CRIMINAL LAW

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I. INTRODUCTION

During the *Survey* period,[1] the Michigan Supreme Court and Michigan Court of Appeals issued numerous noteworthy decisions in the area of criminal law. This Article examines issues ranging from homicide to restitution; from the defenses of entrapment and impossibility to possession of a stun gun; and, as in years prior, many decisions interpreting the Michigan Medical Marijuana Act.[2]

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1. June 1, 2012 to May 31, 2013.

2. MICH. COMP. LAWS ANN. § 333.26421-.26430 (West 2013).

II. HOMICIDE: SECOND DEGREE MURDER

In *People v. Portellos*,[3] the defendant was convicted of second-degree murder and first-degree child abuse following the birth and death of a newborn she had given birth to secretly.[4] After the defendant had the child at her home, she went to the emergency room and was treated for excessive bleeding.[5] When the hospital staff asked her about the location of the newborn, the defendant told them the baby was stillborn.[6] The defendant said she was concerned that her mother would hear the baby cry, so she wrapped it in towels and placed it in a garbage bag.[7] An autopsy performed on the newborn found that she died of asphyxia by smothering and that it was a homicide.[8] The defendant was convicted and sentenced to 10 to 20 years imprisonment for second-degree murder and up to 15 years imprisonment for child abuse.[9]

The court of appeals affirmed in part, vacated in part, and remanded for resentencing.[10] The court affirmed the convictions, finding sufficient evidence to support the second-degree murder conviction.[11] Although the defendant argued that there was no evidence she intended to kill the baby, the court found otherwise.[12] The defendant was trained in childcare and hid her pregnancy from everyone.[13] She decided to give birth to the child at home without assistance and did not call for help when the baby was born breech.[14] She told the police she was afraid her mother would hear the child cry, so she wrapped it in towels and placed it in the garbage bag.[15] On this evidence, the court stated, a reasonable trier of fact could find that she intentionally smothered the child to keep it from crying out.[16] The jury could have also concluded that the baby died because the defendant did not call for medical help, the baby was tightly wrapped in the towel, or because the child was placed in a garbage bag.[17] It could be reasonably inferred, the court noted, that the result of these

3. 298 Mich. App. 431; 827 N.W.2d 725 (2012).
4. *Id.* at 434.
5. *Id.* at 437.
6. *Id.* at 438.
7. *Id.* at 440.
8. *Id.*
9. *Portellos*, 298 Mich. App. at 434.
10. *Id.*
11. *Id.* at 434-45.
12. *Id.* at 444.
13. *Id.*
14. *Id.* at 444-45.
15. *Portellos*, 298 Mich. App. at 438.
16. *Id.* at 445.
17. *Id.* at 445-46.

actions would be death or serious bodily injury to the child. Therefore, there was sufficient evidence to support the convictions for second degree murder and first degree child abuse, the court found, because the defendant's actions were intentional and resulted in the baby's death or showed a wanton disregard of the risks of death to the child.[18] The court remanded for resentencing, as it found that the minimum sentence for the second-degree murder was not high enough under the sentencing guidelines.

In *People v. Brown*,[19] the defendant was denied access to a party at the victim's home, so he began shooting.[20] He killed one victim and seriously wounded a second victim.[21] At trial, he claimed he was acting in self-defense.[22] He was convicted by a jury of second-degree murder,[23] assault with intent to commit murder,[24] assault with a dangerous weapon,[25] carrying a concealed weapon,[26] possession of a firearm by a felon,[27] and possession of a firearm during the commission of a felony.[28]

The court of appeals affirmed, but it remanded for resentencing.[29] The defendant first argued on appeal that there was insufficient evidence of second-degree murder and assault with intent to commit murder.[30] The court rejected this argument, noting that there was evidence he fired the first shot, contradicting his claim of self-defense.[31] The standard for determining whether a killing is self-defense is "if the defendant honestly and reasonably believes that his life is in imminent danger or there is a threat of serious bodily harm."[32] Issues of credibility, the court emphasized, are for the jury to resolve.

The defendant also argued that the murder conviction should be vacated because ballistics testing did not match the bullets found in the victim's body to any gun the defendant possessed.[33] The court noted that scientific evidence is not necessary for a conviction; rather, any evidence

18. *Id.*
19. People v. Brown, No. 309552, 2013 WL 2319546 (Mich. Ct. App. May 28, 2013).
20. *Id.* at *1.
21. *Id.*
22. *Id.*
23. MICH. COMP. LAWS ANN. § 750.317 (West 2013).
24. MICH. COMP. LAWS ANN. § 750.83 (West 2013).
25. MICH. COMP. LAWS ANN. § 750.82 (West 2013).
26. MICH. COMP. LAWS ANN. § 750.227(2) (West 2013).
27. MICH. COMP. LAWS ANN. § 750.224f (West 2013).
28. MICH. COMP. LAWS ANN. § 750.227b (West 2013).
29. *Brown*, 2013 WL 2319546, at *1.
30. *Id.*
31. *Id.*
32. *Id.* (quoting People v. James, 267 Mich. App. 675, 677; 705 N.W.2d 724 (2005)).
33. *Id.*

that would lead a reasonable jury to find the elements of the offense had been met is sufficient.[34] Here, there was eyewitness testimony that the defendant shot the victims, which is sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt.[35]

III. ASSAULTIVE OFFENSES: ASSAULT WITH INTENT TO DO GREAT BODILY HARM/FELONIOUS ASSAULT

In *People v. Russell*,[36] the defendant was convicted of assault with intent to do great bodily harm less than murder,[37] and reckless driving causing serious impairment of a bodily function.[38] The case arose from a confrontation between the defendant and the victim over a laptop computer.[39] The defendant promised to return the laptop, which was in his car.[40] But instead of retrieving it, he got into the vehicle and drove away.[41] He crashed into the back of the victim's vehicle, pinning him between the two cars and causing serious injuries, including the amputation of one leg.[42] The defendant argued that it was an accident, but the prosecution persuaded the jury that it was intentional.[43] During the trial preparation, defense counsel decided not to call defendant's girlfriend as a witness.[44] She gave a statement indicating that she saw the victim had a shiny object, such as a knife, in his hand.[45] She also stated that the victim had chased defendant's vehicle.[46] The defendant was convicted and sentenced to 19 to 120 months for the assault conviction and 5 to 60 months for the reckless driving conviction.[47] The Michigan Court of Appeals entered an order granting the defendant's motion to remand the case to the trial court to conduct an evidentiary hearing on the issue of ineffective assistance of counsel.[48] The defendant alleged

34. *Id.*
35. *Brown*, 2013 WL 2319546, at *1.
36. 297 Mich. App. 707; 825 N.W.2d 623 (2012).
37. MICH. COMP. LAWS ANN. § 750.84 (West 2013).
38. MICH. COMP. LAWS ANN. § 257.626 (West 2013).
39. *Russell*, 297 Mich. App. at 74.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 711-12.
44. *Id.* at 712.
45. *Russell*, 297 Mich. App. at 712.
46. *Id.*
47. *Id.* at 710.
48. *Id.* at 712.

that his defense attorney failed to call a witness and did not object to the closure of the courtroom during voir dire of the jury pool.[49]

The trial court held an evidentiary hearing pursuant to *People v. Ginther*[50] and concluded that defense counsel was ineffective for failing to call defendant's girlfriend as a witness.[51] The court noted that defense counsel never interviewed her in preparation for trial but mistakenly relied upon her statements to the police.[52] Defense counsel testified that her statement regarding seeing the victim chase the defendant's car was inconsistent with his theory that the front of the defendant's car hit the victim.[53] The trial court granted the defendant's motion for a new trial on the basis of defense counsel not calling the witness, but it rejected the claim that the courtroom had been closed during jury voir dire, and the prosecution appealed.[54]

The court of appeals reversed, finding that the trial court complied with the appellate court order to hold the hearing on the defendant's motion, but that it was an error to grant the motion for a new trial.[55] The trial court found that defense counsel was not ineffective for failing to call the witness.[56] An attorney's decision to call witnesses, or not to call witnesses, is given wide latitude as part of trial strategy, the court noted.[57] The theory of the defense at trial was that this incident was an accident and that the defendant did not see the victim before he hit him with the car.[58] Defense counsel testified at the *Ginther* hearing that the girlfriend's statement was inconsistent with the theory of the defense.[59] In addition, her statement that the victim had a weapon was inconsistent with the physical evidence.[60] The court noted that it would have been impossible for the victim to chase the defendant's car and then run ahead of it before impact, because the car was going 19 miles per hour when it hit the victim.[61] Therefore, the court concluded, defense counsel's failure to call the witness was sound trial strategy.[62]

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49. *Id.*
50. People v. Ginther, 390 Mich. 436, 443-44; 212 N.W.2d 922 (1973).
51. *Russell*, 297 Mich. App. at 713-14.
52. *Id.*
53. *Id.* at 713.
54. *Id.* at 714.
55. *Id.* at 711.
56. *Id.* at 714.
57. *Russell*, 297 Mich. App. at 716.
58. *Id.* at 717.
59. *Id.*
60. *Id.*
61. *Id.* at 718.
62. *Id.*

IV. CRIMINAL SEXUAL CONDUCT: RELATION TO THE VICTIM

In *People v. Zajaczkowski*,[63] the defendant pled guilty to first-degree criminal sexual conduct[64] after having sex with his younger step-sister. He entered his plea on the condition that he could appeal whether he may only be found guilty of third-degree criminal sexual conduct,[65] which would apply if he were not related to the victim.[66] The evidence showed that the defendant was born during his parent's marriage, and they subsequently divorced.[67] His father had a child with another woman, who was the victim in this case, and who was considered the defendant's half-sister.[68] Genetic testing indicated that the defendant was not biologically related to his father.[69] The defendant thereafter argued that since he was not related by blood to the victim, he could not be guilty of first-degree criminal sexual conduct, but rather only third-degree criminal sexual conduct.[70] The trial court disagreed, and the defendant appealed.

The court of appeals affirmed, rejecting the defendant's arguments in a case of first impression.[71] One of the elements of a conviction for first-degree criminal sexual conduct requires the defendant to be related to the victim "by blood or affinity to the fourth degree."[72] Although genetic testing indicated that the defendant was not actually related by blood to the victim, the court of appeals found that he could be convicted of first-degree criminal sexual conduct because the presumption that he was the legitimate child of his parent's marriage could not be overcome.[73]

First, the court examined the definitions of the terms "by blood" and "affinity" as used in the criminal sexual conduct statute. The court found that the phrase "related . . . by blood" means descending from a common ancestor.[74] The term "affinity" is defined as "a relationship by marriage."[75] The court noted that when the current criminal sexual conduct statute was enacted, degrees of relation were computed by civil

63. 493 Mich. 6; 825 N.W.2d 554 (2012).
64. MICH. COMP. LAWS ANN. § 750.520b(1)(b)(ii) (West 2013).
65. MICH. COMP. LAWS ANN. § 750.520d(1)(a) (West 2013).
66. *Zajaczkowski*, 493 Mich. at 9.
67. *Id.* at 10.
68. *Id.*
69. *Id.* at 9.
70. *Id.* at 10.
71. People v. Zajaczkowski, 293 Mich. App. 370; 810 N.W.2d 627 (2011).
72. *Id.* (citing MICH. COMP. LAWS ANN. § 750.520b(1)(b)(ii)).
73. *Id.* at 373.
74. *Id.* at 374.
75. *Id.*

law rules, and siblings are related to the second degree, not the fourth degree.[76]

The defendant argued that he was not related by blood to the victim, as the genetic testing showed, and any relation by affinity ended with his parents' divorce.[77] However, the court of appeals rejected this argument. The judgment of divorce did not state that the defendant was not a child of the marriage.[78] Accordingly, the defendant and the victim share the same legal father, since the defendant may be considered the issue of his mother's marriage to the victim's father for legitimacy purposes.[79] Only the defendant's mother and legal father can rebut the presumption that the defendant is a legitimate child of the marriage, the court wrote.[80] Therefore, the court concluded, as a matter of law, the defendant and the victim are related by blood, sharing the same father, and are related within the second degree by descent from a common ancestor.[81] Thus, the court of appeals held that the defendant could be convicted of first-degree criminal sexual conduct. The Michigan Supreme Court granted defendant's application for leave to appeal.[82]

The Michigan Supreme Court reversed and remanded for entry of conviction of third-degree criminal sexual conduct in accordance with the defendant's plea agreement.[83] The court noted that under the criminal sexual conduct statute, the prosecution must prove (1) sexual penetration, (2) a victim who is at least 13 years old, and (3) a relationship by blood or affinity to the fourth degree between the victim and the defendant.[84] The third element can only be met if the defendant is related to the victim by blood or by affinity.[85] The DNA evidence established that the victim's father is not the defendant's biological father, the court noted.[86] Thus, they are not related by blood to the fourth degree.[87] The prosecution conceded that they are not related by "affinity," therefore, the court concluded, the prosecution cannot establish the third element of the offense of first-degree criminal sexual conduct.[88] The court of appeals

76. *Id.* at 376.
77. *Zajaczkowski*, 293 Mich. App. at 376.
78. *Id.* at 377.
79. *Id.* at 377-78.
80. *Id.* at 380.
81. *Id.*
82. People v. Zajaczkowski, 490 Mich. 1004; 807 N.W.2d 708 (2012).
83. People v. Zajaczkowski, 493 Mich. 6, 16; 825 N.W.2d 554 (2012).
84. *Id.* at 13 (citing MICH. COMP. LAWS ANN. § 750.520b(1)(b)(ii) (West 2013)).
85. *Id.* at 12-13.
86. *Id.* at 13.
87. *Id.* at 14.
88. *Id.*

went beyond the language of the statute, the supreme court found, by applying "the civil presumption concerning the legitimacy of a child in order to conclude that defendant and the victim are related by blood as a matter of law."[89] This "changed the ordinary meaning of the statute's terms by adding language that the Legislature did not include," the court noted.[90] Since the elements of first-degree criminal sexual conduct cannot be met, the court concluded that the defendant could not be properly convicted of that crime.[91]

V. OTHER OFFENSES

A. Possession of a Stun Gun

In *People v. Yanna*,[92] the court of appeals consolidated two appeals that presented the same issue to the court. The defendants were charged in separate cases with possession of a stun gun.[93] They both moved to dismiss the charge, arguing the statute was unconstitutional. The Bay Circuit Court granted the motion.[94] In the other case, the Muskegon Circuit Court reinstated the charge after the local trial court dismissed.[95]

The court of appeals held that the statute at issue[96] in the cases is unconstitutional because it violates the rights of a private citizen to own and possess a stun gun for self-defense.[97] The court initially noted that the Second Amendment to the United States Constitution provides, "'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'"[98] The court noted that the Second Amendment applies to the state through the Fourteenth Amendment.[99] The court then examined whether the objects banned by the statute at issue are "arms" under the Constitution.[100] In *District of Columbia v. Heller*,[101] the Supreme Court held that there are certain limitations on the right to keep and bear arms. Those limitations are (1) the weapon cannot be one not typically possessed for lawful

89. *Zajaczkowski*, 493 Mich. at 12.
90. *Id.*
91. *Id.*
92. 297 Mich. App. 137; 824 N.W.2d 241 (2012).
93. *Id.* at 140-41.
94. *Id.* at 141.
95. *Id.* at 141-42.
96. MICH. COMP. LAWS ANN. § 750.224a (West 2013).
97. *Yanna*, 297 Mich. App. at 139.
98. *Id.* at 142 (quoting U.S. CONST. amend. II).
99. *Id.*
100. *Id.*
101. 554 U.S. 570, 592 (2008).

purposes; (2) the weapons protected were those "in common use at the time"; and (3) there is a "historical tradition of prohibiting the carrying of . . . dangerous and unusual weapons.'"[102] The court determined that stun guns are "arms" under the Second Amendment.[103] Although stun guns did not exist when the Second Amendment was written, the court noted that they are legal in 43 states and commonly used by law enforcement officers.[104] Furthermore, stun guns are less dangerous than handguns, the court indicated.[105] Since stun guns do not fit any of the exceptions to the Second Amendment noted in *Heller*, the court concluded, they are protected arms under the Second Amendment.[106] Since both the federal and state constitutions protect the right to "carry" as well as "keep" arms for self-defense, the court found that a total ban on the open carrying of stun guns is unconstitutional.[107]

B. Controlled Substances Act

In *People v. Collins*,[108] the defendant was convicted of delivery of 50 grams or more, but less than 450 grams, of heroin,[109] possession with intent to deliver less than 50 grams of heroin,[110] and conspiracy to deliver less than 50 grams of cocaine and/or heroin.[111] He was sentenced as a third level habitual offender to concurrent prison terms of 10 to 40 years for each conviction.[112] He appealed, arguing, *inter alia*, that the prosecution erred in aggregating several small deliveries of heroin on separate occasions in order to support the charge of delivering 50 grams or more, but less than 450 grams, of heroin.[113]

The court of appeals vacated the conviction for delivering 50 to 450 grams of heroin, affirmed his other convictions, and remanded for resentencing.[114] The court agreed with the defendant's argument that the small amounts of heroin, sold on separate occasions, could not be added together in order to support the charge.[115] There was no evidence that the

102. *Yanna*, 297 Mich. App. at 143 (quoting *Heller*, 554 U.S. at 627).
103. *Id.*
104. *Id.* at 144-45.
105. *Id.* at 145.
106. *Id.* at 146.
107. *Id.*
108. 298 Mich. App. 458; 828 N.W.2d 392 (2012).
109. MICH. COMP. LAWS ANN. § 333.7401(2)(a)(iii) (West 2013).
110. *Id.* § 333.7401(2)(a)(iv).
111. *Id.*
112. *Collins*, 298 Mich. App. at 461.
113. *Id.*
114. *Id.*
115. *Id.* at 466.

defendant ever delivered more than 50 grams of heroin in a single transaction.[116] The court compared the facts of this case to cases involving double jeopardy, which found that separate deliveries constitute separate criminal transactions and give rise to separate charges.[117] Similarly, the court has addressed this issue in the context of false pretenses and Medicaid fraud cases and found that each submission of a false claim constituted a separate offense.[118] The court rejected the prosecution's argument that the deliveries were a continuing course of conduct, noting that conspiring to deliver an amount of drugs is different than the amount actually delivered, which is what matters in this charge. Since there was insufficient evidence, the court reversed the conviction on that charge.

VI. THE MICHIGAN MEDICAL MARIJUANA ACT

A. Immunity from Prosecution

In *People v. Bylsma*,[119] a search warrant executed at the defendant's apartment yielded 88 marijuana plants. The defendant was registered as the primary caregiver for two medical marijuana patients.[120] He was charged with manufacturing marijuana,[121] but he moved to dismiss the charge under section 4 of the Michigan Medical Marijuana Act (MMMA),[122] asserting that as the registered caregiver of two qualifying patients, he was allowed to possess 24 marijuana plants.[123] He asserted that the rest of the plants belonged to other primary caregivers and qualifying patients.[124] The other caregivers and patients that had plants growing in the defendant's apartment testified at the evidentiary hearing. The trial court denied the motion to dismiss, finding that the defendant had not complied with the strict requirements of the MMMA.[125] Specifically, section 4 of the statute mandates that each set of 12 plants

116. *Id.*

117. *Id.* at 464 (citing People v. Bartlett, 197 Mich. App. 15; 494 N.W.2d 776 (1992), People v. Edmonds, 93 Mich. App. 129; 285 N.W.2d 802 (1979), People v. Cuellar, 76 Mich. App. 20; 355 N.W.2d 755 (1977), and People v. Martinez, 58 Mich. App. 693; 228 N.W.2d 523 (1975)).

118. *Collins*, 298 Mich. App. at 465 (citing People v. Harajli, 161 Mich. App. 399; 411 N.W.2d 765 (1987), and People v. Payne, 177 Mich. App. 464; 442 N.W.2d 675 (1989)).

119. 493 Mich. 17; 825 N.W.2d 543 (2012).

120. *Id.* at 23.

121. MICH. COMP. LAWS ANN. § 333.7401(2)(d)(iii) (West 2013).

122. MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2013).

123. *Bylsma*, 493 Mich. at 24.

124. *Id.*

125. *Id.*

allowed for a patient must be designated to meet the medical needs of a specific person and be kept in an enclosed, locked facility that can only be accessed by one person.[126] The defendant's apartment was secured by a single lock, and the defendant had access to all the plants, even the ones for other patients.[127] Since the defendant did not adhere to the requirements of section 4 of the statute, he could not invoke the affirmative defense of immunity under section 8 of the MMMA.

The defendant appealed, and the court of appeals affirmed.[128] "Section 4 of the MMMA provides immunity from arrest and prosecution to qualifying patients and primary caregivers who have been issued and possess a registry identification card," the court wrote.[129] The MMMA allows a primary caregiver to possess 12 plants for each patient, but a caregiver cannot have more than five patients.[130] At the time of defendant's arrest, he was the primary caregiver for two qualifying patients; therefore, he had immunity under the statute as long as he did not possess more than 24 marijuana plants, the court stated.[131] It is clear that the defendant possessed all 88 plants found in his growing operation, as evidenced by the unfettered access he had to all the plants.[132] The court rejected the defendant's argument that the MMMA allows other registered primary caregivers and qualifying patients to grow and cultivate marijuana plants in a common facility.[133] Since the defendant was in possession of more than 24 plants, he was not entitled to immunity under the MMMA and the charges could not be dismissed.

The Michigan Supreme Court granted leave to appeal. The supreme court affirmed and remanded. The court concluded that the court of appeals was correct in finding that the defendant is not entitled to immunity under section 4 of the MMMA.[134] Although a registered primary caregiver is allowed to possess up to 12 plants for each patient, Bylsma exceeded this number because he had control over all 88 plants found in his apartment, the court noted.[135] However, the court reversed the portion of the judgment of the court of appeals that held that the defendant is precluded from asserting an affirmative defense under section 8 of the MMMA because he did not qualify for section 4

126. *Id.*
127. *Id.* at 23.
128. People v. Bylsma, 294 Mich. App. 219; 816 N.W.2d 426 (2011).
129. *Id.* at 228.
130. MICH. COMP. LAWS ANN. § 333.26424(b) (West 2013).
131. *Blysma*, 294 Mich. App. at 229-30.
132. *Id.*
133. *Id.* at 228.
134. People v. Bylsma, 493 Mich. 17, 37; 825 N.W.2d 543 (2012).
135. *Id.* at 33-34.

immunity.[136] In *People v. Kolanek*, the Michigan Supreme Court held that a defendant need not establish the elements of section 4 immunity in order to establish the elements of the section 8 defense.[137] Section 8 contains independent elements that do not turn on the requirements of section 4 immunity, the court noted.[138] Since Bylsma had not yet asserted the section 8 affirmative defense in a motion to dismiss, as required by *Kolanek*, it was premature for the court to decide if he was entitled to the defense.[139] Therefore, a remand to the trial court was required to allow him to assert a section 8 affirmative defense in a motion to dismiss.[140]

B. Probable Cause to Search

In *People v. Brown*,[141] the defendant was convicted of manufacturing less than 5 kilograms, or fewer than 20 plants, of marijuana. The conviction was the result of the defendant's roommate calling the police regarding the defendant growing marijuana in the laundry room of the apartment.[142] The police searched the defendant's trash and found marijuana and pieces of mail belonging to the defendant.[143] The police used this information in a search warrant affidavit to provide probable cause to search the defendant's apartment. However, the police did not investigate whether the defendant was a qualifying patient under the MMMA.[144] The officer later explained that the Department of Community Health would not release that information based on a person's name alone.[145] A magistrate approved the search warrant, and officers found eight marijuana plants and two grams of marijuana.[146]

The defendant moved to suppress the evidence obtained during the search, arguing that since the MMMA legalized the possession and growing of small amounts of marijuana, the statement in the affidavit that the defendant was growing marijuana was insufficient probable cause to search.[147] The trial court agreed, finding that after the MMMA came into effect, an affidavit must provide specific facts refuting the

136. *Id.* at 35-36.
137. 491 Mich. 382; 817 N.W.2d 528 (2011).
138. *Bylsma*, 493 Mich. at 22.
139. *Id.*
140. *Id.*
141. 297 Mich. App. 670; 825 N.W.2d 91 (2012).
142. *Id.* at 672.
143. *Id.*
144. *Id.* The Michigan Medical Marijuana Act is found at MICH. COMP. LAWS. ANN. §§ 333.26421-.26430 (West 2013).
145. *Brown*, 297 Mich. App. at 672.
146. *Id.* at 672-73.
147. *Id.*

legality of the marijuana possession under the MMMA.[148] In other words, the court found that unless the affidavit provides facts showing the possession not to be legal, especially under the MMMA, there is insufficient probable cause to search a defendant's home.[149] However, the trial court did not suppress the evidence, because the officers had a good faith belief that the warrant was valid.[150] In so doing, the court noted that before the passage of the MMMA, the affidavit would have provided sufficient probable cause.[151] After a bench trial, the defendant was found guilty, and he appealed.

The court of appeals affirmed. Marijuana is still an illegal controlled substance in Michigan, the court noted, even after the passage of the MMMA.[152] The court did not want to burden law enforcement with a new standard for search warrant affidavits. Thus, the court concluded that such affidavits need not provide specific facts concerning the MMMA. In other words, the police have no affirmative duty to investigate whether a defendant is subject to the MMMA before seeking a search warrant for marijuana-related activities.

C. Immunity from Arrest

In *People v. Nicholson*,[153] the defendant challenged his arrest for possession of marijuana. He was sitting in the passenger seat of a parked car when he was approached by a police officer.[154] The defendant told the officer that he was a medical marijuana patient and had just been approved for a registry identification card.[155] He also told the officer he had paperwork showing his approval for the use of medical marijuana, but it was in a car parked at his house.[156] The defendant was arrested and charged with possession of marijuana.[157]

He moved for dismissal of the charge under section 4(a) of the Michigan Medical Marijuana Act (MMMA),[158] arguing that at the time

148. *Id.* at 673.
149. *Id.*
150. *Id.*
151. *Brown*, 297 Mich. App. at 673.
152. *Id.* at 674.
153. 297 Mich. App. 191; 822 N.W.2d 284 (2012).
154. *Id.* at 194.
155. *Id.*
156. *Id.*
157. *Id.*
158. Section 4(a) provides, in part, "A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana." MICH. COMP. LAWS

of his arrest he had applied for a registry identification card.[159] Since he had not received his actual card, he contended that his application served as his official card, and, therefore, he was immune from arrest.[160]

The district court denied the defendant's motion to dismiss, and he filed an application for leave to appeal with the circuit court.[161] The circuit court denied the application, and he appealed.[162]

The court of appeals held that the defendant was not immune from arrest.[163] However, as a person who has a registry identification card, he may be immune from prosecution if he can establish that his use of marijuana was for medical purposes at the time he was arrested.[164] "[A] person can fail to qualify for immunity from arrest," the Court wrote, "but still be entitled to immunity from prosecution or penalty."[165] Therefore, "courts must inquire whether a person 'possesses a registry identification card' at the time of arrest, prosecution, or penalty separately."[166] The statute requires a defendant to possess the registry identification card at the time of potential arrest, the court noted.[167] The card must be "reasonably accessible" when requested by a police officer in order to establish immunity from arrest. In the instant case, the defendant's registry identification card was not reasonably accessible at the location where he was asked to produce it; therefore, he was not immune from arrest.[168] However, the defendant's registry identification card was produced in court; therefore, it was "reasonably accessible at the location of his prosecution," the court noted, and therefore he is immune from prosecution under the statute if he can show that he was engaged in the medical use of marijuana at the time of his arrest.[169]

ANN. § 333.26424(a) (West 2013). Defendant Nicholson possessed approximately one ounce of marijuana at the time of his arrest. *Nicholson*, 297 Mich. App. at 194.

159. *Nicholson*, 297 Mich. App. at 194.
160. *Id.* at 195.
161. *Id.*
162. *Id.*
163. *Id.* at 202.
164. *Id.* at 198.
165. *Nicholson*, 297 Mich. App. at 199.
166. *Id.* at 199.
167. *Id.* at 200.
168. *Id.* at 200-01.
169. *Id.* at 201-02.

VII. OPERATING A MOTOR VEHICLE WHILE IMPAIRED: OPERATING WHILE IMPAIRED WITH A MINOR OCCUPANT IN THE VEHICLE

In *People v. Pennebaker*,[170] the defendant was convicted of operating a motor vehicle while intoxicated with an occupant less than 16 years old, second offense.[171] The police stopped the defendant's vehicle while she was driving with her two grandchildren.[172] Her blood alcohol level was .13, and she admitted to drinking a half pint of vodka earlier in the day.[173] She was sentenced to 18 months of probation and 30 days in the electronic-monitoring work release program.[174] The prosecutor argued that the court was statutorily required to sentence the defendant to 30 days of incarceration rather than the work release program, but to no avail.[175] The court of appeals denied the prosecution's application for leave to appeal in an unpublished order,[176] but, subsequently, the Michigan Supreme Court remanded the case to the court of appeals for consideration as on leave granted.[177]

The court of appeals reversed the trial court and remanded for resentencing. The statute under which the defendant was convicted requires a 30-day jail sentence, the court noted.[178] Although the court was sympathetic to the defendant's efforts to abide by all of the requirements of the court, and the trial court's efforts to assist with the problem of jail overcrowding, the plain language of the statute could not be ignored.[179] The court found that the statute "unequivocally means that the trial court *must* sentence defendant to one of the two options, a term in prison or not less than 30 days in jail and community service."[180] Thus, the court did not have discretion to waive the custody requirement, and a tether is not the equivalent of imprisonment in jail, the court stated.[181] Unless the legislature decides to change the statute, the court concluded, it is required to reverse the trial court's sentence because it

170. 298 Mich. App. 1; 825 N.W.2d 637 (2012).
171. MICH. COMP. LAWS ANN. § 257.625(7)(a) (West 2013).
172. *Pennebaker*, 298 Mich. App. at 3.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. People v. Pennebaker, 490 Mich. 910; 805 N.W.2d 427 (2011).
178. *Pennebacker*, 298 Mich. App. at 6.
179. *Id.*
180. *Id.*
181. *Id.* at 7.

ignores the statutory mandate of jail time for those convicted of drinking and driving with minors in the vehicle.[182]

VIII. DEFENSES

A. Impossibility

In *People v. Likine*,[183] a consolidated appeal, the defendants were convicted of felony nonpayment of child support. The relevant statute provides, "If the court orders an individual to pay support . . . for a child of the individual, and the individual does not pay the support, . . . the individual is guilty of a felony."[184]

The Michigan Court of Appeals found that this statute imposes strict criminal liability, regardless of intent or inability to pay.[185] Each of the defendants in the instant case tried to assert a defense of inability to pay, but the trial courts ruled against them, and they were convicted. They appealed, challenging the constitutionality of the statute.[186]

The Michigan Supreme Court reversed. The court acknowledged that this was the first time it had considered Michigan's felony nonsupport statute[187] and any defenses to it.[188] The court found that the common-law defense of impossibility is a proper defense to felony nonsupport. The court wrote, "[W]e believe that to avoid conviction for felony nonsupport, parents should be required to have done everything possible to provide for their child and to have arranged their finances in a way that prioritized their parental responsibility so that the child does not become a public charge."[189]

Although the nonsupport statute is a strict liability statute, the court noted that it criminalizes an omission or a failure to act.[190] At common law, a defense to a crime of omission is impossibility.[191] In other words, the court wrote, "a defendant cannot be held criminally liable for failing to perform an act that was impossible for the defendant to perform."[192] Although a parent's ability to pay is one factor to be considered, the

182. *Id.* at 8-9.
183. 492 Mich. 367; 823 N.W.2d 50 (2012).
184. MICH. COMP. LAWS ANN. § 750.165(1) (West 2013).
185. People v. Adams, 262 Mich. App. 89; 683 N.W.2d 729 (2004).
186. *Likine,* 492 Mich. at 380-81.
187. MICH. COMP. LAWS ANN. § 750.165.
188. *Likine,* 492 Mich. at 380-81.
189. *Id.* at 374.
190. *Id.* at 394-95.
191. *Id.*
192. *Id.* at 396.

court also provided a non-exhaustive list "for illustrative purposes only," which included

> [w]hether the defendant has diligently sought employment; whether the defendant can secure additional employment, such as a second job; whether the defendant has investments that can be liquidated; whether the defendant has received substantial gifts or an inheritance; whether the defendant owns a home that can be refinanced; whether the defendant has assets that can be sold or used as loan collateral; whether the defendant prioritized the payment of child support over the purchase of nonessential, luxury, or otherwise extravagant items; and whether the defendant has taken reasonable precautions to guard against financial misfortune and has arranged his or her financial affairs with future contingencies in mind, in accordance with one's parental responsibility to one's child.[193]

A defendant's failure to explore other avenues to pay child support would prevent that defendant from invoking the impossibility defense, the court emphasized.[194]

B. Entrapment

In *People v. Akhmedov*,[195] the defendant asserted the defense of entrapment. He was convicted of two counts of delivery of less than 50 grams of a controlled substance and one count of delivery of 50 grams or more but less than 449 grams of a controlled substance.[196] The defendant was charged after selling drugs to an undercover police officer on three occasions.[197] On appeal, he argued that the police entrapped him into committing the crimes.[198]

The court of appeals affirmed. The court noted the following standard when a defendant raises a claim of entrapment:

> Whether entrapment occurred is determined by considering the facts of each case and is a question of law for this Court to decide de novo. The trial court must make specific findings

193. *Id.* at 402-03.
194. *Likine,* 492 Mich. at 403-04.
195. 297 Mich. App. 745; 825 N.W.2d 688 (2012).
196. *Id.* at 748.
197. *Id.* at 748-49.
198. *Id.* at 752.

> regarding entrapment, and this Court reviews its findings under the clearly erroneous standard. The findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made.[199]

The defendant has the burden of establishing that he was entrapped by a preponderance of the evidence, the court stated, and Michigan has a "modified objective test" when entrapment is raised as a defense.[200] This analysis examines the police conduct, but it also requires the court to look at the circumstances of a defendant "to determine whether the police conduct would induce a similarly situated person, with an otherwise law-abiding disposition, to commit the charged crime."[201] The court wrote that the following factors must be considered in determining whether a defendant was induced by the police into committing a crime:

> (1) whether the police appealed to the defendant based on friendship, (2) whether the defendant had been known to commit the charged crime, (3) whether there was a time lapse between the investigation and the arrest, (4) whether there was an inducement that would make the crime unusually attractive to a law-abiding citizen, (5) whether excessive consideration was offered to the defendant, (6) whether the police guaranteed that the acts were not illegal, (7) whether the government pressured the defendant to commit the crime, (8) whether sexual favors were offered to the defendant, (9) whether the defendant was threatened with arrest unless he or she complied, (10) whether the government acted to escalate the defendant's criminal culpability, (11) whether the police had control over the informant, (12) whether the investigation targeted the defendant.[202]

The court evaluated each of the three transactions defendant committed separately, finding no evidence of entrapment in any of them. The first transaction involved a third party informant, whose misconduct could not be attributed to the police because they did not have any

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199. *Id.* at 652 (quoting People v. Fyda, 288 Mich. App. 446, 456; 793 N.W.2d 712 (2010)).

200. *Id.* at 752.

201. *Akhmedov,* 297 Mich. App. at 753 (quoting People v. Juillet, 439 Mich. 34, 55; 475 N.W.2d 786 (1991)) (internal quotation marks omitted).

202. *Id.* (quoting People v. Johnson, 466 Mich. 491, 498-99; 647 N.W.2d 480 (2002)).

control over him.[203] The second transaction did not involve inducing the defendant into committing the crime, as the undercover officer made no promises to the defendant but merely arranged a drug transaction.[204] The third transaction involved the defendant contacting the undercover officer and offering to provide larger quantities of drugs.[205] The court noted that the defendant was not pressured into selling drugs or offering larger amounts.[206] The police merely gave the defendant the opportunity to commit a crime, the court concluded, which is insufficient evidence of entrapment.[207]

IX. THE INDIGENT CRIMINAL DEFENSE SYSTEM

In *Duncan v. State*,[208] the plaintiffs challenged the sufficiency of the state's indigent criminal defense system and requested injunctive relief to improve the quality of indigent representation in Michigan. The proposed class of plaintiffs consisted of present and future indigent defendants who would require the assistance of appointed counsel through the indigent criminal defense system.[209] The State moved for summary disposition, which was denied by the trial court.[210] In so moving, the State argued that the plaintiffs' pre-conviction claims could not be decided because the plaintiffs failed to meet the certification requirements of a class action, the plaintiffs failed to plead a valid cause of action, and the plaintiffs lacked standing.[211] On appeal, the court of appeals affirmed, finding that the trial court had properly granted the motion for class certification.[212] The Michigan Supreme Court affirmed the court of appeals' decision and remanded the case to the trial court.[213]

On remand to the trial court, the State again moved for summary disposition, which the trial court denied. The State appealed.

The court of appeals affirmed. On appeal, the State argued that the trial court erroneously allowed class certification.[214] The court rejected this argument, noting the trial court did not certify plaintiffs' case as a

203. *Id.* at 754.
204. *Id.* at 754-55.
205. *Id.* at 755.
206. *Id.*
207. *Akhmedov,* 297 Mich. App. at 755.
208. 300 Mich. App. 176; 823 N.W.2d 761 (2013).
209. *Id.* at 182.
210. *Id.* at 184.
211. *Id.*
212. Duncan v. State, 284 Mich. App. 246, 255; 774 N.W.2d 89 (2009).
213. Duncan v. State, 488 Mich. 957; 488 N.W.2d 695 (2010).
214. *Duncan*, 300 Mich. App. at 185.

class action but rather denied the State's motion for summary disposition until discovery could be completed.[215] The State also argued that the plaintiffs failed to state a valid cause of action. The court of appeals also rejected this claim, applying the law of the case doctrine and concluding "that plaintiffs had pleaded causes of action for which declaratory and injunctive relief could be granted."[216] The State next argued that the plaintiffs lacked standing, but the court of appeals gave this notion short shrift.[217] The State relied on the Michigan Supreme Court decision in *Lansing Schools Education Association v. Lansing Board of Education*,[218] which reinstated the "prudential" standing test, automatically conferring standing upon any party who has a legal cause of action.[219] Under this standard, the court found that the plaintiffs have standing.[220] Finally, the State argued that the doctrine of res judicata barred the claims of the plaintiffs since they could have raised the issue of ineffective assistance of counsel during their individual criminal proceedings.[221] The court of appeals also rejected this argument because the remedy the plaintiffs sought—which was an improvement of the indigent criminal defense system—could not have been granted during the plaintiffs' prior criminal cases.[222] The court stated,

> Without an action such as this, and assuming plaintiffs' allegations are true, indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless such representation adversely affects the outcome. Our system of justice requires effective representation, not ineffective but non-outcome determinative representation.[223]

X. SENTENCING ISSUES: RESTITUTION

In *People v. Cunningham*,[224] the defendant contested the amount of court costs imposed following his guilty plea to a controlled substance offense. The court sentenced him to 1 to 4 years imprisonment and

215. *Id.* at 187.
216. *Id.* at 189.
217. *Id.* at 191.
218. 487 Mich. 349; 792 N.W.2d 686 (2010).
219. *Duncan*, 300 Mich. App. at 192.
220. *Id.* at 193.
221. *Id.* at 193-94.
222. *Id.* at 195.
223. *Id.*
224. People v. Cunningham, 301 Mich. App. 218; 836 N.W.2d. 232 (2013).

$1,000 in court costs.[225] The court based this amount on evidence that the average court cost for a criminal case in Allegan Circuit Court is $1,238.48.[226]

On appeal, the defendant argued that the trial court "erred by (1) including in its calculation the expenses associated with maintaining governmental agencies; and (2) failing to calculate the particular costs incurred in this case."[227]

The court of appeals rejected the defendant's arguments and affirmed. The court began its analysis by noting that, by law,[228] a sentencing court may consider overhead costs when deciding the amount of court costs to impose.[229] The court examined *People v. Sanders*,[230] in which it was held that a sentencing court can consider indirect expenses, such as overhead costs, when determining the amount of court costs to impose.[231] *Sanders*, the court noted, allows a sentencing court to impose costs against a defendant as long as the costs are reasonable.[232] In this case, the costs imposed by the court were reasonable, the appellate court concluded, without providing a further explanation.[233]

XI. CONCLUSION

Michigan's appellate court and supreme court issued several important decisions during the *Survey* period. Each case presented a unique set of circumstances, and the courts rendered thoughtful and

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225. *Id.* at 219-20.
226. *Id.* at 220.
227. *Id.*
228. The trial court imposed the costs under MICH. COMP. LAWS ANN. § 769.1k (West 2013), which provides in part:

> (1) If a defendant enters a plea of guilty . . . both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.
>
> (b) The court may impose any or all of the following:
>
> (i) Any fine.
>
> (ii) Any cost in addition to the minimum state cost set forth in subdivision (a).
>
> (iii) The expenses of providing legal assistance to the defendant.
>
> (iv) Any assessment authorized by law.
>
> (v) Reimbursement under section 1f of this chapter.

229. *Cunningham*, 301 Mich. App. at 220.
230. 296 Mich. App. 710; 825 N.W.2d 87 (2012).
231. *Cunningham*, 301 Mich. App. at 221.
232. *Id.*
233. *Id.* at 222.

noteworthy decisions. These cases are important to our knowledge of criminal law jurisprudence and add to our understanding of that area of law.