CRIMINAL LAW

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I. INTRODUCTION

During the *Survey* period, June 1, 2010, through May 31, 2011, the Michigan Supreme Court and the Michigan Court of Appeals decided a number of significant cases. For the first time, the appellate courts addressed various criminal law violations of the Michigan Medical Marijuana Act, which Michigan voters passed on November 4, 2008, and which went into effect in December 2008.[1] The courts also addressed crimes such as unarmed robbery,[2] operating a motor vehicle while impaired,[3] and possession of burglary tools.[4] Many cases involved criminal law issues during trial, ineffective assistance of counsel, and various defenses.[5] All of these issues are important to both the public and the legal community.

II. OFFENSES AGAINST PEOPLE

A. First Degree Murder

In *People v. Jackson*,[6] the defendant was convicted of "first-degree premeditated murder[,] conspiracy to commit murder[,] assault with intent to commit murder[,] and possession of a firearm during the commission of a felony."[7] On appeal, the defendant challenged the sufficiency of the evidence.[8]

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1. MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2011).
2. People v. Harverson, 291 Mich. App. 171, 804 N.W.2d 757 (2010).
3. People v. Lechleitner, 291 Mich. App. 56, 804 N.W.2d 345 (2010), *appeal denied*, 489 Mich. 934, 797 N.W.2d 151 (2011).
4. People v. Osby, 291 Mich. App. 412, 804 N.W.2d 903 (2011), *appeal denied*, 490 Mich. 873, 803 N.W.2d 686 (2011).
5. *See, e.g.*, *Harverson*, 291 Mich. App. 171.
6. 292 Mich. App. 583, 808 N.W.2d 541 (2011), *appeal denied*, 490 Mich. 882, 803 N.W.2d 883 (2011).
7. *Id.* at 585-86.
8. *Id.* at 587.

At trial, the prosecution revealed that the defendant participated in a scheme to shoot two people over a drug debt.[9] One of the individuals died.[10] The other person was gravely wounded, but gave a statement in the hospital implicating the defendant and a co-defendant in the attack.[11] At trial, the victim identified the defendant and co-defendant as the persons who shot the deceased victim.[12]

The defendant "first argue[d] that the evidence was insufficient to support his convict[ion]" for first-degree murder.[13] Such a conviction requires evidence that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate."[14] A criminal conspiracy, the court pointed out, "is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense."[15] Assault with intent to commit murder, the third charge the jury convicted the defendant of, requires "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder."[16] Finally, a person commits the crime of aiding and abetting if "assistance [was] rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime."[17]

In the instant case, the court concluded that sufficient evidence existed to support each conviction.[18] The testimony at trial indicated that the defendant was waiting in a car on the street, and then followed the victims' car.[19] Once the victims parked their car at their destination, the defendant parked his vehicle so the victims were blocked in and could not drive away.[20] The defendant and a co-defendant then began shooting toward the victims' car.[21] These facts, the court found, supported the inference that the defendant and co-defendants acted together in a plan to

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9. *Id.*
10. *Id.* at 586.
11. *Id.* at 587.
12. *Jackson*, 292 Mich. App. at 587.
13. *Id.*
14. *Id.* at 588 (quoting People v. Kelly, 231 Mich. App. 627, 642, 588 N.W.2d 480 (1998)).
15. *Id.*
16. *Id.* at 588 (quoting People v. Davis, 216 Mich. App. 47, 53, 549 N.W.2d 1 (1996)).
17. *Id.* at 589 (citing People v. Youngblood, 165 Mich. App. 381, 386, 418 N.W.2d 472 (1988)).
18. *Jackson*, 292 Mich. App. at 589-90.
19. *Id.* at *6.
20. *Id.*
21. *Id.*

kill the two victims.[22] They also acted together to separate the victims and "make a surprise attack."[23] These facts supported the first-degree murder and conspiracy convictions, and a finding of aiding and abetting the co-defendant's assault on the second victim.[24] Moreover, the defendant's use of a gun supported his felony-firearm conviction.[25] Therefore, the court affirmed his convictions.[26]

III. OFFENSES AGAINST PROPERTY

A. Unarmed Robbery

In *People v. Harverson*,[27] the defendant appealed his conviction for unarmed robbery, which stemmed from an altercation over a cell phone.[28] Defendant's girlfriend had a cell phone shipped to her apartment, but it was intercepted by his roommate's brother, Conliffe.[29] Conliffe said he threw it away in retaliation for the defendant's girlfriend stealing the phone of his sister's boyfriend.[30] The defendant, his girlfriend, and a friend went to Conliffe's home to retrieve the phone.[31] Conliffe's parents stated that the defendant removed Conliffe's sunglasses at gunpoint before leaving.[32] Police arrested the defendant shortly thereafter and "found Conliffe's sunglasses and ammunition inside the car."[33] Defendant was charged with armed robbery, but was convicted of the lesser offense of unarmed robbery, and sentenced to three to fifteen years imprisonment.[34]

The court of appeals affirmed.[35] A conviction for unarmed robbery requires "(1) [a] felonious[] tak[ing] [of] the property of another, (2) by force or violence or assault or putting in fear, and (3) [without] be[ing] []armed."[36] Unarmed robbery, the court explained, "is a specific intent

22. *Id.*
23. *Id.* at 590.
24. *Jackson*, 292 Mich. App. at 590.
25. *Id.*
26. *Id.* at 585.
27. 291 Mich. App. 171, 804 N.W.2d 757 (2010).
28. *Id.* at 173.
29. *Id.*
30. *Id.*
31. *Id.* at 174.
32. *Id.*
33. *Harverson*, 291 Mich. App. at 174.
34. *Id.* at 173-75.
35. *Id.* at 173.
36. *Id.* at 177 (quoting People v. Johnson, 206 Mich. App. 122, 125-26, 520 N.W.2d 672 (1994); *see also* MICH. COMP. LAWS ANN. § 750.530 (West 2008)).

crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of [his] property."[37] The court further explained that, "because intent may be difficult to prove, only minimal circumstantial evidence is necessary."[38]

The court of appeals characterized the defendant's appeal as a challenge to the intent element of the offense because the defendant claimed that "he walked away [from Conliffe] and refused to steal any other items."[39] The court rejected this assertion, noting that a conviction for unarmed robbery does not require proof that a defendant intended to "permanently deprive the owner of [his] property," but includes a temporary retention of the property, or requiring the property owner to pay compensation in order to get the property back.[40]

The court found defendant had the requisite intent to commit unarmed robbery.[41] The defendant explained that he "'snatched' Conliffe's sunglasses and told him, 'you get these back when we get the phone back.'"[42] In other words, the court wrote, "defendant intended to retain Conliffe's glasses and *only* return them on the condition that Conliffe pay compensation in the form of returning [his girlfriend's] phone."[43]

The court also found sufficient evidence to satisfy the other elements of the offense.[44] The jury could infer the use of fear or violence from the testimony that the defendant "pointed the gun at Conliffe before taking the glasses."[45] The court concluded that the evidence was sufficient to sustain the conviction.[46]

37. *Id.* (quoting People v. Dupie, 395 Mich. 483, 487, 236 N.W.2d 494 (1975); People v. King, 210 Mich. App. 425, 428, 534 N.W.2d 534 (1995)).

38. *Id.* (quoting People v. Strong, 143 Mich. App. 442, 452, 372 N.W.2d 335 (1985)).

39. *Harverson*, 291 Mich. App. at 178.

40. *Id.* at 178 (quoting People v. Jones, 98 Mich. App. 421, 425-26, 296 N.W.2d 268 (1980)).

41. *Id.*

42. *Id.* at 178-79.

43. *Id.* at 179.

44. *Id.*

45. *Harverson*, 291 Mich. App. at 179.

46. *Id.*

IV. OTHER OFFENSES

A. Aiding and Abetting

In *People v. Bennett*,[47] the defendant was convicted of first-degree murder based upon her boyfriend's shooting a mutual friend over missing property.[48] After several items went missing from his apartment, the defendant's boyfriend, Benson, who was also convicted of first-degree murder, made "threatening comments to several people about [the victim]."[49] Benson also threatened to kill the victim.[50] Finally, Benson showed a friend a gun and told him he was going to try to get his items back from the victim.[51] The friend got into a car with Benson and Bennett, and Bennett provided Benson with driving directions to where the victim lived.[52] Benson got out of the vehicle and shot the victim several times.[53] Bennett stayed in the car, and "started crying as soon as they heard the gunshots."[54] Bennett drove the car toward Benson, and "[he] got back in the car."[55] The State charged Bennett with murder on an aiding and abetting theory.[56] At trial, the State called witnesses to testify as to the interactions between Bennett and Benson.[57] "Bennett was present when Benson started" threatening the victim, and Benson talked "openly in the car about shooting [the victim] just before Bennett gave Benson directions to the [victim's house]."[58]

The court of appeals affirmed the conviction of both defendants.[59] In order to find Bennett guilty of first-degree murder on an aiding and abetting theory, the prosecution had to prove:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had

47. 290 Mich. App. 465, 802 N.W.2d 627 (2010), *appeal denied*, 489 Mich. 877, 796 N.W.2d 75 (2011).
48. *Id.* at 467-68.
49. *Id.*
50. *Id.*
51. *Id.* at 469.
52. *Id.* at 469-70.
53. *Bennett*, 290 Mich. App. at 470.
54. *Id.* at 470.
55. *Id.*
56. *Id.*
57. *Id.* at 470-71.
58. *Id.*
59. *Bennett*, 290 Mich. App. at 479, 484.

> knowledge that the principal intended its commission at the time that defendant gave aid and encouragement.[60]

On appeal, Bennett argued "the prosecution had not proven the third element," i.e., "that Bennett *knew* Benson intended to kill the victim" when she gave him directions "to where the victim lived."[61] The court of appeals rejected this assertion, and listed the evidence at trial that the jury relied upon to reach the guilty verdict.[62] For instance, three witnesses testified that the day before the murder, Benson threatened "to kill the victim" and Bennett was present when he made those threats.[63] Bennett also directed Benson to the victim's trailer, "even after Bennett saw Benson with a gun and heard him" threaten the victim's life again.[64] "An aider and abetter's knowledge of the principal's intent," the court noted, "can be inferred from the facts and circumstances surrounding the event."[65] There was "considerable evidence," the court wrote, "from which the jury could have inferred that Bennett knew of Benson's intent" toward the victim.[66] Although Bennett may have been "unenthusiastic" about Benson killing the victim, the court concluded that there was sufficient evidence "that Bennett was aware of Benson's specific intent to kill the victim," and therefore the court upheld Bennett's conviction for aiding and abetting.[67]

B. Contributing to the Neglect or Delinquency of a Minor

In *People v. Tennyson*,[68] the "police executed a search warrant at the defendant's [house]."[69] They found heroin and two loaded firearms in the bedroom.[70] The defendant's wife was on the front porch and the defendant's ten-year-old stepson was "on a couch in the living room."[71] An officer testified that the child "was scared and crying when the officers entered [the house]."[72] The "defendant was charged with

60. *Id.* at 472 (quoting People v. Robinson, 475 Mich. 1, 6, 715 N.W.2d 44 (2006)).
61. *Id.*
62. *Id.* at 473.
63. *Id.*
64. *Id.*
65. *Bennett*, 290 Mich. App. at 474 (quoting People v. Turner, 213 Mich. App. 558, 568, 540 N.W.2d 728 (1995)).
66. *Id.* at 474.
67. *Id.* at 474-75.
68. 487 Mich. 730, 790 N.W.2d 354 (2010).
69. *Id.* at 733.
70. *Id.*
71. *Id.*
72. *Id.*

possession of less than 25 grams of heroin, being a felon in possession of a firearm, possession of a firearm during the commission of a felony, and contributing to the neglect or delinquency of a minor."[73] The last charge, involving the minor child, was the subject of this appeal; the State brought the charge based upon the defendant exposing the child "to the use and sale of narcotics."[74] "The prosecutor argued at trial that the child['s]" mere presence in a house which contained narcotics and firearms proved neglect and/or delinquency.[75]

After the jury convicted the defendant of all charges, "the trial court imposed a suspended sentence of 45 days in jail for the delinquency of a minor [charge]," and told the defendant that it would contact the Department of Human Services to seek the defendant's termination of his parental rights to the child.[76]

The defendant appealed, and the court of appeals affirmed the convictions and sentences in an unpublished per curiam opinion.[77] The court of appeals wrote that the statute under which the defendant was convicted for contributing to the delinquency of a minor[78] "was aimed at preventing conduct 'which would *tend to cause* delinquency and neglect as well as that conduct which obviously *has caused* delinquency and neglect.'"[79] In granting leave to appeal, the Michigan Supreme Court "specified that the parties must address whether the evidence was legally sufficient to sustain defendant's conviction under MCL 750.145."[80]

The Michigan Supreme Court reversed the conviction for contributing to the delinquency of a minor, and affirmed the defendant's drug and firearm possession convictions.[81] The court examined whether the defendant's actions "'tended to cause' the child to become delinquent or neglected, such that the child 'tended to come' under family court jurisdiction."[82] After examining the record, the court found that there was no evidence presented regarding the education or behavioral history of the child, or any other facts that tended to show the child had become

73. *Id.* at 734 (internal citations omitted).

74. *Tennyson*, 487 Mich. at 734.

75. *Id.*

76. *Id.*

77. People v. Tennyson, No. 278826, 2008 WL 4604058 (Mich. Ct. App. Oct. 16, 2008).

78. MICH. COMP. LAWS ANN. § 750.145 (West 2008).

79. *Tennyson*, 487 Mich. at 734-35 (quoting *Tennyson*, 2008 WL 2604058, at *4 (quoting People v. Owens, 13 Mich. App. 469, 479, 164 N.W.2d 712 (1968))).

80. *Id.* at 735.

81. *Id.* at 733.

82. *Id.* at 749 (quoting MICH. COMP. LAWS ANN. § 750.145).

delinquent.[83] There was no evidence that the defendant's crimes had an impact on the child's home, or that the child was even aware of the defendant's criminal activities.[84] The home was not a drug house, nor were drugs being sold from the home, the court noted.[85] There was no evidence the home was unfit to live in, or that the child was subjected to unsanitary living conditions.[86] The State presented the jury with only the child's mere presence in the home where a crime had occurred.[87] Standing alone, the court concluded that a rational trier of fact could not have found beyond a reasonable doubt that the defendant's actions tended to cause the child to become delinquent or neglected, so as to fall under the jurisdiction of the family court, as defined in the statute.[88]

C. Possession of Burglary Tools

In *People v. Osby*,[89] police arrested the defendant following a series of thefts involving the breaking and entering of motor vehicles.[90] "Each of the vehicles had a smashed window and property [was] stolen from inside."[91] Police apprehended the defendant through surveillance video of one of the thefts, and searched his motel room.[92] Police found a "window punch" on the defendant, "which the police believed was used to break car windows."[93] Defendant was convicted of possession of burglar's tools,[94] along with other crimes.[95] On appeal, he argued "there was insufficient evidence to convict him . . . because the statute . . . does not include a reference to motor vehicles."[96]

The court of appeals affirmed.[97] The statute lists tools used to open "any building, room, vault, safe or other depository."[98] The statute "state[s] that the reason for breaking in must be 'to steal therefrom any

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83. *Id.* at 751-52.
84. *Id.* at 752-53.
85. *Tennyson*, 487 Mich. at 755.
86. *Id.*
87. *Id.* at 755-56.
88. *Id.* at 763-64.
89. 291 Mich. App. 412, 804 N.W.2d 903 (2011), *appeal denied*, 490 Mich. 873, 803 N.W.2d 686 (2011).
90. *Id.* at 413-14.
91. *Id.* at 413.
92. *Id.* at 413-14.
93. *Id.* at 414.
94. *Id.* at 413; MICH. COMP. LAWS ANN. § 750.116 (West 2008).
95. *Osby*, 291 Mich. App. at 413.
96. *Id.* at 414.
97. *Id.* at 413.
98. *Id.* at 414-15.

money or other property.'"[99] The term "depository," the court noted, "is a catchall phrase that includes motor vehicles."[100] The definition of a depository is "[a] place where one leaves money or valuables for safekeeping," such as a car, the court wrote.[101] The average person, the court found, stores items in their vehicle, locks it, and expects the items to be safe.[102] Therefore, the court concluded, "in the plain language of the statute, 'depository' includes motor vehicles[,]" and the evidence was sufficient to support the defendant's conviction.[103]

V. OPERATING A MOTOR VEHICLE WHILE IMPAIRED

A. Definition of Operating a Vehicle

In *People v. Lechleitner*,[104] the defendant argued over the definition of "operate" when he was charged with operating a motor vehicle while under the influence of a controlled substance causing death.[105] In the early morning of November 22, 2007, the defendant had a blood alcohol level of .12 and lost control of his truck while driving on the freeway.[106] The truck stopped in the middle of the freeway and the defendant exited it and tried to push it out of the road.[107] Another car almost hit it and "then stopped on the shoulder."[108] A third car swerved to avoid the defendant's car and "struck the vehicle that had stopped on the shoulder, killing that driver."[109] The defendant argued that he was not operating his vehicle within the definition of the statute at the time the third car struck the second car.[110]

The court of appeals affirmed.[111] The statute defines "operate" and "operating" as "being in actual physical control of a vehicle . . . ."[112] The trial court stated:

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99. *Id.* at 415.
100. *Id.*
101. *Osby*, 291 Mich. App. at 415 (alteration in original) (quoting BLACK'S LAW DICTIONARY (9th ed. 2009)).
102. *Id.*
103. *Id.*
104. 291 Mich. App. 56, 804 N.W.2d 345 (2010), *appeal denied*, 489 Mich. 934, 797 N.W.2d 151 (2011).
105. *Id.* at 58-59.
106. *Id.* at 58.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Lechleitner*, 291 Mich. App. at 59.
111. *Id.* at 58.

> [A] person who places a motor vehicle in motion or in a position posing a significant risk of causing a collision, remains responsible for that motor vehicle until such time as that vehicle is put into some position where it poses no risk to other drivers. In other words, we cannot simply stop our car in the middle of the road for whatever reason, in this case striking the curbs or striking the sides, but we can't just stop our car in the middle of the road, stagger off somewhere, standing somewhere else, and expect our liability for that vehicle to end. People are responsible for placing that vehicle in a proper environment.[113]

The defendant conceded that the trial court complied with *People v. Wood*,[114] in which the Michigan Supreme Court stated that "'operating' must be defined 'in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property.'"[115] The *Wood* court concluded, "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk."[116]

In the instant case, the appellate court noted that "[t]he statute does not require that the defendant's vehicle be in motion at the time of the accident, but that the victim's death be caused by the defendant's operation of the vehicle while intoxicated."[117] Here, the court noted, the "defendant was intoxicated, operated his vehicle, and crashed it," resulting in having it positioned in the "middle of the freeway at night," which created a "risk of injury or death to others."[118] The court rejected the defendant's characterization of the *Wood* opinion as "outmoded," and emphasized that it "remains good law, and . . . the trial court properly followed it."[119]

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112. MICH. COMP. LAWS ANN. § 257.35a (West 2008); *Lechleitner*, 291 Mich. App. at 59.

113. *Lechleitner*, 291 Mich. App. at 59-60.

114. 450 Mich. 399, 538 N.W.2d 351 (1995).

115. *Lechleitner*, 291 Mich. App. at 60 (quoting *Wood*, 450 Mich. at 404).

116. *Id.* (alteration in original) (quoting *Wood*, 450 Mich. at 404-05).

117. *Id.*

118. *Id.*

119. *Id.* at 61.

B. Independent Analysis of Blood Sample

In *People v. Reid*,[120] the defendant was convicted of operating a motor vehicle while intoxicated.[121] He argued on appeal that the trial court erred in denying his motion to suppress the result of his blood-alcohol test because "he was deprived of his right . . . to have an independent chemical test performed on the blood sample."[122]

The statute provides that a defendant charged with operating while impaired should be "given a 'reasonable opportunity' to obtain an independent analysis of his blood sample."[123] The "defendant's blood was drawn" on November 13, 2005, when he was arrested.[124] "The sample was destroyed" in February 2008 per State Police Crime Lab policy, approximately two years after receipt.[125] During that two year time period, the defendant made no effort to have an independent test done on the sample.[126] The court concluded that because the defendant did not attempt to obtain his own analysis of the blood sample, while he had ample opportunity to do so, the trial court properly denied his motion to suppress the evidence.[127]

The defendant also argued that the almost two-year delay in charging him was a violation of his due process rights.[128] Police arrested the defendant on November 13, 2005, but did not charge him until August 3, 2007.[129] The court rejected the contention that the delay prejudiced the defendant's ability to obtain an independent analysis of his blood sample because the sample was available for at least six months after he was charged in August 2007.[130] The court also rejected the argument that the "prosecutor gained a tactical advantage" in delaying the charges because any videotape of the police stop that resulted in his arrest would have long been destroyed.[131] The court noted that there was no evidence that the police car that stopped him was equipped with video recording equipment.[132] In fact, the police officer testified that the car probably did

120. 292 Mich. App. 508, 810 N.W.2d at 391 (2011).
121. *Id.* at 510.
122. *Id.*
123. MICH. COMP. LAWS ANN. § 257.625a(6)(d) (West 2008); *Reid*, 292 Mich. App. at 510.
124. *Reid*, 292 Mich. App. at 511.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Reid*, 292 Mich. App. at 512.
131. *Id.* at 512-13.
132. *Id.* at 512.

not have video capability but if it did, it was recorded over after sixty days.[133] The court concluded that the defendant did not show that the prosecution deliberately delayed the case so the tape would be destroyed.[134] Accordingly, the defendant did not establish a due process violation.[135]

VI. THE MICHIGAN MEDICAL MARIHUANA ACT

A. Physician's Statement Requirement

In *People v. Kolanek*,[136] the police found eight marijuana cigarettes in the defendant's car trunk on April 6, 2009, and defendant was charged with possession of marijuana.[137] He "asserted an affirmative defense under the MMMA [Michigan Medical Marihuana Act],[138] [and] move[d] to dismiss [the case] on those grounds."[139] At the hearing on the motion to dismiss, the defendant admitted that he had eight marijuana cigarettes, but stated that he used them for relief of "pain and nausea caused by his Lyme disease."[140] He presented the testimony of his physician, who had been treating him for nine years, and who confirmed the defendant suffered from Lyme disease.[141] The physician further testified that the defendant "receive[d] therapeutic . . . benefit[s] from the medical use of marijuana," and that the quantity of marijuana found in defendant's possession at the time of his arrest was a reasonable amount given his condition.[142]

The evidence indicated that the defendant requested the physician's authorization to use marijuana on April 12, 2009, which was six days after the defendant's arrest for possession of marijuana.[143] He did not tell his physician "that he had been arrested and charged with possession of marijuana."[144] However, his physician "testified that the timing of defendant's request was irrelevant" because the defendant's condition

133. *Id.*
134. *Id.* at 513.
135. *Id.*
136. 291 Mich. App. 227, 804 N.W.2d 870 (2011), *appeal granted*, 489 Mich. 956, 798 N.W.2d 509 (2011).
137. *Id.* at 229.
138. MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2008).
139. *Kolanek*, 291 Mich. App. at 229.
140. *Id.*
141. *Id.*
142. *Id.* at 229-30 (alteration in original).
143. *Id.* at 230.
144. *Id.*

made him eligible to receive treatment from marijuana whether he had been charged with possession or not.[145]

In further support of his motion to dismiss the charges, defendant presented an affidavit in which he affirmed that he used "marijuana for chronic pain and nausea caused by the Lyme disease" and was a qualifying patient.[146] He also "offered into evidence his qualifying patient certificate" and "application form for registering for a medical-marijuana registry identification card" dated April 12, 2009.[147] "The Michigan Department of Community Health issued him a registration card two weeks later."[148]

The district court denied defendant's motion to dismiss, finding the fact that the physician had not approved his use of marijuana prior to the April 6, 2009 arrest to be dispositive.[149] The court noted the language of the medical marijuana statute is written in past tense, requiring that a physician "has *stated* that . . . [a] patient is likely to receive therapeutic or palliative benefit" from the use of marijuana.[150] The "defendant appealed to the circuit court, [which] interpreted the statute differently than did the district court."[151] Specifically, the circuit court found that a person did not have to "previously discuss[] the use of medical marijuana with [his] physician" or obtain a statement from his physician prior to his arrest.[152] Rather, the circuit court held that the statute merely requires that a physician express at some point that a patient could benefit from the use of medical marijuana.[153] In the present case, the defendant's physician stated this at the motion hearing, which was sufficient.[154] "[T]he circuit court reversed the district court's denial of defendant's motion to dismiss," and the prosecution appealed.[155]

The court of appeals, noting this was an issue of first impression, reversed the circuit court and reinstated the charges against the defendant.[156] The court concluded that the physician's statement "must have occurred after the enactment of [the Michigan Medical Marihuana

145. *Kolanek*, 291 Mich. App. at 230.
146. *Id.* at 231.
147. *Id.*
148. *Id.*
149. *Id.* at 231-32.
150. *Id.* at 232 (alteration in original).
151. *Kolanek*, 291 Mich. App. at 232.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 232-33.
156. *Id.* at 229.

Act], but prior to [a defendant's] arrest."[157] The court noted that this case presented an issue of statutory interpretation.[158] This required the court to examine and interpret the statute's requirement of a physician's statement, and the timing of the physician's statement, in relation to a defendant's request for use of medical marijuana and a defendant's arrest for possession of said marijuana.[159] The court believed that because the legislature wrote the statute in the present perfect tense—the physician "has *stated*" the patient's need for medical marijuana—the intent was that this statement occur prior to an event, such as an arrest or prosecution involving marijuana.[160] The court noted that this "interpretation is also consistent with both California's and Oregon's interpretation of their medical-marijuana [laws]."[161] The court concluded that the statute was not intended to "afford defendants an after-the-fact exemption for otherwise illegal activities."[162] Furthermore, the court noted:

> [T]he very fact that the law creates the ability to legitimately have a defense to certain actions that would otherwise be illegal would indicate that persons must fulfill those requirements prior to any arrest. Otherwise, there is no incentive for anyone to utilize their time and money to go through the process; people would simply engage in the illegal activity, rolling the dice that they will not get caught, with the understanding that, if they do get arrested, they can subsequently receive a retroactive exemption.[163]

Thus, the court held a physician's statement regarding a patient's benefit from medical marijuana must have occurred prior to arrest.[164] Because that had not occured in the present case, the charges against the defendant had to be reinstated.[165] The court noted, however, that the defendant is not barred from asserting the same defense at trial.[166]

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157. *Kolanek*, 291 Mich. App. at 241.
158. *Id.* at 235.
159. *Id.*
160. *Id.*
161. *Id.* at 236.
162. *Id.* at 238.
163. *Kolanek*, 291 Mich. App. at 238-39.
164. *Id.* at 241.
165. *Id.* at 241.
166. *Id.* at 241-42.

B. Definition of "Enclosed, Locked Facility"

In *People v. King*,[167] the State charged the defendant with illegally growing marijuana.[168] The charges stemmed from an anonymous tip received by the Michigan State Police, who went to the defendant's house and found marijuana plants growing inside a loosely-covered dog kennel.[169] The officers spoke to the defendant, who had a medical marijuana card, and "he unlocked a chain lock on the kennel."[170] "The kennel was six feet tall, but had an open top and was not anchored to the ground."[171] Defendant also "had more marijuana plants inside the house" in an "unlocked living room closet."[172]

After the defendant was charged with manufacturing marijuana, he moved to dismiss based on the affirmative defenses available under the MMMA.[173] "The district court denied defendant's motion" to dismiss.[174] In the circuit court, the defendant asserted the same defense and also argued that the search warrant was invalid because it was not based on probable cause, but merely an anonymous tip which was hearsay.[175] The prosecution countered that the "defendant had failed to comply with the MMMA because he did not keep the marijuana in an enclosed, locked facility."[176] The circuit court granted defendant's motion to dismiss the charges.[177] The court found that because the defendant had a valid "medical-marijuana registry identification card" and kept the plants in an enclosed, locked area, "there was no probable cause to support the issuance of the search warrant for his home."[178] However, the court also found the officers acted in "good-faith reliance on the [search] warrant," therefore, the evidence should not be suppressed.[179] The court concluded, nevertheless, "that the officers should not have seized the marijuana

167. 291 Mich. App. 503, 804 N.W.2d 911 (2011), *appeal granted*, 489 Mich. 957, 798 N.W.2d 510 (2011).
168. *Id.* at 504.
169. *Id.* at 505.
170. *Id.* at 506.
171. *Id.*
172. *Id.*
173. *King*, 291 Mich. App. at 506. *See also* MICH. COMP. LAWS ANN. §§ 333.26421-.26430.
174. *King*, 291 Mich. App. at 506.
175. *Id.*
176. *Id.*
177. *Id.* at 506-07.
178. *Id.*
179. *Id.* at 507.

because defendant complied with the requirements of the MMMA."[180] The prosecutor appealed.[181]

The court of appeals reversed and remanded for reinstatement of the charges.[182] Under the MMMA, a defendant can assert a defense if he complies with the conditions set forth in the act.[183] The outcome of this appeal hinged on the definition of "enclosed, locked facility" and whether the defendant met the requirements of this definition.[184] The MMMA defines "enclosed, locked facility," as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient."[185]

The court of appeals held that the trial court "incorrectly interpreted and applied the phrase 'enclosed, locked facility.'"[186] The defendant "grew [the] marijuana plants in his backyard, within a chain-link dog kennel that was only partially covered on the sides with black plastic."[187] It greatly bothered the court that, although "[t]he kennel had a lock," there was nothing covering the top of it and it could easily "be lifted off the ground."[188] "The trial court . . . based its interpretation of 'other enclosed area' on the definition of 'enclose' in *Black's Law Dictionary*," which was an incorrect analysis, according to the appellate court.[189] The definition of "enclosed, locked facility" in the MMMA requires that "the marijuana be kept within a secure facility . . . to ensure that it is inaccessible to anyone other than a licensed grower or a qualifying patient," the court held.[190] "[T]hese provisions are obviously meant to prevent access by the general public and, especially juveniles."[191] The court also took issue with the plants the defendant had inside his home in a closet, noting that there was no lock on the closet door, which is definitely contrary to the requirements of the MMMA.[192] Under these circumstances, the appellate court found that the "defendant failed to comply with the strict requirements of the MMMA that he keep the

180. *King*, 291 Mich. App. at 507.
181. *Id.* at 504.
182. *Id.*
183. *Id.* at 509.
184. *Id.* at 511.
185. MICH. COMP. LAWS ANN. § 333.26423(c) (West 2008); *King*, 291 Mich. App. at 511.
186. *King*, 291 Mich. App. at 511.
187. *Id.*
188. *Id.* at 511-12.
189. *Id.* at 512.
190. *Id.* at 513.
191. *Id.*
192. *King*, 291 Mich. App. at 513-14.

marijuana in an 'enclosed, locked facility,'" therefore "he [was] subject to prosecution under [the law], and the trial court abused its discretion by dismissing the charges . . . ."[193]

C. Other Statutory Requirements

In *People v. Redden*,[194] the police executed a search warrant at the defendant's home on March 30, 2009 and netted one and a half ounces of marijuana and twenty-one marijuana plants.[195] During the search, the defendants[196] gave the officers documents regarding their use of marijuana for medicinal purposes.[197] The documents, dated March 3, 2009, were statements from a physician that the defendants have "a terminal illness or debilitating condition as defined in Michigan's medical marijuana law," and that marijuana would have a therapeutic benefit.[198] One of the officers who testified at trial stated that, although the MMMA "went into effect on December 4, 2008," the State of Michigan did not start to issue "registry identification cards until April 4, 2009."[199] The state issued cards to the defendants on April 20, 2009, after the search of their residence.[200]

At the preliminary examination, the defendants asserted the affirmative defense of being qualifying patients under the MMMA, and presented the testimony of the physician who had examined them and issued the statements regarding their medical condition and use of marijuana for medical purposes.[201] The prosecution countered that the defendants could not assert this affirmative defense because they did not have registry identification cards at the time of the search.[202] Although the prosecution conceded that the "defendants could not have obtained [the] card[s]" at that time "because the state had not yet begun issuing them," it argued that the defendants should have abstained from using marijuana until the cards were issued so they could be in compliance with the law.[203]

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193. *Id.* at 514.

194. 290 Mich. App. 65, 799 N.W.2d 184 (2010), *appeal withdrawn*, 489 Mich. 985, 798 N.W.2d 513 (2011).

195. *Id.* at 68.

196. Torey Clark was a co-defendant in this case. *See id.*

197. *Id.* at 68-69.

198. *Id.* at 69.

199. *Id.*

200. *Redden*, 290 Mich. App. at 69.

201. *Id.* at 69-70.

202. *Id.* at 72.

203. *Id.*

The defendants argued that the MMMA "did not require possession of a card."[204] The prosecution argued that the defendants did not have a "bona fide physician-patient relationship" with the doctor who provided a qualifying patient statement on their behalf, and that the defendants possessed more marijuana than was reasonably necessary for medical purposes under the MMMA.[205]

The district court observed that the MMMA "is probably one of the worst pieces of legislation I've ever seen in my life," and noted its many ambiguities and inconsistencies.[206] The court found the defendants were entitled to a dismissal of the charges based on the affirmative defense of having a qualifying patient statement, and the doctor's testimony in court.[207] The court also found that the defendants had a bona fide medical relationship with the doctor.[208]

The prosecution appealed to the circuit court, which reversed the district court's order and remanded the case.[209] The circuit court found that the district court had improperly acted as a trier of fact when it should have bound the case over for trial "in order for proper discovery and rebuttal to take place."[210] The circuit court also disputed that the defendants were entitled to assert an affirmative defense under the MMMA at all, and found that the evidence in support of the defense and the defendants' relationship with the physician had not been developed sufficiently.[211]

The court of appeals "affirmed the circuit court's decision to reinstate the charges."[212] The court determined a number of issues in this case. First, the court examined the statute and held that it permits registered and unregistered patients to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.[213] Therefore, the fact that the defendants did not have a properly issued registry card prior to the search of their home was not dispositive.[214] The court further found no reason to reverse the decision of the circuit court because there were "triable issues in the case and the district court

204. *Id.*
205. *Id.* at 72-73.
206. *Redden*, 290 Mich. App. at 73-74.
207. *Id.* at 74.
208. *Id.* at 74-75.
209. *Id.* at 75.
210. *Id.*
211. *Id.* at 75-76.
212. *Redden*, 290 Mich. App. at 90.
213. *Id.* at 82.
214. *Id.*

improperly acted as a trier of fact in denying the bindover."[215] The appellate court wrote that evidence indicated that the defendant's affirmative defense was not complete and there were issues concerning "whether a bona fide physician-patient relationship existed, whether the amount of marijuana the defendants possessed was reasonable under the statute, whether the marijuana was being used for medical purposes, and whether the defendants [actually] suffered from serious or debilitating medical conditions."[216] The court of appeals concluded that the district court erred in finding "that the defendants satisfied the requirements of the MMMA as a matter of law."[217]

VII. THE MICHIGAN SEX OFFENDER REGISTRATION ACT

A. Termination from Sex Offender Registry

In *In re M.S.*,[218] the defendant filed a petition "seeking removal from the sex offender registry."[219] The State placed the defendant on the registry at age thirteen following a "delinquency proceeding and petition alleging three counts of fourth-degree criminal sexual conduct."[220] The court placed him in an "intensive probation program and [the court] terminated its jurisdiction over" him at age fifteen.[221]

When he was twenty-three, the defendant filed the petition for removal from the registry.[222] "The trial court denied the petition as untimely under [MCLA] 28.728c(4)," which states that an offender who was convicted prior to October 1, 2004 must file the petition before October 1, 2007, or within three years of discharge from the jurisdiction of the court.[223] The court found that the petitioner here had not met either of these deadlines.[224] The "defendant filed his petition in 2008, [which was] eight years after his discharge from the trial court's jurisdiction."[225] He argued that the statute was unconstitutional because it does not require that he receive notice of the deadlines.[226]

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215. *Id.* at 83.
216. *Id.* at 84-89.
217. *Id.* at 90.
218. 291 Mich. App. 439, 805 N.W.2d 460 (2011).
219. *Id.* at 440.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 440-41 (quoting MICH. COMP. LAWS ANN. § 28.728c(4) (West 2004)).
224. *In re M.S.*, 291 Mich. App. at 442.
225. *Id.*
226. *Id.*

The court of appeals affirmed the dismissal of the petition on other grounds, noting that the statute does not provide for those charged with fourth-degree criminal sexual conduct a way to terminate their registration.[227] The statute only allows those juvenile offenders convicted of first-, second-, or third-degree criminal sexual conduct to terminate registration.[228] The prosecutor pointed out that "fourth-degree CSC juvenile offenders are not listed on the *public* sex offender registry" and therefore the legislature probably believed there was no reason for them to be removed from the registry.[229]

B. Requiring Registration as Sex Offender

In *People v. Lee*,[230] the defendant was convicted of third-degree child abuse and "was sentenced to five years [of] probation."[231] At sentencing, the prosecutor argued "that [the] defendant should be required to register as a sex offender" under Michigan's Sex Offenders Registration Act (SORA)[232] because "of information that she had received from the victim's family."[233] The trial court stated that if the prosecutor wanted to have a hearing on the issue at a later date, it would hear testimony before a ruling was made.[234] Over a year after the sentencing, the prosecution "filed a motion requesting that defendant be required to register as a sex offender."[235] After hearing testimony, the trial court granted the motion and "ordered defendant to register" under SORA.[236] Defendant appealed.[237]

The court of appeals affirmed.[238] The court adopted the prosecution's argument that the appellate court should view registration under SORA "not as a punishment or part of the sentence," but as a regulation to

227. *Id.* at 443-44.
228. *Id.* at 443.
229. *Id.*
230. 288 Mich. App. 739, 794 N.W.2d 862 (2010), *overruled by*, 489 Mich. 289, 863 N.W.2d 165 (2011). After the *Survey* period ended, the Michigan Supreme Court overturned *People v. Lee*. *See Lee*, 489 Mich. at 301.
231. *Lee*, 288 Mich. App. at 740.
232. MICH. COMP. LAWS ANN. §§ 28.721-36 (West 2004).
233. *Lee*, 288 Mich. App. at 740-41. Specifically, the evidence established that the defendant intentionally touched the child's genitals in order to inflict humiliation or out of anger. *Id.* at 746. Defendant acknowledged that he did this as a form of "bullying" because he was frustrated that the child would not put on his pajamas. *Id.*
234. *Id.* at 741.
235. *Id.*
236. *Id.*
237. *Id.* at 740.
238. *Id.* at 741.

protect the public.[239] The court cited *In re Ayers*, which referred to two federal court decisions that held that the registration and notification requirements of Michigan's SORA are not punishment under the Eighth Amendment of the United States Constitution.[240] Rather, the court found case law that supported the trial court's decision in this case and believed that such judicial factfinding did not violate the defendant's due process rights.[241] The court concluded that "registration under SORA is not a part of defendant's sentence, nor is it a condition of probation; rather, it is a ministerial function designed to protect the public from sex offenders."[242] In reaching this conclusion, the appellate court glossed over the fact that the defendant was not a convicted sex offender, but had been convicted of child abuse.[243] The court chose to focus on the procedural aspects of the trial court's order.[244] Finding no prior case law addressing the procedural propriety of requiring registration over a year after the original sentencing, the court reached its own conclusion: as long as the trial court "has jurisdiction over [the] defendant's case, it may order registration under SORA."[245]

VIII. DEFENSES

A. Self-Defense

In *People v. Dupree*,[246] an incorrect jury instruction resulted in error, which required reversal of the defendant's conviction of felon in possession of a firearm.[247] Dupree argued on appeal to the Michigan Supreme Court that the trial court incorrectly instructed the jury on his theory that he could not be convicted of felon in possession if he only

239. *Lee*, 288 Mich. App. at 742-44.

240. *Id.* at 743-44 (citing *In re* Ayres, 239 Mich. App. 8, 608 N.W.2d 132 (1999) (citing Doe v. Kelley, 961 F. Supp. 1105, 1009 (W.D. Mich. 1997); Lanni v. Engler, 994 F. Supp. 849, 854 (E.D. Mich. 1999))).

241. *Id.* (citing People v. Althoff, 280 Mich. App. 524, 542, 760 N.W.2d 764 (2008)).

242. *Id.* at 744.

243. *Id.* at 745.

244. *Id.* at 744.

245. *Lee*, 288 Mich. App. at 739, 744. The Michigan Supreme Court subsequently granted defendant's application for leave to appeal in *People v. Lee*, and reversed. *See* People v. Lee, 488 Mich. 953, 790 N.W.2d 823 (2010) (granting leave to appeal); *Lee*, 489 Mich. at 301 (reversing the court of appeals' decision).

246. 486 Mich. 693, 788 N.W.2d 399 (2010).

247. *Id.* at 696.

temporarily took possession of the weapon at issue to defend himself during a life-threatening situation.[248]

Dupree went to a family party, during which he got into an argument with Reeves, one of the other guests.[249] The argument turned into a physical fight.[250] According to Dupree, Reeves had a gun in his waistband, and both men struggled to control it.[251] Dupree testified that while they were struggling for the gun, it discharged, hitting Reeves.[252] Dupree kept the gun and later threw it out of the car window as he drove away from the scene.[253]

Dupree was charged with five felonies: (1) assault with intent to murder Reeves;[254] (2) assault with intent to murder another party guest who contradicted Dupree's testimony by stating that Dupree put the gun to her chin and pulled the trigger;[255] (3) felon in possession of a firearm;[256] (4) felonious assault;[257] and (4) carrying or possessing a firearm during the commission of a felony.[258]

Dupree's counsel argued that he did not assault the other guest and that his actions against Reeves constituted self-defense.[259] He also argued that Dupree's temporary possession of the firearm was justified under the circumstances.[260] However, Dupree's attorney did not request a special jury instruction to that effect, but only a standard self-defense instruction.[261] The court, on its own initiative, instructed the jury on a "necessity defense" which it modeled after federal law, as follows:

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248. *Id.* The court of appeals had previously held in a published opinion that this case involved a determination as to "whether temporary possession of a firearm for self-defense during a life-threatening situation" is an affirmative defense under Michigan law. People v. Dupree, 284 Mich. App. 89, 91-92, 771 N.W.2d 470 (2009). Having answered that question in the affirmative, the court then found it necessary to address 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." *Id.*

249. *Dupree*, 486 Mich. at 697-98.

250. *Id.*

251. *Id.* at 698-99.

252. *Id.*

253. *Id.*

254. MICH. COMP. LAWS ANN. § 750.83 (West 2004).

255. *Dupree*, 486 Mich. at 698.

256. MICH. COMP. LAWS ANN. § 750.224f (West 2010).

257. MICH. COMP. LAWS ANN. § 750.82 (West 2010).

258. MICH. COMP. LAWS ANN. § 750.227b (West 2010). *See also Dupree*, 486 Mich. at 697-98.

259. *Dupree*, 486 Mich. at 699.

260. *Id.*

261. *Id.*

> 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.[262]

Dupree's counsel objected to this instruction, disagreeing with the last phrase "any longer than necessary to defend himself."[263] Although the trial court gave defense counsel the opportunity to research the issue and return the next day, the defense counsel could not find any authority to suggest the original instruction was incorrect.[264] The prosecution, however, suggested the court instruct the jury on "momentary innocent possession" as a defense to the charge of felon in possession.[265] The court complied, and instructed:

> And if the person had a brief or momentary possession of the weapon based on necessity, that's a defense to being a felon in possession. And the elements to that are 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. The law imposes that duty as a concomitant part of that.[266]

The jury deliberated and acquitted Dupree of all the charges except felon in possession.[267]

The court of appeals reversed and remanded for a new trial, concluding that the common law affirmative defenses of self-defense and duress are generally available to a defendant charged with being a felon in possession if supported by sufficient evidence.[268] The court of appeals wrote that "[a]n affirmative defense is not a defense that is directed at an element of the crime, rather it is one 'that admits the doing of the act

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262. *Id.*
263. *Id.*
264. *Id.* at 699-700.
265. *Dupree*, 486 Mich. at 700.
266. *Id.*
267. *Id.* at 698.
268. *Dupree*, 284 Mich. App. at 103-04.

charged, but seeks to justify, excuse, or mitigate it.'"[269] According to the appellate court, two affirmative defenses historically have been recognized by Michigan courts that fit the facts of this case: duress and self-defense.[270] The defense of duress applies when the defendant acted under threat of death or serious bodily harm.[271] Under *People v. Luther*, to establish duress a defendant must offer evidence that:

> (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.[272]

The appellate court's opinion listed five elements that would allow a defendant to raise a justification defense to a felon in possession charge.[273] The court of appeals concluded that the felon in possession statute had to be construed with reference to common law, which necessarily includes the defenses of duress and self-defense.[274]

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269. *Id.* at 99 (quoting People v. Lemons, 454 Mich. 234, 246 n.15, 562 N.W.2d 447 (1997) (quoting 21 AM. JUR. 2D *Criminal Law* § 183)).

270. *Id.* at 103-04.

271. *Id.* at 100 (citing People v. Luther, 394 Mich. 619, 622, 232 N.W.2d 184 (1975)).

272. *Id.* (citing *Luther*, 394 Mich. at 622-23).

273. *Id.* at 107-08. The court of appeals stated that, in order for a defendant to raise a defense of justification as a defense to being a felon in possession, the defendant must show:

> (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 a 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; and
> (5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed.

Id.

274. *Dupree*, 284 Mich. App. at 102-03.

The Michigan Supreme Court granted leave to consider "whether any of the traditional common law affirmative defenses are available for a charge of felon-in-possession and, if so, whether the defendant has the burden of proving the affirmative defense."[275] Upon examining the record, the court concluded that only the common law affirmative defense of self-defense was properly preserved before the trial court and limited the analysis to that issue.[276]

"At common law, the affirmative defense of self-defense justifies otherwise punishable criminal conduct," the Michigan Supreme Court wrote, such as the killing of another person, "if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself."[277]

Having examined that issue, the court concluded that the court of appeals was correct that "self-defense is generally available for a felon-in-possession charge if supported by sufficient evidence."[278] In the present case, the defendant introduced "sufficient evidence from which the jury could have concluded that he violated the felon-in-possession statute but that his violation could be justified because he honestly and reasonably believed his life was in imminent danger and that it was necessary for him to exercise force to protect himself."[279]

The court concluded that Dupree "presented evidence from which a jury could find—and apparently did find—that he acted in self-defense when he struggled over the gun with Reeves and ultimately shot Reeves three times."[280]

The court further emphasized that the prosecution bears the burden of disproving the common law affirmative defense of self-defense beyond a reasonable doubt.[281] Finally, the supreme court found the court of appeals properly ruled that the trial court's modified jury instruction on the "momentary innocent possession defense" was erroneous, and because it likely determined the outcome of the case, a new trial was required.[282] Dupree's self-defense theory did not include a requirement of the momentary innocent possession defense that he intended to turn the gun over to the police;[283] rather, the court noted, his unlawful

275. *Dupree*, 486 Mich. at 696.
276. *Id.*
277. *Id.* at 707 (citing People v. Riddle, 467 Mich. 116, 127, 649 N.W.2d 30 (2002)).
278. *Id.* at 708.
279. *Id.* at 697.
280. *Id.* at 708.
281. *Dupree*, 486 Mich. at 709-10.
282. *Id.* at 710-11.
283. *Id.*

possession was excused as long as his possession was necessary to ensure his protection.[284] However, the modified instruction to the jury negated the justification defense for which Dupree had presented evidence during the trial.[285] The court noted that the error was not harmless because there was no evidence Dupree intended to turn the gun over to the police.[286] Thus, the trial court effectively directed a verdict of guilty on the charge of being a felon-in-possession.[287] This was a substantial error, the court concluded, and the court required the conviction be vacated and the case remanded for a new trial.[288]

B. Imperfect Self-Defense

In *People v. Reese*,[289] the defendant claimed self-defense at his bench trial for second-degree murder.[290] One witness testified that she walked past the victim and then heard a shot, which she speculated came from the defendant firing a gun from his passing vehicle.[291] The witness did not actually see who fired the shot, but thought it came from a vehicle belonging to the defendant, and that she heard the gunshot behind her after the vehicle passed.[292] A second witness placed the defendant on the porch steps of his home as the victim approached.[293] The second witness heard the defendant and victim exchange words, and then saw the victim draw and fire a weapon, and the defendant then pull his gun out and return fire.[294] The defendant was injured and taken to the hospital by the witness, and the victim was found dead on another street.[295]

The trial court determined that the defendant did not act in lawful self-defense, even though he was not the aggressor.[296] The court found that the defendant fired the first shot, which prompted the victim to fire his gun.[297] The court characterized the incident as a "shoot-out."[298] The

284. *Id.*
285. *Id.* at 701-02.
286. *Id.* at 711-12.
287. *Dupree*, 486 Mich. at 702.
288. *Id.* at 697.
289. No. 292153, 2010 WL 3604400 (Mich. Ct. App. Sept. 16, 2010) (per curiam) (unpublished opinion), *appeal granted*, 489 Mich. 958, 798 N.W.2d 511 (2011).
290. *Reese*, 2011 WL 3604400, at *1.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Reese*, 2010 WL 3604400, at *2.
297. *Id.*
298. *Id.*

defendant would have been able to claim self-defense if he had "backed off . . . and made peace."[299] The trial court found the prosecution did not prove second-degree murder beyond a reasonable doubt, but convicted the defendant of voluntary manslaughter using the doctrine of imperfect self-defense.[300]

The court of appeals set aside Reese's conviction for voluntary manslaughter in a per curiam opinion.[301] The court stated that "[i]mperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter," and that "[w]here imperfect self-defense is applicable, it serves as a method of negating the element of malice in a murder charge."[302] The court continued by stating that "[t]he doctrine applies only where the defendant *would have been entitled to self-defense* had he not been the initial aggressor."[303] The court noted that in order for the doctrine of imperfect self-defense to apply, the trial court first had to determine "whether he was entitled to a claim of self-defense had he not served as the aggressor" in provoking the confrontation with the victim.[304]

The court of appeals found inconsistencies in the way the trial court reviewed the evidence.[305] The trial court implicitly acknowledged that the defendant acted in self-defense during the incident when it stated that the victim drew and fired his weapon first.[306] However, the trial court also found the defendant "did not act in self-defense because he was the initial aggressor."[307] The court of appeals wrote that "[a]t best these statements are confusing. At worst they raise questions regarding the trial court's misapprehension of the requirements for imposition of the doctrine of imperfect self-defense."[308]

Examining the record, the appellate court concluded that only the first shot could be attributed to the defendant based on the witness' statement indicating that "she heard the shot and assumed it was from his vehicle."[309] The witness did not know if the shooter was the driver or

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299. *Id.*
300. *Id.* at *1.
301. *Id.*
302. *Reese*, 2010 WL 3604400, at *2 (quoting People v. Kemp, 202 Mich. App. 318, 323, 508 N.W.2d 184, 187 (1993)).
303. *Id.* at *2 (emphasis added) (quoting People v. Butler, 193 Mich. App. 63, 67, 483 N.W.2d 430 (1992)).
304. *Id.*
305. *Id.* at *2-4.
306. *Id.* at *2.
307. *Id.*
308. *Reese*, 2010 WL 3604400, at *2.
309. *Id.*

passenger in the car.[310] Another witness testified that the victim continued toward the defendant's house and briefly spoke to him.[311] As a result, the court concluded that the victim did not appear to feel threatened by the preceding gunfire.[312] This caused the court of appeals to question the trial court's labeling the defendant as the "initial aggressor to justify the use of imperfect self-defense to convict him of voluntary manslaughter."[313]

The trial court also failed to examine the defendant's state of mind at the time he initiated the confrontation, which is important because "[a] defendant is not entitled to invoke the doctrine of imperfect self-defense" if he initiated the confrontation with "the intent to kill or do great bodily harm."[314] The trial court also stated that firing five rounds into the victim was evidence the defendant intended great bodily harm toward the victim.[315] However, the appellate court pointed out that the medical examiner found only two wounds to the victim.[316]

The court wrote that one other problem with the trial court's ruling was that the state of mind attributed to the defendant contradicted the applicability of imperfect self-defense.[317] The evidence did not support the trial court's attribution of the defendant's state of mind based on witness testimony.[318] Finally, the trial court did not address the defendant's intent at the time of the initial provocation, which is crucial in determining whether the use of imperfect self-defense was justified.[319] Evidence presented at trial failed to show the defendant's state of mind or intent at the time of the initial provocation, and the trial court did not resolve the seemingly inconsistent timeline of events that occurred.[320] The court of appeals was troubled by the trial court's inaccurate recitation of the witness testimony.[321]

In reversing the trial court, the court of appeals did not believe that "the trial court was aware of the issues and correctly applied the law."[322] The court believed remand and retrial was necessary, although it

310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at *2.
314. *Reese*, 2010 WL 3604400, at *2 (quoting *Kemp*, 202 Mich. App. at 324).
315. *Id.* at *3.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Reese*, 2010 WL 3604400, *3-4.
321. *Id.* at *4.
322. *Id.* (citing MICH. CT. R. 6.403; *Kemp*, 202 Mich. App. at 322).

affirmed the defendant's convictions and sentences for felon in possession of a firearm and possession of a firearm during the commission of a felony because they were not "dependent on the voluntary manslaughter conviction."[323]

On June 22, 2011, the Michigan Supreme Court granted leave to appeal in this case on the issue of "whether the doctrine of imperfect self-defense can mitigate second-degree murder to voluntary manslaughter and, if so, whether the doctrine was appropriately applied to the facts of this case by the Wayne Circuit Court."[324]

C. Emancipated Minor

In *People v. Roberts*,[325] the defendant advertised for models for a photography shoot and lured a seventeen year old girl into taking naked pictures and having sex with him.[326] The defendant recorded the sexual acts on his cell phone.[327] Following a jury trial, he was convicted of three counts of child sexually abusive activity and sentenced to seven to twenty-two years imprisonment on each count.[328]

On appeal, the defendant argued that the child sexually abusive activity statute was void for vagueness, and that the victim was an emancipated minor under the law.[329] The statute defines "child sexually abusive material" as:

> [A]ny depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act.[330]

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323. *Id.*

324. *Reese*, 489 Mich. at 958.

325. 292 Mich. App. 492, 808 N.W.2d 290 (2011) (per curiam), *appeal denied*, 490 Mich. 893, 804 N.W.2d 325 (2011).

326. *Id.* at 494-95.

327. *Id.* at 495.

328. *Id.* at 494.

329. *Id.* at 496.

330. *Id.* at 498 (quoting MICH. COMP. LAWS ANN. § 750.145c(1)(m) (West 2010)).

A "child" is defined under the statute as "a person who is less than 18 years of age,"[331] and the court noted that there exists an affirmative defense if the person is an emancipated minor.[332] At trial, the defendant asserted this affirmative defense, arguing that the victim was a seventeen-year-old emancipated minor because her parents had signed a release form permitting her to engage in adult activities with him.[333] The court examined the list of circumstances under which a minor is considered emancipated, which include being legally married, reaching the age of eighteen, serving in the military and needing medical treatment, or being in the custody of a law enforcement agency or the corrections department and needing medical treatment.[334] The court found none of these criteria applied to the victim in this case and rejected defendant's reliance upon the release form signed by the victim's parents.[335] The court concluded that the statute was not vague and sufficiently informed a person of ordinary intelligence what was prohibited under the statute.[336] Thus, defendant's challenge to the statute failed.[337]

IX. CRIMINAL ISSUES AT TRIAL

A. Admissibility of Victim's Statements

In *People v. Gursky*,[338] the defendant appealed his conviction of four counts of first-degree criminal sexual conduct for sexually abusing his girlfriend's child.[339] At trial, the child-victim's hearsay statements to a family friend were admitted over the defendant's objection.[340] The statements were made when the abuse allegations first surfaced and were used to corroborate the child's testimony.[341]

The defendant argued that the statements were not "spontaneous" as required by the rules of evidence.[342] Rather, defendant contended that the

331. *Roberts*, 292 Mich. App. at 498 (quoting MICH. COMP. LAWS ANN. § 750.145c(1)(b) (West 2010)).
332. *Id.* (quoting MICH. COMP. LAWS ANN. § 750.145c(6)).
333. *Id.* at 500.
334. *Id.* at 498-99.
335. *Id.* at 500.
336. *Id.*
337. *Roberts*, 292 Mich. App. at 500.
338. 486 Mich. 596, 786 N.W.2d 579 (2010).
339. *Id.* at 598.
340. *Id.*
341. *Id.*
342. *Id.* MICH. R. EVID. 803A provides a hearsay exception for a child's statement regarding sexual assault in certain circumstances. *Id.* The rule provides:

child's statements were prompted by the questioning of a family friend and not spontaneous at all.[343] The trial court did not directly address this argument, but rather held that the statements were admissible because of the reasonableness of the delay between the incidents and the child's disclosure of the incidents.[344] At the defendant's trial, both the child and the family friend testified.[345] The child's mother also testified regarding the circumstances surrounding the child's disclosure of the abuse.[346]

On appeal, the court of appeals affirmed the admission of the family friend's testimony regarding the child's statements of abuse.[347] The panel held that, although the trial court abused its discretion by not directly ruling on defendant's argument regarding the lack of spontaneity of the statements, the error was harmless and the testimony of the family friend was admissible against the defendant.[348] The court of appeals cited *People v. Dunham*,[349] which held that "answers to open-ended, innocuous questions are spontaneous."[350]

Defendant applied for leave to appeal to the Michigan Supreme Court, which granted leave to appeal on two issues: (1) whether the child-victim's statements to the family friend were spontaneous within

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> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
> (1) the declarant was under the age of ten when the statement was made;
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
> (4) the statement is introduced through the testimony of someone other than the declarant.
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.
> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

MICH. R. EVID. 803A.

343. *Gursky*, 486 Mich. at 603.
344. *Id.*
345. *Id.* at 599, 623.
346. *Id.* at 601 n.5.
347. *Id.* at 605.
348. *Id.* at 597-98.
349. 220 Mich. App. 268, 559 N.W.2d 360 (1996).
350. *Gursky*, 486 Mich. at 605, 609 n.24 (citing *Dunham*, 220 Mich. App. at 271-72).

the meaning of MRE 803A(2); and (2) whether or not admission of the statements was "outcome determinative."[351]

The Michigan Supreme Court held that the child-victim's statements were not spontaneous and not admissible.[352] However, the court deemed the erroneous admission of the statements harmless error.[353] The Michigan Supreme Court noted that Michigan's Rules of Evidence do not define "spontaneous."[354] The court examined other state court and federal court decisions addressing the definition of "spontaneous," noting the cases could be categorized into three groups.[355] First, there are "impulsive" statements, which are "made by the declarant without prompt, plan, or questioning."[356] The second category is statements that are the result of "questioning by a third party, yet are in some manner . . . unexpected" responses.[357] The third category identified by the court is statements that are made "as a result of open-ended and nonleading questions that include answers or information outside the scope of the questions themselves."[358] Although these types of statements can be spontaneous, the statements merit scrutiny by trial courts before they may be admitted.[359]

In the instant case, the court held that MRE 803A requires the victim to initiate conversation on "the subject matter of sexual abuse."[360] The court did not hold that questioning by an adult "automatically renders" a child-victim's statement inadmissible,[361] rather, trial courts must look at the questions posed by the adult to determine "whether the questioning shaped, prompted, suggested, or otherwise implied the answers."[362] The *Gursky* Court found that the child-victim's statements to the family friend were not spontaneously given because the adult brought up the subject of sexual abuse and asked the child numerous questions.[363] There was no indication, the court noted, that the child would have brought up

351. *Gursky*, 486 Mich. at 605.
352. *Id.* at 616.
353. *Id.* at 625.
354. *Id.* at 608.
355. *Id.* at 609-11 (citing People v. Bowers, 801 P.2d 511, 514-15 (Colo. 1990); State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987)).
356. *Id.* at 609-10 (citing *Bowers*, 801 P.2d at 514-15; *Robinson*, 735 P.2d at 811).
357. *Gursky*, 486 Mich. at 610-11 (citing State v. Aaron L., 865 A.2d 1135, 1147-48 (Conn. 2005); Swan v. Peterson, 6 F.3d 1373, 1377 (9th Cir. 1993)).
358. *Id.* at 611.
359. *Id.* at 611-12.
360. *Id.* at 613.
361. *Id.* at 614-15.
362. *Id.* at 615.
363. *Gursky*, 486 Mich. at 616.

the abuse if not prompted first.[364] Although parts of the child's statement were spontaneous, the court believed that was insufficient to establish the general spontaneity required by the rule.[365]

Although the child's statements were deemed inadmissible because they were prompted by an adult's questioning, the court found admission of the statements to be harmless error at trial for three reasons.[366] First, the family friend's testimony corroborated the child-victim's statements and were not used substantively by the prosecutor.[367] Second, the family friend's testimony was cumulative to the child's trial testimony.[368] Third, any statements made by the family friend regarding the child's reactions during the conversation were not hearsay because the victim's emotional reactions were admissible as non-assertive conduct.[369] Thus, although the trial court abused its discretion by admitting the child's hearsay statements regarding the abuse, the error did not require reversal and defendant's conviction was upheld.[370]

B. Video Testimony During Trial

In *People v. Buie*,[371] the court of appeals examined the constitutionality of permitting two expert witnesses to testify by way of two-way, interactive video technology at a trial for first-degree criminal sexual conduct.[372] The witnesses at trial were a doctor who examined the victims following the assault and a DNA analyst.[373] Following defendant's conviction by a jury, defendant was sentenced to life imprisonment and appealed to the Michigan Supreme Court.[374] Upon direction from the supreme court, the court of appeals remanded the case back to the trial court to determine whether permitting the video procedure was necessary "to further an important public policy or state interest."[375] The trial court held an evidentiary hearing and found "no error in permitting the video procedure because it furthered several state interests or public policies and [the] defendant consented to the

364. *Id.* at 616.
365. *Id.* at 617.
366. *Id.* at 621-22.
367. *Id.*
368. *Id.* at 623.
369. *Gursky*, 486 Mich. at 624-25.
370. *Id.* at 625.
371. 291 Mich. App. 259, 804 N.W.2d 790 (per curiam), *appeal granted*, 489 Mich. 938, 797 N.W.2d 640 (2011).
372. *Buie*, 291 Mich. App. at 261.
373. *Id.* at 262-63.
374. People v. Buie, 285 Mich. App. 401, 404-05, 775 N.W.2d 817 (2009).
375. *Id.* at 418.

procedure."[376] Defendant appealed the findings of the trial court's evidentiary hearing.[377]

The court of appeals reversed.[378] A provision in the Michigan Court Rules allows a trial court to use video technology to take trial testimony in certain proceedings.[379] Although the trial court found good cause to use the technology, and the defendant had consented, the appellate court disagreed that consent had been shown because the trial court did not appropriately apply the test adopted by the court of appeals in an earlier opinion from the defendant's case.[380] Defense counsel stated at the evidentiary hearing that the defendant had objected to the procedure and defendant testified that he asked counsel to object.[381] Because MCR 6.006(C)(2) states that the objecting party does not have to "articulate any reason for not consenting," the court of appeals found the trial court's use of the video testimony of the two expert witnesses to be an error.[382] Since the experts' testimony was highly relevant to establishing an essential element of the identity of the attacker in this case, the court found that the trial court's error was not harmless and required the defendant's conviction to be reversed.[383]

On May 25, 2011, the Michigan Supreme Court granted leave to appeal the court of appeals judgment.[384] The supreme court requested the parties address: (1) "whether defense counsel's agreement to allow two witnesses to testify . . . via [] video technology waived any of the defendant's rights under the Confrontation Clause[;]"[385] (2) "whether

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376. *Buie*, 291 Mich. App. at 262.

377. *Id.* at 262, 267.

378. *Id.* at 275-76.

379. MICH. CT. R. 6.006(C) states:

> As long as the defendant is either present in the courtroom or has waived the right to be present . . . upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings: . . .
>
> (2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

MICH. CT. R. 6.006(C).

380. *Buie*, 291 Mich. App. at 281-82 (citing Maryland v. Craig, 497 U.S. 836, 852 (1990) (holding that trial courts must find that the use of one-way closed circuit television procedures are a necessity and that this finding of necessity is to be made on a case-specific basis; the closed circuit television procedure must preserve all other elements of the Confrontation Clause)).

381. *Id.* at 282.

382. *Id.* at 274.

383. *Id.* at 262.

384. *Buie*, 489 Mich. at 938.

385. *Id.* (citing U.S. CONST. amend. VI; MICH. CONST. 1963, art. 1, § 20).

there was good cause for the use of [the] video technology pursuant to MCR 6.006(C)[;]"[386] (3) "whether the parties consented to the use of [the] video technology at trial pursuant to MCR 6.006(C)(2)[;]"[387] and (4) "whether there was plain error affecting the defendant's substantial rights."[388]

C. Use of a Witness Screen

Another case decided during this *Survey* period implicated the defendant's Confrontation Clause rights during trial. In *People v. Rose*,[389] the trial court permitted the child victim to testify at trial from behind a screen.[390] The screen prevented the victim from seeing the defendant, "even though he could see her."[391] On appeal, the defendant argued that the "use of a witness screen was inherently prejudical" to his trial and "that the United States Supreme Court has . . . disavowed the use of one-way screens to prevent a witness from being able to see a defendant."[392]

The court of appeals affirmed.[393] First, the court found that the trial court correctly made the finding that the use of the witness screen was necessary to protect the victim from further trauma.[394] In making this determination, the trial court heard the testimony of a therapist who counseled the victim and noted that the victim had expressed fear of the defendant.[395] The court found that while the screen did not allow the victim to see the defendant, it "preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process."[396] Therefore, the court concluded that the defendant's right to confront the witness was not violated.[397]

On February 2, 2011, the Michigan Supreme Court granted leave to appeal in this case in order to address "whether the use of a screen to shield a child complainant from the defendant during testimony violates

386. *Id.*
387. *Id.*
388. *Id.* (citing People v. Carines, 460 Mich. 750, 763; 597 N.W.2d 130 (1999)).
389. 289 Mich. App. 499, 808 N.W.2d 301 (2010), *appeal granted*, 488 Mich. 1034, 1034, 793 N.W.2d 235 (2011), *vacated*, 490 Mich. 929, 929, 805 N.W.2d 827 (2011).
390. *Rose*, 289 Mich. App. at 505.
391. *Id.*
392. *Id.*
393. *Id.* at 532.
394. *Id.* at 509.
395. *Id.* at 505-07.
396. *Rose*, 289 Mich. App. at 517.
397. *Id.*

the Confrontation Clause or prejudices the defendant because it impinges on the presumption of innocence."[398]

X. SENTENCING ISSUES

A. Vulnerable Victim

In *People v. Jamison*,[399] the defendant was in a relationship with the victim before the victim ended it and changed his telephone number.[400] A short time later, the victim encountered the defendant while both were driving their vehicles in traffic.[401] The victim testified that the defendant was driving so erratically that he feared she would cause a collision.[402] The victim pulled his car onto a side street to talk with the defendant, but when she pulled her car alongside his car, she pointed a gun at him and fired.[403] The victim was not shot, but a bullet was removed from the driver's seat of his vehicle.[404] The defendant was charged with "assault with intent to do great bodily harm less than murder and felony-firearm."[405] She was convicted of both counts and sentenced to prison for one to ten years for the assault, and a mandatory consecutive two-year prison term for felony firearm.[406]

On appeal, the defendant argued that her sentencing guidelines were calculated incorrectly.[407] Namely, she objected to receiving ten points for offense variable ten, which requires a domestic relationship to justify such a score.[408]

The court of appeals vacated the defendant's sentence and remanded the case to the trial court for resentencing.[409] Offense variable ten, the court noted, addresses "the exploitation of vulnerable victims."[410] A sentencing court assesses ten points for this variable if "[t]he offender exploited a victim's physical disability, mental disability, youth or

398. *Rose*, 488 Mich. at 1034. The order was vacated and the appeal subsequently denied. *Rose*, 490 Mich. at 929.
399. 292 Mich. App. 440, 807 N.W.2d 427 (2011).
400. *Id.* at 441.
401. *Id.* at 442.
402. *Id.*
403. *Id.*
404. *Id.*
405. *Jamison*, 292 Mich. App. at 442.
406. *Id.* at 441.
407. *Id.* at 444.
408. *Id.*
409. *Id.* at 441.
410. *Id.* at 444.

agedness, *or a domestic relationship*, or the offender abused his or her authority status."[411]

The Michigan Court of Appeals' opinion is very fact specific. In *Jamison*, the defendant argued that there was no domestic relationship between her and the victim because the two never shared a home, nor did they ever live together.[412] The sentencing guidelines do not define "domestic relationship."[413] However, the phrase has been interpreted in unpublished opinions and the court found these to be instructive.[414] For instance, in *People v. Davis*, the domestic violence assault statute, MCL section 750.81(2), was used for guidance in interpreting "domestic relationship."[415] The court noted that a conviction under this statute occurs if a court finds that a person has assaulted "his or her spouse or former spouse, *an individual with whom he or she has or has had a dating relationship*, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household."[416] Using *Davis* as a guide, the *Jamison* court found that the defendant in this case had a dating relationship with the victim because they "had [been in a] previous dating relationship."[417] However, their relationship did not seem "domestic" because it had ended over a year before the shooting incident.[418] The *Jamison* court relied on the dictionary definition of "domestic," and concluded that "there must be a 'familial' or 'cohabitating' relationship to qualify as a domestic relationship."[419] Here, the court found that no such domestic relationship existed between the defendant and the victim, especially because they did not share a home and were not related.[420] Accordingly, the court concluded that the trial court erred in scoring ten points for offense variable ten.[421] The correction of the sentence resulted in a change to her minimum sentence range to zero to eleven months, and the court ordered the case remanded for the correction of her sentence to the lower range.[422]

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411. *Jamison*, 292 Mich. App. at 444 (alteration in original); *see also* MICH. COMP. LAWS. ANN. § 777.40(1)(b) (West 2010).

412. *Jamison*, 292 Mich. App. at 444.

413. *Id.* at 445.

414. *Id.* at 445-48.

415. *Id.* at 445 (citing People v. Davis, No. 280547, 2009 WL 997325 (Mich. Ct. App. Apr. 26, 2009) (per curiam) (unpublished opinion)).

416. *Id.* (quoting MICH. COMP. LAWS ANN. § 750.81(2) (West 2004)).

417. *Id.* at 446.

418. *Jamison*, 292 Mich. App. at 446.

419. *Id.* at 446-47.

420. *Id.* at 447.

421. *Id.* at 448.

422. *Id.* at 449.

B. Inaccurate Information

In *People v. Jackson*,[423] the defendant was convicted of armed robbery and two counts of felonious assault following a bench trial.[424] Testimony at the trial established that a mother was leaving a store with her two young children one evening when she saw a man running toward her.[425] The man, who was later identified as the defendant, pointed a gun at the children and threatened to shoot them unless the mother gave him all of her money.[426] Several months later, the victim saw the defendant again and called the police.[427] Although the gun was never found, the defendant was charged with armed robbery, felonious assault, felon in possession of a firearm, and possession of a firearm during the commission of a felony (felony firearm).[428] The trial court acquitted the defendant of the felon in possession and felony firearm charges after finding a lack of evidence establishing that the defendant actually had a gun at the time of the robbery.[429]

The defendant took issue with the way his sentencing guidelines were calculated.[430] The trial court assessed twenty points for the two felonious assault convictions when it calculated the sentence for the armed robbery.[431] As a result, his guideline range was 108 to 270 months, rather than 81 to 202 months without the additional points.[432] The trial court sentenced the defendant as a third habitual offender to terms of 108 to 240 months for the armed robbery and 24 to 96 months for each felonious assault, all to be served concurrently.[433]

The defendant appealed, arguing that the trial court erred by convicting him of two counts of felonious assault while simultaneously finding that he did not have a gun during the commission of the armed robbery.[434] The defendant argued that a felonious assault conviction

423. 487 Mich. 783, 790 N.W.2d 340 (2010).
424. *Id.* at 787.
425. *Id.* at 786.
426. *Id.*
427. *Id.* at 787.
428. *Id.* at 787 (citing MICH. COMP. LAWS ANN. § 750.82 (West 2010) (felonious assault); MICH. COMP. LAWS ANN. § 750.224(f) (West 2010) (felon in possession of a firearm); MICH. COMP. LAWS ANN. § 750.227b (West 2010) (possession of a firearm during commission of a felony); and MICH. COMP. LAWS ANN. § 750.529 (West 2010) (armed robbery)).
429. *Jackson*, 487 Mich. at 787.
430. *Id.* at 788.
431. *Id.* at 787-88.
432. *Id.*
433. *Id.*
434. *Id.* at 788.

requires proof that a dangerous weapon was used in the commission of the offense, which is inconsistent with the trial court's finding that the defendant did not have a gun at the time of the robbery.[435] The court of appeals agreed that it was incorrect to convict the defendant of felonious assault when the trial court determined he did not have a weapon at the time of the offense.[436] "[A]lthough an armed robbery can be committed without [] a dangerous weapon," the court noted that "a felonious assault cannot."[437] The court vacated the concurrent convictions for felonious assault.[438] However, the court refused to remand the case for resentencing because it was required by statute[439] to affirm the sentences as the sentences were still within the guideline range.[440]

Defendant applied for leave to appeal to the Michigan Supreme Court, which, after oral arguments, found that defendant's sentence was based on inaccurate information and therefore he was entitled to resentencing.[441] The court rejected the prosecution's argument that defendant was barred from requesting resentencing because he did not follow the proper statutory procedure.[442] The prosecution contended that a request for resentencing has to be made either at sentencing, in a "proper motion" for resentencing, or in a "proper motion" to remand filed in the court of appeals.[443] Relying on statutory language,[444] the prosecution argued that because the defendant made his request for a remand for resentencing in his appellate brief rather than in a separate motion for remand, the supreme court could not grant his request.[445]

The supreme court agreed that the way in which a request for remand for resentencing is to be made is limited by the statute.[446] Here, the defendant did not make the request at the trial court level because he

435. *Jackson*, 487 Mich. at 788.
436. *Id.* at 788-89.
437. *Id.*
438. *Id.* at 789.
439. MICH. COMP. LAWS ANN. § 769.34(10) (West 2010).
440. *Jackson*, 487 Mich. at 789 (citing MICH. COMP. LAWS ANN. § 769.34(10)).
441. *Id.* at 801-02.
442. *Id.* at 795-96.
443. *Id.*
444. MICH. COMP. LAWS ANN. § 769.34(10) provides:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

MICH. COMP. LAWS ANN. § 769.34(10) (West 2009).
445. *Jackson*, 487 Mich. at 796.
446. *Id.*

could not request a resentencing until the court of appeals vacated his felonious assault convictions.[447] The only other way to make the request is through a "proper motion with the court of appeals," which the supreme court pointed out the court of appeals found had not been made in this case.[448] Nevertheless, given the unique circumstances of this case, the supreme court found that defendant had presented grounds for relief.[449] The court held that "when the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the mandate of a proper motion in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his appellate brief."[450] Thus, the court concluded that defendant did file a proper motion for remand in the court of appeals as required by statute and remanded his case for resentencing.[451]

XI. THE RIGHT TO COUNSEL

A. Access to Counsel

In *People v. Crockran*,[452] the defendant was charged with, inter alia, first-degree murder following a shooting at a nightclub in Flint, which occurred on February 6, 2009.[453] Between the time the shooting occurred and the date the defendant was arrested on February 26, 2009, he had over twenty contacts with an attorney regarding the charges.[454] After he was arrested, the defendant's family retained the attorney to represent him and the attorney contacted the police several times seeking to speak with his client.[455] The defendant himself had not been told that an attorney had been retained and he was interviewed by the police without his attorney the evening of his arrest.[456] The defendant admitted shooting the victim, but maintained it was in self-defense.[457] Later, the "defendant moved to suppress his statement on the [grounds that] . . . the police had failed to inform him" that an attorney had been attempting to contact

447. *Id.*
448. *Id.* at 797.
449. *Id.* at 798-800.
450. *Id.* at 799-800.
451. *Jackson*, 487 Mich. at 801-02.
452. 292 Mich. App. 253 808 N.W.2d 499 (2011) (per curiam).
453. *Id.* at 255.
454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.*

him.[458] The trial court, relying on Justice Cavanagh's opinion in *People v. Bender*, granted the motion to suppress because the facts of the instant case were "indistinguishable" from *Bender*.[459] The prosecutor appealed.[460]

The court of appeals reversed the trial court, vacated the dismissal of the charges, and remanded for further proceedings.[461] The trial court improperly relied on Justice Cavanagh's opinion in *Bender*, which the court of appeals noted was not the majority opinion.[462] Rather, the controlling opinion in the *Bender* decision was the concurrence written by Chief Justice Brickley and joined by Justices Levin, Cavanagh, and Mallett.[463] The trial court also cited *People v. Leversee*, in which Justice McDonald, improperly relying on Justice Cavanagh's *Bender* opinion, wrote in dicta that it is sufficient if an attorney contacts a police station to express his desire to speak to a defendant.[464] Because it was dicta, it had no binding value on the trial court.[465] Rather, the applicable rule, the court wrote, as outlined by Chief Justice Brickley in *Bender*, states that:

> The right to counsel and the right to be free of compulsory self-incrimination are part of the bedrock of constitutional civil liberties that have been zealously protected and in some cases expanded over the years. Given the focus and protection that these particular constitutional provisions have received, it is difficult to accept and constitutionally justify a rule of law that accepts that *law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal.* If it is deemed to be important that the accused be informed that he is entitled to counsel, it is certainly important that he be informed that he has counsel.[466]

In the instant case, the court of appeals wrote that it must be shown that the police "actually concealed the fact that defendant had counsel

458. *Crockran*, 292 Mich. App. at 255.
459. *Id.* at 255-56 (citing People v. Bender, 452 Mich. 594, 551 N.W.2d 71 (1996)).
460. *Id.* at 256.
461. *Id.* at 255.
462. *Id.* at 257.
463. *Id.*; *see Bender*, 452 Mich. at 620 (Brickley, J. concurring).
464. *Crockran*, 292 Mich. App. at 257 (citing People v. Leversee, 243 Mich. App. 337, 346-47, 622 N.W.2d 325 (2000)).
465. *Id.* at 258.
466. *Id.* (quoting *Bender*, 452 Mich. at 621 (emphasis in original) (Brickley, J. concurring)).

available to him and that counsel was at his disposal."[467] The record reflected an attorney-client relationship between retained counsel and the defendant because they had numerous contacts prior to the defendant's arrest and statement to the police.[468] Counsel advised the defendant to turn himself into police and left a message with the police advising them that he was defendant's lawyer.[469] When the defendant was arrested and placed in the police car, he asked repeatedly if he could call his lawyer, but the police did not respond.[470] Under these facts, the court of appeals concluded that an attorney-client relationship existed between counsel and the defendant.[471] The timing of the payment for services by the family is only one consideration in whether an attorney-client relationship existed.[472] Because such a relationship existed, the court found that the defendant was aware he had counsel and therefore it could not have been shown that the police concealed the fact that counsel was available and at defendant's disposal.[473] Even though counsel had repeatedly called the police station after the defendant's arrest and unsuccessfully attempted to speak to the defendant or the detectives, this fact was not dispositive because the defendant already knew he had counsel.[474] The defendant even testified at the suppression hearing that as the police were leading him to the interrogation room he had asked for his lawyer.[475] On these facts, the court of appeals found "that there [was] no violation of *Bender* and suppression [of the defendant's statement] was not warranted."[476] At the beginning of the interrogation, the defendant validly waived his right to counsel because the defendant never said he wanted to stop talking or that he wanted a lawyer.[477] Thus, the court found that the defendant's statement was valid even though the interrogation was initiated by the police after the right to counsel had attached.[478] The holding in *Crockran* is consistent with the U.S. Supreme Court holding in *Montejo v. Louisiana*.[479]

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467. *Id.* (citing *Bender*, 452 Mich. at 621 (Brickley J., concurring)).
468. *Id.* at 259-60.
469. *Id.* at 260.
470. *Crockran*, 292 Mich. App. at 260-61.
471. *Id.* at 261.
472. *Id.* at 262.
473. *Id.*
474. *Id.* at 262-63.
475. *Id.* at 263.
476. *Crockran*, 292 Mich. App. at 263.
477. *Id.*
478. *Id.* at 264.
479. *Id.* at 263; *see* Montejo v. Louisiana, 556 U.S. 778; 129 S. Ct. 2079 (2009).

XII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Failure to Advise Client of Collateral Consequences of Plea

In *People v. Fonville*,[480] the defendant sought to withdraw his guilty plea to child enticement after he learned it would require him to register on the state's sex offender registry.[481] The case arose when defendant's girlfriend left her two children with him while she went to work.[482] He was supposed to return the children to her later that evening; instead, he kept them until the next afternoon.[483] He admitted to the police that he had been driving around with them and a friend, drinking alcohol and using crack cocaine.[484] The prosecution originally charged him with child enticement and kidnapping; however, they dropped the kidnapping charges after the preliminary examination.[485] Defendant's attorney negotiated a guilty plea to one of the child enticement charges under "a *Cobbs* agreement . . . that the trial court would sentence him at the low end of the guidelines," and he could withdraw his plea if the court intended to sentence above that number.[486]

At the plea hearing, "defense counsel stated he had explained the plea" agreement to the defendant, and the defendant's mother.[487] The court questioned the defendant on the record regarding the night in question, and both "the prosecution and the defense indicated their satisfaction with the factual basis for the [plea.]"[488] At the sentencing hearing, "defense counsel informed the trial court that [the defendant] wished to withdraw his [guilty] plea" because a conviction for child enticement would require him to "register as a sex offender."[489] Defendant told the court he wanted a jury trial, and that, although he admitted to child endangerment, he had no "evil intent" toward his girlfriend's two children at the time of the incident.[490] The trial court adjourned the sentencing in order to review the plea transcript.[491] In the meantime, defense counsel moved to withdraw, and the defendant

480. 291 Mich. App. 363, 804 N.W.2d 878 (2011).
481. *Id.* at 367, 370.
482. *Id.* at 367.
483. *Id.*
484. *Id.* at 369.
485. *Id.* at 368.
486. *Fonville*, 291 Mich. App. at 368-69; *see* People v. Cobbs, 443 Mich. 276, 505 N.W.2d 208 (1993).
487. *Fonville*, 291 Mich. App. at 369.
488. *Id.* at 370.
489. *Id.*
490. *Id.* at 370-71.
491. *Id.* at 371.

obtained new counsel.[492] The defendant moved again to withdraw his plea, asserting that he entered into it based on inaccurate and misleading advice from his prior attorney.[493] The trial court ultimately denied the defendant's motion and sentenced the defendant to the lower end of the guideline range, fifty-one months.[494]

The court of appeals reversed.[495] On appeal, defendant presented several issues, mostly relating to the ineffective assistance of his prior counsel.[496] The appellate court rejected all of his arguments except one: the court concluded "that defense counsel's performance was constitutionally defective when he failed to inform [the defendant] of the sex-offender-registration requirement."[497]

The court of appeals agreed with the trial court that defendant did not have a right "to withdraw his plea to the charge of child enticement because there was a sufficient factual basis on the record to support his conviction."[498] The court rejected defendant's argument that the requirement that he register as a sex offender constituted cruel and unusual punishment because there was no sexual component to the offense charged.[499] The court rejected the defendant's argument that his attorney should have moved to quash the information because this would have been futile.[500]

Defense counsel's failure to advise the defendant of the sex offender registration requirement was a serious error because such registration would be a very serious consequence of a guilty plea.[501] The court compared this situation to the United States Supreme Court case of *Padilla v. Kentucky*, in which the Supreme Court considered whether defense counsel had an obligation to advise a defendant that the offense to which he pled guilty would have resulted in his deportation from the country.[502] "The Supreme Court held that a defense attorney must inform a defendant whether a plea carries a risk of deportation."[503] Similarly, the Michigan Court of Appeals stated that sex offender registration is a severe penalty and therefore, "applying the *Padilla* rationale to this

492. *Id.*
493. *Fonville*, 291 Mich. App. at 371.
494. *Id.* at 373.
495. *Id.* at 395.
496. *Id.* at 380, 382-84, 388.
497. *Id.* at 395.
498. *Id.* at 394-95.
499. *Fonville*, 291 Mich. App. at 395.
500. *Id.* at 384.
501. *Id.* at 386.
502. *Id.* at 389 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010)).
503. *Id.* (citing *Padilla*, 130 S. Ct. at 1478).

case," the appellate court held that "defense counsel must advise a defendant that registration as a sexual offender is a consequence of his guilty plea."[504] The failure to do so, the court concluded, affects "whether the plea was knowingly made."[505] Here, defense counsel had a duty to inform the defendant of the registration requirement, especially because there was no sexual component to defendant's conduct.[506] Because defense counsel did not do this, the defendant was prejudiced and his motion for relief from judgment should be granted.[507]

B. Failure to Investigate

In *People v. Owens*,[508] the defendant raised several issues on appeal following his conviction for second degree criminal sexual conduct, including the conduct of the prosecutor and ineffective assistance of counsel.[509] The defendant was accused of inappropriate touching and sexual behavior toward the younger sister of his daughter's boyfriend while the defendant and girl were alone in the basement of defendant's house.[510] The defendant denied the conduct, but the jury convicted him and the court sentenced him to thirty months to fifteen years imprisonment.[511] On appeal, the defendant raised the issue of ineffective assistance of counsel and the court of appeals remanded for a *Ginther* hearing.[512] The trial court was disturbed by defense counsel's lack of knowledge in handling criminal sexual conduct cases and forensic interview techniques, but ultimately denied defendant a new trial because counsel's deficiency, the court believed, did not affect the outcome.[513] The defendant appealed.[514]

The court of appeals reversed and remanded for a new trial.[515] The court agreed with the defendant that his trial counsel should have investigated the forensic interview process used to question the victim and that reasonable trial counsel would have called an expert at trial to

504. *Id.* at 392.
505. *Fonville*, 291 Mich. App. at 392.
506. *Id.* at 394.
507. *Id.*
508. No. 288074, 2010 WL 4320396 (Mich. Ct. App. Nov. 2, 2010) (per curiam) (unpublished opinion).
509. *Id.* at *1.
510. *Id.*
511. *Id.*
512. *Id.* at *1. *See* People v. Ginther, 390 Mich. 436, 212 N.W.2d 922 (1973).
513. *Owens*, 2010 WL 4320396, at *1-2.
514. *Id.* at *2.
515. *Id.* at *7.

testify about forensic interview techniques.[516] The court did not find counsel's conduct harmless because the "case involved a close credibility contest."[517]

Defense "counsel also failed to object to the prosecutor's introduction of inadmissible other acts evidence" at trial.[518] The prosecutor asked the defendant's wife about the "defendant's prior cocaine addiction to suggest that defendant's testimony was incredible."[519] The court of appeals found that this line of questioning was "improper, highly prejudicial, and warranted an immediate objection," which defense counsel did not do.[520] The court found that neither defense counsel's failure to object to the questions posed to the defendant's wife, nor the prosecutor's misconduct in making improper and highly prejudicial arguments during closing arguments were both not harmless errors.[521] The court concluded that in a case such as this, where credibility is crucial, any arguments that create an improper inference regarding the defendant's character, or improperly bolster the credibility of government witnesses, can "seriously affect the fairness, integrity and public reputation of the judicial proceedings." [522]

C. Failure to Call Witnesses

During the *Survey* period, the court of appeals decided two factually similar cases, both involving claims of ineffective assistance of trial counsel, that ultimately had different outcomes. In *People v. Swain*,[523] the defendant was convicted of four counts of first-degree criminal sexual conduct involving her adopted son.[524] The court of appeals originally affirmed her convictions and "the trial court denied two motions for a new trial and a motion for relief from judgment."[525] In 2009, with new counsel, "defendant filed a second motion for relief from judgment" based on "newly discovered" witnesses.[526] The trial court "heard the testimony of the new witnesses, concluded there was a

516. *Id.* at *3.
517. *Id.* at *3.
518. *Id.* at *3-5.
519. *Owens*, 2010 WL 4320396, at *4.
520. *Id.*
521. *Id.* at *5, *7.
522. *Id.* at *7.
523. 288 Mich. App. 609, 794 N.W.2d 92 (2010), *appeal denied*, 488 Mich. 992, 791 N.W.2d 288 (2010), *reconsideration denied*, 489 Mich. 902, 796 N.W.2d 257 (2011).
524. *Swain*, 288 Mich. App. at 612-13.
525. *Id.* at 613.
526. *Id.*

'significant possibility' the defendant was actually innocent[,] and granted the motion" based on trial counsel's failure to investigate the witnesses.[527] The prosecution filed an application for leave to appeal with the court of appeals that was denied.[528] The prosecution then sought leave to appeal to the Michigan Supreme Court.[529] The Michigan Supreme Court remanded the case to the court of appeals to address whether the successive motion was barred by MCR 6.502(G) and, "if it was, whether defendant's constitutional rights [were] implicated given that the trial court found a significant possibility that defendant [was] innocent based on evidence defendant's attorney failed to present at trial."[530]

On remand, the court of appeals reversed.[531] The court agreed with the prosecution "that once the trial court determined that the testimony of [the witnesses] was not new evidence . . . the court was required to deny defendant's successive petition."[532] Defendant could not obtain relief on a successive motion unless the motion fell within either of the two exceptions of the applicable Michigan Court Rule.[533] The court noted that "the 'good cause' and 'actual prejudice' requirements of [the Michigan Court Rules] do not provide a third exception."[534] Therefore, because "defendant's successive motion was based on evidence discovered before the first motion for relief from judgment was filed," the Michigan Court Rules bar the court from proceeding.[535] The court found that trial counsel's failure to investigate the witnesses during the original trial did not constitute ineffective assistance.[536] Defendant's trial counsel "testified at the evidentiary hearing" that he learned of the witnesses in the middle of the trial.[537] However, the court noted that counsel's failure to investigate them at that time was not unreasonable, especially given the fact that their testimony did not provide direct

527. *Id.*

528. Order Denying Prosecution's Motion for Leave to Appeal, People v. Swain, No. 293350 (Mich. Ct. App. Sept. 10, 2009).

529. People v. Swain, 485 Mich. 997, 997, 775 N.W.2d 147 (2009).

530. *Id.*

531. *Swain*, 288 Mich. App. at 647.

532. *Id.* at 633.

533. *Id.* MICH. CT. R. 6.502(G)(2), the applicable rule, provides that "a defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion . . . ." MICH. CT. R. 6.502(G)(2).

534. *Swain*, 288 Mich. App. at 647; MICH. CT. R. 6.508(D)(3).

535. *Swain*, 288 Mich. App. at 647.

536. *Id.* at 642-43.

537. *Id.* at 645.

evidence that defendant was innocent of the charges.[538] The court determined that while the testimony would have impeached the credibility of the victim, counsel impeached the victim using other witnesses.[539] Since the court found that defendant had not demonstrated "actual innocence" as required by the United States Supreme Court[540] and trial counsel was not ineffective for failing to call the witnesses at trial, the court reversed the order granting the successive petition.[541]

On December 16, 2010, the Michigan Supreme Court denied defendant's application for leave to appeal the appellate court's ruling, and later denied a motion to reconsider the application for leave to appeal.[542]

D. Lack of Meaningful Adversarial Testing

Another defendant in similar circumstances, however, did obtain relief from the Michigan Court of Appeals. A jury convicted defendant Gioglio of two counts of second-degree criminal sexual conduct involving his young niece.[543] "The trial court sentenced him to serve 80 to 270 months in prison for his first CSC II Conviction, to serve 60 to 270 months in prison for his second CSC II conviction, and to serve 18-90 months in prison for his conviction of attempted CSC II."[544] On appeal, he argued that he had ineffective assistance of trial counsel because his attorney "did not make an opening statement and did not present any witnesses or evidence" for the defense.[545] Defense counsel "failed to cross-examine several witnesses" and failed to object on many occasions.[546] "Examining [defense counsel's] handling of the defense as a whole," the court of appeals "conclude[d] that she completely failed to submit the prosecution's case to the meaningful adversarial testing contemplated under the Sixth Amendment of the United States Constitution and the Michigan Constitution."[547] The court of appeals

538. *Id.* at 645-46.

539. *Id.* at 646.

540. *See* Schlup v. Delo, 513 U.S. 298, 314-15 (1995) (holding that a defendant may have an otherwise barred constitutional claim from trial available in a federal habeas action if the defendant can make a "gateway" showing of actual innocence).

541. *Swain*, 288 Mich. App. at 647.

542. *Swain*, 488 Mich. at 992 (denying defendant's application to appeal); *Swain*, 489 Mich. at 902 (denying defendant's motion for reconsideration).

543. People v. Gioglio, 292 Mich. App. 173, 175, 807 N.W.2d 372 (2011), *rev'd*, 490 Mich. 868, 802 N.W.2d 612 (2011).

544. *Id.* at 175.

545. *Id.* at 196.

546. *Id.* at 197.

547. *Id.* at 201.

faulted the trial court for analyzing defendant's motion for a new trial under *Strickland v. Washington* rather than *United States v. Cronic*.[548] The *Gioglio* court wrote that the case at bar implicated the second prong of the *Cronic* test, which addressed the failure to meaningfully test the prosecution's case.[549] At an "evidentiary hearing on the motion for new trial," the prosecutor testified that defense counsel "thought defendant was guilty and had expressed a strong dislike" for him.[550] The court of appeals believed defense counsel's "decision not to cross-examine [the victim]" was not trial strategy, but rather was a choice because she believed the defendant was guilty.[551]

In reversing and remanding for a new trial, the court of appeals concluded:

> We recognize that the presumption of prejudice under *Cronic* will apply only in the most extraordinary of cases. We believe that this is such a case . . . . Whatever the faults in our system, we have no difficulty concluding that the vast majority of criminal defense lawyers not only subject the prosecution to meaningful adversarial testing, but also do so in a professional and effective way. This was one of those rare trials where that was not the case.[552]

548. *Id.* at 206-07; United States v. Strickland, 466 U.S. 668, 687 (1984); United States v. Cronic, 466 U.S. 648 (1984). *Cronic* requires a defendant's trial counsel subject the prosecution's case to "meaningful adversarial testing." The *Cronic* Court noted that there are circumstances involving trial counsel's performance that are likely to prejudice the accused, namely, (1) where the defendant was completely denied the assistance of counsel at a critical stage; (2) where the defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) where the circumstances under which the defendant's trial counsel functions are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Gioglio*, 292 Mich. App. at 195 (quoting *Cronic*, 466 U.S. at 659-60).

549. *Gioglio*, 292 Mich. App. at 206.

550. *Id.* at 203, 212.

551. *Id.* at 204.

552. *Id.* at 209.

XIII. MISCELLANEOUS ISSUES

A. The Slayer Rule

In *In re Estate of Nale*,[553] the petitioner was the personal representative of the estate of Michael Stephen Nale.[554] Mr. Nale's wife stabbed him to death, and was subsequently convicted of voluntary manslaughter.[555] Mr. Nale's estate filed a "petition for forfeiture and revocation of benefits" in probate court in Macomb County, arguing that Michigan's "Slayer Statute" prevented the decedent's wife from receiving benefits from the decedent's estate because she had caused his death.[556] The petitioner argued "that [the] respondent[/wife] had forfeited all benefits from the decedent's estate . . . because she had 'feloniously and intentionally' killed the decedent" under the statute.[557] In response, the respondent/wife argued that the statute in question only "refers to first- and second-degree murder, but not manslaughter[,]" and therefore she is still eligible to receive benefits from the estate.[558] The probate "court disagreed [with the respondent/wife] and entered an order granting the petition."[559]

The court of appeals affirmed.[560] The court noted that the Estates and Protected Individuals Code ("EPIC") states "that [one] who 'feloniously and intentionally' kills a decedent forfeits all benefits from [that person's] estate."[561] The court wrote that this rule, also known as the

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553. 290 Mich. App. 704, 803 N.W.2d 907 (2010) (per curiam).

554. *Id.* at 705-06.

555. *Id.* at 705.

556. *Nale*, 290 Mich. App. at 705-06; MICH. COMP. LAWS ANN. § 700.2803 (West 2010).

557. *Id.* at 706 (citing MICH. COMP. LAWS ANN. § 700.2803).

558. *Id.*

559. *Id.* at 706.

560. *Id.* at 705.

561. *Id.* at 707. MICH. COMP. LAWS ANN. § 700.2803 provides:

> (1) An individual who feloniously and intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.
>
> (2) The felonious and intentional killing of the decedent does all of the following:
>
> (a) Revokes all of the following that are revocable:
>
> (i) Disposition or appointment of property made by the decedent to the killer in a governing instrument.

"slayer rule," comes from the common law concept that a killer "cannot benefit [from] his or her criminal act."[562]

In *Nale*, the "respondent was convicted of voluntary manslaughter" and she argued that her conviction "does not involve an 'intentional killing'" as defined by the statute.[563] Therefore, she sought to receive benefits from the estate of her late husband.[564] In resolving this dispute, the court "examined the meaning of the term 'intentionally'" as used in the slayer statute, as well as the manslaughter statute itself.[565] The court noted that the "Michigan Supreme Court has defined voluntary manslaughter as an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool."[566] The court of appeals wrote that one element of the crime of voluntary manslaughter is an "intent to kill or commit serious bodily harm."[567] The court noted that both murder and voluntary manslaughter contain the element of an "intentional" killing; therefore the courts have designated voluntary manslaughter as an "intentional" killing.[568]

Furthermore, the common law "slayer rule" not only includes murder, but also extends to manslaughter.[569] The legislature, in drafting the statutory version of the slayer rule, could have limited its operation specifically to murder, but because it did not do so "it is fair to conclude that it intended to encompass the crimes that the common law deems 'intentional killings,' including voluntary manslaughter."[570]

(ii) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer.

(iii) Nomination of the killer in a governing instrument, nominating or appointing the killer to serve in a fiduciary or representative capacity, including a personal representative, executor, trustee, or agent.

(b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.

MICH. COMP. LAWS ANN. § 700.2803.

562. *Nale*, 290 Mich. App. at 707-08 (citing Garwols v. Bankers Trust Co., 251 Mich. 420, 428, 232 N.W. 239 (1930)).

563. *Id.* at 708.

564. *Id.*

565. *Id.*

566. *Id.* (citing People v. Mendoza, 468 Mich. 527, 534-35, 664 N.W.2d 685 (2003)).

567. *Id.* (citing People v. Delaughter, 124 Mich. App. 356, 360, 335 N.W.2d 37 (1983)).

568. *Nale*, 290 Mich. App. at 708-09 (citing People v. Hess, 214 Mich. App. 33, 38, 543 N.W.2d 332 (1995); People v. Scott, 29 Mich. App. 549, 551, 185 N.W.2d 576 (1971)).

569. *Id.* at 710.

570. *Id.*

XIV. CONCLUSION

The cases presented in this Article involve significant issues of criminal law addressed by Michigan's appellate courts. Many of these decisions will be cited and followed in future court proceedings, resulting in a lasting impact for years to come in the legal community. The courts' decisions also have a lasting impact on the public in general as the rulings shape our society and the rules of law.