STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2002
v	No. 229091 Macomb Circuit Court
JOEL ALLEN HOPP, Defendant-Appellant.	LC No. 99-000444-FC

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

A jury convicted defendant Joel Allen Hopp of second degree murder for killing his friend, Kerry Reeves.[1] The trial court sentenced Hopp to twenty to forty years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

Danny Willis lived with Hopp, Hopp's girlfriend R'Lene Romano, and Romano's children. Typically, Willis watched the children during the day while Romano worked and Hopp, who worked midnights, slept. Willis, who had known Hopp and Reeves for most of his life, believed Hopp and Reeves were good friends.

On the day of the incident leading to his prosecution, Hopp returned home at around 8:00 a.m. At approximately 11:45 a.m., Hopp announced that he was going to a bar. He again returned home at about 1:30 p.m. or 2:00 p.m., telling Willis that he had seen Reeves at the bar. Hopp consumed one or two beers before going upstairs to rest. About two hours later, Hopp returned downstairs and watched television from the sofa. Reeves, who lived "two doors down" and visited the home frequently, called on the telephone, inquiring whether Willis would be at home and indicating that he would visit later in the day.

Reeves arrived at Hopp's home around 6:30 p.m. carrying a picnic basket, and asked where Hopp was. Reeves turned around and "hollered," "'Get up sloopy-sloop.'" To Willis, "sloopy-sloop" sounded like "[s]omething that he just spurted out of his mouth," and was

[1] MCL 750.317.

consistent with the way Hopp and Reeves would joke with each other. Hopp went upstairs while Reeves continued to sit at the table, drinking a beer and trying to "get a hold of" Hopp.

During this interlude, Reeves talked to Willis as Willis fixed the children's dinner. Reeves then called upstairs, "'Come on down sloopy-sloop.'" Hopp came downstairs, went to the chair where Reeves was sitting, and pushed Reeves to the floor, saying, "'Get out of my house.'" Reeves got up and the two men engaged in "a hard wrestle," pushing, but not punching. They fell down next to the kitchen sink, with Reeves holding Hopp in a headlock. The children came out of the bedroom, but Willis grabbed them and rushed them back into the bedroom. When Willis returned to the kitchen, Hopp and Reeves were still there, with Reeves still holding Hopp in a headlock, as he had done for "[t]hree, four minutes." Reeves told Hopp that he did not want to fight, stating "'Let's stop.'" According to Willis, Reeves repeated the sentiment, saying, "'Stop it, Joel. I don't want to fight. I'll just choke you out and then I'll leave.' And Joel said, 'Okay. I'll stop.'"

As soon as Reeves disengaged from Hopp, Hopp jumped up and grabbed a knife from the "butcher block" near the stove, accidentally knocking a pot of macaroni to the floor in the process. Evidently disregarding the mess, Hopp started "stabbing" at and lunging at Reeves with the knife. Reeves jumped back and, "pretty much yelling," told Hopp to "knock it off." Willis saw Hopp stab at Reeves three times. Reeves dodged the knife and retreated to the bathroom, with Hopp following him. For about one minute, Willis could not see the men fighting in the bathroom while he was attending to the children. When Willis returned, the men were again in the kitchen, still fighting. Hopp had Reeves "by the top of the head, his hair pulled back," with the knife at Reeves' collar. Reeves "jerked his head away, got loose and ran," grabbed his picnic basket with his beer, running out the back door without giving any hint that he had been injured. Hopp threw the knife down to the floor, picked it up, threw it to the floor again, picked it up, and replaced it in the block.

Hopp called Romano at work at about 7:15 p.m. to tell her that he and Reeves had been in a fight. Romano asked what happened, and Hopp replied, "'I'm not quite sure what happened,'" before giving the telephone to Willis. Willis reassured Romano that all was well before he cleaned up the macaroni, and Hopp went upstairs.

About fifteen to twenty minutes later, Hopp called Romano again. He said he needed the keys to the car, which he asked her to put in the car at her workplace. He said that he had to leave quickly, and that there were "cops and ambulances everywhere." When Romano asked what had happened, Hopp said he did not know. Though she said that she would leave the keys as he requested, she actually drove home.

By the time Hopp called Romano, Sergeant Troszak had come across Reeves as he collapsed on the side of the road. Sergeant Troszak saw that Reeves was bleeding from the chest area. Willis, who heard sirens, looked outside. Both Willis and Hopp went outside, but Willis went toward the road, where he saw Reeves lying, while Hopp went out through the backyard, apparently away from the scene. Sergeant Troszak used a canine tracking unit to track Hopp, finding him about twenty minutes later, approximately a quarter mile away from the house.

Officers investigating the scene found the basket with beer, which Reeves had taken with him when he left the house, near the porch. A blood trail ran from the porch to the northeast end

of the property, but there was no blood in the house. Officer Schmittler thought that the house looked as if someone had attempted to clean it, noting a broom against the stove and wood swept into a pile on the floor.

Later that night Hopp, who had bloodshot eyes and smelled of intoxicants, gave a statement to the police. Hopp, who reportedly had consumed two shots of alcohol and two beers, said that he had been asleep in the bedroom and that Reeves tried to drag him out of bed. Reeves had yelled to him, calling him names. When he went downstairs, Hopp said, Reeves grabbed him in a headlock and they wrestled. Hopp said that he broke free and grabbed a large knife, telling Reeves to "get the hell out of the house before he sticks him." At this point, Hopp indicated, he was afraid of Reeves and was just defending himself. Hopp confessed that he hit Reeves with the tip of the knife in the back, claiming that "he did it in self defense." When the police told Hopp that Reeves had died and he was going to be charged with murder, Hopp cried, saying that Reeves was his lifelong friend and that he could not be dead.

At trial, the prosecution and defense stipulated that the knife, a twelve-inch "Ginsue" knife, broken on one side, collected from the butcher block in the kitchen, had a smear of Reeves' blood. According to the medical examiner, the cause of Reeves' death was blood loss as a result of a stab to the heart. The medical examiner concluded that, in order to hit the heart, the weapon must have penetrated 2-1/2 to 3 inches. The stab wound was to the left side of Reeves' chest, close to the midline. Reeves' clothing, including a vest, t-shirt, and sweatshirt, had a two-inch cut, but the jacket he had been wearing had not been cut. Noting "some linear type abrasion" or four "scrapes" on Reeves' chin, the medical examiner did not find any other knife wounds or defensive wounds. Considering all the evidence available to him, including knowledge that there had been an altercation, he did not believe that the stabbing could have been accidental. The medical examiner believed it would be "extremely difficult to stab wound someone accidentally." Further, the medical examiner, who had performed or supervised thousands of autopsies, said that, in his view, "there is no accidental stabbing that leads to death," because force is needed for the knife to penetrate the victim.

> I have been confronted with situations where the argument was, "I held the knife and the individual run [sic] toward it and got himself stabbed." But I need to push against it. If I see the guy running toward me and I'm holding a knife, I withdraw the knife. I don't push it against him, and certainly in the chest, that doesn't make sense either.

The medical examiner ruled the death a homicide.

II. Prosecutorial Misconduct

A. Preservation And Standard Of Review

Hopp first claims that the prosecutor denied him a fair trial by making several remarks during closing arguments that the evidence did not support. Hopp preserved for appeal only his argument that the prosecutor committed misconduct by telling the jury that he had threatened

Reeves, saying "I'll kill you." This allegation merits review de novo.[2] Hopp, however, failed to preserve any of the other remarks he claims constituted misconduct by objecting to them at trial,[3] or by raising an objection on the same grounds he now presents.[4] Thus, these remaining arguments are entitled to review for plain error affecting Hopp's substantial rights.[5]

B. Facts In Evidence

At the beginning of the prosecutor's closing arguments, the prosecutor contended that

> the evidence has shown that the acts of the defendant caused the death of Kerry Reeves. His thrusting the knife into his heart, cutting the vessels of his heart caused the death of Kerry Reeves. The prosecution believes that the defendant – that the evidence shows that defendant intended to kill Kerry Reeves. He said that, "I'll kill you," as he was thrusting the knife, as he had the knife to –

This last remark prompted defense counsel to object. Apparently the trial court overruled the objection, because, following a sidebar conference off the record, the prosecutor continued along this same course:

> As I said, when he had the knife to the back of his head, pulling his hair back, he said, "I'll kill you." That's the evidence that the defendant intended to kill him. The judge tell [sic] you – you'll listen to what he said and what he does to determine his intent, because we can't get into his mind. We're not able to do that. If I had to do that, nobody would be convicted. We can't get into his mind. Just because he says, "I didn't intend to kill him," when he's thrusting the knife at him, you have to look at his action, or, it doesn't have to be intent to kill, it could be intent to do great bodily harm.

In fact, there was no evidence at trial that Hopp said, "I'll kill you."

Hopp, relying on well-settled precedent holding that a prosecutor may only make arguments related to the evidence or reasonable inferences drawn from it,[6] contends that this argument was misconduct requiring reversal of his conviction. The prosecutor, however, contends that the argument was merely figurative; the act of holding a knife to Reeves' neck revealed his intent to kill and was equivalent to saying "I'll kill you." Reading the remarks in context,[7] we agree with Hopp that this was a material misstatement of the evidence admitted at trial. Nevertheless, this misconduct must have denied Hopp a fair and impartial trial in order to

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[2] See *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[3] See *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999).

[4] See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

[5] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[6] See *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

[7] *Id*.

merit reversing his conviction.[8] Here, the trial court unambiguously instructed the jury that the lawyers' arguments did not constitute evidence. The jury, which heard the evidence not including this statement, would have had no problem identifying the prosecutor's mistake and disregarding it while examining other evidence relevant to Hopp's state of mind at the time of the stabbing. Indeed, Willis' testimony provided substantial evidence of Hopp's intent at the time of the stabbing. While certainly improper, the prosecutor's emphasis of this alleged statement did not deny Hopp a fair and impartial trial.

Hopp argues that the prosecutor again made an argument to the jury that the evidence did not support by contending that Hopp pushed Reeves into the bathroom.

> After being let out of the headlock, he deliberately went over, grabbed the knife and deliberately, the testimony was, three times lunged at Kenny [sic – Kerry Reeves]. Kenny [sic] jumped back every time. The kids are screaming. *Pushes him back, pushes him back all the way into the bathroom. At that point he is stabbed. He knew he was stabbed. I mean you don't get stabbed in the heart without knowing something is bad.* He grabbed his basket maybe in – who knows? He grabbed his basket to leave and then he realized he's not even going to be able to hold on to that . . . .[9]

This reference to "pushing him back" is consistent with Willis' testimony that, as Hopp thrust the knife at Reeves, Reeves was jumping back into the bathroom. The remark that Reeves was stabbed in the bathroom and knew he had been stabbed was a permissible inference from Willis' testimony that he did not see the stabbing, which occurred when Hopp and Reeves were in the bathroom and then moved to the kitchen.

C. Punishment

Hopp argues that the prosecutor impermissibly informed the jury of the potential penal consequences of his conduct when the prosecutor responded to Hopp's theory that the stabbing was accidental:

> MR. COURIE [the prosecutor]: How about accident? What if this was an accident? *If it was an accident, ladies and gentleman, let him go free, just let him go.*
>
> MR. SCHARG [defense counsel]: Judge, I object to that type of argument. Let him go free, if it was an accident, let him go free? That's improper argument. If it's an accident defendant, they have to find him not guilty, then let him go free.
>
> THE COURT: I don't have any problem with that statement, Mr. Scharg. That's your defense.

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[8] See *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[9] Emphasis added.

> MR. COURIE: Actually I don't have any problem with that statement either because it's a good statement, it's a good law. If it is an accident, he should [sic] be going to jail, because it was an accident. If I did something by accident, if you did something by accident, you should not be put in jail. *If it was truly an accident, ladies and gentleman, let him go free.*

Hopp contends that this argument was improper because it distracted the jury from its essential factfinding obligations. He draws a parallel between this argument and the argument in *United States v Modica*,[10] in which the prosecutor told the jury, "I submit to you that the Government has proven the proof. It has proven the charges in this case beyond every doubt. The proof is very clear. Don't let Mr. Modica walk out of this room laughing at you." The United States Court of Appeals for the Second Circuit concluded that this remark was improper because it was designed solely to inflame the jury.[11] Michigan law similarly holds that it is improper for a prosecutor to make arguments that appeal to the passions of the jury instead of relying on the evidence.[12] However, unlike in *Modica*, the prosecutor's argument was not crafted to have the jury render a verdict adverse to Hopp's personal interests. Rather, the prosecutor was acknowledging that the jury should acquit Hopp if this truly was an accident. Even assuming that this argument was improper – and it was not – Hopp could not suffer any prejudice from the remark because it reinforced his own theory of the case.

D. Personal Knowledge

Hopp also claims that the prosecutor expressed an improper personal belief that he was guilty when the prosecutor stated:

> Ladies and gentleman, I'm going to ask you to look again at the elements of the crime of second degree murder. None of them say that I have to prove that he knew that he stabbed him. That's not one of the elements. Just because he didn't know it happened, doesn't mean it didn't happen, doesn't mean their son is not dead, the brother is not dead, that he's not here. It happened, whether he knew it or not. *I know he knew it.* You know he knew it. But whether he knew it or not, that's not one of the elements that I have to prove beyond a reasonable doubt.[13]

As Hopp suggests, a prosecutor may not imply to the jury that he has special knowledge of the defendant's guilt of the charged offense.[14] However, when read in context, the prosecutor's comments reveal that they were intended to suggest that guilt was the only logical inference from the evidence on the record, which is why the prosecutor argued that the jurors also knew that Hopp was guilty.

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[10] *United States v Modica*, 663 F2d 1173, 1180 (CA 2, 1981).

[11] See *id*. at 1180-1181.

[12] See, generally, *People v Knapp*, 236 Mich App 643, 651; 601 NW2d 9 (1999).

[13] Emphasis added.

[14] See *Knapp*, *supra* at 382.

III. Jury Instructions

A. Preservation And Standard Of Review

Hopp contends that he was denied his due process right to a properly instructed jury because the trial court issued confusing and misleading instructions concerning the defense of accident and it refused to honor the jury's request for a supplemental instruction defining negligence. Hopp did not object to the instruction as the trial court issued it. Therefore, we review this unpreserved issue for plain error affecting his substantial rights.[15]

B. Accident

Hopp asked the trial court to instruct the jury on the defense of accident pursuant to CJI2d 7.2, which provides:

> (1) The defendant says that [he / she] is not guilty of _____ because _____'s death was accidental. By this defendant means that [he / she] did not mean to kill or did not realize that what [he / she] did would probably cause a death or cause great bodily harm.
>
> (2) If the defendant *did not mean to kill*, or did not realize that what [he / she] did would probably cause a death, then [he / she] is not guilty of murder.[16]

The trial court granted Hopp's request, but actually informed the jury:

> The defendant says that he is not guilty of second degree murder because Kenneth [sic] Reeves' death was accidental. By this he means that he did not mean to kill or did not realize that what he did would probably cause death or cause great bodily harm. If the defendant *did mean to kill* or did not realize that what he did would probably cause death, then he is not guilty of murder.[17]

Clearly, the trial court misspoke. It should have informed the jury that it would have to acquit Hopp if it found that he "did *not* mean to kill" Reeves. This meets the first element of the plain error test.[18] However, to merit reversal, Hopp must demonstrate that this error affected his substantial rights, meaning that the prejudice he allegedly suffered from this error "affected the outcome of the lower court proceedings."[19] Hopp has not, indeed he cannot, show that this error caused him prejudice. This slip of the tongue likely made no impression on the jury whatsoever given the overall message of the instruction, which was legally correct. Certainly, this error was so insignificant it made no impression on the attorneys, even though the trial court alerted them to the

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[15] See *Carines*, *supra*.

[16] Emphasis added.

[17] Emphasis added.

[18] See *Carines*, *supra* at 763.

[19] *Id*.

possibility that it might stumble over the wording of the instructions, saying at the outset of jury instructions, "Please, if I misspeak, stop me so that we don't wait until the end." More importantly, read closely, the instruction actually favored Hopp, expanding the circumstances meriting acquittal to include a finding that he *intended* to kill Reeves. While not perfect, this instruction adequately protected Hopp's rights.[20]

IV. Supplemental Brief

Shortly before oral arguments, Hopp filed a supplemental brief raising numerous additional issues that he claims merits reversal of his conviction. We have reviewed these issues and the record, but find no errors requiring reversal, as we briefly explain.

Hopp argues that the trial court should have instructed the jury with respect to felonious assault as a cognate lesser offense of second-degree murder. However, case law holds that

> [a]t the point a court has before it uncontested evidence that a criminal homicide has been caused by a defendant's acts, there is no justification for instruction on merely assaultive offenses. If a lesser cognate instruction is to be justified in such an instance, there must be some evidentiary basis for the jury to conclude that the causation chain leading from the greater harm back to defendant's admitted acts has been broken by an independent, intervening cause.[21]

Though Hopp acknowledges this precedent, he offers no evidence of an intervening cause of Reeves' death, contending only that the jury could have found that he simply meant to scare Reeves with the knife, not kill him. While Hopp was able to claim accident as a defense, he has provided no evidence that some force or circumstance unrelated to him and his actions actually caused Reeves' death.[22] The trial court did not err in denying Hopp's request to instruct the jury with respect to felonious assault.

Hopp argues that the trial court committed error requiring reversal when it, in the absence of a defense objection, permitted the medical examiner to testify that the stab wound to Reeves was not an accident. He claims that this testimony was improper because it embraced an ultimate issue that should have been left to the jury to decide and because it constituted profile evidence. As a basic principle, contrary to the inapplicable federal precedent Hopp cites, Michigan does not bar expert opinion testimony that addresses an ultimate issue.[23] The medical examiner explained why the sort of stab wound Reeves sustained was incompatible with an accident theory because of the force necessary to cause the wound. While the jury could choose to disbelieve this testimony, this sort of technical evidence regarding wounds was outside the knowledge the average juror possesses. Therefore, the expert testimony was relevant and admissible.[24] Further, while the medical examiner expressed his opinion in broad terms, this

[20] See *Knapp*, *supra* at 376; *People v Johnson*, 164 Mich App 634, 642; 418 NW2d 117 (1987).

[21] See *People v Bailey*, 451 Mich 657, 671-672; 549 NW2d 325 (1996).

[22] See, generally, *People v Clark*, 171 Mich App 656, 659-660; 431 NW2d 88 (1988).

[23] See *People v Samuel Williams*, 198 Mich App 537, 542; 499 NW2d 404 (1993).

[24] *Id*. at 541-542.

testimony did not fit the definition of profile evidence, which is inadmissible in *drug* cases as substantive evidence of the crime,[25] though admissible for other, limited purposes.[26] Plainly, this was not a drug case and there was ample, substantive evidence of the crime. Consequently, the medical examiner's testimony does not provide Hopp with a basis for reversal.

Hopp maintains that he was denied his rights to a fair trial and the presumption of innocence when the jury saw him handcuffed, standing in the hallway during a break in the trial for one or two minutes. The alleged circumstances in this case are similar to the circumstances in *People v Meyers*.[27] As in *Meyers*, we think that this minor incident, which defense counsel did not bring to the trial court's attention, does not warrant reversing his otherwise proper conviction.

Hopp claims that he was denied the effective assistance of counsel given several aspects of his trial counsel's representation. "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial."[28]

First Hopp argues that his attorney was ineffective when he failed to move for a mistrial after learning that the jury had seen Hopp in handcuffs, especially because there was no need to have him in handcuffs at the time. We disagree that the court personnel had no reason to transport Hopp in handcuffs given that he was being tried for a violent crime. Further, the jury's brief glimpse of Hopp was unlikely to have any effect on the outcome of the trial given the strong evidence. There was insufficient prejudice to affect the fairness and reliability of the trial because of this misstep.

Second, Hopp maintains that his trial attorney prevented him from presenting a defense when the attorney opposed admitting a letter Hopp had written to the trial court explaining the stabbing and an unrelated crime from his perspective. In the letter, Hopp said that he and Reeves had been fighting when his skittish dog knocked into a piece of furniture on the way up the stairs. At that point, Hopp wrote in the letter,

> I turn[ed] to see what the noise was when Kerry grabbed my hand with the knife in it. He tried to pull and twist the knife from my hand as he was backing up. There was a basket of shoes behind him, he tripped and brought me down on top of him. I was not aware he was injured, I don't know that he was aware either. I got to my feet and pulled Kerry up by his collar not by his hair Kerrys [sic] hair is to [sic] short to grab. I told him I could have killed you Kerry, you stupid so and so[.] I told him to leave we were in the bathroom doorway which led to the

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[25] See *People v Humphreys*, 221 Mich App 443, 447; 561 NW2d 868 (1997).

[26] See *People v Charles Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000), explaining *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999).

[27] *People v Meyers*, 124 Mich App 148, 164-165; 335 NW2d 189 (1983).

[28] *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

> kitchen, he started back through the bathroom towards the back door. He turned around, came back into the kitchen, got his beer he had brought with him and left. I thought that was the end of it. Fifteen minutes later the ambulance and the police were in front of the house Danny [Willis] told me actually he got in my face and yelled the police are out front you better get out of here. I panicked and went out the back door. I was only gone a short time, when I decided to return home that's when I was arrested. I was taken to the police sation [sic] where I was told Kerry had died. I hope and pray that this will all come out in court.

Hopp's trial counsel, who did not call any witnesses to testify on behalf of the defense, said that he opposed admitting the letter in evidence because "[i]t just gives – him giving his version of what happened." Apparently, his decision was calculated to be consistent with the trial strategy of not having Hopp testify. Attacking the prosecution's case is a known and viable strategy, and our review does not include second-guessing a trial attorney's sound strategy, even when it fails.[29] Additionally, the trial court indicated that it was concerned about the grounds on which the letter could be admitted, to which Hopp's trial attorney replied that he did not know whether the letter was admissible. Even on appeal Hopp has not presented any legal theory under which the trial court could have admitted the letter, which weakens his argument that his trial attorney was deficient for failing to press for the letter to be admitted.

Third, Hopp asserts that his trial counsel was ineffective for insisting that the trial court not define the term "grossly negligent" as it appears in the instruction for involuntary manslaughter after the jury, while deliberating, requested the instruction. The trial court had failed to define this term when instructing the jury before it began its deliberations. Hopp's trial counsel, while not explaining his reasoning in full, flatly opposed giving this supplemental instruction to the jury, indicating that the jury was "stuck with the definitions they have." Apparently, Hopp's trial counsel saw the possibility that the jury, without additional instructions, were willing to consider convicting him of the lesser offense of involuntary manslaughter and did not want to upset the progress of deliberations by inserting the new instructions. Again, it is not our role to question this strategy.[30]

Finally, in his statement of the issues presented, Hopp claims that he was denied effective assistance of counsel related to the trial court's failure to instruct the jury with respect to felonious assault. He has not made any argument in support of this contention, and, therefore, he has abandoned it.[31]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

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[29] See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

[30] See *id.*

[31] See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).