MICHIGAN CRIMINAL

CASE LAW UPDATE

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**PRETRIAL PROCEDURE**

**180 Day Rule**

 **Written notice to the prosecutor**

MCL 780.131(1) requires that an inmate be brought to trial within 180 days after the department of corrections notifies the prosecuting attorney that the inmate has been imprisoned. In order to trigger the 180 day requirement, the Michigan Department of Corrections (MDOC) must send written notice, by certified mail, to the prosecutor. MDOC’s notice to the district court, and not the prosecuting attorney, is not sufficient to establish the notice to the prosecuting attorney required by MCL 780.131(1).

 *People v. Rivera*, 301 Mich App 188 (2013)

***Voir Dire***

 **Waiver of Defendant’s right to be present**

Although defendant asked to be excused from the courtroom during jury *voir dire*, it was not a knowing waiver of the right to be present because the record did not establish that he was ever advised of his constitutional right to be present. The Court of Appeals found no error requiring reversal as there was no evidence that defendant was prejudiced by his short absence.

 *People v. Buie*, 298 Mich App 50 (2012)

**Failure to Swear In the Jury**

 **Structural error**

Although defendant failed to object at the time, the trial court’s failure to administer the oath to the jury was a structural error requiring reversal of defendant’s conviction. Administering the oath is not a mere formality; it is designed to protect the fundamental right of trial by an impartial jury.

 *People v. Allan,* 299 Mich App 205 (2013)

**TRIAL PROCEDURE**

**Jury Instructions**

 **Lesser included offenses**

The trial court did not err by refusing defendant’s requested instruction on the offense of entry without permission. Defendant was charged with entering without breaking with intent to commit a felony or any larceny. The lesser offense is not necessarily included within the greater offense as it contains an element, without permission, that is not required for the charged offense of entering without breaking. Contrary to defendant’s argument, “without breaking” does not include “without permission.” In *People v. Cornell, 466 Mich. 335, 357 (2002),* the Supreme Court said there can be no breaking when the defendant had permission to enter the building. Thus, if breaking is not an element, without permission is similarly not an element.

 *People v. Heft,* 299 Mich App 69 (2012)

**Failure to instruct on manslaughter**

The trial court committed error requiring reversal of defendant’s second degree murder conviction where it refused to give a requested instruction on voluntary manslaughter. Evidence at trial showed that defendant and the victim had been quarrelling about a debt, that the victim threatened to beat defendant’s ass, when defendant went to the victim’s apartment to collect the debt, the victim attacked him with a baseball bat, and defendant had a swollen hand, a scratched face, and a bruise under his eye.

 *People v. Mitchell*, 301 Mich App 282 (2013)

**Statutory prohibition on necessarily included offense**

The prohibition in the reckless driving causing death statute, MCL 257.626, on instructing the jury on the lesser included offense of moving violation causing death, MCL 257.601d, is unconstitutional. The statutory prohibition “…is an infringement on the exclusive role of the judiciary of effectuating procedure to vindicate constitutional rights, as well as an infringement of criminal defendants’ fundamental rights to a properly-instructed jury.”

 *People v. Jones*, \_\_\_ Mich App \_\_\_ (No. 312966, decided 9/10/13)

**Self-Defense / Defense of Others**

The trial court did not err in refusing to instruct on self-defense and defense of others at defendant’s murder trial. Although the Self Defense Act, MCL 780.971 *et seq*, prohibits a defendant from relying on the statutory self-defense if he is engaged in the commission of another crime at the time, the court held that if that other crime is felon in possession, defendant can still raise self-defense. The trial court did not abuse its discretion here because there was no evidence that defendant was acting in legitimate self-defense or defense of others at the time of the shootings.

 *People v. Guajardo,* 300 Mich App 26 (2013)

**Prosecutorial Misconduct**

 **Facts not in evidence**

The prosecutor committed misconduct in closing argument by arguing that the witnesses recanted their testimony because of pressure from the spectators in the courtroom and by arguing that defendant had intent to kill because children lived in the neighborhood where the shooting took place. The first line of argument was not supported by any evidence while the second misstated the law. The Court affirmed the conviction because these issues were unpreserved and did not affect defendant’s substantial rights.

*People v. Marshall*, 493 Mich 1020 (2013)

**EVIDENCE**

MRE 401

Relevance

Defendant was charged with first-degree criminal sexual conduct for raping the victim whom Defendant considered his wife. Defendant tried to have documents regarding his relationship with the victim admitted into evidence. These documents included statements apparently written by defendant, including one which stated his “inalienable religious rights and another claiming that the victim could not authorize anything through signature without Defendant’s consent. The Court found that even if these documents were legitimate, the trial court did not err in refusing to admit them into evidence because the documents had no probative value or relevance to the first-degree criminal sexual conduct charge.

 *People v. Martz*, 301 Mich App 247 (2013)

MRE 401 & 403

 **Hearsay statements of police officers during interrogation**

The trial court abused its discretion by admitting an unredacted tape recording of the police interrogation of defendant. Defendant was charged with CSC with an 11-year-old girl. During his interrogation, the police officers repeatedly told defendant that “…kids have a hard time lying about this stuff…” and otherwise vouched for the credibility of the complainant. The trial court admitted the entire recording on the basis that the officers’ statements were not being offered to prove the truth of the matter but to give context to defendant’s responses. The Supreme Court unanimously disagreed. The officers’ comments were either irrelevant or substantially more prejudicial than probative. Moreover, the statements could have easily been redacted without diminishing the impact of defendant’s admissions. Finally, the Court held that the admission of the unredacted recordings “undermined the reliability of the verdict.”

 *People v. Musser*, 494 Mich 337 (2013)

**MCL 768.27a**

 **Propensity is a proper purpose**

At defendant’s trial on CSC I charges involving an adult victim and two minor victims, the trial court did not err in admitting testimony from a former victim of sexual assault perpetrated by defendant when the former victim was 13. Under MCL 768.27a the prosecution may seek to admit against a defendant accused of an enumerated offense against a child, including CSC I, any evidence that the defendant previously committed an enumerated offense against a child. The jury can consider the evidence for its bearing on any matter relevant to the case including propensity. MRE 403 can be used to exclude such evidence if it is overly prejudicial but unfair prejudice cannot be based on the argument that such evidence may allow a jury to draw a propensity inference.

*People v. Buie*, 298 Mich App 50 (2012)

**MRE 609**

 **Significant probative value on the issue of credibility**

The trial court erred in admitting defendant’s prior larceny in a building conviction for impeachment purposes at defendant’s trial for another larceny in a building. Not only was the prior conviction prejudicial because it was for the exact same crime, but it also lacked significant probative value on the issue of credibility. The trial court failed to make findings on the probative value of the prior conviction (despite a remand ordering the court to do so) and the Court of Appeals could “discern from the record no reasons why defendant's prior larceny conviction is significantly probative of his character for truthfulness.”

 *People v. Snyder*, 301 Mich App 99 (2013)

**MRE 701**

**Non-expert testimony admissible**

A police officer’s opinion that a person in two different surveillance videos was the same person was properly admitted under MRE 701. The officer’s testimony was based on his own perceptions and was helpful to the jury. Moreover, it did not invade the province of the jury.

 *People v. Fomby*, 300 Mich App 46 (2013)

**MRE 804(a) – Witness unavailability**

 **Child witness**

The 3-year-old complainant in a CSC case was deemed incompetent to testify by the trial court after she said she did not know the difference between the truth and a lie and could not explain what a promise was. The trial court then denied the prosecutor’s motion to admit the child’s preliminary exam testimony, finding that the child did not meet one of the definitions of unavailability contained in MRE 804(a). The Supreme Court reversed and held that the child was unavailable as a witness per 804(a)(4) because she was “…unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity[.]” The Court said that one cause of infirmity could be youthfulness as it was in this case; the child “…simply did not have the mental maturity to overcome her debilitating emotions while on the stand.” Remanded for a determination of whether the child’s prelim testimony satisfied MRE 804(b)(1) and whether the admission of that testimony would violate defendant’s confrontation right.

*People v. Duncan*, 494 Mich 713 (2013)

**MRE 804(b)(6)**

 **Forfeiture by wrongdoing**

The trial court permitted evidence of the complainant’s out-of-court statements in defendant’s CSC1 trial where complainant refused to testify. The court reasoned that since defendant allegedly told the complainant during the sexual abuse not to tell anyone, defendant had forfeited his right to exclude hearsay under MRE 804(b)(6) by his own wrongdoing. The Supreme Court unanimously reversed. MRE 804(b)(6) explicitly requires that the defendant’s alleged wrongdoing be done with the specific intent to cause the complainant’s unavailability. The prosecutor failed to show by a preponderance of the evidence that defendant’s admonition to the complainant not to tell anyone was intended to cause her to be unavailable at trial.

 *People v. Burns*, 494 Mich 104 (2013)

**SENTENCING**

Sentencing Guidelines – Scoring

**OV 3 – Physical injury to victim**

The trial court abused its discretion in assigning zero points on OV 3. Defendant was convicted of second degree murder. Although the guidelines prohibit scoring of OV 3 at 50 or 100 points if the conviction offense is homicide, there is no such prohibition on the scoring of 25 points if a “life threatening or permanent incapacitating injury occurred to a Victim.” Since defendant did in fact cause such a life threatening injury to the victim, the court should have granted the prosecutor’s request for 25 points on OV 3.

*People v. Portellos*, 298 Mich App 431 (2012)

**OV 3 & OV 9 – Defining victims**

Defendant was convicted of arson of a dwelling. Two firefighters suffered heat exhaustion and had to be treated by a medical team. The next door neighbor had to be carried out of her house after it filled with smoke. The trial court erred in scoring OV 3 and OV 9 at zero. OV 3 should have been scored at 10 points as both firefighters suffered physical injury. OV 9 should have also been scored at 10 points as there were between 2 and 9 victims who were placed in danger of physical injury or death.

 *People v. Fawaz,* 299 Mich App 55 (2013)

**OV 5 – Harm to victim’s family**

The Court of Appeals earlier remanded for a determination of whether OV 13 was properly scored. At the remand hearing, both parties agreed that OV had been incorrectly scored. However, the trial court then agreed with the prosecutor that OV 5 should have been scored at 15 points for “serious psychological injury to a victim's family requiring professional treatment.” The family member was the victim’s birth mother who had given the victim up for adoption when the victim was very young. Because the statute regarding OV 5 does not include the word “legal” before the word family, the statute was not intended to narrowly define “a member of a victim’s family.” For the purposes of OV 5, family includes, among other people, parents and their children, a person’s spouse and children, or any group of people closely related by blood. Although the biological mother may have given her child up for adoption at a young age, this relationship may be considered for purposes of OV 5.

 *People v. Davis*, 300 Mich App 502 (2013)

**OV 7 – Conduct designed to substantially increase fear and anxiety**

In two cases joined for appeal, the Supreme Court held that scoring of OV 7 based on conduct designed to substantially increase fear and anxiety depends upon “…whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim’s fear or anxiety increase by a considerable amount.” In both cases, the trial court correctly scored OV 7 at 50 points where one defendant “racked” his shotgun at the victim while committing a carjacking while the defendant in the second case struck the victims in the head with the butt of his shotgun while committing a robbery. The Court also clarified that the standard of review for alleged guidelines scoring errors is clear error and whether the judge’s factual findings were supported by a preponderance of the evidence. *People v Glenn*, 295 Mich App 529 (2012), reversed.

*People v. Hardy*, 494 Mich 430 (2013)

**OV 10 – Vulnerable victims**

Defendant was convicted of possession of child sexually abusive material. At sentencing, he objected to the scoring of OV 10 for exploitation of vulnerable victims because he had no contact with the children in the pornographic images. The Court of Appeals upheld the scoring: “By possessing sexually abusive images of children, defendant made those children the victims of his sexual offense and exploited them for his sexual gratification.”

*People v. Needham,* 299 Mich App 251 (2013)

**OV 12 – Contemporaneous offenses**

The trial court did not err in scoring OV 12 at 25 points for contemporaneous criminal offenses. Defendant pled guilty to one count of possession of possession of sexually abusive material and one count of using a computer to commit a crime. The charges were based on defendant’s possession of four computer discs containing approximately one hundred of pictures of children without clothing or in sexual acts. The trial court found that the images, all of which had been downloaded from the internet, established three or more contemporaneous criminal acts against a person. Defendant argued that since he had downloaded some of the images up to a year before the date of the charged offense, the crimes were not contemporaneous, i.e., within 24 hours of the charged offense. The court of appeals held that since defendant’s crime was *possession* of the images and not the downloading of them, the possession was contemporaneous.

 *People v. Loper*, 299 Mich App 451 (2013)

**OV 13 – Continuing pattern of criminal behavior – concurrent convictions**

The trial court did not err in scoring OV 13 at 25 points for a continuing pattern of criminal activity. The scoring was based on defendant’s concurrent convictions of two armed robberies and one unarmed robbery. The guidelines do not expressly prohibit using concurrent convictions under this variable.

*People v. Gibbs*, 299 Mich App 473 (2013)

**OV 13 – Continuing pattern of criminal behavior – dismissed charges**

In scoring offense variable (OV) 13, the sentencing court is permitted to look beyond the sentencing offense because the plain language of OV 13 allows for such a consideration. Similarly, in scoring OV 13, the sentencing court may consider charges against a defendant that were dismissed due to a plea agreement.

 *People v. Nix*, 301 Mich App 195 (2013)

**OV 14 – Leader in a multiple offender situation**

Defendant and another man got into an argument with another group of young men at a mall. Both defendant and the other man pulled out handguns and aimed them at the group. Only defendant fired his weapon and was convicted of three counts of assault with intent to murder. Defendant argued that he should not be scored 10 points on OV 14 because it was not a multiple offender situation; only defendant fired his weapon. The Court disagreed. Because both defendant and his companion were engaging in illegal behavior and threatening the victims, there was sufficient evidence of a multiple offender situation.

 *People v. Jones*, 299 Mich App 284 (2013)

**OV 19 – Interference with the administration of justice**

OV 19 was properly scored at 10 points. When police attempted to pull over the car in which defendant was a passenger, both defendant and the car’s driver jumped out of the car and fled on foot.

 *People v Ratcliff*, 299 Mich App 625 (2013)

**PRV 1 – Out of state felony convictions**

The trial court did not err in assigning 50 points for PRV 1 based on defendant’s two burglary convictions in Ohio. Defendant argued that the burglary convictions should have been considered low-severity because the maximum possible sentence was less than 10 years. However, the instructions also provide that if the out of state conviction is “corresponding to” a Michigan crime categorized by the guidelines as class M2, A, B, C, or D” it can be scored as high-severity. The court of appeals in a question of first impression found that the Ohio burglary statute under which defendant was twice-convicted is “corresponding to” Michigan’s second-degree home invasion in that they are substantially similar or analogous.

 *People v. Crews*, 299 Mich App 381 (2013)

**PRV 5 & 6 – Prior convictions / relationship to the criminal justice system**

Defendant pled guilty to a misdemeanor as a juvenile in August and was sentenced in November. In October, defendant committed the instant offense. It was error to score OV 5 for a prior juvenile misdemeanor as defendant had not yet been sentenced on that misdemeanor at the time of the new offense. However, it was not error to score OV 6 for prior relationship to the criminal justice system. Because defendant had pled guilty to the misdemeanor and was awaiting sentence, he had a relationship to the system.

*People v. Gibbs*, 299 Mich App 473 (2013)

 **Downward departure**

The trial court did not abuse its discretion in departing downward from the guidelines following defendant’s second degree murder conviction. The court’s reasons, defendant’s strong family and community support, her lack of a prior criminal record, that she was 30 years old, had a solid job history as an exemplary employee, and did not require any disciplinary actions while incarcerated, that she cooperated with the police, and that she was learning disabled and did not make good decisions under pressure, were all objective and verifiable.

*People v. Portellos*, 298 Mich App 431 (2012)

**Consecutive vs. Concurrent Sentences**

**Offenses committed on parole / Due process**

Defendant, a parole violator, entered guilty pleas to four new charges with the specific agreement that the sentences, with the exception of a felony-firearm sentence, would run concurrently to each other. The original order of sentence indicated that all but the felony-firearm were to be served concurrently. The sentencing order as well as two later amended orders, failed to mention the parole status. Two years later, the trail court issued a third amended order indicating that the sentences were all “consecutive to parole.” Defendant argued that his due process rights were violated when the court corrected the sentencing order without providing defendant with notice and a hearing. The Court of Appeals affirmed. The trial court has the power under MCR 6.435 to amend clerical errors at any time. That was exactly what the court did here. And it was not required to give defendant a hearing. The trial court had no discretion; by operation of law defendant’s new sentences must be served consecutively to the offense for which he violated parole.

 *People v. Howell*, 300 Mich App 638 (2013)

**Restitution**

 **Discretion to triple the actual amount**

The trial court did not err in tripling the amount of restitution for defendant’s misdemeanor assault conviction to $126,561.63. The plain language of Michigan’s restitution statute, MCL 780.766(5), gives the trial court discretion to increase the amount of restitution. This increase may be up to triple the amount of any other amount of restitution that is allowed under this statute. However, this statute does not limit or specify what the trial court is to consider in exercising this discretion in increasing restitution.

 *People v. Lloyd*, 301 Mich App 95 (2013)

**Costs**

**Expenses of maintaining governmental agencies**

When determining the reasonableness of court costs, it is appropriate for the sentencing court to consider indirect expenses. Included in these indirect expenses, the court may consider expenses associated with maintaining governmental agencies. This rule extends from the holding in *People v Sanders*, 296 Mich App 710 (2012), permitting the sentencing court to consider overhead costs in determining court costs. Also consistent with *Sanders*, the sentencing court need not calculate particular costs of the offender’s case. Here, $1,000 in court costs was reasonably related to $1,238.48 in actual costs incurred and therefore a valid assessment of court costs.

 *People v. Cunningham*, 301 Mich App 218 (2013)

**Sentence Enhancers**

 **Habitual Offender Information**

Defendant was initially charged as a fourth offender. During plea negotiations, the prosecutor amended the charge to third offender but defendant rejected the plea offer. Defendant then went to trial and was convicted of the underlying charges. Four days after trial, the prosecutor filed another amended information recharging defendant as a fourth offender and the court sentenced defendant accordingly. The trial court erred in sentencing defendant as a fourth offender. The information charging fourth offender was not filed until four days after trial, in violation of the 21-day rule of MCL 769.13(1). The Court of Appeals also held that this unpreserved error did not require reversal as it was not plain error. Even though defendant’s minimum sentence was greater than that permitted for a third offender, the court “declined” to order a resentencing. Defendant’s extensive criminal history supported a fourth offender status and defendant was on notice via the first information that the prosecutor intended to pursue sentence enhancement as a fourth offender.

 *People v. Siterlet,* 299 Mich App 180 (2012)

**Probation Violation**

 **Continued probation**

Following his plea to assault with intent to rob, defendant was sentenced to probation with one year in jail. Although the sentence was a downward departure from the guidelines, it was the result of a plea bargain. Subsequently defendant was charged with probation violation. The trial court did not revoke the probation but continued it with added terms. The Court of Appeals rejected the prosecutor’s appeal holding that a probation violation that does not result in the revocation of probation does not require resentencing. Where probation is continued, modified, or extended pursuant to MCR 6.445(G), the holding in *People v Hendrick*, 472 Mich 555 (2005), requiring resentencing under the sentencing guidelines is not applicable.

 *People v. Malinowski*, 301 Mich App 182 (2013)

**POST-CONVICTION REMEDIES**

**Collateral Estoppel**

**Application of a civil judgment in a criminal appeal**

The Court of Appeals refused to review defendant’s ineffective assistance of counsel claim in light of a ruling in a civil case that defendant’s trial counsel did not commit malpractice. The Supreme Court reversed, finding the Court of Appeals’ application of collateral estoppel erroneous in this case. While the court has approved of “crossover” collateral estoppel in applying a judgment in a criminal case to a civil case, the court will “hesitate to apply collateral estoppel in the reverse situation—when the government seeks to apply collateral estoppel to preclude a criminal defendant's claim of ineffective assistance of counsel in light of a prior civil judgment that defense counsel did not commit malpractice.” It was error to do so in this case because defendant’s interests were not the same at the two proceedings. Thus, the Court of Appeals holding precluded a full review of defendant’s claims.

 *People v. Trakhtenberg,* 493 Mich 38 (2012)

**CRIMES**

**Child abuse**

 **Child Passengers during a police chase**

Operating a motor vehicle during a police chase, at times in excess of 100 miles per hour, with two unrestrained child passengers is an act “likely to cause serious physical or mental harm.”

 *People v. Nix,* 301 Mich App 195 (2013).

**Controlled Substances – Delivery**

 **Aggregating amounts from separate deliveries**

The Court vacated defendant’s conviction for delivery of 50 to 450 grams of heroin. According to the testimony, defendant delivered no more than 28 grams of heroin at different times. The trial court permitted the prosecutor to aggregate the amounts in these individual deliveries in order to reach the 50 gram threshold. This was error. Each delivery is a separate offense and none of the individual deliveries amounted to 50 grams.

 *People v. Collins,* 298 Mich App 458 (2012)

**Criminal Sexual Conduct**

**A Person in a Position of Authority under MCL 750. 520d**

This incident took place while the victim was on summer break from school, after the defendant had been a substitute teacher for the victim’s class. The Court of Appeals reasoned that a teacher could prey on a student while avoiding an aggravated charge, so long as the offense was committed on a term break, weekend, or holiday, and then concluded that this was obviously not the intent of the statute.

 *People v. Lewis,* 302 Mich. App. 338 (2013)

**CSC-I**

**“By Blood” or “Affinity”**

In 1979, defendant’s parents were divorced and the court determined that he was “the minor child of the parties.” In fact, it was later learned that defendant was not the natural child of his named father. The father remarried and had another child, the victim in this case. In 2007, defendant engaged in sexual penetration with the minor step-sister. Defendant did not dispute the fact that his step-sister was not actually his blood relative until after criminal proceedings began. Relying on MCL 700.2114.1(a), the Court of Appeals affirmed defendant’s conviction holding that both spouses are presumed to be the natural parent of any child born or conceived during the marriage, and only an individual presumed to be a natural parent may disprove that presumption. The Supreme Court reversed. Under the plain language of the CSC statute, defendant was not related by blood or affinity to the victim. Moreover, the civil presumption of paternity contained in MCL 700.2114.1(a) does not apply in the criminal context. The Court remands for entry of a CSC-III conviction. Reverses *People v. Zajaczkowski*, 293 Mich App 370 (2011).

*People v. Zajaczkowski*, 493 Mich 6 (2012)

**Failure to Report Child Abuse**

**Confidential Communication**

When a statement is made to a clergyman who is a mandatory reporter under MCL 722.631 with an expectation of privacy, and that statement isn’t an admission, the clergyman isn’t required to report the statement.

*People v. Prominski,* 302 Mich. App. 327 (2013)

**Felon in Possession**

**Return of non-contraband property**

Because a convicted felon may not directly or constructively possess firearms under MCL 750.224, the trial court had no authority to order the guns returned to defendant’s mother in her capacity as his agent. However because the police department had the weapons as a constructive bailee, the statute does not prohibit the mother from being named as a successor bailee. Remanded for a new order clarifying disposition of the firearms.

 *People v. Minch,* 493 Mich 87 (2012)

**Forgery / U&P**

 **False affidavit of title**

Defendant filed with the county an “Affidavit of Allodial Title” claiming that he owned a specific house in Detroit. In fact, defendant did not have any ownership interest in the abandoned house. This was sufficient to prove both forgery and uttering and publishing. The prosecutor presented sufficient evidence that the affidavit was false and that defendant intended to defraud the true owner even if he was unaware of the owner’s identity at the time of filing the affidavit.

 *People v. Johnson-El*, 299 Mich App 648 (2013)

**Larceny from a Person**

 **“From the person of another”**

Defendant was seen by a store security guard in the act of hiding a store item in a shopping bag. The security guard followed defendant out of the store and confronted her. A “scuffle” ensued during which defendant bit and scratched the security guard. Following a jury trial, the jury acquitted the defendant of unarmed robbery, but convicted her of the lesser offense of larceny from the person. The Court of Appeals held that while defendant was probably guilty of unarmed robbery, there was insufficient evidence to support a conviction of larceny from a person. That crime requires that the property be taken “from the person or from the person's immediate area of control or immediate presence.” There was no evidence to support this element.

 *People v Smith-Anthony*, 494 Mich. 669 (2013)

**Medical Marihuana Act**

 **Section 4 immunity**

Under section 4 of the MMMA, a defendant is immune from arrest, prosecution, and penalty if he is a qualifying patient, has been issued and possesses a valid registration card, and is in possession of less than 2.5 ounces. Although defendant had been issued a card, he was not immune from arrest because he did not have the card on his possession at the time of his arrest. However, he should still be immune from prosecution as he did produce his card in district court.

 *People v. Nicholson,* 297 Mich App 191 (2012)

 **Criminal prosecution for persons in violation of the Medical Marihuana Act**

The MMMA provides specific and limited protection from prosecution for the use, possession and distribution of marijuana. Any person subject to the jurisdiction of this state, and not protected by the MMMA is still subject to criminal prosecution for drug offenses.

*People v. Johnson*, 302 Mich App 450 (2013**)**

**Michigan Residency and the Medical Marihuana Act**

A person must be a Michigan resident in order to possess a valid registry ID card.

 *People v. Jones*, 301 Mich. App. 566 (2013)

 **Constructive possession**

Defendant, a registered caregiver for two patients under the MMMA, leased a warehouse space where police found 86-88 plants growing. Defendant was entitled to grow only 24 plants for his two patients. The Supreme Court rejected defendant’s argument that he only possessed 24 plants and the other plants were possessed by other caregivers with other registered patients. Because defendant leased the warehouse space, was at the facility 5-7 days per week and had access to all of the plants, he was in constructive possession of all of the plants. Defendant is not entitled to raise the immunity provision of §4 of the MMMA. The Court remanded to allow defendant to assert a §8 defense per *Kolanek*.

 *People v. Bylsma,* 493 Mich 17 (2012)

**Patient-to-patient transfers**

The circuit court did not err in granting defendant's motion to dismiss a charge of delivery of marijuana because the transfer and delivery between registered patients constitutes “medical use” that is protected by § 4(a) of the MMMA.

*People v. Green,* 299 Mich App 313 (2013

**Operating a vehicle under the influence**

The Medical Marijuana Act’s immunity against prosecution supersedes the Vehicle Code’s zero-tolerance provision. A registered patient is permitted to drive when he or she has indications of marijuana in his or her system but is not otherwise under the influence of marijuana. The prosecutor is required to prove that defendant is actually under the influence. Reverses *People v. Koon*, 296 Mich App 223 (2012).

 *People v. Koon*, 494 Mich 1 (2013)

**“Usable Marijuana” and Determining Quantity of Edibles containing Marijuana**

Edible goods containing marijuana aren’t usable marijuana under the Medical Marihuana Act. MCL 333.7401(2)(d)(iii)

 *People v.Carruthers,* 301 Mich. App. 590 (2013)

**Murder – Second Degree**

**Sufficient evidence of malice**

There was sufficient evidence of malice to support defendant’s conviction of second degree murder. Although learning disabled, defendant knew she was pregnant, hid her pregnancy from her mother because she thought her mother was going to be mad at her, read books on child birth and delivery, and decided to deliver the baby herself without assistance. When she realized it was going to be a breech birth she did not call for assistance even though she had access to a cellphone. Finally, when the baby was born and did not cry, she wrapped it in a towel and left it in a garbage can.

*People v. Portellos*, 298 Mich App 431 (2012)

**Owning a Dangerous Animal Causing Serious Injury**

**Knowledge that animal was dangerous**

The defendant’s pit bull attacked a child, injuring the child’s face and leg. To interpret MCL 287.323(2), the Court of Appeals relied on the principle from *People v* *Tombs,* 472 Mich 446 (2005), and *Morrisette v. United States*, 342 US 246 (1952), that courts will infer the presence of the element of *mens rea* unless a statute contains an express or implied indication that the legislative body wanted to dispense with it. The Court held that an element of the crime is knowledge that the animal was *dangerous* before the incident that led to the charge.

*People v. Janes*, 302 Mich. App. 34 (2013)

**Possession of Child Sexually Abusive Material and Using a Computer to Commit a Crime**

 **Not *in pari materia***

The crimes of possession of child sexually abusive material and using a computer to commit a crime do not conflict and thus, are not to be read *in pari materia*. The court rejects defendant’s argument that he could only be convicted of the more specific offense. There were two criminal acts here which the Legislature chose to punish separately: the possession of the sexually abusive material and the use of a computer to obtain the images.

 *People v. Loper*, 299 Mich App 451 (2013)

**Possession of a Weapon in Jail**

 **General intent**

Possession of a weapon in jail is a general intent crime requiring only proof that the defendant intended to possess the weapon. The prosecutor does not have to prove intent to injure anyone.

 *People v. Gratsch*, 299 Mich App 604 (2013)

**CONSTITUTIONAL ISSUES**

**Right to Bear Arms**

 **Possession of a firearm by intoxicated person**

MCL 750.237 prohibiting possession of a firearm by an intoxicated person is unconstitutional as applied to this defendant (a former Republican Speaker of the House). Police responded to a call and were told by a neighbor that defendant was in his house, was drunk, and had a handgun. Police found defendant in his house and found a gun hidden in a garbage can in another room. The district court dismissed the charge on second amendment grounds and the Court of Appeals agreed. The statute is unconstitutional as applied to defendant because it infringed on his state and federal right to keep and bear arms for self defense.

 *People v. DeRoche,* 299 Mich App 301 (2013)

**Search and Seizure**

 **Emergency aid exception**

Police received an anonymous call reporting that the front door of a home was wide open and blowing in the wind. Police arrived, knocked on the door and called out to see if anyone was inside. When they received no answer they suspected it was a home invasion so they entered the house to investigate. Inside they found marijuana and cocaine. The trial court agreed with defendant that it was an illegal search and suppressed the evidence. The Court of Appeals reversed, holding that the police had the right to enter the home because they reasonably believed that people were inside and in need of aid. Even if the entry was illegal, the officers acted in good faith.

 *People v. Lemons*, 299 Mich App 451 (2013)

 **Community caretaking exception**

The police did not violate defendant’s right to be free from unreasonable search and seizure when they entered his home without a warrant and discovered his marijuana. A neighbor called police to report that she was concerned about defendant as she had not seen him in a few days. The neighbor also reported that defendant used his car to leave the house and return on a regular basis but that he had not done so in several days. The car was sitting in the driveway covered with leaves, it was after midnight and lights were on in the home, and the officer knocked on the door and got no response. The officer then entered through an unlocked window and searched the house finding marijuana growing in a closet. The majority found that the officer was lawfully acting under the community caretaking exception to the warrant requirement. Even if the officer did not act legally in this case, the evidence would still be admissible under the good faith exception as the “officers' conduct was innocent and lacked the culpability required to justify the harsh sanction of exclusion.”

 *People v. Hill*, 299 Mich App 402 (2013)

**Confessions**

 **Miranda warnings for prison inmates**

Following remand from the Supreme Court for reconsideration in light of *Howes v Fields*, 132 S.Ct. 1181 (2012), the court again affirmed defendant’s conviction. After prison officers found two weapons in defendant’s prison cell, he was taken to a small room, handcuffed to a table, never told he was free to leave, and questioned by a prison lieutenant without receiving *Miranda* warnings. The court found that defendant was not in *Miranda* custody at the time of the questioning. Defendant freely talked to the lieutenant, he was never threatened, and, “[t]here was no evidence that defendant's sleep schedule was interrupted or that he was made uncomfortable.”

 *People v. Cortez*, 299 Mich App 679 (2013).

**Functional equivalent of interrogation**

After defendant was arrested for murder and read his *Miranda* warnings, he invoked his right to remain silent. The detective immediately responded to defendant’s invocation by saying, “I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold [sic] of it and nobody else can get hurt by it, okay?” Defendant responded that it was an accident and he didn’t mean for it to happen. The trial court suppressed the statement, finding that the officer violated defendant’s rights by engaging in the functional equivalent of interrogation after the invocation of the right to silence. The Supreme Court upheld the Court of Appeals reversal and held that the officer’s statement was not direct questioning or the functional equivalent of interrogation. According to the court, the detective should not have known that his comment would lead to an incriminating statement

*People v. White*, 493 Mich 187 (2013)

**Ineffective Assistance of Counsel**

 **Defendant prejudiced by multiple failures of defense counsel**

Defendant was denied the effective assistance of counsel as the result of three failures on the part of defense counsel. First, counsel waived preliminary exam and did not demand a bill of particulars even though the charging documents did not set out factual allegation of any of the five counts of CSC. Second, counsel did not consult with key witnesses who could have cast doubt on the prosecutor’s case. Finally, defense counsel’s “unreasonably inadequate investigation contributed to her failure to sufficiently develop the defense that was actually presented at trial.” The Court also found that these errors caused sufficient prejudice to defendant to warrant a new trial. The prosecutor at trial relied heavily on the credibility of the complaining witness. “[I]f defense counsel had exercised reasonable professional judgment, she would have discovered and presented impeachment evidence and evidence that corroborated defendant's testimony, and there is a reasonable probability that the result of the trial would have been different.”

 *People v. Trakhtenberg,* 493 Mich 38 (2012)

**Exclusion of defendant’s expert witness at *Ginther* hearing**

The trial court did not abuse its discretion by refusing to permit defendant to call a defense attorney as an expert witness at a *Ginther* hearing. The trial court stated that it was “well aware of the community standards on this issue.” Thus, the proposed expert would not have been helpful to the trier of fact.

*People v. Marshall*, 298 Mich App 607 (2012), *judgment vacated in part, appeal denied in part* by *People v. Marshall*, 493 Mich 1020 (2013).

**Double Jeopardy**

 **Carjacking and UDAA**

Defendant’s convictions for carjacking and unlawfully driving away an automobile did not violate double jeopardy. Under the same elements analysis, each crime requires proof of an element not required by the other. Carjacking requires force or threat of force; UDAA does not. UDAA requires that the defendant complete the larceny by driving away the automobile. Carjacking, like robbery, does not require a completed larceny. *See People v Williams,* 491 Mich 164 (2012).

 *People v. Cain,* 298 Mich App 27 (2012)

 **Armed robbery and assault with intent to rob while armed**

Since assault with intent to rob while armed is a lesser included offense of armed robbery, conviction on both charges for the same transaction violated double jeopardy. Note: Genesee County Prosecutor confessed error on this issue.

*People v. Gibbs*, 299 Mich App 473 (2013)

**Cruel and/or Unusual Punishment**

**Juvenile mandatory life without parole**

MCL 791.234(6)(a), prohibiting parole for those convicted of first degree murder, is unconstitutional as applied to juvenile offenders per *Miller v Alabama, \_\_\_ US \_\_\_; 132 S Ct 2455; 183 L Ed 2d 407 (2012)*. Trial courts sentencing anyone under the age of 18 for first degree murder have discretion to impose a sentence of life with parole or life without parole. However, the United States Supreme Court opinion in *Miller* is not retroactive as it announced a new, but not “watershed” rule. The decision only applies to cases currently pending or on direct review.

*People v. Carp,* 298 Mich App 472 (2012)

**Long term of years**

Defendant’s sentence of 100 to 150 years for second degree murder was not cruel or unusual. The sentence was within the sentencing guidelines range of 365 to 1200 months or life making it presumptively proportionate. Also defendant had an extensive record of crimes of violence which justified the sentence.

*People v. Bowling*, 299 Mich App 552 (2013

**Void for Vagueness**

**Possession of a weapon in jail**

MCL 801.262(2) which prohibits jail inmates from possessing any weapon that could injure another prisoner or any person is not unconstitutionally vague. “A person of ordinary intelligence would understand that an unauthorized, sharpened fragment of metal attached to the end of a Q-tip is a ‘weapon or other item that may be used to injure a prisoner or other person, or used to assist a prisoner in escaping from jail.’

 *People v. Gratsch*, 299 Mich App 604 (2013)