

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 23, 2013

v

ERIC ARLINGTON OGILVIE,  
Defendant-Appellant.

No. 298302  
Wayne Circuit Court  
LC No. 09-025646-FH

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

ERIC ARLINGTON OGILVIE,  
Defendant-Appellant.

No. 307897  
Wayne Circuit Court  
LC No. 09-025646-FH

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Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. In April 2010, the trial court sentenced defendant to three years' probation for the felonious assault conviction and a two-year term of imprisonment for the felony-firearm conviction. Defendant thereafter appealed his convictions as of right in Docket No. 298302. While that appeal was pending, the trial court revoked defendant's probation and sentenced him in April 2011 to one to four years' imprisonment for the felonious assault conviction, after which defendant filed a second claim of appeal in Docket No. 307897. In July 2012, the trial court amended defendant's judgment of sentence to clarify that the felonious assault sentence was to be served consecutive to his felony-firearm sentence. This Court consolidated defendant's two appeals. We now affirm in both appeals.

## I. BACKGROUND

Defendant was convicted of feloniously assaulting his neighbor, Eric Watson (the “victim”), by pointing a gun at him during an argument outside defendant’s home on September 13, 2009. The victim and defendant gave different accounts of the circumstances that preceded defendant’s act of pointing a gun at the victim, but both agreed that the victim approached defendant while defendant was outside working on his lawn in front of his home. The victim claimed that he approached defendant on the sidewalk to speak to him about grass clippings that he left on the sidewalk. According to the victim, defendant began arguing and placed his hand near the victim’s face. The victim claimed that he pushed defendant’s hand out of his face and backed away as defendant pulled out a gun and pointed it at the victim. According to defendant, the victim aggressively approached him in a threatening manner and stated, “Go ahead pull yours I’ll pull mind [sic].” Defendant, who was licensed to carry a gun, testified that he pulled out his gun and pointed it in the general direction of the victim because he thought the victim was getting ready to pull something out from behind his back and he feared for his safety and the safety of his young son, who was also in front of the house. The jury convicted defendant of felonious assault and felony-firearm.

At defendant’s sentencing hearing in April 2010, defendant moved for a new trial through newly retained counsel. The trial court denied the motion, without prejudice to defendant moving for a *Ginther*<sup>1</sup> hearing on his claim that he did not receive the effective assistance of counsel at trial. The court sentenced defendant to three years’ probation for the felonious assault conviction and a two-year prison term for the felony-firearm conviction, to be served concurrently. In September 2010, defendant, represented by retained appellate counsel, filed a motion for a *Ginther* hearing and a new trial or verdict of acquittal. Before the *Ginther* hearing was concluded, the State Appellate Defender Office (SADO), which had been appointed as substitute appellate counsel, filed supplemental motions for a new trial, which the trial court ultimately denied on December 16, 2011.

Previously, in December 2010, the trial court granted defendant’s motion for an appeal bond to permit defendant to be released from his felony-firearm prison sentence pending appeal, but required defendant to report to probation and comply with other conditions, including a requirement that he reside at his Taylor home. Defendant thereafter moved to Alpena. In March 2011, the trial court revoked the appeal bond and, following probation violation proceedings, revoked defendant’s probation. In April 2011, the court sentenced defendant for the felonious assault conviction to one to four years’ imprisonment. On July 17, 2012, the court amended the judgment of sentence to provide that the felonious assault sentence was to be served consecutive to the prior prison sentence for felony-firearm.

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

## II. DOCKET NO. 298302

In his appeal in Docket No. 298302, defendant, proceeding in propria persona, requests that this Court treat his August 17, 2012, appellant's brief as only a "temporary" or "preliminary" brief because his preparation of the brief was interrupted by the trial court's issuance of an amended judgment of sentence on July 17, 2012. However, the court rules do not permit the filing of an additional or supplemental brief on appeal without leave of the Court. MCR 7.212(G). Because defendant has not obtained leave to file any additional brief, his appeal in Docket No. 298302 is limited to the issues raised in his August 17, 2012, brief. In any event, this Court's jurisdiction in Docket No. 298302 is confined to defendant's convictions and original sentences imposed on April 16, 2010. See MCR 7.203(A)(1); MCR 7.202(6)(b)(ii). Issues relating to defendant's probation revocation and subsequent sentencing are properly the subject of defendant's appeal in Docket No. 307897.

### A. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant raises two issues involving the performance of his former appellate counsel. Although the trial court conducted a *Ginther* hearing on defendant's claims that trial counsel was ineffective, defendant's claims of ineffective assistance of appellate counsel were not a subject of that hearing. Therefore, appellate review of defendant's claims of ineffective assistance of appellate counsel is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). "[T]he test of ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008).

Although defendant asserts that former appellate counsel failed to fully advocate all of his claims of ineffective assistance of trial counsel, defendant does not identify or address any particular claim. Further, as this Court observed in *Uphaus*, "[a]ppellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments that are more likely to prevail." *Id.* at 187. Moreover, defendant does not explain how he was prejudiced by the failure to litigate any particular claim. Accordingly, this ineffective assistance of appellate counsel claim cannot succeed.

We also disagree with defendant's argument that former appellate counsel's failure to fully address alleged errors in certain transcripts, motions, and briefs provides a basis for relief. The mere existence of an inaccuracy in a transcript or other matter of record does not entitle a defendant to relief. The defendant must identify the alleged inaccuracy with specificity, provide some independent corroboration of the asserted inaccuracy, and describe how the claimed inaccuracy has adversely affected his ability to secure postconviction relief. *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). Here, defendant merely asserts that there were some errors in the transcript or record, but he does not explain how any alleged error adversely affected his ability to pursue postconviction relief, either in the trial court or on appeal, or provide any basis for concluding that there is a reasonable probability that the trial court's decision to deny his motion for a new trial was influenced by any inaccuracies in the trial transcript. Further, while defendant complains that former appellate counsel's failure to seek correction of the record put him in the position of having to try to correct the record himself, defendant has not shown that his right to appeal has been impeded by a record that is insufficient to allow evaluation of a claim on appeal, *People v Federico*, 146 Mich App 776, 779; 381 NW2d 819 (1985), and defendant cannot complain that the quality of his self-representation amounts to the denial of the effective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 419; 639 NW2d 291 (2001).

#### B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant next argues that his retained trial counsel was ineffective before and during trial. The standards for ineffective assistance of counsel apply to a defendant's retained attorney. See *People v Hamacher*, 432 Mich 157, 170 n 2; 438 NW2d 43 (1989) (LEVIN, J., separate opinion), citing *Cuyler v Sullivan*, 446 US 335, 344-345; 100 S Ct 1708; 64 L Ed 2d 333 (1980). To the extent that defendant advances claims on appeal that were not the subject of the *Ginther* hearing below, our review of those claims is limited to errors apparent from the record. *Horn*, 279 Mich App at 38; *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). We review any findings of fact made by the trial court with respect to the claims raised below for clear error. *LeBlanc*, 465 Mich at 579.

Although defendant asserts that trial counsel provided incorrect legal advice before trial, the nature of counsel's advice is not a matter of record and this issue was not explored at the *Ginther* hearing. Thus, there is no basis for concluding that trial counsel was ineffective for giving incorrect legal advice. Further, defendant has not demonstrated a likelihood of prejudice from counsel's allegedly improper legal advice. Defendant asserts that trial counsel inaccurately advised him that testimony regarding his prior difficulties with the victim and his wife would not be admissible. We note that trial counsel's decision to focus on the events surrounding the offense in his direct examination of defendant was a matter of trial strategy. See *Horn*, 279 Mich App at 39; *People v Johnson*, 168 Mich App 581, 586; 425 NW2d 187 (1988). Counsel reasonably may have decided not to elicit evidence of past difficulties with the victim out of concern that the evidence might show that defendant's reaction of threatening the victim with a gun was motivated by a preexisting animosity against the victim, rather than a perceived threat of immediate harm. Furthermore, a failure to present evidence constitutes ineffective assistance of counsel only where it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The record clearly demonstrates that defendant was not foreclosed from offering evidence of prior problems with the victim. On cross-examination, the

prosecutor asked defendant whether he “had problems with [the victim] before.” In response, defendant complained that the victim sometimes seemed to give him moral lectures, but defendant stated that he had never before been involved in a physical confrontation with the victim. Because defendant had the opportunity to offer testimony regarding past problems with victim, he was not prejudiced by counsel’s allegedly improper legal advice.

Defendant next argues that trial counsel was ineffective for failing to present additional photographs, failing to call an investigator to testify regarding relative distances between the victim and defendant, and failing to call an expert to assist the jury in understanding what goes through the mind of a person who perceives a child to be in danger. Counsel’s decisions regarding what evidence to present and whether to call witnesses were matters of trial strategy. *Horn*, 279 Mich App at 39. The record discloses that trial counsel presented a photograph, which defendant agreed accurately depicted the front yard of his house on the date of the offense. Defendant has not shown that additional photographs were necessary to provide the jury with an adequate understanding of the scene. Further, defendant cites no record evidence showing how any investigator or expert would have testified. Without such testimony, this ineffective assistance of counsel claim cannot succeed. *Carbin*, 463 Mich at 600; *Payne*, 285 Mich App at 190.

Defendant next argues that defense counsel was ineffective for failing to obtain recordings of 911 calls made to the Taylor Police Department on the date of the offense. This issue was the subject of substantial testimony at the *Ginther* hearing. Defense counsel explained his efforts to obtain the recordings, both personally through his service of a discovery order and through a defense investigator, but was unsuccessful because he was advised that the recordings did not exist. The trial court found that defense counsel’s efforts were objectively reasonable. The trial court did not clearly err in its assessment of defense counsel’s performance regarding this matter. Accordingly, defense counsel was not ineffective in this regard.

Next, the record does not support defendant’s argument that trial counsel effectively conceded defendant’s guilt. It was undisputed that defendant threatened the victim with a gun. The principal issue at trial was whether defendant acted in self-defense. Trial counsel did not advance any theory that pointing a gun at someone is always an illegal act. Rather, counsel appropriately argued that defendant’s act was legally justified because he reasonably believed that the victim was attempting to pull out a weapon to harm defendant or his son. The more material question is whether trial counsel requested appropriate jury instructions to advance the self-defense theory.

Defendant was charged with felonious assault, which consists of “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). “An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). The latter type of assault is referred to as “apprehension-type assault.” *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). The actual ability to inflict the threatened harm is largely irrelevant and unnecessary to establish this type of assault, but the victim must reasonably apprehend an imminent battery. *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998). “[T]he assault element is satisfied where the

circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened.” *Id.*

Under the common law, self-defense is an affirmative defense to justify otherwise punishable criminal conduct. It applies where the defendant acted intentionally, but under circumstances that justified his action. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). The general rule is that a nonaggressor is justified in using a reasonable amount of force against his adversary in an encounter when “he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid the danger.” *Id.* at 707, quoting 2 LaFave, *Substantive Criminal Law* (2d ed), § 10.4, p 142. The person’s “intentional infliction of (or, if he misses, his attempt to inflict) physical harm upon the other, or his threat to inflict such harm, is said to be justified when he acts in proper self-defense, so that he is not guilty of any crime.” *Id.* at 707-708, quoting 2 LaFave, § 10.4(a), pp 143-144. Where the defendant injects the issue of self-defense and satisfies his initial burden of producing evidence from which the jury could find the elements of a prima facie defense of self-defense, the prosecution bears the burden of disproving self-defense beyond a reasonable doubt. *Id.* at 709-710.

A person may also act in defense of another. *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). Because the concept of self-defense is founded on necessity, real or apparent, an accused’s failure to retreat or otherwise avoid the harm is also a factor in determining whether a person acts in reasonable self-defense. *People v Riddle*, 467 Mich 116, 126-127; 649 NW2d 30 (2002). But “one is never obligated to *retreat* from a sudden, fierce, and violent attack, because under such circumstances a reasonable person would, as a rule, find it necessary to use force against force without retreating.” *Id.* at 129-130 (emphasis in original). Another exception provides that retreat is not a factor when a person is in his dwelling or “castle.” *Id.* at 134-135. The common law did not extend the “castle” doctrine to the curtilage surrounding the dwelling. *Id.* at 137-138; see also *People v Conyer*, 281 Mich App 526, 530; 762 NW2d 198 (2008). But the Self-Defense Act (SDA), MCL 780.971 *et seq.*, altered the common law regarding the duty to retreat, effective October 1, 2006. *Dupree*, 486 Mich at 708; *Conyer*, 281 Mich App at 530. Section 2 of the SDA addresses both the use of deadly force and “force other than deadly force,” and provides:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force *may use deadly force* against another individual *anywhere he or she has the legal right to be with no duty to retreat* if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

(2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force *may use force other than deadly force* against another individual *anywhere he or she has the legal right to be with no duty to retreat* if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual. [MCL 780.972 (emphasis added).]

Although the SDA does not define “force” or “deadly force,” this Court has described the use of deadly force as referring to a circumstance in which the natural, probable, and foreseeable consequence of the defendant’s act is death. *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). In *Pace*, this Court determined that a defendant’s mere display of a knife, while implying a threat of violence, would not constitute deadly force, but that an instruction on nondeadly force would be appropriate for such conduct.<sup>2</sup> *Id.* at 533-534.

The defense theory in this case was that defendant pulled out his gun and told the victim to leave in reaction to his belief that the victim might be pulling out a gun or some other weapon to harm him or his son. That is, the defense theory was that defendant responded to a fear of immediate harm by reacting with a threat of deadly force. As set forth in defense counsel’s opening statement at trial, the defense theory was that the victim approached defendant

standing about five feet away from him reaching his arms behind his back as if to draw a gun. . . . [Defendant] reacted at that point. He reacted to protect himself and to protect his two-year-old son Logan who was right next to him. He felt their safety and perhaps their lives were in jeopardy.

Defendant testified at trial that he felt it was necessary to pull out the gun because the victim “kept on coming in an aggressive manner and he’s reaching his hand behind his back.” Defendant testified that he thought that the victim might have a knife, stick, or gun because the victim had stated, “Go ahead pull yours I’ll pull mind [sic].” In closing argument, trial counsel argued that the victim’s gestures behind his back caused defendant to fear for his safety and his son’s safety, especially when the victim stated, “You pull yours I’ll pull mine.”

In considering whether the jury instructions requested by trial counsel appropriately advanced this theory of self-defense, we must examine the instructions in their entirety to

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<sup>2</sup> Although this Court did not offer a definition of “nondeadly force” in *Pace*, the result reached is consistent with the dictionary meaning of the term “force,” which is defined, in part, as “unlawful violence threatened or committed against persons or property.” *Random House Webster’s College Dictionary* (1997). A court properly may consult a dictionary definition to determine the meaning of undefined terms in a statute. *People v Tennyson*, 487 Mich 730, 738; 790 NW2d 354 (2010). We note that the majority in *People v Dillard*, 115 Mich App 640; 321 NW2d 757 (1982), later determined that pointing a gun involves no force whatsoever. We note that neither *Pace* nor *Dillard* is precedentially binding on this Court because both cases were decided before November 1, 1990. MCR 7.215(J)(1).

determine if they fairly presented the issues and sufficiently protected defendant's rights. *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007); see also *People v Richardson*, 490 Mich 115, 119; 803 NW2d 302 (2011). We also note that a defendant's failure to request a particular jury instruction can be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003).

The jury instruction addressing the defense theory that defendant acted in self-defense was tailored to the deadly-force form of self-defense in MCL 780.972(1). It essentially mirrors CJI2d 7.15. The separate instruction addressing defendant's defense of his son follows CJ2d 7.22 for the nondeadly-force form of self-defense in MCL 780.972(2). The jury was also instructed on the duty to retreat in a manner consistent with CJI2d 7.16.

Although a trial court should not hesitate to modify or disregard a standard criminal jury instruction when presented with a more accurate instruction, *Richardson*, 490 Mich at 120, we are not persuaded that trial counsel's request for CJI2d 7.15, rather than an instruction that was more accurately tailored to the evidence in this case, amounts to ineffective assistance of counsel. The first issue that the jury was asked to consider under the instruction modeled after CJI2d 7.15 is whether defendant "honestly and reasonably believed he was in danger of being killed or seriously injured." This instruction was supported by evidence offered by defendant. Defendant's testimony did not suggest that he was reacting to a fear of only minor injury, but rather indicated that he honestly and reasonably believed it was necessary to pull out a gun because the victim was attempting to reach for something that defendant believed could have been a gun. In sum, the first part of the instruction requested by trial counsel was consistent with the defense theory at trial. The second part of the instruction based on CJI2d 7.15 contained factors for evaluating whether defendant was afraid of death or serious physical injury. Again, the instruction accurately reflected the defense theory at trial. The third part of the instruction, which addresses the requirement of necessity and sets forth the law that "a person may only use as much force as he thinks is necessary at the time to protect himself," is also an accurate statement of the law.

We are also not persuaded that trial counsel's approval of an instruction based on CJI2d 7.16 was objectively unreasonable. As observed in *Richardson*, 490 Mich at 120-121, CJI2d 7.16 accurately states the law. And while the jury was not given a definition of deadly force, the jury was instructed that "[a] person can use deadly force in self-defense only where it's necessary to do so." Further, with respect to circumstances where there is no duty to retreat because the defendant is at a place where he has a legal right to be, the jury was instructed that there must be "an honest and reasonable belief that the use of deadly force is necessary to prevent eminent [sic] death, great bodily harm or sexual assault."

Assuming that the jury could have incorrectly understood "deadly force" to include threatening an individual with a gun, defendant was not prejudiced because the defense theory was that such threatening conduct was the act of self-defense and that defendant honestly and reasonably believed that it was necessary to prevent death or at least great bodily harm. To the extent that the jury could have understood "deadly force" to include the threatened use of deadly force, defendant suffered no prejudice because the instruction becomes a mere accurate statement of the law that trial counsel, according to his testimony at the *Ginther* hearing, desired the jury to hear for purposes of evaluating defendant's conduct.

Because defendant's claim of self-defense did not depend on whether his threatening conduct was properly treated as deadly force or nondeadly force, but rather required the jury to resolve the conflicting claims concerning whether the victim became threatening and aggressive during their argument and whether defendant honestly and reasonably believed that it was necessary to pull out and point his gun at the victim to avoid a threat of imminent harm, defendant's ineffective assistance of counsel claim based on the self-defense instructions requested by trial counsel cannot succeed. Even if trial counsel could have requested more accurate instructions, defendant has failed to establish a reasonable probability that, but for this omission, the result of the trial would have been different and the result that did occur was fundamentally unfair or unreliable. See *Seals*, 285 Mich App at 17.

Defendant also argues that trial counsel was ineffective by not moving to suppress evidence of his ownership of other guns that were discovered during a search of his home. This particular claim was not explored at the *Ginther* hearing. Even assuming that trial counsel could have successfully objected to the testimony regarding the search of defendant's home on the ground that it was not relevant, there is no basis for concluding that defendant was prejudiced by the testimony. It is apparent from the record that trial counsel attempted to use that evidence to show that defendant was treated differently than the victim, whose home was not searched for weapons. Further, the testimony indicated that defendant was cooperative during the search, there was no suggestion that defendant possessed any guns illegally, and the prosecutor made it clear to the jury that this case was "not about the guns that were recovered from his house" and conceded that defendant legally possessed the guns. Defendant has failed to establish a reasonable probability that the evidence of his legal ownership of other guns affected the outcome of the trial.

### C. PROSECUTORIAL MISCONDUCT

Defendant argues that misconduct by the prosecutor during closing and rebuttal arguments requires a new trial. Defendant concedes that there was no objection to the prosecutor's conduct, leaving this issue unpreserved. Accordingly, defendant bears the burden of establishing plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). The general test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* at 460. Although defendant asserts that the prosecutor's alleged misconduct violated his constitutional rights, not all claims of prosecutorial misconduct are constitutional in nature. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *Id.* at 262. Where it is claimed that the prosecutor infringed upon a specific constitutional right, "courts take special care to ensure that the prosecutor in no way infringes upon that specific constitutional right." *Id.* at 261.

Defendant argues that the prosecutor misstated the evidence in her closing argument. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). But a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Id.* at 241. The prosecutor is not required to state her argument in

the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Although defendant relies on the testimony of witness Rebecca Swanson to argue that the prosecutor misstated the evidence relative to the victim's physical location during the offense, the victim's location was the subject of conflicting testimony at trial. The prosecutor was permitted to argue the evidence as it related to her theory of the case, and we are not persuaded that the prosecutor misstated the evidence. Further, the trial court protected defendant's substantial rights by instructing the jury that the lawyers' statements and arguments are not evidence. Jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

Defendant also appears to argue that the prosecutor improperly characterized him as "trigger happy" in her closing argument. Examined in context, however, the prosecutor was questioning whether defendant had any reason to believe that the victim would be "trigger-happy" while approaching defendant armed with a gun. The prosecutor stated, "Is it reasonable to believe that your neighbor, your neighbor that let your kids play on their swing set is going to be packed locked and loaded like [defendant] was, ready to pull that gun and be trigger happy?" Considering defendant's claim of self-defense, it was not improper for the prosecutor to comment on the reasonableness of defendant's asserted belief that the victim might have a gun.

Defendant also argues that the prosecutor misstated the law concerning his duty to retreat. To the extent that the prosecutor's remark could have been interpreted as inaccurately suggesting that defendant had a duty to retreat from a place where he had a legal right to be, see MCL 780.972(1), any misleading effect was cured by the trial court's accurate instructions to the jury on the duty to retreat. See *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

Next, to the extent that the prosecutor mischaracterized defendant's act of pointing a gun at the victim as involving the use of deadly force, rather than a threat of deadly force, in her closing and rebuttal arguments, the error was not outcome-determinative. The principal issue for the jury to resolve was whether defendant honestly and reasonably believed that it was necessary to pull out and point his gun at the victim to avoid a threat of imminent harm. Therefore, any error does not require reversal.

Lastly, we find no support in the record for defendant's assertion that the prosecutor improperly suggested that a person cannot lawfully possess a gun or that the prosecutor deceived the jury into believing that possession of a gun was sufficient to convict him of felonious assault and felony-firearm. We also reject defendant's argument that the prosecutor's closing argument regarding the law on self-defense was the equivalent of expert testimony, which deprived him of his constitutional right to confront the witnesses against him because he did not have the opportunity to confront or cross-examine the prosecutor. It can be presumed that the jury followed the trial court's instruction that the lawyers' statements are not evidence. *Unger*, 278 Mich App at 235.

#### D. JURY INSTRUCTIONS

Defendant also challenges the trial court's jury instructions. We agree with the trial court that defendant waived his substantive claim of instructional error because defense counsel expressly requested the challenged jury instruction and thereafter expressed his satisfaction of the instructions as given. See *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011);

*People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). A waiver extinguishes any error. *Kowalski*, 489 Mich at 503. Accordingly, any entitlement to relief with respect to this issue must be evaluated in the context of an ineffective assistance of counsel claim, which we have concluded in section II(B) defendant is unable to establish.

#### E. TESTIMONY REGARDING DEFENDANT’S WIFE

Defendant next argues that a new trial is required because he was prejudiced by testimony provided by the victim’s wife regarding her contact with defendant’s wife on the evening of the charged offense and on a later date.

Defendant first argues that he was deprived of a fair trial because the trial court, although sustaining a defense objection to testimony that defendant’s wife “came over later that evening and apologized and said —,” did not instruct the jury to disregard the testimony. Because defendant never moved to strike any testimony, this issue is not preserved. See *Jones*, 468 Mich at 355. Thus, this issue is reviewed for outcome-determinative plain error. *Carines*, 460 Mich at 763. Defendant has not established that it was plain error not to strike any testimony where defendant’s successful objection prevented any testimony concerning what defendant’s wife actually said. The court’s failure to sua sponte strike the vague reference to some sort of apology was not determinative of any issue in the case.

Defendant also failed to preserve his challenge to testimony that the victim’s wife felt “a little scared” for defendant’s wife after her discussion with defendant’s wife concluded. We are satisfied that this brief testimony, even if not relevant, was not outcome determinative and, accordingly, does not warrant reversal. See *Carines*, 460 Mich at 763. Contrary to defendant’s argument on appeal, the testimony did not suggest that defendant was a person of “bad character.”

Next, although defense counsel made a relevancy and hearsay objection when the prosecutor sought to elicit from the victim’s wife what defendant’s wife asked her to do on some later occasion, we reject defendant’s unpreserved argument on appeal that this evidence implicates his constitutional rights. See *Blackmon*, 280 Mich App at 260. Further, we disagree with defendant’s argument that the victim’s wife’s testimony implicates MRE 404(b)(1), which prohibits evidence of a defendant’s other bad acts to show the defendant’s character or propensity to commit the charged crime. See *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012). Although the challenged testimony involved circumstances after the charged offense, it indicated only that defendant’s wife had requested that the victim’s wife call her if she thought defendant was gone so that she could come over to “get her stuff from the house.” The testimony did not refer to any “acts” by defendant. Even if the trial court abused its discretion in overruling defendant’s relevancy objection to the testimony, reversal is not required. Although the challenged testimony suggested some type of marital discord between defendant and his wife, the nature of any discord was never mentioned. Further, we disagree with defendant’s argument that this testimony could have caused the jury to inferentially convict defendant on the basis of his perceived “bad character” rather than his guilt beyond a reasonable doubt of the charged crimes. Because it does not affirmatively appear more probable than not that this testimony was outcome determinative, any error was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

## F. SUPPLEMENTAL MOTIONS FOR NEW TRIAL

Defendant raises several issues concerning his supplemental motions for a new trial in which a new trial was sought on the basis of Rebecca Swanson's recorded 911 call, which defendant obtained after his trial. Defendant argued that he was entitled to a new trial either because the recording constituted newly discovered evidence, or because it was suppressed by the Taylor Police Department contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The trial court determined that the evidence would not have made a difference had it been available for trial and, therefore, denied defendant's motion for a new trial. We review the trial court's decision denying defendant's new trial motion for an abuse of discretion, and review any findings of fact made by the court for clear error. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Issues of constitutional law are reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Defendant has the burden of establishing all four parts of this test. *Rao*, 491 Mich at 279.

Where a defendant claims that the prosecution suppressed evidence in violation of due process, the test is whether the suppressed evidence was exculpatory and material to a defendant's guilt or punishment, regardless of the good faith or bad faith of the prosecution. *Brady*, 373 US at 87. The prosecution's duty to disclose evidence extends to impeachment evidence, as well as evidence known to others acting on behalf of the government, because the prosecution has a duty to learn of any favorable evidence known to others acting on behalf of the government. *Youngblood v West Virginia*, 547 US 867, 869-870; 126 S Ct 2188; 165 L Ed 2d 269 (2006). It is the significance of the omission, and not whether a particular document was disclosed, which determines whether the government fulfilled its *Brady* obligations. *United States v Todd*, 920 F2d 399, 405 (CA 6, 1990). Omitted evidence is material if a reasonable probability exists that the outcome of the proceeding would have been different if the evidence had been disclosed to the defendant. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007), *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998). It is favorable evidence that could reasonably be taken to put the whole case in such a different light that it undermines confidence in the verdict. *Youngblood*, 547 US at 870.

In this case, the trial court's evaluation of the materiality of the undisclosed 911 recording convinces us that the trial court did not abuse its discretion in denying defendant's request for a new trial under the standards for both newly discovered evidence and undisclosed exculpatory evidence. The record discloses that defendant was aware that Swanson was a witness to at least part of his argument with the victim. At the *Ginther* hearing, defense counsel testified that he received a police report during discovery, which indicated that Swanson told the police that she saw the victim reach behind his back. There is nothing in the record to indicate

that the failure to disclose the 911 call deprived defendant of essential facts that would permit him to take advantage of information that Swanson might be able to corroborate defendant's version of his argument with the victim. Indeed, at trial, Swanson corroborated defendant's version to the extent that she described the victim as being very aggressive, and she indicated that she called 911 at defendant's request. Swanson also agreed that the victim put his hands behind his back, although she agreed that the victim could have been adjusting his clothing. She also admitted that she did not see everything that occurred between defendant and the victim.

The contents of the recorded 911 call itself indicate that Swanson was distracted by her son during the call. It also indicates that the operator pressed Swanson for information regarding the person with the gun. At the end of the call, Swanson purported to state "exactly what happened." She described how defendant had warned the victim to get "out of his face" and asked her to "be a witness," and offered her opinion that defendant might have pulled out his gun because he thought the victim had a gun.

After considering the recorded 911 call in light of the evidence presented at trial, we are not persuaded that the trial court erred in its determination that the recording would not have made a difference had it been presented at trial. Therefore, we find no basis for disturbing the trial court's denial of defendant's new trial motion under either of the theories raised by defendant.

Defendant also argues that he is entitled to a new trial because a recorded 911 telephone call made by his wife was also not disclosed before trial. Defendant's wife's 911 call was not a basis for defendant's motions in the trial court. Accordingly, this issue is unpreserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Reviewing this issue for plain error, *Carines*, 460 Mich at 763, we find no basis for relief. The brief call did not add any significant information that was not already before the jury. We similarly conclude that defendant has failed to establish any *Brady* error arising from the failure to disclose a police officer's alleged statements to Swanson that no gun was found on the victim.

#### G. DEFENDANT'S OTHER ISSUES

Defendant argues that the trial court's jury voir dire was deficient because the court failed to adequately question the jurors to determine whether any of them harbored anti-gun views or practices. Defendant concedes that there was no objection to the scope of the trial court's voir dire. Further, defense counsel expressed satisfaction with the jury as impaneled. Accordingly, defendant waived any challenge to the composition of the jury. See *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996), overruled in part on other grounds *People v Bryant*, 491 Mich 575, 618; 822 NW2d 124 (2012). In any event, the record discloses that the trial court adequately questioned the prospective jurors regarding whether they had any views toward guns that would preclude them from following the law. See *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). Contrary to defendant's argument on appeal, the trial court did not send a message to non-gun owners that anti-gun viewpoints need not be excluded.

Next, because defendant did not move to disqualify the trial court under MCR 2.003(D) during the proceedings at issue in Docket No. 298302, we limit our review of defendant's claim of judicial bias to whether the record discloses a plain due process error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. Disqualification under the Due Process Clause is only required in the most extreme cases. *Cain v Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996). A party challenging a judge based on bias or prejudice must overcome a heavy presumption of judicial impartiality. *Id.* at 497; see also *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). Although defendant correctly observes that a judge is not permitted to engage in plea negotiations, *People v Killebrew*, 416 Mich 189, 205; 330 NW2d 834 (1982), the record does not support defendant's appellate argument that the trial court took an active role in plea negotiations. The most that can be deduced from the record is that the trial court expressed a preference for a resolution that would have allowed it to avoid imposing the mandatory two-year sentence for defendant's felony-firearm conviction. Further, defendant has not identified any other conduct by the trial court that overcomes the presumption of judicial impartiality. Defendant's contention that the trial court made mistakes in its recollection of facts and relevant case law is insufficient to establish a disqualifying bias. *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). Therefore, appellate relief on this ground is not warranted. *Carines*, 460 Mich at 763.

Lastly, we conclude that defendant has failed to establish actual errors in the proceedings that, cumulatively considered, deprived him of a fair trial.<sup>3</sup> See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008).

### III. DOCKET NO. 307897

In Docket No. 307897, defendant appeals the trial court's decisions to revoke his probation for the felonious assault conviction, to impose a prison sentence of one to four years for that conviction, and to subsequently amend the judgment of sentence to provide that the felonious assault and felony-firearm sentences are to be served consecutively. Defendant also challenges the trial court's revocation of his December 6, 2010 appeal bond in connection with the felony-firearm sentence.

#### A. APPEAL BOND

Because defendant's appeal in Docket No. 307897 is limited to the probation revocation proceedings and the resentencing for the felonious assault conviction, we lack jurisdiction in that appeal to address the revocation of the appeal bond. MCR 7.203(A)(1); MCR 7.202(6)(b)(v); see also *People v Kaczmarek*, 464 Mich 478, 485; 628 NW2d 484 (2001). In any event, any

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<sup>3</sup> Defendant asserts in his statement of questions presented that "collective effective errors by the trial court and the trial prosecutor in this case permitted the jury to treat the defendant's lawful ownership of multiple firearms and his lawful carry of a concealed pistol as evidence of a propensity for violence." However, defendant fails to address this issue in the body of his brief, thereby abandoning the issue. See *Kevorkian*, 248 Mich App at 388-389.

issues regarding the appeal bond are now moot because the December 6, 2010 appeal bond permitted defendant to be released from his felony-firearm prison sentence pending appeal and defendant has since fully served his two-year prison sentence for felony-firearm. This Court does not decide moot issues. *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187, amended 486 Mich 1041 (2010).

## B. PROBATION REVOCATION

Defendant challenges the trial court's March 11, 2011 determination that he violated the terms of his probation for the felonious assault conviction.

Probation is a matter of grace, not of right. *People v Breeding*, 284 Mich App 471, 479-480; 772 NW2d 810 (2009); see also MCL 771.4. It is "revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion." *People v Harper*, 479 Mich 599, 626-627; 739 NW2d 523 (2007). Probation violation proceedings are not subject to the full panoply of constitutional rights that apply to criminal trials. *Breeding*, 284 Mich App at 480. But due process requires that the probationer be given notice of the probationary conditions so that he will know what is expected of him. *People v Bruce*, 102 Mich App 573, 577-578; 302 NW2d 238 (1980). In addition, "[a] defendant is entitled to receive written notice of a probation violation sufficiently in advance of the scheduled revocation hearing to allow him a reasonable opportunity to present a defense." *People v Irving*, 116 Mich App 147, 151; 321 NW2d 873 (1982). A trial court may only consider evidence relating to a charged probation violation activity in deciding whether to revoke probation. *People v Pillar*, 233 Mich App 267, 270; 590 NW2d 622 (1998). The prosecution has the burden of proving a probation violation by a preponderance of the evidence. MCR 6.445(E)(1).

Here, defendant has not established that he was not provided with notice of the probation conditions. The trial court's April 16, 2010 written order of probation lists the terms of defendant's probation. The order includes a requirement in ¶ 4 that defendant "[n]otify the probation officer immediately of any change of Address" and that "Defendant shall not change Residence without the prior permission of assigned probation agent." Paragraph 13 requires that defendant attend "Alcoholics Anonymous/Narcotics Anonymous treatment," and ¶ 16 contains several conditions, including "[n]o assaultive, abusive, threatening or intimidating behavior. Complete Anger Management Classes and Parenting Classes." The probation order also advises defendant that "[f]ailure to comply with the order may result in revocation of probation and incarceration." Because defendant signed the order to acknowledge his understanding of the conditions and his agreement to comply with the terms of probation, we reject defendant's argument that he was not provided with notice of the probation conditions.

We disagree with defendant's argument that the trial court was required to advise him that he could seek modification of the conditions of probation. To the extent that this Court's decision in *People v Ford*, 95 Mich App 608, 613; 291 NW2d 140 (1980), rev'd on other grounds 410 Mich 902 (1981), suggested that such advice should be given, that decision is not binding under MCR 7.215(J)(1) because it was decided before November 1, 1990, and we decline to follow it. Absent a court rule or statute requiring such advice, the trial court's failure to provide it was not error. *People v McNeil*, 104 Mich App 24, 27; 303 NW2d 920 (1981).

We also reject defendant's argument that he was not provided with sufficient notice of the alleged probation violations. Although the arrest warrant included violations pertaining to both the probation order and the appeal bond, the warrant was sufficient to place defendant on notice that he was being charged with violating the probationary conditions requiring him to (1) obtain permission for a change of residence and provide notice of a change of address, (2) attend AA meetings, (3) complete anger management classes, and (4) refrain from engaging in assaultive, abusive, threatening, or intimidating behavior.

Defendant has also failed to establish any clear error in the trial court's findings that he violated the probation conditions concerning the change-of-address requirement and the requirement that he attend AA meetings. See *Miller*, 482 Mich at 544; *Breeding*, 284 Mich App at 480. And while the trial court's specific finding at the March 11, 2011 probation violation hearing that defendant failed to participate in "proper counseling" could have been clearer, it is apparent from the record, including the court's remarks at the April 29, 2011 sentencing hearing, that this finding was intended to relate to the requirement that defendant complete anger management classes. Considering the evidence as a whole, including the March 8, 2011 letter offered into evidence by defense counsel that summarized defendant's counseling sessions before defendant moved to Alpena, we find no clear error in the trial court's finding.

We reject defendant's argument that the trial court erred by not adjourning the probation violation hearing so that a former probation agent could testify. MCR 6.445(E)(1) provides that a probationer has a right to present evidence at a probation violation hearing. But considering the trial court's determination that the evidence, including defendant's own admissions, had clearly established the probation violations, defendant has not shown that the trial court abused its discretion in denying the request for an adjournment, or shown that he was prejudiced by that decision. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

Defendant also argues that he was denied the effective assistance of counsel at the March 11, 2011 probation violation hearing because defense counsel was unprepared for the hearing. However, defendant does not clearly specify how counsel was unprepared, and he has not provided any factual support for a finding that counsel's alleged unpreparedness deprived him of a substantial defense to the probation violation allegations. See *Payne*, 285 Mich App at 190. Accordingly, this claim cannot succeed. *Carbin*, 463 Mich at 600.

Defendant also challenges the trial court's decision to revoke his probation. Defendant argues that the trial court failed to consider mitigating factors when evaluating his failure to attend NA or AA meetings. Defendant also argues that the trial court improperly considered uncharged conduct in deciding whether to revoke his probation. The general rule is that "[w]hile a trial court must consider evidence presented in mitigation of the probation violation, it need not determine that mitigating circumstances justify allowing the defendant to remain on probation." *People v Knox*, 115 Mich App 508, 514; 321 NW2d 713 (1982). In this case, the trial court determined at the probation violation hearing that defendant had violated multiple conditions of his probation. Although the trial court did not decide to revoke defendant's probation until after it was presented with the updated presentence report at the April 29, 2011 sentencing hearing, we are not persuaded that the court's decision was affected by information unrelated to the violations that the court had found at the probation violation hearing. See *People v Graber*, 128

Mich App 185, 194; 339 NW2d 866 (1983). In addition, the trial court's decision to revoke defendant's probation was not an abuse of discretion. *Breeding*, 284 Mich App at 479-480.

### C. UPDATED PRESENTENCE REPORT

Defendant argues that the trial court failed to properly resolve his challenges to the accuracy and content of the updated presentence report used at the April 29, 2011 sentencing hearing. We disagree.

A trial court must use a reasonably updated presentence report for felony sentencing. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). See also MCR 6.445(G) (court must use a current presentence report to sentence a probationer to prison). Here, at defendant's April 29, 2011 sentencing proceeding, the trial court appropriately used the presentence report prepared for defendant's original sentencing on April 16, 2010, and an update to that report.

A defendant must object at the time of sentencing in order to preserve a challenge to the accuracy or relevancy of information in a presentence report. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000); *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992); see also MCL 771.14(6). MCR 6.425(E)(2) provides that "[i]f any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing." We review a trial court's response to a claim of inaccuracy in the presentence report for an abuse of discretion. *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010).

Here, the trial court adequately responded to defendant's challenge to the information regarding his lack of cooperation during the presentence interview for the updated report. Because defendant was given an opportunity to challenge the accuracy of the information and did not show any inaccuracy in the interviewer's description of what transpired during the interview, the trial court did not abuse its discretion in resolving this claim. Cf. *People v Waclawski*, 286 Mich App 634, 690-691; 780 NW2d 321 (2009).

We also find no abuse of discretion in the trial court's response to defendant's argument during his sentencing allocution regarding alleged mistakes in a police report. See *Lucey*, 287 Mich App at 275. In addition, the trial court did not err in allowing the updated presentence report to include information regarding violations of defendant's probation and appeal bond that were not decided at the March 11, 2011 hearing. Although a trial court's decision whether to revoke probation must be based on evidence at the probation violation hearing, *Pillar*, 233 Mich App at 270, "revocation of probation simply clears the way for resentencing on the original offense," *Kaczmarek*, 464 Mich at 483. A sentence must be tailored to both the offender and the offense. *Triplett*, 407 Mich at 514. An updated presentence report that describes the defendant's most recent behavior is a valuable tool to further the goal of rehabilitation. *Id.* at 515. When fashioning a sentence, "[a] trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence." *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). Considering the specific challenge made by defense counsel to the information regarding defendant's activities while on

probation, the trial court did not abuse its discretion in resolving the challenge. See *Lucey*, 287 Mich App at 275.

#### D. ALLOCUTION

Further, the record does not support defendant's claim that either he or defense counsel were not afforded an opportunity for allocution. The record clearly indicates that defendant and defense counsel were both afforded the opportunity to advise the court of any circumstances they believed should be considered in imposing sentence. See MCR 6.425(E)(1)(c); *People v Petit*, 466 Mich 624, 633; 648 NW2d 193 (2002). The court's brief interruptions of defendant and defense counsel to respond to matters raised by them during their allocutions did not result in a violation of their right to allocate where both were afforded the opportunity to further address the court after the court responded to their remarks. Further, the trial court's determination that it would not revisit matters addressed at the March 11, 2011 probation violation hearing does not establish a deprivation of the right to allocate afforded by MCR 6.425(E)(1)(c).

#### E. SENTENCING DECISION

Defendant also challenges the trial court's decision to depart from the sentencing guidelines range of zero to three months for the felonious assault conviction. While a trial court has broad discretion in deciding whether to revoke probation, "[i]t has less latitude in imposing a sentence in excess of the guidelines." *People v Hendrick*, 472 Mich 555, 563; 697 NW2d 511 (2005).

A trial court may depart from the sentencing guidelines range if it finds substantial and compelling reasons for the departure. MCL 769.34(3). Because the upper end of defendant's sentencing guidelines range was less than 18 months, the trial court was required to identify substantial and compelling reasons for imposing a prison sentence rather than an intermediate sanction, such as probation. MCL 769.34(4)(a); *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008). When a court departs from the guidelines range, it must also explain the extent of departure with respect to any prison sentence. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). We review a departure sentence under the following framework:

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Id.* at 300.]

A trial court may consider whether the acts underlying a probation violation constitute substantial and compelling reasons to depart from the sentencing guidelines. *Hendrick*, 472 Mich at 564. "Putting conduct aside, any probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer." *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005).

In this case, the trial court considered several factors, including unspecified “information in a letter, and other information given to the Court” to justify its departure from the guidelines. Although the trial court indicated that it was attaching the letter to a guidelines departure form that it completed, no letter is attached to the form that appears in the lower court file. Thus, we are not able to fully evaluate the trial court’s reasons for departure. Further, nothing in the record indicates that defendant had the opportunity to review or challenge the accuracy of that information before sentence was imposed. Nonetheless, we conclude that neither remand nor resentencing is necessary. “[W]hen a reviewing court determines that a sentencing court would prescribe the same sentence notwithstanding a misunderstanding of the law or irregularity in the proceeding, the reviewing court may simply affirm the sentence.” *Id.* at 186. Here, it is clear from the trial court’s sentencing decision that it found that defendant’s conduct underlying the multiple probation violations provided substantial and compelling reasons for imposing a prison sentence rather than another intermediate sanction.<sup>4</sup> We are satisfied that the trial court’s decision to impose a prison sentence of some length, rather than another intermediate sanction which already had not been successful, was not affected by the unspecified information that the court referred to at sentencing, and that the court did not abuse its discretion in finding substantial and compelling reasons for imposing a prison sentence. Thus we affirm that aspect of its decision. See MCL 769.24 (an invalid sentence shall only be reversed to the extent of the lawful excess); see also *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994).

However, we are unable to determine whether the unspecified information improperly influenced the trial court’s decision to impose a minimum sentence of one year. Ordinarily, remand for resentencing or rearticulation would therefore be required. However, the July 17, 2012 amended judgment of sentence awarded defendant 804 days of sentence credit. Taking into account the consecutive effect of defendant’s two-year felony-firearm sentence and one-year minimum sentence for felonious assault, defendant has now already fully served his minimum sentence for felonious assault. Therefore, defendant’s challenge to the length of his minimum prison sentence is now moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Accordingly, neither remand nor resentencing is necessary.

Lastly, we reject defendant’s argument that the trial court improperly amended the April 29, 2011 judgment of sentence on July 17, 2012, to specify that the prison sentences for felonious assault and felony-firearm were to be served consecutively. MCL 769.1h(1) requires that “[a] judgment of sentence committing an individual to the jurisdiction of the department of corrections shall specify whether the sentence is to run consecutively to or concurrently with any other sentence the defendant is or will be serving, as provided by law.” This case is distinguishable from *People v Thomas*, 223 Mich App 9, 16-17; 566 NW2d 13 (1997), in which this Court determined that a formal resentencing was required before a court could convert concurrent sentences to consecutive sentences. In this case, there is no indication in the record that the trial court did not understand at the April 29, 2011 sentencing hearing that consecutive sentences were required. On the contrary, the court signed a judgment of sentence that was

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<sup>4</sup> As with defendant’s claim in Docket No. 298302, we find no merit to defendant’s claim that he is entitled to relief because of judicial bias. *Cain*, 451 Mich at 497; *Wade*, 283 Mich App at 470.

inconsistent with its determination at sentencing that defendant had already fully served the mandatory two-year sentence for felony-firearm, and that defendant's sentence credit should first be applied to the felony-firearm sentence. At the hearing on July 17, 2012, the trial court clarified that the amended judgment of sentence was not intended to change defendant's sentence, but rather to accurately reflect the sentences that it had previously imposed. The trial court was authorized to correct clerical errors in the judgment. MCR 7.208(C)(1) and MCR 6.435(A); see also *People v Holder*, 483 Mich 168, 176 n 25; 767 NW2d 423 (2009). Therefore, we affirm the amended judgment of sentence.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Henry William Saad  
/s/ Michael J. Riordan