CRIMINAL LAW

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I. INTRODUCTION

This Survey period, June 1, 2009, through May 31, 2010, produced a number of significant cases decided by the Michigan Supreme Court and Michigan Court of Appeals. The decisions came in such areas as homicide and forms of assault. Also present were traditional crimes such as robbery, larceny, and burglary (breaking and entering). The variety of cases is never ending, including such issues as access to transcripts, intimidation of witnesses and various defenses. Some of the issues are simple, some complex, but all important, to both those involved and the legal community.

II. OFFENSES AGAINST PEOPLE

A. Second-Degree Murder

Ramone Pineda was driving his automobile on a road in Oakland County when he struck the victim's motorcycle.[1] He then drove over the victim and the motorcycle, and furthermore, dragged both underneath his automobile for a substantial distance.[2] The evidence showed that Pineda's blood-alcohol content was substantially beyond the legal limit, and another report showed the victim had died from injuries sustained in the accident.[3] No intoxicating substances were in the victim's system.[4] Pineda was convicted of second-degree murder and contended on appeal

1. People v. Pineda, No. 286267, 2009 Mich. App. LEXIS 2208, at *1-2 (Mich. Ct. App. Oct. 20, 2009).
2. *Id.* at *2.
3. *Id.* at *2-3.
4. *Id.* at *1-2.

that the foregoing facts did not constitute the malice necessary for the crime of murder.[5]

Second-degree murder is a death caused by the malicious act of the defendant without justification or excuse.[6] Malice is defined as, *inter alia*, an act done "in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[7] Drunk driving does not necessarily constitute second-degree murder, but second-degree murder can be found if the evidence constitutes "a level of misconduct that goes beyond that of drunk driving."[8]

In the instant case, the court was of the opinion that the defendant acted with malice.[9] The defendant "deliberately drove over [the victim], and dragged him a great distance."[10] This was after initially hitting the victim.[11] The foregoing was done in an effort to flee the scene, which the defendant might have accomplished but for the fact that his car was stopped because the victim and his motorcycle were wedged under the wheels of the car.[12] The court found that these facts were sufficient to constitute malice and sustain the conviction of second-degree murder.[13] Thus, the conviction was affirmed.[14]

B. Assaultive Offenses

In *People v. Carter*[15] the defendant was convicted of, *inter alia*, two counts of felonious assault. On appeal, he "argued that he could not 'be convicted of two counts of assault since he only [committed] a single act with [the] specific intent to injure one person.'"[16] The pertinent statute, Michigan Compiled Laws Annotated (MCLA) section 750.82(1) states the following:

> [A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous

5. *Id.* at *4.
6. People v. Smith, 478 Mich. 64, 70 (2007).
7. People v. Werner, 254 Mich. App. 528, 531 (2002).
8. People v. Goecke, 457 Mich. 442, 469 (1998).
9. *Pineda*, 2009 Mich. App. LEXIS 2208, at *5.
10. *Id.* at *6.
11. *Id.* at *6.
12. *Id.* at *6-7.
13. *Id.* at *7.
14. *Id.* at *15.
15. People v. Carter, No. 289986, 2010 Mich. App. LEXIS 945 (Mich. Ct. App. May 20, 2010).
16. *Id.* at *13.

> weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.[17]

Felonious assault requires "(1) an assault, (2) with a dangerous weapon, and (3) an intent to injure or place the victim in reasonable fear or apprehension of an immediate battery."[18] In the instant case, the court found the defendant intended to assault the homeowner who was hosting the party he was attending. There was also testimony that when the defendant started firing the gun, the other people attending the party began running. Thus, the court concluded, the defendant committed multiple counts of felonious assault against all of the people at the party who were placed in "reasonable apprehension of receiving an immediate battery."[19]

In *People v. Frank*,[20] the defendant stole a car and drove it directly at a police officer who was standing in the street pointing his weapon at the defendant. He later challenged his felonious assault conviction, claiming there was insufficient evidence of an assault.[21]

The court of appeals affirmed.[22] A felonious assault conviction requires "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery."[23] Defendant's use of the car as a weapon, the court noted, put the police officer "in reasonable apprehension that he was going to be battered."[24] The officer moved out of the path of the car. The issue, the court wrote, was whether the defendant intended to injure the officer, or whether the officer "just happened to be in the middle of the road as defendant made his escape."[25] Intent can be inferred from a defendant's conduct, the court noted, and a video of the incident showed defendant pointed the car at the officer, and that there were no other cars on the road. The court concluded that there was sufficient evidence for a

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17. MICH. COMP. LAWS ANN. § 750.82(1) (West 2004).

18. People v. Lawton, 196 Mich. App. 341, 349 (1992).

19. *Carter*, 2010 Mich. App. LEXIS 945, at *16 (quoting People v. Johnson, 407 Mich. 196, 210 (1979)).

20. People v. Frank, No. 288797, 2010 Mich. App. LEXIS 770 (Mich. Ct. App. Apr. 27, 2010).

21. *Id.* at *3.

22. *Id.* at *1.

23. *Id.* at *5-6.

24. *Id.* at *7.

25. *Id.* at *6.

jury to find that the defendant intended to injure the officer, based on the way he drove the car.[26]

In *People v. Cole*,[27] the defendant was convicted of assault with intent to commit great bodily harm less than murder,[28] assault with a dangerous weapon,[29] unlawful driving away of an automobile,[30] and aggravated domestic violence.[31] He was sentenced as a habitual offender, third offense, to a minimum of 9 years imprisonment.[32]

On appeal, he argued that he did not have the requisite intent to commit an assault with intent to cause great bodily harm.[33] The evidence revealed that the defendant and the victim had just ended a lengthy relationship, when the defendant requested the victim give him a ride home.[34] When the victim rebuffed his advances, the defendant began punching her.[35] The victim eventually ran from the defendant and fell. The defendant also fell down. The victim required surgery to remove a knife blade found lodged in her shoulder.[36]

The defendant argued that he did not intend to stab the victim, but merely fell on her in the street.[37] The court of appeals rejected this assertion.[38] Assault with intent to cause great bodily harm less than murder requires "(1) [a]n attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder."[39] The second element, the court noted, requires a specific intent, and "an intent to harm the victim can be inferred from defendant's conduct."[40] The court noted that the defendant held the victim captive with the knife, and his arm was raised and moved in a stabbing motion when she fell in the street.[41] There was ample factual evidence, the court found, to conclude that the defendant's conduct that evening demonstrated an intent to harm the victim.[42]

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26. *Frank*, 2010 Mich. App. LEXIS 770, at *6-7.
27. No. 288790, 2010 Mich. App. LEXIS 873 (Mich. Ct. App. May 13, 2010).
28. MICH. COMP. LAWS ANN. § 750.84 (West 2004).
29. MICH. COMP. LAWS ANN. § 750.82 (West 2004).
30. MICH. COMP. LAWS ANN. § 750.413 (West 2004).
31. MICH. COMP. LAWS ANN. § 750.81a(2) (West 2004).
32. *Cole*, 2010 Mich. App. LEXIS 873, at *1.
33. *Id.* at *3.
34. *Id.* at *1.
35. *Id.* at *2.
36. *Id.* at *2-3.
37. *Id.* at *3.
38. *Cole*, 2010 Mich. App. LEXIS 873, at *4.
39. *Id.* at *4 (quoting People v. Parcha, 227 Mich. App. 236, 239 (1997)).
40. *Id.* (quoting *Parcha*, 227 Mich. App. at 239).
41. *Id.* at *4.
42. *Id.* at *5.

III. OFFENSES AGAINST PROPERTY

A. Armed Robbery

In *People v. Williams*,[43] the defendant tried to withdraw his guilty plea to armed robbery, and the court refused. He was initially charged with robbing a gas station and a tobacco shop. He pled guilty to armed robbery in both cases, but had difficulty stating a factual basis for the pleas.[44] He stated his purpose for entering the tobacco shop was to steal money, and he suggested to the cashier that he had a gun. The trial court accepted the plea, and the defendant was later sentenced to 24 to 40 years' imprisonment.[45] A year later, he filed a motion to set aside his pleas, arguing there was no showing he actually took anything from the store.[46] The trial court denied the motion and defendant appealed.[47]

The court of appeals affirmed the conviction. The court held that the trial court did not err in accepting defendant's guilty plea even though there was no proof of a completed larceny.[48] The amended armed robbery statute[49] encompasses attempts, and a completed larceny is not necessary to sustain a conviction of robbery, the court noted.[50] The Legislature defined "in the course of committing a larceny" to include

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43. 288 Mich. App. 67 (2010).
44. *Id.* at 69-70.
45. *Id.* at 70.
46. *Id.* at 70.
47. *Id.*
48. *Id.* at 72-73.
49. MICH. COMP. LAWS ANN. § 750.530 (West 2004) defines robbery as follows:
(1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
(2) As used in this section, 'in the course of committing a larceny' includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.
MICH. COMP. LAWS ANN. § 750.529 (West 2004) defines armed robbery as follows:
A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.
50. *Williams*, 288 Mich. App. at 73.

"acts that occur in an attempt to commit the larceny."[51] Thus, the statutory language incorporates acts taken in an attempt to commit a larceny, whether or not the crime is fully completed.[52] The court noted that other jurisdictions are frequently including an attempt to commit the offense within the statute defining the crime.[53] It is the violence or threat of force and the intent that constitute the primary elements of the offense, rather than the successful completion of a certain act.[54]

Judge Gleicher, writing a separate dissent, would find that "the Legislature did not intend that a 2004 amendment to the armed robbery statute would fundamentally alter the elements of that offense by eliminating the requirement of a completed larceny."[55]

B. Breaking and Entering

Kevin Wynn was convicted by a jury of breaking and entering with the intent to commit larceny.[56] The defendant argued on appeal that the evidence submitted at trial was insufficient to establish the crime of breaking and entering.[57]

"The elements of breaking and entering with the intent to commit larceny are (1) the defendant broke into the building by the defendant, (2) the defendant [actually] entered the building, and (3) at [that] time . . . the defendant intended to commit a larceny."[58] The court next turned to a determination of whether or not evidence had been submitted which would justify the jury in concluding that all of the elements of breaking and entering had been established.

According to the court's opinion, the defendant stated in his testimony that he pushed in a window of the building intending to go inside and steal any money he found on the premises.[59] It is not necessary that the defendant actually committed larceny, but only that he intended to commit larceny when he did the breaking and entering.[60]

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51. *Id.* (quoting MICH. COMP. LAWS ANN. § 750.530(2) (West 2004)).
52. *Id.* at 75.
53. *Id.* at 81 n.9.
54. *Id.* at 82.
55. *Id.* at 86.
56. People v. Wynn, No. 287996, 2010 Mich. App. LEXIS 167, at *2 (Mich. Ct. App. Jan. 26, 2010).
57. *Id.*
58. *Id.* (quoting People v. Toole, 227 Mich. App. 656, 658 (1998)).
59. *Id.*
60. *Id.* (quoting People v. Adams, 202 Mich. App. 385, 390 (1993)).

According to the court, the defendant's testimony itself established the element of the intent necessary for this crime.[61]

Furthermore, of course, the defendant's same testimony established that there had been a breaking.[62] The defendant testified "that he pushed in the window in order to get into the business."[63] This was sufficient to establish the element of breaking required for breaking and entering.

Last, a witness testified that he saw the defendant jump into the building through the window the defendant had opened.[64] Indeed, the "defendant himself admitted" that he entered the building.[65] Given this testimony, the court considered it reasonable that the jury had concluded that the element of entering required for the offense of breaking and entering had been established.[66] Defendant's conviction was affirmed.[67]

C. Larceny From A Motor Vehicle

In *People v. Miller*,[68] the victim parked his truck and left it unlocked. His cellular telephone, keys and wallet were taken.[69] The defendant was charged with larceny from a motor vehicle.[70] He moved to quash the charge, arguing that it does not apply to cellular telephones because they are not permanently attached to a vehicle and they would not reduce the value of a vehicle if taken.[71] The trial court granted the motion, concluding that cellular telephones do not fall within the statute.[72]

The statute at issue provides:

> A person who commits larceny by stealing or unlawfully removing or taking any wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on any motor vehicle, house trailer, trailer, or semitrailer is guilty of a felony punishable by imprisonment for

61. *Id.*
62. *Wynn*, 2010 Mich. App. LEXIS 167, at *3.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at *9.
68. 288 Mich. App. 207 (2010).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

not more than 5 years or a fine of not more than $10,000.00 or both.[73]

On appeal, the prosecution argued that the trial court erred in its interpretation of the statute and that it does apply to electronic devices not permanently attached to the vehicle.[74] The court of appeals agreed, and reversed the trial court.[75]

The appellate court concluded that the language of the statute is clear and unambiguous, and the term "telephone" or "electronic device" for transmission of speech includes cellular or mobile telephones.[76] Nothing in the statute, the court noted, limits its application to items permanently attached to a vehicle.[77] The court believed the legislature intended to penalize the stealing of items commonly associated with vehicles in subsection (1) differently than the stealing of other unspecified property in subsection (2) of the statute.[78]

IV. OTHER OFFENSES

A. Aiding and Abetting

In *People v. Plunkett*,[79] the defendant and his girlfriend were daily users of heroin and crack cocaine. The girlfriend introduced her childhood friend, Tiffany Gregory, to heroin and taught her how to prepare the drug.[80] One night the two smoked crack cocaine with another friend in the defendant's living room, and then injected themselves with heroin.[81] Gregory collapsed and paramedics were called, but she was pronounced dead at the scene.[82] An autopsy revealed the cause of death as "multiple drug intoxication," which included high levels of morphine, cocaine, and alcohol. The pathologist concluded Gregory died from a heroin overdose that was made worse by a high level of alcohol consumption earlier the evening she died.[83]

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73. MICH. COMP. LAWS ANN. § 750.356a(1) (West 2004).
74. *Miller*, 288 Mich. App. at 207.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. 281 Mich. App. 721 (2008), *rev'd*, 485 Mich. 50 (2010).
80. *Id.* at 723.
81. *Id.* at 724.
82. *Id.*
83. *Id.* at 725.

The defendant was charged with delivery of heroin causing death and delivery of less than 50 grams of heroin.[84] At the preliminary examination, the defendant argued there was insufficient evidence of those charges, and that, at most, he had funded his girlfriend's heroin purchase.[85] He pointed to the testimony of his girlfriend that he did not possess any heroin and did not know she was going to give heroin to Gregory the evening she died.[86] The prosecutor argued that although the defendant had not possessed heroin, he provided transportation to the drug source and the money to purchase the drug.[87] The trial court found that, since the defendant regularly drove his girlfriend to purchase drugs, gave her the money to purchase drugs, and that the heroin he helped her purchase caused Gregory's death, there was probable cause to bind him over on all counts.[88]

The defendant appealed, arguing there was insufficient evidence that he had delivered heroin to another person.[89] He also asserted that there was insufficient evidence that he delivered to his girlfriend the heroin that caused Gregory's death. The circuit court agreed, finding the trial court abused its discretion in binding defendant over on the charges of delivery of heroin causing death and delivery of less than 50 grams of heroin.[90] The court concluded that defendant's actions did not constitute delivery of heroin to his girlfriend under either statute, and the prosecution appealed.

The court of appeals affirmed.[91] The court found that the defendant's act of driving his girlfriend to purchase heroin and giving her money to purchase was not constructive delivery of heroin, and did not aid or abet his girlfriend in the delivery of the heroin.[92]

The statute at issue provides:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code . . ., that is consumed by that person or any other person and that causes the death of that

84. *Id.* at 851. The defendant was also charged with delivery of less than 50 grams of cocaine and one count of maintaining a drug house, however those charges were not the subject of this appeal.

85. *Plunkett,* 281 Mich. App. at 725.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 726.

90. *Id*

91. *Plunkett,* 281 Mich. App. at 731.

92. *Id.* at 729.

person or other person is guilty of a felony punishable by imprisonment for life or any term of years.[93]

The issue in the present case, the court of appeals opined, was whether there was sufficient evidence to establish the element of delivery; specifically, that defendant delivered *the* heroin to his girlfriend which ultimately caused the death of Gregory.[94] The prosecution argued that the defendant could be found guilty under two theories: (1) the defendant constructively delivered the heroin to his girlfriend, or (2) the defendant aided and abetted the delivery of the heroin to his girlfriend.[795]

The court examined the prosecution's first theory—constructive delivery. The court found no evidence of either an actual or attempted transfer of heroin from the defendant to his girlfriend.[96] In order to establish constructive delivery, the court concluded that the defendant would have to "direct[] another person to convey drugs under his control to a third party."[97] Applying this definition, the court found no constructive delivery either. The heroin purchased by the girlfriend was not under the defendant's control, nor did he tell the drug dealer to give the drugs to his girlfriend.[98] Thus, the court rejected this theory.

The court then turned to examining the prosecution's alternate theory of aiding and abetting.[99] The prosecution argued that the defendant aided and abetted the delivery of the heroin from the drug dealer to his girlfriend by providing the girlfriend with transportation and the money used to purchase the drugs. The prosecution contended that, but for defendant's transportation and money, the girlfriend would not have been able to purchase the heroin that killed Gregory.[100] The court rejected this argument. There was no evidence that the defendant "arranged, assisted, [or] facilitated" the drug dealer in delivering the drugs to his girlfriend.[101] The court believed the defendant did aid and abet his girlfriend in receiving the heroin, but did not aid and abet the drug dealer in delivering the heroin to his girlfriend.[102] The prosecution appealed these findings.

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93. MICH. COMP. LAWS ANN. § 750.317a (West 2010).
94. *Plunkett*, 281 Mich. App. at 727 (emphasis added).
95. *Id.*
96. *Id.* at 728.
97. *Id.* (quoting Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004)).
98. *Id.* at 729.
99. *Id.*
100. *Plunkett*, 281 Mich. App. at 728.
101. *Id.* at 730.
102. *Id.* at 731.

The Michigan Supreme Court framed the issue as follows: "whether a defendant who transported another person to make a drug purchase, supplied the money for this purchase, and intended that the drug purchase occur may be bound over for trial for violating laws prohibiting the delivery of heroin and the delivery of heroin causing death."[103] The court concluded that evidence of such conduct by the defendant establishes probable cause that the defendant was an aider and abetter, and that he could be bound over for trial on those counts.[104] The court reversed the judgment of the court of appeals, reinstated the district court's bindover for trial on those counts, and remanded the case to the circuit court for trial.[105]

The supreme court noted that there were two separate deliveries of heroin: (1) when the drug supplier sold the heroin to defendant's girlfriend, and (2) when defendant's girlfriend gave the heroin to the victim.[106] Since the charges against the defendant were based solely on the delivery of heroin from the drug supplier to defendant's girlfriend, the court limited its analysis to those facts.[107]

The court found that the drug supplier's delivery of heroin to defendant's girlfriend violated two statutes; namely, delivery of a schedule 1 or 2 controlled substance, and delivery of a scheduled 1 or 2 controlled substance causing death.[108] The court concluded that the defendant's conduct provided probable cause that he aided and abetted this delivery, supporting a continuation of the charges against him.[109]

Under the aiding and abetting statute

> [e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.[110]

The Michigan Supreme Court recently reiterated the elements necessary for a conviction under an aiding and abetting theory:

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103. People v. Plunkett, 485 Mich. 50, 52 (2010).
104. *Id.*
105. *Id.*
106. *Id.* at 58.
107. *Id.*
108. *Id.*
109. *Id.* at 58-59.
110. MICH. COMP. LAWS ANN. § 767.39 (West 2004).

> (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 knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.[111]

The defendant argued that, at most, he assisted his girlfriend in obtaining possession of heroin, but did not assist the drug supplier in delivering the heroin to his girlfriend.[112] Although this argument was accepted by the lower courts, the Michigan Supreme Court rejected it outright. The court noted that "a criminal delivery of narcotics necessarily requires both a deliverer and a recipient . . . a defendant who assists *either* party to a criminal delivery necessarily aids and abets the deliverer's commission of the crime because such assistance aids and abets the *delivery*."[113]

Justice Kelly wrote a brief dissent, stating that the defendant, in her view, did nothing to assist the delivery of heroin from the drug supplier to his girlfriend that evening.[114] She disagreed with the majority's conclusion that assisting either party to a criminal delivery of narcotics is aiding and abetting. Rather, she believes aiding and abetting requires there be assistance given to the perpetrator of the crime.[115] Under *People v. Moore*,[116] there are "two key pieces of evidence" missing in this case. First, she wrote, the defendant gave no assistance to the drug supplier, who was the actual perpetrator of the crime.[117] Second, any actions defendant undertook to encourage the commission of the crime were directed toward his girlfriend's possession of the heroin, not the drug supplier's delivery of it.[118] She concluded that the majority's view could result in "any third party who assists in a drug transaction [being] charged with delivery of those drugs" as an aider and abetter.[119] Thus, she believed the majority's analysis of the aiding and abetting theory was

111. People v. Robinson, 475 Mich. 1, 6 (2006) (quoting People v. Moore, 470 Mich. 56, 67-68 (2004)).
112. *Plunkett*, 485 Mich. at 62.
113. *Id.* (emphasis in original).
114. *Id.* at 66.
115. *Id.* at 67.
116. 470 Mich. 56, 63 (2004).
117. *Plunkett*, 485 Mich. at 67 (Kelly, C.J., dissenting).
118. *Id.*
119. *Id.*

overly broad, and she would have affirmed the judgment of the court of appeals.[120]

On September 20, 2010, the defendant was sentenced to three years' probation, following his guilty plea to delivery of less than 50 grams of cocaine and maintaining a drug house.[121] The maximum sentence he could have received under the plea deal was 23 months imprisonment.[122]

In *People v. Gordon-Wood*,[123] the defendant was convicted of two counts of assault with intent to rob while armed,[124] felonious assault,[125] and possession of a firearm during the commission of a felony.[126] The co-defendant, Davis, was convicted of two counts of assault with intent to rob while armed.[127] On appeal, co-defendant Davis claimed the evidence was insufficient to establish two counts of assault with intent to rob while armed.[128]

The court analyzed the problem as being one of aiding and abetting in the commission of an offense.[129] One who aids or abets another in the commission of a crime may be convicted as if that person had him or herself committed the offense.[130] To prove aiding and abetting, the prosecutor must show that a crime was actually committed by either the defendant or someone else, that the defendant assisted or encouraged in the commission of that crime, and that the defendant intended the commission of the crime, or perhaps knew the principal intended to commit the crime at the time of giving of assistance.[131] Co-defendant Davis claimed in his appeal that there was no evidence to show any attempt to rob a co-victim named Collins.[132]

The court of appeals disagreed. The court noted that co-defendant Gordon-Wood had a gun and waved it in the face of both victims. One of the victims, specifically, Collins, testified Davis then started grabbing at him and when Collins claimed not to have anything, Davis turned his

120. *Id.*

121. Valerie Olander, *Ex-Brighton attorney gets three years probation,* DETROIT NEWS (Sept. 21, 2010), http://detnews.com/article/20100921/metro/9210340.

122. *Id.*

123. People v. Gordon-Wood, No. 287515, 2010 Mich. App. LEXIS 341, at *1 (Mich. Ct. App. Feb. 18, 2010).

124. MICH. COMP. LAWS ANN. § 750.89 (West 1970).

125. MICH. COMP. LAWS ANN. § 750.82 (West 1970).

126. MICH. COMP. LAWS ANN. § 750.227b (West 1970).

127. *Gordon-Wood*, 2010 Mich. App. LEXIS 341, at *1.

128. *Id.* at *9.

129. *Id.*

130. *Id.* (citing People v. Robinson, 475 Mich. 1, 5-6 (2006)).

131. *Id.* (quoting People v. Moore, 470 Mich. 56, 67-68 (2004)).

132. *Id.* at *9.

attention to the other victim and took some of the victim's belongings.[133] Based on this action, opined the court, the fact finder could find the elements of aiding and abetting were present.[134] Clearly the co-defendant had assaulted Collins with an intent to rob while armed by waiving the firearm in his face. Davis shouting and grabbing at Collins, according to the court, encouraged co-defendant Gordon-Wood to continue the assault with the weapon. That this was done at the co-defendant demonstrated his intent to assault victim Collins with an intent to rob while armed.[135] Therefore, the court concluded that under an aiding and abetting theory, co-defendant Davis could be found to have supported his co-defendant in the commission of the crime, assault with intent to rob while armed.[136]

Edward Oliver was convicted by a jury of armed robbery.[137] On appeal, he argued that the trial court erred when it refused to instruct the jury on unarmed robbery.[138] The court of appeals first noted that unarmed robbery is a lesser included offense of armed robbery.[139] In the instant case, the jury was instructed on both armed robbery and aiding and abetting.[140] The lower court also instructed on the "natural and probable consequences" theory concerning aiding and abetting.[141] Under the foregoing theory, an individual is criminally liable for anything arising from the commission of the crime if that which happened could be expected to happen if the occasion should arise.[142]

Evidence at the trial showed the robbery victim had been repeatedly stabbed with a knife during the robbery.[143] Therefore the defendant or the co-defendant necessarily possessed a knife during the robbery.[144] The court opined that there was no doubt the defendant had agreed to participate in the robbery.[145] Even if the defendant was not armed, the court believed that it was a natural and probable consequence of the agreement to commit the robbery that the robbery would result in co-

133. *Gordon-Wood*, 2010 Mich. App. LEXIS 341, at *9.
134. *Id.* at *10.
135. *Id.*
136. *Id.* at *11.
137. People v. Oliver, No. 288630, 2010 Mich. App. LEXIS 516, at *1 (Mich. Ct. App. Mar. 18, 2010). The defendant was also convicted of assault with intent to do great bodily harm.
138. *Id.*
139. *Id.* (citing People v. Reese, 265 Mich. App. 642, 645 (2005)).
140. *Id.* at *3.
141. *Id.*
142. *Id.*
143. *Oliver*, 2010 Mich. App. LEXIS 516, at *4.
144. *Id.*
145. *Id.*

defendant's use of a knife.[146] Since such use of a deadly weapon was natural and probable, it would not have been rational for the defendant to be convicted of the lesser offense of unarmed robbery.[147] Therefore, there was no abuse of discretion when the trial court refused to instruct the jury on unarmed robbery and the defendant's conviction was affirmed.[148]

B. Carrying a Dangerous Weapon

In *People v. Parker*,[149] the defendant was convicted of felonious assault[150] and carrying a dangerous weapon with unlawful intent.[151] During the trial, the owner of the bar where the incident occurred testified that a bartender had problems with the defendant, and the defendant was asked to leave. Rather than leave, the defendant brandished a knife. The owner struggled with him, and the defendant was eventually disarmed and arrested.[152]

Defense counsel moved to dismiss the charge of carrying a dangerous weapon with unlawful intent, arguing the prosecution failed to prove the knife had a blade at least three inches long.[153] The prosecutor argued that any dangerous weapon satisfied the statute, and the trial court agreed.[154] The defendant testified he had the knife for three months and carried it daily for practical reasons, such as cutting boxes.[155] He further stated he wasn't going to use it to hurt anyone and "felt stupid" because "[t]hey called my bluff."[156] The trial court instructed the jury that the prosecution had to prove the defendant was "armed with a knife" and intended to use it illegally against another.[157] The defendant was convicted and appealed.

The court of appeals reversed, finding insufficient evidence to support defendant's conviction of carrying a dangerous weapon with unlawful intent. Under the dangerous weapon statute,[158] where a knife is involved, an element of the offense is that the knife must have a blade

146. *Id.*
147. *Id.*
148. *Id.* at *5.
149. 288 Mich. App. 500 (2010).
150. MICH. COMP. LAWS ANN. § 750.82 (West 2004).
151. MICH. COMP. LAWS ANN. § 750.226 (West 2004).
152. *Parker*, 288 Mich. App. at 502.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. MICH. COMP. LAWS ANN. § 750.226.

over three inches in length. The statute was not meant to prohibit the carrying of any knife for an unlawful purpose, otherwise the three-inch specification would be meaningless, the court wrote.[159] Thus, in prosecutions involving carrying a dangerous weapon with unlawful intent, when a knife is the weapon carried, there must be proof that the knife's blade is over three inches in length.[160] Since there was no such proof here, the court invalidated the conviction and directed an acquittal under double jeopardy principles, citing *People v. Thompson*.[161]

C. Unlawful Killing of an Animal

In *People v. Seiler*,[162] the defendant was convicted of unlawful killing of an animal. He was sentenced to six months in jail and 18 months of probation and appealed.[163] The defendant shot and killed his neighbor's dog, Pups. Testimony at trial indicated that he had filed several complaints regarding Pups' barking and wandering onto his property. One night in particular, Pups continually barked at the defendant while he was trying to load his motorcycle onto a trailer.[164] He fired his shotgun at the dog and then left. He was later arrested and told the police the dog attacked him. At trial, the defendant argued that he shot Pups in self-defense. The prosecution portrayed Pups as a gentle family pet, whom the defendant killed without cause.[165] Pups' owner testified that Pups had never bitten anyone. The prosecutor played a video for the jury as proof of Pups' gentleness. Defendant's counsel objected, arguing the video was not relevant to Pups' behavior on the date in question.[166] The trial court held that the video was relevant, not prejudicial to the defendant, and admissible as character evidence under Michigan Rule of Evidence 404.[167] Defense counsel pointed out that the

159. *Parker*, 288 Mich. App. at 509.
160. *Id.*
161. *Id.* (citing People v. Thompson, 424 Mich. 118, 130 (1985)).
162. No. 291562, 2010 Mich. App. LEXIS 978 (Mich. Ct. App. May 25, 2010).
163. *Id.* at *1.
164. *Id.* at *2-3.
165. *Id.*
166. *Id.* at *4.
167. MRE 404 provides as follows:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
> * * *
> (2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the

rule did not apply because Pups was not human, but the court stated the rule gave "some rationale for the reason—for the offering" of the video.[168]

The defendant testified in his own defense at trial, stating he had been bitten by two dogs in the past and another dog had attacked his dog.[169] He stated that Pups had repeatedly acted aggressively towards him and that he was "terrified" of Pups. He stated that he went inside to get his gun so he could safely finish loading the motorcycle, because it required him to turn his back on Pups and squat down.[170] He testified that he had an "instinctive reaction" and shot Pups in self-defense.[171] Nevertheless, the jury convicted him.

On appeal, he argued the trial court erred in allowing the prosecution to introduce evidence of Pups' gentleness during its case-in-chief instead of on rebuttal.[172] The defendant cited *People v. McIntosh*,[173] in which the court held that "evidence of the peaceful character of the deceased [is] not . . . admissible in the prosecution's case in chief in anticipation of defense testimony of violent character supporting a plea of self-defense."

The court of appeals affirmed, finding no error in the trial court's admitting evidence of Pups' characteristics. The court found defendant's argument without merit, noting the video was not admitted under MRE 404, because the trial court found it did not apply since Pups was not human.[174] In addition, Pups' character was at issue in the trial, because defense counsel raised it in defense of the defendant's actions. The court concluded that the evidence was relevant and not unduly prejudicial to the defendant.[175]

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prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor.

MICH. R. EVID. 404.

168. *Seiler*, 2010 Mich. App. LEXIS 978, at *7.

169. *Id.*

170. *Id.*

171. *Id.* at *9.

172. *Id.* at *5.

173. 62 Mich. App. 422, 429 (1975).

174. *Seiler*, 2010 Mich. App. LEXIS 978, at *13.

175. *Id.* at *14-15.

V. DEFENSES

A. Self-Defense

In *People v. Carter*,[176] the defendant was convicted of felonious assault,[177] discharge of a firearm in a building,[178] felon in possession of a firearm,[179] and possession of a firearm during the commission of a felony, third offense.[180] At trial, defendant asserted that he acted in self-defense.

During a party, the defendant tried to pay a woman to have sex with him.[181] When she refused, defendant began hitting her. Other men at the party stopped him, and defendant ran toward the owner of the home where the party was being held.[182] The homeowner hit him with his fist, and the defendant stumbled out of the house.[183] He returned with a gun and started shooting.[184] At least one other witness testified that the homeowner had a gun, and he aimed it at the defendant before the shooting began.[185] The defendant testified that the homeowner hit him with a gun and fired a shot before defendant picked up a gun off the ground and fired it into the air to stop the homeowner from shooting.[186] Despite defendant's contention that he acted in self-defense, he was convicted of all charges.

On appeal, he argued the prosecutor failed to disprove that he acted in self-defense. The court of appeals affirmed, rejecting defendant's self-defense claim. The court noted that the homeowner testified that the defendant left the house and returned with a gun. This was sufficient proof that defendant could not have "honestly and reasonably" believed "his life was in imminent danger or that there was a threat of serious bodily harm."[187] Although there was conflicting witness testimony, the court stated such conflicts are to be resolved in favor of the prosecution.[188]

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176. No. 289348, 2010 Mich. App. LEXIS 945 (Mich. Ct. App. May 11, 2010).
177. MICH. COMP. LAWS ANN. § 750.82 (West 1970) (amended 1994).
178. MICH. COMP. LAWS ANN. § 750.234b (West 1990).
179. MICH. COMP. LAWS ANN. § 750.224f (West 1992).
180. MICH. COMP. LAWS ANN. § 750.227b (West 1992).
181. *Carter*, 2010 Mich. App. LEXIS 945, at *2.
182. *Id.* at *2-3.
183. *Id.*
184. *Id.*
185. *Id*
186. *Id.* at *4.
187. *Carter*, 2010 Mich. App. LEXIS 945, at *5.
188. *Id.*

In *People v. Eplett*,[189] the defendant asserted a self-defense claim after he shot the victim at home. Defendant lived at home with his mother, and one night she returned home with a friend.[190] Both his mother and the friend had been drinking and were loud. Defendant told the police he was mad at his mother because she was not supposed to drink due to medication she was taking.[191] Defendant asked them to quiet down, and an argument ensued. His mother's friend hit the defendant, so the defendant retrieved a gun from his bedroom. Defendant racked the gun, and the victim came down the hall toward the defendant. A struggle occurred and the defendant, who was several inches shorter than the victim, shot the gun twice and struck the victim, killing him.[192]

The district court bound the defendant over to circuit court on a charge of manslaughter and felony firearm, finding insufficient probable cause on second-degree murder.[193] Specifically, the district court judge found the prosecution had failed to prove that the defendant knowingly created a high risk of death by bringing a gun into the argument with the victim.[194] The prosecutor filed a motion with the circuit court to reinstate the second-degree murder charge, and the motion was granted.

Defendant appealed, arguing the circuit court erred in reinstating the charge and that his actions were justified as self-defense.[195] The court of appeals affirmed the reinstatement of the second-degree murder charge against the defendant.[196] Second-degree murder consists of (1) a death, (2) caused by an act of another, (3) with malice, and (4) without lawful justification or excuse.[197] "Malice is . . . the intent to kill," the court noted, and can be inferred from evidence a defendant "intentionally set in motion a force likely to cause death or great bodily harm."[198] In addition, the court found, malice can be inferred from the use of a deadly weapon.[199] Here, the court reasoned, the prosecution established probable cause the defendant acted with malice, because the defendant fired a weapon in close proximity to the victim. According to the court,

189. No. 293255, 2010 Mich. App. LEXIS 889 (Mich. Ct. App. May 18, 2010).
190. *Id.* at *2.
191. *Id.*
192. *Id.* at *3.
193. *Id.*
194. Id. at *4-5.
195. *Eplett,* 2010 Mich. App. LEXIS 889, at *4-5.
196. *Id.* at *1.
197. *See* MICH. COMP. LAWS ANN. § 750.317 (West 2004); People v. Smith, 478 Mich. 64, 70 (2007).
198. *Eplett,* 2010 Mich. App. LEXIS 889, at *6 (quoting People v. Djordjevic, 230 Mich. App. 459, 462 (1998)).
199. *Id.* at *6 (citing People v. Bulls, 262 Mich. App. 618, 627 (2004)).

this act demonstrated a "wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm" the court wrote.[200] Furthermore, the victim was unarmed, lending more credence to this argument.

The court addressed defendant's self-defense argument by first citing the Self-Defense Act, which governs whether defendant was justified:

> Sec. 1. (1) An individual who uses deadly force . . . in compliance with section 2 of the self-defense act and who has not or is not engaged in the commission of a crime at the time he or she uses that deadly force . . . commits no crime in using that deadly force . . . .
>
> (2) If a prosecutor believes that an individual used deadly force . . . that is unjustified under section 2 of the self-defense act, the prosecutor may charge the individual with a crime arising from that use of deadly force . . . and shall present evidence to the judge or magistrate at the time of warrant issuance, at the time of any preliminary examination, and at the time of any trial establishing that the individual's actions were not justified under section 2 of the self-defense act.[201]
>
> Sec. 2. (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.[202]

In order to assert self-defense, the defendant had to have acted with an honest and reasonable belief that the use of deadly force was necessary to prevent his imminent death or great bodily harm.[203] Here, the court believed the issue of whether defendant acted in self-defense

200. *Id,* at *6-7.
201. MICH. COMP. LAWS ANN. § 780.961 (West 2006).
202. MICH. COMP. LAWS ANN. § 780.962 (West 2006).
203. *Eplett,* 2010 Mich. App. LEXIS 889, at *8.

was a question for a jury.[204] The district court, by dismissing the second-degree murder charge, impermissibly decided issues which must be left to a jury, the court concluded.[205] Thus, the second-degree murder charge was reinstated and defendant would have to present his self-defense argument to a jury.

In *People v. Jones*,[206] the defendant was convicted of first-degree murder,[207] felon in possession of a firearm,[208] and felony firearm.[209] At trial, defendant asserted that the victim threatened to kill him and his family on multiple occasions because he believed defendant had broken into his garage.[210] The victim brandished a pistol, tried to run over the defendant with his car, and twice threw rocks at defendant's house.[211] On May 29, 2006, the victim ran his car into the defendant's car and threatened to kill him.[212] He walked toward defendant's house, and the defendant shot him with a rifle.[213] The defendant testified that he feared for his life and believed he would have been killed if he had not shot the victim.[214] He stated that he did not call the police because he had called before and they had not responded.[215]

Defendant appealed his convictions, arguing he acted in self-defense. At trial, the court instructed the jury on the issue of self-defense:

> A person can use deadly force in self-defense only when it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed he needed to use deadly force in self-defense.[216]

Defendant contended he had no duty to retreat because he was within the curtilage of his dwelling at the time of the shooting.[217] The court of appeals rejected this position.[218] Before the jury could even examine the

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204. *Id.* at *9.
205. *Id.* at *9-10.
206. No. 288737, 2010 Mich. App. LEXIS 911, at *1 (Mich. Ct. App. May 18, 2010).
207. MICH. COMP. LAWS ANN. § 750.316(1)(a) (West 1980).
208. MICH. COMP. LAWS ANN. § 750.224f (West 1992).
209. MICH. COMP. LAWS ANN. § 750.227b (West 1990).
210. *Jones*, 2010 Mich. App. LEXIS 911, at *1.
211. *Id.* at *1-2.
212. *Id.* at *2.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Jones*, 2010 Mich. App. LEXIS 911, at *6.
217. *Id.* at *7.
218. *Id.* at *8-9.

issue of a duty to retreat, it had to first find that the defendant "honestly and reasonably believed his life was in imminent danger."[219] The court of appeals could find no basis for the jury to reach such a conclusion.[220] Defendant testified himself that he was waiting for the victim and watching him exit his car.[221] The victim did not have a weapon, and was shot while still in his own driveway.[222] In addition, the defendant shot the victim several more times while he was lying on the ground after the initial shot.[223] There was also a jail telephone recording played for the jury in which the defendant stated he went home and waited for the victim because he was "fed up" with being harassed by him.[224] Thus, the court concluded, no reasonable juror could conclude that the defendant reasonably feared for his life so as to necessitate deadly force.[225] Without such a finding, a duty to retreat is irrelevant, the court noted.[226]

B. Entrapment

In *People v. Fyda*,[227] the defendant appealed his conviction for solicitation of murder and felony firearm. He argued that the trial court incorrectly found the police had not entrapped him.[228] He claimed that the police used a friend of Fyda's to induce him into soliciting an undercover police officer to kill his former wife.[229]

The court of appeals began its analysis by noting the definition of entrapment: "[e]ntrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that the court cannot tolerate it."[230]

The court noted that, in *People v. Johnson*,[231] the Michigan Supreme Court listed several factors to be evaluated when a claim of entrapment arises, including:

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219. *Id. at* *8.
220. *Id.*
221. *Id.*
222. *Jones*, 2010 Mich. App. LEXIS 911, at *8.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at *9.
227. 288 Mich. App. 446 (2010).
228. *Id.* at 456.
229. *Id.* at 449.
230. *Id.* at 456 (quoting People v. Fabiano, 192 Mich. App. 523, 529 (1992)).
231. 466 Mich. 491, 498-99 (2002).

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.[232]

The court of appeals concluded that there was no entrapment in this case. Fyda's friend only facilitated the scheduling of a meeting between the undercover police officer and Fyda, after Fyda sought to find someone to commit the murder.[233] The police did not approach or use the friend; rather, the friend went to the police because Fyda made credible threats against his friend's former wife.[234]

C. Insanity

In *People v. Frank*,[235] the defendant argued on appeal that his attorney should have asserted an insanity defense at his trial. In Michigan, such a defense requires a showing by the defendant that, as a result of mental illness or mental retardation, the defendant "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law."[236]

The court of appeals rejected his claim, noting that although the defendant had a long history of "crack cocaine and marijuana addiction and suffers from a bipolar disorder and suicidal ideation, there is no evidence in the record that defendant lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the

232. *Fyda*, 288 Mich. App. at 457.
233. *Id.*
234. *Id.* at 458.
235. No. 288797, 2010 Mich. App. LEXIS 770 (Mich. Ct. App. Apr. 27, 2010).
236. *Id.* at *3 (citing MICH. COMP. LAWS ANN. § 768.21a (West 1994)).

requirements of the law."[237] In fact, the defendant was found competent to stand trial after a psychiatric examination, and at sentencing, he "articulately" expressed remorse for his conduct.[238]

VI. INTENT

A. Specific Intent

In *People v. Ericksen*,[239] the defendant confronted the victim about an altercation the victim had with the sister of one of defendant's friends. The defendant stabbed the victim several times in the back with a knife.[240] Although the victim did not die, he suffered severe medical complications, including multiple organ failure, cardiac arrest, brain damage, and amputation of both legs below the knee.[241] Defendant was convicted of assault with intent to commit murder,[242] and sentenced to life.

On appeal, he argued the prosecutor presented insufficient evidence to establish he had the requisite specific intent.[243] The court of appeals affirmed, rejecting defendant's argument. The court noted that defendant secretly carried a knife to confront the victim, and told his companions he had "stuck [the victim] five times."[244] This statement, the court wrote, was an admission the defendant "knowingly stabbed the victim many times."[245] The defendant's intent can be inferred from these wounds.[246] The nature, extent and location of the victim's wounds provide "more than minimal" circumstantial evidence that the defendant acted with the requisite intent, the court concluded.[247]

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237. *Id.* at *3-4.
238. *Id.* at *4.
239. 288 Mich. App. 192 (2010).
240. *Id.* at 195.
241. *Id.*
242. MICH. COMP. LAWS ANN. § 769.12 (West 1978).
243. *Erickson*, 288 Mich. App. at 195.
244. *Id.* at 196.
245. *Id.*
246. *Id. See* People v. Mills, 450 Mich. 61, 71 (1995); People v. Unger, 278 Mich. App. 210, 223, 231 (2008).
247. *Erickson*, 288 Mich. App. at 197 (citing People v. McRunels, 237 Mich. App. 168, 181 (1999)).

B. Transferred Intent

In *People v. Carter*[248] the defendant was convicted of, *inter alia*, two counts of felonious assault. On appeal, he argued that he could not be convicted of two counts of assault, since he only committed a single act with the specific intent to injure one person.[249] The pertinent statute, MCL section 750.82(1) states:

> a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.[250]

Felonious assault requires (1) an assault, (2) a dangerous weapon, and (3) an intent to injure or "place the victim in reasonable fear or apprehension of an immediate battery."[251] In the instant case, the court found the defendant intended to assault the homeowner who was hosting the party he was attending.[252] There was also testimony that when the defendant started firing the gun, the other people attending the party began running.[253] Thus, the court concluded, the defendant committed multiple counts of felonious assault against all of the people at the party who were placed in "reasonable apprehension of receiving an immediate battery."[254]

In a concurring opinion, Justice Beckering wrote that he agreed with the outcome of the case, but disagreed with the analysis on the issue of transferred intent.[255] He believed the record supported the conclusion that the defendant intended to place the homeowner in reasonable fear or apprehension of an immediate battery, but not others at the party.[256] The homeowner testified that he saw no one else anywhere near him or the house when the defendant pointed the gun at him.[257] There were no other

248. No. 289986, 2010 Mich. App. LEXIS 945, at *1 (Mich. Ct. App. May 20, 2010).
249. *Id.* at *13.
250. MICH. COMP. LAWS ANN. § 750.82(1) (West 1994).
251. People v. Lawton, 196 Mich. App. 341, 349 (1992).
252. *Carter*, 2010 Mich. App. LEXIS 945, at *16.
253. *Id.*
254. *Id. See* People v. Johnson, 407 Mich. 196, 210 (1979).
255. *Id.* at *18.
256. *Id.* at *21.
257. *Id.*

witnesses who saw the defendant with a gun.[258] Given the location of all of the other witnesses, who scattered when the defendant started fighting with the homeowner, there could be no other acts of felonious assault charged in this case.[259] The problem with applying the doctrine of transferred intent, the Justice wrote, is that anyone could be considered a victim who even sees a defendant with a gun, even if they are not in danger.[260]

VII. CAUSATION

A. Felony Murder

In *People v. Bass*[261] the defendant argued he was not criminally liable for the victim's death because the victim's grossly negligent driving was an intervening cause of death: The victim had crashed into a tree after he was shot in the leg twice while in the driver's seat of his car. He drove away at a high rate of speed and crashed after he was shot.[262] Both defendants were convicted of first-degree felony murder and armed robbery.[263]

The court of appeals rejected the defendants' argument.[264] In order to be found guilty of first-degree felony murder, there must have been "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of a . . . specifically enumerated" felony.[265] A defendant's conduct must be both the factual cause and proximate cause of a victim's death, the court noted.[266] Factual causation, the court wrote, "is established if the result would not have occurred 'but for' the defendant's conduct."[267] Proximate cause results if the victim's injury is a "direct and natural result" of the defendant's actions.[268] If there is an intervening cause—

258. *Carter*, 2010 Mich. App. LEXIS 945, at *21.
259. *Id.* at *22.
260. *Id.* at *23.
261. No. 289299, 2010 Mich. App. LEXIS 807, at *1 (Mich. Ct. App. May 6, 2010).
262. *Id.* at *1.
263. *Id.*
264. *Id.*
265. *Id.* at *2 (quoting People v. Smith, 478 Mich. 292, 318-19 (2007)).
266. *Id.* at *2-3.
267. *Bass*, 2010 Mich. App. LEXIS 807, at *3 (quoting People v. Schaefer, 473 Mich. 418, 435 (2005)).
268. *Id.*

defined as an occurrence that was not reasonably foreseeable—then the link is broken and the defendant's conduct is not the proximate cause.[269]

In *Bass* the court found that the defendants' conduct was the factual cause of the victim's death, because they shot the victim and he would not have driven away and crashed the car if he had not been shot.[270] The defendants' conduct was the proximate cause of death also because it was "the direct and natural result" of shooting the victim.[271] The court concluded that the victim's act of driving his car away at a high speed was not an intervening cause that severed the causal link, because "[i]t was reasonably foreseeable that, after being shot twice in the leg while in the driver's seat of his car, the victim would try to quickly get away from his assailants to either escape or seek medical attention."[272] Although the victim's driving may have been a contributing factor to the crash, the court found that it was mere negligence, which was reasonably foreseeable given the victim's leg wounds and shattered windshield.[273]

B. Superseding Cause

The defendant, Benny Rochelle and the victim were lodged together in the Kent County jail.[274] The defendant caused the victim to fall to the floor where the defendant punched the victim.[275] When the victim fell back, he hit his head and the defendant further struck the victim with a piece of furniture.[276] The victim died of trauma to his brain.[277] The defendant was convicted of second-degree murder by a jury.[278]

On appeal, the defendant argued that gross negligence of personnel at the jail, and not his wrongdoing, was the proximate cause of the victim's death.[279] Factual cause is found when, but for a defendant's conduct, the harm would not have occurred.[280] Proximate cause is found if the harm is the direct and natural result of the defendant's conduct.[281]

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269. *Id.* (citing *Schaefer*, 473 Mich. at 436-37).
270. *Id.* at *3-4.
271. *Id.* at *3.
272. *Id.* at *4.
273. *Bass*, 2010 Mich. App. LEXIS 807, at *4.
274. People v Rochelle, 2009 Mich. App. LEXIS 2517, at *1 (Mich. Ct. App. Dec. 3, 2009).
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id* at *4.
280. *Rochelle*, 2009 Mich. App. LEXIS 2517, at *5 (citing *Schaefer*, 473 Mich. at 435).
281. *Id. See Schaefer*, 473 Mich. at 436-37.

Both forms of causation must be proven. If there is an intervening cause, and the intervening cause is not foreseeable, then the intervening cause supersedes the defendant's action as the proximate cause.[282] In *People v. Rochelle*, the defendant had beaten the victim while both were incarcerated in the Kent County Jail in the same cell.[283] The defendant had beaten the victim with fists and by clubbing the victim with a portable bunk.[284] Nonetheless, the defendant contended that the treating physicians had not been properly informed of the victim's symptoms, and that failure to be so informed was an intervening cause.[285] The court of appeals found that the lack of communication concerning the symptoms could not be considered a superseding cause because such communication breakdown was common, and in the opinion of the court, reasonably foreseeable.[286] Accordingly, the court of appeals concluded there was sufficient evidence to support the conviction.[287]

VIII. CRIMINAL ISSUES AT TRIAL

A. Adjournment

A jury convicted Michael Johnson of multiple firearm related offenses.[288] He received a substantial prison sentence.[289] On appeal, the defendant contended that it was an abuse of discretion by the trial court to deny the defendant's motion for an adjournment of his trial.[290]

Shortly before the trial, in a meeting between the defendant and his attorney, the defendant "indicated an interest in" having a different court-appointed attorney or even retaining his own counsel.[291] He was told by his attorney that it was the petitioner's responsibility to make that request to the court for himself.[292] The defendant did so, and told the trial court that his appointed attorney behaved in an unprofessional manner, and that furthermore, counsel had not been communicating with him.[293] The defendant was told by the trial judge that he should have filed a motion

282. *Id.* at *5-6.
283. *Id.* at *5.
284. *Id.* at *1.
285. *Id.* at *7.
286. *Rochelle*, 2009 Mich. App. LEXIS 2517, at *7.
287. *Id.*
288. People v. Johnson, No. 277617, 2009 Mich. App. LEXIS 1845, at *1 (Mich. Ct. App. Sept. 10, 2009).
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at *2.
293. *Id.*

with these allegations, and when told by the defendant's attorney that he was prepared to go to trial, the judge denied the defendant's request and informed the defendant that the trial was going to begin that day.[294]

A defendant who requests a continuance or adjournment must show both good cause and diligence.[295] The standard for review is whether or not there has been an abuse of discretion by the trial court.[296] In the instant case, the court believed that good cause was lacking because the defendant had permitted his appointed counsel to prepare for trial without any complaint from the defendant.[297] Furthermore, even if the defendant had a good reason for seeking an adjournment, and even if the defendant had been diligent, the court found that the defendant had suffered no prejudice from the denial of his motion.[298] The court reviewed the evidence, including a recanted confession, and concluded it was unlikely that a different defense attorney would have caused a different outcome in the trial.[299] Based on a lack of good cause, a lack of diligence, and the failure to demonstrate any prejudice to the defendant by the denial of the motion, the conviction was affirmed.[300]

B. Amending the Charging Document

In *People v. Ketola*[301] Joseph Ketola was charged with first-degree home invasion[302] and aggravated assault.[303] During the trial, the prosecutor sought to amend the home invasion charge "from breaking and entering with the intent to commit an assault to breaking and entering a dwelling and committing an assault while 'in the dwelling.'"[304] This was allowed by the trial court and the jury subsequently convicted the defendant of both counts.[305] On appeal, the defendant argued the foregoing amendment to the information was prejudicial and that he was entitled to a new trial.[306]

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294. *Johnson*, 2009 Mich. App. LEXIS 1845, at *2.
295. *Id.* (citing People v. Coy, 258 Mich. App. 1, 18-19 (2003)).
296. *Id.* at *2.
297. *Id.* at *3-4.
298. *Id.* at *4.
299. *Id.* at *5.
300. *Johnson*, 2009 Mich. App. LEXIS 1845, at *1.
301. No. 284363, 2009 Mich. App. LEXIS 2045, at *1 (Mich. Ct. App. Sept. 29, 2009).
302. MICH. COMP. LAWS ANN. § 750.110a(2) (West 2004).
303. MICH. COMP. LAWS ANN. § 750.81a (West 2004).
304. *Ketola*, 2009 Mich. App. LEXIS 2045, at *1.
305. *Id.*
306. *Id.* at *1-2.

The charging document, such as an information, may be amended at any time as long as the amendment does not prejudice the defendant.[307] An amendment which deprives a defendant of an opportunity to present a defense is considered prejudicial.[308]

The court noted that no facts were presented at the trial which could have been any surprise to the defense.[309] At the preliminary examination, the witness testified that defendant Ketola broke into his apartment, "cocked his fist at the resident" and told him to get out of the way.[310] That victim also testified that he expected to be hit and the court opined that this showed that the victim had been placed in fear of a battery, which would constitute an assault.[311]

The defendant argued that the amendment gave an advantage to the prosecutor, because he no longer had to prove that defendant broke into his neighbor's apartment to assault his wife who had fled there.[312] In addition, the defendant also asserted the amendment had the effect of taking away one of his defenses at trial, because he had intended to argue he lacked the ability to form an intent to assault when he broke into the apartment.[313] The defendant's theory was that his wife had struck him so hard before she retreated to the neighbor's apartment that he had suffered a concussion and was therefore unable to form the specific intent necessary to commit the crime of breaking and entering with the intent to commit an assault.[314] The court was unimpressed with this theory or argument. The court noted that the amended count, which involved committing an assault on a person present in the dwelling after the entry, was also a specific intent offense.[315] Either way, the jury would have to find that the defendant had the specific intent required of an assault.[316] Therefore, the defendant could not have been prejudiced by the amendment, and this argument was rejected and the conviction affirmed.[317]

307. People v. McGhee, 268 Mich. App. 600, 629 (2005).
308. People v. Hunt, 442 Mich. 359, 364 (1993).
309. *Ketola*, 2009 Mich. App. LEXIS 2045, at *3.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at *3-4.
314. *Id.* at *4.
315. *Ketola*, 2009 Mich. App. LEXIS 2045, at *4.
316. *Id.*
317. *Id.* at *5.

C. Competency to Stand Trial

Bryan Walker was convicted by a jury of the second-degree murder of Latisa Hayes.[318] Walker argued on appeal that it was error for the trial judge to refuse to order a forensic examination.[319] In framing the issues, the court of appeals addressed this as an issue of competence to stand trial and not an insanity defense issue.[320]

Shortly before the trial, defense counsel requested a forensic examination, claiming lack of communication with the defendant and inability to have a rational discussion with the defendant.[321] The trial judge subsequently questioned the defendant.[322] Defendant Walker stated he knew he was charged with killing someone, he knew killing someone meant taking someone's life, understood the charge was premeditated murder, and that premeditation meant he thought about killing somebody.[323] The trial judge concluded Walker understood the charge, and the court concluded the defense was a claim that defendant had not done it.[324]

The court of appeals concluded that the defendant's response to the questioning by the trial court indicated that defendant Walker understood "the nature and object of the proceedings against him."[325] That being true, the court of appeals found there had been no error in the refusal to order a forensic examination.[326]

D. Definition of a Firearm

Lamont Cook was convicted of armed robbery, car jacking, felonious assault, and possessing a firearm during the commission of these offenses.[327] He presented a single issue on appeal, contending that it had not been established that the firearm in question was either a real firearm or an operable firearm.[328]

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318. People v. Walker, No. 289362, 2010 Mich. App. LEXIS 79, at *1 (Mich. Ct. App. Jan. 14, 2010).
319. *Id.* at *2.
320. *Id.*
321. *Id.* at *2-3.
322. *Id.* at *3.
323. *Id.* at *5.
324. *Walker,* 2010 Mich. App. LEXIS 79, at *5.
325. *Id.*
326. *Id.*
327. People v. Cook, No. 287735, 2009 Mich. App. LEXIS 2350, at *1 (Mich. Ct. App. Nov. 12, 2009).
328. *Id.* at *1-2.

The court of appeals noted that the defendant had presented cases which required the prosecutor to show the weapon was an operating weapon.[329] The court noted further that the Michigan "Supreme Court [has] held that the crime of felony-firearm does not require proof that the firearm was operable."[330] To the contrary, the statute applies to any weapon designed or intended to propel a dangerous projectile.[331]

The court then addressed whether the item possessed by the defendant was a firearm.[332] In the instant case, the victim had testified that object was a .38 revolver.[333] The victim testified that the defendant had struck him with that object several times, and the object was made out of metal and was not a toy.[334] This enabled the court to conclude that it was "likely designed to propel a dangerous projectile."[335] Furthermore, the defendant had threatened to kill the victim with the item.[336] From the foregoing, the court of appeals deduced that any rational finder of fact could conclude the item in question was a firearm, even if it had not been recovered. Accordingly, the conviction was affirmed.[337]

E. Definition of Operating a Vehicle

David McNeil encountered the defendant, Naomi Reese, standing on the side of a road near an automobile belonging to her boyfriend.[338] The automobile was out of gas and McNeil was attempting to refuel the automobile for the defendant when a deputy arrived on the scene.[339] Both McNeil and the deputy believed the defendant to be intoxicated.[340] The deputy later testified the defendant's "speech was slurred and she smelled of alcohol."[341] The defendant failed a sobriety test and subsequent lab reports indicated her blood alcohol level to be well beyond the legal limit.[342] She was charged with operating under the influence of liquor (OUIL) and at her trial testified, as did her boyfriend,

329. *Id.* at *3.
330. People v. Peals, 476 Mich. 636, 642 (2006).
331. *Cook*, 2009 Mich. App. LEXIS 2350, at *3.
332. *Id.* at *4.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Cook*, 2009 Mich. App. LEXIS 2350, at *4-5.
338. People v. Reese, No. 286172, 2009 Mich. App. LEXIS 2464, at *1 (Mich. Ct. App. Nov. 24, 2009).
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at *2.

that the boyfriend had been the person driving the vehicle that night.[343] On appeal, the defendant argued she could not be convicted of OUIL because no one had ever seen her operating the motor vehicle.[344]

A person does not have to be seen operating a motor vehicle to be convicted of OUIL. It is sufficient if the prosecution demonstrates that the defendant "*had* operated his vehicle while under the influence at some point *before* he was arrested."[345]

In the instant case, the court believed that the evidence established the defendant had indeed operated the automobile,[346] even though the defendant and her boyfriend both testified that the boyfriend had been driving.[347] The court noted that the keys to the automobile had been found in the defendant's purse.[348] Thus, opined the court, a rational jury could have concluded that it was the defendant who had operated the vehicle before McNeal and the deputy encountered her.[349] Thus, even though nobody had seen the defendant operating the motor vehicle, her OUIL conviction was affirmed.[350]

F. Double Jeopardy

In *People v. Baker*,[351] the defendant was convicted of two counts of first-degree criminal sexual conduct,[352] two counts of first-degree home invasion,[353] and one count of assault with intent to do great bodily harm less than murder.[354] He was sentenced to 30 to 50 years imprisonment.[355] The evidence at trial revealed that the defendant entered the victim's apartment, bound her, assaulted her and stole her personal belongings.[356] The victim recognized the defendant, because she had hired him to install cable television in her apartment a few days before.[357] She was able to

343. *Id.*
344. *Reese*, 2009 Mich. App. LEXIS 2464, at *1.
345. *See* People v. Schinella, 160 Mich. App. 213, 216 (1987); People v. Stephen, 262 Mich. App. 657, 662-63 (2004).
346. *Reese*, 2009 Mich. App. LEXIS 2464, at *4.
347. *Id.* at *2.
348. *Id.* at *5.
349. *Id.* at *5-6.
350. *Id.* at *6.
351. 288 Mich. App. 378 (2010).
352. MICH. COMP. LAWS ANN. § 750.520b(1)(c) and 750.520b(1)(e) (West 2004).
353. MICH. COMP. LAWS ANN § 750.110a(2) (West 2004).
354. MICH. COMP. LAWS ANN § 750.84 (West 2004).
355. *Baker*, 288 Mich. App. at 379.
356. *Id.* at 380.
357. *Id.*

escape and her neighbors called the police.[358] On appeal, defendant challenged his convictions for first-degree home invasion, arguing that the two convictions arose from the same offense and therefore were barred by double jeopardy.[359]

The court of appeals reversed because defendant's first-degree home invasion convictions arose from the same offense.[360] The statute indicates that establishing the defendant committed at least one felony, larceny, or assault while in the dwelling of another is sufficient.[361] The fact that the defendant intended to commit two predicate offense while in the victim's apartment—larceny and assault—constitutes two separate theories under which his first-degree home invasion conviction could be established, the court concluded.[362] Instead, the court noted, the "defendant should have been convicted and sentenced for one count of first-degree home invasion supported by [one of] two theories."[363] One of his convictions should be vacated, and the judgment of sentence modified, the court directed, to state this.[364]

G. Endorsed Witnesses

Defendant Kerley was convicted at a bench trial of failure to stop at the scene of a personal injury accident.[365] On appeal, Kerley argued it was error for the trial court to excuse the prosecutor from producing an endorsed witness.[366]

A prosecutor who endorses a witness must either produce the witness at trial or show that a diligent effort has been made to produce the witness.[367] The diligence required, known as due diligence, is a reasonable good-faith effort.[368] In the instant case, the prosecution had sent a subpoena to the witness' last known work address.[369] The prosecutor also reported that it had been discovered that the witness's

358. *Id.*
359. *Id.*
360. *Id.*
361. Baker, 288 Mich. App. at 384.
362. *Id.* at 386.
363. *Id.*
364. *Id.*
365. People v. Kerley, No. 286963, 2009 Mich. App. LEXIS 2713, at *1 (Mich. Ct. App. Dec. 29, 2009) (acquitting the defendant, at the same trial, of felonious assault).
366. *Id.* at *4.
367. People v. Eccles, 260 Mich. App. 379, 388-89 (2004).
368. People v. Briseno, 211 Mich. App. 11, 14 (1995).
369. *Kerley*, 2009 Mich. App. LEXIS 2713, at *6.

home phone and cellular phone numbers had been disconnected.[370] The court ruled that the foregoing efforts constituted due diligence.[371]

The court of appeals was in agreement with the trial court because there were no further "specific leads" which the prosecutor could have investigated in an effort to find the witness.[372] In addition, the trial judge was not obliged to give himself a missing witness instruction because trial courts are presumed to know the law and need not instruct themselves.[373] The defendant's conviction was affirmed.[374]

H. Inconsistent Verdicts

Kevin New's next door neighbor—the victim—testified that sometime after midnight on the night in question she found the defendant knocking at her door.[375] She chose to ignore the knocking. Thirty minutes later the defendant began knocking again.[376] The defendant appeared intoxicated and the victim told him to stop knocking, locked her door and returned to bed.[377] Shortly thereafter she awoke to find New standing by her bed saying her name.[378] There was some discussion, but by a combination of threats and force she was able to get him out of the apartment.[379] She later learned the defendant had entered her unit through her locked balcony door.[380] New was subsequently tried for first-degree home invasion and assault with intent to commit sexual penetration.[381] He was convicted of the home invasion count and acquitted of the assault charge.[382] On appeal the defendant argued the acquittal of the assault charge rendered a guilty verdict on the home invasion charge inconsistent with the acquittal, and that, therefore, the conviction should be reversed.[383]

First-degree home invasion consists of entry into a dwelling without permission while intending to commit a felony, larceny or assault, and

370. *Id.* at *6.
371. *Id.* at *6-7.
372. *Id.* at *8-9.
373. *Id.* at *9-10.
374. *Id.* at *17.
375. People v. New, No. 290003, 2010 Mich. App. LEXIS 527, at *1 (Mich. Ct. App. Mar. 18, 2010).
376. *Id.*
377. *Id.*
378. *Id.* at *2.
379. *Id.*
380. *Id.*
381. *New*, 2010 Mich. App. LEXIS 527, at *1.
382. *Id.*
383. *Id.* at *4.

that another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon.[384] Simple assault consists of either an attempt to commit a battery or by placing another in reasonable apprehension of receiving an immediate battery.[385] According to the defendant, if there was no assault—and there was no evidence of attempt to commit a felony or larceny—then the defendant should be acquitted of first-degree home invasion.

The court of appeals was not willing to agree the verdicts were inconsistent. The court believed the jury could have determined, based upon the evidence, that the defendant intended to commit at least a simple assault while he was present in the victim's home.[386] The jury did not have to find that the defendant specifically intended to achieve sexual penetration of the victim.[387] Further, even if the verdicts were inconsistent, there exists the power of juries to reach inconsistent verdicts.[388] Even so, the court of appeals has recognized that inconsistent verdicts may require reversal if there is evidence, other than the inconsistent verdict, that the jury was confused, misunderstood instructions, or something indicating the jury did not know what to do.[389] The foregoing would be in addition to the inconsistent verdicts. In the instant case, however, there was nothing "that demonstrates that the jury was confused, or did not understand the instructions or what it was doing."[390] Therefore, even if the verdicts had been inconsistent, the defendant's argument would fail.[391] Thus, the conviction was affirmed.[392]

I. Jury Instructions

Marcus Bolden was convicted of second-degree murder.[393] His conviction was based upon the death of a child who suffered a head injury.[394] On appeal, the defendant contended the standard criminal jury instruction[395] should have been given.[396]

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384. MICH. COMP. LAWS ANN. § 750.110a(2) (West 2004).
385. People v. Reeves, 458 Mich. 236, 240 (1998).
386. *New*, 2010 Mich. App. LEXIS 527, at *4-5.
387. *Id.* at *5.
388. People v. Vaughan, 409 Mich. 463, 466 (1980).
389. *New*, 2010 Mich. App. LEXIS 527, at *6.
390. *Id.*
391. *Id.*
392. *Id.* at *10.
393. People v. Bolden, No. 288255, 2010 Mich. App. LEXIS 302, at *1 (Mich. Ct. App. Feb. 11, 2010).
394. *Id.*
395. *Id.* at *2-3.

Second-degree murder consists of a death caused by the act of the defendant with malice but without justification.[397] One of the definitions of malice is "the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm."[398] The Michigan Criminal Jury Instruction definition of malice is similar. It defines malice as "knowingly creat[ing] a high risk of death or great bodily harm knowing that death or such harm would be the likely result of [the defendant's] actions."[399]

The court of appeals found that the Michigan Criminal Jury Instructions are without "official sanction" of the Michigan Supreme Court, and their use is not required by trial judges.[400] The court further noted that using an instruction based on authority which has not been overruled is within the discretion of the trial court.[401] Accordingly, the conviction was affirmed.[402]

J. Lesser Included Offenses

In *People v. Wilder*,[403] the Michigan Supreme Court granted leave to appeal to consider the issue of whether third-degree home invasion[404] is a necessarily included lesser offense of first-degree home invasion.[405] The defendant entered his cousin's house without permission and took a television set.[406] He displayed a firearm in his waistband as he did so.[407] He was arrested and charged as a third-offense habitual offender, with first-degree home invasion, felon in possession of a firearm, and felony firearm.[408] After a bench trial, defendant was convicted of third-degree home invasion and felony firearm.[409] He appealed, arguing that the conviction violated his due process rights because the crime is a cognate

396. *Id.* at *1.
397. People v. Mayhew, 236 Mich. App. 112, 125 (1990).
398. People v. Aaron, 409 Mich. 672, 728 (1980).
399. *Bowden*, 2010 Mich. App. LEXIS 302, at *2-3 (citing People v. Dykhouse, 418 Mich. 488, 495 (1984)).
400. *Id.* at *3.
401. *Id.*
402. *Id.* at *8.
403. 485 Mich. 35 (2010).
404. MICH. COMP. LAWS ANN. § 750.110a(4) (West 2004).
405. MICH. COMP. LAWS ANN. § 750.110a(2) (West 2004).
406. *Wilder*, 485 Mich. at 38.
407. *Id.* at 38.
408. *Id.*
409. *Id.*

offense, not a necessarily included lesser offense, of first-degree home invasion.[410]

The court of appeals agreed and vacated the convictions.[411] The court of appeals wrote that a third-degree home invasion conviction "is based on the commission of or intent to commit a misdemeanor."[412] "[A] conviction for first-degree home invasion is based on the commission of or intent to commit a felony, an element that it concluded is distinct from the commission of, or intent to commit, a misdemeanor."[413] Thus, the court concluded that third-degree home invasion is a cognate offense of first-degree home invasion and the defendant could not be convicted of the lesser crime.[414] The prosecution appealed to the Michigan Supreme Court, which granted leave to appeal.[415]

The supreme court reversed the court of appeals, holding that third-degree home invasion is a necessarily included lesser offense of first-degree home invasion because all the elements supporting defendant's conviction of third-degree home invasion are subsumed within the elements that would have been necessary to convict him of first-degree home invasion.[416] The court further found that defendant's due process rights were not violated because he was on notice of all the elements of the crime he was required to defend against.[417]

Both first-degree home invasion and third-degree home invasion can be committed in several different ways, the court reasoned.[418] Not all possible alternative elements of the lesser crime need to be subsumed within the elements of the greater crime for the lesser offense to be necessarily included, the court wrote.[419] An examination is required of the first-degree home invasion as charged in order to determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense.[420] In the present case, "[t]he second element of the lesser crime, commission of a misdemeanor while present in the dwelling, is subsumed within the second element of the greater crime charged, commission of a larceny while present in a dwelling, because

410. *Id.* at 39.
411. *Id.*
412. *Wilder*, 485 Mich. at 39.
413. *Id.*
414. *Id.* at 40.
415. *Id.* at 37.
416. *Id.* at 67.
417. *Id.*
418. *Wilder*, 485 Mich. at 43.
419. *Id.* at 44-45.
420. *Id.* at 45.

every felony larceny necessarily includes within it a misdemeanor larceny," the court concluded.[421]

Justice Corrigan wrote a concurrence, stating that she would find that when the Legislature has divided an offense into degrees, such as the home invasion statute, a defendant may be convicted of a legislatively denominated inferior degree of the charged crime if a rational view of the evidence would support such a conviction.[422]

Justice Cavanagh, joined by Justice Kelly, concurred in part and dissented in part, writing that he was unable to join the majority opinion in full because the majority's finding of the word "inferior" is "contrary to the established definition and historical use of that term."[423]

K. Witness Credibility

Keith Mogg was convicted by a jury of multiple instances of criminal sexual conduct.[424] The defendant apparently touched the victim inappropriately on multiple occasions.[425] The opinion does not specify the victim's age, but the statute the defendant is alleged to have violated applies to contact with persons 13 to 15 years of age.[426] On appeal, the defendant claimed it was error for a prosecution "witness to comment or provide an opinion" of the victim's credibility.[427]

It is the function of a jury to determine the credibility of a witness, and "an expert may not vouch for the veracity" of a witness.[428]

In the instant case, the prosecutor inquired of an expert witness whether she had made a determination of whether or not any coaching of the victim had taken place, and the defense objected.[429] Subsequently, the witness indicated no concerns had arisen.[430] The court found that the prosecutor's question did not ask the expert to comment on whether or not the victim-witness had been coached.[431] Nor, according to the court, did the witness comment on credibility or vouch the victim's veracity.[432] The court concluded that the question did not ask the witness to express

421. *Id.* at 46.
422. *Id.* at 48.
423. *Id.* at 48-49.
424. People v. Mogg, No. 285636, 2009 Mich. App. LEXIS 2477, at *1 (Mich. Ct. App. Nov. 24, 2009).
425. *Id.*
426. MICH. COMP. LAWS ANN. § 750.520d(1)(a) (West 2004).
427. *Mogg*, 2009 Mich. App. LEXIS 2477, at *12.
428. *Id.* (citing People v. Buckley, 450 Mich. 349, 352 (1995)).
429. *Id.* at *14.
430. *Id.*
431. *Id.* at *16.
432. *Id.*

an opinion and that the witness did not do so.[433] Thus, the conviction was affirmed.[434]

L. Witness Intimidation

David Ray Smith was convicted by a jury of involuntary manslaughter, witness intimidation, and reckless driving.[435] On appeal, the defendant argued the prosecution had failed to prove witness intimidation.[436]

The witness intimidation statute makes it unlawful to prevent or attempt to prevent a witness from providing truthful information.[437] The statute applies to anyone who knows or has reason to know a person might be a witness.[438] This is true regardless of whether any official proceeding is pending or actually takes place.[439]

The court examined the record and found that the witness in question testified that the defendant, David Ray Smith, "repeatedly discouraged her from providing information about the accident, and indicated that the police would not have any evidence against him unless she spoke with them."[440] Furthermore, according to the court, the foregoing statement was made along with what the court perceived as a threat.[441] Specifically, the defendant reportedly said "If I can't take care of the problem, then I'll have somebody else do it for me."[442] The defendant's statements made clear to the court that the defendant knew of the investigation that

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433. *Mogg*, 2009 Mich. App. LEXIS 2477, at *16.

434. *Id.* at *1.

435. People v. Smith, No. 286479, 2009 Mich. App. LEXIS 2425, at *1 (Mich. Ct. App. Nov. 19, 2009).

436. *Id.* at *4.

437. MICH. COMP. LAWS ANN. § 750.122 (West 2004) provides:

> (3) A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

438. *Smith*, 2009 Mich. App. LEXIS 2425, at *1 (citing People v. Greene, 255 Mich. App. 426, 438 (2003)).

439. *Id.* at *6.

440. Id. at *7.

441. *Id.*

442. *Id.*

was taking place, and knew or should have known the witness could be a witness against him in a proceeding.[443] Therefore, the court was of the opinion there was sufficient evidence for a jury to find the defendant had violated the witness intimidation statute.[444]

IX. MISCELLANEOUS ISSUES

A. Access to Trial Transcripts

Deangelo Bennett was convicted of armed robbery, first-degree home invasion, felon in possession of a firearm, larceny in a building, three counts of felonious assault, and possession of a firearm during the commission of a felony.[445] After the conviction, appellate counsel acquired the trial transcripts, but refused to allow defendant Bennett access to a copy of them.[446] On appeal, Bennett argued the refusal to give him access to the trial transcripts was a violation of his constitutional rights.[447]

In Michigan, the trial court must order preparation of trial transcripts if appointed counsel requests such transcripts.[448] Another court rule requires preparation of such a transcript if the defendant so requests,[449] unless the transcript has already been ordered under the first court rule.

The court of appeals believed that the two rules meant that a defendant is not entitled to an additional transcript once a copy of the transcript has been provided to appellate counsel.[450] Defendant argued,

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443. *Id.* at *7-8.

444. *Smith*, 2009 Mich. App. LEXIS 2425, at *9.

445. People v. Bennett, No. 284887, 2009 Mich. App. LEXIS 2393, at *1 (Mich. Ct. App. Nov. 17, 2009).

446. *Id.* at *11-12. Appellate counsel wrote to the defendant as follows:

> You have . . . requested that the transcribed record of your case be sent to you so that you could prepare your own in pro per supplemental pleading. Unfortunately I am unable to honor your request as I must maintain the transcript until my work on your behalf before the Michigan Court of Appeals is completed. That will occur after the Court hears oral arguments in your case. Enclosed please find a copy of the opinion issued by the Michigan Supreme Court in Larkin v Kent Circuit Judge, 397 Mich 611[;] 246 NW2d 827 (1976). The court held that when an indigent defendant is represented by counsel on appeal he is entitled to receive his transcript only after his appeal of right has been concluded.

447. *Id.* at *11.

448. MICH. CT. R. 6.425(G)(2) provides that if "the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request."

449. MICH. CT. R. 6.433(A).

450. *Bennett*, 2009 Mich. App. LEXIS 2393, at *14 .

however, that appellate counsel's refusal to share the trial transcripts impeded the defendant's ability to prepare his own brief, a right given to the defendant by Standard IV of Administrative Order No. 2004-6.[451] This Standard allows a defendant to present claims on appeal contrary to the advice of counsel.[452] The rule also requires counsel to provide procedural advice or clerical assistance to the defendant.[453] The court found that it might be a better practice for counsel to share the transcript,[454] but also stated unequivocally that "[t]here is no constitutional requirement that the defendant be given access to the transcripts to prepare and file a Standard 4 brief."[455] The court concluded, therefore, there had been no violation of the defendant's constitutional rights.[456]

B. Expungement

In *People v. Schultz*,[457] the defendant appealed the trial court's order granting the prosecution's motion for relief from judgment. In 2002, the defendant pleaded no contest to involuntary manslaughter.[458] The defendant was involved in a fight at a party after he had been drinking, and the other person fell down a flight of stairs and later died from his injuries.[459] Defendant was sentenced to three years probation, and after a five-year period had passed, he moved to have the conviction expunged from his record.[460] The motion was granted in June 2008. Shortly thereafter, in August 2008, the defendant was involved in another fight and pleaded guilty to aggravated assault.[461] The prosecution filed a motion for relief from the judgment setting aside the manslaughter

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451. *Id.* at *14-15. Standard 4 provides in pertinent part:

> When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims in propria persona. Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court.

Id.

452. *Id.* at *15.

453. *Id.*

454. *Id.*

455. *Bennett,* 2009 Mich. App. LEXIS 2393, at *16.

456. *Id.*

457. No. 290344, 2010 Mich. App. LEXIS 796, at *1 (Mich. Ct. App. May 4, 2010).

458. *Id.*

459. *Id.*

460. *Id.* (citing MICH. COMP. LAWS ANN. § 780.621 (West 2004)).

461. *Id.*

conviction, and the trial court granted the motion and reinstated defendant's conviction.[462]

The court of appeals reversed the granting of the motion.[463] The appellate court found that the trial court abused its discretion in granting the prosecution's motion.[464] There is no indication, the court wrote, that there was any perjury, fraud, concealment, or other misrepresentation by the defendant.[465] Although the defendant promised, at both his original sentencing for involuntary manslaughter and the expungement hearing, that he would never do anything like that again, it was not a fraud upon the court. "A claim of fraud generally cannot be based on a promise of future conduct," the court wrote.[466] Although there is an exception if a promise is made in bad faith without the intention to perform it, the court noted, there must be evidence related to the defendant's conduct at the time he made the promise which would show bad faith.[467] Thus, the court concluded that the trial court's finding that the defendant falsely represented that he was not a danger to the community was in error and should be reversed.

C. Habitual Offender Status

Joseph Kadlek pleaded guilty to fleeing from a police officer.[468] He was sentenced as a third habitual offender[469] and his plea to the fleeing charge was conditioned on being able to challenge his habitual offender status.[470] The grounds asserted for the appeal were that the defendant had received improper notice of the potentially enhanced sentence.[471]

A defendant may be subjected to enhanced sentencing if the prosecutor files written notice of an intent to seek such enhancement within 21 days of the defendant's arraignment, or, if arraignment was waived, within 21 days of the filing of the charging information.[472] The written notice may be served upon the defendant, the defendant's attorney at the arraignment, or may be served in any other manner

462. *Id.* at *2.
463. *Schultz,* 2010 Mich. App. LEXIS 796, at *11.
464. *Id.*
465. *Id.* at *7.
466. *Id.* at *8 (citing Eerdmans v. Maki, 226 Mich. App. 360, 366 (1997)).
467. *Id.* at *9.
468. People v. Kadlek, No. 285162, 2009 Mich. App. LEXIS 1241, at *1 (Mich. Ct. App. June 2, 2009). He also pleaded guilty to a third offense of operating a motor vehicle while under the influence of a controlled substance. *Id.*
469. *Id.*
470. *Id.* at *2.
471. *Id.*
472. MICH. COMP. LAWS ANN. § 769.13(1) (West 2006).

provided for by law or in the court rules.[473] Furthermore, the prosecuting attorney "shall file a written proof of service with the clerk of the court."[474] In the instant case, after the defendant waived his preliminary examination and was arraigned, the prosecutor filed a felony complaint and felony information the next day.[475] It was conceded on appeal, however, that the prosecutor neglected to file a proof of service as required by statute.[476]

The court of appeals noted that there was no dispute as to whether or not the defendant had received timely notice of the prosecutor's intention to seek enhanced sentencing of the defendant as a habitual offender.[477] The court also noted that there was no reason to think the written notice of the proposed enhancement could not be accomplished "by providing the requisite information as part of the felony complaint or information."[478] The court concluded the defendant's argument must fail because, lack of proof of service, notwithstanding, it was clear to the court that the defendant had been alerted in writing within the time required of the prosecutor's intent to seek the enhanced sentence.[479] Therefore, the appeal was denied.[480]

X. CONCLUSION

The cases presented in this Article are important criminal jurisprudence decisions issued 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.

473. MICH. COMP. LAWS ANN. § 769.13(2) (West 2006).
474. *Id.*
475. *Kadlek*, 2009 Mich. App. LEXIS 1241, at *1.
476. *Id.* at *3.
477. *Id.* at *4.
478. *Id.*
479. *Id.* at *4-5.
480. *Id.* at *5.