STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 293896 Washtenaw Circuit Court
MARIO DENNIS WILLIAMS, a/k/a BOBBY MIMS, Defendant-Appellant.	LC No. 08-001916-FC

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, and resisting arrest, MCL 750.81d(1). He was acquitted on a charge of domestic violence, MCL 750.81a(2). Defendant was sentenced as a fourth-habitual offender, MCL 769.12, to 30 to 87½ years' imprisonment on the murder conviction and to 1 to 15 years' imprisonment on the conviction for resisting arrest, with the sentences to be served concurrently. We affirm.

I. FACTS

This case arises out of the killing of Bobby Mims, who was defendant's brother, by a single stab wound to the chest.[1] On October 17, 2008, Jessica Harold, who was defendant's long-time girlfriend, Latoya Daniels, defendant, Mims, and Bennie Easley were at Easley's home late in the evening celebrating Harold's birthday. The evidence established that everyone was drinking and that they were all intoxicated. There is no indication of any altercations between persons in the group while at Easley's home. The group then left Easley's home and went to a local bar, where they met a couple of other friends and saw people from school. While at the bar, Harold spoke with some men, and this led to a heated argument and near fight between defendant and the unidentified males. Defendant, Harold, and Daniels then left the bar in

[1] As reflected in this opinion's caption, defendant, in the past, had used his brother's name as an alias.

Daniels' vehicle, with Harold driving, defendant in the backseat, and Daniels in the passenger seat. They headed to Harold's apartment.

According to recorded statements made by Harold and Daniels to the police, defendant and Harold were arguing and yelling at each other in the car and defendant physically struck Harold. According to the same recorded statements, on arrival at Harold's apartment, defendant and Harold were still arguing and yelling at each other and defendant again hit Harold. When testifying at trial, both Harold and Daniels acknowledged that defendant and Harold had been arguing and yelling, but they claimed that defendant never struck or punched Harold.[2] When the prosecutor used the audiotapes of their police statements to, as framed by the prosecutor, "refresh their memories," the tapes were played in open court. Our only knowledge of the contents of the tapes is based on the prosecutor's commentary built into follow-up questions on the continuing examinations of Harold and Daniels.[3] With respect to their statements to police, Harold and Daniels testified that they were intoxicated and did not recall making the statements, although they conceded that it was their voices on the audiotapes. The record does not reflect that the audiotapes were admitted into evidence at trial.

Because of the ongoing altercation between Harold and defendant, someone contacted Mims and Easley by phone to let them know what was transpiring. By now, Mims and Easley had left the bar and were at a McDonalds Restaurant, and they had planned to go back to Easley's home. Mims insisted that they now go to Harold's apartment because of the fight between defendant and Harold. Mims did not want his brother, defendant, to end up in jail again. There was evidence that Mims and defendant had a close relationship and loved and looked out for each other, but they did occasionally engage in fights when intoxicated. Defendant was older than Mims. There was evidence that defendant stands about 5'10" and weighs 150 pounds, while Mims stood about 5'9" and weighed 250 pounds. Defendant testified that when they fought, in states of intoxication, no one ever suffered a physical injury and that Mims usually got the better of defendant in fights because of Mims's superior size.

Back at Harold's apartment, which had a lower, main, and upper level, defendant and Harold were yelling at each other, and defendant ended up smashing Harold's cell phone. Defendant admitted on the stand that he broke the cell phone, but denied ever hitting Harold. He also tore up some money and flushed it down the toilet; however, defendant testified that it was his own money. Daniels testified that she observed defendant tearing up Harold's money and flushing it down the toilet, but she claimed that she did not see defendant break Harold's cell

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[2] Daniels did testify that, before entering Harold's apartment, Harold and defendant were tussling and shoving and pushing each other, but defendant did not use his fists to hit Harold. Harold testified that she busted her lip, but this occurred because she fell down some steps, not from being struck by defendant.

[3] There were no transcripts made of the taped police statements, and the trial transcripts do not include any verbatim communications made on the tapes, only references to the fact that the tapes were played in court.

phone; she only heard something breaking. The prosecutor then played an audiotape in which Daniels informed the police that she observed defendant breaking Harold's phone. Again, Daniels, while acknowledging her voice on the tape, stated that she had no recollection of making the statement.[4] Eventually, Harold was upstairs in the apartment, and defendant and Daniels were in the kitchen on the main level, with Daniels sitting on a stool. At this point, Mims and Easley arrived at Harold's apartment. They first checked on Harold upstairs, and she was crying. Different versions were given regarding the events that next transpired.

According to Daniels, Mims came down the stairs to the main level and headed toward the kitchen, all the while yelling and cussing out defendant, calling him a dummy and stupid. Daniels testified that Easley tried to hold Mims back, half-heartedly, as he headed toward defendant, and defendant moved to the area of the sink in the kitchen. Mims was angry and enraged and was able to maneuver around Easley. Mims then approached defendant. Daniels stated that defendant proceeded to hit Mims in the chest with his fist, but she also testified that she then observed blood coming from Mims's chest. Daniels claimed that she saw no weapons being handled by either defendant or Mims, that Mims was trying to get defendant when defendant hit Mims, that she did not see Mims strike defendant, that defendant did not appear as if he wanted a confrontation until Mims came towards him, and that defendant's "punch" appeared to be a defensive move on defendant's part. Daniels did not recall Mims saying anything after the punch, and, when confronted by the prosecutor, she asserted that she did not remember making a statement to police that Mims stated, "n****r just stabbed me in my heart." According to Daniels, the wounded Mims went upstairs and was bleeding, wheezing, and panting. Daniels then hopped in her car and drove off, but she eventually returned to the crime scene after a friend pleaded with her to do so. Daniels testified that she never talked to anyone upon her return to the scene, but, after then going home, she later went to the Ypsilanti Police Department and talked to police in the early morning of October 18.

According to Easley, at the point in which Mims was consoling Harold upstairs, Mims exclaimed that Harold did not deserve what defendant did to her, and Mims was becoming very angry. Easley testified that Mims was tired of defendant always screwing up and tired of cleaning up defendant's messes. Easley indicated that Mims yelled that he was about to beat defendant's ass. Somewhere around a landing between the main and upper levels of the apartment, Easley grabbed hold of Mims and tried to calm him down. After a few minutes, Mims told Easley that he was calm and would not do anything. Easley testified that he then let go of Mims, at which time Mims proceeded to the kitchen area and Easley remained behind with Harold. A few minutes later, Mims returned and started stumbling up the stairs, muttering, "Damn, you gonna stab me." Mims went to a bathroom upstairs and removed his shirt. Harold started to treat Mims's knife wound, putting pressure on the wound. Easley called 911, and when Mims started going downstairs, he collapsed on the landing. Easley testified that, from his vantage point, he could not see the stabbing or the actual confrontation between defendant and

[4] Harold testified that she knew nothing about any money being torn, nor did she observe anyone breaking her phone, although she assumed defendant did it.

Mims, nor did Easley recall ever seeing Daniels. Easley stated that Mims had no weapons, and he did not witness Mims striking defendant. Easley told the 911 operator and later a detective that he did not know who stabbed Mims.

According to Harold, she was upstairs or in the stairwell when the stabbing occurred and she did not witness the altercation between defendant and Mims. Harold testified that she had been crying and sitting with Mims before he headed downstairs toward the kitchen. Mims was yelling at defendant. The next time she saw Mims, he had been stabbed, and she treated his wound, resulting in her jacket being covered in blood. Harold did not see any weapons on the night of the incident.

Defendant testified that, while he was in the kitchen "chilling," Mims came running down the stairs heading to the kitchen, yelling that he was going to "f**k" defendant up and that he was going to beat defendant's ass. He never observed Easley grabbing hold of Mims. According to defendant, when Mims was almost upon him, defendant punched him in the chest. Defendant claimed that Mims was holding a knife, which is something that defendant had never seen before. Defendant was fearful for his life. The two began to tussle and fell to the floor, at which point Mims indicated that he had been stabbed. Defendant testified that he never touched the knife. Consistent with a 911 tape played for the jury, defendant stated that he twice told the 911 operator that he had stabbed his brother, but he testified that it was accidental and that he punched and tussled with Mims in self-defense. Defendant conceded that he did not tell the 911 operator that it was an accident or done in self-defense. Defendant explained that he later ran from the police because he was scared and because he feared that the police would screw up the investigation and improperly accuse him of a crime.

There was police testimony that a knife with blood on it was found in the kitchen or living room area, that there was no effort to lift fingerprints from the knife because one of the group's friends had arrived and picked up the knife, that blood was found on the main level of the home and on Mims's shirt, that the knife blade matched the hole in Mims's shirt, that Harold and Daniels were not intoxicated by the time they spoke to the police, that Harold told police that Mims had asked defendant before the knifing how he could put his hands on Harold, that Mims was found in the apartment when police arrived, being cradled in Harold's arms, and that no weapons were found on Mims. There was also police testimony that when they arrived, a person was outside the apartment waiving them to Harold's unit. After police entered the apartment and determined what occurred, they became suspicious and deduced that the person they saw on arrival was defendant. The police began a search of the grounds around the apartment complex and spotted defendant. However, he was able to escape on foot. Defendant turned himself in to police about a month later with the assistance of his attorney.

The chief medical examiner testified that Mims died of a single stab wound to the left and center side of his chest, below the left collarbone. The depth of the stab wound was three inches into the chest. The knife perforated the sac surrounding the heart, a thoracic artery, and the right ventricle. The medical examiner testified that Mims was stabbed in a downward motion, with the sharp edge of the blade pointing downward. He opined that the stabbing occurred when Mims and the perpetrator were standing upright. On cross-examination, the medical examiner testified that it was possible, based on the nature of the wound, that the stabbing occurred by Mims falling on the knife during a fight between Mims and the perpetrator.

We note that defendant moved for a directed verdict on the homicide and resisting arrest charges, and the trial court denied the motion.

II. ANALYSIS

A. MOTION FOR DIRECTED VERDICT ON FIRST-DEGREE MURDER CHARGE

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree murder where there was insufficient evidence to establish the requisite elements of premeditation and deliberation.

We review de novo a trial court's ruling on a motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record . . . to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Id.* at 122-123, citing *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). A challenge relative to a trial court's decision on a motion for a directed verdict due to insufficiency of the evidence generally implicates the same principles applicable to a claim that the evidence was insufficient to sustain a conviction. *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010). We consider "all evidence adduced up to the time of the motion for a directed verdict." *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

"To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation." *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); see also *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). The elements of deliberation and premeditation may be inferred from the various circumstances surrounding a killing. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). The *Unger* panel further elaborated:

> Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough "to allow the defendant to take a second look." Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation. [*Id.* (citations omitted).]

While a close call, we find that there was sufficient evidence to allow the jury to deliberate the charge of first-degree murder. Furthermore, as will be discussed below, any error in denying the motion was harmless, considering that defendant was acquitted of first-degree murder and convicted of second-degree murder and that there was no indication of jury compromise. The evidence, when viewed in a light most favorable to the prosecution, supported a finding that defendant killed Mims by stabbing him with a knife and that he intended to kill him, especially given the nature of the wound. And defendant does not argue to the contrary on these matters. With respect to deliberation and premeditation, the testimony of Harold, Daniels, and Easley indicated that Mims was yelling and in a rage outside of the kitchen area and was held back by Easley, at least temporarily, while defendant remained in the kitchen. Reasonable inferences that arise from the evidence are that defendant heard Mims yelling and could hear him approaching the kitchen, that defendant procured a knife from somewhere in the kitchen and had time to prepare and to think about his actions before Mims freed himself from Easley, and that defendant, after having the time to take a second look, however brief, then proceeded to stab Mims in the chest. There is no indication that defendant was prevented, time-wise and logistically, from simply leaving the home after Mims became angered, and defendant chose to use a dangerous weapon despite the fact that the brothers' history of intoxicated fights did not entail physical injuries and the use of weapons. Further, Mims was stabbed in a downward motion to a three-inch depth in the chest, thereby indicating that defendant had to raise the knife upward somewhat before bringing it down and driving it into Mims's chest; a brief process for sure but time to take a second look. As to defendant's conduct after the stabbing, defendant resisted and fled the police, which can support an inference of consciousness of guilt. *Unger*, 278 Mich App at 226. Under all of the circumstances, we conclude that the trial court did not err in allowing the jury to deliberate the first-degree murder charge.

Furthermore, assuming error, it was harmless. In *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), the defendant was convicted of voluntary manslaughter after the jury was instructed on first-degree and second-degree murder, along with voluntary manslaughter. Our Supreme Court, overruling the rule of automatic reversal established in *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), found it unnecessary to decide whether the defendant had been entitled to a directed verdict on the first-degree murder charge, given the jury's ultimate verdict. *Graves*, 458 Mich at 478-479. The *Graves* Court explained:

> Although it might have been error to submit the first-degree murder charge to the jury, it is undisputed that a second-degree murder charge was properly submitted to the jury. The jury acquitted defendant not only of the first-degree murder charge, but also of the supported second-degree murder charge. Where a jury acquits a defendant of an unwarranted charge (first-degree murder) and a lesser included warranted charge (second-degree murder) before convicting of a still lesser charge (voluntary manslaughter), we find that it is highly probable that the erroneous submission of the unwarranted charge did not affect the ultimate verdict. There is no basis on this record to find that it was a product of juror compromise.
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> If, however, sufficiently persuasive indicia of jury compromise are present, reversal may be warranted in certain circumstances. That is to say, a different result *may* be reached, . . . where the jury is presented an erroneous

> instruction, and: 1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) as the prosecution concedes in the alternative, where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense.
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> It is for these reasons that we overrule *Vail* and find that any error in submitting the first-degree murder charge to the jury was harmless in light of the fact that the jury returned a manslaughter conviction. [*Graves*, 458 Mich at 487-488 (emphasis in original).]

We are not presented with circumstances involving logically irreconcilable verdicts, nor is there clear record evidence of unresolved jury confusion. And there was sufficient evidence to support the second-degree murder conviction. Indeed, defendant does not present an appellate argument that the evidence was insufficient to sustain the murder conviction. However, as indicated above, the *Graves* Court allowed for the possibility that reversal might be appropriate where a jury convicted a defendant of the next-lesser offense despite acquitting the defendant on the charge sought to be dismissed pursuant to a motion for a directed verdict. This was the situation presented in *People v Moorer*, 246 Mich App 680; 635 NW2d 47 (2001), a case similar to the one at bar. In *Moorer*, the defendant was convicted of second-degree murder after the jury was instructed on first-degree and second-degree murder and voluntary and involuntary manslaughter, and this Court held:

> Defendant . . . contends that reversal is warranted because the trial court erred in denying his motion for a directed verdict of acquittal of the first-degree murder charge. Defendant does not dispute that the charge of second-degree murder was properly submitted to the jury. Accordingly, any error arising from the submission of the first-degree murder charge to the jury was rendered harmless when the jury acquitted defendant of that charge. As our Supreme Court observed in *Graves:*
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> "[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to the jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury. Such a result squares with respect for juries. Further, not to adopt this view is to countenance a misuse of judicial resources by automatically reversing an otherwise valid conviction." [*Moorer*, 246 Mich App at 682-683 (citation omitted).]

The *Moorer* panel rejected the defendant's claim, premised on *Graves*, that the record contained persuasive indicia of jury compromise and confusion such that the harmless error principle was inapplicable. *Id.* at 683 n 1. The defendant pointed to the fact that the jury had twice requested that the court repeat the instructions regarding the four alternate homicide charges. *Id.* The Court found that the reason proffered by the defendant in support of his claim that the jury reached a compromise verdict was inadequate and would require judicial speculation on the part of the panel. *Id.* This Court noted that the trial court had instructed the jurors not to compromise their views simply to reach a verdict, that the jurors had been polled, with each juror affirming his or her guilty vote on second-degree murder, and that jury questions during deliberations are not necessarily indicative of jury compromise. *Id.*

Here, defendant argues that, absent the first-degree murder charge being presented to the jury, there was significant indicia that the jurors may have instead chosen to convict defendant of voluntary manslaughter. In support, defendant reasons that a rational view of the evidence favored a finding that defendant committed voluntary manslaughter. Defendant further reasons that "[t]he jury . . . expressed doubt by finding [defendant] not guilty of the domestic violence charge, perhaps reflecting a decision to compromise by convicting [defendant] of second-degree murder." We do not quite understand the rationale with respect to the latter reason given by defendant. The decision to convict defendant of second-degree murder and to acquit him of domestic violence may simply have reflected the jury's conclusion that defendant did not act with premeditation and deliberation but did act with malice, taking the case out of the realm of manslaughter, and that the charge of domestic violence was not proven beyond a reasonable doubt given the conflicting evidence regarding whether defendant struck Harold. These verdicts are not irreconcilable, and the facts underlying each charge pertained to a different series of events. Defendant's argument is predicated on pure speculation. There is nothing in the record indicating jury compromise, nor did the jurors pose any questions to the court, let alone questions suggesting jury confusion. The trial court instructed the jurors not to give up their honest opinions about the case just because other jurors disagree or "just for the sake of reaching a verdict." Further, the jurors were polled after the guilty verdict on second-degree murder was announced by the foreperson, and each juror agreed that this was his or her verdict. This case is consistent with *Moorer*, and reversal is unwarranted.

B. ADMISSIBILITY OF AUDIO RECORDINGS OF POLICE STATEMENTS

Defendant next challenges the prosecutor's use of the audiotapes to refresh the memories of certain witnesses. In particular, defendant takes exception with the prosecutor playing the tapes when Daniels testified regarding whether defendant hit Harold in the car, when Daniels testified regarding whether defendant broke Harold's phone and flushed her money down the toilet, and when Harold testified regarding whether she was struck by defendant in the car and again at her apartment. Defendant contends that the proper method to refresh a witness's memory is to let the witness observe a writing or object and then follow up with additional questions; it does not involve disclosing the information to the jury and essentially admitting the material into evidence.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists if the trial court's decision falls outside a principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, evidentiary decisions involving preliminary questions of law, such as whether a rule of evidence or statute precludes admissibility, are reviewed de novo. *Lukity*, 460 Mich at 488. "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*

Under MRE 612, a party may utilize a writing or object to refresh a witness's memory, and the adverse party is entitled to have the writing or object produced at trial. In *People v Favors*, 121 Mich App 98, 109; 328 NW2d 585 (1982), this Court discussed the parameters of MRE 612, explaining:

> Where the memory of a witness is to be refreshed, it is not necessary and is often highly prejudicial to permit the jury to hear the substance of the statement to be employed. Where memory or recollection is being refreshed, the material used for that purpose is not substantive evidence. Rather, the material is employed to simply trigger the witness's recollection of the events. That recollection is substantive evidence and the material used to refresh is not. The substance of the statement used to refresh is admissible only at the instance of the adverse party. MRE 612. Accordingly, we are of the view that the trial court erred in permitting the prosecutor to place before the jury the substance of the witness's prior statement to the police officer. [Citation omitted.]

In the case at bar, if the prosecutor was simply attempting to refresh the witnesses' memories, it would have been improper to play the audiotapes for the jury to hear. However, the testimony by Daniels and Harold not only reflected a lack of recollection on certain matters, it also reflected outright denials of charged events, mainly defendant striking Harold in the car and at the apartment. Indeed, Harold was adamant that defendant never hit her. The taped statements stood in direct conflict with Harold's and Daniels' trial testimony. Under MRE 613(b), "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." In *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007), the Michigan Supreme Court explained the process to be used in admitting evidence pursuant to MRE 613(b):

> Before attempting to impeach a witness by offering extrinsic evidence of a prior inconsistent statement, a litigant must lay a proper foundation in accordance with the court rule. To do so, the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. However, "extrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." [Citations omitted; omission in original.]

The audiotapes revealed prior inconsistent statements and the statements pertained to a relevant matter, not a collateral matter, where the interactions between Harold and defendant related to the domestic violence charge and also provided evidence of events that precipitated the murder. Although the prosecutor may not have precisely followed the procedure outlined in *Barnett* for admitting impeachment evidence, the points in *Barnett* were touched on by the prosecutor and the evidence was admissible.

Further, assuming error, it was harmless. MCL 769.26; *Lukity*, 460 Mich at 495. Defendant was *acquitted* of assaulting Harold, and the challenged evidence predominantly concerned the domestic violence charge. With respect to Daniels' testimony regarding Harold's cell phone and the destruction of cash, defendant himself testified that he broke Harold's phone and that he tore up the money, although he claimed that it was his own money. In sum, we

cannot conclude that it is more probable than not that a different outcome would have resulted absent the presumed error. *Id.*

C. INSTRUCTION ON DEFENSE OF ACCIDENT

Finally, defendant argues that the jury was insufficiently instructed on the defense of accident. In *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007), this Court outlined the general principles applicable to claims of instructional error:

> Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. [Citations omitted.]

When an intentional act must be established as an element of a crime, "the occurrence of the crime is inconsistent with accident." *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Criminal homicides that require proof of intent "are excusable if the killing is accidental." *Id.* at 37-38. It is well-established in our jurisprudence that a homicide is excusable where a death results from an accident and the actor was not criminally negligent. *Id.* at 38. The *Hess* panel defined an "accident" as, in part, "'a fortuitous circumstance, event or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence[.]'" *Id.* at 37 (citation omitted).

Here, defendant's testimony that Mims was somehow stabbed when the two of them tussled and fell to the ground, along with his testimony that it was an accident, supported an accident instruction.[5] The full extent of the court's instruction specifically on the defense of accident was as follows: "The Defendant says he is not guilty of murder because Bobby Mimms' [sic] death was accidental." The trial court then immediately launched into instructions on self-defense. Defendant argues that the one-sentence instruction, while consistent with the first sentence in CJI2d 7.1 and 7.2, was inadequate and should have included the remaining language from either of the two standard instructions. CJI2d 7.1, with relevant language inserted by us, provides:

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[5] In closing argument, defense counsel raised the defenses of accident and self-defense.

> (1) The defendant says that he is not guilty of murder because Bobby Mims's death was accidental. That is, the defendant says that Mims died because he was accidentally stabbed when the two tussled and fell to the ground.
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> (2) If the defendant did not mean to stab Mims then he is not guilty of murder. The prosecutor must prove beyond a reasonable doubt that the defendant meant to stab Mims.

CJI2d 7.2 also pertains to the defense of accident, but it is concerned with situations in which a defendant did not know the consequences of his or her actions; therefore, CJI2d 7.1 is the more relevant instruction in this case.

When the trial court was discussing the instructions with the parties, defense counsel agreed to simply using the one-sentence instruction. Later in the discussion, defense counsel appeared to have second thoughts, indicating that he was "wondering if there should be some type of a follow-up sentence . . . [s]omething to the effect of . . . if you find this to be accidental, he is not guilty because this statement alone, I don't know if that's (indecipherable)." The prosecutor then stated that the one-sentence instruction referenced the defendant not being guilty if the stabbing was accidental, and the court chimed in that it thought that defendant's concerns were covered in the self-defense instructions. Regardless of the soundness of these remarks, defense counsel responded, "Okay, thank you."

In *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."
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> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [Citations omitted.]

Here, the record supports a conclusion that defendant effectively waived this issue by agreeing to the one-sentence instruction. Although defense counsel subsequently began rethinking the issue and showed some hesitation, he once again went along with the instruction.[6]

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[6] Under MCL 768.29, "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the

Furthermore, assuming a preserved error or a plain error, we cannot conclude that defendant was prejudiced. In *People v Hawthorne*, 474 Mich 174, 184-185; 713 NW2d 724 (2006), our Supreme Court held:

> [W]e agree with the Court of Appeals conclusion that defendant has not met his burden of demonstrating that the failure to instruct on the accident defense undermined the reliability of the verdict. As the Court of Appeals explained, "[t]he jury instructions explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that defendant possessed the intent required for murder." Further, the jury was instructed regarding the lesser offense of statutory involuntary manslaughter, MCL 750.329, but instead concluded that defendant was guilty of second-degree murder. If the jury had any doubts regarding whether defendant had the requisite malice for second-degree murder, it could have convicted him of statutory involuntary manslaughter, which does not require a finding of malice. The jury instead found that defendant possessed a mental state that was greater than simply intentionally pointing a weapon at the victim. [Citation omitted.]

Here, there was at least a partial instruction on accident, not a complete failure to instruct on the defense as was the case in *Hawthorne*. While a fully-read standard instruction would have been preferable, we cannot conclude that the reliability of the verdict was undermined by only giving the jury the one-sentence instruction when considering that instruction in conjunction with other jury instructions. As part of the instructions on second-degree murder, the jury was instructed that the prosecution was required to prove beyond a reasonable doubt, in part, that defendant either acted with an intent to kill, an intent to do great bodily harm, or with knowledge that he was creating a very high risk of death or great bodily harm knowing that death or such harm would likely result. In other words, the prosecution had to prove that defendant acted with malice, and if the jury believed that the stabbing was the result of an accident, it could not concomitantly conclude that malice was present. Consistent with *Hawthorne*, if the jurors had any doubts regarding whether defendant had the requisite malice for second-degree murder, the jury could have convicted him of voluntary manslaughter, which does not require a finding of malice, or it could have acquitted him. The instructions as given would have permitted the jury to acquit defendant of murder had it concluded that an accident occurred. The jury, however, instead found defendant guilty of second-degree murder. Reversal is unwarranted.

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accused." Defendant ultimately did not request the court to instruct the jury pursuant to CJI2d 7.1 or 7.2 in full. Thus, even if there was no waiver, defendant was required to establish plain error affecting his substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003)(examining MCL 768.29 and applying plain-error test where the defendant failed to request a cautionary accomplice instruction, which he claimed should have been given). For the reasons set forth below, defendant fails to show a plain error affecting his substantial rights.

III. CONCLUSION

We hold that there was sufficient evidence of premeditation and deliberation such that the trial court did not err in denying defendant's motion for a directed verdict on the charge of first-degree murder. Further, where the jury convicted defendant of second-degree murder and there was no evidence of juror compromise, any error in submitting the charge of first-degree murder to the jury was harmless. We further hold that there was no error in allowing the jury to hear audiotapes of statements made by Harold and Daniels to the police, as the statements constituted prior inconsistent statements made by those witnesses, despite the prosecutor's references to refreshing the witnesses' memories. Assuming error, it was harmless because the taped statements primarily related to the charge of domestic violence and the jury acquitted defendant of that charge. Finally, with respect to the argument of instructional error relative to the defense of accident, defendant waived this argument by voicing approval of the accident instruction as given. Moreover, assuming preserved or plain error in not providing the full instruction as reflected in CJI2d 7.1, the presumed error was not prejudicial when considering the instructions in their entirety.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher