

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENESIS KEVIN XAVIER LEWIS,

Defendant-Appellant.

UNPUBLISHED

September 09, 2026

8:52 AM

No. 369675

Kent Circuit Court

LC No. 22-007617-FC

Before: BOONSTRA, P.J., and YOUNG and KOROBKIN, JJ.

PER CURIAM.

Defendant, Genesis Kevin Xavier Lewis, appeals by right following his jury-trial convictions on one count of second-degree murder, MCL 750.317; three counts of assault with intent to commit murder (AWIM), MCL 750.83; and four of counts of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On appeal, among other issues, defendant contends that the information was improperly amended during his trial and that the jury was erroneously instructed. For the reasons stated in this opinion, we agree that the jury was improperly instructed, and conclude that the error was not harmless. We therefore vacate defendant’s convictions and remand for a new trial.

I. BACKGROUND AND FACTS

The facts as testified to at defendant’s trial and demonstrated through video evidence presented to the jury are as follows. Following the wedding of Faith and Marcellous Suttles¹ on June 5, 2022, the couple and various members of their wedding party, including Richard Caldwell and Marcellus Wilkerson-Allen, continued the celebrations at a nightclub, Ambiance, in Grand Rapids. Defendant and his father, Jerome Lewis, operated a clothing business and also traveled to Ambiance that evening to deliver a clothing order to a security guard at Ambiance. Upon arriving, defendant and Lewis parked their truck in front of Ambiance, delivered the items, and remained outside of their truck to speak with potential customers. Armonie Acklin, a close friend of

¹ “Suttles” hereinafter refers only to Marcellous Suttles.

defendant, happened to drive by Ambiance and, noticing defendant and Lewis, circled back to retrieve his own clothing order and remained there to socialize with defendant and Lewis.

After talking with potential customers for about 45 minutes, Lewis noticed a man smoking outside the Ambiance entrance and staring at him and defendant, which Lewis testified “puzzled” him because he did not recognize the individual. Lewis described the atmosphere as one with “no hostility” until the man he saw smoking “made sure” to look at him with his glasses off. Defendant identified the man as a Wilkerson-Allen, a former classmate of his. A verbal argument ensued and turned into a physical fight in which defendant, Lewis, and Acklin fought against Suttles, Caldwell, and Wilkerson-Allen. Defendant explained at trial that he had a valid concealed pistol license on the night of the shooting and that, during the altercation, he retrieved two guns from his truck and returned to the ongoing fight. As shown in the video footage presented at trial, upon his return, defendant fired shots into the melee, and a crime scene technician testified that she found 13 casings on the scene. Caldwell had tackled Lewis while Lewis was fighting Suttles, and defendant stated that his “intended target” was Caldwell in order to “[g]et him away from” Lewis. Defendant testified that he was not shooting to kill, but that he was shooting to seriously hurt someone and understood that there were consequences of shooting 13 rounds into a crowd of people. The shooting resulted in Acklin’s death and injuries to Suttles, Caldwell, and Wilkerson-Allen.

Defendant was charged in June 2022 with one count of second-degree murder, three counts of AWIM, and one count of felony-firearm in connection with the second-degree murder charge. Defendant proceeded to trial by jury in October 2023, and the defense’s main argument was that defendant’s actions were justified in defense of Lewis. The prosecution requested at the close of its case-in-chief that the information be amended to add three felony-firearm counts for each of the AWIM charges “to conform with the proofs that ha[d] been presented,” which the trial court allowed. The trial court instructed the jury on second-degree murder, AWIM, felony-firearm, involuntary manslaughter, and transferred intent, among other instructions, but declined defense counsel’s request that the jury be provided a mitigating-circumstances instruction, M Crim JI 17.4. The jury ultimately found defendant guilty on all charges, and defendant was later sentenced to concurrent two-year sentences for the felony-firearm convictions, followed by concurrent sentences of 28 to 90 years’ imprisonment for the second-degree murder conviction and 18 to 70 years’ imprisonment for each AWIM conviction.

Defendant now appeals.

II. ANALYSIS

A. AMENDMENT OF INFORMATION

Defendant first contends that he was deprived of due process when the trial court allowed the prosecution to amend the information during trial to add three felony-firearm counts. We disagree.

This Court reviews a trial court’s decision to grant a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). “The trial court abuses its discretion when its decision falls outside the range of principled outcomes.” *People v Perry*, 317 Mich App 589, 594; 895 NW2d 216 (2016). We review de novo,

however, constitutional questions, *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998), and the interpretation of court rules and statutes, *McGee*, 258 Mich App at 686.

Our court rules give trial courts discretion to, “before, during, or after trial[,] . . . permit the prosecut[ion] to amend the information . . . unless the proposed amendment would unfairly surprise or prejudice the defendant.” MCR 6.112(H). As we have explained, a trial court is authorized to allow the prosecution to amend an information only “if amendment would not cause ‘unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend.’ ” *People v Carlton*, 313 Mich App 339, 353; 880 NW2d 803 (2015), quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). “No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, . . . are among the constitutional rights of every” criminal defendant. *Cole v Arkansas*, 333 US 196, 201; 68 S Ct 514; 92 L Ed 644 (1948); see also *Darden*, 230 Mich App at 601 (“Lack of adequate notice violates a defendant’s right to due process . . .”). Thus, MCR 6.112(H) must “give[] effect to a defendant’s right to know and respond to the charges against him.” *Darden*, 230 Mich App at 601.

We are unpersuaded that defendant was deprived of due process as a result of inadequate notice of the charges against him. See *Darden*, 230 Mich App at 603; *Carlton*, 313 Mich App at 353. As we have described, the information initially charged defendant with only one felony-firearm count, in connection with his second-degree murder charge. The trial court permitted the information to be amended to add three felony-firearm counts for each of the AWIM charges pursuant to the prosecution’s request after the close of its case-in-chief. To convict defendant of those three additional counts, the jury would need to find beyond a reasonable doubt that defendant committed AWIM and that he possessed a firearm while doing so. See *People v Jackson*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 366078); slip op at 4. And to in turn secure those additional convictions, the prosecution would thus largely emphasize the same facts as those relied upon in the prosecution’s attempt to secure AWIM convictions, the only difference being the possession of a firearm in committing the assaults.

Further, the prosecution focused throughout its case-in-chief on defendant’s alleged intent to kill via the use of a firearm, presumably both because defendant’s AWIM charges arose out the use of a firearm and because defendant was already charged with a felony-firearm count in connection with the second-degree murder charge. Given defendant’s awareness throughout trial that the prosecution’s theory was that he committed AWIM using a firearm and that he was charged with a felony-firearm count in connection with a second-degree murder charge that arose out of the same incident as the AWIM charges, defendant cannot be considered to have been unfairly surprised or given an inadequate opportunity to defend against the additional felony-firearm counts. Cf. *McGee*, 258 Mich App at 691 (finding record support for the defendant’s claim of surprise regarding an offense added during trial when the charged offenses had “clearly differ[ing]” elements and “might require preparation of a different defense strategy”). The three felony-firearm counts concerned the same conduct underlying the AWIM charges and were alleged to have occurred at the same date and time, at the same location, and with the same witnesses and victims—in short, there was one shooting “incident,” and four people were shot. Defendant thus had an opportunity to defend against these additional charges via his examination of witnesses and presentation of evidence on the same underlying facts. Cf. *People v Adams*, 202 Mich App 385, 390-391; 509 NW2d 530 (1993) (concluding that notice of an additional charge

was inadequate when the charged crimes were “not particularly similar in their elements” and the facts to be emphasized at trial for the crimes “significantly differe[d]”). Indeed, defendant fails to articulate how earlier notice would have in any way changed his actions, strategy, or theory during trial. See *McGee*, 258 Mich App at 693 (concluding that a trial court did not abuse its discretion in allowing an amendment to the information when the defendant failed to explain “how added time to prepare . . . would have benefited the defense”).

We thus conclude that the trial court did not abuse its discretion in permitting the amendment of the information to add three felony-firearm counts during trial, see *id.* at 686-687, and that defendant was not deprived of due process as a result of this amendment, see *Darden*, 230 Mich App at 601, 603.

B. JURY INSTRUCTIONS

In defendant’s supplemental brief filed *in propria persona*, otherwise known as a “Standard 4” brief,² defendant contends that he should receive a new trial due to various jury-instruction errors. We agree. The trial court erred in declining to provide a mitigating-circumstances instruction, and correspondingly a voluntary-manslaughter instruction. These errors were not harmless, so a new trial is required.

This Court reviews claims of instructional error de novo. *People v Rosa*, 322 Mich App 726, 738 n 6; 913 NW2d 392 (2018). In doing so, we consider the jury “instructions as a whole, rather than piecemeal, to determine whether any error occurred.” *People v Joesel*, 36 NW3d 293, 297 (Mich, 2026).³ We review for an abuse of discretion, however, a trial court’s determination of whether a jury instruction applies to the facts of the case. *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013). Reversal on the basis of an instructional error is warranted when “after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *Id.* (quotation marks and citation omitted).

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Czuprynski*, 325 Mich App 449, 456; 926 NW2d 282 (2018) (quotation marks and citation omitted). “A court must properly instruct the jury so that it may correctly and intelligently decide the case.” *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). Jury instructions must thus “include all elements of the charged offenses and any material issues, defenses, and theories if there is evidence to support them.” *Czuprynski*, 325 Mich App at 456. Moreover, “MCR 2.512(D)(2) requires that that the jury be instructed using the Michigan Model Criminal Jury Instructions if ‘(a) they are applicable, (b) they accurately state the applicable law, and (c) they are requested by a party.’ ” *Rosa*, 322 Mich App at 739. And, relevant for our purposes, our Supreme Court has mandated that when a “lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater

² See Administrative Order No. 2004-6, 471 Mich c, cii (2004).

³ “An order of th[e] [Supreme] Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision.” *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012).

offense, and a rational view of the evidence would support such an instruction[.]" an inferior-offense instruction is appropriate. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003), citing *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

In analyzing defendant's challenges to the jury instructions provided at his trial, we recall that the jury was instructed on the charged offenses—second-degree murder, AWIM, and felony-firearm—in addition to involuntary manslaughter as a lesser-included offense of second-degree murder, among other instructions. The second-degree murder charge related to Acklin's death, and the AWIM charges related to the injuries to Suttles, Caldwell, and Wilkerson-Allen.

1. MITIGATING CIRCUMSTANCES

We first consider the propriety of the mitigating-circumstances instruction requested by defendant at trial. The elements of AWIM "are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and citation omitted). An AWIM conviction thus requires the jury to conclude beyond a reasonable doubt that the defendant committed an assault with "the specific intent to kill." *Id.* at 149. But "if a defendant would have been guilty of manslaughter" rather than murder "had the assault resulted in death (due to an absence of malice), there can be no conviction of [AWIM]." *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988). A mitigating-circumstances instruction should therefore be given if a jury could find that "the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died." M Crim JI 17.4.⁴ That is, a mitigating-circumstances instruction is proper when a

⁴ M Crim JI 17.4 provides in full:

(1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he / she] would have been guilty of murder had the person [he / she] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.

(2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:

(3) First, when the defendant acted, [his / her] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. . . .

(4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed.

defendant is charged with AWIM and there is “evidence [(1)] that [the] defendant acted in the heat of passion, [(2)] which was caused by something that would create such a state in an ordinary person[,] *Rosa*, 322 Mich App at 740, (3) that the assault at issue resulted from this “emotional excitement,” and (4) that the defendant acted before a reasonable amount of time had passed to allow the defendant to calm down. M Crim JI 17.4.

The principles underlying the mitigating-circumstances instruction flow from our state’s voluntary-manslaughter jurisprudence. See *Rosa*, 322 Mich App at 740, citing *People v Pouncey*, 437 Mich 382; 471 NW2d 346 (1991); *Lipps*, 167 Mich App at 106, citing *Maher v People*, 10 Mich 212, 218-219 (1862). As our Supreme Court recently explained in reversing for failure to give a voluntary-manslaughter instruction, “[a] ‘heat of passion’ killing is one that occurs as a result of ‘temporary excitement, by which the control of reason was disturbed.’ ” *Joesel*, 36 NW3d at 298, quoting *Maher*, 10 Mich at 219. There is no “ ‘requisite emotional state’ to establish responding in the heat of passion,” but the voluntary-manslaughter “ ‘model jury instruction specifically acknowledges anger as an emotional state that may serve to mitigate murder to voluntary manslaughter.’ ” *Joesel*, 36 NW3d at 298, quoting *People v Yeager*, 511 Mich 478, 492-493; 999 NW2d 490 (2023). Moreover, whether “provocation was adequate is a question of fact” and “[i]t 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.” *Joesel*, 36 NW3d at 298 (cleaned up).

The evidence presented at defendant’s trial supported the requested mitigating-circumstances jury instruction for defendant’s three AWIM charges. See *Rosa*, 322 Mich App at 739; *Czuprynski*, 325 Mich App at 456. Defendant’s AWIM charges were premised on the injuries he was alleged to have inflicted on Suttles, Caldwell, and Wilkerson-Allen by shooting into the area in which they were fighting with Lewis and Acklin. At trial, the jury was presented video evidence showing defendant, Lewis, and Acklin fighting against Suttles, Caldwell, and Wilkerson-Allen. When defendant momentarily left the altercation to retrieve his guns from his truck, the fighting remained ongoing, and by the time defendant was shown to have shot his weapon, Lewis had been tackled by Caldwell. Acklin’s girlfriend, Angelica Enriquez, who was near defendant’s truck and uninvolved in the fighting, testified that she approached defendant as he returned to the truck during the fight to make sure he was okay. Enriquez stated that when she asked defendant “if he was fine,” defendant was not listening to what she had to say and that he “continued to walk to the truck, opened up the truck[,] and then grabbed the two guns.” Enriquez further explained that she “told him not to,” and “was trying to hold him back” but defendant “just pushed [her] back and kept going.” Enriquez described defendant’s demeanor when he came back

That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder [and decide whether (he / she) is guilty of any lesser offense.]

M Crim JI 17.4 explains that the bracketed material at the end of this instruction should only be used when the trial court is instructing on lesser-included offenses.

to the truck as “[j]ust very angry.” Defendant’s testimony corroborated this account, as he explained that he was angry when Wilkerson-Allen threatened him and that when he saw “what was happening to” Lewis, he was focused on “doing something about it immediately.” Defendant agreed with Enriquez’s testimony that defendant was “extremely angry when [he] came back to the truck and picked up the” guns. Defendant further stated that as he approached the fight with his weapons, he “was angry” and that when he was firing his gun, he was “emotionally involved because [he] had just seen” what Lewis was “going through.”

This testimony and video footage constitutes evidence from which a jury could have found that defendant acted in the heat of passion, caused by an adequate provocation, that the alleged assaults of Suttles, Caldwell, and Wilkerson-Allen resulted from this emotional excitement, and that the defendant acted before a reasonable amount of time had passed to allow the defendant to calm down. See M Crim JI 17.4; *Rosa*, 322 Mich App at 740. First, defendant’s and Enriquez’s testimonies indicate that defendant acted in a spit of anger as a result of the fighting in which he was involved and specifically due to the attacks upon his father, Lewis, such that his reason was disturbed to the extent that defendant was not hearing Enriquez’s pleas to “not to,” and that he remained “emotionally involved” as he was firing his weapon. There is thus evidence supporting a finding that defendant acted in the heat of passion. Cf. *Rosa*, 322 Mich App at 731, 740 (finding a mitigating-circumstances instruction unwarranted when the defendant was “calm” when he entered the victim’s room before strangling her).

Second, in light of defendant’s heightened emotions and the ongoing physical altercation in which defendant, Lewis, and Acklin were involved, a jury could have found that these circumstances are those in which “ordinary people, of fair average disposition,” may be “liable to act rashly or without due deliberation or reflection.” *Joesel*, 36 NW3d at 298 (cleaned up). Indeed, “[j]urors are ‘much better qualified to judge . . . the sufficiency and tendency of a given provocation’ ” and “there are myriad examples in Michigan caselaw where a physical altercation has been deemed adequate provocation” *Id.* at 298-299, quoting *Maher*, 10 Mich at 222. Thus, there was evidence of adequate provocation.

Third, the evidence was sufficient to support a finding by a jury that defendant responded to the ongoing fighting with intense emotions of fear for Lewis and anger, and that defendant’s shooting of the victims resulted from this provocation and resulting emotional excitement. See *Joesel*, 36 NW3d at 298; *Mitchell*, 301 Mich App at 286; *People v Holmes*, 111 Mich 364, 367-369; 69 NW 501 (1896) (concluding that there was sufficient evidence of provocation to warrant a voluntary-manslaughter instruction when the victim punched the defendant multiple times, and the defendant then left the scene of the altercation to retrieve his weapon and shot the victim upon his return). Thus, the jury could have found that the assault at issue resulted from the “emotional excitement.” M Crim JI 17.4.

Finally, given the evidence we have described, 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.” *Joesel*, 36 NW3d at 300; see also *Holmes*, 111 Mich at 367-369. Specifically, the video evidence showed that the physical altercation was ongoing when defendant both went to retrieve his weapons and when he fired the shots. The jury therefore could have found inadequate cooling-off time. *Joesel*, 36 NW3d at 300.

Again, “MCR 2.512(D)(2) requires that that the jury be instructed using the Michigan Model Criminal Jury Instructions if ‘(a) they are applicable, (b) they accurately state the applicable law, and (c) they are requested by a party.’ ” *Rosa*, 322 Mich App at 739. For the reasons discussed, the mitigating-circumstances instruction requested by defendant was applicable, and the prosecution makes no argument that the instruction inaccurately states the relevant law—nor do we discern any inaccuracy. Therefore, the trial court abused its discretion by refusing to provide this instruction. See *id.* at 739; *Mitchell*, 301 Mich App at 286.

2. VOLUNTARY MANSLAUGHTER

Our conclusion that the mitigating-circumstances instruction should have been given logically and necessarily compels our consideration of whether a voluntary-manslaughter instruction should have been provided at defendant’s trial. Although generally, a trial court need not instruct a jury *sua sponte* on a lesser-included offense, in this case the trial court declined to provide the mitigating-circumstances instruction as to AWIM *because* a voluntary-manslaughter instruction was not being given in conjunction with defendant’s second-degree murder charge.⁵ And it is true that these instructions ought to have traveled together in the present case because the circumstances that resulted in the injuries of Suttles, Caldwell, and Wilkerson-Allen and the death of Acklin were the same. Therefore, for the same reason it was error to reject the mitigating-circumstances instruction for the AWIM charge, it was likewise error not to provide a voluntary-manslaughter instruction for the murder charge.⁶

⁵ Much of the discussion between counsel and the trial court regarding jury instructions appears to have taken place in chambers and off the record. After the jury had been instructed, the parties then attempted to make a record of what had transpired. In a nutshell, defense counsel had requested the mitigating-circumstances instruction, the prosecution had objected, and the trial court sustained the objection. According to the prosecution, the instruction was improper because it “refers specifically to voluntary manslaughter, that is not an instruction that given to the jury. This jury was given an involuntary manslaughter [instruction].” The trial court agreed, stating, “I think this applies specifically to voluntary manslaughter, and we’re dealing with involuntary manslaughter.”

⁶ Defendant’s counsel raised the issue of the propriety of a voluntary-manslaughter instruction for the first time at oral argument. Ordinarily, we do not decide issues that are not raised in the parties’ briefs. See *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009). This Court, however, possesses the discretion to review a legal issue not properly raised by the parties. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004); see also *In re Walters*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 369318); slip op at 2-3; *People v Musico*, unpublished per curiam opinion of the Court of Appeals, issued July 20, 2026 (Docket No. 364567), p 4. And before issuing this opinion, following the discussion regarding the propriety of a voluntary-manslaughter instruction at oral argument, we invited supplemental briefing on this issue so that all parties could be adequately heard. *People v Lewis*, unpublished order of the Court of Appeals, entered August 6, 2026 (Docket No. 369675). Because in this case the failure to provide an involuntary-manslaughter instruction is factually and legally intertwined with the

To explain, the mitigating-circumstances instruction provides that “if the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died,” then “the defendant is not guilty of [AWIM].” M Crim JI 17.4. Thus, when given, the instruction mandates the jury’s consideration of whether, had a victim of a charged AWIM offense died, that death would have resulted from murder or voluntary manslaughter. In the present case, there was no voluntary-manslaughter instruction given for defendant’s charged responsibility for the death of Acklin. But clearly, the circumstances in which that death occurred were the same as those in which the charged assaults against Suttles, Caldwell, and Wilkerson-Allen occurred.⁷ If there was sufficient evidence to support a jury finding that defendant shot Suttles, Caldwell, and Wilkerson-Allen as the result of provocation and in the heat of passion, there was likewise sufficient evidence to support a jury finding that defendant shot Acklin as the result of provocation and in the heat of passion. Put differently, logic dictates that under these facts, the mitigating-circumstances instruction and voluntary-manslaughter instruction rise or fall together; either both instructions should have been provided, or neither instruction should have been provided.⁸

Having already examined the evidence supporting a mitigating-circumstances instruction on the AWIM charges, we turn now to consider the propriety of a voluntary-manslaughter instruction for the murder charge. To find defendant guilty of second-degree murder, as the jury was instructed, the prosecution needed to establish the following elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* Both involuntary manslaughter,⁹ on which the jury was instructed, and voluntary manslaughter,

failure to provide a mitigating-circumstances instruction, and because retrial is required, we exercise our discretion under these unique circumstances to decide the issue in the interest of justice. Cf. *Equity Funding, Inc v Village of Milford*, 342 Mich App 342, 354; 994 NW2d 859 (2022) (“[W]e have authority to . . . address issues we believe necessary to resolve a case.”).

⁷ The circumstances were so similar that a transferred-intent instruction was given both as to the second-degree and AWIM charges. The principle of transferred intent holds that a defendant may be convicted of an offense against an individual even though the defendant’s actual intent was to commit that offense against another individual. See *People v Lovett*, 90 Mich App 169, 171; 283 NW2d 357 (1979). There appeared to be no disagreement in the trial court that defendant intended to harm, to a disputed degree, Caldwell and perhaps Suttles and Wilkerson-Allen, but not Acklin, who was fighting alongside defendant and Lewis.

⁸ This case thus differs from circumstances in which an individual kills and assaults individuals in various locations, at different times, or in diverse other manners. In such an instance, the lack of a voluntary-manslaughter instruction may not logically bear upon whether a mitigating-circumstances instruction should be provided in conjunction with an AWIM instruction.

⁹ Involuntary manslaughter differs from murder in that “involuntary manslaughter contemplates an unintended result and thus requires something less than an intent to do great bodily harm, an intent to kill, or the wanton and wilful disregard of its natural consequences.” *People v Datema*,

on which the jury was not instructed, are necessarily included lesser offenses of murder. *Mendoza*, 468 Mich at 541. The elements of voluntary manslaughter mirror those of murder except that voluntary manslaughter, unlike murder, does not have malice as an element. See *id.* at 540. Rather, as we described with regards to the mitigating-circumstances instruction, voluntary manslaughter occurs when a defendant kills “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.” *Mitchell*, 301 Mich App at 286 (quotation marks and citation omitted). “[T]he element distinguishing murder from manslaughter—malice—is [thus] negated by the presence of provocation and heat of passion.” *Mendoza*, 468 Mich at 540. Because voluntary and involuntary manslaughter are necessarily included lesser offenses of murder, our Supreme Court has required that “when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.” *Id.* at 541.

For the same reason that the mitigating-circumstances instruction was warranted by a rational view of the evidence, so was a voluntary-manslaughter instruction. As we have described, there was evidence that the shooting occurred amidst a physical altercation that defendant, Lewis, and Acklin were involved in, that defendant intended to come to his father’s aid in the fight, and that defendant was angry and “emotionally involved” when shooting the various victims. This evidence could support findings that defendant acted in the heat of passion when shooting, that defendant’s emotions were caused by adequate provocation, and that there was insufficient time for a reasonable person to cool off from this emotional excitement. See *Rosa*, 322 Mich App at 740; *Joesel*, 36 NW3d at 298; *Mitchell*, 301 Mich App at 286. A rational view of the evidence presented at trial thus supported a voluntary-manslaughter instruction. See *Yeager*, 511 Mich at 491-492, 494 (concluding that a rational view of the evidence would have supported a voluntary-manslaughter instruction when the defendant shot the victim after the victim had physically assaulted the defendant); *Mitchell*, 301 Mich App at 287-288 (finding a voluntary-manslaughter instruction warranted when there was evidence that the defendant hit the victim with a baseball bat after the victim had struck the defendant with the bat).

Although defendant was charged with second-degree murder and a rational view of the evidence could support a conclusion that 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[,]” the trial court failed to provide a voluntary-manslaughter instruction. *Mitchell*, 301 Mich App at 286 (quotation marks and citation omitted). Because a

448 Mich 585, 606; 533 NW2d 272 (1995). Involuntary manslaughter in turn may be distinguished from voluntary manslaughter in that, unlike voluntary manslaughter, “the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender’s mental state is not sufficiently culpable to reach the traditional malice requirements.’ ” *Mendoza*, 468 Mich at 541, quoting *United States v Browner*, 889 F2d 549, 553 (CA 5, 1989).

rational view of the evidence supported a voluntary-manslaughter instruction, the trial court erred in failing to provide one. See *Mendoza*, 468 Mich at 541.¹⁰

3. HARMLESS ERROR

We will only reverse for instructional error when we conclude that, “after examin[ing] the entire cause,” it appears “more probable than not that the error was outcome determinative.” *Mitchell*, 301 Mich App at 286 (quotation marks and citation omitted); see also *Joesel*, 36 NW3d at 300-302 (applying harmless-error analysis in deciding that reversal was warranted for failure to provide a voluntary-manslaughter instruction). This Court evaluates the impact of instructional errors by considering them “in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *Mitchell*, 301 Mich App at 286 (quotation marks and citation omitted).

“[A] failure to instruct on a lesser included offense results in error requiring reversal . . . because it is impossible to know what a jury would do if it had been properly apprised of the lesser included offense.” *Yeager*, 511 Mich at 503. Our Supreme Court recently explained in *Joesel* that “[u]nlike in other cases of instructional error where a substantial evidence standard is applied to a disputed factual element, instruction on voluntary manslaughter requires a harmless-error analysis that rests on a legal question regarding the defendant’s required state of mind.” *Joesel*, 36 NW3d at 300-301 (cleaned up). Thus, “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” an appellate court cannot be sure what a jury would have done if it had been properly instructed on this lesser-included offense. *Id.* at 300, quoting *Yeager*, 511 Mich at 503.

Applying these principles, we conclude that in this case the failure to provide jury instructions for mitigating circumstances and, correspondingly, voluntary manslaughter, was not harmless. See *Mitchell*, 301 Mich App at 286. Because the jury was not provided a mitigating-circumstances instruction, it is impossible to know whether the jury would have found that defendant acted under circumstances that would have reduced the charges to manslaughter if Suttles, Caldwell, and Wilkerson-Allen had died. M Crim JI 17.4. If the jury would indeed have found that the circumstances here would have reduced the charges to manslaughter if Suttles, Caldwell, and Wilkerson-Allen had died, *id.*, then the conviction for AWIM was improper, as the requisite element of malice would not be present. *Lipps*, 167 Mich App at 106. Correspondingly, because the circumstances under which the charged assaults of Suttles, Caldwell, and Wilkerson-Allen occurred were the same as those under which Acklin died, if mitigating circumstances were present to undermine the AWIM convictions, such mitigating circumstances would necessarily reduce defendant’s second-degree murder conviction to voluntary manslaughter. See *Joesel*, 36

¹⁰ We disagree with the prosecution that defendant is not entitled to relief because the issue was not preserved. The trial court was aware that voluntary manslaughter was at issue because defendant had requested the mitigating-circumstances instruction. On the specific facts of this case, where the trial court erred in denying the requested mitigating-circumstances instruction and all charges arose from a single incident as previously described, the failure to instruct the jury on voluntary manslaughter was plain error affecting defendant’s substantial rights. See *People v Carines*, 460 Mich 750, 769; 597 NW2d 130 (1999).

NW3d at 301-302. Accordingly, the failure to instruct on voluntary manslaughter likewise requires reversal because “it is impossible to know what a jury would do if it had been properly apprised of the lesser included offense.” *Yeager*, 511 Mich at 503.

Because these jury-instruction errors were not harmless, defendant is entitled to a new trial. *Joesel*, 36 NW3d at 302; *Yeager*, 511 Mich at 503.

4. ASSAULT WITH INTENT TO DO GREAT BODILY HARM

Defendant also challenges the lack of an AWIGBH instruction via his complaint that his trial counsel rendered ineffective assistance in failing to request this instruction on the record. To succeed on an ineffective-assistance-of-counsel claim, a defendant must show that his trial counsel’s performance “fell below an objective standard of reasonableness,” in other words, that it was deficient, and that this deficient performance prejudiced the defense. *Yeager*, 511 Mich at 488 (quotation marks and citation omitted). There is a strong presumption that a trial counsel’s actions constituted reasonable trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The failure to request a jury instruction may constitute deficient performance. *Yeager*, 511 Mich at 490; see also, e.g., *People v Kilgore*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 365881); slip op at 5.

As we have described, the elements of AWIM, on which the jury was instructed, “are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *Brown*, 267 Mich App at 147 (quotation marks and citation omitted). AWIGBH is a necessarily included lesser offense of AWIM, the elements of which “are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *Id.* at 147, 151 (quotation marks and citation omitted). AWIM and AMIGBH thus differ in “the intent required of the actor at the time of the assault.” *Id.* at 148. More specifically, the specific intent to do great bodily harm as required for an AWIGBH offense “is less than the specific intent to kill necessary to sustain” an AWIM conviction. *Id.* at 149; see also *People v Everett*, 318 Mich App 511, 529; 899 NW2d 94 (2017) (“AWIM requires an actual intent to kill that is not a part of AWIGBH.”). Because AWIGBH is a necessarily included lesser offense of AWIM, when a rational view of the evidence supports an AWIGBH charge, an AWIGBH instruction should be provided for a defendant charged with AWIM. See *Brown*, 267 Mich App at 151-152.

Reviewing video footage of the incident underlying his charges, defendant testified that he shot at Caldwell because he was “seeing [his] dad attempted to be stomped to the ground” and answered affirmatively when asked if he was trying to hurt someone seriously. Defendant clarified that he was “not shooting to kill” and that his “intentions were not to murder anybody.” Evidence we detailed with respect to the mitigating-circumstances and voluntary-manslaughter instructions would also support allowing a jury to find that defendant intended only to seriously injure a victim rather than to kill. This view of the evidence would in turn support a conclusion that defendant was guilty of AWIGBH but not AWIM. See *id.* at 147. Therefore, an AWIGBH instruction would have been proper in light of the evidence presented at trial. See *Czuprynski*, 325 Mich App at 456; *Rosa*, 322 Mich App at 739.

But we cannot say that defendant's counsel performed deficiently on the record before us given the limited evidentiary development of this claim. See *People v Collins*, 298 Mich App 458, 468 n 5; 828 NW2d 392 (2012) (explaining that in reviewing unpreserved ineffective-assistance-of-counsel claims, our review is limited to the facts on the record before us). That is, although the evidence would have supported giving the instruction, defendant has not established on this record that failing to request it was not a reasonable trial strategy. See *Stanaway*, 446 Mich at 687. Therefore, although defendant is correct that a rational view of the evidence presented at trial would have supported an AWIGBH instruction, defendant is not entitled to relief on this issue. However, because the case is being remanded for a new trial, defendant will have an opportunity to request the instruction.

III. CONCLUSION

We find no error in the trial court's allowance of an amendment to the information during trial. But we conclude that the trial court erred by failing to instruct the jury on mitigating circumstances and voluntary manslaughter, and that these errors were not harmless. We accordingly vacate defendant's convictions and remand for a new trial.¹¹ We do not retain jurisdiction.

/s/ Adrienne N. Young

/s/ Daniel S. Korobkin

¹¹ In light of this disposition, it is unnecessary to address the remaining issues raised by defendant and his appellate counsel.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENESIS KEVIN XAVIER LEWIS,

Defendant-Appellant.

UNPUBLISHED

September 09, 2026

8:52 AM

No. 369675

Kent Circuit Court

LC No. 22-007617-FC

Before: BOONSTRA, P.J., and YOUNG and KOROBKIN, JJ.

BOONSTRA, P.J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority’s finding of instructional error, and accordingly I dissent from its decision to vacate defendant’s conviction and to remand for a new trial. I otherwise concur in the majority opinion.¹

I. VOLUNTARY MANSLAUGHTER

The trial court did not err by not instructing the jury on voluntary manslaughter as a lesser included offense of second-degree murder. Such an instruction was never requested by defense counsel, defense counsel was not ineffective in failing to request the instruction, and the trial court was not required to provide the instruction sua sponte.

A. THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING ON VOLUNTARY
MANSLAUGHTER SUA SPONTE

Generally, a trial court has no duty to instruct a jury sua sponte on lesser included offenses when counsel has not requested it. *People v Reese*, 242 Mich App 626, 629 n 2; 619 NW2d 708 (2000). Our Supreme Court has instructed that “with the *sole exception* of first degree murder

¹ Defendant, in his Standard 4 Brief and through counsel, raised several other issues that the majority did not address because it vacated defendant’s convictions on the basis of the supposed error in the jury instructions. Like the majority, I express no opinion regarding those other issues.

cases, failure of the trial court to instruct on lesser included offenses will not be regarded as reversible error, absent requests for such instructions before the jury retires to consider its verdict.” *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975) (emphasis added). In other words, it is only “in every trial for first-degree murder, including felony murder, [that] the trial court is required to instruct the jury *sua sponte*, and even over objection, on the lesser included offense of second-degree murder.” *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975), overruled in part on other grounds *People v Cornell*, 466 Mich 335, 357-358; 626 NW2d 127 (2002) (overruling *Jenkins* to only to the extent that it conflicts with the Court’s holding that an instruction on a lesser included offense is proper only if “a rational view of the evidence would support it”).

I appreciate that *Henry* and *Jenkins* were decided long before our Supreme Court recognized voluntary manslaughter and common-law involuntary manslaughter as lesser included offenses of second-degree murder. See *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). But the majority wrongly seems to assume that *Mendoza* somehow altered the rule set forth in *Henry* and *Jenkins*. It did not. *Mendoza* simply held that manslaughter is a necessarily included lesser offense of murder, and that a manslaughter instruction therefore “is warranted when a rational view of the evidence would support it.” *Id.* at 548. But it reached that conclusion in the context of a defense request for a manslaughter instruction, and *Mendoza* is therefore entirely consistent with the general rule set forth in *Henry* and *Jenkins*. *Mendoza* did not in any way alter that general rule so as to require a trial court to *sua sponte* provide a manslaughter instruction. Indeed, as the concurring Justice in *Mendoza* noted, *Mendoza* merely “affirms that a defendant facing a murder charge *may request* a manslaughter instruction if supported by the evidence.” *Id.* at 555 (CAVANAUGH, J., concurring) (emphasis added).²

Our Supreme Court could, of course, expand the holding of *Henry* and *Jenkins* to require a trial court to *sua sponte* provide a manslaughter jury instruction even if not requested by defense counsel. But it did not do so in *Mendoza*, nor has it done so elsewhere. Indeed, the Supreme Court in *Henry* long ago announced its intention to formulate a court rule that would address all circumstances in which *sua sponte* instructions are required:

We have not yet been able to establish and consistently follow a rule which would require the trial judge to instruct on lesser included offenses without relying on requests from counsel. That is the goal toward which we are striving. It is our intention to formulate a court rule which will require instructions on lesser included

² I note that defense counsel in *Mendoza*, 478 Mich at 530, requested both a voluntary manslaughter instruction and a common-law involuntary manslaughter instruction. The trial court denied both requests. On appeal, this Court held that the trial court did not err by denying the voluntary manslaughter instruction, but that it did err by denying the involuntary manslaughter instruction, and it therefore reversed and remanded for a new trial. *Id.* at 530-531. Our Supreme Court, as noted, held that both instructions should have been given if supported by a rational view of the evidence, yet it held that the involuntary manslaughter instruction was not warranted. *Id.* at 555. It reinstated the defendant’s conviction without further addressing the requested voluntary manslaughter instruction. *Id.*

offenses in every appropriate case, without requests from counsel. [*Henry*, 395 Mich at 374.]

It appears that those plans never came to fruition. Until our Supreme Court revisits this issue, we are left with the general rule that instructions on lesser included offenses are not required unless requested by counsel, with the “sole exception” of an instruction on second-degree murder as a lesser included offense of first-degree murder. *Jenkins*, 395 Mich at 442. This case does not fall into that exception, so the trial court did not err when it did not instruct the jury on voluntary manslaughter sua sponte.

B. THE EVIDENCE DID NOT SUPPORT A VOLUNTARY MANSLAUGHTER INSTRUCTION IN ANY EVENT

Furthermore, by noting that voluntary manslaughter was not at issue in this case, the trial court essentially held that the evidence did not support a voluntary manslaughter theory, which made the voluntary manslaughter instruction inapplicable. A trial court’s determination of whether an instruction applies to the facts of a case is reviewed for an abuse of discretion. *People v Mitchell*, 301 Mich App 282, 286; 835 NW2d 615 (2013). “[T]o show voluntary manslaughter, one must show 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. This principle “reflects the philosophical distinction between emotions that only cause choice and emotions so intense that they distort the very process of choosing.” *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991) (quotation marks and citation omitted).

In *Pouncey*, the defendant, the victim, and several other individuals got into a verbal argument outside of a house. *Id.* at 384-385. The victim called the defendant names and threatened to put him “on his head.” *Id.* at 384. The defendant disengaged from the argument, walked into the house, retrieved a shotgun from a closet, then returned to the scene of the argument. *Id.* at 385. As he came out of the house, he instructed another person to hit the victim with a monkey wrench, but the victim ducked out of the way. *Id.* The defendant then shot and killed the victim. *Id.* Our Supreme Court held that the trial court properly denied the defendant’s request for a voluntary manslaughter instruction in part because the defendant was not acting in the heat of passion. *Id.* at 390.

This case is similar to *Pouncey* in that defendant disengaged from the altercation, left to retrieve his guns, and then returned. Both defendants also initially chose the less lethal option available to them—the defendant in *Pouncey* initially chose to have the victim attacked with a monkey wrench, and defendant in this case chose to use his gun with the less dangerous ammunition. He did not see his father “on the ground and being jumped by multiple individuals” until *after* he had retrieved his guns and was returning to the fight. These facts indicate that “[e]ven if he was scared and confused, his decision to retrieve the gun[s] was a deliberate and reasoned act.” *Id.* Unlike the defendant in *Pouncey*, who testified that he was not angry, defendant in this case testified that he was “angry,” that he “had a lot of adrenaline going” and was emotionally overwhelmed, but he nonetheless stated that his intention in aiming his gun was “to get them off my dad.” He also testified that as he was grabbing his guns, he noticed someone run past, and he was “wondering who the guy was” because that man “wasn’t involved at first.” When he shot into

the crowd, he consciously chose to shoot the gun he was holding in his left hand because he did not want to use the more lethal gun in his right hand.³ Therefore, defendant's own testimony indicates that "his emotional state did not reach such a level that he was unable to act deliberately." *Id.* Despite the anger, adrenaline, and flood of emotions,⁴ defendant remained aware of his surroundings well enough to identify others around him, and he reasoned that to get the attackers away from his father, he should only use the less lethal of the two guns. A person who is overwhelmed by "emotions so intense that they distort the very process of choosing" would not be able to identify a specific goal and analyze the best available means to achieve that goal. *Id.* at 389 (quotation marks and citation omitted). Given these facts, the trial court did not abuse its discretion by determining that the voluntary manslaughter instruction was inapplicable, so it would not have been required to give the instruction even if defense counsel had requested it. MCR 2.512(D)(2).

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN NOT REQUESTING A VOLUNTARY MANSLAUGHTER INSTRUCTION

Because it apparently relies on a nonexistent duty to sua sponte give a voluntary manslaughter instruction, the majority does not contend that defense counsel was ineffective for failing to request the instruction. But clearly he was not. To succeed on a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). There is a "strong presumption that counsel's performance was born from a sound trial strategy." *Id.* at 52. "Even if the defense counsel does not request a jury instruction that the trial court would have been required to grant, that decision may be a matter of sound trial strategy." *People v Geary*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 371889); slip op at 3. For example, the defense counsel may reasonably decide not to request an instruction (even if supported by the evidence) if the instruction is "inconsistent with the primary defense theory," which "could confuse the jury and weaken both defenses." *Id.* at 5.

In this case, defense counsel's primary defense theory was that after seeing his father tackled to the ground by his attackers, defendant fired into the crowd in lawful defense of his father. During his closing argument, defense counsel also emphasized that defendant never intended to kill anyone because between his two guns, he chose to fire the one with less damaging ammunition, he only fired about a third of the bullets in the magazine, and he waited for police to arrive after the shooting. This theory of the case was consistent with the instructions on defense of others and statutory involuntary manslaughter⁵—instructions that defense counsel requested and

³ Defendant testified that although he was left-handed, he had trained to shoot a gun with his right hand, just as he had learned to shoot a basketball with his right hand. He nonetheless chose to shoot the gun he was holding in his left hand.

⁴ As our Supreme Court noted in *Pouncey*, "[t]he law cannot countenance the loss of self-control; rather, it must encourage people to control their passions." *Pouncey*, 437 Mich at 389.

⁵ The relevant involuntary manslaughter statute, MCL 750.329(1), states that "[a] person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed

that the trial court gave to the jury. But the theory was inconsistent with voluntary manslaughter, which is an impulsive killing resulting not from malice, but from a heat of passion and not from an exercise of deliberation, judgment, and reflection. See *Mendoza*, 468 Mich at 541. Furthermore, defense counsel may have been concerned that the jury would be confused about whether defendant's decision to shoot should be considered the lawful defense of another (which allows the jury to "consider how the excitement of the moment affected the choice the defendant made," M Crim JI 7.21), or voluntary manslaughter (which requires the jury to consider whether the defendant was "disturbed by emotional excitement," M Crim JI 16.9). The instructions are not inconsistent, but the distinction between the two can be very nuanced and difficult to apply.

Defense counsel employed a sound trial strategy: his "Plan A" was to argue for acquittal on a defense-of-others theory. If the jury did not believe that defendant was lawfully defending his father, then his "Plan B" was to present involuntary manslaughter as an alternative to murder because defendant was only trying to scare or mildly injure the alleged victim to break up the fight. Introducing voluntary manslaughter as a "Plan C" could have confused the jury and could have increased the risk that defendant would be convicted of voluntary manslaughter when he otherwise might have been acquitted. Therefore, regardless of whether a rational view of the evidence supported an instruction on voluntary manslaughter, defense counsel's decision not to request the instruction did not fall below an objective standard of reasonableness. See *Trakhtenberg*, 493 Mich at 51. Accordingly, defendant was not denied the effective assistance of counsel on that basis.

II. MITIGATING CIRCUMSTANCES

The majority also finds error in the trial court's denial of defendant's requested mitigating-circumstances instruction, M Crim JI 17.4. The majority notes that "[t]he principles underlying the mitigating-circumstances instruction flow from our state's voluntary-manslaughter jurisprudence," and that "these instructions ought to have traveled together." To that extent, I agree. Because the trial court did not err by not giving a voluntary manslaughter instruction, it also did not err by denying defendant's requested mitigating-circumstances instruction.

A trial court is only required to use a model criminal jury instruction if it is applicable, accurately states the applicable law, and is requested by a party. MCR 2.512(D)(2). "The elements of assault with intent to commit murder [AWIM] are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 1912, 195-196; 793 NW2d 120 (2010) (quotation marks and citation omitted). It is well established that a defense to AWIM exists when the killing would have been manslaughter instead of murder. *Maher v People*, 10 Mich 212, 217 (1862). See also *People v Lipps*, 167 Mich App 99, 206; 421 NW2d 586 (1988) ("[I]f a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to

intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death." This crime differs from common-law involuntary manslaughter in that it contains two additional elements: "(1) that the death resulted from the discharge of a firearm and (2) that the defendant intentionally pointed a firearm at the victim." *People v Smith*, 478 Mich 64, 72; 478 Mich 1201 (2007).

murder.”). That is why the requested jury instruction, M Crim JI 17.4, directs the jury to consider a hypothetical scenario in which the alleged victim had actually died:

(1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he / she] would have been guilty of murder had the person [he / she] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.

(2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:

(3) First, when the defendant acted, [his / her] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. [If the defendant is mentally or emotionally impaired in some way, you may consider that.]

(4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder [and decide whether (he / she) is guilty of any lesser offense].

M Crim JI 17.4 is not necessarily inaccurate—it correctly states the elements for voluntary manslaughter and that the defendant cannot be guilty of AWIM if a completed killing would have been manslaughter rather than murder. But in the context of this case, the instruction would have been misleading and confusing to the jury. Paragraph (2) states that “voluntary manslaughter is different from murder,” but then it frames the following list of requirements as the elements “for manslaughter.” But the jury had already heard instructions for statutory involuntary manslaughter, which was charged as an alternate theory to second-degree murder.⁶ If the jury was also instructed with M Crim JI 17.4, then it would hear the elements of two different forms of manslaughter, but only the involuntary manslaughter elements would be associated with the murder charge, and only

⁶ The trial court described the statutory involuntary manslaughter as a “lesser included offense” of second-degree murder and instructed the jury to only consider the charge if it found defendant not guilty of second-degree murder. But unlike common-law involuntary manslaughter, statutory involuntary manslaughter is not a lesser included offense of second-degree murder. *Smith*, 478 Mich at 71.

the voluntary manslaughter elements would be associated with the AWIM charge (and somehow those elements are simply referred to as “manslaughter”). This scenario could be confusing to a jury—should it consider involuntary manslaughter as a defense to AWIM? Should it consider voluntary manslaughter when determining defendant’s guilt on the murder charge? One instruction would likely influence the jury’s deliberation on the other.

The instructions for statutory involuntary manslaughter and mitigating circumstances as a defense to AWIM “are not inherently in conflict,” but they would likely leave the jury “understandable confused.” *People v Nelson*, ___ Mich ___, ___; ___ NW3d ___ (2025) (Docket No. 166297); slip op at 12. Under these circumstances, relying on the presumption that jurors follow their instructions “is overly simplistic here, where it was likely unclear to the jury how to apply the jury instructions.” *Id.* The trial court noted that the mitigating-circumstances instruction would likely confuse the jury given that voluntary manslaughter was not at issue for the murder charge, and it did not err when it denied defendant’s request for that instruction.

For the reasons stated, and while I concur in part in the majority opinion, I respectfully dissent from the majority’s finding of instructional error and from its resulting decision to vacate defendant’s conviction and to remand for a new trial.

/s/ Mark T. Boonstra