STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2013
v	No. 302107 Oakland Circuit Court
JONATHAN BELTON, Defendant-Appellant.	LC No. 2009-225093-FC

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

This case arises from the death of Oak Park police officer Mason Samborski in the early morning hours of December 28, 2008. Defendant appeals his jury trial convictions of first-degree murder, MCL 750.316(1)(a), murder of a peace officer, MCL 750.316(1)(c), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent terms of life in prison without parole for his convictions of first-degree murder and murder of a peace officer and concurrent terms of two years in prison for each felony-firearm conviction. For the reasons set forth below, we affirm defendant's convictions but remand for resentencing.

I. JURY INSTRUCTIONS

Defendant argues that the trial court erred when it denied his request for jury instructions on theories of accident and involuntary manslaughter. As discussed by this Court in *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013) (citations and quotation marks omitted):

> We review questions of law arising from the provision of jury instructions de novo. However, we review a trial court's determination whether a jury instruction is applicable to the facts of a case for an abuse of discretion. An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice.

Similarly, this Court reviews "de novo claims of instructional error and determinations whether an offense is a necessarily included lesser offense." *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004).

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "A defendant asserting an affirmative defense[1] must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998) (footnote added). Here, while defense counsel asked questions of various witnesses in an attempt to elicit testimony suggesting accident, the attempt failed and there was simply insufficient evidence of accident to warrant a jury instruction.

Eyewitness Kendiesha Jackson testified that defendant tried to deceive Officer Samborski by pretending to live in Ms. Jackson's apartment complex. She further testified that defendant tried to get an adult female to impersonate his mother after Officer Samborski stopped defendant for a traffic violation. When Officer Samborski became suspicious and indicated that he would take defendant to jail, defendant ran from the officer. Officer Samborski's attempts to restrain defendant were met with physical resistance from defendant, who also ignored the officer's verbal instructions to "stop." Defense counsel suggests that defendant's verbal requests that Samborski "get off of him" implies a struggle resulting in the accidental discharge of the weapon, but the actual testimony provided by Ms. Jackson belies that position. Ms. Jackson saw Officer Samborski and defendant struggling on the stairway when defendant uttered these remarks and no evidence indicates that Officer Samborski's gun was out of its holster at that time. Ms. Jackson saw defendant and Officer Samborski fall down a stairway in the apartment building and testified that she never saw Officer Samborski draw a weapon or have one in his hand. Defendant was positioned on top of Officer Samborski following the fall. Though Ms. Jackson did not see the shot fired, immediately after hearing the shot she saw defendant holding a gun and standing over Officer Samborski. Ms. Jackson also testified that she received a call from defendant using a "517 number," later identified as Officer Samborski's cellular telephone. According to Ms. Jackson, "he told me he was sorry what he – for what he did and he had wanted me to tell his sister that he was at home." Officer Samborski's service revolver and cellular telephone were never recovered.

The medical examiner, Dr. Patrick Cho, testified about the results of the autopsy he conducted on Officer Samborski. Dr. Cho testified that, based on the location of the wound, its trajectory, stippling at the wound site, and the presence of an impact wound from the gun barrel, Officer Samborski was shot at close range and at an angle inconsistent with a self-inflicted wound. Dr. Cho also discounted a theory of accident, noting the absence of any defensive wounds or abrasions on Officer Samborski's hands and the presence of evidence of independent head wounds indicative of a pre-death head trauma, which could have served to impair or incapacitate Officer Samborski. Dr. Cho specifically noted the absence of a "slide injury" from

[1] "An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. . . . It does not negate selected elements or facts of the crime." *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997) (quotation marks and citations omitted).

the recoil of the handgun, which would be expected if Samborski had been holding the gun when it discharged.

During trial, defense counsel repeatedly questioned witnesses about whether they had obtained or uncovered any evidence that this event was the result of an accident or that Officer Samborski was holding the gun when it discharged. Oak Park police officer Walter Duncan responded by denying receipt of any such information. Similar queries were made to Oak Park police officer Troy Taylor. Over the prosecution's hearsay objection, Officer Taylor responded: "Some of the people I did interview indicated that Mr. Belton . . . stated . . . that something happened other than . . . what has been stated in court." Defense counsel also questioned Oak Park police detective Jason Ginopolis regarding evidence that Samborski was holding the gun when it discharged. Detective Ginopolis testified that defendant's friends made contradictory statements, but that some reported that defendant indicated the shooting was accidental.

The trial court did not err when it declined to give the jury an instruction on accident. "To warrant reversal of his convictions, defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict." *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003). The reliability of a verdict is deemed to have been undermined when the evidence at trial clearly would support the provision of the instruction. *People v Heft*, 299 Mich App 69, 73; 829 NW2d 266 (2012). The phrase "clearly supported" means that "there is substantial evidence to support the requested instruction [such] that an appellate court should reverse the conviction." *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). Here, there was no support for the requested instruction. The evidence and testimony all indicated a purposeful act by defendant: (a) by engaging in a scuffle with Officer Samborski, (b) Ms. Jackson's observation of the gun in defendant's hand immediately after hearing the gunshot, and (c) the physical evidence procured by the medical examiner and at the crime scene. The only suggestion of accident came from repeated references by defense counsel. Information gleaned by two police officers from people who did not witness the event, and who were told by defendant that the events unfolded differently than presented at trial, did not "clearly support" an instruction on accident. These statements were hearsay and involved information provided by defendant to friends, none of whom testified at trial. Given the absence of any evidence to support the defense theory of accident, the trial court correctly declined to give the requested instruction to the jury.

The jury instructions, as given by the trial court, permitted the jury to acquit defendant of the charges should the prosecution fail to demonstrate the requisite intent or premeditation to establish the crimes. "To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation." *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); see also *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). The elements of deliberation and premeditation may "be inferred from the circumstances surrounding the killing." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). The *Unger* Court further stated:

> Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the

> homicide. Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough "to allow the defendant to take a second look." Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation. [*Id*. (citations omitted).]

When an intentional act must be established as an element of a crime, "the occurrence of the crime is inconsistent with accident." *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Crimes of homicide that require proof of intent "are excusable if the killing is accidental." *Id*. at 38. It is well-established that a homicide is excusable if the death results from an accident and the perpetrator was not criminally negligent. *Id*. at 38. In *Hess*, this Court defined an "accident" as comprising, in part, "'a fortuitous circumstance, event or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence[.]'" *Id*. at 37 (citation omitted). In *People v Hawthorne*, 474 Mich 174, 184-185; 713 NW2d 724 (2006), our Supreme Court held:

> [W]e agree with the Court of Appeals conclusion that defendant has not met his burden of demonstrating that the failure to instruct on the accident defense undermined the reliability of the verdict. As the Court of Appeals explained, "[t]he jury instructions explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that defendant possessed the intent required for murder."

Because the jury found the requisite intent to convict defendant of the charged crimes, the jury logically and necessarily had to reject the defense theory of accident. Had the jury believed that the shooting death of Officer Samborski was accidental, defendant necessarily would have been acquitted of the charges.

Further, defendant was not deprived of a defense of accident by the trial court's refusal to give the requested jury instruction. "A defendant has a constitutionally guaranteed right to present a defense," and to confront through cross-examination the witnesses against him. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008); *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998); US Const, Am VI; Const 1963, art 1, § 20. Here, defendant elected to not testify and did not present any witnesses, but defense counsel extensively cross-examined witnesses called by the prosecution. Again, defense counsel repeatedly questioned prosecution witnesses regarding the possibility that the shooting was an accident and, in closing arguments, he argued defendant's innocence and lack of evidence that defendant ever handled Officer Samborski's gun. Accordingly, defendant's contention that he was deprived of the opportunity to present a defense is without merit.

Defendant also suggests that a query raised by the jury during its deliberations demonstrates that the failure to provide an instruction on accident was determinative of the outcome in this case. The trial court did receive a note from the jury in the afternoon on November 18, 2010, which read:

> If it is determined that the injury that Officer Samborski received to the head that caused his death was the result of an accident, no matter how the accident occurred or who was to fault for the accident, is a guilty verdict appropriate?

The trial judge read the question to counsel and invited counsel to comment. The prosecution asserted that "accident is not a defense in this case," which prompted the trial court to respond:

> Yes, but the jury is the one who gets to determine the facts. I don't think it's appropriate for me to tell them accident is not a defense to the case.
>
> What . . . I think I should tell them is you, you are the only people who get to determine the facts, you're to apply the law as I gave it to you, and you have the jury instructions and all appropriate options are on the verdict form.

Defense counsel responded to the trial court's proposed instruction as follows:

> Your Honor, I believe that what you had just indicated would be the most appropriate, that it would be left for the jury to decide the appropriate outcome based on the instructions and the verdict form without any further, uh, without any further comment from the court. That would be our position at this time.

The trial judge brought the jury to the courtroom, acknowledged her receipt of the note and its content, and provided the following instruction:

> You, as the jury, are the only people who get to determine the facts of this case. You've heard all of the testimony and so, uh, you are the only ones who can decide what the facts are and, once you determine what the facts are, you apply the law as I've given it to you. And you have that law, uh, you have all the appropriate instructions available to you and you apply the law to the facts as you find them. And all the appropriate, uh, options – all the appropriate verdicts – are given to you on the verdict form.

We hold that defense counsel's affirmative expression of approval of the proposed response by the trial court to the jury's inquiry waives any implied appellate claim of error concerning the instruction. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Further, merely because the jury sought clarification from the trial court does not serve to transform the trial court's refusal to provide an instruction on accident, premised on the lack of evidence adduced at trial to support the instruction, into error requiring reversal. At most, the question demonstrates a level of effectiveness by defense counsel in putting his theory of accident before the jury, which the jury clearly rejected when it declined to acquit defendant of the charges.

Defendant also challenges the trial court's failure to instruct the jury on involuntary manslaughter. Though defendant and the prosecution initially provided the court proposed jury instructions on involuntary manslaughter, the trial court rejected them and declined to include them in the instructions or on the jury verdict form. Defendant did not object to the omission. In addition, earlier in the discussion with the trial court, defense counsel indicated a belief that the

inclusion of an instruction on involuntary manslaughter was inapplicable. As such, defendant's failure to object is construed as a forfeiture of the alleged error and limits appellate review to plain error affecting substantial rights. *Carter*, 462 Mich at 215.

Following indictment for an offense that is comprised of different degrees, a jury may find the defendant guilty of a degree of that offense inferior to that charged in the indictment. MCL 768.32(1); *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). "A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense." *Apgar*, 264 Mich App at 326. Involuntary manslaughter is defined as "the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty," *Mendoza*, 468 Mich at 536, and is a necessarily included offense of murder. *Id*. at 544. Instruction on an inferior offense, such as involuntary manslaughter, "is appropriate only when a rational view of the evidence supports a conviction for the lesser offense." *Id*. at 545.

Here, a rational view of the evidence does not support a conviction for involuntary manslaughter. The defense theory was that defendant never touched the gun and that Officer Samborski's injury was self inflicted and occurred somehow accidentally during the scuffle with defendant. Defendant's theory of accident does not support an unintentional killing or negligence. Because a rational view of the evidence does not support the instruction, the trial court did not abuse its discretion in declining to give a jury instruction on involuntary manslaughter.

II. 404(B) EVIDENCE AND JURY INSTRUCTION

Defendant argues that the admission of testimony and evidence pertaining to an incident involving defendant and a Detroit Public School safety officer that occurred two years before Officer Samborski's death was improper pursuant to MRE 404(b). Defendant further asserts that the trial court erred when it instructed the jury on the limited use of this evidence in expanding its application from simply motive demonstrating defendant's lack of respect for authority figures to also encompass its use for showing a lack of accident or mistake.

Preserved claims of evidentiary error are reviewed for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 379. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), citing MCL 769.26. Errors regarding the admission of evidence are nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). Consequently, the effect of an evidentiary error is discerned by evaluating the error in "the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. Further, this Court reviews "a claim of instructional error involving a question of law de novo, but []

review[s] the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Defendant filed a motion in limine seeking to preclude the admission of evidence of a school incident involving defendant when he was 14 years old. Defendant argued that the proffered evidence failed to demonstrate "motive, intent, preparation, scheme, plan or any other element of the charged offense and could not be used to show defendant's character." Defendant sought to have the trial court exclude the evidence as inadmissible and to determine that it was more prejudicial than probative. The prosecution responded, asserting the information was relevant and admissible under MRE 404(b) because it demonstrated: "(1) defendant's motive for shooting Officer Samborski and (2) that the shooting of Officer Samborski was not a mistake or accident." At oral argument on the motion, the prosecution maintained that the evidence was "very relevant as to motive, as to his knowledge, as to his system in doing an act. All these things show for a proper purpose under the court rule and the case law why it's admissible." The trial court ruled that the evidence was admissible, stating:

> The court believes that the incident is relevant because it demonstrates – it doesn't just say that the defendant is a bad person, what . . . it says is, it demonstrates the defendant's attitude of disregard for authority figures, and I think the facts are somewhat similar to the incident in this case, the assault and the running away, so the court's going to deny the motion to suppress the school incident.

At trial, the prosecution called Cynthia Tyner, the Detroit Public School safety officer involved in the prior incident with defendant. On the morning of March 6, 2006, Tyner was working at the metal detector for male students entering the school. When defendant attempted to pass through the metal detector, it emitted a signal prompting Tyner to approach defendant, instruct him to stop and empty his pockets. Defendant became angry, began cursing and trying to push past Tyner. When Tyner stepped in front of defendant, he struck her in the chest with his closed fist and ran down the hallway. He was stopped by another public safety officer. On cross-examination, defense counsel elicited testimony from Tyner indicating that defendant "went to the juvenile court" for the incident. During cross-examination, defense counsel also posited the following question:

> *Q.* Are you trying to say he's a bad person?
>
> *A.* I'm – I can't answer that. I'm not his parents.

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b) "limits the use of logically relevant evidence only when" the evidence provides an inference regarding a defendant's character from the "defendant's prior misdeeds" and the purpose of the evidence is to show that the defendant acted "in conformity therewith." *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (quotation omitted). Specifically, MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) has been designated to constitute a "rule of inclusion" rather than exclusion. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

The prior school incident was not offered by the prosecution as evidence of defendant's character. As argued at the motion in limine, the prosecution sought only to introduce evidence of the "prior act" and not any subsequent punishment or response by the school system or other legal entity. The incident was similar to the events surrounding Officer Samborski's death because it demonstrated defendant's aggressive response to authority figures. "Evidence of other crimes, wrongs or acts may be offered to prove motive." *Yost*, 278 Mich App at 406. The term "motive" is defined as the "cause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act." *Id.* (quotation marks and citations omitted). In addition, defendant was arguing that Officer Samborski was injured by mistake or accident and not by any intentional act by defendant.

In accordance with MRE 404(b), evidence of defendant's similar behavior in response to confrontations from authority figures was admissible to demonstrate a common plan or system and, therefore, the absence of accident or mistake. Our Supreme Court has recognized "that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000). "Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot." *Id.* at 64. The evidence was relevant to show "the design of the [defendant]." *People v Mardlin*, 487 Mich 609, 618; 790 NW2d 607 (2010). It should be recognized, "[t]o establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Sabin*, 463 Mich at 65-66. Yet, the distinction in this case is that the evidence was not proffered to demonstrate a plan or propensity but rather the absence of accident or mistake. As discussed by our Supreme Court, "[t]he recurrence of similar incidents incrementally reduces the possibility of accident. The improbability of a coincidence of acts creates an objective probability of an actus reus." *Mardlin*, 487 Mich at 619 (citation omitted).

In addition, the trial court's provision of a limiting instruction to the jury designating how the evidence could be used, coupled with the presumption that jurors follow a trial court's instructions, precludes a finding of error. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). And, it was defense counsel at trial who actually questioned the witness whether defendant's prior bad act constituted evidence of his flawed character. "[A]n appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence." *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003).

Defendant further contends that the trial court's limiting instruction to the jury was inaccurate because it did not comport with the earlier ruling on the motion in limine and improperly expanded the permissible uses of the evidence. This argument is disingenuous and without support in the record.

The limiting instruction provided by the trial court stated:

> You have heard evidence that was introduced to show that the defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show, A, that the defendant had a reason to commit the crime, B, that the defendant acted purposefully, that is not by accident or mistake or because he misjudged the situation. You may not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

Including within the limiting instruction that the evidence could be used only for the purposes of motive and the absence of accident or mistake was consistent with the trial court's ruling following the motion in limine. In ruling on the motion, the trial court indicated both defendant's motive, premised on his "attitude of disregard for authority figures," and implied the absence of accident or mistake by recognition that "the facts are somewhat similar to the incident in this case, the assault and the running away. . . ." Both purposes were specifically argued by the prosecution in response to defendant's motion in limine. Because MRE 404(b)(1) permits the admission of evidence to demonstrate "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material," defendant cannot challenge the stated purpose of the prosecutor in seeking to admit this evidence.

Importantly, it was the prosecution and not defense counsel who requested the limiting instruction. In fact, defense counsel did not inadvertently omit the instruction but actually stated that he did not want the trial court to give the instruction. In response to defense counsel, the trial court observed:

> So what you're saying is I've never agreed with your ruling, Judge, to let in the 404B evidence and, because of that, I'm objecting also to you giving any type of curative instruction that might make it look okay to the Court of Appeals.
>
> * * *
>
> You know, I've never had anybody argue over this instruction, uh, it's always a standard instruction when the court lets in 404B evidence – because you tell the jury you've heard evidence that was introduced to show that there was an improper act that the defendant committed for which he's not on trial.

> I, I'm not aware of any other instruction that addresses that. I'm going to leave it in.

While "[t]his Court will not reverse a conviction on the basis of alleged instructional error unless the defendant has requested the omitted instruction or objected to the instructions given," *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996), commensurately, it will not reward a defendant or his counsel for strategy intended to "harbor error as an appellate parachute." *Carter*, 462 Mich at 214.

III. EXPERT TESTIMONY

Defendant asserts the trial court committed error requiring reversal by permitting Jannie Van Der Westhuizen to testify regarding crime scene reconstruction despite his limited qualification as an expert in firearms and tool mark examination. The qualification of a witness as an expert and the admissibility of the witness's testimony are reviewed for an abuse of discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). An evidentiary error does not merit reversal in a criminal case "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496, quoting MCL 769.26.

Defendant challenged Mr. Van Der Westhuizen's qualifications as an expert in crime scene reconstruction. Mr. Van Der Westhuizen acknowledged that certification as an expert in crime scene reconstruction was not on his resume and that he had never been qualified as such in a court. Accordingly, in qualifying this witness as an expert, the trial court stated:

> The court is going to find him qualified to be an expert in firearm and tool mark analysis. He . . . says himself he is not a certified crime scene analyst, but honestly, from my point of view, I don't see how you do firearm and tool mark analysis, unless it's at a crime scene. So I think there is some overlapping as to that, but I'm not qualifying him as an expert at crime scene, except how it relates to . . . firearm and tool mark.

Notably, Mr. Van Der Westhuizen was not brought in solely as an outside expert. He also participated in the investigation because of his position as a forensic lab scientist with the Oakland County Sheriff's Department as a forensic lab specialist. As part of his involvement in the investigation, Mr. Van Der Westhuizen conducted tests on a mark observed on an apartment doorway in the hallway of the crime scene, from which he determined the damage was not attributable to a bullet. Mr. Van Der Westhuizen also participated in the testing of defendant's hands for gunshot residue, but testified that he had opined at that time that the time interval between the testing and the shooting "could have significant influence on obtaining primer residue from the hands area or the facial area." Mr. Van Der Westhuizen confirmed that he personally detected "a distinct odor of detergent" from defendant when he performed the residue testing. Mr. Van Der Westhuizen identified the type of bullet recovered in the shooting as "a 40 caliber fired bullet." Because the actual weapon used was not recovered, Mr. Van Der Westhuizen conducted tests to verify that the "shell casing and bullet [were] consistent with a sig sauer type of gun," which is the same make of revolver carried by Officer Samborski. Mr. Van Der Westhuizen also testified about the amount of pressure required to pull the trigger on the

gun, concurring that "the first shot would be a 10 pound amount of force on the trigger to make it fire[.]" Using photographs of the crime scene and conducting a "muzzle-to-target distance examination" Mr. Van Der Westhuizen concluded that the injury observed on Officer Samborski was incurred "in close proximity of the muzzle." Specifically, from his tests he concluded, "A similar pattern of gunshot discharge products to that present on the deceased can be produced at a distance of greater than 0.4 inches and less than 0.8 inches."

When the prosecution initiated an inquiry regarding whether Mr. Van Der Westhuizen viewed crime scene photographs taken by his coworker, Nichole Christensen (nee Grandensack), defense counsel objected. The trial court responded, "I qualified him as a firearm and tool mark expert *and* to the extent that he did crime scene investigation in this case. . . ." (Emphasis added.) Mr. Van Der Westhuizen acknowledged reviewing copies of reports from experts retained by defendant and when asked by the prosecutor regarding his opinion of the position of Officer Samborski's body at the moment of the shooting, Mr. Van Der Westhuizen responded, reading from his report:

> The attendance to the crime scene, terminal ballistic tests conducted, documents, reports and digital images are all relevant guidelines that were taken into consideration, leading to the following conclusion. The head of the deceased must have been low to the ground or carpeted area and in close proximity to the muzzle of the firearm at the time of discharge. Point 2, the body of victim or the deceased could have been moved from the original position by the suspect and that it is documented that the body was moved by first-responding officers and emergency personnel attending to the victim, or deceased, after the shooting incident took place. No other documented or visible trace evidence indicated that the deceased was in an upright position during this discharge of the firearm.

Based on this evidence, Mr. Van Der Westhuizen further opined that Officer Samborski could not have fired the fatal bullet. Defense counsel engaged in substantial cross-examination of Mr. Van Der Westhuizen.

When providing the jury with instructions, the trial court stated, in relevant part:

> You have heard testimony from several witnesses who have given you their opinion as an expert in the field of blood stain pattern interpretation and analysis, forensic pathology, firearm and tool mark identification and DNA collection and analysis. Experts are allowed to give opinions in court about matters they are experts on. However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert's opinion, think carefully about the reasons and facts they gave for their opinion and whether those facts are true. You should also think about the expert's qualifications and whether their opinion makes sense when you think about the other evidence in the case.

In accordance with MRE 702, "expert testimony must be limited to opinions falling within the scope of the witness's knowledge, skill, experience, training or education." *Unger*, 278 Mich

App at 251, citing MRE 702. "Consequently, an expert may not opine on matters outside his or her area of expertise." *Id*. The majority of Mr. Van Der Westhuizen's testimony directly related to identifying the type of bullet involved, the distance from which the fatal shot was fired based on stippling and gun barrel marks on Officer Samborski's face, the consistency of the weapon used with the type of service revolver used by Officer Samborski and testing he performed at the crime scene to determine whether certain markings were caused by a bullet. All of this testimony is clearly within the purview of Mr. Van Der Westhuizen's expertise and qualification by the trial court.

In arguing that Mr. Van Der Westhuizen rendered opinions outside of his scope of expertise, and within the realm of crime scene reconstruction, defendant ignores that Mr. Van Der Westhuizen was not merely viewing evidence after the fact and rendering an opinion. Rather, Mr. Van Der Westhuizen was at the crime scene and engaged in the actual investigation of the shooting. In terms of Mr. Van Der Westhuizen's opinion that the wound was not self-inflicted by Officer Samborski, this testimony was cumulative to that of the medical examiner and cannot be deemed inappropriate because it is based on his knowledge and expertise in firearms.

Defendant's primary concern is that Mr. Van Der Westhuizen opined that Officer Samborski was on or close to the floor when the fatal shot was fired, which provides some contradiction of defense counsel's theory that Mr. Samborski accidentally shot himself. Arguably, this determination by Mr. Van Der Westhuizen is cumulative to the testimony of Cheryl Lozen, an expert qualified in "blood stain pattern analysis." In her evaluation of various blood stain patterns from the crime scene, Ms. Lozen concurred that one of the stains "originated from approximately 6-1/2 and 5-1/2 inches off the ground when they impacted the door[.]" Ms. Lozen could not be as definitive of the location of Officer Samborski's body with regard to another stain.[2] Further, Mr. Van Der Westhuizen's opinion about Officer Samborski's position at the moment of the fatal shot was fired is consistent with his area of expertise. Based on his familiarity with firearms and the physical evidence in this case, it was within the scope of his training and knowledge to hypothesize that the injury was incurred at close range and at a particular angle, suggesting the location of Officer Samborski's body.

Finally, the trial court provided instructions to the jury regarding the areas of expertise of the various expert witnesses and how the testimony could be used. Clearly absent from these instructions was any reference to crime scene reconstruction. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Hence, any potential error from this testimony lacked the type of severe prejudicial effect that could not have been cured by the instruction provided by the trial court.

[2] Based on cross-examination by defense counsel, Ms. Lozen specifically opined in her report: "the height or location from which the blood on the door originated could not be determined. It cannot be eliminated that this blood originated from a low height, however, it could have also originated from a higher height, with blood/matter on its downward fall."

IV. SENTENCING

Defendant and the prosecution concur that defendant is entitled to resentencing pursuant to the United States Supreme Court's recent decision in *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), which held that an automatic sentence of mandatory life imprisonment without parole for individuals under the age of 18 at the time of the commission of the charged crime violates the Eighth Amendment. "This Court reviews constitutional questions de novo." *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009).

It is undisputed that defendant was a juvenile[3] at the time of this offense. In *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012), this Court discussed, in detail, the Supreme Court's ruling in *Miller*, which precluded the mandatory imposition of life sentences without the possibility of parole for juvenile offenders. Specifically:

> The *Miller* majority concluded "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." The *Miller* majority did reject, however, arguments for a categorical bar to sentencing juveniles to life in prison without parole, stating, "[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The *Miller* majority emphasized that its decision served to
>
> > mandate[] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents . . . and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. [*Carp*, 298 Mich App at 497-498 (footnotes omitted).]

The *Miller* Court ruled:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of

[3] Defendant (dob: June 30, 1992) was 16 years old on December 28, 2008, when the offense occurred.

> proportionality, and so the Eight Amendment's ban on cruel and unusual punishment. [*Miller*, 132 S Ct at 2475.]

This Court has ruled, based on *Miller*, "that juveniles are subject to different treatment than adults for purposes of sentencing under the Eighth Amendment." *Carp*, 298 Mich App at 537. Accordingly, this Court has held

> that in Michigan a sentencing court must consider, at the time of sentencing, characteristics associated with youth as identified in *Miller* when determining whether to sentence a juvenile convicted of a homicide offense to life in prison with or without the eligibility for parole. While *Miller* does not serve to "foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." [*Id.*, quoting *Miller*, 132 S Ct at 2469.]

As recognized by both the prosecutor and defendant in the supplemental authority submitted in conjunction with this appeal, defendant's case must be remanded to the trial court for resentencing to conform with *Miller* and *Carp.*

We affirm defendant's convictions, but remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen