsy revealed the cause of death as "multiple drug intoxication," which included high levels of morphine, cocaine, and alcohol.[328] The pathologist concluded Gregory died from a heroin overdose that was made worse by a high level of alcohol consumption earlier the evening she died.[329]

The defendant was charged with delivery of heroin causing death and delivery of less than fifty grams of heroin.[330] At the preliminary examination, the defendant argued there was insufficient evidence of those charges, and that, at most, he had funded his girlfriend's heroin purchase.[331] He pointed to the testimony of his girlfriend that he did not possess heroin and did not know she was going to give heroin to Gregory the evening she died.[332] The prosecutor argued that although the defendant had not possessed heroin, he provided transportation to the drug source and the money to purchase it.[333] The trial court found that, since the defendant regularly drove his girlfriend to purchase drugs, gave her the money to purchase drugs, and that the heroin he helped her purchase caused Gregory's death, there was probable cause to bind him over on all counts.[334]

The defendant appealed, arguing there was insufficient evidence that he had delivered heroin to another person.[335] He also asserted that there

323. 281 Mich. App. 721, 760 N.W.2d 850 (2008).
324. *Id.* at 723, 760 N.W.2d at 851.
325. *Id.*
326. *Id.* at 724, 760 N.W.2d at 852.
327. *Id.* at 724-25, 760 N.W.2d at 852.
328. *Id.* at 725, 760 N.W.2d at 852.
329. *Plunkett*, 281 Mich. App. at 725, 760 N.W.2d at 852.
330. *Id.* at 722, 760 N.W.2d at 851. Prosecutors also charged the defendant with delivery of less than fifty grams of cocaine and one count of maintaining a drug house, however those charges were not the subject of this appeal. *See id.* at 722 n.1, 760 N.W.2d at 851 n.1.
331. *Id.* at 725, 760 N.W.2d at 852.
332. *Id.* at 729, 760 N.W.2d at 852.
333. *Id.* at 729, 760 N.W.2d at 854.
334. *Plunkett*, 281 Mich. App. at 725, 760 N.W.2d at 852.
335. *See id.* at 726, 760 N.W.2d at 853.

was insufficient evidence that he delivered to his girlfriend the heroin that caused Gregory's death.[336] The circuit court agreed, finding the trial court abused its discretion in binding defendant over on the charges of delivery of heroin causing death and delivery of less than fifty grams of heroin.[337] The court concluded that defendant's actions did not constitute delivery of heroin to his girlfriend under either statute, and the prosecution appealed.[338]

The court of appeals affirmed.[339] The court found that the defendant's act of driving his girlfriend to purchase heroin and giving her money to purchase was not constructive delivery of heroin, and he did not aid or abet his girlfriend in the delivery of the heroin.

The statute at issue provides:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.[340]

The issue in the present case, the court of appeals opined, was whether there was sufficient evidence to establish the element of delivery; specifically, that defendant delivered the heroin to his girlfriend which ultimately caused the death of Gregory.[341] The prosecution argued that the defendant could be found guilty under two theories: (1) the defendant constructively delivered the heroin to his girlfriend, or (2) the defendant aided and abetted the delivery of the heroin to his girlfriend.[342]

The court examined the prosecution's first theory—constructive delivery.[343] The court found no evidence of either an actual or attempted transfer of heroin from the defendant to his girlfriend.[344] In order to establish constructive delivery, the court concluded that the defendant would have to "direct[] another person to convey" drugs under his

336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. MICH. COMP. LAWS ANN. § 750.317a (West 2005).
341. *See Plunkett*, 281 Mich. App. at 727, 760 N.W.2d at 853.
342. *Id.*
343. *See id.* at 727-28, 760 N.W.2d at 853-54.
344. *See id.* at 728, 760 N.W.2d at 854.

control to a third party.[345] Applying this definition, the court found no constructive delivery either.[346] The heroin purchased by the girlfriend was not under the defendant's control, nor did he tell the drug dealer to give the drugs to his girlfriend.[347] Thus, the court rejected this theory.[348]

The court then turned to examining the prosecution's alternate theory of aiding and abetting.[349] The prosecution argued that the defendant aided and abetted the delivery of the heroin from the drug dealer to his girlfriend by providing the girlfriend with transportation and the money used to purchase the drugs.[350] The prosecution contended, but for defendant's transportation and money, the girlfriend would not have been able to purchase the heroin that killed Gregory.[351] The court rejected this argument.[352] There was no evidence that the defendant arranged, assisted, or facilitated the drug dealer in delivering the drugs to his girlfriend.[353] The court believed the defendant did aid and abet his girlfriend in receiving the heroin, but did not aid and abet the drug dealer in delivering the heroin to his girlfriend.[354]

D. Fleeing and Eluding

In *People v. Chapo*,[355] the defendant was convicted of fourth-degree fleeing or eluding a police officer.[356] He challenged the conviction on

345. *See id.* at 768, 760 N.W.2d at 854 (quoting Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004)).

346. *See id.* at 729, 760 N.W.2d at 854.

347. *Plunkett*, 281 Mich. App. at 729, 760 N.W.2d at 854.

348. *See id.*

349. *Id.*

350. *Id.* at 729, 760 N.W.2d at 854.

351. *See id.*

352. *See id.* at 730, 760 N.W.2d at 855.

353. *Plunkett*, 281 Mich. App. at 730, 760 N.W.2d at 855 (citing People v. Berry, 101 Mich. App. 399, 402-03, 200 N.W.2d 575, 577 (1981)).

354. *See id.*

355. 282 Mich. App. 360, 770 N.W.2d 68 (2009).

356. *Id.* at 362, 770 N.W.2d at 71. M.C.L.A. section 257.602a provides:

> (1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.
>
> (2) . . . an individual who violates subsection (1) is guilty of fourth degree fleeing and eluding, a felony.

appeal, arguing there was insufficient evidence the police officer was in the lawful performance of his duties when the defendant fled from him.[357]

The conviction resulted from the defendant driving his pickup truck over a fire hose that firefighters were using to put out a fire.[358] A nearby police officer saw the defendant run over the hose, turned on his overhead flashers and stopped defendant's truck.[359] The officer intended to write the defendant a ticket for driving over the fire hose.[360] He asked for the defendant's driver's license, proof of insurance and vehicle registration, but instead of complying, the defendant tossed his license at the officer and told him he was in a hurry and would return later for the ticket.[361] The defendant drove a few feet, was ordered to stop, but still told the officer he intended to leave.[362] The officer demanded he step out of the truck, but the defendant refused.[363] The officer was going to arrest the defendant for obstructing an officer, and when the defendant would not exit his vehicle, the officer shot a taser at him but missed as the defendant drove off.[364]

The defendant argued on appeal that the officer was not lawfully performing his duties when the defendant fled.[365] The court of appeals gave this argument short shrift, noting that the fact that the officer was trying to detain the defendant in order to issue a ticket was sufficient evidence the officer was performing his lawful duties.[366] Driving over a fire hose is a civil infraction,[367] the court noted, and an officer who witnesses a civil infraction can stop and temporarily detain a person to issue a ticket.[368] Moreover, the traffic stop was incomplete when the defendant fled.[369] Therefore, it was irrelevant whether the officer had probable cause to arrest the defendant for obstruction,[370] although the

---

MICH. COMP. LAWS ANN. § 257.602a (West 2010).

357. *Chapo*, 283 Mich. App. at 363, 770 N.W.2d at 72.

358. *See id.* at 362, 770 N.W.2d at 71.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 362, 770 N.W.2d at 71-72.

363. *Chapo*, 283 Mich. App. at 362-63, 770 N.W.2d at 72.

364. *Id.*

365. *Id.* at 363, 770 N.W.2d at 72; *See* MICH. COMP. LAWS ANN. § 257.602a(1) (West 2009).

366. *See id.* at 366, 770 N.W.2d at 73.

367. MICH. COMP. LAWS ANN. § 257.680 (West 2001).

368. *Chapo*, 283 Mich. App. at 366, 770 N.W.2d at 73 (citing MICH. COMP. LAWS ANN. § 257.742(1) (West 2001)).

369. *Id.*

370. *See id.* at 366, 770 N.W.2d at 73-74.

court believed probable cause for a warrantless arrest developed during the course of the traffic stop.[371]

E. Possession of Counterfeiting Tools

In *People v. Harrison*,[372] the defendant was convicted of possession of counterfeit bank bills,[373] possession of counterfeiting tools,[374] and using a computer to commit a crime.[375] On appeal, the defendant challenged whether the language of M.C.L.A. section 750.255, the statute prohibiting possession of counterfeiting tools, includes the use of computers to make forged bills.[376]

The testimony at trial established that an acquaintance of the defendant tried to pay for gasoline with a counterfeit $100 bill.[377] He cooperated with the police investigation and named the defendant as the source of the counterfeit.[378] In a recorded telephone call, the defendant admitted to making money, how he did it, and previous times he had successfully passed it.[379] Digital images of bills were found on his computer, and others testified that he often spoke of printing bills on his computer.[380] Several discarded counterfeit $20 bills were found in his wastebasket and admitted into evidence.[381] The defendant testified he only printed the bills to catch a thief who had been stealing items from his home.[382] He planned to lure the thief with the fake money and then the thief would be caught passing it at a store.[383] The jury convicted him of all counts.[384]

The court of appeals affirmed, holding that the statute prohibiting possession of counterfeiting tools does include the use of a computer to make counterfeit money.[385] The court rejected the defendant's interpretation of the statute, namely, that the statute only prohibits the

371. *See id.* at 366, 770 N.W.2d at 74.
372. 283 Mich. App. 374, 768 N.W.2d 98 (2009).
373. *See* MICH. COMP. LAWS ANN. § 750.254 (West 2004).
374. *See* MICH. COMP. LAWS ANN. § 750.255 (West 2004).
375. *Harrison*, 283 Mich. App. at 375, 768 N.W.2d at 99; *see* MICH. COMP. LAWS ANN. §§ 752.796, 752.797(3)(d), and 752.797(3)(e).
376. *See Harrison*, 283 Mich. App. at 375-76, 768 N.W.2d at 99-100.
377. *Id.* at 376, 768 N.W.2d at 100.
378. *Id.*
379. *Id.*
380. *Id.* at 376-77, 768 N.W.2d at 100.
381. *Id.* at 377, 768 N.W.2d at 100.
382. *Harrison*, 283 Mich. App. at 377, 768 N.W.2d at 100.
383. *Id.*
384. *Id.* at 376, 768 N.W.2d at 100.
385. *Id.*

making of a tool specifically designed to make counterfeit money, and that a computer is not specifically designed to print counterfeit money.[386] The statute[387] was enacted around the time Michigan became a state, the court noted, and has not been substantially changed since then.[388] The court felt that:

> While it is clear to us that the intent of this language is to criminalize the production of a copy or imitation of official, negotiable currency, it is also obvious that the Legislature that drafted the bill could not have anticipated the development of computer technology, let alone how it could be adapted to produce counterfeit currency.[389]

While it is true that the items listed in the statute are all things that are physically manipulated to make an image, the court explained, the statute speaks broadly of tools, instruments or implements.[390] A computer, scanner and printer are tools under the statute, the court concluded, because they are "used as a means of accomplishing a task."[391] Thus, the court held, the phrase "other tool" as used in the statute includes a computer, scanner, printer, and all other modern technology adapted for counterfeiting currency.[392]

VI. JUSTIFICATION

A. Self Defense

In *People v. Conyer*,[393] the defendant was convicted of assault with intent to do great bodily harm less than murder and felony firearm,

386. *Id.* at 379, 768 N.W.2d at 101.

387. *Id.* at 379, 768 N.W.2d at 101-02 (quoting M.C.L.A. § 750.255 which provides: "Any person who shall engrave, make or mend, or begin to engrave, make or mend, any plate, block, press or other tool, instrument or implement, or shall make or provide any paper or other material, adapted or designed for the forging and making any false or counterfeit note, certificate or other bill of credit . . . issued by lawful authority . . . and any such person who shall have in his possession any such plate or block, engraved in whole or in part, or any press or other tool, instrument or implement, or any paper or other material, adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used in forging or making any such false or counterfeit certificates, bills or notes, shall be guilty of a felony.").

388. *Harrison*, 283 Mich. App. at 379, 768 N.W.2d at 101.

389. *Id.* at 380, 768 N.W.2d at 102.

390. *See id.*

391. *Id.* (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2nd ed. 1997)).

392. *Id.*

393. 281 Mich. App. 526, 762 N.W.2d 198 (2008).

stemming from an incident at a party in which he fired shots at two people who threatened him.[394] At trial, his attorney requested the court instruct the jury consistent with the Self-Defense Act,[395] that defendant did not have a duty to retreat before he defended himself after being threatened with harm.[396] The trial court denied the request, stating that the shootings in this case occurred before the effective date of the Self-Defense Act.[397] The court instructed the jury on the common-law rule of self-defense, which includes the duty to retreat.[398]

On appeal, the defendant argued that the trial court erred in instructing the jury that he had a duty to retreat, and that the Self-Defense Act applied retroactively to his case.[399] The court of appeals disagreed, applying principles of statutory construction to determine whether the Self-Defense Act applied retroactively. The court noted that under *Russo*, a statute is presumed to be prospective "unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect."[400] The exception to this rule is if a statute is remedial or procedural in nature, the court stated.[401] If a statute affects or creates substantive rights, it is not remedial, and therefore not given retroactive effect unless the legislature has clearly intended otherwise, the court emphasized.[402] The statute at issue here specifically states that it "does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force."[403] Here, the shootings took place in January 2006; the

---

394. *Id.* at 527, 762 N.W.2d at 199.

395. M.C.L.A. section 780.972 provides, in part:

> (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.

MICH. COMP. LAWS ANN. § 780.972 (West 2006).

396. *See Conyer*, 281 Mich. App. at 528, 762 N.W.2d at 200.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Conyer*, 281 Mich. App. At 529, 762 N.W.2d at 200.

401. *See id.* (citing *Russo*, 439 Mich. at 594, 487 N.W.2d at 702).

402. *See Conyer*, 281 Mich. App. at 528, 762 N.W.2d at 200 (citing Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 585, 624 N.W.2d 180, 183 (2001)).

403. *Id.* at 530, 762 N.W.2d at 200 (quoting MICH. COMP. LAWS ANN. § 780.973 (West 1998)).

Self-Defense Act became effective October 1, 2006.[404] The court noted that the Act "created a new substantive right, i.e., the right to stand one's ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law."[405] Therefore, the court concluded, it does not apply retroactively unless the legislature expressed a clear intent that it so apply, which did not occur here.[406] The act contains no language expressing an intent that it apply retroactively, the court noted, and in fact, contains the effective date of October 1, 2006.[407] This, the court believed, "is an indication that the Legislature intended the provision to apply prospectively from that date."[408] Since the defendant's conduct occurred prior to the effective date of the act, his right to use deadly force was governed by the common law rule to retreat, and therefore, the jury was instructed properly during his trial.[409]

In *People v. Dupree*,[410] an incorrect jury instruction resulted in error that required reversal of the defendant's conviction for felon in possession of a firearm. Dupree argued on appeal that the trial court incorrectly instructed the jury on his theory that he could not be convicted of felon in possession if he only temporarily took possession of the weapon at issue to defend himself during a life-threatening situation.[411]

The court of appeals determined that this appeal involved a preliminary determination as to whether temporary possession of a firearm for self-defense during a life-threatening situation is an affirmative defense under Michigan law.[412] Having answered that question in the affirmative, the court then found it necessary to address

404. *Id.* at 530, 762 N.W.2d at 200-01.

405. *See id.* at 530, 762 N.W.2d at 201.

406. *Id.* at 530-31, 762 N.W.2d at 201.

407. *Id.* at 531, 762 N.W.2d at 201.

408. *See Conyer*, 281 Mich. App. at 531, 762 N.W.2d at 201.

409. *Id.* The court noted that the use of deadly force in self-defense is generally justified if the person "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *Id.* (quoting People v. Heflin, 434 Mich. 482, 502, 456 N.W.2d 10, 19 (1990)). Unless a person is attacked inside their own home, or under a "sudden, fierce, and violent attack," there is a common-law duty to retreat as far as safely possible. People v. Riddle, 467 Mich. 116, 118-21, 649 N.W.2d 30, 34-36 (2002). Under section 2 of the Self-Defense Act, there is no duty to retreat if the person has not committed or is not committing a crime and has a legal right to be where the person is at the time he uses deadly force. MICH. COMP. LAWS ANN. § 780.972(1) (West 2006). The court noted, "Section 2 of the SDA thus constitutes a substantive change to the right of self defense." *Conyer*, 281 Mich. App. at 530, 762 N.W.2d at 201.

410. 284 Mich. App. 89, 111-12, 771 N.W.2d 470, 483-84 (2009).

411. *Id.* at 110, 771 N.W.2d at 483.

412. *Id.* at 91-93, 771 N.W.2d at 473-74.

two additional issues: (1) whether that defense applied in the instant case, and (2) whether the trial court properly instructed the jury on that defense.[413]

The court's opinion contained a lengthy recitation of the facts that led to defendant Dupree's conviction. Dupree went to a family party, during which he got into an argument with Reeves, one of the other guests.[414] The argument turned into a fight. According to Dupree, Reeves had a gun in his waistband, and both men struggled to control it.[415] Dupree testified that while they were struggling for the gun, it discharged, hitting Reeves.[416] Dupree kept the gun and later threw it out the car window as he drove away from the scene.[417]

Dupree was charged with five felonies: (1) assault with intent to murder Reeves;[418] (2) assault with intent to murder another party guest who contradicted Dupree's testimony by stating Dupree put the gun to her chin and pulled the trigger;[419] (3) felon in possession of a firearm; (4) felonious assault;[420] and (5) carrying or possessing a firearm during the commission of a felony.[421]

Dupree's counsel argued that he did not assault the other guest, and that his actions against Reeves were in self-defense.[422] He also argued that Dupree's temporary possession of the firearm was justified under the circumstances.[423] However, Dupree's attorney did not request a special jury instruction to that effect, only a standard self-defense instruction.[424] The court, on its own initiative, instructed the jury as follows:

> As to being a felon in possession, [Dupree] claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.[425]

---

413. *Id.*
414. *Id.* at 93-95, 771 N.W.2d at 474-75.
415. *Id.*
416. *Dupree*, 284 Mich. App. at 93-95, 771 N.W.2d at 474-75.
417. *Id.*
418. MICH. COMP. LAWS ANN. § 750.83 (West 2004).
419. *Dupree*, 284 Mich. App. at 91-95, 771 N.W.2d at 473-75.
420. MICH. COMP. LAWS ANN. § 750.82 (West 2004).
421. MICH. COMP. LAWS ANN. § 750.227b (West 2004).
422. *Dupree*, 284 Mich. App. at 93-95, 771 N.W.2d at 474-75.
423. *Id.*
424. *Id.*
425. *Id.*

Dupree's counsel objected to this instruction, disagreeing with the last phrase "any longer than necessary to defend himself."[426] His attorney preferred "any longer than necessary."[427] The trial court gave defense counsel the opportunity to research the issue and return the next day, however, defense counsel could not find any authority to suggest the original instruction was incorrect.[428] The prosecution, however, suggested the court instruct the jury on "momentary innocent possession as a defense to the charge of felon in possession," which the trial court did as follows:[429]

> That the defendant had the gun because he had taken it from someone else who was in wrongful possession of it, or he took it from him because of necessity, because he needed to. Second, that the possession after taking the gun was brief. And third, that it was the defendant's intention to deliver the gun to the police at the earliest possible time.[430]

Dupree's counsel objected to this instruction as well, because possession for self-defense is a separate defense that does not require an intent to deliver the gun to the police.[431] The jury deliberated and acquitted Dupree of all the charges except felon in possession.[432]

The court examined whether a defendant can assert an affirmative defense to felon in possession. "An affirmative defense," the court wrote, "is not a defense that is directed at an element of the crime, rather it is one 'that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it.'"[433] According to the court, Michigan courts historically recognize two affirmative defenses that fit the facts of this case: duress and self-defense.[434] The defense of duress applies when the defendant acted under threat of death or serious bodily harm.[435] Under *People v. Luther*, to establish duress a defendant must offer evidence that

---

426. *Id.*
427. *Id.*
428. *Dupree*, 284 Mich. App. at 93-95, 771 N.W.2d at 474-75.
429. *Id.*
430. *Id.*
431. *Id.*
432. *Id.* at 97, 771 N.W.2d at 476.
433. *Id.* at 99, 771 N.W.2d at 477 (quoting People v. Lemons, 454 Mich. 234, 246 n.15, 562 N.W.2d 447 (1997) (quoting 21 Am. Jur. 2d *Criminal Law* § 183)).
434. *Dupree*, 284 Mich. App. at 100, 771 N.W.2d at 477-78.
435. *Id.* (citing People v. Luther, 494 Mich. 619, 622, 232 N.W.2d 184, 186-87 (1975)).

(A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

(B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

(C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

(D) The defendant committed the act to avoid the threatened harm.[436]

In the instant case, the court opined, the defense of duress seems applicable.[437] Dupree had to either commit the crime of being a felon in possession by taking Reeves' gun away from him, or risk death or harm by allowing Reeves to keep it.[438] The court grappled with the issue of whether the felon-in-possession statute had a mens rea requirement, requiring criminal intent.[439] The court noted that the Michigan Supreme Court has recognized that criminal statutes must be interpreted in light of Anglo-American criminal jurisprudence and common law.[440] Applying the same reasoning, the court of appeals concluded that the felon-in-possession statute had to be construed in accordance with common law, which necessarily includes the defenses of duress and self-defense.[441]

The court examined the defense of justification, reasoning that a defendant may be justified in temporarily possessing a firearm even though the possession is unlawful, in order to prevent death or serious harm.[442] The court noted that the term "justification" is used interchangeably with duress, necessity and self-defense.[443] In order to raise such a defense to being a felon in possession, a defendant must show:

436. *Id.* at 100, 771 N.W.2d at 478 (citing *Luther,* 494 Mich. at 623, 232 N.W.2d at 187).

437. *Id.* at 101, 771 N.W.2d at 478.

438. *Id.* at 99-101, 771 N.W.2d at 477-79.

439. *Id.* at 102, 771 N.W.2d at 479.

440. *Dupree,* 284 Mich. App. at 102, 771 N.W.2d at 479 (citing People v. Tombs, 472 Mich. 446, 697 N.W.2d 494 (2005)).

441. *Id.* at 102-03, 771 N.W.2d at 479.

442. *Id.* at 106, 771 N.W.2d at 481.

443. *Id.* at 104-05, 771 N.W.2d at 480.

> (1) The defendant or another person was under an unlawful and immediate threat that was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, and the threat actually caused such fear of death or serious bodily harm in the mind of the defendant at the time of the possession of the firearm.
>
> (2) The defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct.
>
> (3) The defendant had no reasonable legal alternative to taking possession, that is, a chance to both refuse to take possession and also to avoid the threatened harm.
>
> (4) The defendant took possession to avoid the threatened harm, that is, there was a direct causal relationship between the defendant's criminal action and the avoidance of the threatened harm.
>
> (5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed.[444]

In the instant case, the court felt that Dupree had introduced sufficient evidence of each element of the justification defense.[445] However, his counsel did not request such an instruction but chose to rely on a self-defense instruction.[446] The original instruction the trial court gave to the jury implied that the justification defense applies only if the defendant gives up the unlawful possession of the firearm at the earliest possible opportunity once the danger has passed.[447] This instruction was not entirely inaccurate, the court noted, and may not have prejudiced Dupree's case.[448] The problem occurred the next day when the prosecution requested a modification of that instruction to tell the jury it must also find that Dupree intended to turn the gun over to the police within a reasonable time.[449] Dupree's self-defense theory did not include a requirement that he intended to turn the gun over to the police;

444. *Id.* at 108, 771 N.W.2d at 482.
445. *Id.*
446. *Dupree*, 284 Mich. App. at 110, 771 N.W.2d at 483.
447. *Id.*
448. *Id.*
449. *Id.* at 110-11, 771 N.W.2d at 483.

rather, the court noted, his unlawful possession was excused as long as his possession was necessary to ensure his protection.[450] These were two different defense theories, the court wrote, and could have been presented to the jury as alternatives.[451] However, the modified instruction to the jury was different from the justification defense that Dupree had presented evidence of during the trial.[452] The error was not harmless, the court noted, because there was no evidence Dupree intended to turn the gun over to the police.[453] Thus, the trial court effectively directed a verdict of guilt on the charge of being a felon-in-possession.[454] This was a substantial error, the court concluded, requiring the conviction be vacated and the case remanded for a new trial.[455]

VII. CRIMINAL ISSUES AT TRIAL

A. Lesser Offense Instructions

In *People v. Johnson*,[456] the court of appeals reversed the defendant's conviction for felonious assault[457] and remanded the case for entry of a judgment of conviction of misdemeanor assault,[458] following the failure of the trial court to instruct the jury on the lesser-included offense of simple assault.[459] The defendant was arrested following an altercation in which he admitted hitting the victim with his fists after the victim pushed him.[460] During a search subsequent to his arrest, the police found a gun and charged him with felonious assault and felony firearm.[461] At trial, the defendant requested a jury instruction on simple assault, which the trial court denied, because it was inconsistent with the defense of self-defense, which the defendant had advanced.[462]

In reversing, the court of appeals noted that the trial court is required, upon request, to instruct the jury regarding any necessarily included lesser offense, "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense,

450. *Id.* at 111, 771 N.W.2d at 483-84.
451. *Id.* at 111-12, 771 N.W.2d at 484.
452. *Dupree*, 284 Mich. App. at 111, 771 N.W.2d at 483-84.
453. *Id.* at 112, 771 N.W.2d at 484.
454. *Id.*
455. *Id.*
456. No. 276086, 2008 WL 2813028 (Mich. Ct. App. July 22, 2008).
457. MICH. COMP. LAWS ANN. § 750.82 (West 2004).
458. MICH. COMP. LAWS ANN. § 750.81(1) (West 2004).
459. *Johnson*, 2008 WL 2813028, at *5.
460. *See id.*
461. MICH. COMP. LAWS ANN. § 750.227b (West 2004).
462. *Johnson*, 2008 WL 2813028, at *4.

and a rational view of the evidence would support it."[463] Simple assault is "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery."[464] Felonious assault, the court noted, has the additional element of the use of a weapon.[465] The court of appeals believed that a jury instruction on simple assault was supported by the evidence in this case because both the defendant and a witness testified that the defendant struck the victim in the face with his fist, and did not have a gun.[466] There was "substantial evidence" of simple assault, and therefore, the court remanded for entry of a judgment of conviction of misdemeanor simple assault.[467] The court refused to overturn defendant's felony firearm conviction, however, noting an acquittal of an underlying felony conviction does not require reversal of a felony firearm conviction.[468]

B. Evidence of Flight

In *People v. Smelley*,[469] the court reversed the defendant's jury convictions for second-degree murder,[470] felon in possession of a firearm,[471] felony firearm,[472] and assault with intent to do great bodily harm less than murder[473] due to introduction of evidence that defendant was arrested in Georgia two weeks after the homicide as evidence of flight.[474] On the first day of defendant's trial, the prosecutor indicated she was going to introduce evidence that the defendant was arrested in

---

463. *Id.* at *4 (citing People v. Silver, 466 Mich. 386, 388, 646 N.W.2d 150, 151 (2002); People v. Cornell, 466 Mich. 335, 356, 646 N.W.2d 127, 139 (2002) (overruled in part on other grounds)).

464. *Id.* at *4 (citing People v. Grant, 211 Mich. App. 200, 202, 535 N.W.2d 581, 582 (1995)).

465. *Johnson,* 2008 WL 2813028, at *4. *See* People v. Jones, 443 Mich. 88, 100, 504 N.W.2d 158, 164 (1993) (felonious assault is "a simple assault aggravated by the use of a weapon").

466. *Id.* at *5.

467. *Id.*

468. *Id.* (citing People v. Garrett, 161 Mich. App. 649, 652-53, 411 N.W.2d 812, 813 (1987)).

469. People v. Smelley, No. 274033, 2009 WL 1508884 (Mich. Ct. App. May 26, 2009).

470. MICH. COMP. LAWS ANN. § 750.317 (West 2004).

471. MICH. COMP. LAWS ANN. § 750.224f (West 2004).

472. MICH. COMP. LAWS ANN. § 750.227b (West 2004).

473. MICH. COMP. LAWS ANN. § 750.84 (West 2004).

474. *Smelley*, 2009 WL 1508884, at *10. The defendant also appealed several of the trial court's other evidentiary rulings, which were also a basis for the court of appeals' reversal. *Id.*

Georgia two weeks after the homicide.[475] Defense counsel objected, based on untimely notice, relevance, and prejudice to the defendant.[476] Defense counsel further asserted that the defendant did not know he was wanted for a crime, as there was no arrest warrant at that time.[477] The trial court allowed the evidence, which consisted of testimony from a federal agent as to the circumstances of defendant's arrest.[478]

The court of appeals reversed. The court noted that, although evidence of flight is usually admissible because it is probative of a defendant's consciousness of guilt,[479] such is not the case where a defendant merely leaves the jurisdiction prior to issuance of an arrest warrant. There was no evidence in the record, the court found, that defendant left the area due to fear of apprehension for a crime.[480] There was no reasonable inference of "flight" in the legal sense, the court emphasized, and the prosecutor never rebutted defense counsel's assertion that the defendant had no knowledge of criminal charges against him.[481] Moreover, the court found, even if this had been circumstantial evidence of defendant's guilt, the probative value was greatly outweighed by the danger of unfair prejudice.[482] Therefore, the court concluded that the trial court abused its discretion in admitting this evidence, and combined with the other evidentiary error committed during the trial, the abuse necessitated reversal and retrial.[483]

C. Defective Verdict Form

In *People v. Wade*,[484] the defendant was charged with first-degree murder and felony firearm. The jury was given a verdict form which included the lesser offenses of second degree murder and involuntary

475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.*
479. *Smelley*, 2009 WL 1508884, at *10 (citing People v. Coleman, 210 Mich. App. 1, 4, 532 N.W.2d 885, 887 (1995)).
480. *Id.*
481. *Id.*
482. *Id.* (citing MICH. R. EVID. 403).
483. *Id.* The court found that several significant evidentiary errors occurred during the trial, including allowing inadmissible hearsay under Michigan Rule of Evidence 803(3); admitting third-party testimony concerning a statement of identification which did not meet the standard of Michigan Rule of Evidence 801(d)(1); and permitting the admission of prior bad acts evidence relating to defendant's past possession of firearms under Michigan Rule of Evidence 404(b). *Id.*
484. 283 Mich. App. 462, 771 N.W.2d 447 (2009).

manslaughter.[485] He challenged the verdict form, arguing it did not comply with the standard jury form because it did not give the jury the option of finding the defendant not guilty of all the charges, or not guilty of the lesser included offenses.[486] The defendant's attorney raised the issue twice, and the trial court disagreed both times.[487] After the jury returned a verdict of guilty as to the lesser offense of involuntary manslaughter, the defendant moved to set aside the verdict, but the trial court stated the verdict form was "self-explanatory" and denied the motion.[488]

The verdict form and the instructions to the jury were confusing, the court of appeals found, and reversed.[489] The defect in the verdict form was the fact that it did not allow the jury to return a general verdict of not guilty as to all of the charges, the court noted.[490] Also, the form should have allowed the jury to find the defendant not guilty of the lesser offenses.[491] If the form had included these changes, it would have been correct.[492] The same error caused the court to reverse the defendant's conviction in *People v. Garcia*,[493] where the verdict form was very similar to the verdict form in the instant case.

D. Witness Intimidation

In *People v. Bacon*,[494] the defendant challenged certain evidence admitted at his trial that went to prove his motive for murder. He was convicted of second-degree murder,[495] assault with intent to murder,[496] felon in possession of a firearm,[497] and possession of a firearm during the commission of a felony.[498] He was sentenced as a fourth-degree habitual

485. *Id.* at 465, 771 N.W.2d at 449.
486. *Id.* at 467, 771 N.W.2d at 450.
487. *Id.*
488. *Id.*
489. *Id.* at 468, 771 N.W.2d at 451.
490. *Wade,* 283 Mich. App. at 468, 771 N.W.2d at 451.
491. *Id.*
492. *Id.*
493. No. 94233, slip op. (Mich. Ct. App. Oct. 19, 1988). The court noted that, although *Garcia* was an unpublished opinion and not binding precedent, the Michigan Supreme Court subsequently approved of the holding in *People v. Garcia*. 448 Mich. 442, 446, 531 N.W.2d 683, 685 (1995).
494. No. 274242, 2008 WL 2356359 (Mich. Ct. App. June 10, 2008).
495. MICH. COMP. LAWS ANN. § 750.317 (West 2004).
496. MICH. COMP. LAWS ANN. § 750.83 (West 2004).
497. MICH. COMP. LAWS ANN. § 750.224f (West 2004).
498. MICH. COMP. LAWS ANN. § 750.227b (West 2004).

offender to sixty to ninety years imprisonment.[499] During the trial, he argued that the court should have disallowed testimony of the shooting victim's mother, as it was prejudicial to him.[500] He also argued that the statements of two women whom he was with following the shooting were obtained as a result of police intimidation.[501]

The court of appeals affirmed. The court noted that "[a] defendant's threat against a witness is generally admissible to show consciousness of guilt."[502] In addition, the court stated, the prosecutor could "elicit testimony from a witness regarding threats . . . to show how those threats affected the witness' testimony or to explain a prior inconsistent statement."[503] Here, the prosecutor read into the record a witness' testimony at an investigative hearing after she denied at the trial that she stated she had been threatened by the defendant and his family.[504] The court determined that this evidence was properly admitted, since it helped to explain the witness' inconsistent statements and was relevant to her credibility.[505]

As to the issue of witness intimidation, the court noted that in order to prevail, the defendant would have to show a "clear or obvious error that affected the outcome" of his trial, since he had not preserved the issue for review.[506] Although the successful intimidation of a witness by the police violates a defendant's due process rights,[507] the court believed there was no intimidation here. The witnesses both testified at trial that the police threatened to take away their children if they did not incriminate the defendant.[508] However, both admitted that their statements to the police were truthful, even after the police threatened to take away their children.[509] The court felt that since both witnesses

499. *Bacon*, 2008 WL 2356359, at *1.

500. *Id.* at *2.

501. *Id.*

502. *Id.* at *3 (citing People v. Scholl, 453 Mich. 730, 740, 556 N.W.2d 851, 856 (1996)).

503. *Id.* at *3 (citing People v. Clark, 124 Mich. App. 410, 412, 335 N.W.2d 53, 54 (1983)).

504. *Id.* at *3.

505. *Bacon,* 2008 WL 2356359, at *4 (citing People v. Mills, 450 Mich. 61, 72 (1995), 537 N.W.2d at 915-16; *Clark*, 124 Mich. App. at 412, 335 N.W.2d at 54).

506. *Id.* at *2 (noting an unpreserved issue is reviewed for plain error only under *People v. Carines*, 460 Mich. 750, 763-64, 597 N.W.2d 130, 138-39 (1999)).

507. *See* People v. Canter, 197 Mich. App. 500, 569, 496 N.W.2d 336, 345 (1992); and People v. Stacy, 193 Mich. App. 19, 25, 484 N.W.2d 675, 679 (1992).

508. *Bacon*, 2008 WL 2356359, at *2.

509. *Id.*

testified that their previous incriminating statements to the police were truthful, there was no plain error requiring reversal on this issue.[510]

E. Juror Misconduct

Michael Miller was convicted by a jury of first-degree criminal sexual conduct.[511] Prior to sentencing, the defendant learned that a juror had not revealed that he had been convicted of assault with intent to commit sexual conduct, and of assaulting his sister and another person.[512] The juror in question indicated, at an evidentiary hearing, that he thought he did not have to reveal the prior convictions because they were old.[513] He denied being intentionally untruthful.[514] The juror testified he had tried to be fair during the jury deliberations and that he had made no effort to improperly persuade other members of the jury.[515] After hearing the juror's testimony, the trial judge denied a defense motion for a new trial. The court ruled there was no evidence the defendant had suffered any actual prejudice.[516] The trial judge further indicated that the prosecutor, and not the defendant, would likely have been the one seeking to excuse the juror in question if the information had been known.[517] After sentencing, the defendant appealed and the court of appeals reversed the conviction and remanded the matter for a new trial because of the juror misconduct.[518] The Supreme Court granted the prosecutor's application for leave to appeal.

In order to be eligible to serve on a jury in Michigan, a person must not have previously been convicted of a felony.[519] A person who has been convicted of a felony may be challenged for cause.[520] However, if an unqualified person has served on a jury that has reached a verdict, the verdict will not be disturbed unless the party claiming invalidity

510. *Id.*
511. People v. Miller, 482 Mich. 540, 542, 759 N.W.2d 850, 853 (2008).
512. *Id.*
513. *Id.*
514. *Id.* at 542-43, 759 N.W.2d at 853-54.
515. *Id.* at 543, 759 N.W.2d at 853-54.
516. *Id.*
517. *Miller*, 482 Mich. at 543, 759 N.W.2d at 853-54.
518. *Id.* The Michigan Court of Appeals opinion (unpublished) is *People v. Miller*, No. 273488, 2008 WL 161998 (Mich. Ct. App. Jan. 17, 2008).
519. MICH. COMP. LAWS ANN. § 600.1307(a)(1)(e) (West 2009) (providing that to qualify as a juror a person shall "not have been convicted of a felony").
520. MICH. CT. R. 2.511(D)(1) provides that a person may be challenged for cause if the person "is not qualified to be a juror."

demonstrates actual prejudice.[521] Clearly, in the instant case the juror, because of the prior conviction, was not qualified to serve as a juror.[522] Thus, the issue before the Michigan Supreme Court was whether or not the defendant deserved a new trial because the convicted felon participated as a juror.[523]

There is no constitutional right to a felon-free jury.[524] The right to a felon-free jury is granted by statute and requires a new trial only if the defendant in a criminal case is able to demonstrate actual prejudice because of a violation of the statutory right.[525] Jurors in Michigan are presumed to be impartial.[526] The defendant in a criminal case has the burden of establishing that a juror was not impartial, or that at least there is a reasonable doubt about a juror's impartiality.[527] In the instant case, the defendant's only complaint about this particular juror was the prior felony convictions. No evidence was offered that the juror was not impartial.[528] Nor was any evidence offered to demonstrate that the defendant was prejudiced by the presence of this particular juror on the jury.[529] The court noted there was no evidence that the juror in question had tried to influence any of the other jurors one way or the other.[530] It also noted that the trial court found the juror in question would have been more harmful to the prosecutor and more sympathetic to the defendant.[531] Accordingly, the court believed the trial judge had committed no clear error in finding the absence of any prejudice to the defendant.[532]

Finally, the court considered whether having a convicted felon on a jury constituted structural error, which is defined as a fundamental constitutional error.[533] The court could find no constitutional error because there is no constitutional right to have a jury without convicted felons serving thereon. In other words, the presence of a convicted felon on a jury does not constitute constitutional error or structural error.[534]

---

521. MICH. COMP. LAWS ANN. § 600.1354(1) (West 209) (providing that jury verdicts are not invalid "unless the party claiming invalidity. . . demonstrates actual prejudice").

522. *Miller,* 482 Mich. at 546, 759 N.W.2d at 855.

523. *Id.*

524. *Id.* at 547, 759 N.W.2d at 855-56.

525. *Id.* at 548, 759 N.W.2d at 856.

526. *Id.* at 550, 759 N.W.2d at 857-58. The court cited *Holt v. People*, 13 Mich. 224, 228 (1865).

527. *Id.*

528. *Miller,* 482 Mich. at 552, 759 N.W.2d at 858-59.

529. *Id.* at 553, 759 N.W.2d at 859.

530. *Id.* at 554, 759 N.W.2d at 860.

531. *Id.*

532. *Id.* at 554-55, 759 N.W.2d at 860.

533. *Id.* at 556, 759 N.W.2d at 861.

534. *Miller*, 482 Mich. at 556, 759 N.W.2d at 861.

The court either distinguished or overruled any prior authority in Michigan case law to the contrary.[535] The court was unwilling to reverse the trial court finding of absence of prejudice to the defendant and concluded that court had not abused its discretion. It reversed the matter and remanded it to the court of appeals.[536]

F. Perjurious Prosecution Witnesses

The defendant in *People v. Aceval*[537] was charged with possession with intent to distribute cocaine[538] and conspiracy to distribute cocaine.[539] One of the witnesses in the case was a confidential informant (CI).[540] Prior to trial, the defendant sought the identity of the CI. Further, the defense requested that the trial judge interview the officer in charge of the investigation in camera.[541] During that interview, the police witness told the judge the identity of the CI and outlined the remuneration the CI was to receive for his services.[542] The judge thereafter denied the defense request for the identity of the CI.[543]

In subsequent court proceedings the police lied about their relationship with the CI. The prosecutor, again in camera, told the judge she knew the police officer had committed perjury but, because of danger to the CI, this was not mentioned in court.[544] The judge indicated, still in camera, that it was "appropriate" for the witness to lie, indicating the trial judge thought the CI was in grave danger.[545] At trial, the police continued their testimonial deception. Indeed, the deception expanded to include untruthful testimony by the CI himself.[546] At the close of the trial, the jury was unable to reach a verdict, and a mistrial was declared.[547]

Prior to the second trial the defense learned the identity of the CI and sought dismissal of the case because of misconduct by the trial judge and

535. *Id.* at 556-61, 759 N.W.2d at 861-63. The court distinguished *People v. DeHaven*, 321 Mich. 327, 32 N.W.2d 468 (1948) and overruled *People v. Daoust*, 228 Mich. App. 1, 577 N.W.2d 179 (1998).

536. *Miller*, 482 Mich. at 561, 759 N.W.2d at 863.

537. 282 Mich. App. 379, 383, 764 N.W.2d 285, 289 (2009).

538. MICH. COMP. LAWS ANN. § 333.7401(2)(a)(I) (West 2009).

539. MICH. COMP. LAWS ANN. § 750.157a (West 2004).

540. *Aceval*, 282 Mich. App. at 382, 764 N.W.2d at 288-89.

541. *Id.* at 383, 764 N.W.2d at 289.

542. *Id.*

543. *Id.* at 383, 764 N.W.2d 290.

544. *Id.*

545. *Id.*

546. *Aceval*, 282 Mich. App. at 383-84, 764 N.W.2d at 289-90.

547. *Id.* at 384, 764 N.W.2d at 289-90.

the prosecutor in allowing perjured testimony.[548] Furthermore, the defense requested the disqualification of the prosecutor and the trial judge.[549] The trial judge immediately disqualified herself from the case,[550] and the successor judge unsealed all of the in camera interviews.[551] Defendant's retrial began shortly thereafter. However, before trial the prosecution learned that a prosecution witness might have previously provided false testimony in support of the defense.[552] That witness subsequently purged himself of his false testimony and, in turn, the defendant plead guilty to possession with intent to distribute cocaine.[553] The defendant subsequently appealed, claiming the presentation of perjured testimony at his trial constituted prosecutorial misconduct to such an extent that the subsequent prosecution should have been barred.[554]

The court began its analysis by noting that a conviction obtained by knowingly using perjured testimony violates a defendant's due process rights.[555] Such a conviction must be reversed if there is any reasonable possibility that the perjured testimony influenced the jury. It is the effect of the misconduct and not the bad action of the prosecutor which is the crucial element.[556]

The court distinguished double jeopardy violations from due process violations.[557] A double jeopardy violation bars retrial or second prosecutions after an acquittal. Further, double jeopardy violations are not necessary to establish a due process violation, where the issue is whether the defendant received a fair trial.[558] The remedy for an unfair trial is a new trial.[559] The court found no evidence that the prosecutor's misconduct was for the purpose of preventing an acquittal. An issue of that sort might implicate double jeopardy considerations.[560] The court also noted that the defendant was not convicted at the end of his first trial. Rather, the judge declared a mistrial because of a hung jury. In the court's opinion, the misconduct did not prejudice the defendant because

548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. *Aceval*, 282 Mich. App. at 385, 764 N.W.2d at 290.
553. *Id.* at 385, 764 N.W.2d at 290. Prosecutors most likely dropped the conspiracy charge. The court made no further reference to it.
554. *Id.* at 382, 764 N.W.2d at 288.
555. *Id.* at 389, 764 N.W.2d at 292.
556. *Id.*
557. *Id.* at 389-90, 764 N.W.2d at 292-93. *See* U.S. CONST amend. V.
558. *Aceval*, 282 Mich. App. at 391, 764 N.W.2d at 293.
559. *Id.*
560. *Id.* at 391 n.5, 764 N.W.2d at 294 n.5.

he was already entitled to a new trial due to the hung jury. Accordingly, the court dismissed the defendant's due process claim.[561]

VIII. MISCELLANEOUS ISSUES

A. Sexual Offender's Registration Act (SORA)

In *People v. Althoff*,[562] the defendant challenged the requirement that he register as a sex offender under the state's Sex Offenders Registration Act (SORA).[563] The defendant pled guilty to possession with intent to disseminate obscene material.[564] Defendant admitted to downloading pornographic material.[565] After he was ordered to register as a sex offender, he filed an appeal arguing that he had pled guilty to an offense that was not listed in SORA as requiring registration upon conviction, and that there was no evidence the offense involved a minor.[566] The court of appeals remanded the case to the trial court for development of the record on the issue of whether the defendant was convicted of a sexual offense against a person under eighteen years old.[567] As a result, the trial court held an evidentiary hearing, and the police detective who investigated the case testified.[568] He indicated that he had viewed the contents of the computer disks taken from the defendant's home, and they contained images of young teenage females.[569] On the basis of his testimony, the court concluded that the defendant had been convicted of a sexual offense involving an individual less than eighteen years old, and therefore, he had to register as a sex offender under SORA.[570] Defendant appealed, and the court of appeals dismissed the petition for lack of

---

561. *Id.* at 393, 764 N.W.2d at 294.

562. 280 Mich. App. 524, 526, 760 N.W.2d 764, 765 (2008).

563. MICH. COMP. LAWS ANN. § 28.721-36 (West 2009).

564. *Althoff*, 280 Mich. App. at 526, 760 N.W.2d at 765. Defendant was originally charged with possession of child sexually abusive material, MICH. COMP. LAWS ANN. § 750.145c(4) (West 2009), but was allowed to plead guilty to the reduced charge of possession with intent to disseminate obscene material. *Althoff*, 280 Mich. App. at 527, 760 N.W.2d at 766.

565. *Althoff*, 280 Mich. App. at 527, 760 N.W.2d at 766.

566. *Id.*

567. *Id.* *See* People v. Althoff, No. 264980, slip op. at 1 (Mich. Ct. App. Nov. 23, 2005).

568. *Althoff*, 280 Mich. App. at 527-28, 760 N.W.2d at 766.

569. *Id.*

570. *Id.* at 528, 760 N.W.2d at 766. The trial court made this finding despite the fact that the discs and any pictures printed from them had been mistakenly lost or destroyed following the defendant's sentencing and were, therefore, unavailable at the evidentiary hearing. *Id.*

merit.[571] He applied for leave to appeal to the Michigan Supreme Court, which, instead of granting leave, remanded the case to the court of appeals to address four specific issues.[572]

SORA requires individuals convicted of a listed offense after October 1, 1995, to register as a sex offender.[573] Along with a list of offenses,[574] the statute contains a catchall provision, which requires registration for "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than eighteen years of age."[575] *People v. Meyers*[576] established that the sentencing court is allowed to consider the underlying facts in determining whether or not the offense is a sexual offense.[577] In its December 8, 2006 order in the instant case, the Michigan Supreme Court labeled this portion of the *Meyers* opinion dictum.[578] The court of appeals subsequently decided *People v. Golba*,[579] which also addressed the catchall provision of SORA. Defendant Golba was charged with possession of child sexually abusive material and unauthorized access to computers.[580] Golba was convicted of unauthorized access to computers and ordered to register as a sex offender.[581] The court of appeals followed the *Meyers* court interpretation

---

571. People v. Althoff, No. 264980, slip op. at 1 (Mich. Ct. App. Mar. 3 2006).

572. *Althoff*, 280 Mich. App. at 528, 760 N.W.2d at 767. According to *Althoff*, the four issues were:

> (1) whether MCL 28.722(e)(xi) requires registration of an offender based solely on the legal elements of the offense for which he stands convicted, or whether the facts of the particular offense are to be considered in determining if the offense by its nature constitutes a sexual offense against an individual who is less than 18 years of age; (2) whether the possession of pornographic photographs constitutes an offense against an individual who is less than 18 years of age; (3) if possession is an offense against an individual, what evidentiary standards apply to a hearing held to determine if a defendant must register under the Sex Offender[s] Registration Act; and (4) whether the evidence in this case was sufficient to satisfy the statutory requirement that the individual be less than 18 years of age.

Id. at 528, 760 N.W.2d at 767.

573. *Id.* at 529, 760 N.W.2d at 767 (citing MICH. COMP. LAWS ANN. § 28.723(1)(a) (West 2009)).

574. MICH. COMP. LAWS ANN. § 28.722(e) (West 2009).

575. MICH. COMP. LAWS ANN. § 28.722(e)(xi).

576. 250 Mich. App. 637, 649 N.W.2d 123 (2002).

577. *Id.* at 650, 649 N.W.2d at 130-31.

578. People v. Althoff, 477 Mich. 961, 724 N.W.2d 283 (2006).

579. 273 Mich. App. 603, 729 N.W.2d 916 (2007).

580. *Id.* at 605, 729 N.W.2d at 919; MICH. COMP. LAWS ANN. § 750.145(c)(4) (West 2009) (possession of child sexually abusive material); MICH. COMP. LAWS ANN. § 752.795 (West 2009) (unauthorized access to computers).

581. *Golba*, 273 Mich. App. at 605, 279 N.W.2d at 919.

of the catchall provision, finding the underlying facts of the case involved a sexual offense and a minor under the age of eighteen.[582] The court of appeals in *Althoff* noted that, in light of the supreme court's order in this case, the *Golba* court was incorrect in finding it was bound to follow the *Meyers* holding.[583] However, the court concluded it was bound by the prior appellate panel's interpretation of the catchall provision in *Golba*.[584] The court found that defendant Althoff's offense—possession with intent to disseminate obscene material—involved child pornography and was, therefore, exactly the type of offense SORA was targeted to address.[585] The court concluded that, considering its previous holdings,[586] "a sentencing court may consider all record evidence in determining if a defendant must register under SORA, as long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence."[587]

Finally, the court concluded, there was sufficient evidence to satisfy the requirement under the catchall provision that the victim of Althoff's offense was less than eighteen years of age.[588] Althoff was charged with possession of child sexually abusive material, and although he later pled guilty to a lesser offense, the probation officer stated at sentencing that the defendant viewed child pornography.[589] Moreover, at the subsequent evidentiary hearing regarding defendant's appeal of the registration requirement, the police detective testified that the physical appearance of the females in the photographs and his previous experience investigating child pornography cases led him to believe the photographs involved minors under the age of eighteen.[590] This evidence, the court of appeals concluded, was sufficient to allow the trial court to find the victims were under the age of eighteen.[591] The court rejected Althoff's argument that expert testimony is required to establish the age of the victims in a case,

---

582. *Id.* at 612, 729 N.W.2d 922-23.

583. *Althoff*, 280 Mich. App. at 534, 760 N.W.2d at 770.

584. *Id.*

585. *Id.* at 539-40, 760 N.W.2d at 772.

586. The court cited to *Golba*, 273 Mich. App. 603, 729 N.W.2d 916, and *People v. Ratkov*, 201 Mich. App. 123, 505 N.W.2d 886 (1993), which held that a "sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *Id.* at 125, 505 N.W.2d at 888.

587. *Althoff*, 280 Mich. App. at 541-42, 760 N.W.2d at 773.

588. *Id.* at 543-44, 760 N.W.2d at 774-75.

589. *Id.* at 543, 760 N.W.2d at 774.

590. *Id.*

591. *Id.*

noting such testimony is permissible if age is not otherwise proven, but not required.[592]

In *People v. Anderson*,[593] the defendant pled guilty to aggravated assault, but was required to register as a sex offender and to have no contact with minor children under the age of sixteen. He challenged those conditions on appeal, arguing the court was not bound by *Meyers*,[594] wherein the court of appeals held that the trial court should examine the facts of the offense in determining if it constitutes a sexual offense under the SORA. Anderson argued that the court was not bound by *Meyers* because the Michigan Supreme Court stated that holding to be dictum in *Althoff*.[595] Anderson further argued that two subsequent court of appeals decisions, *Golba*[596] and *Althoff (Althoff II)*,[597] are not binding on this issue because both erroneously stated they were bound by the *Meyers* decision.[598]

The court of appeals disagreed.[599] The court noted that, even though the Michigan Supreme Court declared the *Meyers* holding dictum, *Golba* and *Althoff II* are binding on the court because those panels conducted an independent analysis of the facts before agreeing with the *Meyers* analysis.[600]

Anderson next urged the court to examine the facts of his offense in this case and that it find the aggravated assault was not a sexual offense.[601] The court noted that the offense he pled guilty to, aggravated assault, is not a listed offense which requires registration as a sexual offender in SORA.[602] However, the court stated, the catchall provision of the statute could apply if the following requirements are met: "(1) the defendant must have been convicted of a state-law violation or a municipal-ordinance violation, (2) the violation must, by its nature, constitute a sexual offense, and (3) the victim of the violation must be under 18 years of age."[603]

---

592. *Id.* at 543-44, 760 N.W.2d at 774-75 (citing People v. Girard, 269 Mich. App. 15, 22, 709 N.W.2d 229, 234 (2005)).

593. 284 Mich. App. 11, 12, 772 N.W.2d 792, 794 (2009).

594. *Id.* (citing *Meyers*, 250 Mich. App. at 649, 649 N.W.2d at 130-31).

595. *Id.*

596. 273 Mich. App. 603, 729 N.W.2d 916.

597. 280 Mich. App. 524, 760 N.W.2d 764.

598. *Anderson*, 284 Mich. App. at 12-13, 772 N.W.2d at 794.

599. *Id.* at 13, 772 N.W.2d at 794.

600. *Id.*

601. *Id.*

602. *Id.* at 14, 772 N.W.2d at 795.

603. *Id.* (citing *Althoff II*, 280 Mich. App. at 532, 760 N.W.2d at 768).

The second factor, the court noted, is to be determined after examining the facts of the offense, which is not limited to "facts . . . developed through the trial process or through admissions," as defendant Anderson contends.[604] Rather, the court can conduct judicial fact-finding outside of the avenues of trial or admissions because SORA is remedial in nature, not punitive.[605] The court examined Anderson's offense, noting it was a state law violation, thus meeting the first requirement of the catchall provision.[606] The second requirement was also met, the court found, because evidence from the preliminary examination revealed he touched a seven year old victim underneath her underwear at least nine times.[607] During his plea, the defendant admitted he touched the victim in a harmful way over a year and a half period of time, and this, combined with the victim's description of the touching, shows by a preponderance of the evidence that the aggravated assault was of a sexual nature.[608] Therefore, the court concluded, it was proper for the trial court to require the defendant to register as a sex offender.[609]

In *People v. Zujko*,[610] the defendant was convicted of using a computer to commit a crime, following the discovery of child pornography on his computer. He was sentenced to five years probation and ordered to register as a sex offender.[611] He was also ordered to move from his residence because he lived in a student safety zone.[612] He later filed a motion to modify the terms of his probation to remain in his residence and the trial court granted the motion.[613] The prosecutor appealed, arguing it was an abuse of discretion for the trial court to grant the motion because the language of the statute prohibits registered sex offenders from living in or near school safety zones.[614]

---

604. *Anderson*, 284 Mich. App. at 15, 772 N.W.2d at 795.
605. *Id.*
606. *Id.* at 14, 772 N.W.2d at 795.
607. *Id.* at 15, 772 N.W.2d at 795.
608. *Id.* at 15, 772 N.W.2d at 795-96.
609. *Id.*
610. 282 Mich. App. 520, 521, 765 N.W.2d 897-98 (2008).
611. *Id.*
612. *Id.*
613. *Id.*
614. *Id.* at 522, 765 N.W.2d at 898-99; MICH. COMP. LAWS ANN. § 28.735 (West 2009) provides in part:

> (1) Except as otherwise provided in this section . . . an individual required to be registered under article II shall not reside within a student safety zone.
>
> (3) This section does not apply to any of the following:
>
> (c) An individual who was residing within that student safety zone on January 1, 2006. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

The court of appeals affirmed, finding no abuse of discretion in the trial court's interpretation of the statutory language.[615] The statute is unambiguous, the court wrote, creating a clear exemption for individuals who resided in the school safety zone as of January 1, 2006.[616] The prosecution's claim that the exemption "applies only to those who were registered sex offenders as of January 1, 2006 and who also resided in a student safety zone as of that date" was incorrect, the court noted.[617] The statute does not require both of those facts, and the prosecution was adding a requirement into the statute that simply is not contained therein.[618]

The court of appeals also rejected the prosecution's other arguments.[619] The prosecution also argued that the trial court's interpretation of the statute rendered subsection (4) null and void.[620] Subsection (4) allows a person who lives in a student safety zone and who subsequently becomes a registered sex offender ninety days to relocate outside of the zone.[621] This argument is specious, the court reasoned, because a person either falls under the exemption listed in 3(c) and therefore does not have to relocate, or subsection 4, in which case they would have to relocate.[622]

Finally, the prosecution argued that the trial court's interpretation of the statute would give registered sex offenders carte blanche to violate the law by living in a student safety zone and possibly endangering children.[623] The court rejected this contention, noting that the statute explicitly states: However, "[t]his exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone."[624] Thus, the court noted, if the person has any contact with a minor, they lose the benefit of the statutory exemption and must move within ninety days pursuant to subsection (4) of the statute.[625] "This is not carte blanche to violate criminal laws," the court emphasized.[626]

615. *Zujko*, 282 Mich. App. at 523, 765 N.W.2d at 899.
616. *Id.* at 524, 765 N.W.2d at 900.
617. *Id.* at 523, 765 N.W.2d at 899.
618. *Id.*
619. *Id.* at 523-24, 765 N.W.2d at 899-90.
620. *Id.* at 523, 765 N.W.2d at 899.
621. MICH. COMP. LAWS ANN. § 28.735(4) (West 2009).
622. *Zujko*, 282 Mich. App. at 524, 765 N.W.2d at 900.
623. *Id.* at 524, 765 N.W.2d at 900.
624. *Id.* (citing MICH. COMP. LAWS ANN. § 28.735(3)(c) (West 2009)).
625. *Id*; *see* MICH. COMP. LAWS ANN. § 28.735(4) (West 2009).
626. *Zujko*, 282 Mich. App. at 524, 765 N.W.2d at 900.

In *People v. Haynes*,[627] the defendant pled no contest to committing an "abominable and detestable crime against nature" with a sheep.[628] The defendant was sentenced to prison[629] and ordered to register under the SORA.[630] The defendant appealed the requirement that he register as a sex offender.[631]

The court observed that "abominable and detestable crime[s] against nature can be committed against a human being or they can be committed against an animal."[632] SORA requires individuals convicted of certain offenses to register under the provisions of SORA if the victim is an individual less than eighteen years of age.[633] The court relied upon the *Random House Webster's College Dictionary*[634] to define an individual as a solitary human being or person.[635] The court reviewed Michigan statutes other than SORA and found that the word "individual" was used in a manner consistent with the dictionary definition.[636] Thus, the court concluded, if a sheep was the object of the defendant's conduct, then the sheep was not a victim under SORA.[637] Therefore, the defendant's conduct would not be covered by SORA.[638] The court of appeals vacated the trial court's order requiring registration by the defendant under SORA.[639]

---

627. 281 Mich. App. 27, 28, 760 N.W.2d 283, 284 (2008).

628. M.C.L.A. section 750.158 provides:

> Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

MICH. COMP. LAWS ANN. § 750.158 (West 2009).

629. *Haynes*, 281 Mich. App. at 28, 760 N.W.2d at 284.

630. MICH. COMP. LAWS ANN. § 28.721-36 (West 2009).

631. *Haynes*, 281 Mich. App. at 28, 760 N.W.2d at 284.

632. *Id.* at 29, 760 N.W.2d at 285.

633. *Id.*

634. RANDOM HOUSE, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (Robert Costello et. al. eds., 1997).

635. *Haynes*, 281 Mich. App. at 30-31, 760 N.W.2d at 285.

636. *Id.* at 31, 760 N.W.2d at 285.

637. *Id.* at 32, 760 N.W.2d at 286.

638. *Id.*

639. *Id.* at 34, 760 N.W.2d at 287.

B. Reimbursement for Cost of Representation

The defendant in *People v. Trapp*[640] pleaded guilty to possession of child sexually abusive material[641] and was sentenced to a term of two to six years. The court also ordered him to pay three hundred dollars to reimburse the county for the cost of appointed counsel.[642] The defendant subsequently appealed this portion of the judgment.[643]

A person who enjoys appointed counsel may be ordered to reimburse the county for the cost of such counsel if reimbursement can be done without substantial hardship.[644] The defendant must be given both notice and an opportunity to be heard before the court orders such payment.[645] The trial court must specifically consider a defendant's ability to pay before any reimbursement is ordered.[646] The court reviewed the sentencing transcript and found the sentencing judge had not stated that he had considered the defendant's ability to pay before ordering of reimbursement.[647] The court of appeals remanded the matter to the trial court for consideration of the defendant's ability, both present and future, to reimburse the county for the cost of appointed counsel.[648] The court noted that the trial court may rely on a report from the probation department and therefore no evidentiary hearing will be required.[649]

C. Crime Victims' Rights Act

In re Lee and *In re Ivos* were consolidated on appeal.[650] In each case, prosecutors claimed that the minor had committed an offense listed in the Crime Victim's Rights Act (CVRA).[651] The court transferred each case to the family court consent calendar.[652] On appeal, the prosecutor contended that the court failed to give written notice of its intent to divert the cases, which would have provided the prosecutor and the victims an

640. 280 Mich. App. 598, 599, 760 N.W.2d 791, 792 (2008).
641. MICH. COMP. LAWS ANN. § 750.145(c)(4) (West 2009).
642. *Trapp*, 280 Mich. App. at 599, 760 N.W.2d at 791.
643. *Id.*
644. *Id.* at 600, 760 N.W.2d at 792.
645. *Id.*
646. *Id*; *see* People v. Dunbar, 264 Mich. App. 240, 251-55, 690 N.W.2d 476, 284-87 (2004).
647. *Trapp*, 280 Mich. App. at 601, 760 N.W.2d at 792.
648. *Id.* at 601, 760 N.W.2d at 793.
649. *Id.*
650. 282 Mich. App. 90, 92, 761 N.W.2d 432, 434 (2009).
651. MICH. COMP. LAWS ANN. § 780.781(1)(f) (West 2009).
652. *In re Lee*, 282 Mich. App. at 92, 761 N.W.2d at 434.

opportunity to address the court before action would be taken to remove the cases from the adjudicative process.[653]

The court of appeals emphasized that written notice must be given to the prosecuting attorney before a juvenile case involving a CVRA offense can be removed from the adjudicative process.[654] The written notice must specify the time and place of a hearing on a proposal to remove the case from the adjudicative process.[655] Moreover, the notice must be issued far enough in advance so that the victim receives notice of the hearing.[656] Further, at such hearing, the prosecutor and the victim must have an opportunity to address the court regarding the proposed removal of the case.[657]

In the case identified as Docket No. 282848,[658] the prosecutor filed a delinquency petition in June 2007. At some point a probation officer advised the parties that the court would consider diverting the case to the consent calendar.[659] In August, the prosecution filed objections to the possible diversion.[660] A pretrial conference was held in October 2007.[661] Then defendant filed a notice with the court indicating that he intended to plead guilty to a lesser offense as part of a plea bargain.[662] In the beginning of November 2007, the court provided notice that it would hold a "delinquency adjudication/disposition hearing" on November 15, 2007.[663] There was no indication that the court would at that time consider diverting the case to the consent calendar.[664] At that hearing a probation officer recommended the minor be placed on the consent calendar.[665] The prosecutor objected, stating the victim lacked notice that the court was considering diversion.[666] The prosecutor did agree the victim had notice of the possible adjudication disposition.[667] The

---

653. *Id.*

654. *Id.* at 95, 761 N.W.2d at 436; *see* MICH. COMP. LAWS ANN. § 486; *see* MICH. COMP. LAWS ANN. § 780.786b(1) (2009).

655. *In re Lee*, 282 Mich. App. at 96, 761 N.W.2d at 436.

656. *Id.*

657. *Id.*

658. The opinion does not specify which docket number applies to which case by name.

659. *In re Lee*, 282 Mich. App. at 96,761 N.W.2d at 436.

660. *Id.*

661. *Id.* at 97, 761 N.W.2d at 436-37.

662. *Id.* at 97, 761 N.W.2d at 437. The plea would result in the CVRA being inapplicable because the plea would be to a misdemeanor. *Id.*

663. *Id.*

664. *Id.*

665. *In re Lee*, 282 Mich. App. at 97, 761 N.W.2d at 437.

666. *Id.* at 96, 761 N.W.2d at 437.

667. *Id.*

prosecutor believed the victim would want to address the court and state the reasons diversion would be inappropriate.[668] The trial court agreed that no notice had been given concerning the possibility of the diversion.[669] However, the trial court said that the victim did indeed have notice that a hearing was set for this date and time.[670] The court indicated the case would move to the consent calendar, and in December, it entered an order diverting the case from the adjudicative process to the consent calendar.[671]

The court of appeals held that the family court had failed to comply with the requirements of the CVRA.[672] The court of appeals conceded the prosecutor had notice of the hearing, but there was no indication to the prosecutor that the family court might remove the case by transferring it to the consent calendar.[673] Notwithstanding the error, the court found that reversal was not warranted.[674] First, the court observed, the victim had actual notice of the hearing, but did not appear.[675] Second, the prosecutor was present, opposed the transfer, and represented the victim's views in opposition to it.[676] Third, the agreement allowed a guilty plea to a lesser offense classified as a misdemeanor if committed by an adult and was not within the scope of the CVRA.[677] Finally, the passage of time precluded reversal.[678] At the time the appellate opinion was written, either the consent calendar case plan would have been completed or the diversion would have been unsuccessful and the special status of the consent calendar would have ended.[679] Therefore, it affirmed the order in Docket No. 282848.[680]

In April 2007, the prosecutor in Docket No. 283562 filed a petition alleging the juvenile had committed second-degree home invasion.[681] In September 2007, the parties, including the victim, appeared at a disposition hearing.[682] At this hearing, the family court judge indicated a willingness to assign the case to the consent calendar, even though the

668. *Id.*
669. *Id.*
670. *Id.*
671. *In re Lee*, 282 Mich. App. at 96, 761 N.W.2d at 437.
672. *Id.* at 98, 761 N.W.2d at 437-38.
673. *Id.* at 438.
674. *Id.* at 99, 761 N.W.2d at 438.
675. *Id.* at 99-100, 761 N.W.2d at 438.
676. *Id.*
677. *In re Lee*, 282 Mich. App. at 99-100, 761 N.W.2d at 438.
678. *Id.* at 100, 761 N.W.2d at 438.
679. *Id.*
680. *Id.*
681. *Id.* at 100, 761 N.W.2d at 438-39.
682. *Id.* at 100, 761 N.W.2d at 439.

prosecutor reported the objections by the victim.[683] The hearing ended without any disposition because the court feared it might lose any opportunity to assign the case to the consent calendar if there was a disposition of the matter.[684] Furthermore, the trial judge wanted more time to consider assignment of the case to the consent calendar.[685]

There was a further hearing in November 2007, at which the parties met in chambers and the family court judge indicated that assignment to the consent calendar was still being considered.[686] The family court judge so stated in a subsequent letter addressed to counsel in early December.[687] It scheduled further hearing for January 2008.[688] At that hearing, the prosecutor continued to object to a transfer of the case to the consent calendar.[689] The family court judge claimed to be in compliance with the CVRA because a hearing had been scheduled.[690]

On appeal, the court of appeals explicitly disagreed,[691] holding that it is not acceptable to schedule a hearing after the court has rendered a ruling to transfer a case to the consent calendar.[692] The court opined that notice to the prosecutor and victim must be given before the case is removed from the adjudicative process.[693] Even so, the court of appeals was of the opinion that the trial court had managed to comply with the CVRA.[694] The victim had been present in court at the September hearing and had addressed the judge.[695] She had made her objections known to the judge.[696] The prosecutor consulted with the victim and the prosecutor reiterated the victim's objections.[697] The court found written notice with the December 2007 letter to the prosecutor in which the court indicated that he still believed the case to be appropriate for the consent calendar.[698] This, according to the court of appeals, constituted

683. *In re Lee*, 282 Mich. App. at 100, 761 N.W.2d at 439.
684. *Id.* at 101, 761 N.W.2d at 439.
685. *Id.* at 101-02, 761 N.W.2d at 439.
686. *Id.*
687. *Id.* at 102, 761 N.W.2d at 440.
688. *Id.* at 103, 761 N.W.2d at 440.
689. *In re Lee*, 282 Mich. App. at 103, 761 N.W.2d at 440.
690. *Id.* at 103-04, 761 N.W.2d at 439.
691. *Id.* at 104, 761 N.W.2d at 440.
692. *Id.*
693. *Id.*
694. *Id.*
695. *In re Lee*, 282 Mich. App. at 104, 761 N.W.2d at 441.
696. *Id.* at 104, 71 N.W.2d at 441.
697. *Id.*
698. *Id.* at 105, 761 N.W.2d at 441.

"substantial compliance" with the CVRA and affirmed the order in Docket No. 283562.[699]

D. Maintaining Arrest Records

In *People v. Benjamin*,[700] the defendants pled guilty to possession of less than twenty-five grams of cocaine, but were granted deferral status. When a person recieves deferral status, upon successful completion of probation, there is no public record of the conviction and the determination of guilt becomes a nullity.[701] After completing their probation terms, the defendants filed motions for destruction of their arrest cards and fingerprints, which the trial court granted.[702] The prosecutor appealed, arguing that state law requires the state police to keep a non-public record of an arrest when the individual receives a deferral of prosecution.[703]

The court of appeals reversed.[704] The court found that the trial court erroneously equated a discharge and dismissal under the deferral statute with a finding of not guilty, which triggers a requirement to destroy fingerprint cards under a different statute.[705] Here, the defendants received the benefit of a deferral under the statute, which is distinct from a not-guilty finding.[706] Thus, the trial court erred in holding that their fingerprints could be destroyed.[707]

---

699. *Id.*

700. 283 Mich. App. 526, 527, 769 N.W.2d 748, 749 (2009).

701. Under M.C.L.A. section § 333.7411(1), if a person either pleads guilty or is found guilty of certain controlled substance offenses, the proceeding is deferred while the person is placed on probation. If the defendant satisfies all of the terms of probation, the trial court discharges the person without an adjudication of guilt and dismisses the case. If the person violates probation, the trial court enters a judgment of guilt. MICH. COMP. LAWS ANN. § 333.7411(1) (West 2009).

702. *Benjamin*, 283 Mich. App. at 527, 769 N.W.2d at 749.

703. *Id.* at 528, 769 N.W.2d at 749; M.C.L.A. section 333.7411(2)(a) provides:

> (2) The records and identifications division of the department of state police shall retain a nonpublic record of an arrest and discharge or dismissal under this section. This record shall be furnished to any or all of the following:
>
> > (a) To a court, police agency, or office of a prosecuting attorney upon request for the purpose of showing that a defendant in a criminal action involving the possession or use of a controlled substance, or an imitation controlled substance as defined in section 7341, covered in this article has already once utilized this section.

MICH. COMP. LAWS ANN. § 333.7411(2)(a) (West 2009).

704. *Benjamin*, 283 Mich. App. at 537, 769 N.W.2d at 755.

705. *Id.* at 534-35, 769 N.W.2d at 753; MICH. COMP. LAWS ANN. § 28.243(8) (West 2009).

706. *Benjamin*, 283 Mich. App. at 534-35, 769 N.W.2d at 753.

707. *Id.*

The court then weighed whether the statute required the arrest cards must be retained along with the fingerprint cards.[708] The prosecution argued that, because a person is entitled to only one deferral under the statute, the arrest record must be kept because it contains identifying information on that person, which would ensure they receive only one deferral.[709] The court found that maintaining arrest and fingerprint records "is important in meeting the directive that a court shall contact the state police to determine if a defendant had previously been given deferral status."[710] Fingerprint and arrest records are a necessary part of the identification process for that purpose; thus, the court concluded that both records must be maintained.[711]

E. Restitution

In *People v. Cross*,[712] the defendant was convicted for attempted embezzlement of $1,000 or more, but less than $20,000. He received a sentence of three years probation, with the first 90 days in jail.[713] He filed an appeal, objecting to the trial court's restitution order in the amount of $123,180.[714] The defendant argued the trial court lacked authority to order restitution for the victim's lost income, relying on *People v. Shanks*,[715] an unpublished court of appeals opinion.[716] The court noted that an unpublished opinion is not binding under the rule of stare decisis, and at least one published opinion of the court is contrary to the defendant's argument.[717] In *People v. Guajardo*,[718] the court of appeals held that since the restitution statute is silent regarding how to determine the amount of loss a victim incurred, there should be an evidentiary basis for the determination.[719] The court further stated that if the evidence showed a loss based on both the replacement value of the stolen items and expected profits, then the trial court may consider lost profits in assessing restitution.[720] Under *Guajardo*, the court concluded, the trial

708. *Id.* at 536, 769 N.W.2d at 754.
709. *Id.*
710. *Id.* at 537, 769 N.W.2d at 754-55.
711. *Id.* at 537, 769 N.W.2d at 755.
712. 281 Mich. App. 737, 737-38, 760 N.W.2d 314, 315 (2008).
713. *Id.* at 738, 769 N.W.2d at 315.
714. *Id.*
715. No. 178365, 1996 WL 33362190 (Mich. Ct. App. July 26, 1996).
716. *Cross*, 281 Mich. App. at 738, 760 N.W.2d at 315.
717. *Id.*
718. 213 Mich. App. 198, 539 N.W.2d 570 (1995).
719. *Id.* at 200, 539 N.W.2d at 571.
720. *Id.*

court was allowed to order restitution for lost profits.[721] Thus, the court found defendant's argument specious and affirmed the restitution order.[722]

The defendant next challenged the amount of restitution, arguing a preponderance of the evidence did not establish the victim lost that exact amount.[723] The court of appeals noted that it generally defers to a trial court's judgment, and "if the trial court's decision falls within the range of principled outcomes, it has not abused its discretion."[724]

The court was adamant that a crime victim's right to restitution is well-settled under both statute and the state constitution.[725] The Crime Victim's Rights Act requires a defendant to "make full restitution to any victim of the defendant's course of conduct."[726] When the amount of restitution is disputed, the court noted, the statute requires:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.[727]

In the instant case, the court noted, the prosecution presented the victim's testimony which demonstrated that the defendant embezzled $123,180.[728] The court referred to the victim's testimony as extensive and essentially expert.[729] Although the defendant disagrees with this amount, the court found, he did not provide any evidence to the contrary.[730] Thus, the trial court could rationally determine, the court of appeals concluded, that the amount set forth by the prosecution was correct.[731] The court therefore rejected the defendant's challenge to the restitution order and affirmed.[732]

---

721. *Cross,* 281 Mich. App. at 739, 760 N.W.2d at 315.
722. *Id.*
723. *Id.*
724. *Id.* (citing People v. Carnicom, 272 Mich. App. 614, 616-17, 727 N.W.2d 399, 400-01 (2006)).
725. *Id.* at 739, 760 N.W.2d at 316. *See also* MICH. CONST. 1963 art. I, § 24; MICH. COMP. LAWS ANN. § 780.766 (West 2009).
726. *See* MICH. COMP. LAWS ANN. § 780.766(2) (West 2009).
727. *Cross*, 281 Mich. App. at 739, 760 N.W.2d at 316 (citing MICH. COMP. LAWS ANN. § 780.767(4) (West 2009)).
728. *Id.* at 740, 760 N.W.2d at 316.
729. *Id.*
730. *Id.*
731. *Id.*
732. *Id.*

F. Interstate Agreement on Detainers

The defendant in *People v. Swafford*[733] was charged with first-degree murder.[734] Sometime later he was arrested on an unrelated federal bank robbery charge in Tennessee.[735] In June 2004, the Wayne County Prosecutor's Office (the prosecutor) filed a written detainer against the defendant with the United States Marshal in Tennessee.[736] Swafford pleaded guilty to the federal bank robbery charge and was sentenced to federal prison in November 2004.[737] The following March, the federal authorities verified the detainer had been lodged against the defendant.[738] Swafford then requested disposition of the Michigan charges, and the federal authorities notified the prosecutor of that request.[739] The prosecutor received this request on March 7, 2005.[740] The following June the prosecutor indicated an intention to bring Swafford to trial within the time specified in Article III(a) of the Interstate Agreement on Detainers (IAD),[741] which is 180 days.[742] Approximately sixty days later, federal authorities wrote to the prosecutor indicting that ninety of the allotted 180 days had elapsed as of June 25, 2005.[743] Even so, the defendant was not arraigned in Michigan until October 2005, which was more than 180 days after the prosecutor received defendant's request for a final disposition.[744]

Swafford filed a motion to dismiss the Michigan charges because he had not been brought to trial within 180 days of receiving his request for final disposition.[745] The motion was granted by the trial judge and the charges were dismissed with prejudice.[746] The prosecutor appealed, and the court of appeals reversed.[747] However, the Michigan Supreme Court

733. 483 Mich. 1, 762 N.W.2d 902 (2009).

734. *Id.* at 4, 762 N.W.2d at 903. Prosecutors charged the defendant with assault with intent to commit murder and possession of a firearm while committing a felony. *Id.*

735. *Id.*

736. *Id.* at 4, 762 N.W.2d at 903-04.

737. *Id.* at 4, 762 N.W.2d at 904.

738. *Id.*

739. *Swafford*, 483 Mich. at 4, 762 N.W.2d at 904.

740. *Id.* at 4-5, 762 N.W.2d at 904.

741. MICH. COMP. LAWS ANN. § 780.601 (West 2009).

742. *Swafford*, 483 Mich. at 5, 762 N.W.2d at 904.

743. *Id.* at 6, 762 N.W.2d at 904.

744. *Id.* at 5-6, 762 N.W.2d at 904.

745. *Id.* at 6, 762 N.W.2d at 904. This would be a violation of Article III(a) of the IAD, MICH. COMP. LAWS ANN. § 780.601 (West 2009).

746. *Swafford*, 483 Mich. at 6, 762 N.W. at 904-05.

747. People v. Swafford, No. 268499, 2007 WL 914531, at *1 (Mich. Ct. App. Mar. 27, 2007).

vacated the court of appeals judgment and instructed the Court of Appeals to reconsider Swafford's appeal.[748] The court of appeals again reversed the dismissal of the charges, finding the IAD was inapplicable in this case because the detainer had not been delivered to the actual institution in which Swafford was incarcerated.[749] Defendant again applied to the Michigan Supreme Court, and that court granted defendant Swafford's application for leave to appeal.[750]

According to the Michigan Supreme Court, forty-eight states, the District of Columbia, and the federal government have entered into the Interstate Agreement on Detainers.[751] The IAD creates a procedure for preparing and delivering a detainer.[752] A detainer is a legal order requiring the state or federal government where an individual is imprisoned to hold that individual when he has finished serving his sentence.[753] This is to enable the state issuing the detainer to try the defendant for a different crime.[754] Furthermore, the person subject to a detainer may request a final disposition of the pending charges within 180 days.[755] Finally, if the matter is not brought to trial within that period – i.e. 180 days – the court where the charges are pending is directed to dismiss the charges with prejudice.[756]

In the instant case, after the Wayne County prosecutor delivered the detainer, Swafford made a written request for final disposition.[757] The prosecutor nonetheless failed to bring him to trial within the required time period, 180 days, as required by the IAD.[758] The only remedy at that point was dismissal of the charges with prejudice.[759]

The court further noted there is no requirement in the IAD that a detainer be filed with the institution in which the prisoner is

748. 480 Mich. 881, 738 N.W.2d 233, 233 (2007).

749. People v. Swafford, No. 268499, 2008 WL 723920, at *7 (Mich. Ct. App. Mar. 18, 2008).

750. People v. Swafford, 482 Mich. 1015, 1015, 756 N.W. 713, 713 (2008).

751. *Swafford,* 483 Mich. at 8, 762 N.W.2d at 905-06 (citing Alabama v. Bogeman, 533 U.S. 146 (2001)).

752. *Id.* at 8, 762 N.W.2d at 906.

753. *Id.*

754. *Id.*

755. *Id.* at 8-9, 762 N.W.2d at 906; *see* Article III(a) of MICH. COMP. LAWS ANN. § 780.601 (West 2009).

756. *Swafford,* 483 Mich. at 8-9, 762 N.W.2d at 906; *see* Article V(c) of MICH. COMP. LAWS ANN.
§ 780.601 (West 2009).

757. *Id.* at 9, 762 N.W.2d at 906.

758. *Id.*

759. *Id.*

incarcerated.[760] It was not disputed that the detainer had reached the institution where Swafford was incarcerated, even though it had been initially delivered to the United States Marshal.[761] The court believed that Article III(a) was "indisputably violated" when Swafford was not brought to trial within 180 days.[762] The court also observed that the prosecution had failed to satisfy its responsibilities.[763] The court concluded that the only remedy is dismissal with prejudice.[764] Accordingly, the trial court properly dismissed the charges.[765]

G. Habitual Offender Statute

In *People v. Gardner*,[766] the Michigan Supreme Court had an opportunity to consider the proper method for counting prior felonies under Michigan's Habitual Offender Statutes.[767] In 2001, defendant Gardner was convicted of second-degree murder, being a felon in possession of a firearm and possession of a firearm during the commission of a felony.[768] The court noted the facts of his prior cases had no bearing on the question before the court in the instant case.[769] In the instant case, the defendant was sentenced as a third-offense habitual offender.[770] On appeal, the defendant challenged some of the trial court evidentiary rulings, but the court of appeals affirmed his convictions and sentences.[771] The Michigan Supreme Court subsequently denied Gardner's application for leave to appeal from the decision of the court of appeals.[772] Later, Gardner sought relief from judgment and argued that his trial and appellate counsel had provided ineffective representation.[773] Gardner alleged that his attorneys failed to investigate or challenge his two prior convictions underlying his third offense status.[774] The prior

760. *Id.* at 12-13, 762 N.W.2d at 908.
761. *Id.* at 13, 762 N.W.2d at 908.
762. *Swafford*, 483 Mich. at 16, 762 N.W.2d at 910.
763. *Id.* at 16-17, 762 N.W.2d at 910.
764. *Id.*
765. *Id.*
766. 482 Mich. 41, 753 N.W.2d 78 (2008).
767. *Id.* at 44, 753 N.W.2d at 81. Habitual offender statutes provide for increased penalties for offenders repeatedly convicted of felonies. *Id.*; *see* MICH. COMP. LAWS ANN. § 769.10-13 (West 2009).
768. *Gardner*, 482 Mich. at 44, 753 N.W.2d at 81-82.
769. *Id.* at 45, 753 N.W.2d at 82.
770. *Id.*
771. *Id.*
772. *Id.*
773. *Id.*
774. *Gardner*, 482 Mich. at 45, 753 N.W.2d at 82.

convictions arose from the same criminal act.[775] It was Gardner's contention that the two convictions should have been counted only as a single prior felony conviction in determining habitual offender status.[776] In other words, he believed that he should have been sentenced only as a second offense offender.[777] As such, Gardner would have theoretically received a shorter prison term.[778]

The circuit court denied the motion, finding there was no good cause for Gardner's failure to raise this issue in his earlier appeal, and the court of appeals denied application for leave to appeal.[779] The Michigan Supreme Court subsequently directed the parties to address whether multiple convictions from a single criminal incident counted as a single prior conviction or multiple prior convictions.[780] Gardner was sentenced under M.C.L.A. section 769.11, which reads in part: "[i]f a person has been convicted of any combination of two or more felonies . . . that person shall receive a greater penalty."[781] Previously, in *People v. Preuss*[782] and *People v Stoudemire,*[783] the Michigan Supreme Court had concluded this language implied a "same incident" or "single transaction" method of counting the prior felonies.[784] The court noted that habitual offender status increases a defendant's possible minimum and maximum sentences. For example, a second habitual offender faces a possible 25% increase, a third habitual offender a 50% increase, and a fourth habitual offender a 100% increase in the possible sentence.[785]

Defendant Gardner contended that under the prior case law, he could have been sentenced only as a second habitual offender because his prior \convictions arose from the "same incident."[786] The supreme court noted that if the sentencing judge relied on an inaccurate sentencing range, then resentencing would be required.[787] The prosecution did not claim the prior felony convictions had arisen from separate transactions.[788] It further conceded that Gardner had been prejudiced by ineffective

775. *Id.*
776. *Id.*
777. *Id.*
778. *Id.*
779. *Id.* at 46, 753 N.W.2d at 82.
780. People v. Gardner, 477 Mich. 1096, 1096, 729 N.W.2d 519, 520 (2007).
781. *Gardner*, 482 Mich. at 47, 753 N.W. 2d at 83.
782. 436 Mich. 714, 739, 461 N.W.2d 703, 714 (1990).
783. 429 Mich. 262, 278, 414 N.W.2d 693, 700 (1987).
784. *Gardner*, 482 Mich. at 44, 753 N.W.2d at 82.
785. *Id.* at 47-48, 753 N.W.2d at 83.
786. *Id.* at 48, 753 N.W.2d at 83-84.
787. *Id.* at 48-49, 753 N.W2d at 84.
788. *Id.* at 49, 753 N.W.2d at 84.

assistance of counsel if the prior case law was correctly decided.[789] However, it was the prosecutor's position that the prior case law was incorrectly decided and that Gardner was properly sentenced as a third habitual offender.[790]

The court began its analysis by noting that when examining a statute, interpretation is neither required nor permitted when the statutory language is unambiguous.[791] The statute in question refers to "a person . . . convicted of a combination of two or more felonies,"[792] which indicated to the court the language contemplated the number of times a person has been convicted.[793] Indeed, the court could find nothing in the statute suggesting the convictions had to be based on separate instances.[794] The court conceded that initially the Michigan Supreme court had interpreted the statute as meaning that multiple convictions from a single incident counted only as a single conviction.[795] The court was critical of the Michigan Supreme Court's earlier finding, and concluded that it was time to reject the prior case law as being inconsistent with principles of statutory construction.[796]

The court reported that defendant Gardner conceded the prior case law was not consistent with a proper interpretation of the statute.[797] On the contrary, defendant's principal argument was that the legislature was consistent with the prior case law because it had not acted to amend the Habitual Offender Statutes.[798] The court observed, however, that silence does not mean agreement, nor could the court assume that the legislature felt it had a duty to correct possibly erroneous interpretations that the court might make.[799] Finally, the court opined that if the legislature had wanted offenses arising from the same transaction to be considered as one conviction, then the legislature could have explicitly so stated.[800] Indeed, the court noted that several states had done exactly that.[801] For the foregoing reasons, the court believed that the prior case law

789. *Id.* at 49-50, 753 N.W.2d at 84.

790. *Gardner*, 482 Mich. at 50, 753 N.W.2d at 84.

791. *Id.* at 50, 753 N.W.2d at 85 (citing People v. Weeder, 469 Mich. 493, 674 N.W.2d 372 (2004)).

792. MICH. COMP. LAWS ANN. § 769.11(1) (West 2009).

793. *Gardner*, 482 Mich. at 50-51, 753 N.W.2d at 85.

794. *Id.* at 51, 753 N.W.2d at 85.

795. *Id.* at 47, 753 N.W.2d at 83.

796. *Id.* at 57, 753 N.W.2d at 88.

797. *Id.* at 58, 753 N.W.2d at 89.

798. *Id.*

799. *Gardner*, 482 Mich. at 58-59, 753 N.W.2d at 89-90. The court called attention to statutes in Arizona, California and Illinois. *Id.* at 59-60, 753 N.W.2d at 90.

800. *Id.* at 60-61, 753 N.W. 2d at 90.

801. *Id.* at 60, 753 N.W.2d at 90.

interpreting the Habitual Offender Statute should be overruled.[802] The court could discern no reliance interests that might be afforded by overruling the prior case law.[803] The court was not willing to believe that criminal offenders attempted to conform their crimes to any legal test created by the prior case law.[804] Indeed, the court concluded it would be simpler to apply the new interpretation of the statute.[805] Finally, the court stated that the prior case law was erroneous.[806] Thus, the defendant was properly sentenced, and resentencing was not required, notwithstanding a claim of ineffective assistance of counsel.[807] It affirmed sentence.[808]

802. *Id.* at 61, 753 N.W.2d at 91.
803. *Id.*
804. *Id.* at 61-62, 753 N.W.2d at 91.
805. *Gardner*, 482 Mich. at 62, 753 N.W.2d at 91.
806. *Id.* at 68, 753 N.W.2d at 95.
807. *Id.* at 68-69, 753 N.W.2d at 95.
808. *Id.* at 69, 753 N.W.2d at 95.