Order

Michigan Supreme Court
Lansing, Michigan

June 26, 2026

SC: 167705-6
COA: 362388, 367180
Muskegon CC: 2020-003689-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KRISTOPHER HARLAN JOESEL,
Defendant-Appellant.

On November 5, 2025, the Court heard oral argument on the application for leave to appeal the August 29, 2024 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(I)(1). In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, which affirmed the trial court's refusal to instruct the jury on voluntary manslaughter; VACATE defendant's conviction, sentence, and order of restitution; and REMAND this case to the Muskegon Circuit Court for further proceedings not inconsistent with this order.

I. FACTS AND PROCEDURAL HISTORY

This appeal follows defendant Kristopher Harlan Joesel's conviction of second-degree murder. Video footage shows that defendant fatally stabbed Laura Sanchez immediately after she followed him to the vestibule of his apartment building and pushed him into a bank of mailboxes.

The stabbing was the culmination of a series of events that evening. At trial, a number of witnesses, including defendant and decedent's boyfriend, testified that defendant was involved in a series of altercations at a bar leading up to the time of the stabbing. After a night out, defendant and a friend stopped at a bar across the street from defendant's apartment. A verbal dispute arose between defendant and a bar employee, and defendant was asked to leave. A physical fight erupted, during which a bouncer, bartender, and bar patron restrained defendant on a pool table while defendant spat in their faces and thrashed his legs. In the chaos, defendant dropped his phone near the pool table. Two bartenders helped the bouncer drag defendant outside. Sanchez was also at the bar but was not involved in this initial altercation.

After being ejected from the bar, defendant punched a patron who was holding the door open and split the man's lip. Defendant reentered the bar briefly but was promptly escorted out. He then urinated on a bartender's truck before walking to his nearby apartment. Defendant sent an angry e-mail to his apartment manager about the encounter

at the bar, alleging that one of the residents of the apartment complex had assaulted him. Defendant then retrieved a fixed-blade double-edged knife, returned to the bar parking lot, and slashed tires on several cars he believed to be empty. One of these cars belonged to Sanchez's boyfriend, Manuel Suarez, who was sitting in his car when defendant punctured a tire on the car. Suarez got out of the car. Sanchez, who was with Suarez, came around the front of the vehicle to confront defendant. Sanchez approached defendant and started to yell at him. Defendant did not engage and returned to his apartment. Suarez testified that he had to restrain Sanchez to prevent her from following defendant.

While Suarez went back into the bar to inform people about the tire slashing, Sanchez walked to defendant's apartment on her own. Within moments of defendant's entry, Sanchez entered the public vestibule of the apartment building and tried to open the locked door into the secure, private lobby. She banged on the door and then went back outside. Sanchez approached a resident of the apartment building who was standing in the parking lot and asked him to let her into the building; he refused to let her into the secure area. Sanchez returned to the bar, where she stood outside with a small group of patrons. Another witness testified that the group included six or seven people.

Defendant left his apartment again, according to some testimony, to retrieve his cell phone from the bar. He put his hair up and put on a hat before leaving. His knife remained in his pocket. When defendant approached the bar, a patron outside recognized him and alerted the others. Sanchez then confronted defendant again—Suarez testified that she came up on him "really fast"—and followed him back to the vestibule of his apartment building. She was followed by some of the other patrons outside the bar.

Defendant entered the building and pulled the outer door shut behind him. Sanchez was close behind him. Video surveillance footage shows that defendant leaned forward and appeared to say something to Sanchez through the door. Sanchez pushed on the door and responded verbally. Defendant turned away and walked to the keypad that grants entrance into the secure lobby. He was holding his knife in his dominant hand as he attempted to get his keys from his belt loop with his nondominant hand.

Sanchez opened the vestibule door and entered unarmed. Another patron from the bar held the vestibule door open and stood in the doorway. Defendant and Sanchez appear to have exchanged words. Defendant turned away from Sanchez and back to the keypad. Sanchez approached defendant slowly at first and then more quickly before she used both her hands to push defendant from behind into the panel and wall. Defendant immediately turned and stabbed Sanchez twice, once in the chest and once in the leg. Sanchez backed away, and defendant lunged at her a third time with his knife, but video footage shows that his knife did not make contact on this third lunge. Sanchez moved further backward. The two appeared to say something to each other. A second patron from the bar approached the vestibule door. Defendant attempted to enter the secure part of the building, but the door remained locked. Sanchez stood near the foyer door while blood streamed down her

leg. Defendant turned back to walk toward the key panel. Sanchez walked toward him and bent forward as if to say something. Defendant swiped his key and entered the secure door as a third patron from the bar approached the vestibule. Sanchez then fell to the ground. The other patrons entered the vestibule, called 911, and attempted to render aid. Sanchez died moments later. The physical confrontation between Sanchez and defendant lasted less than five seconds.

Defendant was charged with open murder, and the jury was given instructions on first-degree and second-degree murder. At trial, defendant requested an instruction on self-defense, which was given by the trial court. A self-defense instruction requires, in relevant part, that there be evidence supporting that the defendant "*honestly and reasonably believed that* [*he*] *was in danger of being* [*seriously injured*]," even if that belief turns out to be incorrect. M Crim JI 7.15 (Use of Deadly Force in Self-Defense) (emphasis added). Defendant also requested a voluntary-manslaughter instruction. The trial court refused that instruction, stating that it did not "believe that the provocation point is adequate enough in this case." The jury acquitted defendant of first-degree murder and convicted him of second-degree murder. Defendant appealed the trial court's denial of an instruction on voluntary manslaughter. In a split decision, the Court of Appeals affirmed defendant's conviction. *People v Joesel*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2024 (Docket Nos. 362388 and 367180). For the reasons set forth in this order, we reverse.[1]

II. DISCUSSION

A. STANDARD OF REVIEW

This Court reviews de novo claims of instructional error. *People v Kowalski*, 489 Mich 488, 501 (2011). We have previously said that we review the question of whether a lesser-included-offense instruction is appropriate under the facts of the case for an abuse of discretion, *People v Jones*, 497 Mich 155, 161 (2014); we have also found that a trial court abuses its discretion when a rational view of the evidence would support a voluntary-manslaughter instruction, *People v Cornell*, 466 Mich 335, 352-361 (2002); see also *People v Pouncey*, 437 Mich 382, 391-392 (1991). This Court also considers the instructions as a whole, rather than piecemeal, to determine whether any error occurred. *Kowalski*, 489 Mich at 501.

B. VOLUNTARY MANSLAUGHTER

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[1] This Court also asked for briefing regarding restitution, but it is unnecessary to address that issue given our conclusion that defendant's conviction must be vacated.

When a defendant is charged with murder, a requested instruction for voluntary manslaughter "must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541 (2003). Voluntary manslaughter consists of three prongs: (1) "the defendant killed in the heat of passion," (2) "the passion was caused by adequate provocation," and (3) "there was not a lapse of time during which a reasonable person could control [their] passions." *Id*. at 535. Provocation is not an element of voluntary manslaughter. *Id*. at 536. Rather, it is "the circumstance that negates the presence of malice." *Id*. In this way, voluntary manslaughter serves to mitigate an intentional killing because "the law, out of indulgence to the frailty of human nature, regards the offense as of a less heinous character than murder, and designates it manslaughter." *People v Holmes*, 111 Mich 364, 370 (1896). When there is sufficient evidence to submit a charge of murder to a jury, "only a modicum of evidence of provocation" is required to justify a voluntary-manslaughter instruction. *People v King*, 98 Mich App 146, 152 (1980); cf. *People v Heflin*, 434 Mich 482, 504 (1990) (opinion by RILEY, C.J.) ("[A] trial court need not instruct the jury on inconsistent theories when neither party produces a modicum of evidence in support of a particular theory.").

A "heat of passion" killing is one that occurs as a result of "temporary excitement, by which the control of reason was disturbed . . . ." *Maher v People*, 10 Mich 212, 219 (1862). This "temporary excitement" does not have to "entirely dethrone[] . . . or overpower[]" reason; rather, it is sufficient that reason is "disturbed or obscured by passion to an extent which *might render* ordinary [people], of fair average disposition, *liable* to act rashly or without due deliberation or reflection . . . ." *Id*. at 220. Michigan caselaw does not "circumscribe the requisite emotional state" to establish responding in the heat of passion, although "the model jury instruction specifically acknowledges anger as an emotional state that may serve to mitigate murder to voluntary manslaughter . . . ." *People v Yeager*, 511 Mich 478, 492-493 (2023).

The Court of Appeals majority stated that defendant was not acting under the influence of passion; the majority described defendant's state of mind as both "in a state of simmering rage" and, potentially contradictorily, as "an ordinary man functioning with deliberation." *Joesel*, unpub op at 6-7 (quotation marks and citation omitted). Evidence of deliberation is not fatal to a voluntary-manslaughter instruction. Instead, it is the presence of a provocation that negates any deliberation. See *Holmes*, 111 Mich at 372 ("If it appears that murder is committed upon a heat of passion engendered entirely by such provocations, and suddenly conceived, such a murder cannot properly be called deliberate."). And, as stated in *Yeager*, 511 Mich at 492-493, the emotional state that serves as the "heat of passion" that mitigates the murder may be anger.

As in other cases involving questions around voluntary manslaughter that have come before this Court, and as evaluated by the Court of Appeals, the entire course of events can be considered. See *id*. at 491-492. In this case, defendant testified that he "was upset" when he left his apartment to slash tires in the bar parking lot. When he left his

apartment again, purportedly to retrieve his phone, he testified that he was scared because he saw "the group that had just beat the crap out of [him] at the bar." Defendant testified that when Sanchez pushed him, he had an "instinctual reaction" and "just tried getting the person off of [him] . . . ." In evaluating these statements, as well as the testimony of other witnesses and the video of the stabbing, the trial court was charged with determining whether a rational view of the evidence would support defendant's claim that he acted in the heat of passion. It does. A rational view of the evidence might also support the prosecution's argument that defendant did not act in the heat of passion. But in determining whether an instruction for voluntary manslaughter should be provided, the trial court must not "arbitrarily assume[] to take the question from the jury . . . ." *Maher*, 10 Mich at 225.

Whether the provocation was adequate is a question of fact. *Id*. at 221-222. Jurors are "much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature . . . ." *Id*. at 222. But if no reasonable jury could find that the provocation was adequate, then a trial court may refuse to instruct the jury on manslaughter. *Pouncey*, 437 Mich at 392. The provocation necessary to mitigate a murder to manslaughter is "that which causes the defendant to act out of passion rather than reason." *Id*. at 389. The defendant must have been provoked to the degree that their practical-reasoning skills were distorted. *Id*.

This Court has been reluctant to draw clear lines of what does and does not provide sufficient evidence of adequate provocation to warrant a voluntary-manslaughter instruction. For example, in *Pouncey*, this Court held that insulting words *in that instance* were not enough to conclude that the trial court erred by failing to provide a voluntary-manslaughter instruction, but this Court refused to create a per se rule that words are never adequate provocation. *Pouncey*, 437 Mich at 391-392. But there are myriad examples in Michigan caselaw where a physical altercation has been deemed adequate provocation for a voluntary-manslaughter instruction. See, e.g., *People v Oster (On Resubmission)*, 97 Mich App 122, 128, 133 (1980) (the decedent punched the defendant, and the defendant then stabbed him five times); *Holmes*, 111 Mich at 367-369 (the decedent punched the defendant three or four times after a scuffle in a boarding house, after which the defendant retrieved a revolver from his room and shot at the victim three times); *People v Mitchell*, 301 Mich App 282, 287-288 (2013) (the victim swung a baseball bat at the defendant and struck him three or four times before the defendant took the bat from the victim and hit him on the head and shoulders).

We hold that a rational view of the evidence in this matter supports the voluntary-manslaughter instruction and a jury making the determination of whether there was provocation sufficient to mitigate murder to manslaughter. Sanchez's boyfriend, Suarez, testified that after defendant slashed the tires on his car, Sanchez confronted defendant and yelled at him. Sanchez followed defendant as he walked across the street to his apartment building, and Suarez pulled her back. Another witness said that he heard people screaming

outside the apartment. Suarez testified that when defendant came back out of his apartment, Sanchez was "walking really fast" to confront defendant again. Another witness outside the bar said that there was a "verbal confrontation" at this point and that Sanchez was yelling at defendant. Sanchez followed defendant to his apartment building. One witness testified that Sanchez ran after defendant. A small group of people were in the parking lot to examine the tire damage. At least two of them followed defendant behind Sanchez. After defendant entered the vestibule of his apartment building, Sanchez slammed on the outside door with both her hands, yelled something, and then entered the vestibule. Video evidence shows Sanchez then pushed defendant from behind. He turned and stabbed her.

Accordingly, there was evidence to support each prong of voluntary manslaughter. The Court of Appeals majority erred by discounting the provocation presented here based on defendant's role as an initial aggressor. *Joesel*, unpub op at 8.[2] Michigan caselaw does not per se bar an instruction on voluntary manslaughter in cases where the defendant is the initial aggressor or where there is mixed evidence regarding who initiated the circumstances that led to the provocation. See *Mitchell*, 301 Mich App at 283-284, 287 (holding that the trial court erred by denying the defendant's request for a voluntary-manslaughter instruction where "in the days leading up to the victim's death," the defendant "had been threatening and harassing the victim by banging or kicking on the walls and doors of his apartment in an effort to collect [a debt] from the victim"); *People v Reese*, 491 Mich 127, 160 (2012) (holding that factual circumstances that can be characterized as "imperfect self-defense" may negate the malice that distinguishes murder from manslaughter in a case where the defendant engaged in a shoot-out with the victim and there was mixed testimony about who fired first); *Holmes*, 111 Mich at 367 (holding that adequate provocation for a voluntary-manslaughter instruction existed where there was "a conflict in the testimony as to whether [the defendant] struck [the decedent] first, or whether [the decedent] was the aggressor"); *People v Palmer*, 96 Mich 580, 581 (1893) (holding that the trial court erred by failing to give a requested instruction on voluntary manslaughter where the defendant "had some words of dispute in a saloon" with the victim before he left, armed himself with a double-barreled shotgun, and returned to the saloon, where he shot the victim).

Here, viewing the entire transaction—including defendant's role in the affray at the bar and his aggressive acts of tire slashing—may ultimately not be beneficial to defendant. But as a matter of law, a rational view of the evidence supports providing the voluntary-manslaughter instruction and allowing the jury to make this determination.

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[2] Neither the Court of Appeals nor the dissent attempts to square how the trial court found that there was sufficient evidence that defendant "honestly and reasonably believed that [he] was in danger of being [seriously injured]" to support a self-defense instruction but not adequate provocation to support a voluntary-manslaughter instruction.

The third prong of the voluntary-manslaughter test provides that there cannot be a cooling-off period during which a reasonable person could control their passions. *Pouncey*, 437 Mich at 388. Neither the trial court nor the Court of Appeals stated that there was a cooling-off period that would warrant refusing defendant's instructional request. Here, we cannot conclude as a matter of law that defendant had sufficient time to control his passions such that the issue was properly withheld from jury consideration.

Because a rational review of the evidence supports each prong of the voluntary-manslaughter test, the trial court erred by refusing to provide a voluntary-manslaughter instruction.

C. HARMLESS ERROR

We turn now to whether the error in refusing to provide a voluntary-manslaughter instruction was harmless. See *Cornell*, 466 Mich at 361-362; see also *Yeager*, 511 Mich at 494, 503 (applying *Cornell* to an unpreserved instructional error). We conclude that the failure to provide a voluntary-manslaughter instruction in this case was not harmless.

Whether the absence of an instruction on a lesser included offense is harmless depends on the facts and circumstances of the individual case. *Yeager*, 511 Mich at 496. We recently held that where a rational view of the evidence supports a voluntary-manslaughter instruction, the trial court's refusal to provide the instruction is not "harmless" because "it is impossible to know what a jury would do if it had been properly apprised of the lesser included offense." *Id*. at 494, 503. Unlike in other cases of instructional error where a "substantial evidence" standard is applied to "a disputed factual element," *Cornell*, 466 Mich at 361, 365,[3] instruction on voluntary manslaughter requires

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[3] The *Cornell* defendant was charged with breaking and entering with intent to commit larceny and requested an instruction on the lesser included offense of breaking and entering without permission. *Cornell*, 466 Mich at 360. The lesser included offense contained all elements of the greater offense except for intent, which—as this Court observed—means that it was impossible to commit the greater offense without first committing the lesser offense. *Id*. at 361. We found that the error in *Cornell* was harmless because intent was shown at trial through the statements of two co-offenders who testified that they intended to steal property in a house. *Id*. at 366-367. This Court could be confident that the instructional error would not have been outcome-determinative because there was "little evidence in the record to support defendant's assertion that they just went into the house to look around." *Id*. at 366. The *Cornell* Court contrasted that case with the situation in *People v Rodriguez*, 463 Mich 466 (2000), where the defendant placed evidence in the record that supported the instruction and the failure to instruct "was 'outcome

a harmless-error analysis that rests on a "legal question [regarding] the defendant's required state of mind," *Yeager*, 511 Mich at 498. The *Yeager* Court did not demand certainty on what a jury might find on retrial, as the dissent suggests. See *id*. at 500 ("[W]e cannot *definitively* conclude whether the jury would have determined that defendant's actions were provoked by inflamed passions or emotional excitement.") (emphasis added).[4] In cases where a voluntary-manslaughter instruction was warranted, it is the *lack* of certainty about what a jury might decide that is "sufficient to undermine confidence in the outcome of defendant's trial." *Id*. at 501 (citation modified).[5]

We cannot say that the error here was harmless. As Judge MARIANI discusses in his dissent in this case, the fact that the jury chose to convict defendant of second-degree murder does not necessarily tell us what the jury would have done had it been properly instructed on voluntary manslaughter. See *People v Silver*, 466 Mich 386, 393 n 7 (2002) (opinion by TAYLOR, J.) (rejecting as "too facile" the argument that the absence of a lesser-offense instruction was harmless because "the jury would have acquitted defendant if it believed his testimony," given the reality that, " '[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction' "), quoting *Keeble v United States*, 412 US 205, 212-213 (1973). We held that the error was not harmless in *Yeager*, where a voluntary-manslaughter instruction was warranted and the defendant was convicted of first-degree murder, because the jury could have reasonably concluded that the defendant's actions were the result of provocation to a state of emotional excitement. *Yeager*, 511 Mich at 500-501. We find no reason to conclude differently here.[6]

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determinative' because it undermined the reliability of the verdict." *Cornell*, 466 Mich at 365.

[4] See also *id*. at 501 ("[T]he absence of the lesser-included-offense instruction *does not* '*necessarily* . . . indicate a lack of likelihood that the jury would have adopted the lesser requested charge.' ") (citation omitted; emphasis added); *id*. ("[A] reasonable jury *could* have found that defendant acted in the state of mind required for voluntary manslaughter . . . .") (emphasis added); see also *Rodriguez*, 463 Mich at 474 (holding that the error was not harmless when the jury received no instruction on a statutory exemption crucial to the defense that was supported by the evidence, but making no finding that the defendant would have succeeded on that defense).

[5] The dissent points to factual distinctions between *Yeager* and this case. These distinctions make no difference to *Yeager*'s conclusion with regard to harmless error.

[6] The dissent contends that by not applying the *Lukity* harmless-error standard we are overruling prior decisions without conducting a stare decisis analysis. We do no such thing. We are applying the harmless-error standard used in *Yeager*, which examined harmless error in the context of a voluntary-manslaughter-instruction error, the exact

In the same vein, we cannot say that the error was harmless because of the information the jury did receive about manslaughter, as the Court of Appeals majority concluded. It is true that defense counsel discussed the prongs of voluntary manslaughter during argument and that the trial court provided more information about voluntary manslaughter than is included in the model jury instructions. But this does not cure the error of failing to provide the jury with the option to convict defendant of voluntary manslaughter.

We have previously held that when considering whether a jury should have been instructed on a lesser included offense, appellate courts must consider whether "the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge" in light of the proposed defense theory and the factual elements of the relevant offense. *People v Beach*, 429 Mich 450, 491 (1988). Here, the jury was given information about the existence of voluntary manslaughter but was never given the opportunity to *adopt* that charge. As in *Yeager*, defendant's conviction "does not speak to what the jury might have done were it instructed on adequate provocation." *Yeager*, 511 Mich at 502; see also *Silver*, 466 Mich at 393 n 7 (opinion by TAYLOR, J.). Accordingly, we cannot say that the error here was harmless.

III. CONCLUSION

Having found error in the trial court's refusal to provide a voluntary-manslaughter instruction and that such error was not harmless, we reverse Part II of the judgment of the Court of Appeals, vacate the remainder of the opinion given that the instructional error is dispositive, vacate defendant's conviction, and remand this case to the trial court for further proceedings.

WELCH, J. (*concurring in part and dissenting in part*).

I agree with the majority that a rational view of the evidence supports an instruction for voluntary manslaughter and that the trial court erred when it failed to give that

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situation we have in this case. To the extent there is tension between *Yeager* and *Lukity*, a future court may want to address that further. The dissent also implies that our approach is inconsistent with *Mendoza*, but there we disagreed with the Court of Appeals' conclusion that a rational view of the evidence supported an involuntary-manslaughter instruction. *Mendoza*, 468 Mich at 545-546. We did not conduct a harmless-error analysis because we did not find error, *id*., and we did not discuss the defendant's claim of error related to his requested voluntary-manslaughter instruction because he did not cross-appeal the Court of Appeals' judgment affirming the trial court's decision not to give that instruction, *id*. at 531 n 1.

instruction. However, because I believe that this error was harmless, I join Part III of Justice BERNSTEIN's dissent. As a result, I would not reverse defendant's second-degree murder conviction.

I write separately because, given the majority decision, we do not reach the second question in our order granting oral argument on the application—whether the award of over $1 million in restitution for future lost earnings under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., was appropriate. That is not because it was unworthy of our consideration. As the prosecution candidly acknowledged at oral argument, such awards are currently uncommon. The question of whether they are available as a matter of course in homicide cases has significant implications.

In *People v Garrison*, 495 Mich 362, 365-366 (2014), we upheld a restitution order to compensate several theft victims for $977 in travel expenses incurred while reclaiming their stolen property. Although the holding used broad language, *id*. at 369 ("[T]he Legislature unambiguously instructed courts to order restitution that is 'full,' which means complete and maximal."), that case obviously was not pondering a multimillion-dollar award for a lifetime of lost earnings.

Moreover, our prior interpretations of the CVRA appear to have relied on an understanding that the statute imposed a civil remedy rather than a criminal punishment. See *People v Neilly*, 513 Mich 401, 426 (2024) ("In enacting the restitution statutes, the Legislature intended to create a civil remedy. Although the imposition of these statutes has some punitive effect, that effect is not sufficient to overcome the demonstrated legislative intent."). That reading may have been undercut by the United States Supreme Court's decision in *Ellingburg v United States*, 607 US ___, ___; 146 S Ct 564, 567 (2026), which held that the federal Mandatory Victims Restitution Act of 1996, 18 USC 3663A *et seq*., is "criminal punishment for purposes of the Ex Post Facto Clause." The United States Supreme Court vacated our decision in *Neilly*, see *Neilly v Michigan*, ___ US ___ (January 26, 2026) (No. 24-395), and we are set to reconsider its reasoning in light of *Ellingburg*, see *People v Neilly*, ___ Mich ___ (June 18, 2026) (Docket No. 165185).

Viewing restitution as criminal punishment could affect our reading of the statute, as we have traditionally construed criminal statutes more strictly than remedial statutes. Compare *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 740 (1982) ("[A] remedial statute, . . . which attempts to protect the public health and general welfare, should be liberally construed."), with *People v Bergevin*, 406 Mich 307, 312 (1979) (" 'It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.' "), quoting *Bell v United States*, 349 US 81, 83 (1955); *People v Gilbert*, 414 Mich 191, 211 (1982) ("[P]enal statutes are to be strictly construed and any ambiguity is to be resolved in favor of lenity[.]") (citation omitted); *People v Jahner*, 433 Mich 490, 499 (1989) ("The rule of lenity operates in favor of an accused, mitigating punishment when punishment is unclear."). See also

People v Ellis, 204 Mich 157, 160 (1918) (stating that a remedial statute provided "but little aid . . . in construing" a statute that "creates a felony and provides for drastic punishment").

In short, though our decision today does not answer the question of whether restitution awards for homicide victims' future earnings are available under the CVRA, I question if the award was proper. Should another trial court issue a similar restitution award, appellate review would be warranted to determine whether *Garrison* was intended to be applied so broadly.

BERNSTEIN, J. (*dissenting*).

This case asks us to consider whether the trial court abused its discretion when it rejected defendant's request to provide the jury with a voluntary-manslaughter instruction. Today, the majority holds that: (1) defendant was entitled to an instruction on voluntary manslaughter; and (2) the failure to receive such an instruction was outcome-determinative. I disagree with both holdings and, accordingly, I respectfully dissent.

I. FACTUAL BACKGROUND

To begin, I believe that a comprehensive accounting of the factual background is necessary to determine whether a reasonable person in defendant's situation would have been adequately provoked. See *People v Pouncey*, 437 Mich 382, 388 (1991). This factual grounding is necessary because a voluntary-manslaughter instruction assists the jury in considering a "defendant's state of mind . . . in a manner not contemplated by instructions on first- and second-degree murder alone." *People v Yeager*, 511 Mich 478, 500 (2023). A full discussion of the events underlying defendant's conviction provides better context for whether defendant was entitled to the instruction.

The majority is correct that defendant was forcibly ejected from a bar for instigating a fight. But this was anything but a run-of-the mill bar fight. Testimony from the bartender and video evidence provided from the bar demonstrate that the bartender working that night asked defendant to leave the bar. Defendant responded by knocking over a number of items. One of the bar's bouncers then attempted to restrain defendant. Defendant overpowered this bouncer and pushed him into a lottery machine, which broke on impact. Two other individuals also attempted to restrain defendant, but defendant overpowered these individuals as well. When a patron tried to help, defendant grasped onto some sort of post, lifted himself into the air, and kicked this patron in the face. At some point, when defendant finally left the bar, a man was holding the door open and defendant hit the man so hard that the man required stitches to repair a split lip.

Defendant did not stop there. He attempted to reenter the bar but was denied entry. He urinated on the bartender's truck and then went home to his apartment, which was

within walking distance of the bar. While there, he sent his apartment manager an incoherent and charged email, referring to him as "degenerate scum." As the majority notes, defendant then returned to the bar with a knife and slashed the tires of multiple patrons' cars. One of these patrons was the boyfriend of the victim in this case—Laura Sanchez.

After slashing a number of tires, defendant returned to his apartment once more. He again returned to the bar shortly after. He testified that he returned because he forgot his cell phone at the bar, but he was still armed with his knife. Seeing that there were patrons outside the bar, he decided to return to his apartment instead. Sanchez followed him to his apartment. The video footage from the apartment building demonstrates that Sanchez followed defendant into the vestibule of the building. She said something to him, and defendant ignored her. At this point, Sanchez shoved defendant and knocked his shoulder against a wall. Defendant then turned around and stabbed her twice with his knife. He attempted a final blow after Sanchez was already falling backward from the first two blows. Sanchez fell to the ground, bleeding heavily. Defendant left Sanchez in the vestibule, opened the lobby door, and went up to his apartment. Two men from the bar found her on the ground in a pool of her own blood. She died shortly after.

Defendant was arrested, and the prosecution charged him with open murder. Pertinent to our consideration here, defendant argued at trial that he acted out of passion and that he did not have adequate time to cool off. Accordingly, defendant requested that the trial court instruct the jury on voluntary manslaughter. The trial court denied the request, reasoning that "the provocation point is [not] adequate enough in this case." Defendant was convicted of second-degree murder. He appealed his conviction in the Court of Appeals, which affirmed in a split opinion. *People v Joesel*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2024 (Docket Nos. 362388 and 367180). He now seeks leave to appeal in this Court, challenging the trial court's failure to instruct the jury on voluntary manslaughter.

II. VOLUNTARY MANSLAUGHTER

To determine whether defendant was entitled to a voluntary-manslaughter instruction, we must determine whether a rational view of the evidence supports that: (1) defendant was adequately provoked; (2) defendant acted in a heat of passion; and (3) there was not a lapse of time during which a reasonable person could control their passions. *Pouncey*, 437 Mich at 388. Given that defendant has all but abandoned any argument about the third element, and because I believe that defendant's voluntary-manslaughter claim fails on the first two elements, it is unnecessary to determine whether an adequate cool-off

period existed here.[1] Whether defendant was adequately provoked and whether he acted in a heat of passion are interrelated inquiries. *Id*. (explaining that "the passion must be caused by an adequate provocation"). The facts of this case do not demonstrate either that there was adequate provocation or that defendant acted in a heat of passion in response to that provocation.

To begin, I agree with the majority that this Court has never created a bright-line rule as to what could constitute adequate provocation. This makes sense, as each case will present unique facts and circumstances for a court's consideration. Our caselaw demonstrates that in some circumstances, some degree of actual, imminent physical harm can amount to adequate provocation. But the cases relied upon by the majority are readily distinguishable from the case at hand. In *Oster*, for instance, the defendant was convicted of voluntary manslaughter for stabbing a man who had punched him and tossed him down a flight of stairs, even though the defendant attempted to deescalate the dispute. *People v Oster (On Resubmission)*, 97 Mich App 122, 125, 128 (1980). In *Mitchell*, the victim had threatened the defendant multiple times prior to the altercation and struck the defendant in the head with a baseball bat several times before the defendant took the bat and killed the victim. *People v Mitchell*, 301 Mich App 282, 284-285, 287-288 (2013). In each case, the defendant responded to imminent and threatening behavior *from the victim*. In other words, the victim exhibited behavior that adequately provoked the defendant under the circumstances.

Here, defendant was shoved one time by Sanchez, who was much smaller than defendant and unarmed. Perhaps this incident did provoke defendant, but the question is whether this provocation was adequate. Our inquiry does not consider this particular defendant's state of mind; instead, the provocation element must be of such a nature that "would cause a *reasonable* person to act out of passion rather than reason." *Pouncey*, 437 Mich at 390 (emphasis added). The majority stops short of explaining why this was an *adequate* provocation under the objective standard that we are bound to apply.

Here, defendant reacted to a single shove—where he was not at all injured or placed in any sort of imminent harm—by stabbing the victim twice. After the first two stabs, Sanchez fell backward, clearly impaired. Yet defendant attempted to stab her a third time. Then, as Sanchez was bleeding out, defendant calmly opened the lobby door and went to his apartment. There is simply no principled reason to conclude that a single shove should be considered so provoking that a reasonable person would enter an altered state of mind and react with a multiple-blow stabbing. See *Yeager*, 511 Mich at 489 ("The

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[1] Defendant's brief only cursorily mentions whether there was an adequate cool-off period and offers no argument on the issue. Defendant states only that this is a question for the jury to determine. The majority similarly makes the conclusory point that this was a question for the jury and faults the Court of Appeals for failing to address this argument.

provocation . . . must be sufficient to cause a reasonable person to lose control, not just the specific defendant."), citing *Pouncey*, 437 Mich at 389. Indeed, it simply cannot be the case that *any* physical contact can always amount to adequate provocation sufficient to justify a voluntary-manslaughter instruction. See, e.g., *People v Gutierrez*, 45 Cal 4th 789, 827 (2009) ("Simple assault, such as the tussle defendant described, also does not rise to the level of provocation necessary to support a voluntary manslaughter instruction."). See also 40 CJS (December 2025 update), Homicide, § 122 ("[P]hysical contact between a defendant and a victim is not always sufficient to warrant a manslaughter instruction even when the victim initiated the contact; this is particularly so when a defendant is armed with a deadly instrument and a victim is not.").

This lack of adequate provocation also helps explain why Sanchez could not have plausibly placed defendant in a heat of passion. The evidence demonstrates that defendant had already been in a prolonged state of rage long before Sanchez encountered him. Indeed, this fact further illustrates the error of the majority's reliance on *Oster* and *Mitchell*. In those cases, it was adequate provocation from the *victims* that had caused the defendants' heat of passion. But here, to the extent that defendant was in a heat of passion at all, it clearly preexisted Sanchez's contact with defendant, as evidenced by defendant's wide-ranging hostile behavior that night, which was even directed at his apartment manager, who was not present and had nothing to do with any of the altercations at the bar. When viewed in this context, defendant's encounter with Sanchez can hardly be used to excuse his use of deadly force against her.

It is on this point that the majority misunderstands why the Court of Appeals referred to defendant as the "initial provocateur."[2] I agree with the majority that a defendant's acting as an initial aggressor does not, by itself, preclude a voluntary-manslaughter instruction. But here, the Court of Appeals did not reject defendant's voluntary-manslaughter argument solely because he was an initial aggressor. Instead, the Court of Appeals' characterization of defendant as an "initial provocateur" speaks to the fact that defendant was in a fit of rage of his own making well before any contact with Sanchez. The Court of Appeals correctly identified that, in light of all of defendant's actions that night, it was extremely improbable that defendant's actions were a result of a "heat of passion" that Sanchez had provoked.

The majority merely observes that defendant was hotheaded and, presumably, subjectively provoked in concluding that a voluntary-manslaughter instruction was

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[2] Although the Court of Appeals majority characterized Sanchez as an initial aggressor for purposes of defendant's self-defense claim, *Joesel*, unpub op at 11-12, it specifically characterized defendant as "the initial provocateur" for purposes of his voluntary-manslaughter-instruction claim, *Joesel*, unpub op at 8.

warranted. But this is not the legal standard. The facts instead demonstrate that defendant was not objectively provoked by a minor shove and that any heat of passion on defendant's part clearly existed long before his encounter with Sanchez. Thus, when considering the factual circumstances as a whole, a rational view of the evidence does not support a voluntary-manslaughter instruction.[3] Instead, defendant is the exact sort of "hot-tempered individual" to whom our law refuses to afford relief. *Pouncey*, 437 Mich at 389 ("Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter. The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions.").

III. HARMLESS ERROR

Even if the trial court erred, any error is harmless in this case. The majority determines that the error here was not harmless largely by analogizing this case to *Yeager*. I find *Yeager* to be inapplicable here, given the significant factual differences. In *Yeager*, the defendant's boyfriend hit her on the head, struck her in the face with his gun, pulled her out of her vehicle by her hair, and chased her with that vehicle, attempting to run her over multiple times. *Yeager*, 511 Mich at 484-485. Soon after, the defendant attempted to retrieve her vehicle and met her boyfriend in a gas station parking lot. *Id*. at 485. It was at this point that the defendant shot and killed her boyfriend. *Id*. The defendant was charged with first-degree murder; at trial, the jury was instructed on first- and second-degree murder, and the jury convicted the defendant as charged. *Id*. at 486. The question in *Yeager* was whether the defendant was denied the effective assistance of counsel by her trial counsel's failure to request a voluntary-manslaughter instruction. We held that the defendant was prejudiced when her attorney failed to request an instruction for voluntary manslaughter because the jury could have used the voluntary-manslaughter instruction to determine whether the defendant had acted in an altered state of mind given the abusive encounter with her boyfriend. *Id*. at 495, 500. But here, the evidence of provocation is not nearly as strong. Sanchez and defendant had no prior relationship or physical contact before their interaction in the apartment building's vestibule. Instead, defendant's provocation claim relies entirely on a single altercation that lasted only a few seconds. Simply put, the defendant in *Yeager* had a much stronger case for voluntary manslaughter than defendant here. Accordingly, our conclusion in *Yeager* does not provide support for the majority's conclusion.

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[3] The majority incorrectly states that " 'only a modicum of evidence of provocation' is required to justify a voluntary-manslaughter instruction." (Quoting *People v King*, 98 Mich App 146, 152 (1980).) That is inconsistent with caselaw from this Court, which is clear in stating that a *rational* view of the evidence is required to support such an instruction. See *People v Mendoza*, 468 Mich 527, 542 (2003) ("Michigan courts have historically concluded that a manslaughter instruction is appropriate on a murder charge if a manslaughter instruction is supported by a rational view of the evidence."); *People v Cornell*, 466 Mich 335, 357 (2002).

Notwithstanding the factual differences in *Yeager*, the majority bungles the harmless-error standard because it conflates the harmless-error analysis in *People v Cornell*, 466 Mich 335 (2002), with the ineffective-assistance-of-counsel analysis in *Yeager*. *Cornell* was a harmless-error case applying the *Lukity* " 'more probable than not that the error was outcome determinative' " standard, as we are bound to do here. *Cornell*, 466 Mich at 364, quoting *People v Lukity*, 460 Mich 484, 496 (1999). *Yeager*, on the other hand, was an ineffective-assistance-of-counsel case applying the *Strickland* "reasonable probability of a different outcome" standard. *Yeager*, 511 Mich at 488, citing *Strickland v Washington*, 466 US 668, 694 (1984). To the extent that the majority finds *Yeager* instructive, however, it fails to accurately apply the *Strickland* prejudice standard. Put succinctly, we held in *Yeager* that a jury conviction on a more serious offense did not bar a defendant from satisfying the *Strickland* prejudice standard. However, we did *not* hold that the failure to give a warranted lesser-included-offense instruction *automatically* satisfies that standard. A defendant must still establish that but for counsel's deficient performance, " 'there is a reasonable probability that [the] outcome would have been different.' " *Yeager*, 511 Mich at 488, quoting *People v Trakhtenberg*, 493 Mich 38, 51 (2012). The majority does not acknowledge this critical aspect of the *Strickland* prejudice standard. As a result, it fails to consider "prejudice" at all.

Instead, the majority states that reversal is warranted whenever a rational view of the evidence supports a voluntary-manslaughter instruction. But the "rational view of the evidence" standard governs whether a *trial court* must give a lesser-included-offense instruction. See *People v Mendoza*, 468 Mich 527, 533 (2003), citing *Cornell*, 466 Mich at 357. Indeed, the majority concedes that consideration of the entire factual transaction might not ultimately benefit defendant but states that this is a judgment for the jury to make. That is a misunderstanding of how the harmless-error standard is applied. A conclusion that an error occurred does not necessarily mean that this error was outcome-determinative and requires a retrial. Rather, the defendant must demonstrate that "it is more probable than not that a different outcome would have resulted had the lesser offense instruction been given." *Cornell*, 466 Mich at 367. This is because the harmless-error standard requires more evidence to overturn a conviction on the basis that a lesser-included-offense instruction was not given than it does to obtain that instruction in the first place. *Id*. at 365. Neither defendant nor the majority notes this distinction or makes this showing. Instead, the majority peculiarly concedes that the relevant facts may prove to be fatal to defendant's voluntary-manslaughter claim. Such an assertion flies in the face of the outcome-determinative standard. According to the majority, reversal is warranted whenever a rational view of the evidence supports a voluntary-manslaughter instruction—i.e., when a defendant would have been entitled to the instruction in the first place—and when it is impossible to know what a jury would have done had it been properly instructed to consider the lesser included offense—i.e., every time the instruction was not given. This would

effectively make a trial court's failure to give a lesser-included-offense instruction an *automatic* reversible error. Whatever standard the majority attempts to piece together here, it has not applied the *Strickland* prejudice standard we applied in *Yeager*, nor has it applied the *Lukity* harmless-error standard that should govern here.[4]

For these reasons, even if defendant were entitled to have the jury instructed on voluntary manslaughter, I cannot conclude that it is more probable than not that the jury would have convicted him of voluntary manslaughter where the factual circumstances indicate that defendant acted in accordance with a fit of rage that predated his encounter with Sanchez.

IV. CONCLUSION

In conclusion, a survey of the facts demonstrates that this particular defendant was agitated long before he encountered Sanchez. The majority errs in focusing on defendant's subjective state of mind. Defendant simply has not demonstrated either that a single shove was adequately provoking to a reasonable person or that Sanchez's actions placed him in a heat of passion. But even if defendant was entitled to a voluntary-manslaughter instruction, the majority similarly falls short in explaining how the trial court's failure to instruct the jury was an outcome-determinative error. For these reasons, I dissent.

ZAHRA, J., joins the statement of BERNSTEIN, J.

WELCH, J., joins Part III of the statement of BERNSTEIN, J.

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[4] By not applying the *Lukity* harmless-error standard, the majority is effectively overruling our many prior decisions stating that "harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses," *Cornell*, 466 Mich at 361, and thus that the failure to give a lesser-included-offense instruction "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 (1999), quoting MCL 769.26. See, e.g., *People v Fox*, 507 Mich 936 (2021); *People v Haynie*, 505 Mich 1096 (2020); *People v Martin*, 482 Mich 851 (2008); *People v Weeder*, 469 Mich 493, 499 (2004). See also *People v Mendoza*, 468 Mich 527, 545 (2003) (applying the *Cornell* standard for when a lesser-included-offense instruction must be given in a voluntary-manslaughter case). The majority effectively overrules these prior decisions without conducting a stare decisis analysis.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 29, 2024
v	Nos. 362388; 367180 Muskegon Circuit Court
KRISTOPHER HARLAN JOESEL, Defendant-Appellant.	LC No. 2020-003689-FC

Before: GADOLA, C.J., and K. F. KELLY and MARIANI, JJ.

PER CURIAM.

In Docket No. 362388, defendant Kristopher Harlan Joesel appeals by right his jury conviction of second-degree murder, MCL 750.317, arising out of the stabbing death of Laura Sanchez. The trial court sentenced Joesel to serve 33 years to 90 years in prison. Joesel argues that the trial court erred when it refused to instruct the jury on manslaughter and erred when it denied his request to present evidence that Sanchez had alcohol and cocaine in her system. He also maintains that the trial court erred when it scored Offense Variable (OV) 19 of the sentencing guidelines and erred when it imposed a sentence that was disproportionate to his offense and to him as an offender.

In Docket No. 367180, Joesel appeals by right the trial court's order of restitution.[1] He argues that the trial court had no authority to order him to reimburse Sanchez for lost income and, in the alternative, argues that the trial court improperly included Sanchez's income losses on the basis of speculative evidence. He similarly states that the order should not have included costs for Sanchez's family's future counseling expenses for which there was no evidentiary support.

We conclude that Joesel has not identified any errors that warrant reversing his conviction. He has also not identified any error in the scoring of OV 19. He has, however, shown that the trial

[1] This Court consolidated the appeals on its own initiative for the efficient administration of the appellate process. *People v Joesel*, unpublished order of the Court of Appeals, entered August 8, 2023 (Docket Nos. 362388 and 367180).

court did not provide sufficient justification for the minimum sentence that it ordered him to serve. Joesel has also shown that the trial court erred in its order of restitution. Accordingly, we affirm in Docket No. 362388, but remand for resentencing. In Docket No. 367180, we vacate in part the trial court's order of restitution.

I. BASIC FACTS

In the early morning hours of July 18, 2020, Joesel and a friend went to a bar called Mike's Inn for a drink. The bar was directly across the street from an apartment complex—the Amazon Apartments—where Joesel lived. At about 1:00 a.m. Joesel asked the bartender for another beer in a manner that offended the bartender. As a result, the bartender suggested, in colorful terms, that Joesel leave. Joesel responded by knocking things off the bar. A bouncer attempted to restrain Joesel, and Joesel shoved him with such force that the bouncer struck and broke a lottery machine.

Two bartenders came to assist the bouncer and dragged Joesel over to a pool table between the bar and the front door. They struggled to keep Joesel under control, and Joesel spat in one bartender's face while swinging at them. A patron came over to the pool table, and Joesel pulled his legs up and forcefully kicked the patron. The patron lifted Joesel off the table, and Joesel, the patron, and the two bartenders then fell. Testimony established that the bartenders and patron were then able to drag Joesel outside.

Once outside, Joesel punched a patron who was holding the door open and split his lip so badly that he needed stiches. Joesel then went back into the bar only to be escorted out a different entrance. Once outside, Joesel urinated on the bouncer's truck. Joesel then walked down an alley and over to his apartment complex. The video evidence from the apartment complex showed that it was about 1:09 a.m. when Joesel arrived there.

After he returned to his apartment, Joesel sent an angry e-mail to the apartment manager. He apparently referred to the altercation at the bar: "Hi, Degenerate Scum. You owe money, and your resident just assaulted me for being white and said to leave the neighborhood." Joesel then grabbed a hunting knife and went back downstairs. Joesel encountered his friend from the bar in the foyer of the Amazon Apartments building, which was accessible to the public. Joesel let his friend into the secure area of the Amazon building and walked back to Mike's Inn at approximately 1:25 a.m.

Sanchez was at Mike's Inn with her boyfriend, Manuel Suarez. She and Suarez were not involved in Joesel's scuffle at the bar, but Suarez decided to leave shortly after the scuffle. Suarez and Sanchez went to Suarez's car, which was parked on the street outside the bar, and they spoke. Joesel walked by while Suarez sat in his car, and Suarez felt the back end of his car "go down." Joesel was apparently walking past the cars parked in front of the bar and puncturing their tires. Suarez and Sanchez got out of the car, and Sanchez began yelling at Joesel. Joesel walked back to the Amazon Apartments, and Suarez restrained Sanchez from following him. Suarez went back into the bar and told others about the tire incident. Sanchez apparently walked over to the Amazon Apartments at that time and tried to follow Joesel inside, but she was not able to enter the secure area. She then went back across the street to the bar.

The video evidence showed that after returning to his apartment, Joesel put up his hair, put on a hat, and went back down the elevator. He again left the Amazon Apartments with his knife and headed in the direction of Mike's Inn at about 1:31 a.m. Bar patrons were examining the cars parked in front of the bar and one patron was on the phone with a 911 dispatcher. Someone recognized Joesel as he approached and indicated that he was outside. Sanchez went toward Joesel to confront him, and Joesel decided to return to the apartment complex.

The video from the Amazon building's foyer showed Joesel return to the door after only being outside for about one minute; he entered the foyer, and Sanchez approached as he entered. Joesel turned and looked at Sanchez as he pulled the door shut behind him; he leaned forward a bit and appeared to say something to Sanchez. She pushed the door and appeared to speak to Joesel. Joesel then turned his back to Sanchez and walked to the panel that would allow him to key into the secure area of the apartment building. He switched the knife from his left hand to his right hand as he approached the panel. Sanchez then opened the door, and Joesel looked back at her. They appeared to say things to each other.

Joesel again turned away from Sanchez. He pulled at something on his left side with his left hand by the panel and appeared to be ignoring Sanchez. At that point, Sanchez ran toward Joesel and shoved him into a bank of mailboxes. Joesel turned suddenly and thrust his knife at Sanchez three times, the third time occurring after Sanchez had been forcefully stabbed twice and was moving away from Joesel. The video showed an instant stream of blood flowing from Sanchez's leg. Sanchez retreated from Joesel and stood for a moment by the door to the outside. She looked down and saw the blood from her leg.

The video showed that Joesel then calmly walked to the secure door as two men reached the door to the foyer. Sanchez's leg was bleeding profusely. When the secure door did not open, Joesel walked back to the panel and triggered it again. Sanchez approached, raised her arms, and stated something. Joesel ignored her, turned, and opened the secure door. He then left the room as Sanchez staggered and fell. It was 1:32 a.m. Sanchez died shortly thereafter.

Police officers arrested Joesel later that morning and the prosecution charged him with open murder. At trial, Joesel argued that he acted in self-defense when he stabbed Sanchez to death. The jury rejected his defense and found him guilty of second-degree murder. Defendant now appeals.

II. MANSLAUGHTER INSTRUCTION

A. STANDARD OF REVIEW

Joesel first argues that the trial court abused its discretion when it refused to instruct the jury that it could find him guilty of manslaughter as a necessarily included lesser offense of second-degree murder.

This Court reviews de novo claims of instructional error. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006), aff'd in part 482 Mich 851 (2008). This Court, however, reviews whether a requested lesser-included-offense instruction was appropriate under the facts of the case for an abuse of discretion. *People v Jones*, 497 Mich 155, 161; 860 NW2d 112 (2014). A trial

court abuses its discretion when it selects an outcome that falls outside the range of principled outcomes. *Id*. A trial court necessarily abuses its discretion when it premises its decision on an error of law. *People v McFarlane*, 325 Mich App 507, 517; 926 NW2d 339 (2018). To warrant reversal, a "defendant must show that it is more probable than not that the trial court's failure to give the requested instruction undermined the reliability of the verdict." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005).

B. ANALYSIS

Criminal defendants have the right to a properly instructed jury. See *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). That includes the right to have the jury instructed on an applicable necessarily included lesser offense. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Voluntary manslaughter is a necessarily included lesser offense of second-degree murder. See *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003). Therefore, Joesel would be entitled to have the jury consider that offense if a rational view of the evidence would support the instruction. See *id*. at 541. The requested instruction must be supported by evidence that demonstrates that the element distinguishing the two crimes was sufficiently disputed that the jury could consistently find the defendant innocent of the greater offense and guilty of the lesser offense. *Cornell*, 466 Mich at 352.

Voluntary manslaughter is murder without malice. See *Mendoza*, 468 Mich at 534. It is an intentional killing done in the heat of passion rather than from wickedness of heart or cruelty or reckless disposition. *Id*. at 535, citing *Maher v People*, 10 Mich 212, 219 (1862); see also *People v Townes*, 391 Mich 578, 589; 218 NW2d 136 (1974) (observing that voluntary manslaughter is an intentional killing in which the killer's malice was negated by provocation and killing in the heat of passion). To establish voluntary manslaughter, there must be evidence that "the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Mendoza*, 468 Mich at 535.

The first inquiry is whether there was evidence that the killing was an act of passion—that is, whether there was evidence that the defendant killed "in a moment of frenzy or of temporary excitement." *People v Younger*, 380 Mich 678, 681; 158 NW2d 493 (1968). If the evidence showed that the defendant acted with deliberation, "it cannot be said, legally, that the homicide was the product of provocation which unseated reason and allowed passion free rein." *Id*. at 681-682. Accordingly, a reviewing court must first examine the "nature and quality of the act of homicide" to determine whether it was that of "an ordinary man responding to the heat of passion or that of an ordinary man functioning with deliberation." *Id*. at 682. "Only if the defendant's actions can be found to be acts of passion is it appropriate to inquire into the legal sufficiency of the asserted provocation." *Id*.

To satisfy the provocation element, the provocation must have actually caused the defendant to act out of passion rather than reason—it must have caused emotions so intense that it distorted the defendant's very process of choosing. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation must also be adequate as judged by a reasonable person. *Id*. "Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter." *Id*. Stated in other terms, the provocation must be of a kind that might cause even

a reasonable person to lose control of their decision making. See *Townes*, 391 Mich at 589-590. Acting in the heat of passion means acting while in a state of mind incapable of cool reflection. See *id*. at 589 n 3.

Generally, mere words and insults will not constitute adequate provocation. *Pouncey*, 437 Mich at 391. Even a physical battery might not rise to the level of an adequate provocation. To constitute adequate provocation, a battery must not have been privileged (i.e., committed in self-defense) and must have been a hard blow inflicting considerable pain or injury. See Perkins & Boyce, Criminal Law (3rd ed), p 92; see also 40 CJS, Homicide, § 122 ("However, physical contact between a defendant and a victim is not always sufficient to warrant a manslaughter instruction even when the victim initiated the contact; this is particularly so when a defendant is armed with a deadly instrument and a victim is not.").[2]

Ordinarily, whether a particular act amounted to adequate provocation is a question of fact for the jury. *Pouncey*, 437 Mich at 390. This Court has stated that a defendant need only have a "modicum of evidence of provocation" to support a manslaughter instruction, but the evidence must, nevertheless, be sufficient to permit the jury to find manslaughter. See *People v King*, 98 Mich App 146, 152; 296 NW2d 211 (1980). If no reasonable jury could find that the provocation was adequate, then the trial court may properly refuse to instruct the jury on manslaughter. See *Pouncey*, 437 Mich at 392; see also *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998) ("[W]e conclude that there must be sufficient evidence to allow a rational trier of fact to find adequate provocation by a preponderance of the evidence.").

When the evidence adduced at trial is considered as a whole, no reasonable jury could find that Joesel stabbed Sanchez under the influence of passion arising from Sanchez's act of pushing him into the mailboxes, let alone that Sanchez's provocation caused the passion, even if the provocation could be considered legally adequate. Testimony established that by about 1:00 a.m. on the night at issue, a bartender refused to serve Joesel more alcohol and suggested that Joesel should leave the bar in strongly worded language. Joesel immediately became angry and started knocking items off the bar. When a bouncer intervened, Joesel violently shoved the bouncer into a lottery machine and broke it. Two bartenders then joined the effort to remove Joesel from the bar.

The video evidence showed that it essentially took three grown men—including one with physically intimidating stature—to compel Joesel to leave. After being put outside, Joesel immediately and forcefully punched an older patron who simply held open the door to the bar. Joesel then deliberately reentered the bar and, after again being escorted outside, he urinated on an employee's truck. The evidence showed that Joesel was not only unafraid of the bar's staff and patrons, he actively confronted them.

The evidence of Joesel's calculated rage did not end with his expulsion from the bar. Joesel proceeded back to his apartment. The video evidence showed him to be in control and moving at

[2] Learned treatises are not binding on this Court, but may be persuasive. See *Patrick v Turkelson*, 322 Mich App 595, 618 n 7; 913 NW2d 369 (2018).

a normal pace. He sent an e-mail to a person completely unrelated to the bar incident in which he cited the bar incident and interjected race. He then armed himself with a hunting knife. He calmly let a friend into the apartment building and escorted him up the elevator; after that, he left the building and walked across the street to methodically puncture the tires of cars parked outside the bar. When confronted by Sanchez after he deflated Suarez's car's tire, Joesel calmly walked back to his apartment. He then changed his appearance and immediately went back outside. He was still armed. Although Joesel claimed that he was going to retrieve his phone from the bar, the fact that he changed his appearance and continued to carry his knife strongly suggested that he was still angry and that he went outside to continue to express his anger in one way or another.

Joesel claimed that he immediately returned to his apartment because he feared the "mob" that had assembled outside the bar (a group that the evidence showed assembled to assess the damage that Joesel had inflicted to their vehicles) but the video evidence of the stabbing belied that claim. The video showed Joesel returning to the Amazon building's foyer and showed that Sanchez closely followed him. Joesel was not, however, moving particularly fast. Rather, he appeared calm and moved with due deliberation. He pulled the foyer's exterior door closed behind him, but his actions did not appear frantic or desperate. The video showed him pulling the door and leaning into the glass as if to taunt or insult Sanchez. He then proceeded to the panel that would allow him to use his key fob to enter the interior door. He looked at Sanchez when she entered. He did not show any sign of fear. The evidence showed that Joesel was 50 pounds heavier than Sanchez (and nearly a foot taller), armed with a hunting knife, and had nearly overpowered two grown men at the bar about 30 minutes earlier. He was also unafraid to enter a public space and vandalize multiple cars just outside a crowded bar.

The video did show that Sanchez, who again was of much smaller stature, ran toward and pushed Joesel, but the entire incident does not depict Joesel suddenly losing control as a result of a push from behind from a much smaller female. Rather, the video showed an already angered Joesel turn and viciously stab Sanchez. His first blow penetrated more than four inches into Sanchez's chest through two of Sanchez's ribs and pierced her left ventricle. The second thrust went three inches into her leg and severed her femoral artery. The two piercing blows required tremendous force to achieve that degree of penetration. Joesel then stabbed out again as Sanchez staggered back from the attack. Far from being disturbed by passion, Joesel turned to the panel, activated it, walked to the door, turned back to the panel, activated it again, and then calmly walked into the building's interior. He looked back at Sanchez briefly and then chose not to wait for the closest elevator, but instead used a different route to his apartment.

The circumstances showed that Joesel had been acting in a state of simmering rage for approximately 30 minutes before the encounter with Sanchez. Although he acted on anger, the evidence—and especially the video evidence—demonstrated that Joesel still acted with deliberation and control. He made numerous decisions that required forethought and calculated steps. In each instance, he chose to provoke others and escalate the disturbances that he initiated. Joesel specifically targeted others with violence who were not even involved in his expulsion from the bar. Joesel could have ended the sequence of events that led to Sanchez's murder at various points, but he chose to go down the path of continued confrontation and provocation. He claimed that he was retreating and that Sanchez's push caused him to snap and react on instinct, but the video evidence showed that he was not overcome with passion. The video depicted him reacting

with cold, calculated anger—lashing out, as he had all night, against the people that he felt had wronged him.

On the totality of this evidence, no reasonable jury could conclude that Sanchez's shove—even if it were legally adequate provocation—caused Joesel to lose control of his ability to make choices and act out of passion. See *Younger*, 380 Mich at 681-682. The "nature and quality of the act of homicide" did not show "an ordinary man responding to the heat of passion"; instead, it showed "an ordinary man functioning with deliberation." *Id*. at 682. Consequently, because there was insufficient evidence to allow a jury to find by a preponderance of the evidence that Joesel acted under the influence of passion,[3] the trial court did not err when it refused to instruct the jury that it could convict Joesel of the lesser included offense of manslaughter without regard to whether Sanchez's shove would have constituted adequate provocation. See *Pouncey*, 437 Mich at 392; *Darden*, 230 Mich App at 604.

On appeal, Joesel has not shown that it is more probable than not that the trial court's failure to give the requested instruction undermined the reliability of the verdict. See *Tierney*, 266 Mich App at 714. Joesel does not address the evidence that he was not under the influence of passion when he stabbed Sanchez. Instead, he focuses on the evidence that Sanchez rushed at him and pushed him into a wall. He argues that this evidence alone warranted a manslaughter instruction because it amounted to legally adequate provocation. As already discussed, the initial question was whether there was evidence that would permit a reasonable finder of fact to find that Joesel was acting out of passion at the moment of the stabbing. We do not agree that there was evidence from which a reasonable jury could find that he acted out of passion. In any event, we shall briefly examine the authorities that Joesel cites for the proposition that the trial court had to instruct the jury on manslaughter.

Joesel cites, among other cases, *People v Neal*, 201 Mich App 650; 506 NW2d 618 (1993). That case, however, did not involve the propriety of a manslaughter instruction; it dealt with whether the circuit court erred when it reversed the district court's refusal to bind over the defendant on charges of murder, but instead bound him over on a charge of manslaughter. See *id*. at 652, 655-656. This Court determined that the evidence showed that a white mob chased the defendant for up to a half mile after attacking one of the defendant's companions. All the while, the mob shouted racial epithets. The defendant shot the decedent, but only after warning him and telling him that he did not want to shoot. This Court determined that the evidence showed the defendant acted without malice sufficient to establish murder and that the circuit court erred when

[3] Joesel argues that the trial court's decision to instruct the jury on self-defense was inconsistent with its decision to deny an instruction on manslaughter. He relies on our Supreme Court's statement that what had been labeled imperfect self-defense can often be used as evidence of heat of passion. See *Reese*, 491 Mich at 150-153. The fact that things that might have been used to support a self-defense claim can sometimes be used to establish a heat of passion claim does not mean that a trial court must instruct the jury on manslaughter whenever the court instructs the jury on self-defense. Self-defense does not have the same elements as heat of passion manslaughter. Compare *Mendoza*, 468 Mich at 535, and *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002).

it reversed the district court's bindover determination. *Id*. at 656-657. This Court impliedly agreed that bindover on manslaughter was warranted, but it did not directly analyze the issue of passion caused by provocation and whether the provocation was legally adequate because those issues were not before it. The facts in *Neal* show that, when a black man is chased by a white mob yelling racial epithets after the mob attacked the defendant's companion, the defendant can be found to have acted under provocation sufficient to excite passion beyond the control of reason. That is not the case here.

In this case, Sanchez did not make an unprovoked and sudden attack on Joesel. Joesel vandalized her boyfriend's car, and Sanchez confronted Joesel. Thus, Joesel was the initial provocateur. Although Sanchez pursued Joesel, she was not armed, and she was shorter and much lighter than Joesel. Simply put, Sanchez's push in the back, under all the surrounding circumstances, could not reasonably be considered adequate provocation for Joesel's act of plunging a hunting knife through Sanchez's rib cage, piercing her heart, removing the knife, and then plunging it deep into her thigh and piercing her femoral artery such that she bled to death at the scene. No reasonable juror could have concluded either that Sanchez aroused Joesel's passions, which were on full display long before the fatal attack, or that her actions were sufficient to arouse such violent passion in Joesel. Joesel was the aggressor in every instance, and he alone escalated matters. He acted with apparent deliberation throughout the incident that resulted in Sanchez's murder.

Even if the trial court erred when it concluded that the facts did not warrant a manslaughter instruction, we conclude that the error was harmless. See *Cornell*, 466 Mich at 361-362 (stating that the failure to give an instruction on a lesser included offense can be harmless error). In her closing argument, defense counsel attacked the evidence that Joesel acted with malice; she stated, in relevant part, that the only thing that made the situation dangerous was Sanchez's decision to attack Joesel. She then noted what could not be second-degree murder: a killing on sudden impulse and without reflection. She even quoted the jury instruction to that effect. She elaborated:

> And in other words, second-degree murder cannot be a heat-of-passion killing. And just like first-degree murder, one, it can't be one that's done by sudden impulse.
>
> And here we have a killing that is an impulsive reaction to being chased down and assaulted, and—and it's not murder.
>
> So putting these two things together, it's not murder if the killing is a result of a sudden impulse without reflection, and it's not murder if the killing was done under circumstances that reduce it to a lesser crime such as manslaughter, which is this heat-of-passion killing.

Defense counsel again informed the jury that Joesel's acts might be "something, but it's not murder," and all the jury had before it was the charge of "murder." She reiterated her belief that the evidence showed only that he acted on sudden impulse or acted out of passion or anger, which would be manslaughter and which was not available to the jury. She then argued that the jury could not find the malice required for murder on the evidence before it:

> When you look at these facts and analyze the law in these instructions that the Judge is going to give you, can you say that this was anything other than what I told you three days ago—an impulsive reaction to being chased down and assaulted.
>
> Can you say that it wasn't that?
>
> Can you even say: Geez, I don't know if it was that. I don't think so.
>
> He is not guilty of murder. He might be guilty of something, but it's not murder, and murder is what you have in front of him—in front of you.

The trial court also instructed the jury that it could not find Joesel guilty of murder consistent with the third element of second-degree murder if it found that Joesel killed Sanchez under circumstances that reduced the killing to a lesser crime: "Third, that the—that the killing was not justified, excused, or done under circumstances that reduced it to a lesser crime such as manslaughter, which occurs if the Defendant acted out of passion or anger brought about by adequate cause and before the Defendant had a reasonable time to calm down."

Defense counsel's argument and the trial court's instruction placed before the jury the question whether Joesel acted out of passion caused by adequate provocation; and it is evident that the jury rejected Joesel's claim that he acted out of passion after having been provoked by Sanchez. The absence of the manslaughter instruction was harmless because the jury rejected the defense theory that the killing was something less than second degree murder. Moreover, the failure to give an instruction on a lesser included offense will only warrant relief when the evidence clearly supported the lesser included instruction. See *id*. at 365. Given the overwhelming evidence that Joesel acted with calm deliberation before, during, and after the stabbing, any error in failing to instruct the jury that it could find Joesel guilty of manslaughter was harmless—indeed, harmless beyond a reasonable doubt. Therefore, any potential error does not warrant a new trial. See *id*. at 366-367.

III. TOXICOLOGY REPORT

A. STANDARD OF REVIEW

Joesel next argues that the trial court abused its discretion when it precluded him from presenting evidence that Sanchez's autopsy revealed that she had alcohol and cocaine in her system.

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Daniels*, 311 Mich App 257, 265; 874 NW2d 732 (2015). This Court reviews de novo the application of rules and statutes governing the admission of evidence. *Roper*, 286 Mich App at 91. A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*.

B. ANALYSIS

Relevant evidence is generally admissible. MRE 402.[4] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Even when evidence is relevant, the trial court may exclude the evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403.

In the trial court, Joesel argued that evidence that Sanchez had consumed alcohol and used cocaine would be relevant because those substances can cause some people to become aggressive and violent. He maintained that this evidence would support his claim of self-defense because it would explain why he feared Sanchez. Defense counsel also raised the issue of character—she argued that Sanchez's use of those substances went to whether she had a character for peacefulness. She concluded that, "if the decedent's behavior is affected in such a way that it would be obvious to the defendant that the person was not acting normally, then it is relevant."

The trial court rejected the defense's arguments. It explained that the evidence would not be relevant unless Joesel knew that Sanchez was "high and drunk." The court also disagreed that Joesel had the right to present the evidence to prove Sanchez's character. The court reasoned that there was no evidence that Sanchez's alcohol and drug use was reflective of her character, particularly of a penchant for violence, and there was no evidence that Joesel knew Sanchez and knew that "every time she gets high or drunk she's—she's violent." For these reasons, it excluded the evidence of Sanchez's toxicology report.[5]

Our Supreme Court addressed when evidence of a victim's intoxication might be relevant in *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010). In that case, the defendant was charged with various crimes after he drove a vehicle while intoxicated and struck and killed a pedestrian. *Id*. at 187-188. The Supreme Court first held that the offenses at issue all contained an element of causation. *Id*. at 193. Because they all involved causation, the defense could present evidence that the victim was grossly negligent, which would sever the causal chain. See *id*. at 193-196. The Court determined that evidence that the victim was intoxicated was relevant and admissible because the fact of intoxication made it more likely that the victim acted with gross negligence. *Id*. at 198. Nevertheless, the Court cautioned that evidence of a victim's intoxication—even in the context of a crime involving proximate causation—would not always be admissible:

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[4] The Michigan Rules of Evidence were substantially amended on September 20, 2023, effective January 1, 2024. See ADM File No. 2021-10, 512 Mich lxiii (2023). This opinion relies on the version of the rules in effect at the time of trial.

[5] Joesel's claim that the trial court applied the wrong standard is not supported by the record. A careful reading of the trial court's analysis shows that the court applied a relevance standard and cited *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010). The court only discussed character evidence because the defense raised that as an alternate ground for allowing the admission of the evidence.

> Generally, the mere fact that a victim was intoxicated at the time a defendant committed a crime is not sufficient to render evidence of the victim's intoxication admissible. While intoxication may explain why a person acted in a particular manner, being intoxicated, by itself, is not conduct amounting to gross negligence. In this case, however, the victim's extreme intoxication was highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around him. Indeed, in this case, the proffered superseding cause was the victim's presence in the middle of the road with his back to traffic at night during a rain storm with a sidewalk nearby. Thus, the proofs were sufficient to create a jury-submissible question about whether the victim was grossly negligent, and the victim's high level of intoxication would have aided the jury in determining whether the victim acted with wantonness and a disregard of the consequences which may ensue. [*Id*. at 199 (quotation marks, citation, and alteration omitted).]

This case did not involve a superseding cause that might have relieved Joesel of liability for causing Sanchez's death. Joesel's defense was that he acted in self-defense. Self-defense is a subjective standard that looks to the circumstances as they appeared to the defendant. See *Riddle*, 467 Mich at 126-127. For that reason, Joesel's ability to assert the defense depended on evidence about his knowledge and perception of Sanchez, and her conduct and whether her conduct caused him to have a reasonable belief that his life was in danger or that he was in danger of serious bodily harm. *Id*. Even when character evidence is admissible to prove whether a victim was the initial aggressor, it is not admissible to prove that the defendant acted in self-defense: "However, unlike evidence tending to show that the victim was the aggressor, the decedent's violent reputation must be known to the defendant if he is to use it to show that he acted in self-defense." *People v Harris*, 458 Mich 310, 316; 583 NW2d 680 (1998).

There was no evidence that Joesel knew Sanchez personally before the incident at issue and no evidence that he had personal knowledge of her conduct while intoxicated or under the influence of cocaine. There was also no evidence that he knew that she used cocaine on the night at issue, or even that he knew she was drunk. He could not, therefore, argue that he feared her because he was aware that she was violent and dangerous while drunk or high. See *id*.

Joesel maintains that an expert could have testified that persons who are drunk and high are generally more aggressive and violent. Be that as it may, such evidence would not show that Sanchez was in fact subjectively more dangerous or violent on that night, and it would not establish that her observable behaviors were more dangerous or violent. To the extent that such expert testimony may have been relevant, it was relevant to explain why Sanchez did not take steps to avoid the obvious danger that Joesel posed to her. Expert testimony would not, however, shed any light on Joesel's *perception* of Sanchez's behaviors. Contrary to Joesel's suggestion, evidence about how Sanchez's intoxication might have affected her behaviors would not have permitted any inferences about how Joesel perceived those behaviors absent personal knowledge of those characteristics.

The evidence was also excludable because it was unfairly prejudicial. See MRE 403. All relevant evidence is inherently prejudicial, and, for that reason, it is not proper to exclude evidence under MRE 403 simply because it is damaging. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Nevertheless, when there is a possibility that the jury will weigh marginally probative evidence substantially out of proportion to its logically damaging effect, a trial court may properly exclude the evidence under MRE 403. See *id*. at 75-76.

In this case, the specific information provided by the toxicology report—to the extent that it was relevant at all—would have permitted inferences that explained why it was that Sanchez endangered herself by confronting a man who was stronger, taller, armed, and who clearly demonstrated his tendency for violence earlier in the night. It was not relevant to establish Joesel's knowledge or his perception of Sanchez's conduct. In theory, it might also have been admissible to show that Sanchez was the initial aggressor had that been an issue at trial. Whatever minimal relevance the evidence might have had, there was a substantial danger that the jury would have given the toxicology report weight out of proportion to its relevance. Joesel was in effect inviting the jury to conclude that Sanchez was at fault for her own death because she was drunk and high, and chose to attack a man who clearly posed a danger to her under the circumstances. Stated another way, it was evident that the toxicology report involved a "matter of scant or cumulative probative force" that the defense hoped to drag in "by its heels for the sake of its prejudicial effect." *Id*. at 75 (quotation marks and citation omitted). For that reason, the evidence was also inadmissible under MRE 403.

The trial court's decision to exclude Sanchez's toxicology report did not fall outside the range of principled outcomes. See *Daniels*, 311 Mich App at 264-265.

IV. OV 19

A. STANDARD OF REVIEW

Joesel next argues that the trial court clearly erred when it found that he interfered with the administration of justice and assigned 10 points under OV 19.

"This Court reviews for clear error a trial court's findings in support of [a] particular score under the sentencing guidelines but reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the findings." *McFarlane*, 325 Mich App at 531-532. "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Brooks*, 304 Mich App 318, 319-320; 848 NW2d 161 (2014) (quotation marks and citation omitted).

B. ANALYSIS

Although the sentencing guidelines are now advisory, trial courts must still properly score the guidelines and must consider them when sentencing a defendant. *People v Lockridge*, 498 Mich 358, 391, 392 n 28; 870 NW2d 502 (2015). "When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a [presentence investigation report or] PSIR, plea admissions, and testimony presented at a preliminary examination." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). Further, the trial court may properly

rely on inferences that arise from the record evidence when making the findings underlying its scoring of OVs. *Id.* at 109.

Trial courts are to assign points under OV 19 on the basis of conduct that interferes with the administration of justice. See MCL 777.49. In relevant part, the trial court was to assign 15 points if it found that Joesel "used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice." MCL 777.49(b). If it found that Joesel "otherwise interfered with or attempted to interfere with the administration of justice," it was to assign 10 points under OV 19. MCL 777.49(c). A person interferes with the administration of justice if he or she does anything to "hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 342-343; 844 NW2d 127 (2013).

At sentencing, the trial court relied on the testimonies of the officers at trial when finding that Joesel interfered with the administration of justice in the moments before and during his arrest. Detective Kyle Hall testified that he and other officers tried to contact Joesel as they awaited a search warrant and knocked at both doors and announced their presence, but Joesel did not answer. He stated that Joesel finally opened the door slightly at about 8:15 a.m. They tried to get Joesel out of the apartment because they could not see both of his hands, but he tried to shut the door on them. Detective Hall stated that he "pushed the door open" and took Joesel into custody. Although Detective Hall did not agree that it was "quite a tussle," he admitted that he "dragged" Joesel out of the apartment to arrest him. Detective Hall explained that Joesel had not been "compliant." Detective Hall stated that he had obtained a warrant for Joesel's arrest by the time of that encounter.

Detective Hall's testimony that Joesel had not been compliant permitted an inference that he ordered Joesel to show his hands and come out of the apartment. The evidence that Joesel tried to close the door on the officers and that Detective Hall had to force the door open to take Joesel into custody under the authority of an arrest warrant permitted an inference that Joesel was disregarding a lawful command, which can constitute interference with the administration of justice. See *id*. at 344 (observing that disobeying a police order can constitute interference with the administration of justice). Given this evidence, the trial court did not clearly err when it found that Joesel interfered with the administration of justice. See *Brooks*, 304 Mich App at 319-320. The trial court, accordingly, did not err when it assigned 10 points under OV 19. See MCL 777.49(c).

V. PROPORTIONATE SENTENCE

A. STANDARD OF REVIEW

We next address Joesel's argument that the trial court's decision to sentence him to a minimum of 33 years in prison was disproportionate to him as an offender and the nature of his offense.

This Court reviews a trial court's decision that a particular sentence is proportionate to the offender and the offense for an abuse of discretion. *People v Lydic*, 335 Mich App 486, 500; 967

NW2d 847 (2021). A trial court abuses its discretion when it selects a sentence that is not proportionate to the offender and offense. *Id*.

B. ANALYSIS

The Legislature has granted to trial courts the discretion to sentence a defendant—with some exceptions—within a given range. See *People v Posey*, 512 Mich 317, 343; 1 NW3d 101 (2023) (opinion by BOLDEN, J.); see also *People v Purdle*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 353821); slip op at 3-4 (stating that, although the lead opinion in *Posey* was not technically binding, this Court will follow it in the interests of judicial economy). When exercising its discretion to select a sentence within that range, a trial court must individualize the sentence to the circumstances surrounding the offense and the offender. *Posey*, 512 Mich at 343. See also *Graham v Florida*, 560 US 48, 59; 130 S Ct 2011; 176 L Ed 2d 825 (2010). Michigan courts utilize the now advisory sentencing guidelines to help individualize the sentences while reducing disparities premised on improper factors. *Posey*, 512 Mich at 343-344. When reviewing a sentence, this Court applies the proportionality test stated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), without regard to whether the trial court's sentence falls within the recommended range of the sentencing guidelines. See *Posey*, 512 Mich at 351-353.

This Court has held that the sentencing guidelines are a useful tool for courts to review the proportionality of a sentence, and has stated that trial courts must justify the sentence actually imposed:

> Because the guidelines embody the principle of proportionality and trial courts must consult them when sentencing, it follows that they continue to serve as a "useful tool" or "guideposts" for effectively combating disparity in sentencing. Therefore, relevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight. When making this determination and sentencing a defendant, a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. [*People v Dixon-Bey*, 321 Mich App 490, 524-525; 909 NW2d 458 (2017) (quotation marks and citations omitted).]

At sentencing, the trial court acknowledged that the recommended range for Joesel's minimum sentence was $13^1/_2$ years to $22^1/_2$ years, but it nevertheless chose to sentence him to serve a minimum of 33 years in prison. The trial court noted that Sanchez was relatively young when Joesel ended her life, but it did not state whether that justified a longer sentence. It did state that it felt that Joesel's failure to take responsibility was a factor not considered under the guidelines, which can be an important factor to consider. See *People v Lemons*, 454 Mich 234, 259-260; 562 NW2d 447 (1997) (holding that the sentences were proportionate because, in relevant part, the defendant "expressed no remorse whatsoever"). The court did not, however, include an explanation establishing how the sentence it actually imposed was more proportionate to Joesel's

offense and status as an offender than a different sentence, particularly a sentence within the applicable sentencing guidelines range, would have been. See *Dixon-Bey*, 321 Mich App at 525. The facts of this case would likely justify a more severe minimum sentence than identified under the sentencing guidelines, but on this record, the trial court did not provide sufficient justification for the sentence imposed. Accordingly, we vacate Joesel's sentence and remand for resentencing.

VI. RESTITUTION

A. STANDARD OF REVIEW

Finally, Joesel argues that the trial court did not have the authority to order him to pay restitution for Sanchez's lost income. He also maintains that there was insufficient evidence to support the amount of income loss and the Sanchez family's future counseling expenses.

"Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and this Court reviews de novo the proper interpretation of statutes." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2011). This Court reviews a trial court's findings in support of an order of restitution for clear error. *Id*.

B. BACKGROUND LAW

The victims of crime have a constitutional and statutory right to restitution. *People v Bentley*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 364303); slip op at 3. They have a right under the general restitution statute, see MCL 769.1a, and under the Crime Victim's Rights Act (CVRA), see MCL 780.751 *et seq*. *Bentley*, ___ Mich App at ___; slip op at 3. The primary difference between the general restitution statute and the CVRA is that the general restitution statute does not provide compensation for future losses. See *id*.; slip op at 4 n 4. Both statutes, however, mandate the order of full restitution, which means restitution that is maximal and complete. *Id*.; slip op at 4. Nevertheless, the restitution must bear a direct causal relationship to the conduct underlying the offense of conviction, and the restitution may encompass only losses that are easily ascertained and are a direct result of the defendant's criminal conduct. *Id*. When there is a dispute about the amount of compensation, the prosecution bears the burden to prove the amount of the loss by a preponderance of the evidence. *Id*. Notably, because the CVRA mandates full restitution for the victims of crime, the enumerated list of injuries for which restitution must be ordered is not exclusive; rather, those provisions tell courts how to evaluate specific types of losses. See *People v Garrison*, 495 Mich 362, 368-369; 852 NW2d 45 (2014).

Under the CVRA, a trial court must order a person convicted of a crime to pay full restitution to his or her victims: "when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 780.766(2). This provision is broadly worded and requires restitution for all losses incurred by a victim as a result of the course of conduct that gave rise to the defendant's conviction. See *Garrison*, 495 Mich at 368 (observing that the CVRA imposes a "duty on sentencing courts to order defendants to pay restitution that is maximal and complete").

C. FUTURE INCOME

In the present case, the jury found that Joesel murdered Sanchez. Accordingly, it was beyond reasonable dispute that Joesel's course of conduct directly caused Sanchez to be unable to earn income from the moment of her death. MCL 780.766(4)(c) provides that, "[i]f a crime results in physical . . . injury to a victim, the order of restitution shall require that the defendant . . . [r]eimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime." For that reason, the trial court was obligated to order Joesel to reimburse Sanchez's estate for Sanchez's after-tax income losses and, on the basis of the evidence, the court found that Sanchez would have earned $1,539,574.40 after taxes during the remainder of her life. The trial court then ordered Joesel to pay restitution of that amount.

On appeal, Joesel argues that this provision does not authorize a trial court to order reimbursement for lost income for a deceased victim. Specifically, he cites the Legislature's use of the term "suffered" in MCL 780.766(4)(c) as evidence that the Legislature did not intend to allow reimbursement for future income losses.

Joesel reads the term "suffered" in isolation and places much weight on the Legislature's use of the past tense. The Legislature addressed the victim's "after-tax income loss" in MCL 780.766(4)(c) and provided that that loss must be "suffered by the victim as a result of the crime." The phrase introduced by the term "suffered" qualifies the nature of the loss for which reimbursement must be ordered. Stated another way, the Legislature intended to limit the after-tax losses for which compensation must be paid to those losses the prosecution can show were suffered as a direct result of the actual crime of which the defendant was convicted. The Legislature's use of the past tense form of the verb "to suffer" does not demonstrate that the Legislature intended to impose a strict temporal limitation on the order of reimbursement for all income losses. An injured victim who can show that his or her injury will prevent him or her from working for a specified period of time has "suffered" an identifiable income loss even before the passage of time within which he or she would have earned the income. This Court has already acknowledged that a victim might be able to establish that he suffered an income loss within the meaning of MCL 780.766(4)(c) with proof that the victim would be unable to work for a specified period. See *People v Corbin*, 312 Mich App 352, 371; 880 NW2d 2 (2015). Sanchez's death plainly precluded her from being able to earn income for the remainder of her expected lifespan.

Joesel's preferred interpretation would also create practical difficulties for victims and trial courts. A victim would almost never suffer lost income at the very moment that he or she suffered a physical injury consistent with MCL 780.766(4). Rather, a victim's injury would typically preclude the victim from earning income—other than passive income—at some future point after suffering the injury. Under Joesel's preferred interpretation, a person who was incapacitated—but not killed—would only be entitled to reimbursement for lost income up to the moment of the restitution hearing or request for restitution because those income losses would be the only losses actually "suffered"—in a temporal sense—by the victim to that point. That would be true even though the victim's incapacity might be permanent. Presumably, in those situations, the victim—or the victim's estate—would have to periodically return to the trial court to request additional reimbursement for the newly suffered income losses as those losses occurred, as permitted by MCL 780.766(22) ("The court may amend an order of restitution entered under this section on a motion by the prosecuting attorney, the victim, or the defendant based upon new information

related to the injury, damages, or loss for which the restitution was ordered."). The conclusion that the Legislature intended to require reimbursement for income loss when there is evidence that the victim's injury is such that he or she will continue to be unable to earn income is consistent with the remedial nature of the statute and the Legislature's goal of shifting the burden of losses from victims to the perpetrators of crimes. See *Allen*, 295 Mich App at 282.

In any event, even if MCL 780.766(4)(c) only applies to after-tax income losses that the victim has suffered as of the request for restitution or restitution hearing, that provision would not preclude trial courts from ordering reimbursement for future income losses consistent with the other provisions of the CVRA. The provisions for restitution stated under MCL 780.766(4) are "complementary to the broad mandate for complete restitution" stated under MCL 780.766(2), and do not constitute an "exhaustive list of all types of restitution available under Michigan law for victims . . . ." *Garrison*, 495 Mich at 369-370. A person who is unable to work as a result of the commission of a crime is a victim who "suffers direct . . . financial . . . harm," MCL 780.766(1), and who is entitled to "full restitution," MCL 780.766(2). Thus, future losses are not precluded under MCL 780.766(4)(c) and are clearly encompassed within the broad mandate of MCL 780.766(2).

Joesel also invokes other grounds for concluding that the order of restitution was improper. He maintains that, to the extent that the CVRA is ambiguous, this Court must apply the rule of lenity to mitigate the punishment imposed by the order of restitution. An order of restitution is not a penalty, however. See *People v Foster*, 319 Mich App 365, 389; 901 NW2d 127 (2017). Accordingly, the rule of lenity does not apply to it. See *People v Johnson*, 302 Mich App 450, 462; 838 NW2d 889 (2013).

He also argues that the trial court's order of restitution infringed his right to have a jury trial in a civil case decide whether and to what extent he should be liable for the damages caused by his conduct. The statutory scheme for restitution is separate and independent of the remedies available in a civil proceeding. *People v Lee*, 314 Mich App 266, 275; 886 NW2d 185 (2016). Indeed, the Legislature specifically contemplated that a victim might obtain compensation in a civil proceeding in addition to compensation through restitution and provided that any amounts received in restitution would be set off against the amount later recovered in a civil proceeding. MCL 780.766(9). Consequently, these additional grounds do not establish that the CVRA did not authorize the trial court to order restitution for future income losses. The trial court did not err when it determined that future income losses were subject to restitution under the CVRA.

Joesel also argues that the prosecution presented insufficient evidence to establish Sanchez's potential future earnings. More specifically, he maintains that the prosecution had to present evidence establishing Sanchez's employment history and the amount that she had actually made. Joesel's arguments are not well-taken.

As this Court has explained, although the restitution must be for actual losses suffered by the victims, the method for calculating the losses is a matter of reasonableness:

> Put simply, the amount of restitution must be based on the *actual* loss suffered by the victim. The standard for calculating a restitution award under the CVRA is simply one of reasonableness. The language of the statute does not

> suggest the need for absolute precision, mathematical certainty, or a crystal ball. But speculative or conjectural losses are not deemed reasonably expected to be incurred under the CVRA. Therefore, where the evidence provides a reasonably certain factual foundation for a restitution amount, the statutory standard is met.
>
> To that end, when determining the amount of restitution to award a victim, the focus is consistently not on what a defendant took, but what a victim lost because of the defendant's criminal activity. Moreover, restitution is not designed to provide a windfall for crime victims, but was created to ensure that victims are made whole for their losses to the extent possible. [*Bentley*, ___ Mich App at ___; slip op at 4-5 (quotation marks, citations, and alterations omitted).]

There was testimony at trial that Sanchez was employed as a medical assistant, and the prosecution informed the trial court that Sanchez had been employed as a resource technician with Michigan State University's College of Human Medicine. Even though Sanchez had been employed in a professional capacity with education beyond the high school level, the prosecution relied on evidence that established the median weekly earnings for a woman of Sanchez's age with only a high school education. The prosecution then used that data and applied it to Sanchez's expected remaining lifespan, as determined using the Unites States Social Security Administration's life expectancy calculator to determine how much she was likely to earn over her remaining lifespan. The prosecution then adjusted that figure by deducting taxes. The result was $1.539 million.

The prosecution presented evidence from which the trial court could infer that Sanchez had gainful employment earning an income at a level beyond that which a woman of her age would typically have earned with a high school diploma. Despite that, the prosecution only asked for an order of restitution for an amount that a woman with a high school diploma could be expected to make. As such, her expected income was actually understated.

The prosecution also used a mortality calculator to determine Sanchez's expected remaining lifespan. Courts have recognized mortality tables as competent evidence for decades. See, e.g., *Jenkins v Canfield*, 282 Mich 277, 279; 276 NW 447 (1937). Moreover, there was no evidence in the record that showed that Sanchez had a health concern that would alter her life expectancy.

Although "an element of uncertainty always lurks in the background when a fact-finder predicts future damages," *Corbin*, 312 Mich App at 368, the evidence presented by the prosecution provided "a reasonably certain factual foundation" for the restitution actually found, *Bentley*, ___ Mich App at ___; slip op at 4-5. On this record, there was sufficient evidence to support the trial court's finding that Sanchez would have earned $1,539,574.40 over her expected remaining years. Accordingly, we are not left with the definite and firm conviction that the trial court's finding was clearly erroneous. See *Allen*, 295 Mich App at 281. Joesel has not shown that the trial court erred when it ordered him to pay $1,539,574.40 in restitution for Sanchez's lost income.

D. PSYCHOLOGICAL TREATMENT

The parties suggest that the trial court had the discretion to select an amount of restitution related to psychological treatment, but the law does not support that view. The trial court had to order full restitution—no more, no less. See MCL 780.766(2); *Allen*, 295 Mich App at 281 n 1 (relating that it was "inaccurate to state that trial courts have the discretion to award restitution" because the statute does not confer such discretion and it would necessarily amount to an abuse of discretion to order restitution other than full restitution). The sole question was whether the trial court clearly erred when it found that the prosecution established that Sanchez's immediate family had incurred and would reasonably be expected to incur, see MCL 780.766(4)(d), more than $83,000 in psychological treatment.

In this case, the prosecution requested restitution for counseling services for Sanchez's parents and four siblings in the amount of $87,360. It derived that rate on the assumption that all six members of her family would need five years of counseling with 26 sessions a year at a rate of $112 an hour. The prosecution did not present any evidence to support that request. At the restitution hearing, the prosecution offered to present evidence that Sanchez's immediate family members had in fact been going to counseling and had had unreimbursed expenses, but the trial court did not agree to take testimony.

The trial court had to order Joesel to pay "an amount equal to the reasonably determined cost of psychological and medical treatment for members of the victim's family actually incurred and reasonably expected to be incurred as a result of the crime." MCL 780.766(4)(d). The trial court found that Sanchez's immediate family members had incurred or would reasonably be expected to incur a total of $83,906.02 in counseling services without any evidence in the record to support that amount. There was no evidence that they reasonably expected to incur additional psychological expenses and no evidence concerning the expected length of treatment, the causal link between the treatment and the crime, or the reasonable costs of the treatment. Cf. *Corbin*, 312 Mich app at 368-370. In the absence of such evidence, the trial court clearly erred when it found that Sanchez's family had incurred and would incur a total of $83,906.02 in counseling expenses. See *Allen*, 295 Mich App at 281. Nevertheless, the parties agree on appeal that the prosecution presented receipts after the restitution hearing that established that Sanchez's family members had in fact incurred counseling expenses and that the trial court did not clearly err when it included that amount in the restitution order. Consequently, we vacate the trial court's order of restitution, but only to the extent that it included an order to pay $83,906.02 in future counseling services.[6]

VII. CONCLUSION

In Docket No. 362388, we affirm Joesel's conviction, but remand for resentencing consistent with this opinion. In Docket No. 367180, we vacate the trial court's order of restitution to the extent that it included $83,906.02 in future counseling services. In all other respects, we affirm the order of restitution.

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[6] Nothing prevents the prosecution or Sanchez's immediate family members from seeking additional restitution under MCL 780.766(22) on remand.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISTOPHER HARLAN JOESEL,

Defendant-Appellant.

UNPUBLISHED
August 29, 2024

Nos. 362388; 367180
Muskegon Circuit Court
LC No. 2020-003689-FC

Before: GADOLA, C.J., and K. F. KELLY and MARIANI, JJ.

MARIANI, J. (*dissenting*).

I respectfully dissent. In my view, the trial court reversibly erred by refusing to instruct the jury on voluntary manslaughter. Accordingly, I would vacate the defendant's conviction of second-degree murder and remand for a new trial. And because this claim of error is dispositive, I would not reach the defendant's other claims on appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1:31 a.m. on July 18, 2020, the defendant, Kristopher Harlan Joesel, fatally stabbed Laura Sanchez during a physical altercation between the two. Earlier in the evening, Joesel and his friend walked to a bar that was directly across the street from Joesel's apartment complex. Joesel had moved into the apartment complex only a few days prior, so he was unfamiliar with the bar and the people in the area. There was some dispute as to the cause, but Joesel eventually became involved in a physical altercation at the bar with bar staff and several bar patrons. Joesel dropped his phone during the altercation, and a bartender later picked it up and brought it behind the bar with him. Sanchez and her boyfriend were patrons at the bar at that time, but they were not involved in the physical altercation with Joesel. After being physically dragged out of the bar by bar staff because of the altercation, Joesel walked back to his apartment. Video surveillance footage from Joesel's apartment building showed that he returned to his apartment at 1:09 a.m. Joesel's friend returned to Joesel's apartment at 1:25 a.m. and waited in front of a locked security door within the apartment's vestibule, which was open to the public, until Joesel came downstairs, unlocked the secure door with a key fob, and let him in.

After leading his friend back to his apartment, Joesel grabbed a hunting knife and began walking back to the bar. Joesel testified at trial that he did so because he was still upset about what had occurred at the bar and "had the dumb idea to slash tires" of the cars parked near the bar. Joesel returned to the bar and, after determining that nobody from the bar was watching him, proceeded to puncture the tires of random cars near the bar, one of which, unbeknownst to him, contained Sanchez and her boyfriend. Sanchez's boyfriend testified that, as he and Sanchez were talking in his car, he felt the back part of his car "go down," and he saw Joesel walking past the car with a knife. Sanchez's boyfriend stated that Joesel was not at all focused on him or Sanchez and, instead, simply walked to the next car and punctured more tires. Sanchez and her boyfriend then got out of the car, and, as Sanchez's boyfriend asked Joesel what he had done, Sanchez approached Joesel and began yelling at him.

Joesel testified that he was startled because he did not believe that there were any other people around while he was puncturing car tires, so he immediately put his head down and began walking back to his apartment "as quickly as possible." As he did so, however, Sanchez followed him and continued to yell at him. Sanchez's boyfriend testified that he followed after her as she pursued Joesel so that he could stop her, but he was unable to keep up with her because he was recovering from foot surgery. Video surveillance footage from Joesel's apartment showed Joesel returning to the vestibule at approximately 1:27 a.m., going through the secure door, and getting onto an elevator directly in front of the vestibule to return to his apartment. The video showed Sanchez entering the vestibule and attempting to open the secure door a few seconds after Joesel had passed through it, but she was unable to do so.

An apartment resident testified that he was smoking a cigarette outside at that time and heard screaming. Sanchez then approached him and asked him to open the secure door for her, but he refused to do so because he did not know her and she seemed frantic. Sanchez, along with two or three men from the bar who had followed her to Joesel's apartment, then walked back to the bar and stood outside for a brief period of time.

Video surveillance footage from Joesel's apartment showed Joesel leaving his apartment a second time at approximately 1:31 a.m. with a knife in his hand but returning to the vestibule a few seconds later. The other apartment resident testified that he saw Joesel come out of the apartment at that time with a knife in his hand and watched him walk toward the bar before promptly turning around and walking back toward the apartment. Sanchez's boyfriend testified that he attempted to get Sanchez to go back into the bar, but, as he did so, another bar patron spotted Joesel walking toward the bar again and pointed him out to the others. When he looked up, he saw Joesel walk out of the apartment but turn around and walk back toward it after walking only partway to the street. Sanchez also saw Joesel after the individual had pointed him out and immediately ran toward Joesel's apartment to confront him again. Both the apartment resident and Sanchez's boyfriend testified that several of the bar patrons also began running toward Joesel's apartment, and Sanchez's boyfriend testified that it was "a pretty chaotic scene" on the street at that time.

The surveillance video showed Joesel, who testified that he is right-handed, entering the vestibule with the knife in his left hand, pulling the door closed behind him with his right hand as Sanchez approached the door, and retrieving the knife's sheath out of his right pocket with his right hand. Sanchez entered the vestibule as Joesel walked toward the secure door. As he did so,

Joesel switched the knife to his right hand—which, at that point, was also holding the knife's sheath—and reached with his left hand for his keys clipped to a belt loop on his left hip. Sanchez continued to walk toward Joesel and say things to him as this occurred. Joesel briefly glanced at Sanchez as she spoke but then turned his back to her as he continued to try to unhook his keys from the belt loop on his left hip. Immediately after Joesel turned his back, Sanchez ran up behind him, shoved him into a brick wall with metal mailboxes affixed to it, and grabbed onto his left arm and shoulder. Sanchez continued to hold onto Joesel's left arm and shoulder and push him as he attempted to turn around. Joesel managed to turn himself around so that he was facing Sanchez and jabbed the knife at her torso three times. Joesel stabbed Sanchez twice, once in the left ventricle of her heart and once near her groin.

The surveillance video then showed Sanchez, upon being stabbed, immediately release her grip on Joesel and back up several feet. Sanchez bled profusely as a result of her injuries. Joesel went back to trying to unlock the security door but was unable to do so on the first attempt. As he went back to the key fob reader to try again, a few men from the bar entered the vestibule. Sanchez saw the large amount of blood streaming from her chest and groin, walked toward Joesel again, and said something to him as he managed to unlock the secure door on the second attempt. Joesel looked at Sanchez as she spoke to him—with other bar patrons directly behind her—but continued through the secure door and shut it behind him. Rather than waiting for the elevator directly in front of the vestibule, Joesel walked further down the hall and took a different elevator to get to his apartment. Sanchez backed away again and, after Joesel had passed through the secure door, collapsed to the ground, apparently unconscious. Sanchez died from her injuries within a matter of minutes. Approximately 28 seconds passed between the time that Sanchez entered the vestibule and the time that she collapsed to the ground. The physical confrontation between Sanchez and Joesel, including the stabbing, occurred in less than five seconds.

All of the bar patrons who ran after Sanchez testified that they heard and saw her confront Joesel in the vestibule while they were just outside of the front door, and the video shows one of the bar patrons leaning on the doorframe while two others run up to the building from behind him. The bar patron leaning on the doorframe testified that he watched Sanchez approach Joesel and saw Joesel "shove her . . . after he had stabbed her." He also testified, however, that Sanchez "never presented her front side" to him at that time and, while he immediately "knew something had happened" because he saw blood running down her leg, it took him "probably three or four seconds" to realize what had occurred. The other bar patron and Sanchez's boyfriend both testified that they did not see Joesel stab Sanchez and had only seen Sanchez collapse to the ground bleeding as they approached the vestibule. All of the men testified that they then approached Sanchez on the ground to assist her in some way, and the video reflects them doing so. The bar patrons testified that Joesel entered the secured portion of the apartment very quickly after the stabbing, and the video shows all of the men in the vestibule as Joesel made multiple attempts to get past the secure door of the apartment.

Joesel testified that he left his apartment the second time to retrieve his phone from the bar, having realized at that point that he no longer had it on him. He testified that he still had the knife and its sheath in his pocket from when he had recently returned from puncturing car tires but began holding the knife to prevent it from poking his leg as he walked. He stated that he intended to sheath his knife as he walked toward the bar, but, as he did so, he saw Sanchez and a few other bar patrons spot him from across the street. He stated that he became scared because Sanchez and "the

group that had just beat the crap out of [him] at the bar" began yelling and running toward him, so he immediately "[p]ut [his] head down, turned around, [and] just started walking back to [his] apartment building."

Joesel testified that, when he entered the front vestibule of his apartment building, he pulled the door shut behind him in an attempt to keep Sanchez and the others from entering. He testified that he immediately turned toward the secure door, pulled the sheath out of his right pocket, and attempted to sheath the knife, but Sanchez ran into the vestibule and began yelling at him, with the rest of the group standing near the front door. Joesel stated that, at that point, he switched the knife into his right hand with the sheath so that he could reach for his keys on his left hip with his left hand. He testified that he had told Sanchez to "stop" and to "leave [him] alone" while she was yelling at him in the vestibule because he was "not trying to be confrontational," and he "was focused on using that key fob and getting in that door."

Joesel stated that he then turned his back to the group and continued to struggle with removing his keys from his belt loop when he suddenly "got slammed into the corner of the wall," which injured his left eye and cut open his thumb and index finger. He testified that his reaction was "instinctual" and that he "just tried getting the person off of [him] and get away." He further testified that he "just reacted" to being shoved from behind and had instinctively pushed Sanchez without realizing that he had actually stabbed her with the knife in his hand. He stated that he had no intention of injuring or killing Sanchez and that his only intent was to get Sanchez off of him so that he could "create distance" between them and "get away." He testified that he believed that the group of bar patrons was still following him, so he passed through the apartment's secure door and took a different route to get to his apartment rather than wait for the elevator directly in their line of sight. He stated that he was unaware that Sanchez was even injured from the altercation until he was interviewed by the police the following morning.

Joesel was tried before a jury on a charge of open murder, and he was permitted to present self-defense as a defense to murder at trial. Joesel maintained that, during the stabbing, he "acted out of passion or anger," that Sanchez was the initial aggressor, and that he did not have a reasonable time to calm down before reacting. Correspondingly, he also requested a jury instruction on voluntary manslaughter. The trial court denied Joesel's request, finding that there was insufficient evidence of adequate provocation to support the instruction. As a result, the jury was provided a verdict form that permitted it to find Joesel guilty of first-degree murder, guilty of second-degree murder, or not guilty, and the jury was instructed accordingly. The jury found Joesel guilty of second-degree murder. This appeal followed.

II. JURY INSTRUCTIONS

Joesel argues that the trial court reversibly erred by refusing his request to instruct the jury on voluntary manslaughter as a lesser included offense of second-degree murder. I agree.

A. PRESERVATION AND STANDARDS OF REVIEW

Joesel preserved appellate review of this issue by requesting that the trial court instruct the jury on voluntary manslaughter at trial. See *People v Everett*, 318 Mich App 511, 526; 899 NW2d 94 (2017).

> We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion. Even when instructional error occurs, reversal is warranted only if after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. The defendant bears the burden of establishing that the error undermined the reliability of the verdict. [*Id.* at 528-529 (quotation marks, citations, and alterations omitted).]

"The verdict is undermined when the evidence clearly supports the requested lesser included instruction that was not given to the jury." *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013). This standard is met "when there is substantial evidence to support the requested instruction." *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002).

B. ANALYSIS

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018) (quotation marks and citation omitted). "One of the essential roles of the trial court is to present the case to the jury and to instruct it on the applicable law with instructions that include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Craft*, 325 Mich App 598, 606-607; 927 NW2d 708 (2018) (quotation marks and citation omitted). "[T]he trial court is obligated to give instructions on any theory or defense supported by the evidence upon request." *People v Ogilvie*, 341 Mich App 28, 35; 989 NW2d 250 (2022). "A requested instruction on a lesser included offense is proper if the greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Haynie*, 505 Mich 1096, 1096; 943 NW2d 383 (2020).

Voluntary manslaughter is a necessarily included lesser offense of second-degree murder. *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003). Accordingly, "[w]hen a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is 'supported by a rational view of the evidence.' " *Mitchell*, 301 Mich App at 286, quoting *Mendoza*, 468 Mich at 541.

"Both murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *People v Yeager*, 511 Mich 478, 489; 999 NW2d 490 (2023) (quotation marks and citation omitted). Murder, however, "possess[es] the single additional element of malice." *People v Reese*, 491 Mich 127, 144; 815 NW2d 85 (2012) (quotation marks and citation omitted). When this malice element "is negated by the presence of provocation and heat of passion," the crime is voluntary manslaughter, not murder. *Yeager*, 511 Mich at 490 (quotation marks and citation omitted). In other words, "provocation is not an element of voluntary manslaughter," but rather "the circumstance that negates the presence of malice." *Mendoza*, 468 Mich at 536. Such mitigating circumstances are present where the defendant "kill[s] in the heat of [a] passion . . .

caused by adequate provocation" with no "lapse of time during which a reasonable person could control their passions." *Yeager*, 511 Mich at 489.

"The determination of what is reasonable provocation is a question of fact for the factfinder." *People v Pouncey*, 437 Mich 382, 390; 471 NW2d 346 (1991). Correspondingly, a trial judge may only exclude evidence of provocation "[w]hen, as a matter of law, no reasonable jury could find that the provocation was adequate[.]" *Id.* Generally speaking, "[t]he provocation must be sufficient to cause the defendant to act out of passion rather than reason, but it also must be sufficient to cause a reasonable person to lose control, not just the specific defendant." *Yeager*, 511 Mich at 489. Although words alone might at times be enough, adequate provocation often involves a physical altercation of some sort. See, e.g., *Pouncey*, 437 Mich at 391 (declining "to issue a rule that insulting words per se are never adequate provocation" given that "adequate provocation is a factual question," but finding the provocation in that case inadequate because, among other things, there was "no physical contact of any kind"); *Mitchell*, 301 Mich App at 287-288, 288 n 2 (noting that "the implication [from *Pouncey*] is that a physical altercation could constitute adequate provocation" in holding that a voluntary manslaughter instruction was warranted where the victim swore at the defendant and hit him with a baseball bat).[1] "Adequate provocation does not excuse or justify murder, but rather designates one guilty of manslaughter less culpable than one guilty of murder." *Pouncey*, 437 Mich at 392-393.

In this case, a rational view of the evidence presented at trial supported a voluntary manslaughter instruction. Joesel testified that, after returning to his apartment from puncturing car tires, he realized that he did not have his phone with him, so he left his apartment to return to the bar a second time to retrieve it. Joesel testified that he put his head down and returned to his apartment within seconds of leaving when he saw Sanchez—with a group of men from the bar who "had just beaten the crap out of" him trailing behind her—because he was afraid that there would be further confrontation. Joesel stated that he became "really scared" because he believed that he was "being hunted and followed into [his] apartment" by Sanchez and the other bar patrons. Joesel further testified that, at that point, he still had the knife in his pocket from his first trip to the bar because he had forgotten about it. He stated that he intended to sheath the knife as he walked to the bar to retrieve his phone but was interrupted by Sanchez and the other bar patrons as he attempted to do so. He further stated that he held the knife in his right hand only so that he could grab his keys from his left hip and "wouldn't get poked" in the leg as he attempted to open his apartment doors. He testified that he had told Sanchez to "stop" and to "leave [him] alone" while she was yelling at him in the vestibule because he was "not trying to be confrontational." He also testified that he "just reacted" to Sanchez shoving him from behind and had instinctively pushed her without realizing that he had stabbed her with the knife in his hand, and that his only intent was to get her off of him so that he could "create distance" between them and "get away."

[1] The majority posits that, "[t]o constitute adequate provocation, a battery . . . must have been a hard blow inflicting considerable pain or injury." I agree that such a battery may very well amount to adequate provocation in most if not all instances. I disagree, however, to the extent the majority suggests that anything less would necessarily fall short; indeed, *Pouncey* recognized that, in some circumstances, even words alone could be sufficient. In any event, I would conclude that, even under such a heightened standard, there was substantial evidence of adequate provocation in this case.

He testified that he believed that the group of bar patrons were still following him, so he passed through the apartment's secure door and took a different route to get to his apartment rather than wait for an elevator directly in their line of sight.

Joesel's version of the altercation was consistent with witness testimony and video surveillance footage from his apartment building. Witness testimony established that Joesel had dropped his phone near the pool table during the bar fight and that the bartender picked up Joesel's phone and brought it behind the bar. The apartment resident and Sanchez's boyfriend both testified that, immediately prior to the altercation, they saw Joesel step out of his apartment and walk toward the street before spotting Sanchez and immediately turning around to go back into his apartment. The apartment resident testified that he saw Sanchez and a few other bar patrons immediately start running after Joesel, and Sanchez's boyfriend testified that it was "a pretty chaotic scene" on the street at that time. The apartment surveillance video of the altercation shows Joesel stepping out of his apartment's vestibule but returning only a few seconds later, with Sanchez following him inside almost immediately thereafter. The video also shows Joesel ignoring Sanchez as she approached him and continued to yell at him, turning his back to her as he attempted to unlock the secured apartment door with his keys, and jabbing the knife at Sanchez immediately after she suddenly shoved him into metal mailboxes affixed to the wall and while she was still grabbing onto him. The video confirms that this altercation happened within a matter of seconds. And, consistent with Joesel's testimony that his index finger and thumb were cut by the knife when Sanchez shoved him into the wall, an investigating officer testified that both Joesel's and Sanchez's blood were found on an elevator in Joesel's apartment building and on the knife that he used to stab her.

Under "a rational view of the evidence" presented at trial, *Mendoza*, 468 Mich at 541, a reasonable jury could find in this altercation "the presence of provocation and heat of passion" sufficient to negate malice and render Joesel culpable of voluntary manslaughter, but not second-degree murder, *Yeager*, 511 Mich at 490 (quotation marks and citation omitted). By nonetheless refusing to provide the requested voluntary-manslaughter instruction, the trial court abused its discretion.[2]

[2] In refusing Joesel's request to provide the voluntary-manslaughter instruction, the trial court did not explain why it believed the evidence of provocation was inadequate. In opposing the request, the prosecution argued that the instruction was not warranted because Joesel had instigated the provocation by involving himself in a bar fight and subsequently using a knife to puncture the car tires of bar patrons, including Sanchez and her boyfriend. Based on the evidence presented, however, a reasonable jury could conclude that, while Joesel instigated those earlier events, he did not play such a role in the later altercation that precipitated the stabbing. Furthermore, even if a jury concluded that Joesel was the initial aggressor, it also could have reasonably concluded that Sanchez's pursuit and physical confrontation of Joesel constituted an escalation that served as adequate provocation to negate malice. Our Supreme Court has rejected "the doctrine of 'imperfect self-defense' as an independent theory that automatically mitigates criminal liability for a homicide from murder to manslaughter when a defendant acts as the initial aggressor and then claims that the victim's response necessitated the use of force"—but it has also recognized that "factual circumstances that have been characterized as imperfect self-defense may negate the

The majority grounds its conclusion otherwise in a particular view of the evidence: that Joesel "acted with calm deliberation before, during, and after the stabbing"; that he "made numerous decisions that required forethought and calculated steps"; that he "was the aggressor in every instance" and "alone escalated matters," including by acting "as if to taunt or insult Sanchez" shortly before the stabbing; and that he stabbed Sanchez in a "cold, calculated anger." I lack the majority's confidence in this view,[3] but more to the point, I fail to see how the evidence so clearly demands it that the jury should not have been permitted to even consider voluntary manslaughter as an option. As discussed, Joesel's testimony painted a different picture of the altercation and his state of mind that, on this record, "the jury could have chosen to believe." *Haynie*, 505 Mich at 1097. What is before us here is not whether we believe Joesel or think he was guilty of second-degree murder—such matters are "for the jury to decide, not appellate judges," *id*. (quotation marks and citation omitted)—nor is it even whether we think the evidence was sufficient to sustain his conviction of that offense. It is instead a narrow legal inquiry: whether "a rational view" of the evidence "would allow a jury to conclude that [Joesel] committed" voluntary manslaughter. *Id.* Indeed, the trial court could only refuse to instruct the jury on that theory of culpability if, "*as a matter of law, no reasonable jury* could find" it. *Pouncey*, 437 Mich at 390 (emphasis added). This is a demanding standard that, properly applied, ensures the jury is afforded due space and respect to perform the factfinding role with which it, and it alone, has been entrusted. I do not see how that standard has been satisfied here.

Nor can I agree with the majority that the trial court's error was harmless. Examining the "entire cause," the evidence in support of the instruction was, in my view, not just sufficient, but "substantial." *Cornell*, 466 Mich at 365 (quotation marks omitted). Between the video surveillance footage and the other testimony and evidence presented at trial, there was no meaningful dispute about the core events immediately preceding the stabbing—namely, that Sanchez (with bar patrons trailing her) pursued Joesel into his apartment building, confronted him,

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malice element of second degree murder" and "can . . . provide grounds for a fact-finder to conclude that the prosecution has not proved the malice element that distinguishes murder from manslaughter." *Reese*, 491 Mich at 129-130, 150-151, 160. The inquiry therefore hinges on whether there was sufficient evidence of adequate provocation to mitigate the element of malice in the eyes of a reasonable jury, not whether the defendant was the initial aggressor. *Id*. at 150-151, 160. For the reasons discussed above, I believe there was sufficient—indeed, substantial—evidence to that effect in this case, and the matter should have been left to the jury to decide.

[3] I have difficulty, for instance, seeing much in the way of calm, calculation, or deliberation in Joesel's (or others') actions during the altercation and its surrounding events. Nor do I see particular aggression or escalation in Joesel's efforts to retreat into his apartment building, or evidence to substantiate an assumption that he insulted or taunted Sanchez in the process, or indication that he had any desire or intent to engage with Sanchez outside of those five seconds when she shoved him from behind into the wall and he turned and stabbed in response. And while the majority stresses the size difference between the two, the question at hand is not whether it was necessary or excusable for Joesel to respond to Sanchez's shove as he did—the jury rejected that notion (and rightly so, in my view)—but what type of murder he could be rationally found to have committed in doing so; I struggle to see how the crime of voluntary manslaughter could not fit with these facts as a matter of law.

and initiated physical contact with him by shoving him into the wall while he, with his back turned, was trying to gain access to the secure area of the building. Joesel then turned with Sanchez still holding onto him and stabbed, with the altercation spanning a few seconds. To this, Joesel added testimony about his state of mind during these events, which was the only direct evidence offered on the point and was not contradicted by any other evidence presented at trial. And defense counsel made a concerted effort during closing arguments to convince the jury that, based on the totality of the evidence presented, Joesel had acted in the "heat of passion" such that the stabbing could only constitute a "lesser crime such as manslaughter" rather than murder. There was ample evidence at trial to support this theory of the case and, again, its "believability" was "for the jury to decide." *Haynie*, 505 Mich at 1097 (quotation marks and citation omitted); see also *Pouncey*, 437 Mich at 390 ("The determination of what is reasonable provocation is a question of fact for the factfinder.").

The majority stresses that, in light of the arguments and instructions the jury heard on second-degree murder, "it is evident that the jury rejected Joesel's claim that he acted out of passion after having been provoked by Sanchez"; accordingly, "[t]he absence of the manslaughter instruction was harmless because the jury rejected the defense theory that the killing was something less than second degree murder." As both our Supreme Court and the United States Supreme Court have explained, however, the fact that the jury chose to convict Joesel of second-degree murder in this case does not necessarily tell us much about what the jury would have done had it been properly instructed on voluntary manslaughter, nor does it cure the trial court's failure to provide that instruction. See *People v Silver*, 466 Mich 386, 393 n 7; 646 NW2d 150 (2002), quoting *Keeble v United States*, 412 US 205, 212-213; 93 S Ct 1993; 36 L Ed 2d 844 (1973) (rejecting as "too facile" the argument that the absence of a lesser-offense instruction was harmless because "the jury would have acquitted defendant if it believed his testimony," given the reality that, " '[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction' "); see also *Silver*, 466 Mich at 393 n 7, quoting *Keeble*, 412 US at 212 (" '[A] defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.' ") (ellipsis in original).

Had the jury, consistent with the theory of the case presented by Joesel, concluded he was culpable, but only of voluntary manslaughter, it "realistically could not act on [that conclusion] unless [it] had an instruction that gave [it] that choice." *Silver*, 466 Mich at 393. But the jury was not given that choice. Instead, the jury was provided a verdict form that only permitted three outcomes—guilty of first-degree murder, guilty of second-degree murder, or not guilty of either crime—which the trial court reiterated during its oral recitation of the jury instructions. If that universe of options had also included guilt of voluntary manslaughter, as it should have, the jury, in light of the evidence presented, may well have chosen that outcome instead. Nothing about its choice of second-degree murder in the absence of that option shows otherwise. To the contrary, the jury's decision to find Joesel guilty of the lowest degree of culpability offered to it would be readily compatible with a conviction of voluntary manslaughter.[4] Of course, a properly instructed

[4] No more telling is the jury's rejection of Joesel's claim of self-defense. That the jury chose not to entirely excuse Joesel from culpability on that theory does nothing in this case to show whether

jury might still choose second-degree murder, but that does not mean the jury need not be properly instructed, or its verdict sufficiently reliable. In my view, "[n]ot to give [the jury] an instruction that allowed [it] to agree with [Joesel's] view of the events in this case undermines the reliability of the verdict" and requires a new trial. *Id*. See also *Haynie*, 505 Mich at 1097 (citing *Silver* for this same proposition and conclusion); *People v Leffew*, 508 Mich 625, 646-652; 975 NW2d 896 (2022) (holding that, in an ineffective-assistance context, the defendant was prejudiced by the failure to provide instructions relevant to the defense's primary theory of the case because the jury was led to the theory by the attorneys' arguments but denied "a judge-given map to reach that destination").

Accordingly, I would conclude Joesel is entitled to reversal of his conviction for second-degree murder and a new trial with a properly instructed jury, to ensure that any verdict in this case is reliable under the law. See *Haynie*, 505 Mich at 1097; *Silver*, 466 Mich at 393-394.

/s/ Philip P. Mariani

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it would have found him guilty of voluntary manslaughter. See generally *Pouncey*, 437 Mich at 392-393 ("Adequate provocation does not excuse or justify murder, but rather designates one guilty of manslaughter less culpable than one guilty of murder.").