STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2005
v	No. 243439 Wayne Circuit Court
WILLIAM A. WILLIS, Defendant-Appellant.	LC No. 02-000492-01

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant William A. Willis appeals as of right his jury trial convictions for second-degree murder[1] and possession of a firearm during the commission of a felony.[2] Defendant was sentenced to 240 to 480 months' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences. However, we remand for the ministerial task of correcting defendant's presentencing investigation report (PSIR).

I. Factual Background

Defendant's convictions arose from the fatal shooting of his roommate, James Williamson. Mr. Williamson had been institutionalized ten years earlier for mental illness. Mr. Williamson's mental health had since deteriorated and, on December 10, 2001, defendant and Mr. Williamson's family joined to convince Mr. Williamson to commit himself to a mental health facility once again. Although Mr. Williamson initially agreed to go to the hospital on the next day, he later became angry with defendant for conspiring to have him committed. On the morning of December 11, 2001, Mr. Williamson took defendant's only phone and left the house, threatening to return and beat up the defendant. A neighbor, Norma Norman, heard Mr. Williamson repeatedly threaten to kill the defendant as he walked away from the house.[3]

[1] MCL 750.317.

[2] MCL 750.227b.

[3] Mrs. Norman also testified that she had witnessed Mr. Williamson physically attack defendant on two prior occasions and once saw Mr. Williamson chase another man down the street with a

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Defendant told police that he then retrieved a shotgun belonging to Mr. Williamson from the attic and asked a neighbor to call 911.[4]

Mr. Williamson returned home before noon and pounded on the door. At that time, defendant was watching television with a friend, Vincent Ford. Defendant would not allow Mr. Williamson to enter. He opened the interior door to the house, which blocked Mr. Ford's view, but kept the glass exterior door closed. Defendant and Mr. Williamson argued for 15 to 20 minutes. Mr. Williamson told defendant that he owed him a large sum of money[5] and threatened to beat him up. Mr. Ford testified that he heard Mr. Williamson claim that he had "something that will go through that door." Mrs. Norman testified that she heard Mr. Williamson threaten to shoot defendant. Defendant later told police that Mr. Williamson then reached for the door. Mr. Ford saw defendant flinch and testified that defendant looked frightened. Without opening the exterior door, defendant shot Mr. Williamson once in the chest with the shotgun. He asked a neighbor to call for an ambulance. When the police arrived, they found Mr. Williamson dead on the porch. He was unarmed and his house keys were laying near his body. The defense theory was that Mr. Williamson was very aggressive due to his mental illness and that defendant shot him in self-defense.

Following his convictions and sentencing, defendant twice moved for a new trial based on his claims of ineffective assistance of counsel and prosecutorial misconduct. Defendant also moved for resentencing based on errors in scoring his prior record and offense variables. The trial court denied his motions; however, this Court remanded for an evidentiary hearing limited to defendant's claims of ineffective assistance of counsel.[6] Following the *Ginther*[7] hearing, the trial court again denied defendant's motion for a new trial.

II. Prosecutorial Misconduct

Defendant asserts that he was denied a fair trial by numerous instances of prosecutorial misconduct. We review claims of prosecutorial misconduct on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[8] Our

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gun in defendant's presence.

[4] There is no evidence on the record that the neighbor actually called 911 at that time.

[5] Hattie Williamson, Mr. Williamson's mother, testified that Mr. Williamson had become delusional and believed that someone had stolen a large amount of money from him. Mr. Ford testified that Mr. Williamson accused defendant of stealing either $3 million or $300 million from him.

[6] *People v Willis*, unpublished order of the Court of Appeals, entered May 28, 2004 (Docket No. 243439).

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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

review of most of the challenged instances of prosecutorial misconduct is limited to plain error affecting defendant's substantial rights, as defense counsel failed to raise timely objections.[9]

First, defendant claims that the prosecutor mischaracterized the law of self-defense to the jury during voir dire.[10] Defendant asserts that several of the prosecutor's remarks and questions improperly shifted the focus from defendant's honest belief that he was in imminent danger of death or great bodily harm to the fact that Mr. Williamson was unarmed. The purpose of voir dire is to assist counsel in "discovering grounds for challenges for cause and of gaining knowledge to facilitate in intelligent exercise of peremptory challenges,"[11] not to instruct the jury on the law. A prosecutor is entitled to question potential jurors regarding "the subject of self-defense and [their] attitudes toward the use of deadly force."[12] The prosecutor's questions were proper to determine juror attitudes regarding the use of deadly force in self-defense.[13] Moreover, any potential prejudice was cured as the prosecutor did accurately describe the law of self-defense before questioning the potential jurors and the trial court subsequently fully instructed the jury on the applicable law.

Second, defendant contends that the prosecutor failed to disclose exculpatory evidence relating to the extent and nature of Mr. Williamson's mental illness.[14] However, there is nothing in the record to suggest that the prosecutor ever had these records or had any knowledge of these records.[15] Furthermore, defense counsel knew of Mr. Williamson's history of mental illness; elicited testimony from his mother, Hattie Williamson, about his prior commitment; and actually obtained the medical records of a "Mr. Williamson."[16] Accordingly, defendant has not

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[9] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[10] The prosecution asked potential jurors whether they could convict defendant if they found that Mr. Williamson was unarmed and did not pose a deadly threat; whether they agreed that one person does not have a right to shoot another; whether they agreed that a person does not have a right to shoot a defenseless person; and whether they agreed that a person does not have the right to shoot someone who is threatening less than deadly force.

[11] MCR 6.412(C)(1).

[12] See *People v Taylor*, 195 Mich App 57, 59; 489 NW2d 99 (1992).

[13] Furthermore, whether Mr. Williamson was armed would be a factor in determining the reasonableness and necessity of defendant's reliance on deadly force. See *People v Riddle*, 467 Mich 116, 119-120; 649 NW2d 30 (2002).

[14] Defendant also contends that the prosecutor minimized Mr. Williamson's mental illness during voir dire. However, the prosecutor merely asked the potential jurors if they could determine whether Mr. Williamson posed a deadly threat to defendant without being biased by evidence of his mental illness.

[15] See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[16] These records actually belonged to another man by the same name who was committed on

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established that he was prejudiced by any improper conduct on the part of the prosecutor in this regard.

Third, defendant claims that the prosecutor improperly appealed to the jury's sympathy by repeatedly referring to Mr. Williamson as "the victim" during opening statement and by describing Mr. Williamson as defenseless and helpless. A prosecutor is not permitted to appeal to the jury's sympathy for a victim.[17] While a prosecutor may not make a statement of fact to the jury which is unsupported by the record,[18] he or she is free to argue all reasonable inferences arising from the evidence.[19] Reversal is unnecessary where the comments were isolated and were not blatant or inflammatory.[20] Mr. Williamson was clearly a "victim" of an alleged crime and, therefore, the prosecutor was not prevented from referring to him as such. Furthermore, the prosecutor's isolated comments referring to Mr. Williamson as defenseless do not require reversal. They supported the prosecution theory that defendant did not act in self-defense as Mr. Williamson was, in fact, unarmed.

Fourth, defendant argues that the prosecutor elicited testimony from Hattie Williamson regarding Mr. Williamson's nonaggressive nature before defendant placed his character at issue in violation of MRE 404(a)(2). Character evidence is generally inadmissible to prove action in conformity therewith.[21] When a defendant charged with homicide asserts self-defense, however, the accused may offer evidence of the alleged victim's aggressive character. The prosecutor may then offer rebuttal evidence regarding the victim's peaceful character.[22] The prosecutor did elicit this testimony before defendant presented any evidence of Mr. Williamson's character. However, defense counsel raised the defense theory of self-defense in opening statement and argued that Mr. Williamson threatened defendant with violence. Defense counsel later presented Mrs. Norman's testimony that she knew Mr. Williamson to be a "very aggressive" person who was "loud" and had "a nasty mouth." Accordingly, any error in the prosecutor's timing did not prejudice defendant.

Fifth, defendant contends that the prosecutor improperly and repeatedly elicited testimony from Mr. Ford, a prosecution witness, that the shooting "should have never happened." The prosecutor's line of questioning was leading and asked for speculation about the shooting. Yet, Mr. Ford specifically testified that he could not see Mr. Williamson and could not hear all of the argument. As Mr. Ford admitted that he could only form a limited opinion, this error did not likely affect the outcome of defendant's trial.

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several occasions. Defense counsel was able to question Mrs. Williamson about these hospitalizations on cross-examination and the jury was never informed of the error.

[17] *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

[18] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

[19] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[20] *Id*. at 591-592.

[21] MRE 404(a).

[22] MRE 404(a)(2).

Defendant also contends that the prosecutor improperly impeached Mr. Ford's testimony that he heard Mr. Williamson threaten defendant by using his prior inconsistent statement to the police.[23] Defendant's testimony on cross was inconsistent with his testimony on direct, and his statement to the police, that he could not hear the dispute between defendant and Mr. Williamson. Mr. Ford stated that he could only hear some loud profanity, as the television was too loud. The credibility and truthfulness of a witness offering relevant testimony is itself a relevant issue.[24] Given the inconsistencies in Mr. Ford's testimony at trial, the prosecutor properly introduced his prior statement as impeachment evidence.

Defendant further asserts that the prosecutor improperly invaded the province of the jury to determine the credibility of the witnesses by subsequently asking Mr. Ford whether his testimony was a lie. As defense counsel raised a timely objection, we review this challenge de novo to determine whether defendant was denied a fair and impartial trial.[25] "[T]he prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial."[26] Just before this line of questioning, Mr. Ford eventually admitted that, although he testified that he heard Mr. Williamson accuse defendant of stealing $300 million, he actually only heard of this accusation through defendant. Mr. Ford's testimony regarding what he heard during the argument between defendant and Mr. Williamson changed throughout his examination. When viewed in context, the prosecutor's repeated questioning regarding the truthfulness of Mr. Ford's testimony was justified and not improper.

Sixth, defendant argues that the prosecutor improperly denigrated defense counsel and the defense theory. Defendant contends that the prosecutor repeatedly indicated that defense counsel's questions to Mr. Ford were leading and suggestive and that Mr. Ford merely agreed with everything defense counsel asked. Defendant further contends that the prosecutor told the jury that defense counsel was lying. A prosecutor may not personally attack defense counsel.[27] However, "the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence."[28]

During her questioning of Mr. Ford, the prosecutor did accuse Mr. Ford of changing his testimony and agreeing with every remark made by defense counsel. However, the prosecutor was attempting to impeach Mr. Ford's inconsistent testimony. The prosecutor also interrupted defense counsel's closing argument and stated, "Counsel, you know that is not true." This was in response to defense counsel's assertion that Mr. Williamson had been convicted of carrying a

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[23] Mr. Ford's statement to the police was used for impeachment purposes only and was not introduced into evidence or placed before the jury.

[24] *People v Mills*, 450 Mich 61, 73; 537 NW2d 909 (1995).

[25] *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

[26] *Id.* at 452.

[27] *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003).

[28] *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995).

concealed weapon. As the evidence showed that Mr. Williamson had only been charged with this offense, the prosecutor's objection was accurate. Finally, the prosecutor did infer in closing that defense counsel made untrue statements. However, this statement was made in response to defense counsel's attempts to elicit testimony regarding the numerous hospitalizations detailed in another man's medical records. Viewed in context, the prosecutor's comments do not rise to the level of reversible error.

Seventh, defendant contends that the prosecutor mischaracterized evidence and introduced facts not in evidence by arguing that defendant shot Mr. Williamson through the heart and stating that the exterior door of the house was locked. A prosecutor may not argue facts unsupported by the evidence.[29] However, it could reasonably be inferred from the testimony of the medical examiner that defendant shot Mr. Williamson in the heart. In fact, defense counsel similarly summarized this medical evidence. While there was no evidence that the exterior door was locked, it is unlikely that this brief remark affected the outcome of defendant's trial. Accordingly, reversal is not warranted.

Eighth, defendant argues that the prosecutor improperly vouched for Hattie Williamson's credibility by stating in closing that she "testified honestly" regarding Mr. Williamson's character. A prosecutor may not imply that he or she has special knowledge that a witness is testifying truthfully.[30] While this remark was improper, the prosecutor immediately emphasized other evidence corroborating her testimony that Mr. Williamson was not aggressive. Accordingly, this remark also does not warrant reversal.

Finally, defendant claims that the prosecutor improperly injected her personal opinion regarding the evidence during closing argument by noting "I think there is some element that Mr. Williamson['s] life is not as worthy as Mr. Willis's here. . . . [T]he law says that he's guilty of murder." A prosecutor is free to argue that the evidence demonstrates that the defendant is guilty.[31] "If the prosecutor says 'I believe' rather than 'the evidence shows', this in and of itself does not constitute reversible error."[32] The prosecutor properly argued that the evidence showed that defendant was guilty and that defendant's claim of self-defense was unsupported. While the prosecutor was particularly aggressive and crossed the bounds of propriety several times, defendant has not established that he was deprived of a fair and impartial trial due to any misconduct by the prosecutor.[33]

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[29] *Stanaway*, *supra* at 686.

[30] *Bahoda*, *supra* at 276.

[31] *People v Erb*, 48 Mich App 622, 632; 211 NW2d 51 (1973).

[32] *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

[33] Defendant also contends that the trial court improperly failed to control the prosecutor's conduct during the trial. However, as we have determined that the prosecutor did not commit any error that affected the outcome of defendant's trial, this claim is without merit.

III. Ineffective Assistance of Counsel

Defendant also asserts that he was denied a fair trial by the ineffective assistance of counsel at trial and sentencing. Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[34] To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different.[35] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[36]

First, defendant contends that defense counsel improperly advised him not to testify in his defense. Generally, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."[37] The failure to introduce evidence or call witnesses can constitute ineffective assistance of counsel when it deprives a defendant of a substantial defense; i.e., one that might have affected the outcome of the trial.[38]

At the *Ginther* hearing, defense counsel testified that defendant did not want to testify at trial. She further testified that she advised defendant not to testify to prevent the inadvertent admission of harmful evidence against him. Although he had not been charged with any crime, defendant had fatally shot individuals attempting to enter his home on two prior occasions. Defendant also admitted at the hearing that he never told defense counsel that he wanted to testify. Under the circumstances, defense counsel's advice was part of a sound trial strategy in which defendant acquiesced. Furthermore, defendant was not deprived of a substantial defense. Counsel elicited testimony from Mr. Ford and Mrs. Norman, and introduced defendant's statement to the police, to support defendant's claim of self-defense. Accordingly, defense counsel was not ineffective for advising defendant to refrain from testifying.

Defendant also challenges counsel's failure to raise timely and specific objections to numerous instances of alleged prosecutorial misconduct. At the *Ginther* hearing, defense counsel explained that she does not object during opening statement and closing arguments, preferring to respond in her own arguments. She also indicated that she responded to the prosecutor's improper conduct during trial through her own questions to the witnesses as the trial court continually ruled against her objections. As previously noted, many of defendant's challenges did not rise to the level of prosecutorial misconduct. Those instances in which the prosecutor's conduct was improper did not warrant reversal. Defense counsel explained her

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[34] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[35] *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

[36] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[37] *Rockey*, *supra* at 76.

[38] *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

strategy for failing to raise timely and specific objections to every instance of improper conduct. We will not second-guess that strategy with the benefit of hindsight.[39]

Defendant argues that defense counsel failed to adequately rehabilitate Mr. Ford after the prosecutor impeached his testimony. However, the record clearly shows that counsel repeatedly used consistent remarks in Mr. Ford's statement to the police and during his preliminary examination testimony to bolster his credibility. Counsel elicited testimony that she had not spoken with Mr. Ford prior to trial. She noted at the *Ginther* hearing that the prosecutor's questioning of Mr. Ford was aggressive and that she did not want the trial to become a "boxing match" between the attorneys. Defense counsel also believed that the prosecutor "would lose brownie points by beating up on her own witness." We will not substitute our judgment for that of trial counsel on matters of trial strategy.[40] Defendant has not overcome the presumption that this strategy was sound.

Defendant also contends that his counsel deficiently failed to discover and introduce Mr. Williamson's medical records to establish his history of mental illness. Defense counsel admitted at the *Ginther* hearing that she did not have these records during trial. She had received another individual's records and did not discover the mistake until after trial. The medical records of James Williamson, discovered by appellate counsel after trial, revealed that Mr. Williamson had been involuntarily committed based on his mother's allegations that he had threatened her life.

Defense counsel was clearly deficient in failing to discover her mistake until after trial and we do not condone her performance. Defense counsel clearly could have used this evidence to impeach Hattie Williamson's testimony that her son was not aggressive. However, counsel did elicit testimony that Mr. Williamson had been institutionalized in the past and, based on the erroneous medical records, counsel questioned Mrs. Williamson about other hospitalizations. Mr. Williamson obviously met the standard for involuntary commitment based on the danger he posed to others.[41] This evidence would certainly have strengthened defendant's claim of self-defense by establishing that he had a credible reason to fear Mr. Williamson. Looking at this case in its entirety, however, we do not find reversible error. Defendant shot an unarmed man through a closed door. Defendant could have retreated and shut and locked the interior door.[42] It is possible, based on this evidence, that the jury could have found mitigating factors to convict defendant of the reduced charge of manslaughter. However, defendant did not refute counsel's testimony at the *Ginther* hearing that he refused to request the lesser offense instruction. Under the circumstances, counsel's error does not warrant granting a new trial.

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[39] *Rockey*, *supra* at 76-77.

[40] *Id*.

[41] MCL 330.1401.

[42] Albeit, defendant could not have called the police, as Mr. Williamson had taken his only phone.

Finally, defendant claims that counsel was ineffective in failing to object to the miscalculation of his sentencing guidelines range. Defendant was incorrectly assessed ten points for PRV 6. PRV 6 is scored ten points when "[t]he offender is . . . on bond awaiting adjudication or sentencing for a misdemeanor."[43] Defendant conceded that he had an outstanding bench warrant or capias for a misdemeanor charge between his conviction and sentencing in this case. Therefore, defendant should have been scored five points for PRV 6.[44] Defendant was also assessed 25 points for OV 3, for causing a "[l]ife threatening or permanent incapacitating injury . . . ."[45] However, this Court recently held that "in cases in which one hundred points cannot be awarded because the sentencing offense is a homicide as defined by the statute, the appropriate sentencing score for OV 3 is zero points."[46] Therefore, the trial court should have assessed zero points for OV 3.

Had defense counsel objected to the improper scoring of these variables, and the trial court made the proper corrections, defendant's minimum sentencing guidelines range would have changed from 180 to 300 months or life to 162 to 270 months. Although the trial court incorrectly amended the range to 144 to 240 months, it did not amend defendant's minimum sentence. Resentencing is unnecessary where the trial court would have imposed the same sentence irrespective of the error in scoring.[47] As defendant's minimum sentence of 240 months' imprisonment is within the corrected minimum sentencing guidelines range, we need not remand for resentencing based on defense counsel's errors. However, we remand for the ministerial task of correcting defendant's PSIR.[48]

IV. Defendant's Oral Statements to the Police

At trial, the prosecutor elicited testimony from Detroit police officer Nakinya Floyd, who arrived on the scene first, that defendant admitted to shooting Mr. Williamson. The prosecutor objected on hearsay grounds when defense counsel attempted to elicit testimony that defendant also told Officer Floyd that Mr. Williamson threatened him just before defendant shot him. Defense counsel asserted that the entire statement to Officer Floyd should be admitted, as it contained both inculpatory and exculpatory statements, was an excited utterance or present sense impression, and was necessary under the rule of completeness. However, the trial court excluded the remainder of defendant's oral statement to Officer Floyd. On appeal, defendant asserts that the prosecutor improperly fought the admission of his complete statement, that defense counsel

[43] MCL 777.56(1)(c).

[44] MCL 777.56(1)(d). Following the *Ginther* hearing, the trial court improperly determined that defendant should not have been scored for this variable.

[45] MCL 777.33(1)(c).

[46] *People v Brown*, 265 Mich App 60, 65; 692 NW2d 717 (2005).

[47] *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

[48] MCL 777.14(6); MCR 6.425(D)(3)(a); *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001).

was ineffective for failing to provide an adequate basis to support its admission, and that the trial court improperly excluded this evidence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[49] However, a party's own admissions, when introduced by a party-opponent, are not hearsay.[50] Therefore, defendant's admission to Officer Floyd that he shot Mr. Williamson was admissible when introduced by the prosecutor.

The prosecutor did not improperly fail to introduce the remainder of the statement, nor did she improperly object to its admission. The rule of completeness provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.[51]

This rule only applies when a defendant seeks to have a complete writing or recorded statement introduced following the introduction of an excerpt by the opposing party.[52] "MRE 106 does not have any bearing on the admissibility of the testimony that the prosecution introduced, except that it might have allowed defendant to supplement the prosecution's proofs."[53] The prosecutor sought only to introduce defendant's oral statement to Officer Floyd when she arrived on the scene, not her written report. The statement introduced by the prosecutor against defendant was admissible and the prosecutor had no duty to introduce the remainder.

Furthermore, contrary to defendant's assertion, defense counsel raised several grounds to support the admission of the remainder of his oral statement to Officer Floyd. Although she did not cite the proper rule of evidence when she referred to the rule of completeness, she did raise two exceptions to the hearsay rule to support the admission of defendant's statement. Accordingly, defendant's claim that defense counsel was ineffective in this regard is without merit.

While the prosecutor properly fought against and defense counsel effectively advocated for the admission of this evidence, the trial court improperly denied defense counsel's request to admit defendant's oral statement to Officer Floyd that Mr. Williamson had threatened him. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[54] However, when a trial court's decision regarding the admission of evidence

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[49] MRE 801(c).

[50] MRE 801(d)(2)(A); *People v Herndon*, 246 Mich App 371, 408; 633 NW2d 376 (2001).

[51] MRE 106.

[52] *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002).

[53] *Id.*

[54] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

involves a preliminary question of law, we review the issue de novo.[55] Defendant sought to admit this statement for the truth of the matter asserted as support for his claim of self-defense. Accordingly, it would be inadmissible hearsay if it did not fit within an exception to the hearsay rule.[56]

The trial court should have admitted defendant's statement regarding Mr. Williamson's threat as a present sense impression. Pursuant to MRE 803(1), "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible as an exception to the hearsay rule.

> The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be "substantially contemporaneous" with the event.[57]

Defendant's statement met all of these requirements. Furthermore, the statement was corroborated by the testimony of Mr. Ford and Mrs. Norman recounting Mr. Williamson's threats.[58] However, the content of Mr. Williamson's threats did reach the jury through the testimony of Mr. Ford and Mrs. Norman. Accordingly, the trial court's error was harmless and does not warrant reversal.[59]

V. Great Weight of the Evidence

Defendant contends that his convictions were against the great weight of the evidence, as the prosecutor failed to prove the absence of self-defense beyond a reasonable doubt. We review such challenges to determine whether "the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand."[60] Conflicting evidence and questions of witness credibility are insufficient grounds for granting a new trial on this basis as such contests are in the sole province of the jury.[61] The trial court, and this Court, must defer to the jury's determination unless the evidence "defied physical realities" or the testimony "was

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[55] *Id.*

[56] MRE 801(c); MRE 803.

[57] *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998), quoting *United States v Mitchell*, 145 F3d 572, 576 (CA 3, 1998).

[58] *Id.* at 237-238.

[59] *Lukity*, *supra* at 495-496.

[60] *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

[61] *Id.* at 643, quoting *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992).. See also *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

so far impeached that it was 'deprived of all probative value'" and could not be believed by any reasonable juror.[62]

Defendant was convicted of second-degree murder which requires proof of "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse."[63]

> [T]he killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force.[64]

A person has no duty to retreat before resorting to deadly force in self-defense when he or she is faced with a "sudden and violent attack," he or she reasonably believes that the attacker is armed with a deadly weapon, or he or she is otherwise required to resort to deadly force within his or her dwelling.[65] Once alleged, the prosecutor has the burden to prove that the defendant did not act in self-defense.[66]

Defendant presented evidence that Mr. Williamson's mental health had deteriorated to a point where his family wanted to have him committed. Defendant also presented evidence that Mr. Williamson threatened him just before he shot. However, the prosecutor presented evidence that Mr. Williamson's mental illness did not cause him to be violent and aggressive. The jury heard varying accounts regarding the confrontation between defendant and Mr. Williamson from Mr. Ford, Mrs. Norman, and through defendant's written statement to the police. The jury's verdict was not against the great weight of the evidence. We give great deference to the jury's determination, as the trier of fact, regarding the credibility of the witnesses and which theory they chose to believe,[67] and will not interfere with the jury's verdict.

VI. Cumulative Error

Defendant also asserts that the cumulative effect of numerous errors throughout these proceedings deprived him of a fair trial. The cumulative effect of numerous, actual errors "can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would

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[62] *Lemmon*, *supra* at 645-646 (internal citation omitted).

[63] *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). Defendant was also convicted of felony-firearm, which requires proof that "the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). It is undisputed that defendant possessed a firearm; defendant only contends that the evidence establishes that the killing was justified.

[64] *Riddle*, *supra* at 119.

[65] *Id*. at 119-121.

[66] *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

[67] *Lemmon*, *supra* at 642-643.

not."[68] "The effect of the errors must [be] seriously prejudicial in order to warrant" reversal.[69] As previously noted, several errors did occur during defendant's trial, none of which was outcome determinative. Defense counsel adequately presented defendant's claim of self-defense and combated the prosecutor's improper conduct. Accordingly, reversal is not warranted.

We affirm defendant's convictions and sentences. However, we remand for the ministerial task of correcting defendant's PSIR. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[68] *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

[69] *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).