CRIMINAL LAW

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I. INTRODUCTION

This *Survey* period[1] provided a fascinating array of criminal law decisions. This Article examines issues ranging from murder to registration of sexual offenders; from armed robbery to assault on prison guards using HIV positive blood as a weapon; from the insanity defense to amendment of charging documents. In addition, the Michigan Supreme Court continues to refine the distinction between necessarily

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1. June 1, 2007 through May 31, 2008.

and cognate lesser offenses. All in all, it was another year of thoughtful and provocative criminal jurisprudence.

II. HOMICIDE

A. Premeditation

Florence Unger, the victim in this affair, had filed for divorce from Mark Unger, the defendant in *People v. Unger*.[2] Divorce proceedings notwithstanding, however, the Unger family traveled together to a resort area in October, 2003.[3] There was a boathouse not far from the cottage in which the family was spending the weekend.[4] Vacationers often congregated on a wooden deck on the roof of the boathouse.[5] Mr. and Mrs. Unger (defendant and victim, respectively) were on the deck the evening of their arrival.[6] Defendant later stated that the victim requested that he go to the cottage to check on their two young children.[7] He put the children to bed, and upon return to the deck found that his wife was gone.[8] He thought she had gone to speak with neighbors, and he returned to the cottage where he fell asleep.[9] The next morning Mark Unger called the neighbors and stated that his wife "had never returned to the cottage" the previous evening.[10] The neighbors helped search for the missing wife.[11] They discovered Florence Unger in the lake, in shallow water, dead.[12] The neighbor who found the body went to find the defendant.[13] The neighbor later testified that even though it was not possible to see the body in the lake from where he and the defendant were speaking, the defendant ran to the water and jumped in next to the body.[14] The police were called and, upon arriving at the scene, found that the railing surrounding the rooftop deck was damaged and bowed toward the lake.[15] Furthermore, a large blood stain was found on the concrete

2. 278 Mich. App. 210, 213, 749 N.W.2d 272, 281 (2008).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Unger*, 278 Mich. App. at 213, 749 N.W.2d at 281.
9. *Id.* at 213-14, 749 N.W.2d at 281.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 214, 749 N.W.2d at 281.
14. *Unger*, 278 Mich. App. at 214, 749 N.W.2d at 281.
15. *Id.* at 214-15, 749 N.W.2d at 281-82.

pavement below the deck, along with one of the victim's earrings.[16] There was no trail of blood to the lake from the stain on the concrete.[17] The police searched defendant Unger's vehicle and also the cottage.[18] A pair of shoes was recovered from the vehicle, and the shoes were found to have a paint smear consistent with the paint on the railing of the boathouse deck.[19]

The police arrested Unger and charged him with first degree premeditated murder.[20] At the preliminary examination, a forensic pathologist, Dr. Steven Cohle, testified that Florence Unger had died of brain injuries sustained on impact with the concrete.[21] On the other hand, Dr. L.J. Dragovic, a medical examiner, opined that the cause of death was actually drowning and not head injuries.[22] The district court, however, excluded Dr. Dragovic's opinion, then concluded there was no evidence of premeditation and bound defendant to circuit court for trial on a charge of second degree murder.[23] The circuit court did not agree with the district court.[24] Dr. Dragovic's testimony was ruled admissible.[25] The prosecution was allowed to amend the charging document and the charge of premeditated first-degree murder was reinstated.[26] At trial, the prosecution contended the defendant had caused the victim to go over the railing and then had moved the victim from the pavement to the lake to drown her.[27] The prosecution relied on the testimony of Dr. Dragovic.[28] The defense argued, and presented expert testimony to support the argument, that the victim had simply fallen over the railing and had "rolled, bounced, or otherwise inadvertently moved into the lake."[29] After trial, the jury convicted the defendant of first-degree murder.[30] On appeal, the defendant argued there was insufficient evidence to support a conviction of premeditated first-degree murder.[31]

16. *Id.*
17. *Id.* at 214-15, 749 N.W.2d at 282.
18. *Id.* at 215, 749 N.W.2d at 282.
19. *Id.*
20. *Unger*, 278 Mich. App. at 215, 749 N.W.2d at 282.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 215, 749 N.W.2d at 282.
25. *Id.*
26. *Unger*, 278 Mich. App. at 216, 749 N.W.2d at 282.
27. *Id.*
28. *Id.* at 216, 749 N.W.2d at 282.
29. *Id.*
30. *Id.*
31. *Id.* at 222, 749 N.W.2d at 285.

The prosecution must prove that the defendant intentionally killed the victim in order to convict a defendant of first-degree premeditated murder.[32] Additionally, the prosecution must prove "that the killing was premeditated and deliberate."[33]

In assessing whether the defendant intentionally killed the victim, the court noted that both doctors concluded this was a homicide case.[34] Neither doctor believed there was a possibility of accidental death because neither believed the body could have gotten into the water without the action of a second person.[35] Further, the court noted the defendant had a motive to kill his wife.[36] Motive is not an element of a homicide offense, but it is always relevant.[37] The court noted the divorce proceedings initiated by the victim, and indicated that motive for murder can be found in marital discord.[38] Then, of course, there was evidence of life insurance policies on the defendant's wife.[39]

The court also noted that the defendant had an opportunity to kill his wife.[40] After all, the defendant and the victim were alone on the boathouse deck on the night of the death, by the defendant's own admission.[41] The court noted that even the defendant had stated that he was probably the last person to see the victim alive.[42]

There was also evidence of a scuffle or perhaps a struggle on the boathouse deck shortly before the death.[43] Witnesses established that the deck railing had not been broken the day before, but it was damaged and broken at the time the body was found.[44] The court noted that the damage could have resulted from an accident, but because of the paint smear on defendant Unger's shoe, it was "likely" that the damage to the railing was evidence of a struggle between the Ungers.[45] Other evidence that the court found indicating that the defendant intentionally killed his

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32. *Unger*, 278 Mich. App. at 223, 749 N.W.2d at 286. *See also* People v. Marsack, 231 Mich. App. 364, 370, 586 N.W.2d 234, 237 (1998).

33. *Unger*, 278 Mich. App. at 229, 749 N.W.2d at 289. *See also Marsack*, 231 Mich. App. at 370, 749 N.W.2d at 237.

34. *Unger*, 278 Mich. App. at 223, 749 N.W.2d at 286.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 223-24, 749 N.W.2d at 286. *See also* People v. Rotar, 137 Mich. App. 540, 548-49, 357 N.W.2d 885, 889-90 (1984).

39. *Unger*, 278 Mich. App. at 224, 749 N.W.2d at 286-87.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 224, 749 N.W.2d at 287.

45. *Unger*, 278 Mich. App. at 224-25, 749 N.W.2d at 287.

wife consisted of such things as conflicting statements the defendant had made to various people,[46] that the defendant was prepared to leave and had packed the family's belongings into their vehicle before the victim's body was even removed from the lake,[47] the defendant's desire for immediate cremation,[48] and, importantly, the evidence showed that the victim was afraid of the dark and would not have remained on the boathouse deck in the dark willingly.[49] The court also noted that the defense had submitted evidence and rebuttal to the prosecution's case but that the jury must have believed the prosecution's evidence.[50] The court was of the opinion that there was sufficient evidence for the jury to conclude that the defendant had intentionally killed his wife.[51]

In addition to proving that the defendant intentionally killed his wife, the prosecution must also prove "that the killing was premeditated and deliberate."[52] For a killing to be premeditated there must be some span of time between the formation of the homicidal intent and the killing.[53] If the period of time is sufficient to allow the defendant to take a second look, then that is all that is required.[54]

In this case, both doctors testified that a second person had to have moved the victim's body to the water.[55] Indeed, Dr. Dragovic believed that the victim had been drowned after being placed in the lake.[56] This testimony permitted the jury to conclude that the defendant had sufficient time to take a second look.[57] Further, there was evidence concerning marital discord and that is also admissible as evidence of premeditation.[58] And further still, there was the evidence of the struggle between the defendant and the victim on the boathouse deck.[59] There was also evidence that the victim may have been unconscious before she

46. *Id.* at 226, 749 N.W.2d at 287.

47. *Id.* at 226, 749 N.W.2d at 287-88.

48. *Id. See also*, People v. Usher, 212 Mich. App. 345, 351, 328 N.W.2d 628, 631 (1982).

49. *Unger*, 278 Mich. App. at 227, 749 N.W.2d at 288.

50. *Id.* at 228-29, 749 N.W.2d at 288-89.

51. *Id.* at 229, 749 N.W.2d at 289.

52. *Id. See also*, *Marsack*, 231 Mich. App. at 370, 586 N.W.2d at 237.

53. *Unger*, 278 Mich. App. at 229, 749 N.W.2d at 289. *See also* People v. Gonzalez, 468 Mich. 636, 641, 664 N.W.2d 159, 163 (2003).

54. *Unger*, 278 Mich. App. at 229, 749 N.W.2d at 289. *See also* People v. Schollaert, 194 Mich. App. 158, 170, 486 N.W.2d 312, 318 (1992).

55. *Unger*, 278 Mich. App. at 229, 749 N.W.2d at 289.

56. *Id.*

57. *Id.* at 230, 749 N.W.2d at 289-90.

58. *Id.* at 231, 749 N.W.2d at 290.

59. *Id.*

even struck the pavement.[60] According to the court, the nature and number of the injuries supported a finding of premeditation and deliberation.[61] The inflicting of multiple blows gives the assailant time to take a second look.[62] Thus, viewing the evidence "in a light most favorable to the prosecution," the court of appeals was able to conclude that the jury was correct and the defendant had, indeed, premeditated the victim's murder.[63]

III. ASSAULTIVE OFFENSES

A. Assault with Intent to Commit Armed Robbery

Keith Davis and Gilberto Perez, co-defendants,[64] were involved in what the court of appeals called an "incident."[65] The "incident" in question was a foiled effort to rob a liquor store.[66] The owner of the store testified that she saw Davis enter her store and "mill around" before approaching the front of the store and asking about the price of rum.[67] While Davis was in the store, the owner saw Perez watching her through the back door.[68] Davis left without purchasing anything.[69] Within minutes, Perez entered wearing sunglasses and a hat, and the store owner responded by dialing 911.[70] Perez attempted to hand a note to the store owner but the owner simply responded by inquiring about the sunglasses Perez was wearing.[71] Perez gestured as if he had a firearm in his pocket and the owner responded by demanding to see the firearm, telling Perez to show it or leave.[72] The owner's fiancé entered the store and Perez continued to demand compliance with his orders, simultaneously reaching for a beer bottle and the cash register with his free hand.[73] The

60. *Id.*
61. *Unger*, 278 Mich. App. at 231, 749 N.W.2d at 290.
62. *Id.*
63. *Id.*
64. People v. Davis, 277 Mich. App. 676, 747 N.W.2d 555 (2008) *vacated in part*, People v. Davis, No. 136073, 2008 Mich. LEXIS 1942, at *1 (Mich. Sept. 10, 2008) (remanding to the circuit court for reconsideration of scoring offense variable).
65. *Id.* at 678, 747 N.W.2d at 556.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Davis*, 277 Mich. App. at 678, 747 N.W.2d at 557.
71. *Id.*
72. *Id.*
73. *Id.*

store owner responded by smacking that hand with a flashlight.[74] Perez and the store owner continued to argue until the store owner's fiancé hit Perez in the back with a large shovel.[75] Another man who arrived on the scene helped the fiancé to restrain Perez.[76] The store owner then went looking for Davis, and when she found him, she identified him to the police who then arrested him.[77] At trial, during cross examination of the store owner, counsel for Perez managed to advance the theory that the store owner never feared Perez nor did she ever feel threatened by him.[78] The defendants were convicted of assault with intent to rob while armed.[79] Perez appealed, contending the store owner never believed he was armed and was never in fear that Perez would carry out his threats.[80] In his appeal, Perez contended there was insufficient evidence to establish that he had assaulted the store owner, that the trial court's instruction to the jury concerning the subjective belief of the store owner was not correct, and the jury should have been instructed on the alternative crime of attempted assault.[81]

The court of appeals was convinced that the prosecutor had presented sufficient evidence to show that Perez had assaulted the store owner.[82] Even if fear is a necessary element of criminal assault, opined the court, the conviction should still be sustained.[83] The court noted that the store owner testified that she believed the defendant was armed with a gun.[84] Further, the defendant threatened to take the store owner's life, and the jurors were able to view the entire incident from the surveillance videotape.[85] The court of appeals was of the opinion that there was ample evidence from which one could conclude that the victim "reasonably apprehended an imminent battery."[86]

The court of appeals noted that the statute proscribing assault with intent to rob while armed requires an assault.[87] A criminal assault can be either an attempted battery or an act that causes the victim to be

74. *Id.* at 678-79, 747 N.W.2d at 557.
75. *Id.* at 679, 747 N.W.2d at 557.
76. *Davis*, 277 Mich. App. at 679, 747 N.W.2d at 557.
77. *Id.*
78. *Id.* at 682, 747 N.W.2d at 558-59.
79. *Id.* at 677, 747 N.W.2d at 556. *See* MICH. COMP. LAWS ANN. § 750.89 (West 2008).
80. *Davis*, 277 Mich. App. at 681-82, 747 N.W.2d at 558-59.
81. *Id.* at 681-82, 747 N.W.2d at 558.
82. *Id.* at 683, 747 N.W.2d at 559.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Davis*, 277 Mich. App. at 683, 747 N.W.2d at 559.
87. *Id.* at 684, 747 N.W.2d at 559.

reasonably apprehensive that he or she is about to be battered.[88] The difficulty for the court of appeals in the instant case was the necessity to reconcile conflicting language in various Michigan Supreme Court opinions.[89] For example, *People v. Reeves*[90] could be read to require that an assault victim have had an actual honest belief in the validity of the threat.[91] Compare that to *People v. Sanford*,[92] where the court seemed to indicate that fear is not a mandatory element of a criminal assault.[93]

The court of appeals believed that Michigan case law has always taken the position that fear has no place in the definition of criminal assault, as long as a rational person would reasonably have believed that the defendant's behavior threatened immediate battery.[94] The court noted that "a victim's subjective emotional response to a defendant's behavior does not exonerate him any more than it condemns him."[95] A defendant's intent to scare or intimidate a victim, and a reasonable perception that this constitutes "a legitimate threat of harmful contact," was found by the court to be sufficient.[96] Accordingly, the court was persuaded that "fear is not an element of assault."[97] The court concluded that the instructions given to the jury were adequate and the defendant's rights were fairly presented.[98]

Finally, the court of appeals considered whether the trial court should have given the jury an instruction for the lesser offense of attempted assault with intent to rob.[99] The court of appeals noted that the trial court had correctly ruled that there were no facts to suggest an attempted assault.[100] Rather, the facts seem to indicate an attempted robbery.[101] If the jury found no assault, then the jury would have been permitted to find the defendant guilty of an attempt to rob the store.[102] Therefore, according to the court of appeals, there was no basis for giving an

88. *Id.*
89. *Id.* at 684-85, 747 N.W.2d at 559-60.
90. 458 Mich. 236, 240, 580 N.W.2d 433, 435-36 (1998).
91. *Davis*, 277 Mich. App. at 685, 747 N.W.2d at 560.
92. 402 Mich. 460, 478-79, 265 N.W.2d 1, 7 (1978).
93. *Davis*, 277 Mich. App. at 684, 747 N.W.2d at 559.
94. *Id.* at 685-86, 747 N.W.2d at 560.
95. *Id.* at 687, 747 N.W.2d at 561.
96. *Id.*
97. *Id.* at 687-88, 747 N.W.2d at 561-62.
98. *Id.* at 688, 747 N.W.2d at 562.
99. *Davis*, 277 Mich. App. at 688, 747 N.W.2d at 562.
100. *Id.* at 689, 747 N.W.2d at 562.
101. *Id.*
102. *Id.*

instruction on attempted assault with intent to commit armed robbery.[103] The defendant's conviction was affirmed.[104]

B. Assaulting a Prison Employee

Antoine Odom was incarcerated at a correctional facility in Jackson, Michigan.[105] While moving through a food line at mealtime, defendant Odom tried to complain to Officer K. Watson about a ticket he had received.[106] The officer told the defendant she would talk to him later, when she had time, and Odom began to act as if he were angry.[107] Watson, after Odom had eaten, discussed Odom's complaint with him.[108] Odom was not satisfied with the result of the conversation and became more upset.[109] At that point, Officer Watson testified that she told another officer to handcuff Odom.[110] Odom responded by punching Officer Watson in the face and spitting in her face twice.[111] Another officer attempted to help and was also punched in the mouth.[112] Many officers responded to the scene and Odom was subdued and carried from the cafeteria.[113] Another officer testified that he noticed that Odom was bleeding from the mouth.[114] That same officer testified that Odom also spit in his face.[115] Odom was subsequently convicted by a jury of three counts of assault on a prison employee by an inmate.[116] Odom appealed, contending, among other things, that there was no evidence of aggravated use of a weapon, specifically, a harmful biological substance,[117] nor, for that matter, was there any evidence that he had assaulted any corrections officers.[118]

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103. *Id.*
104. *Id.* at 691, 747 N.W.2d at 563.
105. People v. Odom, 276 Mich. App. 407, 409, 740 N.W.2d 557, 560 (2007).
106. *Id.*
107. *Id.* at 410, 740 N.W.2d at 560.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Odom*, 276 Mich. App. at 410, 740 N.W.2d at 560.
112. *Id.* at 411, 740 N.W.2d at 561.
113. *Id.* at 410, 740 N.W.2d at 560.
114. *Id.* at 411, 740 N.W.2d at 561.
115. *Id.*
116. *Id.* at 409, 740 N.W.2d at 560. *See* MICH COMP. LAWS ANN. § 750.197c(1) (West 2007).
117. *Odom*, 276 Mich. App. 411-12, 740 N.W.2d at 561.
118. *Id.* at 418, 740 N.W.2d at 564.

Use of a weapon in assaulting a prison employee is an aggravating factor at sentencing time.[119] That is, use of such a weapon in the assault will result in a harsher sentence upon conviction.[120] A weapon can include a harmful biological substance.[121] Testimony at trial indicated that Odom was bleeding from the mouth at the time of the incident and, further, was also HIV positive at the time of the incident.[122] The trial court considered spitting HIV positive blood to be assault with a weapon on the officer.[123] A "harmful biological substance" is a substance which can "be used to cause death, injury or disease," and the court of appeals was willing to take judicial notice that blood is a means of spreading HIV.[124] Accordingly, the court was willing to conclude that HIV infected blood is a harmful biological substance and can cause death, injury, or disease in humans.[125] Therefore, the court concluded that there was sufficient evidence of aggravated use of a weapon.[126]

Odom further argued on appeal that the evidence was insufficient to convict him of assaulting the corrections officers because the officers lied about the assault.[127] The statute[128] which makes it unlawful for imprisoned persons to assault employees of the place of confinement applies, according to the court, to state prisons and guards employed at those prisons.[129] The court had no doubt that the officers were employees, nor did the court have any doubt that Odom was lawfully incarcerated.[130] The court also noted there was testimony from multiple witnesses that the defendant punched or spat upon the officers.[131] The defendant's argument that there was insufficient evidence was deemed by the court to be completely without merit.[132] Therefore, this portion of Odom's appeal was also rejected.[133]

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119. *Id.* at 411, 740 N.W.2d at 561. *See* MICH. COMP. LAWS ANN. § 777.31 (West 2008).
120. *See* MICH. COMP. LAWS ANN. § 777.31 (West 2008).
121. MICH. COMP. LAWS ANN. § 777.31(1)(b) (West 2008).
122. *Odom*, 276 Mich. App. at 412, 740 N.W.2d at 561.
123. *Id. See* MICH. COMP. LAWS ANN. § 777.31(1)(b) (West 2008).
124. *Odom*, 276 Mich. App. at 412-13, 740 N.W.2d at 561.
125. *Id.* at 413, 740 N.W.2d at 562.
126. *Id.*
127. *Id.* at 418, 740 N.W.2d at 564.
128. MICH. COMP. LAWS ANN. § 750.197c(1) (West 2008).
129. *Odom*, 276 Mich. App. at 419, 740 N.W.2d at 564.
130. *Id.* at 418, 740 N.W.2d at 564-65.
131. *Id.* at 418, 740 N.W.2d at 565.
132. *Id.* at 419, 740 N.W.2d at 565.
133. *Id.*

C. Vulnerable Adult Abuse

In *People v. Cline*,[134] the defendant was convicted of abusing his wife, who was blind and had diabetes.[135] On appeal, the defendant raised a number of issues, none of which succeeded.[136] First, he argued that his attorney was ineffective for failing to move for a change of venue due to the pre-trial publicity the case had received.[137] The court found that the sheer number of newspaper articles written about the case did not establish "the atmosphere surrounding the trial was such as would create a probability of prejudice."[138] Moreover, the court concluded, "the totality of the circumstances surrounding the jury selection in the instant case does not overcome the seated jurors' assurances that they could decide the case impartially."[139]

Defendant also asserted that there was insufficient evidence to convict him of first-degree vulnerable-adult abuse because the victim, his wife, was not a "vulnerable victim," as proscribed by statute.[140] The defendant was charged, and convicted of, seventeen counts of first-degree vulnerable-adult victim abuse under M.C.L. Section 750.145n(1), which states "[a] caregiver is guilty of vulnerable adult abuse in the first degree if the caregiver intentionally causes serious physical harm or serious mental harm to a vulnerable adult."[141]

A "vulnerable adult" is defined by statute as:

> (i) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.[142]

The defendant insisted that the victim, his wife, was not a "vulnerable adult" because she was capable of performing many tasks independently and without assistance.[143] However, the court disagreed, noting that the victim required some level of care due to her blindness

134. 276 Mich. App. 634, 741 N.W.2d 563 (2007).
135. *Id.* at 635, 741 N.W.2d at 565.
136. *Id.*
137. *Id.* at 637-38, 741 N.W.2d at 566.
138. *Id.* at 640, 741 N.W.2d at 567.
139. *Id.* at 641, 741 N.W.2d at 568.
140. *Cline*, 276 Mich. App. at 642, 741 N.W.2d at 568.
141. MICH. COMP. LAWS ANN. § 750.145n(1) (West 2008).
142. MICH. COMP. LAWS ANN. § 750.145m(u) (West 2008).
143. *Cline*, 276 Mich. App. at 642, 741 N.W.2d at 568.

and diabetes.[144] The testimony at trial established that she required assistance for cooking and grocery shopping, and depended on others to read food labels and her mail.[145] She also needed assistance in refilling prescriptions and taking her medications on a regular basis.[146] Accordingly, the court concluded the victim met the statutory definition of a vulnerable adult[147] and affirmed the defendant's convictions.[148]

IV. THEFT OFFENSES

A. Robbery

In *People v. Passage*,[149] the defendant was apprehended outside of a store with a stolen car stereo.[150] A jury convicted the defendant of robbery and as a fourth offense, habitual offender he was sentenced to fifty months to twenty years imprisonment.[151]

Defendant appealed his conviction, first arguing that he was not guilty of committing a robbery because he was a mere shoplifter, and there was no force or violence as required by the robbery statute.[152] However, the court gave this argument short shrift, as the evidence at trial indicated the defendant struggled in the parking lot with a loss prevention officer and other store employees after leaving the store with the stolen merchandise.[153] The court indicated that the "statute's clear and unambiguous language punishes a defendant for using force or violence, committing an assault, or placing a person in fear during flight or attempted flight after the larceny was committed."[154] The statute

144. *Id.* at 646, 741 N.W.2d at 570.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 653, 741 N.W.2d at 574.
149. 277 Mich. App. 175, 743 N.W.2d 746 (2007).
150. *Id.* at 176, 743 N.W.2d at 747.
151. *Id.*
152. MICH COMP. LAWS ANN. § 750.530 (West 2008) states:
(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.
Id.
153. *Passage*, 277 Mich. App. at 176, 743 N.W.2d at 747.
154. *Id.* at 178, 743 N.W.2d at 748.

applies to force used at any time during commission of the offense, the court noted.[155] Force used during a period of flight, the court concluded, is sufficient under the statute.[156] Therefore, the court affirmed the defendant's conviction.[157]

V. MISCELLANEOUS

A. Sexual Offenders Registration Act

The defendant, Harry J. Hesch, was a juvenile when he babysat two children in the fall of 1997.[158] He was accused of enticing the children to engage in sexual behavior with him.[159] Defendant admitted some of the acts of which he was accused, but denied that any force, threats or aggression had been used.[160] The final result was that the defendant was placed on probation and ordered to register as an offender under the Sex Offenders Registration Act.[161] The defendant successfully completed his probation.[162] Sometime later, the defendant asked the lower court to remove the requirement that he continue to register as a sex offender.[163] The defendant had only been eleven years old at the time of the offense, six years had passed, and psychologists and psychiatrists now concluded the defendant was not a sexual predator and was unlikely to commit more sex crimes.[164] There had been no subsequent arrests nor had there been any convictions for criminal sexual conduct since the original offense and, according to the defendant, there were no aggravating factors at the time of that offense.[165] The prosecutor responded by asserting that the offense did involve force and coercion, and that in any event, the victim wanted the defendant to continue to register as a sex offender.[166] The lower court found that the original offense did indeed

155. *Id.*
156. *Id.*
157. *Id.* at 181, 743, N.W.2d at 750.
158. People v. Hesch, 278 Mich. App. 188, 190, 749 N.W.2d 267, 269 (2008).
159. *Id.*
160. *Id.*
161. *Id.* at 190-91, 749 N.W.2d at 269. *See* MICH. COMP. LAWS ANN. § 28.721 (West 2008) (codifying the Sex Offenders Registration Act).
162. *Hesch*, 278 Mich. App. at 191, 749 N.W.2d at 269.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*

involve force or coercion and denied the motion.[167] The defendant appealed.[168]

Some juvenile sex offenders who are required to register as sex offenders may petition the court in which they were convicted to limit or terminate continued registration.[169] Under certain circumstances the lower court is vested with discretion to cease the registration process.[170] The court noted that the defendant was in a position to petition the court, at least as a preliminary matter, because the defendant was under the age of thirteen at the time of the offense, and the defendant was not more than five years older than the victim.[171] Therefore, it is permissible in those circumstances for the defendant to petition the lower court for relief.[172] Having the possibility of petitioning does not guarantee there will be relief.[173] The lower court, to whom the petition is addressed, must deny the petition if the original offense involved any of the factors found in the Michigan Criminal Sexual Conduct Statutes.[174] The court of appeals noted that force or coercion is an aggravating factor found throughout those statutes.[175] Additionally, if the defendant is in a position of authority and used that position of authority to coerce the victim, then that is a factor which is applicable.[176]

The court indicated it had examined the record and found that the defendant, as a babysitter, was in a position of authority over a victim of tender years, and using that position of authority constituted force or

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167. *Id.* at 191, 749 N.W.2d at 269.

168. *Hesch*, 278 Mich. App. at 191, 749 N.W.2d at 269.

169. *Id.* at 192, 749 N.W.2d at 270.

170. *Id.* at 192-93, 749 N.W.2d at 270. *See* MICH. COMP. LAWS ANN. § 28.728d(1) (West 2008) provides in part:

> An individual who petitions the court under section 8c to register as provided in this section shall register under this act as follows:
>
> (a) For a violation described in section 8c(15)(a) or (b), the individual shall register under this act until the petition is granted but is not subject to the requirements of section 8(2).
>
> (b) For a violation described in section 8c(15)(c) and for which the petition is granted, the individual shall register under this act for a period of 10 years after the date he or she initially registered or, if the individual was in a state correctional facility, for 10 years after he or she is released from that facility, whichever is greater, and is subject to the requirements of section 892 during that registration period.

Id.

171. *Hesch*, 278 Mich. App. at 194, 749 N.W.2d at 270.

172. *Id.*

173. *Id.*

174. *Id.* at 194, 749 N.W.2d at 270-71.

175. *Id.* at 195, 749 N.W.2d at 271.

176. *Id.* at 196, 749 N.W.2d at 272.

coercion.[177] This was the finding of the lower court, and the court of appeals was of the opinion the lower court had not "clearly erred" in reaching that conclusion.[178] The decision of the lower court was therefore affirmed.[179]

B. Lesser Included Offenses

The defendant in *People v. Nyx*,[180] was the dean of a school when he was accused of sexual misconduct by a student.[181] The defendant was subsequently charged with first degree criminal sexual conduct (hereinafter CSC I).[182] At a bench trial, the victim testified concerning the sexual penetration and a police officer testified that the defendant had admitted sexual contact but denied any penetration had occurred.[183] The trial court indicated it disbelieved the complainant and acquitted the defendant of CSC I, and instead, convicted defendant of two counts of second degree criminal sexual conduct (hereinafter CSC II), an offense involving sexual contact with a complainant between thirteen and fifteen years of age for sexual gratification.[184] On appeal to the court of appeals, the conviction was vacated because that court was of the opinion that the trial court had no authority to consider the cognate lesser offense of CSC II.[185] The Michigan Supreme Court granted the prosecution's application for leave to appeal.[186] The Court defined the issue in this case as whether a person can be convicted of a lesser degree of the charged offense where the crime of lesser degree contains an element not found within the charged offense.[187]

M.C.L. Section 768.32(1) allows a jury, or judge in a trial without a jury, to find an accused person guilty of an inferior offense to the offense charged in the indictment.[188] The Court noted that it was undisputed that

177. *Hesch*, 278 Mich. App. at 197, 749 N.W.2d at 272.

178. *Id.* at 197, 749 N.W.2d at 272.

179. *Id.*

180. 479 Mich. 112, 734 N.W.2d 548 (2007).

181. *Id.* at 115, 734 N.W.2d at 551.

182. *Id.* Defendant was charged with CSC I, for sexual penetration of a victim between the ages of 13 and 16. He was convicted sua sponte of CSC II charges for victims ages 13 through 15.

183. *Id.*

184. *Id.* at 115-16, 734 N.W.2d at 551.

185. *Id.* at 116, 734 N.W.2d at 551.

186. *Nyx*, 479 Mich. at 116, 734 N.W.2d at 552.

187. *Id.*

188. MICH. COMP. LAWS ANN. §768.32(1) (West 2008) provides in relevant part:

> Upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may

criminal sexual conduct is a crime divided into degrees, specifically, first, second, third, and fourth degree criminal sexual conduct.[189] However, observed the court, the elements of CSC II are not necessarily present within CSC I.[190] Specifically, CSC II has intent requirements not necessarily present when CSC I is committed.[191] Accordingly, opined the court, CSC II is a cognate lesser offense and not a necessarily included lesser offense.[192] A necessarily included lesser offense is an offense without which it is impossible to commit the greater offense without having committed the lesser offense, whereas a cognate lesser offense is one which has the elements of the charged offense but in addition has at least one element not found in the charged offense.[193] This distinction was taken by the Court from *People v. Cornell.*[194]

The Court traced the development of more than 150 years of lesser-included-offense law to establish the principle that a prisoner may be guilty of a lesser offense if the lesser offense is contained within the principle charge.[195] There may have been, for a period of time, case law which permitted consideration of cognate offenses, but such case law was expressly repudiated in 2002 in *Cornell.*[196] And, in any event, the Michigan Supreme Court had held in *People v. Lemons*[197] that CSC II is a cognate lesser offense of CSC I.[198] The Court further noted that *Cornell* had been reaffirmed in its 2003 opinion in *People v. Mendoza*[199] and also in its 2004 opinion of *People v. Nickens.*[200] The Court then specifically stated "[w]e hold that MCL 768.32(1) precludes a judge or a jury from convicting a defendant of a cognate lesser offense even if the crime is divided into degrees."[201]

> find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

Id.

189. *Nyx*, 479 Mich. at 117, 734 N.W.2d at 552.
190. *Id.*
191. *Id.* at 118, 734 N.W.2d at 552.
192. *Id.* at 118, 734 N.W.2d at 553.
193. *Id.* at 118 nn.13 &14, 734 N.W.2d at 553 nn.13 &14.
194. *Id.* at 118, 734 N.W.2d at 553 (citing 466 Mich. 335, 646 N.W.2d 127 (2002)).
195. *Nyx*, 479 Mich. at 119, 734 N.W.2d at 553.
196. *Id.*
197. 454 Mich. 234, 253, 562 N.W.2d 447, 456 (1997).
198. *Nyx*, 479 Mich. at 118 n.14, 734 N.W.2d at 553 n.14.
199. 468 Mich. 527, 533, 664 N.W.2d 685, 688 (2003).
200. 470 Mich. 662, 626, 685 N.W.2d 657 (2004).
201. *Nyx*, 479 Mich. at 121, 734 N.W.2d at 554.

The rationale for the foregoing is that the statute requires the lesser offense to be an inferior offense.[202] An offense is inferior, according to the court, only if all of the elements of the lesser offense are included within the greater offense.[203] Thus, even if a crime has been divided into degrees, it is not inferior under the statute unless the offense of lesser degree has all of its elements contained within the offense of a greater degree.[204] The Court explicitly noted that all of the elements of CSC II are not included in CSC I.[205]

The Court found that the prosecution urged that the statute only be applicable to offenses which have not been divided into degrees by the legislature.[206] The Court declined to adopt this argument because of more than one hundred years of case law consistent with the opinion in the instant case.[207] Furthermore, the Court was not attracted to the concept of lesser offense instructions for cognate offenses.[208] The Court was far more interested in the "bright-line rule of *Cornell*" as the preferable rule.[209]

The Court also considered whether convicting the defendant of CSC II constituted harmless error.[210] First, the Court found the error to be plain error because *Lemons* held that CSC II was a cognate lesser offense of CSC I and *Cornell* had held that no consideration could be given to cognate lesser offenses.[211] The Court reviewed the trial strategy of the defense counsel and noted that it had been successful because of the acquittal on the CSC I charges.[212] The strategy might have been considerably different if trial counsel had known the trial judge was going to, on its own accord, convict the defendant of CSC II.[213] Indeed, the defendant might not have waived trial by jury if trial counsel and the defendant had known that a CSC II conviction was possible.[214] Thus, the trial court's improper consideration of CSC II could not be considered

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 121-22, 734 N.W.2d at 555.
207. *Nyx*, 479 Mich. at 122, 734 N.W.2d at 555.
208. *Id.*
209. *Id.* at 123, 734 N.W.2d at 555.
210. *Id.* at 125, 734 N.W.2d at 556.
211. *Id.* at 125, 734 N.W.2d at 556-57.
212. *Id.* at 126, 734 N.W.2d at 557.
213. *Nyx*, 479 Mich. at 126, 734 N.W.2d at 557.
214. *Id.* at 126-27, 734 N.W.2d at 557.

harmless.[215] Therefore, the judgment of the court of appeals reversing the conviction and discharging the defendant was affirmed.[216]

C. Criminal Contempt

Much of the court of appeals opinion in *Taylor v. Currie*,[217] a civil case, addresses political activities that occurred in the City of Detroit.[218] Indirectly, however, the opinion has implications for persons, possibly including attorneys, who find themselves held in criminal contempt of court.

The year 2005 was an election year in Detroit, and defendant Currie, then the Detroit City Clerk, was a candidate for re-election.[219] In previous years, Currie had authorized mass mailing of absentee voter ballot applications to possible absentee voters.[220] Plaintiff Taylor was a candidate for Detroit City Council but she was unable to qualify for the November general election.[221] In August of that year, plaintiff Taylor sued Currie.[222] Plaintiff claimed that Currie had improperly mailed the absentee voter applications, and these irregularities prevented plaintiff from qualifying to appear on the ballot.[223] In late August, the plaintiff filed a motion for a preliminary injunction to prevent Currie from mailing the applications.[224] They were scheduled to be mailed on August 29, 2005.[225] The trial court found that Currie was without statutory authority to send unsolicited absentee voter ballot applications.[226] The court granted the plaintiff's motion and enjoined the bulk mailing.[227] The mailing, nonetheless, occurred.[228] Plaintiff then moved for an order to show cause why Currie should not be held in contempt of court.[229]

In late September, 2005, the court conducted a contempt proceeding, and the court found that defendant Currie had acted in contempt of the

215. *Id.* at 125, 734 N.W.2d at 557.
216. *Id.* at 121, 734 N.W.2d at 555.
217. 277 Mich. App. 85, 743 N.W.2d 571 (2007).
218. *Id.* at 88-93, 743 N.W.2d at 574-76.
219. *Id.* at 88, 743 N.W.2d at 574.
220. *Id.*
221. *Id.* at 89, 743 N.W.2d at 574.
222. *Id.*
223. *Taylor*, 277 Mich. App. at 89, 743 N.W.2d at 574.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Taylor*, 277 Mich. App. at 89-90, 743 N.W.2d at 574-75.

trial court's injunction.[230] The court subsequently fined defendant Currie $250, the maximum fine which, at that time, could be imposed.[231] Currie applied for leave to appeal, and the motion for immediate consideration was granted, and the following order was entered: "As to the imposition of a $250 fine in the October 11, 2005, order of criminal contempt, the Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented."[232] The matter was then remanded to the circuit court.[233] The matter ran its course in the trial court, and the trial court issued an opinion and order granting the plaintiffs the relief they had sought in their original lawsuit.[234] Currie appealed, contending, among other things, that the criminal contempt conviction should be reversed because there was no enforceable order of the trial court.[235]

The appellate court noted that a contempt hearing had been held in late September, 2005, and that the trial court had entered an order finding Currie in contempt and imposing the fine on October 11, 2005.[236] Currie was entitled to an appeal as of right from that order because it was a criminal conviction.[237] The court noted that Currie had chosen, however, to apply for leave to appeal rather than to appeal as of right, and that the court of appeals had denied that portion of Currie's appeal.[238] The court of appeals explicitly noted that it was clear from its prior order that the court had denied leave to appeal on the substantive portion of Currie's appeal concerning her conviction of criminal contempt.[239] At that point, opined the court, defendant Currie's options were to either seek reconsideration of the court's order or file an application for leave to appeal in the Supreme Court of Michigan.[240] She did neither. Therefore, because Currie had already presented this issue on appeal, the court concluded she was not entitled to another appeal of the same issue.[241]

230. *Id.* at 90, 743 N.W.2d at 575.
231. *Id.* at 90 n.3, 743 N.W.2d at 575 n.3.
232. *Id.* at 90-91, 743 N.W.2d at 575.
233. *Id.* at 91, 743 N.W.2d at 575.
234. *Id.* at 91-93, 743 N.W.2d at 576.
235. *Taylor*, 277 Mich. App. at 97, 743 N.W.2d at 578.
236. *Id.* at 97-98, 743 N.W.2d at 578.
237. *Id.* at 98, 743 N.W.2d at 578-79.
238. *Id.* at 98, 743 N.W.2d at 579.
239. *Id.*
240. *Id.* at 98 n.5, 743 N.W.2d at 579 n.5.
241. *Taylor*, 277 Mich. App. at 98, 743 N.W.2d at 579.

D. Amendments to Charging Documents

Florence Unger filed for divorce from her husband, Mark Steven Unger, in August, 2003, while her husband was attempting to recover from prescription drug and gambling addictions.[242] Despite marital disharmony, the family traveled to a resort area during a weekend in October.[243] There was a boathouse near the cottage the family had rented.[244] A wooden deck was on the roof of the boathouse.[245] The Ungers were on the deck of the boathouse the first weekend evening.[246] The defendant subsequently told the police and others that sometime that evening, his wife, the victim, requested he check on their two children back in the cottage.[247] According to the defendant he went to the cottage and put the children to bed and then returned to the deck.[248] He later stated that he could not find his wife, and presumed she had gone to visit neighbors.[249] He returned to the cottage where he fell asleep.[250] The next morning he informed neighbors that his wife had never returned to the cottage the night before.[251] They dressed and went outside to search for her.[252] The neighbors discovered her in the shallow water of the nearby lake.[253] It appeared Florence Unger had fallen from the deck of the boathouse.[254] Defendant Unger was informed of this discovery, and ran directly to the water and jumped in next to the body.[255] Police subsequently discovered that the railing surrounding the rooftop deck of the boathouse was damaged and bowed toward the lake.[256] The police also observed a large blood stain on the concrete payment twelve feet below the surface of the rooftop deck.[257] One of the victim's earrings, some candles, a broken candle holder and a blanket were found nearby on the concrete.[258] There was no blood trail between the blood stain and

242. *Unger*, 278 Mich. App. at 213, 749 N.W.2d at 272, 281.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Unger*, 278 Mich. App. at 213-14, 749 N.W.2d at 281.
249. *Id.*
250. *Id.*
251. *Id.* at 214, 749 N.W.2d at 281.
252. *Id.*
253. *Id.*
254. *Unger*, 278 Mich. App. at 214, 749 N.W.2d at 281.
255. *Id.*
256. *Id.* at 215, 749 N.W.2d at 282.
257. *Id.* at 214, 749 N.W.2d at 281.
258. *Id.* at 214, 749 N.W.2d at 281-82.

the lake.[259] Police searched defendant Unger's vehicle and the interior of the cottage.[260] A pair of shoes with a white paint smear was recovered, and that paint was consistent with the paint on the boathouse deck railing.[261]

Mark Unger was arrested and charged with premeditated first-degree murder.[262] At the preliminary examination, a forensic pathologist testified that the victim had died of brain injuries sustained upon impact with the concrete.[263] On the other hand, a medical examiner was of the opinion that the victim died from drowning and not from head injuries.[264] The district court excluded the medical examiner's opinion and concluded there was no evidence of premeditation.[265] Therefore, the defendant was bound over for trial on a charge of second-degree murder.[266]

The circuit court subsequently ruled the medical examiner's testimony was admissible, and allowed the prosecution to amend the information and thereby reinstate the charge of premeditated first-degree murder.[267] The prosecution contended the "defendant had kicked or pushed" Florence Unger over the railing and then moved her into the lake to drown her.[268] The prosecution relied on the testimony of the medical examiner; the defense, on the other hand, contended the death was accidental and that the victim had died of brain injuries upon striking the pavement.[269] The defense provided expert testimony that the victim had accidentally fallen from the deck and had "rolled, bounced, or otherwise inadvertently moved into the lake."[270] Even so, the defendant was convicted of first-degree premeditated murder and sentenced to life in prison without parole.[271] On appeal, the defendant argued that the circuit court erred by allowing the information to be amended to reinstate the charge of first-degree premeditated murder.[272]

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259. *Id.* at 215, 749 N.W.2d at 282.
260. *Unger*, 278 Mich. App. at 215, 749 N.W.2d at 282.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Unger*, 278 Mich. App. at 215, 749 N.W.2d at 282.
267. *Id.* at 215-16, 749 N.W.2d at 282.
268. *Id.* at 216, 749 N.W.2d at 282.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Unger*, 278 Mich. App. at 216, 749 N.W.2d at 282.

Michigan statutes,[273] Michigan court rules,[274] and Michigan case law[275] permit amendment of the charging document, in this case the information, at any time in order to correct a variance between the charging document and the proof unless to do so would unfairly surprise or prejudice the defendant.[276] This was an important amendment. Once the medical examiner was found by the circuit court to be qualified as an expert, and his testimony found to be admissible, it was obvious that there was evidence of premeditation and deliberation.[277] The amendment permitted correction of a variance between the information and the proofs.[278] This also permitted the reinstatement of the premeditated first-degree murder charge.[279] This could result, according to the court, because there was no unfair surprise or prejudice to the defendant since the defendant had originally been charged with this particular offense.[280] Therefore, the court of appeals opined that the circuit court had not abused its discretion by allowing the information to be amended to reinstate the premeditated first-degree murder charge.[281]

VI. DEFENSES

A. Insanity

In *People v. Shahideh*,[282] the defendant was convicted of first-degree murder and sentenced to life in prison without parole.[283] The evidence at trial indicated that his girlfriend had been bludgeoned to death.[284] Following his arrest, defendant requested a court order allowing a privately retained psychologist to evaluate him at the jail in order to determine whether an insanity defense was appropriate.[285] The prosecutor objected, urging that the defendant be required to comply

273. MICH. COMP. LAWS ANN. § 767.76 (West 2008).
274. MICH. CT. R. § 6.112 (H) (West 2008).
275. People v. Russell, 266 Mich. App. 307, 317, 703 N.W.2d 107, 115 (2005).
276. *Unger*, 278 Mich. App. at 221, 749 N.W.2d at 285.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 221-22, 749 N.W.2d at 285.
281. *Id.* at 222, 749 N.W.2d at 285.
282. 277 Mich. App. 111, 743 N.W.2d 233 (2007), *appeal granted*, 748 N.W.2d 518 (Mich. 2008).
283. *Id.* at 112, 743 N.W.2d at 235.
284. *Id.*
285. *Id.*

with the procedures specified by statute.[286] Those procedures required the defense to file a timely notice of intent to assert an insanity defense.[287] The trial court found the defendant had not filed a timely notice of intent to use an insanity defense under the statute, and denied the independent psychological evaluation.[288] As a result, the defendant did not assert an insanity defense at trial and he was convicted.[289] He appealed, arguing that the trial court erred in refusing to allow a privately retained psychologist to evaluate him while he was awaiting trial.[290]

The court of appeals remanded to allow the defendant to obtain a private psychological examination.[291] The court noted that, following the defendant's arrest, his counsel simply wanted to gain more information about the defendant's mental state, and sought the psychological evaluation for that purpose.[292] Defense counsel was trying to ascertain which potential defenses were available.[293] The court did not believe that merely requesting an evaluation was a "proposal to offer . . . testimony to establish [defendant's] insanity at the time of an alleged offense" under the statute.[294] At the time of the request, the court stated, it was not yet known if an insanity defense was even possible for the defendant.[295] The statute, which requires a thirty-day notice of an assertion of an insanity defense, "does not come into play until a defendant definitively 'proposes to offer in his or her defense testimony to establish his or her insanity'" the court emphasized.[296] The appellate court concluded that the trial court abused its discretion by denying defendant's request for an independent psychological evaluation, because it deprived the defendant of an affirmative defense to the crime of first-degree murder.[297] However, instead of reversing, the court of appeals remanded the case to afford the defendant the opportunity to explore the possibility of the appropriateness of raising an insanity defense to the charges.[298] After the

286. *Id.* MICH. COMP. LAWS ANN. § 768.20(a) (West 2008) requires a timely notice, not less than thirty days before trial, of a defendant's intention to assert the defense of insanity.

287. MICH. COMP. LAWS ANN. § 768.20(a) (West 2008).

288. *Shahideh*, 277 Mich. App. at 113, 743 N.W.2d at 235.

289. *Id.*

290. *Id.*

291. *Id.* at 112, 743 N.W.2d at 235.

292. *Id.* at 116, 743 N.W.2d at 237.

293. *Id.*

294. *Shahideh*, 277 Mich. App. at 116, 743 N.W.2d at 237 (quoting MICH. COMP. LAWS ANN. § 768.20(a)).

295. *Id.*

296. *Id.* at 117, 743 N.W.2d at 238.

297. *Id.* at 118, 743 N.W.2d at 238.

298. *Id.* at 121, 743 N.W.2d at 240.

defendant is evaluated, the defense may determine that the defendant's mental state was a triable issue in the case.[299] If so, the court of appeals noted, the trial court can vacate the defendant's conviction and grant a new trial.[300]

B. Proximate Cause

In *People v. Wood*,[301] the defendant led the police on a high speed chase in Kalamazoo County. The police car chasing the defendant went out of control and hit a tree, killing one officer and seriously injuring another officer.[302] The defendant was apprehended and charged with second-degree murder and first-degree fleeing and eluding.[303] He was, however, bound over to circuit court only on the fleeing and eluding charge.[304] The defendant moved to dismiss the fleeing and eluding charge, arguing that proximate cause had not been established at the preliminary examination.[305] The trial court denied the motion, ruling that proximate cause did not need to be established under the statute.[306] The defendant was convicted and appealed.[307]

The court of appeals affirmed.[308] The defendant asserted that his actions did not "result in" the officer's death; rather, the officer's actions of losing control of the police car caused his death.[309] This was an issue of statutory interpretation, the court noted, and therefore is a question of

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299. *Id.*

300. *Shahideh*, 277 Mich. App. at 121-22, 743 N.W.2d at 240.

301. 276 Mich. App. 669, 670, 741 N.W.2d 574, 575 (2007).

302. *Id.*

303. *Id.* MICH.COMP. LAWS ANN. § 257.602a (West 2008) provides in part:

> (1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. . . .
>
> (5) If the violation results in the death of another individual, an individual who violates subsection (1) is guilty of first-degree felony fleeing and eluding, a felony punishable by imprisonment for not more than 15 years or a fine of note more than $10,000.00, or both.

Id.

304. *Wood*, 276 Mich. App. at 670, 741 N.W.2d at 575.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 669, 741 N.W.2d at 575.

309. *Id.* at 671, 741 N.W.2d at 575.

law which the court reviewed de novo.[310] The court examined the phrase "results in" contained in the fleeing and eluding statute, and concluded that "result" was not, as the defendant asserted, interchangeable with "cause."[311] Rather, the court found, the legislature specifically used the term "result" instead of "cause" in the statute, directing "that only factual causation need be established."[312] This distinction was discussed by the Michigan Supreme Court in *People v. Schaefer*,[313] the court of appeals noted, and that court found a difference between the legislature's use of the phrase "causes the death" instead of "results in death."[314] In addition, the Michigan Supreme Court in *Robinson v. Detroit*,[315] reiterated the significance of the legislature's use of "result" rather than "cause," the court of appeals concluded.[316] Defendant's reliance on *Robinson* was misplaced, the appellate court found, because the analysis found in *Robinson* did not apply to the instant case.[317] Specifically, the court stated:

> The question in *Robinson* was whether a police officer, who was attempting to uphold the law, could be held liable under civil law for injuries that occurred during a high-speed chase of a fleeing defendant. Here, the question is whether the fleeing defendant, who was breaking the law, can be held criminally liable for the death of another individual that occurred during the high-speed chase of him.[318]

The court of appeals concluded that a narrow interpretation of the criminal statute at issue in the instant case was not necessary.[319] The court found that the defendant's act of fleeing and eluding "clearly" resulted in the police officer's death.[320] Factual causation, the court noted, is all that need be established, and that requirement was met because but for the defendant's criminal conduct of fleeing and eluding,

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310. *Wood*, 276 Mich. App. at 671, 741 N.W.2d at 575. *See* People v. Schaefer, 473 Mich. 418, 427, 703 N.W.2d 774, 780 (2005).

311. *Wood*, 276 Mich. App. at 671-72, 741 N.W.2d at 575-76.

312. *Id.* at 672, 741 N.W.2d at 576.

313. *Schaefer*, 473 Mich. at 435, 703 N.W.2d at 784.

314. *Wood*, 276 Mich. App. at 671-72, 741 N.W.2d at 575-76 (discussing *Schaefer*, 473 Mich. at 435, 703 N.W.2d at 784).

315. 462 Mich. 439, 613 N.W.2d 307 (2000).

316. *Wood*, 276 Mich. at 671, 741 N.W.2d at 575 (citing *Robinson*, 467 Mich. at 457 n.14, 613 N.W.2d at 316 n.14).

317. *Id.* at 675, 741 N.W.2d at 578.

318. *Id.*

319. *Id.*

320. *Id.* at 676, 741 N.W.2d at 578.

the officer's death would not have occurred.[321] The court noted an awareness that "the use of the phrase 'results in' instead of 'causes' may cast a wider net with regard to the imposition of criminal liability."[322] However, the court indicated that was an issue for the legislature to address, not the judiciary.[323]

C. Mens Rea

In *People v. Schumacher*,[324] the jury convicted the defendant of unlawful disposal of scrap tires, a violation of the Natural Resources and Environmental Protection Act.[325] He argued on appeal that the prosecution had not established a knowing violation of the law.[326]

In examining whether the statute had a mens rea, or, criminal intent requirement, the court of appeals began with *Morissette v. United States*,[327] which established that, as a matter of public policy, a public-welfare offense does not specify intent as a necessary element.[328] The court of appeals found the offense in the instant case was a public-welfare offense as discussed by the Supreme Court in *Morissette*.[329] As such, the statute does not include a requirement that a violator "knowingly" violate its terms.[330]

In the instant case, the court of appeals found that there was sufficient evidence that the defendant knowingly caused over 500 scrap tires to be delivered to Robinson Farms, which was a place not licensed to receive such scrap.[331] Defendant did not contest the fact that he delivered the tires to Robinson Farms, but rather argued that he did not know it was illegal to do so because it was not an authorized tire

321. *Id.*

322. *Wood*, 276 Mich. App. at 676, 741 N.W.2d at 578.

323. *Id.*

324. 276 Mich. App. 165, 740 N.W.2d 534 (2007).

325. *Id.* at 167, 740 N.W.2d at 539. MICH. COMP. LAWS ANN. § 324.16909(3) (West 2008) provides, "A person shall deliver a scrap tire only to a collection site registered under section 16904, a disposal area licensed under part 115, an end-user, a scrap tire processor, a tire retailer, or a scrap tire recycler, that is in compliance with this part."

326. *Schumacher*, 276 Mich. App. At 167, 740 N.W.2d at 539.

327. 342 U.S. 246 (1952).

328. *Schumacher*, 276 Mich. App. At 174, 740 N.W.2d at 542 (citing *Morissette*, 342 U.S. at 450).

329. *Id.* at 172, 740 N.W.2d at 541.

330. *Id.* at 171-72, 740 N.W.2d at 541.

331. *Id.* at 173, 740 N.W.2d at 542.

dump.[332] The court found this argument unfounded, and affirmed the conviction.[333]

VII. CONCLUSION

The cases presented in this Article were carefully reviewed and thoroughly analyzed by the appellate courts. Each case represents an important decision by the Michigan courts in the area of criminal law jurisprudence which will impact society, and the individuals involved, for years.

332. *Id.* at 168, 740 N.W.2d at 539.
333. *Id.* at 175, 740 N.W.2d at 543.