

original

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellee

COA: 314315

LCT: 11-012794-01 FC

SCT:

v.

JOHN OLIVER WOOTEN,

Defendant/Appellant

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

Notice of Hearing

Order of the Court Below



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DEFENDANT'S STATEMENT OF QUESTIONS PRESENTED

- I. **Where Judge Callahan correctly ordered a Mistrial after the prosecutor asked a key witness about the Defendant's silence Did he Err by not finding that the prosecutorial misconduct was intentional and that the Mistrial should have been granted With Prejudice, barring retrial as Defendant's retrial violated the bar against Double Jeopardy?**

- II. **Are the jury verdicts of second-degree murder and assault with intent to murder are based on insufficient evidence and must they be overturned?**

- III. **Did the Prosecutor committed misconduct when, during closing argument, he argued that the Defendant must be guilty since he did not turn himself in or provide information to law enforcement about his involvement in the crime?**

Defendant answers "YES" to all of the Questions posed above.

THE COURT OF APPEALS BELOW ANSWERED "NO".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant JOHN OLIVER WOOTEN was convicted of Second degree Murder [MCL 750.317] and Assault with intent to Murder [MCL 750.83] Felon in Possession [MCL 750.224] and Felony Firearm 2nd offense [MCL 750.227BB] after a jury trial held before the Honorable James Callahan in Wayne County Circuit Court on November 27 , 2012.

Defendant Wooten was sentenced on December 13, 2012 to serve 30-50 years each on the Second Degree Murder and Assault with intent to Murder, plus 4 years for Felon in Possession and 5 years on Felony Firearm, 2nd offense. The Court below issued a Per Curiam unpublished opinion on June 26, 2014 and thus this case is timely filed with 56 days per MCR 7.302. The order of the court below is attached hereto.

STATEMENT OF FACTS

In December of 2011, Defendant John Wooten was criminally charged as a result of a shooting incident occurring at a topless bar and strip club “The Pretty Woman” in Detroit during the early morning hours of August 5, 2011. He was charged on four counts, including (1) the deliberate with intent and premeditation murder of Alfonso Thomas, (2) assault with intent to murder on Omar Madison, (3) felon in possession of a weapon, and (4) weapons felony possession. (JT Day 1 I at 18-19).

The Defendant, having pled not guilty, proceeded to his first trial on Wednesday, July 25, 2012 before Judge James A. Callahan. Antonio D. Tuddles proceeded on behalf of the Defendant, while Steven Kaplan was the Assistant Prosecuting Attorney for Wayne County. This trial ended in a mistrial without prejudice after an impermissible question regarding the defendant’s pre-arrest silence. The second trial commenced on Monday, November 19, 2012, again before Judge Callahan. Mr. Tuddles remained defense counsel, while Mr. Kaplan was replaced by Michael Harrison. The second trial ended in a guilty verdict on all four counts, with the jury finding Wooten guilty of a charge less serious than premeditated murder on count one: second degree murder. The two trials are outlined below.

I. THE FIRST TRIAL.

During the first trial’s voir dire, defense counsel raised a Batson challenge after the prosecuting attorney excused four jurors, all of who were African American females. (JT I Day 1 at 63.)¹ The prosecuting attorney offered his race-neutral reason for striking the potential jurors as all had relatives who had been convicted of crimes. The court accepted this explanation and denied the Batson challenge. Later, after the jury pool had been dismissed back to jury services,

¹ JT refers to the first trial transcript, Day 1 denotes 7/25/12 and Day 2 denotes 7/26/12

one juror spoke up to say she had never “read questions from the yellow sheet,” from which all other jurors had read. (JT I Day 1 at 73.) After she answered the questions, the defense counsel eliminated her by way of preemptory challenge, however the jury pool had already exited the courtroom so another juror could not be called. Judge Callahan then stated, “this is our jury, we’ll proceed with 13 (jurors.)”

Opening statements were made and the prosecution called their first witness, Janie Thomas, the mother of the victim, Alfonso Thomas. (JT I Day 1 at 102) The next witness from the prosecution was Officer Jeffrey Bare. (JT I at 113.) He was employed with the City of Detroit Police Department’s Northeastern District on the night of the incident, and responded to the scene at approximately 2:00 a.m. on August 5. (JT I Day 1 at 114.) By the time he arrived, both the victim and the Defendant had gone from the scene, however, the injured Mr. Madison was still lying inside the club on the ground. (JT I Day 1 at 115.) He approximates his time spent at the scene at approximately four hours. He stated he noticed “what might be blood” on the ground outside of the club’s front door, and described it as fresh blood. (JT I Day 1 at 116-17.) He further testified that the pool of blood was five inches in circumference, and that he did not notice any shell casings on the ground. (JT I Day 1 at 117.) Officer Bare stated that he did not observe a holster at the scene, and further that he took information on a suspect and held the scene for homicide. (JT I Day 1 at 118-19.)

On cross-examination, Officer Bare stated that he had spoken only to Mr. Madison, and no others at the scene. (JT I Day 1 at 120.) In response to questions from the jury, he stated that the pool of blood he saw was approximately two to three feet from the door of the establishment. (JT I Day 1 at 122.) On re-direct from the prosecution, he stated he was not an evidence technician and that he was guessing about the measurements he had stated. (JT I Day 1 at 123.)

Next the prosecution called Officer Raymond Diaz, a Detroit Police Officer of over 11 years experience who processed the scene. (JT I Day 1 at 124-25.) He arrived at approximately 4:20 a.m. on August 5, and prepared an evidence technician's report measuring three pages in length, including a sketch of the scene. (JT I Day 1 at 125.) He stated he found bullets as well as an empty holster, which he believed housed a semi-automatic gun. (JT I Day 1 at 131.) He further stated that he could not tell if the three bullets he recovered were the same kind of bullets, or if they were all different kinds of bullets. Over the defense's objection, Officer Diaz guessed that a lack of shell casings in a situation similar to the one at hand would mean that no semi-automatic weapon had been fired. (JT I Day 1 at 135.) However, the court sustained an objection asking directly what a lack of shell casings meant at the actual scene of the incident, as Officer Diaz had arrived two hours after the shooting occurred. (JT I Day 1 at 133.)

On cross-examination Officer Diaz stated that there was no indication that a revolver had been kept in the empty holster, due to the indentations on the holster itself. (JT I Day 1 at 143.) Further, he agreed that he did not know whether another individual had picked up or moved a semi-automatic weapon on the scene before he had arrived. (JT I Day 1 at 148.) Furthermore, he stated that a security camera situated above the pool of blood was facing east, towards the very back of the parking lot on the property. (JT I Day 1 at 151.) On re-direct, he stated that he did not know whether the cameras were operational or real. (JT I Day 1 at 151.) In response to questions from the jury, he stated he could not give a precise caliber of the bullets involved, but that they were larger than a .22. further, he stated that he looked on south and west walls and on two vehicles, and found no further damage worth noting. (JT I Day 1 at 155.) On re-cross once again, he could not say there was blood on a bullet found on the sidewalk. (JT I at 159.)

Next, the prosecution called Omar Madison, the complaining witness in count (2) and manager of The Pretty Woman bar on the night of the incident. (JT I Day 1 at 160.) He stated that the victim Mr. Thomas was working as a valet on August 5. Further, he said he heard the Defendant talking about shooting up the bar earlier that night. (JT I Day 1 at 164.) Later, Madison stated that when the defendant tried to get back into the bar later that night, the Defendant tried to avoid being searched for weapons, while Madison felt a gun in the Defendant's pants and proceeded to throw him out of the bar. (JT I Day 1 at 166-67.) Meanwhile, the victim grabbed a gun off of another individual to cover Madison. (JT I Day 1 at 169.) After attempting to break the crowd up, they turned to go back into the bar, and that is when the shooting started. *Id.* Madison stated that when he turned to see who was shooting, he saw the defendant with the gun. (JT I Day 1 at 170.) When the prosecution asked whether anyone had threatened the defendant in any way, Madison replied that typically the Defendant was the one who made threats, over the objection of the defense. The objection was sustained and the jury was instructed to disregard Madison's answer. (JT I Day 1 at 173.)

On cross-examination, defense attorney Tuddles began with impeachment of Madison with his preliminary exam testimony. Specifically, defense counsel pointed out that during the preliminary exam he asserted that he only felt the gun when he moved to throw the Defendant out, contrary to earlier testimony that he "knew" the Defendant was armed prior to throwing him out. (JT I Day 1 at 177-187.) Madison repeatedly gave non-responsive answers to questions, volunteered information when there was no question on the floor, and at times seemed confused and frustrated. After admitting he knew the victim Mr. Thomas typically carried a gun, Madison admitted that he made statements to the contrary during earlier testimony because he did not think it was important. (JT I Day 1 at 221.) He later admits that he left information out of his

story, depending on whether or not he thought it was important, regardless of whether it was true. (JT I Day 1 at 224.)

The second day of the trial began with re-direct examination of Madison. The jury was sent out after the prosecuting attorney attempted to elicit testimony from Mr. Madison about prior bad acts by the Defendant. (JT I Day 2, 4-5.) The court ruled that as the prosecution had failed to present 404b notice to the defense, they could not go into events which happened prior to August 4th, which were mentioned the day before during Madison's original testimony and were part of the narrative of the events which occurred in the early morning of August 5. (JT I at Day 2, 5.) Questions from the jury included whether Madison had a learning disability, to which he replied he had a Bachelors Degree from Knoxville College in Knoxville, Tennessee. (JT I at Day 2, 12.) Further, he demonstrated that he saw the victim holding the gun downward at a forty-five degree angle. (JT I at Day 2, 17.) Again on re-cross examination, he stated that he said "Boo [referring to the victim Thomas] get your gun," loud enough for the Defendant to hear. (JT I at Day 2, 29.)

The prosecution next called Anthony Gary, who worked as a party promoter every Thursday at The Pretty Woman Bar. (JT I at Day 2, 33.) He was present Thursday, August 4 2011 through the early morning hours of Friday, August 5. Gary stated that as the situation escalated, Mr. Thomas grabbed his gun off of him, and further, that the empty holster police found in the parking lot was his. (JT I at Day 2, 37-38.) When the shooting began, Gary testified that he heard three or four shots, and that his gun was not fired as he had checked it afterwards. (JT I at Day 2, 40, 42.)

On cross-examination, Gary admitted that he failed to tell investigators that Thomas had pulled his gun off of him. (JT I at Day 2, 43.) Gary stated that his gun had ended up on the

ground near the valet area after the shooting. (JT I at Day 2, 47.) Gary agreed he didn't "think" to tell the police that the Thomas was holding Gary's gun when Thomas was shot, nor did Gary test his gun to see if it had been fired that day. (JT I at Day 2, 50-51.) Mr. Gary admitted that he removed his gun from the scene because he "didn't want it to be a part of the situation." (JT I at Day 2, 62.)

Next the prosecution called Officer Latonya Brooks, assigned to homicide. (JT I at Day 2, 71.) She told the jury that it took four months to find the Defendant, and that Defendant Wooten did not come into the police station to explain his claim of self-defense. (JT I at Day 2, 72, 76.) After a question regarding whether the Officer had information regarding the victim's reputation, a sidebar was convened and the jury was sent out. (JT I at Day 2, 77.) When the prosecuting attorney began to speak, the court interrupted him and stated that per a discovery order issued on January 6, 2012, information regarding any criminal record a party has in its possession concerning any witnesses must have been turned over within two weeks of the order. (JT I at Day 2, 77.) When the prosecuting attorney stated that the victim could not testify and was therefore not a witness, the court replied that he is a witness as he is the complaining witness, and that fact was included in the charging information. (JT I at Day 2, 78.) A back-and-forth exchange occurred, in which the court expressed frustration with the prosecuting attorney. (JT I at Day 2, 79.) Defense counsel, Mr. Tuddles, stated that he had no documentation regarding the victim's criminal history even though he had requested that evidence from the prosecuting attorney. (JT I at Day 2, 80.)

With the jury still out of the courtroom, the judge allowed questioning of Officer Brooks in regard to whether she knew anything of the victim's criminal record. (JT I at Day 2, 81-82.) Officer Brooks stated she understood that victim Thomas had convictions including a CCW

violation, possession of stolen property, and fleeing and eluding. (JT I at Day 2, 82.) The court sent staff to make copies of prosecution records for the defense counsel on the matter. The jury re-entered, and Officer Brooks testified that the victim had a reputation for non-violence. (JT I at Day 2, 83.)

On cross-examination, defense counsel asked if Officer Brooks still would consider the victim a peaceful person in light of his criminal convictions and his parole from the Michigan Department of Corrections, and she doggedly re-affirmed her answer. (JT I at Day 2, 86.) Defense counsel also discussed with Officer Brooks that there was no mention of Anthony Gary's gun in either Madison's or Gary's statements. (JT I at Day 2, 86-92.) Further, she admitted that she did not request that the victim's hands be tested for residue powder to determine if he had fired a gun that night, nor had she tested the gun to see if it had been fired, nor did she have progress notes delineating her progress in the case. (JT I at Day 2, 92-105.) Later, she stated that had she known about the second gun she would have tried to follow up on that lead. (JT I at Day 2, 105.)

On redirect, after inquiring about evidence found at the scene, the prosecuting attorney asked Officer Brooks if "In this case, would you have enjoyed talking to the Defendant?" (JT I at Day 2, 106-108, 109 at lines 2-3.) She replied, "yes." Defense counsel immediately objected, the court sustained, and a sidebar ensued. Judge Callahan then directed his comments at the prosecuting attorney, stating he was disturbed that Mr. Kaplan would ask a question regarding statements "not being made" by the Defendant after he was specifically told to avoid the topic in an earlier conference. (JT I at Day 2, 109 at lines 11-21.) When asked to explain, Mr. Kaplan stated the question was asked in response to the claim that there was a second gun on cross examination, and the questions asked to Officer Brooks regarding whether she would have

wanted to test that gun. (JT I at Day 2, 109 at lines 22-25.) He implied that the person with knowledge about the gun was the Defendant himself, and thus the question arose. (JT I at Day 2, 110 at lines 1-3.)

Judge Callahan noted the weak nature of this explanation, and replied that there was already evidence of a second gun present due to the introduction of the holster found at the scene, and witnesses who testified that the holster would not have held a revolver as used by Defendant Wooten, but would only house a semi-automatic. (JT I at Day 2, 110.) Mr. Kaplan stated that the defense had argued that the second gun had been fired, and thus the question was part of his proper response. The court corrected him, noting that the defense had asked questions regarding whether Officer Brooks would have wanted to test the gun to see “if” it had been fired. (JT I at Day 2, 111.) After lunch recess Defense counsel Tuddles addressed the court at length and requested a mistrial based on the prosecutor’s query into whether or not testimony from Defendant Wooten would have been helpful. (JT I at Day 2, 112-117.) Citing *Oregon v. Kennedy*, 456 U.S. 667 (1982), and *People v. Dawson*, 431 Mich. 234 (1988), defense counsel argued that the prosecutor believed his case to be a losing one and *purposefully* asked the question to allow for a new trial. (JT I at Day 2, 114.) He further argued that such action was prosecutorial misconduct, in light of Mr. Kaplan’s “20 plus years” of experience, and jeopardy should attach. (JT I at Day 2, 114, 116-117.)

Mr. Kaplan briefly responded that Mr. Tuddles was “wrong about the law,” and that *People v. Collier* and *Jenkins v. Anderson* both state that impeachment of a defendant’s pre-arrest silence is constitutional and permissible when “it would have been natural for a defendant to come forward.” (JT I at Day 2, 117-118.) He reiterated that the cross-examination of Officer

Brooks as to a second gun triggered the legitimacy of such a question as he asked. (JT I at Day 2, 118.) He denied that the question was misconduct on his part. (JT I at Day 2, 118.)

Mr. Tuddles responded again at length, responding both to Mr. Kaplan's argument and personal comments Mr. Kaplan made to Mr. Tuddles about Kaplan's "winning" trial record. (JT I at Day 2, 118-120.) He reiterated witness testimony that evidenced a second gun was present, and argued that those witnesses do not have the same Fifth Amendment protections as the Defendant. (JT I at Day 2, 119.) Mr. Tuddles made it clear that the law protected a Defendant's silence but that other witnesses, who had also lied or not been forthcoming, were not protected. (JT I at Day 2, 120.)

The court then responded to the motion for a mistrial. In response to the prosecution's argument, the court considered *People v. Collier*, 426 Mich. 23 (1986) which cites *Commonwealth v. Nickerson*, 386 Mass. 54 (1982.) While the prosecution argued that impeachment with pre-arrest silence is valid per these precedents, the court stated that the Defendant could not even be impeached as he had not decided whether to testify at that point in the trial. (JT I at Day 2, 121-22.) The court stated that to justify the question posed to Officer Brooks in order to substantiate the second gun "is ludicrous" because of the other evidence already presented. The court continued that both *Nickerson* and *Collier* suggest there must be some "natural" consequence or circumstance that would prompt the defendant to come forward for this line of reasoning to be valid. (JT I at Day 2, 122.) Since the charges brought against Defendant Wooten were "almost instantaneous," Judge Callahan did not believe it would be a "natural thing" for the defendant to come forward.

Judge Callahan then granted the motion for a mistrial without prejudice, insinuating that Mr. Kaplan had asked the question in "the heat of combat (which) overwhelms our rational

decision making processes.” (JT I at Day 2, 123.) Judge Callahan further commented *that he did not believe the jury would have found Mr. Wooten guilty, and would have given a directed verdict on count one* at the end of the prosecution’s case. (JT I at Day 2, 126.) The judge commented on the prosecution’s inability to bring forth three witnesses, his belief that the prosecution’s case was “in the toilet,” and the seeming lack of preparation in regards to witnesses Madison and Gary. (JT I at Day 2, 124, 126, 130.)² He further stated that he was granting the mistrial without prejudice to give the prosecution “the benefit of the doubt.” (JT I at Day 2, 127.)³ Defense counsel attempted to move for a directed verdict on count one, which the court denied as would only be proper after the prosecution rested its case, which it had not. (JT I at Day 2, 128.) A second trial was scheduled for November 2012.

II. THE SECOND TRIAL.

The second trial began on Monday, November 19, 2012 again before Judge Callahan. Mr. Tuddles appeared on behalf of the defendant, while Michael Harrison replaced Mr. Kaplan as prosecuting attorney. After voir dire, the defense renewed its motion for a mistrial. (JT II at Day 1, 144-149.)⁴ The court denied the motion and stated that the affidavit submitted by the defense was not relevant, though defense counsel asserted that it tended to show a pattern by Mr. Kaplan of throwing trials when it seemed he was losing. Nonetheless, Judge Callahan repeated he was giving the prosecution “the benefit of the doubt in ruling a mistrial without prejudice. The proceeding continued and the charges were explained to the jury. (JT II at Day 1, 171-78.) They were unchanged from the first trial.

² Judge Callahan commented, “I’d like to see you try a case in civil court with an experienced trial lawyer, Mr. Kaplan, you’d have your fanny handed to you in a basket.” (JT I at Day 2, 132, at lines 15-18.)

³ Judge Callahan further commented, “So, was it to the benefit of the prosecution to have had a mistrial granted without prejudice? You bet your sweet bippy.” (JT I at Day 2, 126 at lines 23-25.)

⁴ JT II denotes the second trial transcript, Day 1 denotes 11/19/12

Opening statements were made by both the prosecution and defense. (JT II at Day 1, 192-204.) On the whole, the prosecution's opening statement was much clearer and more organized than the previous trial, organizing what the jury would hear by each anticipated witness. (JT II at Day 1, 192-199.) Defense counsel asserted during his opening statement that the decedent fired at the defendant, and was subsequently interrupted by objections and an off-the-record conversation. (JT II at Day 1, 202-03.) The court then reminded the jury that the burden is on the prosecution to prove that the defendant did not act in self-defense.

Prosecution witness Officer Raymond Diaz testified first. He stated that he arrived on the scene on the morning of August 5, and when he arrived the scene had already been 'taped.' (JT II at Day 1, 207.) He testified that Peoples Proposed Exhibits 3 to 27 were the photographs he had taken on that night, and these as well as a sketch of the scene were admitted into evidence. (JT II at Day 1, 207-209.) He explained that he retrieved five items from the scene, and they were, (1) the fired bullet on the sidewalk along the west side of the building; (2) a pair of eyeglasses or sunglasses on the ground near the front door; (3) a leather tan colored holster; (4) a fired bullet inside the vestibule area; and (5) a fired bullet impact. (JT II at Day 1, at 210-211.) Overall, he found two strike marks, and explained strike marks as areas where a bullet had struck yet no bullet was found. (JT II at Day 1, at 212.) He testified that recovered item (4) corresponded with a strike mark on the front door to the vestibule outside of the bar, and item (5) corresponded to a strike mark on the guardhouse frame. *Id.* Officer Diaz also testified to, while observing a photo of the building front, a "large area containing suspecting blood that trails westward toward the sidewalk." (JT II at Day 1, at 214.) Furthermore he testified that he did not find anything indicating bullets were heading in a southbound direction, away from the bar. (JT II at Day 1, at 219.)

On cross examination, Officer Diaz stated that responding officers had preserved the scene, yet did not know the time period between the incident and the arrival of the first responding officer. (JT II at Day 1, 221.) Objections were sustained when defense counsel asked Officer Diaz if he would have found shell casings had a semi-automatic been fired. (JT II at Day 1, at 225-26.) He could not identify what kind of weapon fired the bullets he found, and did not find a weapon that matched the holster found at the scene. (JT II at Day 1, at 227.)

Unlike his testimony at the first trial, there was no mention that Diaz arrived on the scene approximately two hours after the shooting had occurred. Furthermore, there was no significant discussion on cross-examination regarding whether there was a security camera situated outside of the bar.

Day two of the trial began with the testimony of Jamie Thomas, victim Thomas' mother. Her short testimony consisted of her identification of a picture of the decedent, which was admitted into evidence. (JT II at Day 1, at 235.) Next the prosecution called Officer Jeffrey Bare, who along with his partner was the first responder to the scene. (JT II at Day 2, at 238.) He estimated there was approximately a five-minute time span between receiving the call and arriving on the scene. He testified he saw a chaotic scene, with people running around the parking lot. (JT II at Day 2, 239.) Upon entering the facility he saw Omar Madison bleeding, and saw no one else who had been injured. He further testified he saw blood just outside the doorway. (JT II at Day 2, at 240.)

On cross-examination, he testified he was approximating his response time as he didn't have his run sheet before him. (JT II at Day 2, at 242.) He further testified that he did not get the names of other individuals around the door to the club when he arrived, though he did get the names of the bouncers. (JT II at Day 2, at 246-47.) On re-direct, the prosecution explored what

his function was at the scene. (JT II at Day 2, at 247.) On re-cross examination, he admitted he did not know what happened prior to his arrival. (JT II at Day 2, at 249.) The court asked questions regarding the logistics of securing the area and when other officers arrived. (JT II at Day 2, at 250.) The jury inquired whether he saw any security cameras, to which he said he saw cameras in the doorway but none outside. (JT II at Day 2, at 251.)

Unlike Officer Bare's testimony during the first trial, he did not discuss the length of time he was at the scene nor did he attempt to approximate the size of the blood seen on the ground outside of the door. Furthermore, while he stated during the second trial that he had secured the names of the bar's bouncers, during the first he stated he only spoke to Omar Madison and no one else while at the scene.

Next the prosecution brought forth Francisco Diaz, Assistant Medical Examiner for the Office of the Medical Examiner in Wayne County. (JT II at Day 2, at 256.) Dr. Diaz was deemed as an expert and testified about the autopsy she performed on the decedent. (JT II at Day 2, at 257, 259.) She indicated that one bullet entered the victim through the right upper chest and exited through the mid-left chest through his side. (JT II at Day 2, at 260.) Another wound was found in the victim's right arm. (JT II at Day 2, 261.) She could not tell which wound was received first and which was second. Dr. Diaz further testified that the chest wound entered the chest, perforated the right lung, the heart, and the left lung before exiting. (JT II at Day 2, at 262.) She stated the victim died due to extensive bleeding. Further, she said that neither wound carried evidence indicating it was received at a close range. (JT II at Day 2, at 262-63.)

On cross-examination, Dr. Diaz stated she did not examine the victim's clothing. (JT II at Day 2, at 264.) Further, she demonstrated that in order for one bullet to have caused both wounds, the decedent's arm would have had to have been "far above his head" and so

demonstrated for the jury. (JT II at Day 2, 266-67.) She stated that the exit wound was lower on the body than the entrance wound. In response to questions from the jury, she stated the decedent was naked when he came to the Medical Examiner's office. (JT II at Day 2, 270.) She further testified on re-direct that stippling – gunshot residue found on close range wounds – is filtered through clothing, and the amount of clothing affects the degree to which the stippling is filtered. (JT II at Day 2, at 272.)

Next the prosecution called Omar Madison, manager of The Pretty Woman. (JT II at Day 2, at 274.) Madison stated the victim Mr. Thomas was a valet at the bar and also assisted in security. He further stated that everyone who enters the bar is searched. (JT II at Day 2, at 277.) He went on to detail a problem with the Defendant which occurred at the bar two weeks prior. (JT II at Day 2, at 282.)⁵ Defendant reportedly “threw something” in the bar one night and Omar Madison claimed he was hit by the projectile. The Defendant was escorted out by another bouncer, and afterwards Madison claims the Defendant fired shots into the air while in the parking lot area. Later that evening, the Defendant arrived in the parking lot in either a Suburban or a Tahoe vehicle, holding a gun in his lap, and asked if Madison had a problem with him. (JT II at Day 2, at 283.) Madison claims they talked it out and the Defendant left reportedly stating “as long as we don't got no problem.”

He admitted he did not personally see the Defendant shoot in the air afterward this alleged incident but only heard about that from someone else. (JT II at Day 2, at 306.) After a back and forth with the defense attorney, he admitted he didn't actually see a gun when the Defendant came back to the bar later that evening. (JT II at Day 2, at 312.)

⁵ Testimony concerning this incident which reportedly took place two weeks prior to the fatal shooting was not allowed at the first trial as the prosecutor had not provided proper notice- a problem now remedied.

On the night of the incident, Madison stated that the Defendant and another man were bumping into customers and “making comments.” (JT II at Day 2, at 280-81.) He told Anthony Gary, a fellow employee, and the Mr. Thomas to “be on alert.” (JT II at Day 2, at 284.) At approximately 1:50 a.m. on August 5, the Defendant the other man began to try and push their way into the bar, and refused to be searched. (JT II at Day 2, at 285.) Madison told the jury that he reached and felt the gun the Defendant was carrying on his center waist area. (JT II at Day 2, at 286.) Madison reportedly told the Defendant he could not enter the bar with the gun. Madison then proceeded to grab the Defendant and the other man and force them out of the bar. As they proceeded out of the bar, Madison stated he was face to face with the Defendant, while Anthony Gary had his chest facing the other man’s back. (JT II at Day 2, at 291.)

The prosecution then asked Madison about the second gun which was apparently used on the night of the shootings. (JT II at Day 2, at 293.) During the scuffle, and after Mr. Thomas had grabbed Anthony Gary’s gun off his person, Madison stated to Thomas, “you got him?” To which Mr. Thomas replied, “yeah, I got him.” He described the gun held by the Mr. Thomas as a .380, and identified the gun as belonging to Anthony Gary. Madison further stated that during this time, Thomas was not pointing the gun at the Defendant. (JT II at Day 2, at 294.) Further, after he had released the Defendant, he turned to go back inside. He stated that after the shooting started, he turned to see the Defendant shoot Mr. Thomas just before the door was slammed. (JT II at Day 2, at 297-98.) Madison told the jury that when the shooting started, he was facing away from the Defendant, and he was hit in the left buttock as he was going back inside. (JT II at Day 2, at 296.) He stated that the bullet went in through his hip and exited next to his groin. (JT II at Day 2, at 296.) He was later transported to St. John's Hospital. (JT II at Day 2, at 302.)

Madison then discussed the security cameras in the facility. (JT II at Day 2, at 299.) He explained that they were only working inside strip club, not on the outside. Any cameras on the outside of the property were not actually functioning. (JT II at Day 2, at 301.)

Cross-examination of Madison was lengthy and contentious at times. Defense counsel impeached Madison with his testimony at the preliminary hearing stating that he threw Defendant Wooten out because the Defendant began to pull out his gun, rather than because Madison had brushed against it. (JT II at Day 2, at 319-20.) Madison stated that he didn't recall giving that answer, and that the preliminary exam answers were "a little off." (JT II at Day 2, at 324-25.) He further stated he was "absolutely sure" he didn't tell the Mr. Thomas, who was working as a valet, to take Mr. Gary's gun. (JT II at Day 2, at 329, 338.) He further stated he did not remember ever speaking to police on the matter. (JT II at Day 2, at 350.) Later, he stated that he was heavily sedated after the shooting so he does not remember much of the conversation with Anthony Gary that occurred the next day. (JT II at Day 2, at 354.) He stated he was not sedated for the first conversation with police when he arrived at the hospital, but was for the second statement later that morning at approximately 11 a.m. (JT II at Day 2, at 355-57.)

Next the prosecution called Myiea Mayes, the victim's girlfriend on the night of the incident and eyewitness. (JT II at Day 2, at 394.) She stated she would drive Mr. Thomas to work and wait for him to end his shift, though she did not work at the club. She stated she saw the Defendant at the club frequently. (JT II at Day 2, at 399.) On the night of the incident, she was in her car, parked across the street in the lot of Captain J's. (JT II at Day 2, at 401-02.) She further stated that Defendant Wooten's friend drove a white Yukon. (JT II at Day 2, at 404.) Defendant Wooten seemed to be walking away from the bar after being thrown out, and then turned and started shooting. (JT II at Day 2, at 405.) She stated he seemed to be almost at the front door. At

first, she claimed she only heard two shots. (JT II at Day 2, at 406.) After the prosecution told her not to guess, but to answer based on her memory, she stated she heard 5 or 6 shots. (JT II at Day 2, at 407.) She further claimed she did not see Mr. Thomas with a gun, and further that Mr. Thomas had given his own gun to a friend earlier that evening. (JT II at Day 2, at 407-08.) She stated there were two arguments between the Defendant and bouncers that evening, one prior to the shooting and one immediately preceding the shooting itself. (JT II at Day 2, at 414.) When the prosecuting attorney asked whether she was in court testifying of her own free will, the judge called a bench conference and sent the jury out. (JT II at Day 2, at 417.) The judge spoke on the record inquiring as to why the prosecution was attempting to discredit its own witness. No further questions were asked on the matter and the jury returned.

On cross-examination, Mayes stated she did not see the Defendant searched prior to the incident. (JT II at Day 2, at 425.) She affirmed that Madison and Gary together pushed the Defendant out of the bar. (JT II at Day 2, at 430-31.) She stated that when Madison released the Defendant, he gave him a push as well. (JT II at Day 2, at 432-33.) She said the Defendant pulled the gun from “clearly on his side,” rather than victim take anything off of Gary, and was standing “directly facing” her across the street when he was shot; she admitted later that there were people between her and the victim. (JT II at Day 2, at 454.) On re-cross, she stated that she “clearly... unequivocally... absolutely” did not see a muzzle flash coming from Mr. Thomas *because he did not have a gun.* (JT II at Day 2, at 462.) (emphasis added)

The next witness from the prosecution was Dakarai Burrell, who worked as a doorman at The Pretty Woman bar. (JT II at Day 2, at 466.) Burrell described the skirmish from two weeks prior. He stated that he was the one who walked the Defendant out, indicating that the Defendant had had enough and it was “time to go.” (JT II at Day 2, at 468-69.) He admitted he could not

say that it was the Defendant who fired shots on that evening, as Burrell was not outside when the shots were fired. However, he stated that there was no one else outside the bar at the time. On cross-examination, he stated he did not search the Defendant before he entered the bar that night, as he had arrived late that day. (JT II at Day 2, at 487.)

Burrell stated that on the night in question the Defendant and another man came in, and he tried to search one of them, but the Defendant did not want to be searched. (JT II at Day 2, at 467.) He testified that both he and Madison insisted that the Defendant be searched, and he replied, "I ain't getting searched. I spent too much money in this bitch. I ain't getting searched." (JT II at Day 2, at 470-71.) The Defendant stepped back, Burrell stated, "but I felt him so I knew he had something on him. Omar [Madison] grabbed him." (JT II at Day 2, at 467.) He stated Madison picked the Defendant up, another person came by and grabbed Madison as they went out the door. (JT II at Day 2, at 470-71.) Once outside, Gary grabbed the man who grabbed Madison.

Burrell elaborated that he told Madison, "Omar. We got him. We got him. Go ahead. You can let him go." The Defendant took a step, then turned, and "all you hear is shots go off." He further testified he believed that the gun Mr. Thomas had that night belonged to Omar Madison and that he heard five shots. (JT II at Day 2, at 473, 474.) He stated the Defendant kept the gun in the middle of his belt. (JT II at Day 2, at 475.) He also testified that on previous occasions he would "put up" the Defendant's gun for him when he came to the bar. (JT II at Day 2, at 475.) Contrary to Madison's testimony, he stated he did not have a chance to shut the door after the shooting. (JT II at Day 2, at 477.)

Day three began with the cross examination of Burrell who denied that he had conversations with Madison that evening that put him on "higher alert" regarding the Defendant

Wooten. (JT II at Day 3, at 490.) He further stated that other individuals were telling Madison, “we got him, we got him,” while Madison was holding the Defendant. (JT II at Day 3, at 497.) Burrell stated that after turning to go inside the bar, he heard “Two shots. Two shots. Hear a series of two shots.” (JT II at Day 3, at 501.) He further stated that Madison did not touch the Defendant prior to grabbing him, nor did the Defendant make any threatening gestures prior to being grabbed. (JT II at Day 3, at 502, 505.) On redirect, Burrell clarified he heard a total of five shots altogether. (JT II at Day 3, at 505.) He stated that at no time did he see anyone with any kind of weapon in their hands other than the Defendant. (JT II at Day 3, at 509.)

Next the prosecution called Anthony Gary, who worked as a promoter at The Pretty Woman bar on the night in question. (JT II at Day 3, at 511-12.) He stated he was authorized to carry a concealed weapon and he had a CPL- a permit- and in fact was carrying a “380 Hi Point,” black in color semi-automatic, in a holster. (JT II at Day 3, at 512-13, 579.) He stated he had walked a lady to her car across the street and was returning when the altercation began. (JT II at Day 3, at 513-18.) He saw Alfonso Thomas working as valet outside of the club. (JT II at Day 3, at 518.) Inside the club, he saw Madison searching the Defendant, and “next thing you know they were outside.” (JT II at Day 3, at 521.) When Madison grabbed the Defendant another man joined the fray and grabbed Madison, and Gary grabbed the second man. (JT II at Day 3, at 522-23.) While Gary was attempting to verbally diffuse the situation, Alfonso Thomas grabbed his gun off of him. (JT II at Day 3, at 525.) After the huddle broke up, Mr. Gary took a few steps and the Defendant began shooting, and he heard three or four shots. (JT II at Day 3, at 527, 529.) When it was apparent that Mr. Thomas was hit, Gary testified he ran into the parking lot. He stated that then Defendant Wooten ran into the parking lot as well, pointed at Gary and stated “Love your life. Love your life.” (JT II at Day 3, at 529.)

On cross examination, Gary stated that he retrieved his weapon before he left the scene to take Alfonso Thomas to the hospital, yet did not tell the police about the presence of a second gun. (JT II at Day 3, at 535, 570.) He further stated that when Madison grabbed the Defendant, they were facing chest-to-chest, and their positions shifted once they were outside. (JT II at Day 3, at 538, 540.) Additionally, when Thomas took his weapon off of him, Gary did not see what Thomas did with it, nor did he see the Thomas take the weapon out of the holster. (JT II at Day 3, at 549, 552.) He stated he had never given his gun to the police for testing. (JT II at Day 3, at 565.) He revealed he had told the prosecutor about his weapon two days before the second trial, and agreed it was the first time the prosecutor's office had expressed an interest in his weapon. (JT II at Day 3, at 568.)

On re-direct examination, when the prosecuting attorney asked Gary whether anyone from the defense had requested his weapon for testing, the Judge reminded the jury that the burden of proof is upon the prosecution and not the defense. (JT II at Day 3, at 575-76.) He stated that the gun was still fully loaded when he checked it after the incident. (JT II at Day 3, at 580-81.) In response to questions from Judge Callahan, he stated he would "have told the truth." (JT II at Day 3, at 587-88.) In response to direct questions from the Jury, Gary stated the safety was switched on when he retrieved his gun. (JT II at Day 3, at 594.)

The next witness called by the prosecution was Officer LaTonya Brooks, Investigator with the City of Detroit Homicide Section. (JT II at Day 3, at 596.) She stated she follows up with cases she receives after the initial responders work the scene. (JT II at Day 3, at 598.) She stated she did not find any credible evidence that a second gun was fired on the night in question, and thus she did not look for a second gun. (JT II at Day 3, at 598-99.) She further stated she was unable to identify all the witnesses to the shooting. (JT II at Day 3, at 600-01.) She stated that

when the warrant was issued for the Defendant's arrest, the Detroit Fugitive Apprehension Team became responsible and they apprehended the Defendant approximately four months later. (JT II at Day 3, at 604.)

On cross-examination she stated she did not take notes while working the case. (JT II at Day 3, at 606.) Further she stated she did not learn of the presence of a second weapon until the preliminary exam held in July of 2012. (JT II at Day 3, at 607.) However, she later stated that she learned of the presence of a second weapon from reading a witness statement on August 6, the day after she received the case. (JT II at Day 3, at 609.) Shortly after, she states the report only "mentioned" the second weapon, and she learned the second weapon was present "Maybe in December." (JT II at Day 3, at 610.) She admitted she could not specifically tell the jury when she learned of the second weapon. She further stated that despite the presence of an empty holster and a mention of a second weapon in a statement, she was of the understanding that the second weapon was never "pulled." (JT II at Day 3, at 614.) After a contentious exchange, she further admitted that she could not remember when she learned that the empty holster belonged to Gary. (JT II at Day 3, at 617-621.) She told the jury she could not recall if she had interviewed Gary after learning that the holster belonged to him. (JT II at Day 3, at 622.) She further admitted she learned only during the first trial that Gary had surreptitiously removed his weapon from the crime scene, and further she could not say whether Gary's gun had been fired that night (JT II at Day 3, at 626-27.) After a brief re-direct, the prosecution ended its case.

The defense presented only one witness, the Defendant John Wooten. (JT II at Day 3, at 633.) He stated he understood his right not to testify to the court outside of the presence of the jury. (JT II at Day 3, at 634.) The Defendant testified to the prior conduct which Madison described, in which Madison was hit by a drink. (JT II at Day 3, at 638.) He testified it was an

accident, and he “did not want to have no problems,” so he left the bar, walking out on his own. (JT II at Day 3, at 638-39.) He further denied shooting into the air after he left.

On the night in question, the Defendant testified that he arrived between 10 p.m. and 11 p.m. on August 4. He admitted to drinking and having his .357 revolver on him at the club that evening. (JT II at Day 3, at 640.) He stated that Burrell had let him into the establishment when he first arrived with his revolver. (JT II at Day 3, at 641.) Later in the evening, he went outside to smoke marijuana, and upon re-entering was stopped by Burrell. (JT II at Day 3, at 642.) He stated that Burrell gestured that he couldn’t allow him back into the club with the gun as his boss Madison was “right there.” The defendant interpreted Burrell’s comments to mean that once Madison was no longer paying attention, Burrell would allow him back into the club. (JT II at Day 3, at 645.) He stated they proceeded to make small talk, but when Madison came over, wondering why the Defendant had been standing there, Madison grabbed him, lifting him off his feet. (JT II at Day 3, at 645, 647.) Defense Attorney Tuddles conducted a demonstration for the jury, showing how the Defendant’s chest was touching the Defense counsel’s back. (JT II at Day 3, at 648.)

The Defendant stated he heard Madison say, “Pull your gun. Pull your gun. Get ready. Are you ready?”. He testified he believed he was about to get killed, and that he heard the safety click off of a gun. (JT II at Day 3, at 649.) When Madison let him go, he stated that he was given a strong push, then he heard a gunshot. He drew his gun and returned fire. (JT II at Day 3, at 652.) He stated he both heard and saw the gunshot. (JT II at Day 3, at 652-53.) He stated that he had never had any problems or issues with the Mr. Thomas before. (JT II at Day 3, at 650.) After realizing he had hit the Mr. Thomas, he took off running in the direction of Van Dyke. (JT II at Day 3, at 655.) He stated he had dropped the gun at some point, but was unsure of where or

when because he was so shaken by the incident. (JT II at Day 3, at 656.) After the incident, he stated he spoke with several lawyers, and all told him not to turn himself in to police until he had retained a lawyer, and as he did not have a lawyer he did not turn himself in. (JT II at Day 3, at 657-58.)

On cross-examination, he stated that during the prior incident, when he was in the SUV speaking to Madison in the parking lot, that the friend he was with drove a red Tahoe, not a white Yukon. (JT II at Day 3, at 663.) He further denied instigating the incident and prompting Madison to pick him up to throw him out of the strip club. (JT II at Day 3, at 666.) He stated that the decedent was less than four feet away from him when he shot, and luckily he was not hit. (JT II at Day 3, at 668-669.) At that point the judge ended the proceedings for the day, to resume the following Monday. (JT II at Day 3, at 669.)

The fourth day of trial began on Monday, November 26, 2012 with the continued cross-examination of the defendant. He admitted that he had gone by the alias "Keith Lewis," and the court overruled the defense objection that his alias was irrelevant and allowed it for impeachment purposes. (JT II at Day 4, at 4-6.) After objection and re-phrasing from the prosecution, the Defendant also agreed that at no point between the incident and his arrest had he told any police officer that he was acting in self-defense. (JT II at Day 4, at 10.) He reiterated that Mr. Thomas was aiming the handgun at him when, in self-defense, Mr. Wooten fired back. (JT II at Day 4, at 14.) On re-direct examination, he stated he was sorry for what he did, but he felt his life was in danger. (JT II at Day 4, at 24.)

After a brief re-cross examination, the defense rested. The people requested a jury instruction on the lesser-included offense to the first count of voluntary manslaughter, which the judge denied. (JT II at Day 4, at 31-32.) Closing arguments were given, and the prosecutor

argued "And then he [Defendant Wooten] hid out for four months before the Fugitive Apprehension Team finally found in him in another county. Does that sound to you like he had an honest and reasonable belief that he had to do what he did? Does that behavior sound like the behavior of a killer?" . (JT II at Day 4, at 35.) During his rebuttal argument, the prosecutor stated "Mr. Tuddles said, oh, if you find that he acted in self defense, you've got to find him not guilty of the assault with intent to murder Omar Madison as well... that's not true. What evidence did you find that Omar Madison presented any threat? What evidence on either side did you hear that Omar Madison was armed? None, zero, zippo, and he shot a man in the back. Self-defense? Please....[the Defendant] also admitted he ran away, he spent a night in the alley; that he either threw away or lost the murder weapon that night; that he talked to lawyers almost right away; that he didn't turn himself in; that he didn't reach out to anybody in law enforcement prior to his arrest and say, hey, you got this thing wrong. I know you're looking for me. You don't know what's going on. He agreed to all of that. He wants us to believe he did that on advice of counsel? Ladies and gentlemen, use your common sense and reason, please."

After the above statements, Mr. Tuddles asked to approach and a sidebar was held. (JT II at Day 4, at 83-84.) Nothing of note occurred as a result although it appears that the Defendant objected to this improper argument. It can be assumed that the Court directed Mr. Harrison to discontinue this argument, as he did not mention the Defendant's pre-arrest silence again, and just continued with his rebuttal statement.

The jury began deliberations at 3:22 p.m., and returned the following day at 12:07 p.m. with a verdict. (JT II at Day 4, at 126; Day 5 at 3.) Defendant John Wooten was pronounced guilty of (1) a less serious offense of murder, second degree murder, of Alphonso Thomas; (2)

assault with intent to murder of Omar Madison; (3) possession of weapons or firearm by a felon; and (4) weapons, felony firearm. (JT II at Day 5, at 4-5.)

Defendant Wooten was sentenced on December 13, 2012 to serve 30-50 years each on the Second degree Murder [MCL 750.317] and Assault with intent to Murder [MCL 750.83] charges, plus 4 years for Felon in Possession [MCL 750.224] and 5 years for Felony Firearm 2nd offense [MCL 750.227BB] His guidelines, scored at 315-787 months, appear accurately calculated and his sentence as imposed falls within the guidelines.(ST of 12/13/12) Presently incarcerated, Defendant appealed as of right, MCR 7.203 and filed a timely brief. On June 26, 2014 the Court of Appeals below issued a Per Curiam unpublished opinion affirming the Defendant's convictions. He now files this timely Application for Leave MCR 7.302.

ARGUMENTS

- I. **Judge Callahan correctly ordered a Mistrial after the prosecutor asked a key witness about the Defendant's silence but erred by not finding that the prosecutorial misconduct was intentional and that the Mistrial should have been granted With Prejudice, barring retrial as Defendant's retrial violated the bar against Double Jeopardy.**

Issue Preservation: Defendant John Wooten, through his trial attorney Mr. Tuddles, moved for Mistrial and argued that the Mistrial should be granted with prejudice. (JT I at Day 2, 123.)

Standard of Review: Double Jeopardy questions are to be reviewed *de novo* by this Court, *People v Smith* 478 Mich 298 (2007). However, this Court is asked to review the trial court's finding that there was not overtly intentional misconduct on the part of the prosecution. This is a mixed question of fact and law. This Court reviews factual findings under the clearly erroneous standard. MCR 2.613(C). This Court reviews questions of law *de novo*. *People v. Laws*, 218 Mich.App. 447, 451 (1996). See also, *People v Tracey* 221 Mich App 321 (1997)

Discussion: Defendant Wooten's first trial was not going well for the Wayne County Prosecutor. The prosecution had no idea what its own witnesses were going to say at trial. He also had no idea that that in this homicide case, the victim, Alfonso Thomas, had a gun in his possession, which he had apparently pointed at the Defendant before the Defendant drew his own gun. The police witnesses had not connected the dots either, and had not even investigated the evidence found at the scene, including an empty gun holster. For example, witness Anthony Gary testified that the victim, Mr. Thomas, had grabbed Mr. Gary's gun, and further that the empty holster police found in the parking lot was his. (JT I at Day 2, 37-38.) On cross-

examination, Gary admitted that he failed to tell investigators that Thomas had pulled his gun off of him. (JT I at Day 2, 43.) Gary stated that his gun had ended up on the ground near the valet area after the shooting. (JT I at Day 2, 47.) Gary agreed he didn't "think" to tell the police that the Thomas was holding Gary's gun when Thomas was shot, nor did Gary test his gun to see if it had been fired that day. (JT I at Day 2, 50-51.) Mr. Gary admitted that he removed his gun from the scene because he "didn't want it to be a part of the situation." (JT I at Day 2, 62.)

Similarly, the prosecutor ran into trouble when he called Officer Latonya Brooks, assigned to homicide. (JT I at Day 2, 71.) She told the jury that it took four months to find the Defendant, and that Defendant Wooten did not come into the police station to explain his claim of self-defense. (JT I at Day 2, 72, 76.) After a question regarding whether the Officer had information regarding the victim's reputation, a sidebar was convened and the jury was sent out. (JT I at Day 2, 77.) When the prosecuting attorney began to speak, the court interrupted him and stated that per a discovery order issued on January 6, 2012, information regarding any criminal record a party has in its possession concerning any witnesses must have been turned over within two weeks of the order. (JT I at Day 2, 77.) When the prosecuting attorney stated that the victim could not testify and was therefore not a witness, the court replied that **he is a witness as he is the complaining witness, and that fact was included in the charging information.** (JT I at Day 2, 78.) A back-and-forth exchange occurred, in which the court expressed frustration with the prosecuting attorney. (JT I at Day 2, 79.) Defense counsel, Mr. Tuddles, stated that he had no documentation regarding the victim's criminal history even though he had requested that evidence from the prosecuting attorney. (JT I at Day 2, 80.)

Officer Brooks was allowed to testify that the victim, a valet and part time bouncer at a strip club, had a reputation for non-violence. (JT I at Day 2, 83.) On cross-examination, defense

counsel asked if Officer Brooks still would consider the victim a peaceful person in light of his criminal convictions (CCW, receiving stolen property, fleeing and eluding) and his parole from the Michigan Department of Corrections, and she doggedly re-affirmed her answer. (JT I at Day 2, 86.) Officer Brooks admitted that she did not request that the victim's hands be tested for residue powder to determine if he had fired a gun that night, nor had she tested the gun to see if it had been fired, nor did she have progress notes delineating her progress in the case. (JT I at Day 2, 92-105.) **Later, she stated that had she known about the second gun she would have tried to follow up on that lead. (JT I at Day 2, 105.)**

On redirect the prosecuting attorney, now painfully aware that his case against Defendant Wooten was beyond salvaging, asked Officer Brooks if **"In this case, would you have enjoyed talking to the Defendant?"** (JT I at Day 2, 106-108, 109 at lines 2-3.) She replied, "yes." Defense counsel immediately objected, the court sustained, and a sidebar ensued. Judge Callahan then directed his comments at the prosecuting attorney, stating he was disturbed that Mr. Kaplan would ask a question regarding statements "not being made" by the Defendant after he was specifically told to avoid the topic in an earlier conference. (JT I at Day 2, 109 at lines 11-21.) When asked to explain, Mr. Kaplan stated the question was asked in response to the claim that there was a second gun on cross-examination. (JT I at Day 2, 109 at lines 22-25.) He implied that the person with knowledge about the gun was the Defendant himself, and thus door was opened by the Defense. (JT I at Day 2, 110 at lines 1-3.)

Judge Callahan noted the weak nature of this explanation, and replied that there was already evidence of a second gun present due to the introduction of the holster found at the scene, and witnesses who testified that the holster would not have held a revolver as used by Defendant Wooten, but would only house a semi-automatic. (JT I at Day 2, 110.) Mr. Kaplan

stated that the defense had argued that the second gun had been fired, and thus the question was part of his proper response. The court corrected him, noting that the defense had asked questions regarding whether Officer Brooks would have wanted to test the gun to see “if” it had been fired. (JT I at Day 2, 111.) After lunch recess Defense counsel Tuddles addressed the court at length and requested a mistrial based on the prosecutor’s query into whether or not testimony from Defendant Wooten would have been helpful. (JT I at Day 2, 112-117.) Citing *Oregon v. Kennedy*, 456 U.S. 667 (1982), and *People v. Dawson*, 431 Mich. 234 (1988), defense counsel argued that the prosecutor believed his case to be a losing one and *purposefully* asked the question to allow for a new trial. (JT I at Day 2, 114.) He further argued that such action was prosecutorial misconduct, in light of Mr. Kaplan’s “20 plus years” of experience, and jeopardy should attach. (JT I at Day 2, 114, 116-117.)

Mr. Kaplan briefly responded that Mr. Tuddles was “wrong about the law,” and that *People v. Collier* and *Jenkins v. Anderson* both state that impeachment of a defendant’s pre-arrest silence is constitutional and permissible when “it would have been natural for a defendant to come forward.” (JT I at Day 2, 117-118.) He reiterated that the cross-examination of Officer Brooks as to a second gun triggered the legitimacy of such a question as he asked. (JT I at Day 2, 118.) He denied that the question was misconduct on his part. (JT I at Day 2, 118.)

Mr. Tuddles responded again at length, responding both to Mr. Kaplan’s argument and personal comments Mr. Kaplan made to Mr. Tuddles about Kaplan’s “winning” trial record. (JT I at Day 2, 118-120.) He reiterated witness testimony that evidenced a second gun was present, and argued that those witnesses do not have the same Fifth Amendment protections as the Defendant. (JT I at Day 2, 119.) Mr. Tuddles made it clear that the law protected a Defendant’s

silence but that other witnesses, who had also lied or not been forthcoming, were not protected. (JT I at Day 2, 120.)

The court then responded to the motion for a mistrial. In response to the prosecution's argument, the court considered *People v. Collier*, 426 Mich. 23 (1986) which cites *Commonwealth v. Nickerson*, 386 Mass. 54 (1982.) While the prosecution argued that impeachment with pre-arrest silence is valid per these precedents, the court stated that the Defendant could not even be impeached as he had not decided whether to testify at that point in the trial. (JT I at Day 2, 121-22.) The court stated that to justify the question posed to Officer Brooks in order to substantiate the second gun "is ludicrous" because of the other evidence already presented. The court continued that both *Nickerson* and *Collier* suggest there must be some "natural" consequence or circumstance that would prompt the defendant to come forward for this line of reasoning to be valid. (JT I at Day 2, 122.) Since the charges brought against Defendant Wooten were "almost instantaneous," Judge Callahan did not believe it would be a "natural thing" for the Defendant to come forward.

Judge Callahan then granted the motion for a mistrial without prejudice, insinuating that Mr. Kaplan had asked the question in "the heat of combat (which) overwhelms our rational decision making processes." (JT I at Day 2, 123.) Judge Callahan further commented *that he did not believe the jury would have found Mr. Wooten guilty, and would have given a directed verdict on count one* at the end of the prosecution's case. (JT I at Day 2, 126.) The judge commented on the prosecution's inability to bring forth three witnesses, his belief that the prosecution's case was "in the toilet," and the seeming lack of preparation in regards to witnesses Madison and Gary. (JT I at Day 2, 124, 126, 130.) He further stated that he was granting the mistrial without prejudice to give the prosecution "the benefit of the doubt." (JT I at Day 2, 127.)

Judge Callahan may have chosen to give the prosecutor the benefit of the doubt, but there is simply no way to argue that the prosecutor was not intentionally trying to taint this trial. Even Judge Callahan thought so- he tells the prosecutor he acted rashly and stated the prosecutor was in “the heat of combat overwhelms our rational decision making processes” In short this prosecutor knew better but in a panic, his conduct crossed the line into misconduct. The prosecutor asked a question he knew was constitutionally off limits; he had been warned about asking such impermissible questions earlier in the trial. He was a very experienced prosecutor. If a prosecutor intentionally causes a mistrial, re-trial is barred.

The case law is very straightforward on this legal issue. The Fifth Amendment of the United States Constitution protects a criminal defendant from being “twice put in jeopardy of life or limb” US Const, Am V; *People v Szalma* 487 Mich 708, 715-716(2010). The Michigan Constitution contains a parallel provision that this Court construes consistently with the Fifth Amendment. Const 1963, art 1, § 15; *Szalma* 487 Mich at 716. This provision protects a criminal defendant against multiple prosecutions for the same offense. *People v Lett* 466 Mich 206, 213-214, 215 (2002).

The trial court implicates this right when it declares a mistrial after the jury is empanelled and sworn. However, the Double Jeopardy Clause does not automatically bar a second trial when the trial court declares a mistrial. It is well settled, for instance, that where a defendant requests or consents to a mistrial, retrial is not barred” unless the prosecution provoked the defendant to request a mistrial.

If defense counsel argues that a mistrial is warranted but refuses to expressly consent to a mistrial the defendant has “consented to discontinuance of the trial by expressly objecting to

its continuance.” By moving the trial court for a mistrial, the defendant waives his or her double jeopardy claim *unless prosecutorial misconduct provoked the motion*. *Oregon v Kennedy* 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Dawson* 431 Mich 234, 253 (1988); *People v Gaval* 202 Mich App 51, 53; 507 (1993). A waiver is an intentional relinquishment of a known right. A defendant’s waiver extinguishe[s] any error.

The Dawson ruling has not been overturned, but continues in force. See *Tracey, supra* and the recent *People v Aaron Smith* COA#307755 (11/15/2012)(unpublished, per curiam)

The Double Jeopardy Clause does not bar all retrials. The Supreme Court of the United States has held that the charged offense may be retried where the mistrial was declared because of a hung jury. The Court has fashioned a balancing test focusing on the cause prompting the mistrial. The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made **an innocent error** or where the cause prompting the mistrial was **outside their control**. Where the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed if declaration of the mistrial was “manifest[ly] necess[ary]”.

Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim. Defendant Wooten notes and agrees where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the “objective facts and circumstances of the particular case,” that

the prosecutor intended to goad the defendant into moving for a mistrial. Thus, when a mistrial is declared, retrial is permissible under double jeopardy principles in two circumstances: (1) where there was “manifest necessity” to declare the mistrial or (2) where the defendant consented to the mistrial and was **not goaded** into consenting by intentional prosecutorial misconduct. See also *People v. Hicks*, 447 Mich. 819, 827-828, (1994)

Defendant Wooten asks this Court to consider that at his first trial, Judge Callahan, a very experienced trial Judge, was certainly under the impression that the prosecutor was in deep trouble. Judge Callahan then granted the motion for a mistrial without prejudice, insinuating that Mr. Kaplan had asked the question in “the heat of combat (which) overwhelms our rational decision making processes.” (JT I at Day 2, 123.) Judge Callahan further commented *that he did not believe the jury would have found Mr. Wooten guilty, and would have given a directed verdict on count one* at the end of the prosecution’s case. (JT I at Day 2, 126.) The judge commented on the prosecution’s inability to bring forth three witnesses, his belief that the prosecution’s case was “in the toilet,” and the seeming lack of preparation in regards to witnesses Madison and Gary. (JT I at Day 2, 124, 126, 130.)⁶ He further stated that he was granting the mistrial without prejudice to give the prosecution “the benefit of the doubt.” (JT I at Day 2, 127.) Judge Callahan further commented, “So, was it to the benefit of the prosecution to have had a mistrial granted without prejudice? You bet your sweet bippy.” (JT I at Day 2, 126 at lines 23-25.)

A trial court cannot give the Prosecution the “benefit of the doubt” here. If trial had continued, Judge Callahan stated he would have granted a directed verdict motion. The Defendant should have retracted his motion for a mistrial upon hearing that, but in good faith did

⁶ Judge Callahan commented, “I’d like to see you try a case in civil court with an experienced trial lawyer, Mr. Kaplan, you’d have your fanny handed to you in a basket.” (JT I at Day 2, 132, at lines 15-18.)

not. The prosecutor did not make an honest mistake. In fact, he argued that he meant to ask the offending question in violation of *Collier*. The Prosecution intentionally asked a prohibited question and knew Mr. Tuddles would move for a mistrial because the prosecutor wanted another bite at the apple. The Wayne County Prosecutor's office even replaced Mr. Kaplan with a different trial prosecutor for the second trial. The prosecution, woefully unprepared and faced with a case that seemed to show the Defendant was acting in self defense, was given the gift of a free do-over. At the second trial the people were much better prepared and had properly requested and provided evidence. Certainly, Defendant Wooten understands that this Court, and Judge Callahan, are loath to grant a mistrial with prejudice when it a homicide charge hangs in the balance. But what else will deter the prosecutors in Michigan from intentionally causing a mistrial unless they are held to the true intent of the double jeopardy clause? Defendants do not get another chance when a trial goes bad for them, and in an adversarial system, which we embrace, neither should the government. Defendant is entitled to Dismissal of his charges.

II. The jury verdicts of second-degree murder and assault with intent to murder are based on insufficient evidence and must be overturned.

Issue Preservation: This issue could not have been preserved below.

Standard of review: This Court reviews challenges to the sufficiency of the evidence *de novo* to determine whether a rational trier of fact could have found that the prosecutor proved that Defendant possessed the requisite intent to kill and was not acting in self-defense. *People v Harrison*, 283 Mich App 374, 377 (2009).

Discussion: The actual events that led to the shooting at the Pretty Woman Club on August 15, 2011 are less than clear even after considering all of the testimony of the prosecution witnesses. It appears that the various managers and bouncers at the Club were hiding or trying to hide the fact that they were carrying or using firearms that night. Viewing the testimony at trial in the light most favorable to the prosecution, see *People v Davis*, 241 Mich App 697, 700 (2000), there was insufficient evidence to allow the jurors to conclude that the Defendant was guilty beyond a reasonable doubt. Even if their testimony, often incomplete and inconsistent, is taken at face value, there is nothing indicating that the Defendant had developed an intent to kill- even the minimal intent required for second-degree murder. Indeed, it appears that he was frightened by the behavior of the Club staff members. Defendant asks this Court to find that the evidence is insufficient to support his conviction here of second-degree murder and assault with intent to murder. Defendant's convictions must be reversed.

III. The Prosecutor committed misconduct when, during closing argument, he argued that the Defendant must be guilty since he did not turn himself in or provide information to law enforcement about his involvement in the crime.

Issue Preservation: Although the record does not contain the exact objection of the Defendant's attorney, he did make an objection to this line of argument and the prosecutor chose to move on to a different argument after a bench conference. (JT II Day 4 at 35-84)

Standard of Review: Claims of prosecutorial misconduct are generally reviewed *de novo* to determine whether the defendant was denied a fair trial. *People v Wilson* 265 Mich App 386, 393 (2005). The constitutional privilege against self-incrimination and the right to due process restricts the use of a defendant's silence in a criminal trial.

People v Dennis 464 Mich 567, 573 (2001).

Discussion: During his closing, the prosecutor argued "And then he [Defendant Wooten] hid out for four months before the Fugitive Apprehension Team finally found in him in another county. Does that sound to you like he had an honest and reasonable belief that he had to do what he did? Does that behavior sound like the behavior of a killer?" . (JT II at Day 4, at 35.) the Defendant] also admitted he ran away, he spent a night in the alley; that he either threw away or lost the murder weapon that night; that he talked to lawyers almost right away; that he didn't turn himself in; that he didn't reach out to anybody in law enforcement prior to his arrest and say, hey, you got this thing wrong. I know you're looking for me. You don't know what's going on. He agreed to all of that. He wants us to believe he did that on advice of counsel? Ladies and gentlemen, use your common sense and reason, please."

After the above statements, Mr. Tuddles asked to approach and a sidebar was held. (JT II at Day 4, at 83-84.) Nothing of note occurred as a result although it appears that

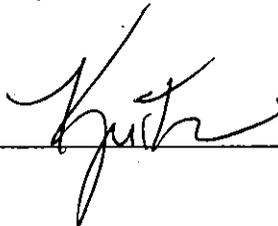
the Defendant objected to this improper argument. It can be assumed that the Court directed Mr. Harrison to discontinue this argument, as he did not mention the Defendant's pre-arrest silence again, and just continued with his rebuttal statement.

In this trial, where the prosecutor's own witnesses lied about the use of a gun, hid evidence, and were generally not forthcoming, it is hard to see how any Defendant would be expected to behave in an upstanding manner following such a terrifying event. The prosecutor has a duty to not ask the jury to consider the Defendant's silence. *A Defendant has no duty to come forward with testimony about what happened when he or she is charged with a crime (see issue 1, supra).* The Prosecutor committed misconduct and Defendant Wooten is entitled to a new trial.

RELIEF REQUESTED/ORAL ARGUMENT PRESERVED

WHEREFORE, Defendant **John Oliver Wooten** respectfully requests that this Court ORDER that the Defendant is entitled to Dismissal of the charges herein or a New Trial pursuant to MCR 7.203. His Pleading was timely filed.

Respectfully submitted,



BY: Kristina Larson Dunne P45490
Attorney for Defendant
P.O. Box 97
Northville MI 48167

Date: August 12, 2014

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee.

v

JOHN OLIVER WOOTEN,

Defendant-Appellant.

UNPUBLISHED

June 26, 2014

No. 314315

Wayne Circuit Court

LC No. 11-012794-FC

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm (“felon-in-possession”), MCL 750.224f, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.11, to 30 to 50 years’ imprisonment for the second-degree murder conviction, 30 to 50 years’ imprisonment for the assault with intent to murder conviction, four to seven years’ imprisonment for the felon-in-possession conviction, and five years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that, when the trial court granted his motion for a mistrial, it erred when it did not do so with prejudice, which would have barred retrial on double-jeopardy grounds. We disagree.

To preserve appellate review of a double-jeopardy violation, a defendant must object at the trial court level. See *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Because defendant did not object to the trial court’s decision to grant the motion for a mistrial without prejudice, this issue is not preserved. However, double-jeopardy issues “present[] a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court.” *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). This Court reviews “an unpreserved claim that a defendant’s double jeopardy rights have been violated for plain error that affected the defendant’s substantial rights, that is, the error affected the outcome of the lower court proceedings. Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *McGee*, 280 Mich App at 682. The trial court’s factual findings regarding whether the prosecutor “intended to goad the defendant

into moving for a mistrial” are reviewed for clear error. *People v Dawson*, 431 Mich 234, 258; 427 NW2d 886 (1988). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” US Const, Am V. “No person shall be subject for the same offense to be twice put in jeopardy.” Const 1963, art 1, § 15. The Michigan Constitution’s protection against double jeopardy is set forth in the same test used by federal courts, as stated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932): “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *People v Smith*, 478 Mich 292, 311; 733 NW2d 351 (2007).

“When a mistrial is declared, retrial is permissible under double jeopardy principles where manifest necessity required the mistrial or the defendant consented to the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or judge, or by factors beyond their control.” *People v Echavarría*, 233 Mich App 356, 363; 592 NW2d 737 (1999). “Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar.” *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997) (quoting *Dawson*, 431 Mich at 257). “The balance tilts, however, where the judge finds, on the basis of the ‘objective facts and circumstances of the particular case,’ that the prosecutor intended to goad the defendant into moving for a mistrial.” *Id.* (quoting *Dawson*, 431 Mich at 257). “Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [the] defendant’s motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.” *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982).

At the first trial, the officer-in-charge, LaTonya Brooks, testified during cross-examination that she was not aware before trial that a second gun had been “present and had been pulled” by Alfonso Thomas, the deceased victim. During redirect examination, the prosecutor attempted to rehabilitate Brooks by asking questions prompting answers to the effect that there was no evidence of a second gun at the scene of the shooting that would have directed the investigation toward Anthony Gary’s pistol. The prosecutor then asked, “In this case, would you have enjoyed talking to the [d]efendant?”

Defendant immediately objected, and an on-the-record sidebar conference was held at which the prosecutor explained that he was attempting to rebut defendant’s theory that Thomas fired Gary’s semiautomatic pistol, which had not been tested by or turned into police, toward defendant, causing defendant to fire back in self-defense. Defendant moved for a mistrial, arguing that the question violated his Fifth Amendment right against compelled self-incrimination, and that the prosecution deliberately asked the improper question so that defendant’s forthcoming motion would be granted and the prosecution “would have a second strike” at the case. The prosecution responded that impeaching a defendant with evidence of his prearrest silence was permissible where “it would have been natural for a defendant to come

forward.” Because defendant implied, in the course of cross-examining Brooks, that she failed to obtain relevant facts about Gary’s gun from Gary and Omar Madison, defendant opened the door to the suggestion that defendant was equally capable of providing Brooks with that information, the prosecution argued.

The trial court found that the facts did not create a situation in which it would have been natural for defendant to come forward because the “charges brought against the defendant were probably almost instantaneous, and then he was not . . . found until December 3, 2011, which was almost . . . four months later.” The judge granted defendant’s motion for a mistrial without prejudice, explaining:

Sometimes when we wind up getting involved in the give and take of a trial, the heat of combat overwhelms our rational decision making processes, and . . . that may very well have been the situation today. I don’t believe that the last question that was posed to [Brooks] was directly intended to impeach the credibility of the defendant. As I said, even though [defendant] had not even testified as yet, or even made an election in that regard, or was consciously thought of by the prosecution as calling into question the defendant’s right to remain silent guaranteed to him under the Fifth Amendment to the Constitution. So, I’m not going to dismiss this case with prejudice.

The trial court did not clearly err when it found that the prosecutor did not intend to create the conditions sufficient to justify declaration of a mistrial. Defendant’s argument to the contrary is premised on the theory that the “first trial was not going well” for the prosecution because it “had no idea what its own witnesses were going to say” and the police “had not . . . investigated the evidence found at the scene, including an empty gun holster.” In an effort to buy more time, defendant argues, the prosecutor deliberately asked Brooks a question, concerning defendant’s failure to come forward during the investigation, that violated defendant’s constitutional right against compelled self-incrimination.

On appeal, the prosecution argues that the question was not designed to draw a motion for a mistrial, and further that the question did not violate defendant’s constitutional rights because it concerned his prearrest silence. “No person . . . shall be compelled in any criminal case to be a witness against himself.” US Const. Am V; Const 1963, art 1, § 17. This privilege is violated when the prosecution comments on a defendant’s postarrest, post-*Miranda*¹ silence. *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Borgne*, 483 Mich 178, 186-187; 768 NW2d 290 (2009). However, a defendant’s prearrest silence, as well as his silence after arrest but before he receives *Miranda* warnings, may be used against him because the “use of a defendant’s silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him.” *Fletcher v Weir*, 455 US 603, 606-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 240; 100 S Ct

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

2124; 65 L Ed 2d 86 (1980) (“[N]o governmental action induced [the defendant] to remain silent before arrest.”); *Borgne*, 483 Mich at 187-188.

“Neither the Fifth Amendment nor the Michigan Constitution preclude[s] the use of prearrest silence for impeachment purposes.” *People v Clary*, 494 Mich 260, 266; 833 NW2d 308 (2013) (internal punctuation omitted). “[W]here a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant’s silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant’s Fifth Amendment privilege.” *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004).

Defendant appears to take for granted the fact that the prosecutor violated his right against compelled self-incrimination, citing case law holding that a retrial is barred if a defendant’s motion for a mistrial is prompted by prosecutorial misconduct, but offering no authority to support his position that the prosecutor’s question to Brooks—“In this case, would you have enjoyed talking to the [d]efendant?”—actually constituted misconduct or was contrary to case law interpreting the Fifth Amendment and its counterpart in the Michigan Constitution. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Because the prosecutor’s question referred to defendant’s failure to present investigators with an explanation that he acted in self-defense, that is, before he was arrested or received *Miranda* warnings, and because there was no indication that he was invoking his Fifth Amendment right to silence, evidence of defendant’s prearrest silence was admissible as substantive evidence of his guilt, subject to the Michigan Rules of Evidence. *People v Hackett*, 460 Mich 202, 214; 596 NW2d 107 (1999) (“The issue of prearrest silence is one of relevance.”); *Solmonson*, 261 Mich App at 665. Defendant’s failure to come forward was especially relevant following defendant’s cross-examination of Brooks wherein the implication of his line of questions was that defendant was falsely accused as the result of an inept police investigation that failed to uncover the gun that was fired toward defendant. Because the prosecutor’s question was proper, the question was not misconduct, and, therefore, there was no basis upon which to grant defendant’s motion for a mistrial with prejudice.

Defendant next argues that there was insufficient evidence to sustain his convictions of second-degree murder and assault with intent to murder. We disagree.

Due process requires that the evidence must have shown the defendant’s guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

“In order to convict a defendant of second-degree murder, the prosecution must prove: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (internal quotations

omitted). “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful [sic] disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* “Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Id.* (internal quotations omitted). Malice may likewise be “inferred from the use of a deadly weapon.” *People v McMullan*, 284 Mich App 149, 153; 771 NW2d 810 (2009), aff’d 488 Mich 922 (2010). “The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.” *Roper*, 286 Mich App at 84.

“The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and footnote omitted). The malice element of second-degree murder is necessary, but not sufficient, to satisfy the intent element of assault with intent to murder. *Brown*, 267 Mich App at 148-149.

Defendant’s only argument against the sufficiency of the evidence is that the prosecution’s witnesses “were hiding or trying to hide the fact that they were carrying or using firearms” on the night of the shooting, and that their testimony was “often incomplete and inconsistent.”² However, the weight of the evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence are questions that are resolved by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).

There was sufficient evidence for a rational trier of fact to have found each element of second-degree murder and assault with intent to murder proved beyond a reasonable doubt. Four witnesses saw defendant shoot Thomas. Madison said that defendant and Thomas were approximately four feet apart. The witnesses agreed that defendant fired at least three and as many as five shots. Defendant threatened Madison with a gun after a confrontation approximately two weeks before the shooting involving defendant’s having thrown a drink at Madison, and, on the night of the shooting, was overheard making threatening comments relating to robbing the club and repeatedly refused to be searched for weapons. Regarding the intent element of assault with intent to murder, *Brown*, 267 Mich App at 147, the jury could rationally have concluded that defendant bore a grudge against Madison—for the drink-throwing incident two weeks before the shooting, for refusing to allow defendant to enter the club with his revolver, and for physically removing him from the club upon his refusal to be searched—and therefore had the requisite intent to kill Madison.

Notwithstanding the prosecution’s “burden of disproving the common law defense of self-defense beyond a reasonable doubt,” *People v Dupree*, 486 Mich 693, 710; 788 NW2d 399

² Defendant does not cite to the lower court record in this issue. “Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court.” MCR 7.212(C)(7); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

(2010), defendant's theory of self-defense was implausible. It began with his admission that he refused to be searched for no apparent reason, continued with his statement that Madison then grabbed him for no apparent reason, and concluded with his failure, for approximately four months, to inform police that he acted in self-defense and that Gary held the gun that defendant maintained was used to fire at him. Reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the elements of second-degree murder and assault with intent to murder were proved beyond a reasonable doubt.

Defendant next argues that the prosecutor committed misconduct during closing argument by twice referring to defendant's prearrest silence. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). This issue is not preserved because defendant did not object during closing argument. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Reversal is not required "where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Id.*

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant claims that a "prosecutor has a duty to not ask the jury to consider" a defendant's silence, citing no law in support of that statement.³ Although that is the general rule, *Borgne*, 483 Mich at 186-187, the prosecution is entitled to use a defendant's prearrest silence, both for impeachment purposes and as substantive evidence of guilt, without offending the Fifth Amendment or the Michigan Constitution. *Clary*, 494 Mich at 266; *Solmonson*, 261 Mich App at 665. The first excerpt of closing argument to which defendant refers—"And then [defendant] hid out for four months before the Fugitive Apprehension Team finally found him in another county. Does that sound to you like he had an honest and reasonable belief that he had to do what he did?"—was designed to impeach defendant's credibility following his testimony that he acted in self-defense.

In the second excerpt defendant claims was erroneous, the prosecutor said:

[Defendant] also admitted he ran away, he spent a night in the alley; that he either threw away or lost the murder weapon that night; that he talked to lawyers almost right away; that he didn't turn himself in; that he didn't reach out

³ "Argument must be supported by citation to appropriate authority or policy." MCR 7.212(C)(7); *Payne*, 285 Mich App at 188.

to anybody in law enforcement prior to his arrest and say, ["H]ey, you got this thing wrong. I know you're looking for me. You don't know what's going on.[""] He agreed to [sic] all of that. He wants us to believe he did that on advice of counsel?

This was a proper use of defendant's silence, before he was arrested and given *Miranda* warnings, in response to his claim that he did not come forward for four months as a result of speaking to a lawyer he did not retain. "[N]onverbal conduct by a defendant, a failure to come forward, is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances." *Clary*, 494 Mich at 285 n 12. Because the prosecutor's commentary on defendant's prearrest silence conformed to case law interpreting the constitutional right against compelled self-incrimination, defendant has not demonstrated misconduct.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellee

COA: 314315

LCT: 11-012794-01 FC

SCT:

v.

JOHN OLIVER WOOTEN,

Defendant/Appellant

Kristina Larson Dunne
Attorney for Defendant-Appellant
PO Box 97
Northville MI 48167
248 895 5709



Notice of Hearing

This case will come before this Court for hearing on September 9, 2014

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

COA: 314315

LCT: 11-012794-01 FC

Plaintiff/Appellee

v.

John Oliver Wooten
Defendant/Appellant

Kristina Larson Dunne P 45490
P. O. Box 97 Northville MI 48167
Attorney for the Defendant
248 895 5709

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I, KRISTINA L. DUNNE hereby affirm that on 8/13/14I served a copy of the Defendant's Application for Leave to Appeal, as well as this Proof of Service upon:

Prosecuting Attorney Wayne County
1441 St. Antoine
Detroit MI 48226

via first class mail service

Dated: August 13, 2014



Kristina Larson Dunne Attorney at Law

P.O. BOX 97 NORTHVILLE MI 48167 248 895 5709

August 13, 2014

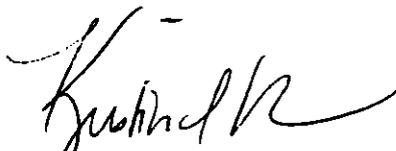
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052, Lansing, MI 48909

Re: People v Wooten COA#314315

Dear Sir or Madam:

Please find enclosed Defendant's **Application for Leave to Appeal** for filing in your Court,
plus eight copies, and Proof of Service.

Sincerely,



Kristina L. Dunne

cc: file
Wayne County Prosecutor-Appellate Division
COA Detroit

