STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 244067 Wayne Circuit Court
TYRONE A. RICHARDSON, Defendant-Appellant.	LC No. 01-009812

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

I. Overview

A jury convicted defendant Tyrone A. Richardson of involuntary manslaughter,[1] felon in possession of a firearm, and felony-firearm, after he fatally shot Cash Howard outside a party store. Richardson appeals as of right. We affirm.

II. Basic Facts And Procedural History

This case arose out of a February 21, 2000 shooting that occurred in the parking lot of the House of Vino party store after a brief encounter between Richardson and Howard, who did not know each other. Accounts of the events leading up to the shooting varied. At trial, prosecution witness Malcolm Branch testified that had driven his friend Howard and his cousin Johnnie Wallace to the House of Vino so Howard could buy some cigarettes. Branch explained that his car was a two-door model from the mid-seventies that would not operate in reverse. Because of this limitation, when Branch pulled into the parking lot, he made a U-turn and parked with the passenger side next to the entrance so that he could leave the parking lot without backing up. Branch estimated that the car was parked between fifteen and twenty feet from the door.

[1] MCL 750.321. Although the appellate briefs both indicate that Richardson was convicted of *voluntary* manslaughter, the order of conviction, the judgment of sentence, and the claim of appeal all indicate that Richardson was convicted of *involuntary* manslaughter. The jury verdict form indicates only that he was convicted of manslaughter.

According to Branch, when he, Wallace, and Howard were leaving the store, Branch said "what's up?" to a man from the neighborhood named Fred Wilson, also known as "Smoke," who was on his way into the store. Behind "Smoke," Branch saw a man he knew as "T-Bone" and later identified as Richardson. Branch noticed that Richardson and Howard had made eye contact and were staring at each other. According to Branch, Howard asked, "What the fuck is the problem?" As Branch proceeded to the driver's side of his car, he saw that Richardson had come out of the store and begun talking to a man who then handed him something. Branch identified the second man as James Burbridge.

At that point, Branch heard either Wallace or Howard say, "they got a gun." Branch turned around and began talking to Richardson, who was holding the gun in his right hand and pointing it toward the ground. By this time, Wallace had gotten into the back seat of Branch's car and Howard was in the front passenger seat. Branch told Richardson "that it wasn't like that, that I know his boy Smoke from the same hood." When Branch heard Richardson respond, "It's all good from the Projects," he thought the situation was resolved, because Richardson was still pointing the gun toward the ground. However, when Branch got in the car and began driving away, he heard gunshots, and saw that Richardson had fired the gun, breaking the car's rear window. Branch saw that Howard had been shot, and Branch later realized that he himself had been shot in the leg. Branch drove to a friend's house for help, and when he got out of the car, Wallace drove off with Howard. Howard later died from the two gunshot wounds he sustained, one of which entered his right ribcage, and one of which entered his right upper arm.

Branch explained that he did not go immediately to the hospital because he had traffic warrants and unpaid child support payments, and he did not want to go to jail. When he finally decided to go to the hospital, he told them he was "Arthur Lee Smith," and he gave police the same false name and an incorrect birth date and social security number when they questioned him about the incident. Branch gave the same false information under oath at two previous hearings in the case, and did not tell his attorney his real name until the week before trial. Branch admitted having been convicted for receiving and concealing stolen property in 1994 or 1995. On cross-examination, Branch acknowledged that he had given a previous statement indicating that there was no one with Richardson except "Smoke"; however, he explained that he had not recalled seeing Burbridge when he gave his statement. Branch also admitted that he had previously identified his shooter as a man named Antonio or Andre.

Branch said he did not know Richardson before this incident, had never seen him before, and had no problems with him in the past. Branch said he was also unaware of any problems that Richardson might have had with Howard or Wallace. Branch testified that while he was trying to convince Richardson to put the gun away, Howard's car window was down, and Branch could see his arm or some part of his head sticking out of the window. Branch also testified that sometime after the shooting, a man who identified himself as T-Bone called him and said that "[h]e didn't mean to shoot me, and he would give me a package not to testify."

According to Wallace's account of the incident, Richardson walked into the store as they were walking out, and he and Howard began staring at each other but did not say anything. Howard then asked Wallace and Branch whether they knew Richardson, but Wallace had never met him before. Wallace testified that Howard did not have a problem with Richardson, and that the only thing Howard said about him was, "do we know him?"

As the men were getting into the car, Richardson came out of the store. Wallace noticed two other men standing near Richardson. Wallace testified he saw one of these men hand Richardson a gun. Wallace heard Branch tell Richardson "we was straight, we ain't like that, you know, we ain't gotta have no guns"; but Richardson did not respond. Meanwhile, Howard had rolled down his car window and started talking to Richardson also, telling him that everything was okay. Both Branch and Wallace testified that Howard did not have a gun. Wallace testified that they thought the situation had been resolved, but when they pulled away, Richardson began shooting. Wallace heard Richardson say one thing before he began shooting: "From the projects." Wallace testified that, as far as he knew, Richardson had never had any problems with him, Howard, or Branch in the past. Wallace admitted referring to Branch as "Arthur Smith" in his statement to the police, as well as in court under oath, because he knew that Branch had outstanding warrants and was using an alias.

Fred Wilson, the man known as "Smoke," testified that when he arrived at the House of Vino, he recognized Burbridge looking at the videotapes for sale just outside the store's door, and he saw Wallace, Howard, and Branch coming out of the store. As Wilson entered the store, Richardson came in behind him. Wilson noticed that one of the three men was looking at Richardson "in an evil way" and saying some "cussing words" to him, but Richardson did not respond. As Wilson was leaving the counter after making his purchase, he heard gunshots. Wilson said that none of the men had appeared to be armed, but Burbridge was holding a bag as he was standing outside the door.

According to Richardson's account, he saw Burbridge with the man selling videos as he went into the store, and also saw Wilson, who walked up to the door of the store at the same time he did. Richardson stopped and picked out a video, and told the man he would pay for it on his way out when he had some change. Richardson noticed two men closely followed by a third man, none of whom he recognized, leaving the store. When Richardson saw that Wilson was talking to the men, Richardson acknowledged them by nodding his head and saying, "What's up?" According to Richardson, Howard "had a look on his face like, you know, he was mad at the world." When Richardson asked Howard "What's up?," Howard "went off" on him and swore at him, but Richardson responded only by laughing at him, shaking his head, and continuing walking into the store. Richardson bought a six-pack of beer and a bag of potato chips, stood in line, paid for them, then left the store carrying these items.

On his way out, Richardson stopped and put his bag of purchases on the ground, and the man handed him the video he had chosen earlier. Richardson put the video in the bag. As Richardson reached into his pocket to get the money to pay for the video, a car pulled up and stopped in front of him, and Richardson recognized the men in the car as the three men he had seen earlier. Richardson testified, "My heart skipped a beat because I seen the same look on [Howard's] face that I seen in the store." According to Richardson, Howard rolled his window down and said "What's funny now, mother—," then pointed a gun out the window. Richardson "instantly panicked," pulled out his gun, and fired. Richardson testified that he was in fear for his life when he pulled out his gun. Richardson explained that he carried a gun because he had been the victim of an attempted carjacking and had been shot in the chest. Richardson said he did not see whether his shots hit anyone, and that he was "tryin' to run" when he tripped and fell over his bag of merchandise. When asked whether he had done anything aggressive that would have provoked anyone to shoot at him, Richardson responded, "Not at all."

Richardson denied that he had been standing outside the door for five minutes before the shooting occurred, estimating that only twenty or thirty seconds elapsed between when he left the store and when Howard pulled a gun, and that he did not have time to run. Richardson testified that he did not know whether Howard ever fired his gun, because when he saw the gun pointed at him, he "panicked" and "pulled my gun out and shot, and was running; started shootin' and ran." Richardson testified that he did not see the car drive away and did not know whether he hit the car because he was shooting without looking as he was trying to get away.

On cross-examination, Richardson admitted giving an alias to a judge when pleading to a felony in 1999. Richardson denied saying "I'm from the projects," and also denied being from the projects, although he admitted spending time there. Richardson testified that he had been convicted of receiving and concealing stolen property over a hundred dollars in 1994. Richardson denied calling Branch to offer him a "package" for not testifying.

Diane Kovach, who witnessed the incident, testified for the defense. Kovach stated that she was walking towards the House of Vino when she saw Branch's car come towards her as though it was leaving, then it slowed down in front of the doorway. Kovach testified that the passenger window was down and "they started screaming profanity . . . the F word was used several times." Kovach noticed that they were looking towards the door of the store, and as the car slowed further, she saw that the passenger was holding a gun out the car window. She heard more profanity, saw a man in the doorway duck, and then she heard gunshots. Kovach testified that she thought the person in the car fired first, but could not be sure because she had turned around; however, she was sure that the person in the car was first to draw a gun. Kovach testified that she did not know any of the men involved.

Officer Eugene Fitzhugh and a partner photographed the crime scene as well as Branch's car. Fitzhugh testified that his examination of the outside of the House of Vino revealed no firearm damage. Officer Donald Rem, an evidence technician, testified that the damage to the car was caused by bullets fired into the car from outside of it. Rem's investigation indicated that five shots entered the car: two fired directly into the passenger side, one at an angle, one from directly behind the car, and one whose trajectory could not be determined. Officer David Pauch testified that all the slugs recovered from the car were fired from the same weapon.

At the close of evidence, defense counsel objected to the prosecutor's request to instruct the jury on voluntary manslaughter, arguing that there was no evidence regarding provocation. The prosecutor responded that there was evidence that Howard pointed a gun at Richardson, which he believed would constitute adequate provocation. Alternatively, the prosecutor stated that the jury could conclude that while Richardson was acting in self-defense, he used excessive force. The trial court then ruled that it would give the manslaughter instruction, because it believed that the jury could find the necessary provocation. The prosecutor also requested an instruction on flight, and defense counsel objected on the ground that the evidence indicated that Richardson ran because of fear, not to evade the authorities. The trial court ruled that it would give the instruction because Richardson himself testified that he ran from the scene.

The trial court instructed the jury that although Richardson was charged with first-degree murder, they could find him guilty of the lesser crime of voluntary manslaughter if he intended to kill Howard or cause him great bodily harm, or created a very high risk of death or great bodily harm, and if he caused Howard's death without lawful excuse or justification. The trial

court explained that murder could be reduced to manslaughter if Richardson "acted out of passion or anger brought about by adequate cause and before [he] had a reasonable time to calm down," and that whether these elements were present was for the jury to decide.

Regarding flight, the trial court instructed:

> There has been some evidence that the defendant Richardson ran away after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows that the defendant Richardson had a guilty state of mind.

The jury found Richardson guilty of manslaughter, possession of a firearm, and felony-firearm.

III. Voluntary Manslaughter Instruction

A. Standard Of Review

We review the trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion.[2]

B. A Rational View Of The Evidence

Richardson was charged with first-degree murder, but the trial court instructed the jury on voluntary manslaughter at the prosecutor's request. A jury instruction on a lesser offense is appropriate only if all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence supports the instruction.[3] Because the elements of manslaughter are included in the offense of murder, when a defendant is charged with murder, instructions for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.[4]

To establish voluntary manslaughter, the jury must find that the defendant killed in the heat of passion caused by an adequate provocation, and there was no lapse of time during which a reasonable person could have controlled his passions.[5] The provocation necessary to mitigate a homicide from murder to manslaughter is "that which causes the defendant to act out of passion

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[2] See *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003), citing *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

[3] *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

[4] *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

[5] *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

rather than reason."[6] In other words, the provocation must be that which would cause the reasonable person to lose control.[7] However, "provocation is not an element of voluntary manslaughter. Rather, provocation is the circumstance that negates the presence of malice."[8] Malice is the only element that distinguishes murder from manslaughter.[9] "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act with wanton and willful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm."[10]

Richardson testified that Howard had sworn at him as he entered the store, but that he only laughed at Howard and continued walking into the store. Richardson testified that when he came out of the store, no more than half a minute elapsed before Branch's car pulled up and Howard said, "What's funny now, mother—," and pointed a gun out the window. Richardson testified that he "instantly panicked," pulled out his gun, and fired out of fear for his life. Richardson argues that, absent testimony by him that he was actually provoked by Howard pointing the gun at him, a voluntary manslaughter instruction was unsupported. According to Kovach's account of the incident, however, Richardson and the men in the car were "screaming profanity" at one another, a gun appeared in the car window, more profanity was exchanged, and a gun was fired. This testimony supports the view that, contrary to Richardson's representations, he was arguing with Howard immediately before the shooting.

Richardson argues that neither mere words nor the mere presence of a gun constituted adequate provocation. This Court addressed the provocation issue at some length in *People v Pouncey*.[11] In *Pouncey*, the defendant and two friends, White and Johnston, accused a man named Bland of stealing White's car. When Bland denied stealing the car, the defendant and his friends returned to White's home. Bland, accompanied by his brother and a man named Powers, went immediately to White's home, where Bland repeated that he knew nothing about the car theft. Powers threatened to beat the defendant and called him several offensive names. Powers then walked towards the defendant, but Bland restrained Powers. The defendant told Powers not to "walk up on" him. The defendant then went into the house, got a gun, came out, and shot Powers.[12]

This Court concluded that these facts provided insufficient evidence to establish adequate provocation, stating: "The evidence offered at trial painted a picture of a verbal fracas between six young men. The decedent insulted the defendant, but there were no punches thrown" and "no

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[6] *Pouncey, supra* at 389, citing *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974).

[7] *Id*.

[8] *Mendoza, supra* at 536 (citations omitted).

[9] *Id*. at 540.

[10] *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

[11] See *Pouncey, supra*.

[12] *Id*. at 384-385.

physical contact of any kind . . ."[13] The Court noted that this case involved only insulting words which, unlike informative words, are generally not considered adequate provocation; however, the Court declined to rule that "insulting words per se are never adequate provocation." Rather, the Court concluded that "what constitutes adequate provocation is a factual question, and on these facts, the provocation was not adequate."[14]

In this case, there was evidence indicating that there was not only a "verbal fracas," but that the men were "screaming profanity" at one another immediately before Howard drew a gun on Richardson. While evidence relating to the nature of the dispute was admittedly scant, evidence that Howard drew a gun on Richardson during a heated exchange indicated that Richardson might have fired in anger or in the heat of passion brought on by both Howard's words and his act of pointing a gun at Richardson. We acknowledge that the question whether a rational view of the evidence supported the instruction was a close one, and, in our view, the trial court would not have abused its discretion regardless how it ruled. Given Kovach's testimony, however, we conclude that the trial court's decision to instruct the jury on voluntary manslaughter did not rise to the level of an abuse of discretion, which is defined as a decision "so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias."[15]

The prosecutor also argues that the doctrine of "imperfect self-defense," while not applicable to this case, illustrates how a jury might have mitigated a murder to a manslaughter by concluding that Richardson attempted to act in self-defense but his response was excessive or he failed to retreat. While it is true that the "imperfect self-defense" doctrine "can mitigate second-degree murder to voluntary manslaughter,"[16] the doctrine only applies if "the defendant would have been entitled to self-defense had he not been the initial aggressor,"[17] as the prosecutor acknowledges. The prosecutor cites no legal authority for the proposition that the jury may similarly mitigate murder to manslaughter for a defendant who *was* entitled to, and actually received, a self-defense instruction. In any event, the question at issue is not whether the jury's voluntary manslaughter verdict was supported, but rather whether the trial court's decision to instruct the jury on voluntary manslaughter was an abuse of discretion. Based on Kovach's testimony that the men were "screaming profanity" at one another immediately before Howard drew a gun on Richardson, we conclude that the trial court's decision to instruct on voluntary manslaughter was not an abuse of discretion.

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[13] *Id*. at 391.

[14] *Id*.

[15] *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

[16] *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992), citing *People v Amos*, 163 Mich App 50, 56-57; 414 NW2d 147 (1987) (internal citation omitted).

[17] *Id*.

IV. Ineffective Assistance

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[18] This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[19] We review the trial court's factual findings for clear error and review de novo its constitutional determination.[20] Because no hearing was conducted, our review is limited to mistakes apparent on the record.[21]

B. Legal Standards

To establish ineffective assistance of counsel, the defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[22] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[23] To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[24] In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.[25] The defendant must also show that the proceedings were "fundamentally unfair or unreliable."[26]

C. Failure To Object To Bribery Evidence

Richardson argues that his counsel was ineffective for failing to object to testimony regarding a telephone conversation in which a man who claimed to be Richardson offered Branch a bribe not to testify. As an initial matter, it is not clear whether testimony regarding the telephone conversation would have been admissible despite an objection. MRE 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Under MRE 901(b)(5), "[i]dentification of a voice, whether heard firsthand

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[18] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[19] *Id*. at 579.

[20] *Id*.

[21] *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

[22] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[23] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[24] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

[25] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[26] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

or through mechanical or electronic transmission or recording," conforms with the requirements of the rule when proven "by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker." It is possible that Branch could have identified Richardson's voice as the caller based on having heard that voice on the day of the shooting. Although Richardson argues that Branch only heard Richardson say one sentence that day, other witnesses indicated that more words were exchanged.

Regardless whether a proper foundation for this testimony could have been laid, however, Richardson cannot premise an ineffective assistance claim on counsel's failure to object because it is not reasonably probable that the outcome of the trial would have been different.[27] There was never any question that Richardson shot and killed Howard; the only question was Richardson's state of mind at the time of the shooting, and the telephone conversation shed no light on this point. Further, as the prosecutor noted, the testimony regarding the conversation was very brief. Therefore, Richardson's ineffective counsel claim fails.[28]

V. Flight Instruction

A. Standard Of Review

We review the trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion.[29]

B. Legal Standards

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal.[30] Jury instructions "must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them."[31] "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights."[32]

C. Evidence Of Flight

Evidence that a defendant fled, while insufficient by itself to sustain a conviction,[33] is "admissible to show consciousness of guilt."[34] The trial court may give a flight instruction if

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[27] *Strickland*, *supra* at 687; *Pickens*, *supra* at 302-303.

[28] See *id*.

[29] See *McKinney*, *supra* at 163, citing *Ho*, *supra* at 189.

[30] *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

[31] *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439; (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975), and *Piper*, *supra* at 648.

[32] *Piper*, *supra* at 648.

[33] *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

[34] *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

supporting evidence exists.[35] "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody."[36]

Richardson argues that the flight instruction was improper because he did not run *after* the shooting; he ran *during* the shooting. However, accepting this argument would require us to hold that a flight instruction is only appropriate in cases where a defendant has waited until the crime is completed to begin running from the scene. While the evidence of Richardson's conduct immediately after the shooting was admittedly scant, it was not an abuse of discretion to conclude that Richardson began "fleeing the scene of the crime" while it was in progress.

Richardson correctly points out that, to support a flight instruction, the evidence at trial must indicate not only that the defendant left the scene of a crime or departed, but that the defendant did so because of the fear of apprehension.[37] Thus, where a defendant has merely walked away from the scene of a crime, an instruction on flight is not appropriate.[38] However, in this case, Richardson did not merely walk away from the scene; as he admitted, he ran. Although Richardson testified that he ran from fear of being shot rather than fear of apprehension, this determination was for the jury, not the trial court, to make.[39] Accordingly, the trial court did not abuse its discretion by giving the flight instruction on this ground.

Richardson also relies on *People v Taylor*, in which this Court reversed a conviction in part because the trial court erred in instructing the jury on flight.[40] However, in *Taylor*, the trial court had "refused to instruct that flight could have resulted from reasons consistent with innocence."[41] In this case, by contrast, the trial court explicitly instructed the jury that a person may run "for innocent reasons, such as panic, mistake, or fear." The trial court did not abuse its discretion by leaving this determination to the jury.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

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[35] *People v Keen*, 446 Mich 866; 522 NW2d 334 (1994); *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

[36] *Coleman*, *supra* at 4, citing 29 Am Jur 2d, Evidence, § 532, p 608.

[37] *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

[38] *Id*.

[39] See *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992), citing *People v Stull*, 127 Mich App 14, 18; 338 NW2d 403 (1983).

[40] *Id*.

[41] *Id*. at 63.