

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

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 10, 2013

v

HOLLAND HARDAWAY,  
Defendant-Appellant.

No. 304814  
Recorder's Court  
LC No. 93-012651

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Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317,<sup>1</sup> and possession of a firearm during the commission of a felony, second offense, MCL 750.227b(1), for the shooting death of an undercover Detroit police officer in October 1993. The circuit court sentenced defendant as a fourth habitual offender, MCL 769.12, to consecutive prison terms of 40 to 80 years for the murder conviction and five years for the felony-firearm conviction. Despite defendant's challenges, he has not established that defense counsel provided ineffective assistance or that the prosecutor engaged in misconduct or withheld exculpatory evidence denying him a fair trial. Defendant further has established no grounds supporting a mistrial or that the circuit court judge should have disqualified herself from hearing the case. The circuit court properly instructed the jury in all respects and imposed proportionate sentences under the judicial sentencing guidelines then in place. We therefore affirm.

**I. BACKGROUND**

On the evening of October 2, 1993, undercover Detroit police officers Clifton Counts and Norman Spruiel parked their unmarked cars on a dead end street and stood outside discussing the details of a manhunt they were conducting to find a murder suspect. Wendell Hardaway, defendant's cousin, owned an auto body repair shop nearby. He claimed that a suspicious-looking vehicle drove by and parked down the street. Defendant and Gregory McDonald were also at the shop working on cars. Defendant briefly went home but returned to assist Wendell in

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<sup>1</sup> The prosecution charged defendant with open murder. The jury declined to convict defendant of the greater charge of first-degree premeditated murder.

closing and securing the shop for the night. Defendant admittedly retrieved a rifle from his home before returning to the shop. Defendant claimed that his cousin was nervous about the suspicious vehicle parked down the road.

Defendant testified that he saw a man with a gun standing by a parked vehicle. Defendant claims to have stopped his vehicle to ask the man “what he was doing.” According to defendant’s version of events, the armed man fired at him and defendant shot back in self-defense. Defendant denied knowing that Spruiel was a police officer.

Officer Counts, on the other hand, testified that defendant drove slowly by in a black Camaro twice while he and Officer Spruiel talked. At some point, two men in a gold car—Wendell Hardaway and McDonald—drove adjacent to the officers and shined the car’s headlights on them. The men queried “what’s happening,” at which point Counts asserted that he revealed his badge and told the men to move along. Defendant then drove up in his Camaro, pulled to a stop and alighted from the vehicle. Counts saw defendant holding a rifle and heard four shots. Counts saw Spruiel collapse and heard defendant say, “[F]ucking police.” Counts shot toward defendant and the gold car, whose passenger also had a gun. Defendant and his associates in the gold car returned fire and then drove away from the scene. Spruiel died from his gunshot wounds.

## II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several ineffective-assistance claims. “Because a *Ginther*<sup>[2]</sup> hearing was not conducted, our review of the relevant facts is limited to mistakes apparent on the existing record.” *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “[T]he right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant’s claim of ineffective assistance of counsel includes two components: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” To establish the first component, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his “counsel’s conduct falls within the wide range of reasonable professional assistance,” and that his counsel’s actions represented sound trial strategy. *Strickland*, 466 US at 689.

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

## A. CONFLICT OF INTEREST

Defendant maintains, in both a brief filed by appointed appellate counsel and in a pro se Standard 4 brief,<sup>3</sup> that defense counsel was ineffective for failing to disclose before trial his personal relationship with the victim, which defendant contends created a conflict of interest. “To establish a conflict of interest claim, a defendant must demonstrate that an actual conflict of interest existed and that it negatively affected his attorney’s performance.” *People v Smelley*, 285 Mich App 314, 334; 775 NW2d 350 (2009), vacated in part on other grounds 485 Mich 1023 (2010), citing *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). Reading defense counsel’s revelation in context, it is abundantly clear that he bore no conflict of interest.

Defendant’s trial was emotionally charged, as would be any trial involving the killing of a police officer. At the beginning of the third day of trial, defense counsel moved for a mistrial because the prosecutor had elicited “blatant hearsay” and the court had declined to give a curative instruction. Defense counsel noted the prosecutor had engaged in “a continuous pattern of conduct,” which “unfortunately ha[d] been allowed by [the circuit] court,” and effectively denied defendant a fair trial. Defense counsel pleaded that the death of a police officer did not warrant denying defendant a fair trial:

And I’ll state for the record, . . . I’ve known Norman Spruiel, I played ball with Norman Spruiel, I was a softball buddy with him, I also rollerskated with Norman Spruiel. But notwithstanding, my duties as a lawyer are to [defendant] to seek for him a fair trial, . . . regardless of what the circumstances and what our emotional underpinnings might be, to have a fair trial granted.

“[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Yet, defendant has presented nothing beyond his bald assertion that defense counsel failed to mention his acquaintance with Officer Spruiel prior to trial. In any event, defendant does not specifically explain any manner in which defense counsel’s purported conflict of interest “negatively affected his . . . performance” at defendant’s trial. *Smelley*, 285 Mich App at 334. Rather, the record reveals that defense counsel vigorously contested the prosecutor’s case and pursued defendant’s self-defense theory throughout trial. Indeed, defense counsel’s efforts yielded a second-degree murder conviction despite considerable evidence supporting premeditation. As such, defendant is not entitled to relief.

## B. JURY’S REQUEST TO REVIEW EVIDENCE

Defendant next submits that defense counsel was ineffective for not insisting that the circuit court produce the “medical examiner’s testimony as to Officer Spruiel’s wounds and their location” and “the surgeon’s report on Spruiel’s wounds.” Defendant argues that because “the location of the wounds” was critical to his self-defense theory, counsel should have asked the court to highlight the disparity between the medical examiner’s findings and a hospital surgeon’s

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<sup>3</sup> Michigan Supreme Court Administrative Order 2004-6, Standard 4.

account regarding the location and number of gunshot wounds suffered by the victim. The parties stipulated and the evidence supported that Spruiel had been shot twice. Consistent with the prosecution's theory that defendant acted in cold blood, the medical examiner testified that the bullets entered from Spruiel's back. The surgeon apparently believed that the bullets entered the victim's left and right flanks rather than his back.<sup>4</sup>

The circuit court instructed the jury that the surgeon's report was not entered into evidence and that they must rely on their "collective memories" regarding the requested information. The court accurately instructed the jury that the surgeon's report had not been presented into evidence. Information regarding the surgeon's opinion was presented to the jury through the parties' stipulation to the notes of another officer who questioned the surgeon during Spruiel's hospital stay. Specifically, the parties stipulated:

And we would also stipulate that the doctor who removed it [a .30-caliber spent bullet fragment] from the body of Officer Norm Spruiel would testify that the bullet entered the right side under the armpit and entered the chest to the abdomen and that's where he recovered it, in the abdomen of Officer Spruiel.

\* \* \*

We also stipulate that the doctor would also testify that he only observed two wounds on the body.

\* \* \*

. . . At the close of the People's case we had stipulated about what the doctor would have testified to who treated the Officer Norman Spruiel at the hospital had he been here to testify . . . .

\* \* \*

The full stipulation . . . , one, the correct spelling . . . of the doctor's name is Dr. G-o-l-w-a-l-a, . . . and . . . one bullet was recovered from the abdomen . . . .

\* \* \*

That the bullet entered the right side under the armpit and entered the chest to the abdomen, the only two wounds. Also one gunshot wound to left flank; no bullet recovered from that wound.

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<sup>4</sup> The medical examiner performed Spruiel's autopsy on October 23, 1993, several weeks after the shooting, which limited his ability to identify bullet paths and other injuries because Spruiel's body had begun to heal.

There is no record explanation for the court's failure to read the parties' stipulation back to the jury. There is also no clear reason why the circuit court refused the jury's request to rehear the medical examiner's testimony. The court had earlier read to the jury various portions of other witnesses' testimony without hesitation. Even if we were to presume that defense counsel performed in an objectively unreasonable manner by failing to insist that the court reread the medical examiner's testimony and advise the jury concerning the substance of the parties' gunshot wound stipulation, defendant has not demonstrated a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Solmonson*, 261 Mich App at 663-664. Because the parties had placed on the record twice during trial the content of the stipulation most helpful to the self-defense theory, there is no reasonable probability that an objection by defense counsel to the circuit court's response would have altered the outcome of defendant's trial.

### C. STIPULATION REGARDING THE VICTIM'S WOUNDS

Defendant avers that defense counsel was ineffective for "agreeing to the stipulation regarding the doctor who first treated" Spruiel. Defendant complains that if defense counsel had called Dr. Golwala as a witness, "the jury would have been more aware of where the officer had suffered the gunshot wounds, rather than relying on the stipulation." Defendant does not provide any factual support or offer of proof substantiating his contention that Dr. Golwala's testimony would have offered the jury more detail about the number and location of Officer Spruiel's gunshot wounds. *Hoag*, 460 Mich at 6. Furthermore, because the parties placed on the record twice during trial the content of the gunshot-wound stipulation important to the self-defense theory, no reasonable probability exists that defense counsel's agreement to the stipulation, in lieu of calling the treating doctor, altered the outcome of defendant's trial. *Solmonson*, 261 Mich App at 663-664.

### D. FAILURE TO INVESTIGATE

In his Standard 4 brief, defendant claims that defense counsel was ineffective for "fail[ing] to investigate Sgt. Davis," who had taken "written notes from the hospital records documenting Norman Spruiel's injuries at the time of admission to Grace [H]ospital and his medical condition communicated to Sgt. Davis on a daily basis by hospital staff." However, defendant nowhere sets forth or references any specific facts to substantiate his claim concerning the significance of Sergeant Davis as a potential witness. *Hoag*, 460 Mich at 6. Even assuming that it was objectively unreasonable to neglect to investigate Sergeant Davis as a potential witness, we detect no reasonable likelihood of a different outcome at trial absent the sergeant's testimony; defendant emphasizes the significance of the hospital records due to their inconsistency with the medical examiner's testimony, but the gunshot wounds documented in the hospital records were placed before the jury twice in the form of the parties' stipulations. *Solmonson*, 261 Mich App at 663-664.

### E. FAILURE TO MOVE FOR A DIRECTED VERDICT

Defendant lastly asserts that counsel was ineffective for failing to seek a directed verdict with respect to the first-degree premeditated murder charge against him. To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally

killed the victim, and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (quotation marks and citation omitted). Premeditation and deliberation may be established by evidence of (1) the prior relationship between the defendant and the victim, (2) the defendant’s actions before the murder, (3) the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted, and (4) the defendant’s conduct after the murder. *Abraham*, 234 Mich App at 656; *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Circumstantial evidence and the reasonable inferences arising therefrom may suffice to prove the elements of a crime, and “[m]inimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *Ortiz*, 249 Mich App at 301; *Abraham*, 234 Mich App at 656.

Officer Counts testified that defendant had twice driven slowly past the location where Spruiel and Counts had parked on Prairie Street, and minutes later he turned onto Prairie Street yet again. The testimony of multiple witnesses established that before returning to Prairie Street for the third time, defendant went to his nearby residence and retrieved a rifle. Counts additionally testified that defendant stopped his car adjacent to Spruiel’s unmarked car, alighted from his vehicle, fired repeatedly at Spruiel and struck him twice, and thereafter declared, “[F]ucking police.”

These circumstances suffice to establish that defendant had an opportunity to reconsider his actions in the course of his assault of Spruiel, and thus that he premeditated and deliberated the killing. *Abraham*, 234 Mich App at 656. Because the record contained ample evidence of defendant’s premeditation and deliberation, defense counsel was not ineffective for failing to make a meritless motion for a directed verdict. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

### III. DENIAL OF MOTIONS FOR DISQUALIFICATION AND MISTRIAL

Defendant argues through both appointed counsel and in his Standard 4 brief that the circuit court erred in denying his motion to disqualify the court without “submit[ting] the matter to review by the chief judge.” “In reviewing a motion to disqualify a judge, this Court reviews the trial court’s findings of fact for an abuse of discretion and reviews the court’s application of those facts to the relevant law de novo.” *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009).

Defendant also contends that the circuit court erred in denying his motions for a mistrial. We review for an abuse of discretion a circuit court’s ruling on a motion for a mistrial. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). “A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *Id.* (quotation marks and citation omitted).

To the extent that defendant’s mistrial claims rest on evidentiary issues, we review for an abuse of discretion a trial court’s ruling whether to admit evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). To the extent that the evidentiary ruling involves a preliminary

legal question, “such as whether a rule of evidence or statute precludes admitting of the evidence,” we consider the legal question de novo. *Id.*

#### A. JUDICIAL BIAS

Defendant asserts that the circuit court’s “constant rulings against defense counsel presented evidence of a preconceived notion of defendant’s guilt throughout the trial.” Defendant seemingly intends to urge for the court’s disqualification on the basis that the court was “biased or prejudiced” against him. MCR 2.003(C)(1)(a). To establish a judge’s bias or prejudice, a litigant “must overcome a heavy presumption of judicial impartiality.” *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The litigant must demonstrate that the judge possessed an actual, personal, and extrajudicial bias against him. *Id.* at 495-496. “Judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003) (quotation marks and citation omitted). “Repeated rulings against a litigant, even if erroneous, are not grounds for disqualification. The court must form an opinion as to the merits of the matters before it. This opinion, whether pro or con, cannot constitute bias or prejudice.” *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001) (quotation marks and citation omitted).

Defendant sets forth as the basis for the circuit court’s disqualification only its evidentiary rulings against him in this case. Yet, he has not established that the circuit court’s rulings displayed “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Gates*, 256 Mich App at 440. Although the circuit court overruled most of defense counsel’s objections throughout the lengthy proceedings, it did not do so in a manner that suggested that the court had premised its rulings on any actual, personal bias. The circuit court routinely and cordially allowed the parties to state or elaborate their positions with respect to evidentiary and other issues. In short, we find no arguable basis for judicial disqualification in the record.<sup>5</sup>

Defendant also complains that the circuit court violated MCR 2.003(D)(3)(a)(i) by declining to “refer the motion to the chief judge, who shall decide the motion de novo.” However, defendant does not explain how the absence of a referral to the chief judge “resulted in a miscarriage of justice,” MCL 769.26, especially given the lack of grounds for the circuit court’s disqualification in the record.

#### B. PROSECUTOR’S IMPEACHMENT OF GREGORY MCDONALD

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<sup>5</sup> In defendant’s pro se brief, he suggests that the court considered “[f]acts not gleaned from the record,” explaining that defense counsel had advised defendant “that the trial court judge knew [Spruiel] as well. It was [counsel’s] belief that relationship was affecting the Court’s ability to be impartial with her ruling.” However, defendant does not cite any portion of the record and makes no offer of proof about the extent of the court’s purported familiarity with Spruiel.

Defendant characterizes as a basis for a mistrial the prosecutor's improper impeachment of Gregory McDonald, a friend of defendant who was present at the time of the shooting. In light of testimony by McDonald, that he "got shot in the nose" during the gunfire on Prairie Street on October 2, 1993, the prosecutor properly elicited McDonald's acknowledgment that he falsely told medical personnel that he "got robbed and cut on the nose," for the purpose of impeaching McDonald's credibility. *Johnson Estate v Kowalski*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 297066, issued May 29, 2012, amended June 21, 2012), slip op at 6-7, citing MRE 613(b); *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002), citing MRE 613. The circuit court acted within its discretion in allowing the prosecutor to examine McDonald with respect to his prior inconsistent statement, and its ruling is not evidence of judicial bias. The circuit court thus acted within its discretion in denying defendant's motion for a mistrial on this basis. *Schaw*, 288 Mich App at 236.

### C. PROSECUTOR'S CROSS-EXAMINATION OF DEFENDANT

Defendant also characterizes as a basis for a mistrial a question posed by the prosecutor while cross-examining defendant. During direct examination at trial, defendant volunteered, "I don't have nothing against the police," a proposition that defendant repeated during the prosecutor's cross-examination. By testifying at trial, defendant placed himself at risk of a potential investigation into his biases and credibility. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001) ("The interest or bias of a witness has never been regarded as irrelevant.") (quotation marks and citation omitted). After confirming defendant's attitude about the police, the prosecutor asked defendant, "[B]efore the shooting wasn't your woman, Gwendolyn Wallace, convicted of Carrying a Concealed Weapon?" Even assuming as defendant suggests that the rules of evidence do not permit the prosecutor's cross-examination about defendant's girlfriend's conviction, the question did not justify a mistrial because (1) the circuit court prohibited the prosecutor from restating the question to defendant, and (2) the isolated reference to Wallace's potential conviction did not prejudice defendant's right to a fair trial, especially in light of the ample, properly admitted evidence of defendant's guilt. *Schaw*, 288 Mich App at 236. Accordingly, this ruling by the circuit court is also not evidence of judicial bias.

### IV. EXCLUSION OF EVIDENCE OF PRIOR SHOOTINGS

In both appointed counsel's brief and defendant's Standard 4 brief, defendant submits that the circuit court erroneously denied his offer to introduce "information regarding Officer Counts as well as Officer Spruiel . . . concerning shooting incidents," which the defense "desired to bring in . . . under MRE 405(b) to make inquiry of the fact that [Spruiel and Officer Counts were] not unfamiliar with discharging firearms or shooting at a person." We again review for an abuse of discretion a trial court's decision whether to admit or exclude evidence, and review de novo any questions of law. *Gursky*, 486 Mich at 606.

"The actual violent character of [a victim], even though it is unknown to the defendant, is admissible as evidencing the deceased's probable aggression toward the defendant" pursuant to MRE 404(a)(2). *People v Harris*, 458 Mich 310, 315; 583 NW2d 680 (1998). "In contrast, where a defendant charged with murder asserts that he killed in self-defense, his state of mind at the time of the act is material because it is an important element in determining his justification for his belief in an impending attack by the deceased." *Id.* at 316. Defendant offered specific

acts in support of his self-defense claim. “In cases in which character or a trait of character of a person is an essential element of a . . . defense, proof may . . . be made of specific instances of that person’s conduct.” MRE 405(b); see also *People v Cooper*, 73 Mich App 660, 665; 252 NW2d 564 (1977) (specific acts may be admissible to “show that [the] defendant’s state of mind was such that he reasonably apprehended danger of serious bodily injury or death at the hands of his victim”). However, a “deceased’s violent reputation must be known to the defendant if he is to use it to show that he acted in self-defense.” *Harris*, 458 Mich at 316; see also *Cooper*, 73 Mich App at 665 (evidence of a specific threat by the victim “would be admissible, upon laying a proper foundation establishing that defendant knew” of the victim’s threat).

Defendant argues that three specific instances of prior conduct by Officers Counts and Spruiel were relevant to his self-defense theory. At trial, defendant explained that he had learned of a June 1990 incident when Counts interrupted a man removing hubcaps from his unmarked police car; the man “resisted [arrest] . . . and shouted at a person sitting inside of a red truck to help,” the truck’s driver “accelerated backwards toward[]” Counts, and Counts “supposedly shouted for the red truck to stop and fired a shot at the occupant.” In January 1992, Counts observed a fleeing suspect “reach[] in his jacket as if to draw a weapon.” Counts fired at the suspect and shot his leg. With respect to a February 1992 incident involving Spruiel, the officer reported “hearing a series of shots, observing a black male . . . running toward him . . . [and an] unidentified male standing in the street shooting . . . in the officer’s direction,” which prompted Spruiel to draw his gun and “yell[] police, [but] they continued shooting”; Spruiel “fire[d] approximately six shots at the person firing the gun,” then moved closer toward the gunman and “fired approximately six more shots” before the gunman fled. In all three instances, police internal affairs investigators concluded that Officers Counts and Spruiel had acted “within the guidelines of the Detroit Police manual.” The prosecutor responded that the evidence was not “relevant to decide the issues in this case,” specifically who fired first. The circuit court refused to admit the prior shooting evidence, characterizing it as pertaining to collateral matters.

We will assume that the specific instances of conduct proffered by defendant possessed some relevance toward proving defendant’s reasonable apprehension of harm at the time of the shooting. Nonetheless, none of the specific acts qualifies for admissibility because defendant did not assert below, and does not assert on appeal, his awareness of those shooting incidents. *Harris*, 458 Mich at 316; *Cooper*, 73 Mich App at 665. Irrespective of whether the circuit court elaborated a correct basis for excluding the evidence of prior shooting incidents, the court reached a correct result when it denied the defense motion to admit this evidence. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005) (“This Court will not reverse a trial court’s decision when the lower court reaches the correct result even if for a wrong reason.”).<sup>6</sup>

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<sup>6</sup> Because the proffered evidence of prior shootings was inadmissible to support defendant’s self-defense theory, his suggestion that the circuit court’s ruling deprived him of the right to present a defense is groundless. With respect to defendant’s additional argument in his Standard 4 brief that the exclusion of the prior shootings evidence interfered with his constitutional right of confrontation, “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *Holmes v South Carolina*, 547 US 319,

## V. DEADLOCKED JURY INSTRUCTION

In both appointed counsel's brief and defendant's Standard 4 brief, defendant complains that the circuit court read a coercive jury deadlock instruction. Defense counsel first raised his complaint about the language that the circuit court added to CJI2d 3.12 on the next morning of jury deliberations, and thus did not timely preserve this issue for appellate review.

“A criminal defendant has the right to have a properly instructed jury consider the evidence against him.” *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000), quoting *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). We review jury instructions as a whole to determine whether error requiring reversal occurred. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Even when somewhat imperfect, jury instructions do not qualify as erroneous if they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *Id.*

In 1974, the Michigan Supreme Court sanctioned standard instructions concerning the proper mode of jury deliberations, including when jury deadlock occurs. *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995). These principles now appear in CJI2d 3.11<sup>7</sup> and

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324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (quotation marks and citation omitted). Federal constitutional guarantees of a defendant's “meaningful opportunity to present a complete defense” are “abridged [only] by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.” *Id.* (quotation marks and citations omitted). In light of the irrelevance of the proffered evidence of prior shootings to prove self-defense in this case, defendant has not shown any “infringe[ment] upon . . . [his] weighty interest[s].” *Id.* (quotation marks and citations omitted).

<sup>7</sup> Regarding the manner of deliberations and verdict, CJI2d 3.11 provides:

(1) When you go to the jury room, you will be provided with a written copy . . . of the final jury instructions. . . . You should first choose a foreperson. The foreperson should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

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(3) A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.

(4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

CJI2d 3.12.<sup>8</sup> *Pollick*, 448 Mich at 382 n 12. The Supreme Court cautioned that any “substantial departure therefrom shall be grounds for reversible error.” *Id.* at 382 (quotation marks and citation omitted). The Supreme Court then clarified that a substantial departure “must also have an undue tendency of coercion—e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement?” *Id.* at 384 (quotation marks and citation omitted). “[T]o determine whether the . . . instruction was a coercive influence on the jury, the charge must be examined in the factual context in which it is given.” *Id.* (quotation marks and citation omitted). “The optimal instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision.” *Id.* (quotation marks and citation omitted). “Also relevant is whether the court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals.” *Id.* (quotation marks and citation omitted). Additionally, “an instruction that calls for the jury, as part of its civic duty, to reach a verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose . . . [likewise] tends to be coercive.” *Id.* at 385 (quotation marks and citation omitted).

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(5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience. . . .

<sup>8</sup> At the time of defendant’s trial, CJI2d 3.12 provided, in relevant part:

(1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.

(2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

(3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.

(4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

(5) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

(6) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

In response to a note from the jury advising the circuit court of its deadlocked status, the court accurately recited to the deliberating jurors the content of CJI2d 3.12, which explains the manner in which a deadlocked jury should proceed. Defendant complains of the following supplemental wording that the trial court added immediately after its recitation of CJI2d 3.12:

So once again, ladies and gentlemen, this was a long trial, we were in trial all week and you've got plenty of time. Take your time. We are going to break for now . . . —let you have a 15-minute break and then *you will return to the courtroom and you will deliberate for as long as necessary for you to reach agreement.* [Emphasis added.]

We conclude that the circuit court's deviation did not suggest to the jury that it had to reach some outcome within a specified period of time or fail its mission, or otherwise urge the jury to reach a verdict as part of its civic duty. Instead, the court explicitly clarified that the jury, still in its first full day of deliberations, had "plenty of time" remaining to continue its deliberations. In the final instructions to the jury, the court also had read instructions tracking CJI2d 3.11. "[C]onsidering the timing and full content of the instructions," we detect no "undue tendency of coercion" in the circuit court's deviation from the standard instructions. *Pollick*, 448 Mich at 384, 386 (quotation marks and citation omitted).<sup>9</sup>

## VI. PROPORTIONALITY

In both appointed counsel's brief and defendant's Standard 4 brief, defendant avers that the circuit court's imposition of a 40- to 80-year term for the murder conviction violates the principle of proportionality. Defendant was convicted and sentenced before the enactment of the legislative sentencing guidelines and was therefore sentenced pursuant to the judicial guidelines. We review a sentence imposed under the judicial guidelines for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). "[A] given sentence can be said to constitute an abuse of discretion only if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.*

Defendant acknowledged at the sentencing hearing his status as a fourth habitual offender. MCL 769.12. "This Court's review of an habitual offender sentence," imposed under the judicial- guidelines regime, was "limited to considering whether the sentence violates the principle of proportionality . . . , without reference to the guidelines." *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

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<sup>9</sup> Defendant references another deadlock note from the jury during the second day of deliberations. In the cited passage, however, the circuit court merely sent the jurors on a lunch break and did not reread a jury deadlock instruction on the jury's return.

The circuit court offered the following rationale before imposing sentence on defendant:

You know, once again, the court is amazed because the defendant doesn't get it. He doesn't understand it doesn't matter whether he knew this man was a police officer or not. The defendant went home, got a gun, came back to the location and fired the weapon.

\* \* \*

. . . This is a senseless, heinous crime. This defendant is no stranger to the criminal justice system. Has been on parole, violated parole and continues to come back through the system.

\* \* \*

Now, the only thing that the court has before it by way of letters or the [PSIR] that says anything positive for the most part about the defendant is that he's in good health, and I'm glad to know that because you'll need it.

There is no history of structurally sound employment or any type of productivity in this community.

The court believes that Mr. Hardaway is indeed a threat to society and that society must be protected from people such as Mr. Hardaway.

Again, . . . the lesson to be learned out of this is that guns cannot be tolerated in . . . resolving this matter. If [defendant] felt that the property or the business was in dispute, that's why we have the law and the police officers.

At the time of defendant's 1994 trial, he had six prior felony convictions, including four armed robbery convictions. Defendant had twice violated the terms of his release from prison on parole, and during his last term of incarceration between 1987 and 1990, he had received eight major misconduct citations. In light of defendant's several armed robbery and other felony convictions, his unprompted shooting of the victim, and his seemingly minimal to nonexistent potential for rehabilitation, we cannot conclude that the circuit court abused its discretion when it imposed a statutorily authorized prison term of 40 to 80 years. *Hansford*, 454 Mich at 325-326. Stated differently, the circuit court's 40- to 80-year sentence is proportionate to the offense and the offender. *Milbourn*, 435 Mich at 636.<sup>10</sup>

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<sup>10</sup> Because the circuit court sentenced defendant as a habitual offender, we need not address defendant's offense variable (OV) scoring complaints. *Crawford*, 232 Mich App at 621. But our review of the record confirms that defendant's challenge to his OV 3 score involved a not cognizable complaint directed toward the court's interpretation of the guideline. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998). The record also supports defendant's OV 13 score. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

## VII. JURY INSTRUCTIONS

In defendant's Standard 4 brief, he claims that the circuit court's final instructions improperly mandated that the jury "find beyond a reasonable doubt that the death was the natural or the necessary result of the defendant[']s act." At the conclusion of the final jury instructions, the court asked, "[A]re both counsels satisfied with the jury instructions as read[,]" and defense counsel replied, "Satisfied your Honor." Defense counsel's affirmative expression of satisfaction with the instructions constitutes a waiver, which extinguishes any instruction-related claims of error. *People v Carter*, 462 Mich 206, 208-209, 215; 612 NW2d 144 (2000).

Moreover, the challenged portion of the instructions closely tracked CJI2d 16.21. The circuit court repeatedly and properly advised the jury that it could draw inferences of defendant's intent to kill from particular circumstances. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). Contrary to defendant's contention on appeal, the court did not mandate the jury to draw any particular inference from defendant's use of a dangerous weapon. Compare *Caldwell v Bell*, 288 F3d 838, 841 (CA 6, 2002) (condemning the trial court's instruction directing the jury to presume malice from the defendant's employment of a dangerous weapon as violative of the federal constitution's due process requirement "that every element of the crime must be proven by the prosecution beyond a reasonable doubt").

## VIII. PROSECUTOR'S CONDUCT

In defendant's Standard 4 brief, he raises several claims of prosecutorial misconduct. Because defendant did not object during trial to any of the alleged instances of misconduct, these issues are not preserved for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004). As such, our review is limited to plain error affecting defendant's substantial rights. *Id.*

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the [fact finder] that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*Id.* at 721; 613 NW2d 370 (2000).]

"We review claims of prosecutorial misconduct case by case . . . to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant avers that the prosecutor improperly referenced facts not in the record in the following passages of his opening statement and closing argument. In his opening statement, the prosecutor apprised the jury, in pertinent part:

But during the first volley of shots that [defendant] fires, Norman Spruiel is shot. He's shot three times. In fact, he's shot three times in the back. Three

times Norman Spruiel is shot in the back by [defendant] as he is trying to dive for cover when this man, for no reason at all, gets a gun and comes back and bothers police officers who don't care about him at all. He's shot three times in the back as he's fleeing for his life. . . .

\* \* \*

. . . Officer Counts will testify that the first shots came from [defendant's] car as he jumped up with his rifle and began shooting at Mr. Spruiel diving for cover when he was shot in the back.

The prosecutor mentioned the following in his closing argument:

Let's talk about some facts in this case and some analysis from my perspective as an advocate for the prosecution. We begin with the fact that Norman Spruiel died in October of 1993, he died. Dr. Bader Cassin, the Chief Medical Examiner, testified to you. He died as a result of two gunshot wounds. And the doctor testified that he observed the body of Norman Spruiel . . . [on] October 22nd or 23rd of 1993, and still saw the evidence of the gunshot wounds. And I stood in front of you and he pointed for your benefit exactly where the gunshots were and they were to the back of Norman Spruiel, one I think on the left hip and one I think you had just the left of the midline. That's where the doctor observed the gunshot wounds. And even under the skin, he saw a little bit of track left by those gunshot wounds that Norman Spruiel got to the back.

\* \* \*

Did not need to shoot Norman Spruiel in the back. If there had been an initial barrage of shots and then Norman Spruiel is running away having ended a barrage of shots, there's no need to shoot a man in the back as he's running away, and yet the medical examiner tells us he is shot in the back.

The prosecutor's opening statement remarks reflect good-faith declarations of evidence that he intended to introduce during trial, specifically Officer Counts's testimony concerning defendant's unprompted initiation of the shooting and the medical examiner's testimony that Officer Spruiel had suffered bullet wounds to his back. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (observing that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence"). At trial, the evidence revealed that Spruiel was shot twice, not three times. There was also conflicting evidence whether Spruiel was shot in the flank or the back. The referenced portions of the prosecutor's closing argument accurately recited the medical examiner's testimony that Spruiel had received two gunshot wounds to his back. The prosecutor's closing argument mention of Spruiel fleeing from defendant's gunfire constituted proper argument on the basis of Officer Counts's account of the shooting and reasonable inferences arising from Counts's trial testimony. *Schutte*, 240 Mich App at 721. Accordingly, there was no plain error.

## IX. FAILURE TO DISCLOSE EVIDENCE

Defendant lastly contends in his Standard 4 brief that the prosecutor failed to disclose at defendant's preliminary examination the existence of other reports that materially impeached Officer Counts's testimony. Defendant references prior statements by Counts that he "was the first to start shooting after seeing the defendant exit his car with a weapon," and that the profanity he heard "could have come from some[one] else." Because defendant did not raise this issue before the circuit court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

"Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

[T]he elements necessary to prove a *Brady*<sup>11</sup> violation . . . are (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 177 (quotation marks and citation omitted).]

In defendant's Standard 4 brief, he does not specifically contest his ability to "have obtained [Officer Counts's initial statements] with any reasonable diligence" before the preliminary examination. *Id.* Furthermore, in light of Counts's testimony at the preliminary examination about his and Spruiel's encounter with defendant on October 2, 1993, followed by defendant's unprompted initiation of gunshots at Spruiel, no reasonable probability exists that the admission of prior statements by Counts equivocating regarding when Counts had begun shooting or the source of the overheard expletive, "fucking police," would have altered the district court's finding of probable cause to bind defendant over on the open murder charge. In summary, no error, plain or otherwise, arose from the prosecutor's purported suppression of exculpatory evidence.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter  
/s/ Elizabeth L. Gleicher

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<sup>11</sup> *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).