

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 29, 2012

v

VINCENT EDWARD HUDSON,

Defendant-Appellant.

No. 303437
Oakland Circuit Court
LC No. 2010-234459-FH

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant Vincent Edward Hudson of possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to consecutive prison terms of 1-1/2 to 7-1/2 years and two years. Defendant appeals as of right and raises several issues for appeal. We affirm.

I. PERTINENT FACTS

At about 3:00 a.m. on October 26, 2010, officers from the Southfield Police Department went to an Embassy Suites Hotel in a response to dispatch reporting an assault. The officers encountered a young man, Collin Petri, sitting in the lobby. Petri was "very coherent" but appeared to be a "little distraught" and "intoxicated a little bit." Petri informed the officers that he had been assaulted at a townhouse "down the street." Petri also informed the officers that there was a pistol at the location. On the basis of this information, the officers decided to go to the townhouse.

Petri directed the officers to a complex of townhomes and then, specifically, to a row of four townhomes that were connected to each other. The subject townhouse was "somewhere in the middle" of the row. When the officers parked and exited their cars, they could hear voices from one area behind the row of townhomes. The officers walked around both sides of the row of townhomes to the backyard so that the people behind the townhomes could be contained. The backyard was an "open backyard" that was shared by all of the occupants of the four townhomes. Behind the backyard was a ten-foot high brick wall separating the backyard from a highway. When the officers got to the backyard, they saw five people, including defendant, "sitting at a table" at a patio of the subject townhouse where defendant and his grandmother resided. The people were "relatively calm" and "just hanging out." According to one officer, the people were

surprised to see the officers. The officers ordered everyone not to move and gathered their identification.

One officer noticed that defendant's mannerisms were different than the other individuals. Defendant did not make eye contact when he was questioned by the officers, and he made motions indicating that he was trying to conceal or hide something, including several adjustments to his legs and groin area. On the basis of defendant's movements and demeanor, an officer performed a pat-down search on defendant. The officer immediately felt a handgun in defendant's "crotch area." The officer then obtained the handgun, which was "between [defendant's] underwear and his body." The weapon was cocked and locked but did not have a bullet or magazine in it. The officers ultimately arrested defendant.

II. IMPEACHMENT EVIDENCE

Defendant first argues that his convictions should be reversed because the trial court erroneously admitted impeachment evidence pertaining to defendant and another defense witness. We agree that the trial court erred when determining the admissibility of the impeachment evidence at issue; however, we conclude that the admission of the evidence was harmless.

We review defendant's challenge to the trial court's admission of impeachment evidence under MRE 609 for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003); *People v Hicks*, 185 Mich App 107, 110; 460 NW2d 569 (1990). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012).

MRE 609 governs the impeachment of a witness by admission of evidence that the witness has been convicted of a crime, stating in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

* * *

(e) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding.

In this case, the trial court permitted the prosecutor to introduce evidence of (1) defendant's prior conviction for second-degree home invasion and (2) defense witness Samantha Johnson's juvenile adjudication for second-degree home invasion. The court explained its ruling as follows:

The requirement here that the Court is looking at is the probative value being substantially outweighed by the prejudicial affect or the danger of unfair prejudice.

And in this kind of situation it's clearly a toss up [sic]. It's a toss up [sic] in the sense that the jury may factor it in, they may not factor it in, but it does bear upon the question--the first line in 3.04 [sic] you may consider only in deciding whether you believe the defendant is truthful.

The Court does not find that the probative value is substantially outweighed by the danger of unfair prejudice and, therefore, rules in the People's favor. He--it may be used by the People.

Regarding Johnson, the trial court stated, "But I don't see--actually I don't see how the ruling differs that much for the other one."

With respect to the evidence of defendant's prior conviction, MRE 609 required the trial court to determine whether the evidence had "significant probative value on the issue of credibility . . . and that the probative value of the evidence outweigh[ed] its prejudicial effect." MRE 609(a)(2)(B). When determining probative value, the trial court was required to "consider only the age of the conviction and the degree to which the conviction was indicative of veracity." MRE 609(b). When determining prejudicial effect, the court was required to consider "only the conviction's similarity to the charged offense and the possible effects on the decisional process if

admitting the evidence cause[d] the defendant to elect not to testify.” *Id.* MRE 609(b) required the trial court to articulate its analysis of each factor on the record. The trial court, however, did not articulate its analysis of each factor on the record. Furthermore, it did not correctly apply the balancing test provided in MRE 609; rather, it stated that it did not find that the “probative value was substantially outweighed by unfair prejudice,” which is a reference to MRE 403. With respect to the evidence of Johnson’s juvenile adjudication, MRE 609(j) required the trial court to determine whether Johnson’s testimony about her prior conviction was “necessary for a fair determination of the case.” Yet, the trial court did not analyze the introduction of Johnson’s conviction in this manner.

While the trial court erred in these respects, we conclude that any erroneous admission of the evidence (assuming without deciding that it would not have passed muster under MRE 609) was harmless. A preserved nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 494-496; 596 NW2d 607 (1999); *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008) (“Evidentiary errors are nonconstitutional.”). Here, the evidence against defendant was strong. The parties stipulated that defendant was a felon, and there was substantial testimony that defendant possessed the firearm. Defendant’s theory of defense was that he was under duress when he possessed the firearm and that the firearm was not his. Thus, the credibility of defendant and the witnesses supporting his theory of defense were important in this case. The evidence of defendant’s and Johnson’s prior convictions was used solely for purposes of impeachment. Specifically, during its instructions to the jury, the trial court instructed the jury that it was to consider their past convictions only for the purpose of determining their credibility. Thus, we presume that the jury only considered this erroneously admitted evidence for purposes of impeachment. See *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009) (“Jurors are presumed to follow their instructions”). Significantly, however, there was additional evidence attacking the credibility of defendant and Johnson independent of the erroneously admitted impeachment evidence. With respect to Johnson, the jury received evidence that she was currently in a romantic relationship with defendant, which is evidence of bias that is probative of Johnson’s credibility. See generally *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). And, with respect to defendant, the prosecution introduced evidence that defendant attempted to influence the testimony of other witnesses. See *People v Jones*, 75 Mich App 261, 275; 254 NW2d 863 (1977) (“It was not improper for the prosecutor to ask the witness questions designed to reveal whether [the witness] had discussed the case with other witnesses or attempted to influence their testimony. A witness’s interest or bias is a proper basis for attacking his credibility.”). Given this independent impeachment evidence admitted at trial, the erroneous admission of the evidence of defendant’s and Johnson’s convictions, which the jury considered only for purposes of impeachment, was cumulative impeachment evidence. Generally, the erroneous admission of evidence is harmless when the erroneous evidence is cumulative of properly admitted evidence; here, the force of the erroneous impeachment evidence was diminished because it was cumulative. See *People v Matuszak*, 263 Mich App 42, 52; 687 NW2d 342 (2004) (erroneously admitted evidence is harmless where it is cumulative); *People v Grissom*, 492 Mich 296; ___NW2d___ (2012) (“[T]he force of impeachment evidence . . . is diminished . . . when the impeachment evidence is cumulative”), slip op at 13 n 38. Given the strength of the remaining evidence against defendant and the independent impeachment evidence pertaining to defendant and Johnson, assuming the trial court erroneously admitted

defendant's and Johnson's convictions, doing so did not more probably than not affect the outcome. See *Lukity*, 460 Mich at 494-496.

Accordingly, the trial court's admission of the impeachment evidence was harmless.

III. ABSENCE OF COUNSEL DURING PROCEEDINGS

Defendant next argues that his convictions should be reversed because the trial court violated his right to counsel at a critical stage of the trial when, in the absence of defense counsel, it selected a juror "to be held in abeyance," told the jury how to fill out the verdict form, and told the jury to take its time deliberating. We conclude that, although the trial court's decision to proceed in the absence of defense counsel (who was late for court) was inappropriate, counsel was not absent during a critical stage of the proceedings. Therefore, defendant is not entitled to reversal absent a showing of prejudice, which he has not established.

"The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal proceedings." *Iowa v Tovar*, 541 US 77, 87; 124 S Ct 1379; 158 L Ed 2d 209 (2004). "[A] trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v Cronin*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Therefore, the Supreme Court of the United States "has uniformly found constitutional error without any showing of prejudice when counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n 25; see also *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000) ("[T]he complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.'").

A critical stage of trial for purposes of the right to counsel has been defined in several ways. For example, the Supreme Court of the United States has characterized it as follows: a stage "where counsel's absence might derogate from the accused's right to a fair trial," *United States v Wade*, 388 US 218, 226; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); "a step of a criminal proceeding . . . that held significant consequences for the accused," *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002); and a stage where "potential substantial prejudice to [a] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice," *Wade*, 388 US at 227. Moreover, this Court has defined a critical stage "to mean prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel." *People v Donaldson*, 103 Mich App 42, 48; 302 NW2d 592 (1981), quoting *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969).

A judge's communication with a juror is not necessarily a critical stage. See *Rushen v Spain*, 464 US 114, 117-120; 104 S Ct 453; 78 L Ed 2d 267 (1983) (stating that an ex parte communication between a judge and a juror can be harmless error). In the context of where a jury has begun deliberating, giving a new, nonstandard supplemental jury instruction is a critical stage. *French v Jones*, 332 F3d 430, 438 (CA 6, 2003). However, rereading instructions originally given to a jury is not a critical stage. *Hudson v Jones*, 351 F3d 212, 216-217 (CA 6, 2003). In *People v France*, 436 Mich 138, 142-144; 461 NW2d 621 (1990), the Michigan Supreme Court set forth an analysis to determine whether a trial court's ex parte communication

with a jury requires reversal by categorizing the communication into one of three categories: substantive, administrative, or housekeeping. *Id.* at 142-143. The Court defined these categories as follows:

Substantive communication encompasses supplemental instruction on the law given by the trial court to a deliberating jury. A substantive communication carries a presumption of prejudice in favor of the aggrieved party, regardless of whether an objection is raised.

* * *

Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication has no presumption of prejudice. The failure to object when made aware of the communication will be taken as evidence that the instruction was not prejudicial.

* * *

Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general “housekeeping” needs that are unrelated in any way to the case being decided. [*Id.* at 163-164.]

We conclude that defendant’s counsel was not absent during a critical stage of the proceedings. The trial court did the following in counsel’s approximate three-minute absence: (1) conducted a “drawing out of the box of which juror [was] going to be held in abeyance”; (2) told the jury that it could answer the counts on the verdict form in whatever order it wanted and that the foreman must sign, date, and return the verdict form to the courtroom when the jury was ready to return a verdict; and (3) told the jury to take all the time it needed to deliberate. While the factual and legal context of this case is not the same as *France*, characterizing the trial court’s actions in this case as substantive, administrative, or housekeeping is a helpful starting point to determine whether defense counsel was absent during a critical stage of the proceedings as defined by the Supreme Court of the United States. Here, the trial court’s conduct was not substantive as it did not provide further instruction with respect to issues of law already given in the presence of defendant’s attorney. The court’s actions were not merely housekeeping because they were not “unrelated in any way to the case being decided.” *Id.* at 164. Rather, the court’s actions were administrative, which are not presumed prejudicial. See *id.* at 163-164.

Considering how both this Court and the Supreme Court of the United States have defined a critical stage of a proceeding, it is apparent that counsel was not absent during a critical stage. The administrative actions of randomly selecting an alternate juror out of a box and telling the jury how to fill out the verdict form and to take its time deliberating did not constitute “prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel.” *Donaldson*, 103 Mich App at 48. Similarly, this stage of trial did not necessitate counsel’s presence to avoid prejudice from confrontation. See *Wade*, 388 US at 227. Moreover, randomly selecting an alternate juror and

telling the jury how to fill out the verdict form and to take its time deliberating are not steps of a trial that hold “significant consequences for the accused.” *Bell*, 535 US at 696. Finally, this stage of trial would not derogate from defendant’s right to a fair trial. See *Wade*, 388 US at 226.

Accordingly, counsel was not absent during a critical stage of the proceedings. Therefore, defendant is not entitled to reversal absent a showing of prejudice, which defendant has not demonstrated in this case.

IV. ASSISTANCE OF COUNSEL WITH RESPECT TO THE OFFICER’S SEARCH OF DEFENDANT AND SEIZURE OF THE FIREARM

Defendant’s final argument is that he was deprived of the effective assistance of counsel. Defendant asserts that his trial counsel unreasonably failed to move the trial court to suppress the firearm that he was convicted of possessing on the basis of an unconstitutional search and that counsel’s failure to do so was prejudicial. We disagree.

Whether defendant was denied effective assistance of counsel is a question of constitutional law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We generally review a trial court’s findings of fact for clear error and questions of constitutional law de novo. *Id.* However, defendant did not preserve his claim of ineffective assistance of counsel by moving for an evidentiary hearing; therefore, our review of defendant’s unpreserved claim is limited to mistakes apparent in the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Brasic*, 171 Mich App 222, 232; 429 NW2d 860 (1988).

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel’s performance was so deficient “that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 US at 687. To do so, defendant must show that his counsel’s performance “fell below an objective standard of reasonableness” under prevailing professional norms. *Id.* at 687-688. Courts strongly presume that counsel rendered adequate assistance. *Id.* at 690. Second, defendant must show that his counsel’s deficient performance prejudiced the defense. *Id.* at 687. To do so, “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV.]

The Michigan Constitution provides an analogous provision: “The person, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or thing shall issue without describing them, nor without probable cause, supported by oath or affirmation.” Const 1963, art 1, § 11. Absent a

compelling reason to impose a different interpretation, we construe art 1, § 11 as providing the same protection as that secured by the Fourth Amendment. *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

The Supreme Court of the United States has explained that “[t]he touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’” *California v Ciraolo*, 476 US 207, 211; 106 S Ct 1809; 90 L Ed 2d 210 (1986), quoting *Katz v United States*, 389 US 347, 360; 88 S Ct 507; 19 L Ed 2d 576 (1967) (HARLAN, J., concurring). Justice Harlan’s concurrence in “*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?” *Id.* Recently, however, the Supreme Court emphasized that “Fourth Amendment rights do not rise or fall with the *Katz* formation.” *United States v Jones*, ___US___; 132 S Ct 945, 950; 181 L Ed 2d 911 (2012). Indeed, “for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (“persons, houses, papers, and effects”) it enumerates. *Katz* did not repudiate that understanding.” *Id.* Rather, “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.” *Id.* at 952. Thus, either a trespass to persons, houses, papers, or effects or a *Katz* invasion of privacy will be a search under the Fourth Amendment if it is done to find something or obtain information. *Id.* at 950-951 & n 5, 953 n 8.

“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *United States v US Dist Court for Eastern Dist of Mich, Southern Div*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972). “It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004), quoting *Payton v New York*, 445 US 573, 586; 100 S Ct 1371; 63 L Ed 2d 639 (1980). Furthermore, the Fourth Amendment protections attached to a home extend to the curtilage of a home, i.e., the land immediately surrounding and associated with the home. See, e.g., *United States v Dunn*, 480 US 294, 300; 107 S Ct 1134; 94 L Ed 2d 326 (1987); *Oliver v United States*, 466 US 170, 180; 104 S Ct 1735; 80 L Ed 2d 214 (1984). “The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself.” *Dunn*, 480 US at 300. “The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.” *Ciraolo*, 476 US at 212-213. Indeed, as the Supreme Court has explained, “[t]he curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.” *Dow Chem Co v United States*, 476 US 227, 235; 106 S Ct 1819; 90 L Ed 2d 226 (1986). Thus, the curtilage of a home is considered “part of the home itself for Fourth Amendment purposes.” *Oliver*, 466 US at 180.

“[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.” *Dunn*, 480 US at 300. The Supreme Court of the United States has identified “the central component of this inquiry as whether the area harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.” *Id.* (quotation omitted). Furthermore, to

assist courts in determining the extent of a home's curtilage, the Court in *Dunn* directed courts to consider four factors:

[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by. [*Id.* at 301.]

Importantly, the *Dunn* Court cautioned that the factors are not “a finely tuned formula that, when mechanically applied, yields a ‘correct’ answer to all extent-of-curtilage questions.” *Id.* In addition, no one factor, such as the presence of a fence, is dispositive. See *id.* at 301 n 4 (rejecting a rule that curtilage should extend no further than the first fence surrounding a fenced house). As courts applying the *Dunn* factors have shown, an area of a home can be curtilage even in the absence of a fence or when neighbors have a view of the area. See, e.g., *Hardesty v Hamburg Twp*, 461 F3d 646, 653 (CA 6, 2006) (area can be curtilage even when it is visible to neighbors); *State v Wilson*, 229 Wis 2d 256, 264-266; 600 NW2d 14 (1999) (area of backyard where officer detected odor of marijuana was curtilage even though it was not enclosed); *Brown v State*, 75 Md App 22, 31; 540 A2d 143 (1988) (enclosed backyard is curtilage even though it can be viewed by occupants of an adjoining duplex); see also *State v Reed*, 182 NC App 109, 112, 114; 641 SE2d 320 (2007) (defendant had a reasonable expectation of privacy on his patio even though the patio was surrounded by a large common grassy area because there was no doubt that the patio was itself part of the defendant's home).

Applying the analysis articulated by the *Dunn* Court, we conclude that the backyard patio where the officers searched defendant was part of the curtilage of defendant's home. First, the patio was in defendant's backyard in close proximity to his home such that it was “an adjunct to the house.” *Dunn*, 480 US at 302. Therefore, the first *Dunn* factor supports a finding of curtilage. See *id.* at 301. Second, the backyard was not completely enclosed; however, it was partially enclosed. Specifically, a ten-foot brick wall behind the backyard and the other townhomes connected to the sides of defendant's home kept defendant's patio outside of the view of the public. Therefore, while the second factor does not strongly support a finding of curtilage as defendant's backyard was not completely enclosed, we consider this factor to be neutral or mildly supporting a finding that the patio was not curtilage. See *id.* Third, the nature of the use to which the patio was put supports a finding of curtilage because it was being used for an intimate activity of the home; when the officers entered the backyard, they saw a “relatively calm” gathering of friends sitting around a table. These “facts indicated to the officers that the use to which the [patio] was being put could . . . fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the [patio] as part of [defendant's] home.” *Id.* at 303; compare *People v Powell*, 477 Mich 860, 861; 721 NW2d 180 (2006) (opining that growing marijuana plants in an unobstructed and open area of a backyard is not an intimate activity whose presence defines the curtilage for Fourth Amendment purposes). Finally, the fourth *Dunn* factor appears to support a finding that defendant's patio was not curtilage because nothing in the record indicates that defendant took steps to protect the patio from observation by people passing by. See *Dunn*, 480 US at 301. However, the presence of both the ten-foot brick wall behind the backyard and the townhomes connected to both sides of defendant's home already left defendant's patio in a position where it could not be observed by people “*passing by*” his home. *Id.* (emphasis added). Given these facts, we consider the fourth

factor to be neutral or only minimally supporting the conclusion that the patio is not curtilage. See generally *id.* (warning courts that the *Dunn* factors are not a finely tuned formula to be applied mechanically).

In sum, two of the *Dunn* factors strongly support the conclusion that the patio was curtilage while the other two factors, at most, mildly support the opposite conclusion. Furthermore, we recognize the Supreme Court's emphatic instruction to courts that an application of the *Dunn* factors should not be mechanically applied but, rather, applied with a view toward the central inquiry of whether the area harbors "an intimate activity associated with the sanctity of a man's home and the privacies of life." *Id.* Focusing on this central inquiry, we conclude that defendant's patio is an area that harbors such activity. See *id.* Distinguishing a backyard and patio from the front of a home, the Court of Appeals of Oregon has stated the following:

Drivers who run out of gas, Girl Scouts selling cookies, and political candidates all go to front doors of residences on a more or less regular basis. Doing so is so common in this society that, unless there are posted warnings, a fence, a moat filled with crocodiles, or other evidence of a desire to exclude casual visitors, the person living in the house has impliedly consented to the intrusion. *Going to the back of the house is a different matter. Such an action is both less common and less acceptable in our society. There is no implied consent for a stranger to do so.* [W]e do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck. [*State v Somfleth*, 168 Or App 414, 422; 8 P3d 221 (2000) (emphasis in original and quotation omitted).]

Similarly, the United States Court of Appeals for the Sixth Circuit has stated the following:

The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways. . . . The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place. [*Dow Chem Co v United States*, 749 F2d 307, 314 (CA 6 1984).]

In circumstances where the front of a home is, as it normally is, the method for an unknown individual to contact someone at a home, society would certainly consider it unacceptable for that individual to go to a backyard patio uninvited. The plain explanation for this is that a backyard patio harbors intimate activities associated with the sanctity of the home and the privacies of life.

Accordingly, the backyard patio where the officers searched defendant was part of the curtilage of defendant's home. Therefore, the search violated defendant's Fourth Amendment

rights because the officers committed a warrantless information-gathering trespass against an item enumerated in the Fourth Amendment: defendant's home. See *Jones*, 132 S Ct at 952-953 & n 5, 8; *Oliver*, 466 US at 180; *Bolduc*, 263 Mich App at 440.

The exclusionary rule applies to exclude evidence obtained as a result of an illegal search or seizure. *Segura v United States*, 468 US 796, 804; 104 S Ct 3380; 82 L Ed 2d 599 (1984). “By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.” *People v Frazier*, 478 Mich 231, 250; 733 NW2d 713 (2007), quoting *Mich v Tucker*, 417 US 433, 447; 94 S Ct 2357; 41 L Ed 2d 182 (1974). Importantly, however, “[t]he fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies.” *Herring v United States*, 555 US 135, 140; 129 S Ct 695; 172 L Ed 2d 496 (2009). The exclusionary rule is not a personal constitutional right designed to redress injury but, rather, a judicially created doctrine that serves to compel respect for the Fourth Amendment. *Id.* at 141; *Davis v United States*, ___US___; 131 S Ct 2419, 2426; 180 L Ed 2d 285 (2011). It is “a harsh remedy” that should be used as a last resort and not on first impulse. *Herring*, 555 US 140; *Frazier*, 478 Mich at 247. The rule “has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.” *Frazier*, 478 Mich at 248.

Application of the rule is restricted to instances where its deterrence benefits outweigh the substantial social costs of detracting from the truth-finding process and allowing those who would otherwise be incarcerated to escape incarceration. *Id.* at 249. Thus, “[i]n determining whether exclusion is proper, a court must evaluate the circumstances of [the] case in the light of the policy served by the exclusionary rule.” *Id.* (quotation omitted). “[T]he deterrent effect of suppression must be substantial and outweigh any harm to the justice system.” *Herring*, 555 US at 147. “The extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct.” *Id.* at 143; see also *Davis*, 131 S Ct at 2427. “[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule.” *Herring*, 555 US at 143 (quotation omitted). “[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.” *Id.* Moreover, the “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Id.* at 144. The rule “serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Id.* “[I]solated, nonrecurring police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion.” *Davis*, 131 S Ct at 2428 (quotation omitted). Moreover, the exclusionary rule “should not be applied to deter objectively reasonable law enforcement activity.” *Id.* at 2429 (quotation omitted).

We conclude that the exclusionary rule should not apply in this case. Initially, we note that it cannot be said that no deterrent purpose would be served by excluding the fruit of the officer's illegal search, *i.e.*, the firearm that defendant possessed. The officers had no right to enter the curtilage of defendant's home without a warrant. Excluding the firearm would instill in both the officers in this case and their future counterparts a greater degree of care toward the Fourth Amendment rights of individuals. However, with that said, we cannot conclude that

deterrence in this case “is worth the price paid by the justice system.” *Herring*, 555 US at 144. Viewing the facts of this case objectively, the officers’ violation of defendant’s Fourth Amendment rights was not particularly flagrant. Whether the officers entered the curtilage of defendant’s home was a close legal question complicated by several facts: defendant’s home was connected to other townhomes, defendant’s backyard was a common area shared by the residents of the connected townhomes, and the backyard was not completely enclosed. Given this factual record, we cannot say that the officers knew or should have known that their search was unconstitutional. See *id.* The benefit of applying the harsh remedy of exclusion in such circumstances does not outweigh the social costs. See *Frazier*, 478 Mich at 249.

In light of our conclusions above, we hold that defendant has not established his claim of ineffective assistance of counsel. While counsel should have asserted a violation of defendant’s Fourth Amendment rights in the trial court, defendant has not established a reasonable probability that, had counsel made the Fourth Amendment argument, the result of the proceeding would have been different. See *Strickland*, 466 US at 694. As discussed above, the fruit of the illegal search should not be excluded pursuant to the exclusionary rule.

V. CONCLUSION

We conclude that neither the trial court’s erroneous admission of impeachment evidence under MRE 609 nor defense counsel’s absence during the short period of trial in this case warrant reversal of defendant’s convictions. We further conclude that defendant has not established his claim of ineffective assistance of counsel. While counsel should have asserted a violation of defendant’s Fourth Amendment rights in the trial court, defendant has not established a reasonable probability that, had counsel made the Fourth Amendment argument, the result of the proceeding would have been different because the fruit of the illegal search should not be excluded pursuant to the exclusionary rule.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane M. Beckering