STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs,

v

NO: 14-251162-FC
Honorable Michael Warren

ALEX JAY ADAMOWICZ,

Defendant.

OPINION, FINDING AND ORDER REGARDING EVIDENTIARY HEARING PURSUANT TO *PEOPLE v GINTHER*, 390 MICH 436 (1973) UPON REMAND FROM THE COURT OF APPEALS AT DIRECTION OF THE SUPREME COURT

At a session of said Court, held in the County of Oakland, State of Michigan on March 9, 2020

PRESENT: HON. MICHAEL WARREN

I

Introduction

Upon remand by the Michigan Court of Appeals, at the direction of the Supreme Court pursuant to an Order dated October 24, 2018 and an Order of the Court of Appeals dated November 21, 2018, this Court conducted an exhaustive and comprehensive evidentiary hearing regarding whether the Defendant, Alex Jay Adamowicz, was deprived of his right to the effective assistance of counsel in his trial and conviction for first degree premeditated murder. The hearing was

conducted on two issues: (1) "the failure to call an expert witness" and (2) "the failure to object to the prosecutor's errors" of (a) "asking the jury to consider the defendant's 'moral duty' to retreat from his own dwelling in relation to his self-defense claim" and (b) "eliciting testimony and presenting argument regarding the defendant's retrospective assessment of his ability to retreat, where it was undisputed that the defendant had no duty to retreat."[1]

At stake is whether the Defendant's conviction for first degree premeditated murder should be reversed when:

- Defense counsel's decision not to call an expert was an objectively reasonable part of the Defendant's defense strategy;
- even if an expert had been called, because such testimony was not credible, there was no reasonable probability that the result of the trial would have been changed;
- Defense counsel's decision not to object with regard to the prosecutor's errors was an objectively reasonable part of the Defendant's tactical decision process; and
- even if Defense counsel had objected to the prosecutor's errors, there was no reasonable probability that the results of the trial would have changed.

[1] Order of the Supreme Court dated October 24, 2018.

II

Ineffective assistance of counsel

"Both the United States Constitution and the 1963 Michigan Constitution guarantee defendants the right to the effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20." *People v Jurewicz*, ___ Mich App ___ (2019) (slip opinion at 2). See also *People v Trakhtenberg*, 493 Mich 38, 51 (2012) ("Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense"). A claim of ineffective assistance of counsel is a mixed question of constitutional law and fact. See e.g., *Trakhtenberg*, 493 Mich at 51; *People v Petri*, 279 Mich App 407, 410 (2008); *People v Russell*, 297 Mich App 707, 715 (2012); *Jurewicz*, ___ Mich App at ___ (slip opinion at 2). More specifically, the appellate courts "review[] for clear error the trial court's findings of fact and review[] de novo questions of constitutional law." *Trakhtenberg*, 493 Mich at 47. See also *Jurewicz*, ___ Mich App at ___ (slip opinion at 2).

To make a showing of the ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *Trakhtenberg*,

493 Mich at 51, citing *People v Armstrong*, 490 Mich 281, 290 (2011). See also *People v Toma*, 462 Mich 281, 302 (2000) ("For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial"); *People v Pickens*, 446 Mich 298, 303 (1994); *People v Ginther*, 390 Mich 436, 442 n 5 (1973) (noting that "it [is] incumbent upon a defendant, who seeks to have his guilty plea set aside because of misadvice of his lawyer, to show that the advice rendered was outside the 'range of competence demanded of attorneys in criminal cases'"); *People v Johnson*, 313 Mich App 163, 174 (2016), quoting *People v Heft*, 299 Mich App 69, 80-81 (2012) ("'To establish ineffective assistance of counsel, the 'defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant'"); *Russell*, 297 Mich App at 715-716, quoting *Armstrong*, 490 Mich at 289-290 (2011) ("A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a

different result would have been reasonably probable"). Accord *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In examining whether defense counsel's performance fell below an objective standard of reasonableness, "a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, 462 Mich at 302. See also *People v Hoag*, 460 Mich 1, 6 (1999); *People v Mitchell*, 454 Mich 145, 156 (1997); *People v Russell*, 297 Mich App 707, 715-716 (2012). Thus, "[t]he question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases." *People v Thew*, 201 Mich App 78, 89-90 (1993). See also *In re Oakland Co Prosecutor*, 191 Mich App 113, 121 (1991). The Court is not permitted to "second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *Russell*, 297 Mich App at 716. See also *People v Horn*, 279 Mich App 31, 39 (2008).

In *Harrington v Richter*, 562 US 86, 104; 131 S Ct 770, 787-788; 178 L Ed 2d 624 (2011), the United States Supreme Court elaborated on the deficient performance and prejudice requirements:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an

objective standard of reasonableness." [*Strickland*, 466 US at 688]. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*, at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*, at 687.

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687.

Thus, a reviewing court's authority to find ineffective assistance of counsel is very limited:

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v Kentucky*, 559 US [356, 371-372; 130 S Ct 1473, 1485; 176 L Ed 2d 284 (2010)]. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to service. *Strickland*, 466 US at 689-690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; see also *Bell v Cone*, 535 US 685, 702[; 122 S Ct 1843; 153 L Ed 2d 914] (2002); *Lockhart v Fretwell*, 506 US 364, 372[; 113 S Ct 838; 122 L Ed 2d 180] (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms,"

> not whether it deviated from best practices or most common custom. *Strickland*, 466 US at 690.
>
> [*Id.* at 105.]

In addition, a defendant claiming a denial of ineffective assistance of counsel, "must establish a record factually supporting his claim." *People v Adams*, 76 Mich App 384, 385 n 1 (1977) (per curiam). In other words, "'[t]o the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately.'" *Ginther*, 390 Mich at 442-443, quoting *People v Jelks*, 33 Mich App 425, 431 (1971). See also *Hoag*, 460 Mich at 6, quoting *Ginther*, 390 Mich at 442-443. Accordingly, "[a] defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the processes of the appellate courts except in the rare case where the record manifestly shows that the judge would refuse a hearing; in such a case the defendant should seek on appeal, not a reversal of his conviction, but an order directing the trial court to conduct the needed hearing." *Ginther*, 390 Mich at 443-444. However, a trial court commits reversible error in granting a new trial after a *Ginther* hearing predicated upon ineffective assistance of

counsel if the defendant fails to show that the asserted failure to call witnesses "deprive[d] the defendant of a substantial defense;" that an asserted "failure to make an adequate investigation . . . undermines confidence in the trial's outcome;" that an asserted failure to object to violation of the defendant's Sixth Amendment right to a public trial does not "affect[] his substantial rights . . . result[ing] in the conviction of an actually innocent defendant or seriously affect[ing] the fairness, integrity or public reputation of the judicial proceedings;" and/or where there is no merit to the objection the defendant asserts should have been made. *Russell,* 297 Mich App at 720 (citations omitted) (reversing trial court's finding of ineffective assistance of counsel after a *Ginther* hearing).

III

Defendant's Arguments

Although this record is voluminous, the gravamen of the Defendant's assertion is that he received the ineffective assistance of counsel because:

- Defense counsel failed to investigate and call an expert regarding the Defendant's post-traumatic stress disorder which could "contextualize

and explain" the Defendant's "conduct" after the murder would have "negate[d] the prosecutor's theory of the case;"[2] and

- Defense counsel "failed to object to prosecutorial error and misstatement of the law" by (a) "asking the jury to consider the defendant's 'moral duty' to retreat from his own dwelling in relation to his self-defense claim" and (b) "eliciting testimony and presenting argument regarding the defendant's retrospective assessment of his ability to retreat, where it was undisputed that the defendant had no duty to retreat."[3]

IV

Defense counsel's decision not to call an expert was an objectively reasonable part of the Defendant's defense strategy and even if an expert had been called, because such testimony was not credible, there was no reasonable probability that the result of the proceeding would have been changed

A

The decision not to investigate and hire an expert about the Defendant's alleged PTSD was objectively reasonable in light of the circumstances of the murder, the report of the Forensic Center and similar data, the Defendant's own recommendations about how to defend the case, and such a defense would have resulted in the introduction of evidence prejudicial to the Defendant

Defense counsel in this matter made an objectively reasonable strategic choice to defend the case as a matter of self-defense. The proposition that to receive the effective assistance of counsel, Defense counsel was required to

[2] Defendant's Brief pp 15 and 17.
[3] *Id.*, p 27 and Supreme Court Order dated October 24, 2018.

engage and present an expert to contextualize the Defendant's behavior at the time of the murder and his post-murder conduct falls far short.

First, the circumstances of the case made focusing on self-defense (and not being distracted by the sideshow of PTSD) a solid trial strategy. The Defendant did not deny killing the victim. The Defendant stuffed the victim's body in his apartment's closet. The Defendant claimed he was attacked by the victim, feared for his life, defended himself, slew the victim, and then panicked and cleaned up the mess. How is self-defense not an objectively reasonable strategic choice?

Second, all of the pertinent data, including an evaluation by the State of Michigan, Department of Community Health, Center for Forensic Psychiatry (intermittently, the "Forensic Center"), supported focusing on self-defense, not PTSD. Although Defense appellate counsel dismisses the efforts of trial counsel in connection with investigating mental health and related issues in connection with a trial strategy, that argument is belied by reality. Defense counsel asked that the Defendant be evaluated by the Forensic Center, and the Court ordered the same. The stipulated order specifically provided "That the Center for Forensic Psychiatry shall examine the Defendant and include in their written report **a full diagnosis and discussion of *any* mental illness,** ailments, and conditions **that currently exist or *existed at the time of the incident.***" Pursuant

to that Order, the Forensic Center issued a report dated September 24, 2014. The report listed as its Sources of Information an interview with the Defendant, a review of police reports and witness statements, an administrative and interpretation of psychological testing consisting of the Personality Assessment Inventory ("PAI"), and **telephone contact with Defense Counsel.** In the course of the Relevant History section, the Defendant disclosed in an interview that he had been seeing a therapist for the three years prior to the murder, that he was admitted to St. John's Providence Hospital at the age of 18 following a suicide attempt, that he was prescribed antidepressant medications, and that he took psycho-stimulate medications to treat attention deficit hyperactivity disorder. **The Defendant specifically stated that "he did not believe that an insanity defense was his best option, stating 'I'm not insane. I believe my best bet is to plead self-defense because the guy attacked me with a knife first. I don't have any history of the kinds of mental problems that would cause me to be insane.'"** He disclosed he had steady jobs, including one at the time of the murder. He admitted an extensive substance abuse history. In connection, with its finding regarding Criminal Responsibility, the report opined:

> Although his reportedly extreme level of intoxication at the time likely negatively impacted his judgment and decision making, it is the understanding of this examiner that solely being under the influence of voluntarily consumed alcohol and other intoxicating substance is not grounds for an insanity defense. With regard to intellectual disability, there is no information to indicate that Mr. Adamowicz would meet the statutory criteria for this condition, in that he conveyed clearly and accurately, reported that he graduated

> from high school in regular classes, and has been gainfully employed. Similarly, he denied a history of psychiatric symptoms that would qualify him for the statutory definition of mental illness. Since neither of the threshold conditions were met, Mr. Adamowicz would not qualify for the insanity defense, and therefore it is the opinion of this examiner that Mr. Adamowicz did not meet the statutory criteria for insanity at the time of the alleged offense.

Furthermore, the Defendant consistently denied being depressed or having suicidal thoughts and never raised the issue of PTSD until after he was convicted. This was true with his own counsel, the Forensic Center, the jail (at booking), his interactions at the Oakland County Jail with the nursing and other staff, and even with his prior medical treaters.[4] That Defense counsel should have ignored the suggestion of his own client to rely on self-defense, and instead conjure a new theory based on PTSD, is nothing more than hindsight second-guessing that is prohibited by the United States Supreme Court.

In light of all of the foregoing, Defense counsel's decision to focus on self-defense and not be side-tracked by PTSD was objectively reasonable.

Third, the Defendant himself knew that self-defense was his best trial strategy. He said so to the Forensic Center. The Defendant retained Defense counsel and had a strong working relationship. Defense counsel concurred with his client. As such, focusing the case on self-defense was objectively reasonable.

---

[4] See pp 9-15 of the People's Post-Hearing Bench Brief.

Fourth, Defense counsel knew if an expert was called, the People would call a rebuttal witness, likely resulting in highly prejudicial evidence to be used against the Defendant. This battle of the experts would almost certainly shift the focus away from the viable self-defense strategy and place the Defendant into a nonviable defense of PTSD. Dr. Kane's testimony would have inescapably led to his disclosure that people with the Defendant's personality profile, a schizoid personality, "had histories of committing domestic violence with possible danger to those smaller and weaker than they were."[5] Here, the victim was frail, physically disabled, 30 years older than the Defendant, and amazingly intoxicated (with a blood alcohol content of .30 and fentanyl in his system). Dr. Kane's report also concluded that individuals similar to the Defendant's personality profile generally had poorly developed consciences, and did not identify with conventions, moral and ethical standards, and rules and regulations. They were also aggressive, anti-social, amoral, indifferent, manipulative, impulsive, narcissist, and overreact. This portrait of an amoral, aggressive, and anti-social personality would likely have ruined any chance of a being believed by the jury. Moreover, his personality profile of lacking of moral and ethical standards, indifference to rules and regulations, and being manipulative with a poorly developed conscience would only serve to undermine his credibility before the jury. If the Defendant made the choice not

[5] People's Exhibit 5 at 17, 28; Transcript 4/29/19 at 261.

to testify in light of the report, then his self-defense claim would be crippled. And that does not even consider the damning testimony from the People's expert which utterly eviscerated the Defendant's argument. The Defendant was wise to stay clear of this issue, and Defense counsel was objectively reasonable to do the same.

Fifth, Defense counsel's decision was objectively reasonable because the PTSD defense simply was not viable for the reasons articulated in Section IV B below.

"Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *Russell,* 297 Mich App at 716. See also *People v Rockey,* 237 Mich App 74, 76-77 (1999). "'[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.' *People v Dixon,* 263 Mich App 393, 398 (2004)." *Russell,* 297 Mich App at 716. Likewise, "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant,* 479 Mich 477, 493 (2004). See also *Russell,* 297 Mich App at 716; *Jurewicz,* ___ Mich App at ___ (slip opinion at 2).

In sum, Defense counsel's strategy to focus on self-defense was a solid trial strategy. That this argument ultimately failed does not mean it was

ineffective. Indeed, this Court may "not substitute its judgment for that of counsel regarding matters of trial strategy." *Rockey*, 237 Mich App at 77. See also *Strickland*, 466 US at 769; *Payne*, 285 Mich App at 190. Accordingly, "the fact that defense counsel's strategy ultimately failed does not render it ineffective assistance of counsel." *Jurewicz*, ___ Mich App at ___ (slip opinion at 2-3). See also *People v Stewart*, 219 Mich App 38, 422 (1996). As the United States Supreme Court has elaborated:

> Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach. It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it.
>
> [*Harrington*, 562 US at 106 (internal citations and quotation marks omitted).]

This is not one of those rare cases.

Moreover, trial counsel's after-the-fact self-assessment at the *Ginther* hearing that he was ineffective for not investigating the Defendant's mental state is neither credible nor relevant. First, based on the Court's assessment of the credibility, demeanor, veracity, vocal tone and expression, tonality, and

honesty of the witnesses, exhibits, and reasonable inferences of the same, Defense counsel's *Ginther* hearing concession of error and falling on the sword for his client was not credible - it was offered, perhaps in even good faith, to assist his client in his appeal. Second, the trial counsel's subjective retroactive judgment of his own performance is irrelevant. The issue is whether his performance was so deficient that it fell below an objective standard of reasonableness. See, e.g., *Trakhtenberg*, 493 Mich at 51; *Armstrong*, 490 Mich at 290; *Toma*, 462 Mich at 302; *Johnson*, 313 Mich App at 174. As such, trial counsel's profession of error is of no moment and weight. See, e.g., *Ebert v Gaetz*, 610 F3d 404, 416 (CA 7, 2010) ("It is of no moment that the court neglected to give weight to Ebert's attorney's assessment of his performance as constitutionally ineffective. *See McAfee v Thurmer*, 589 F3d 353, 356 [CA 7, 2009] [noting that attorney 'reflection after the fact is irrelevant to the question of ineffective assistance of counsel']; *Chandler v United States*, 218 F3d 1305, 1315 n 16 [CA 11, 2000] [en banc] ["Because the standard is an objective one, that trial counsel . . . admits that his performance was deficient matters little']).

In light of the foregoing, Defense counsel's performance was objectively reasonable.

B

Even if an expert had been called, because such testimony was not credible, there was no reasonable probability that the result of the proceeding

would have been changed

Based on the Court's assessment of the credibility, demeanor, veracity, vocal tone and expression, tonality, and honesty of the witnesses, exhibits, and reasonable inferences of the same, the Defendant's expert was simply not credible. At times it was obvious to this Court - and would almost certainly be to any jury - that the expert was straining credibility to paint the Defendant in a sympathetic light. The battle of the experts did not go well for the Defendant. Although the expert was likeable and very knowledgeable, his conclusions about the Defendant were hyper-technical and clearly glossed over material facts presented by the murder scene, the Defendant's own statements, and the People's expert. More importantly, the expert's opinion flies in the face of common sense and the experiences of life, and a reasonable jury would reject it outright as the desperate attempt of a paid expert to help his client and/or earn his fee. In the end, this court rejects Dr. Kane's opinion. To the extent this Court's over 17 years of trial court experience matters, including presiding over 370 jury trials, everything also points to the rejection of this testimony by the jury. The result of the proceeding would not have changed. Period.

V

Defense counsel's decision not to object to the prosecutor's errors of asking the jury to consider the Defendant's "moral duty" to retreat from his own dwelling in relation to his self-defense claim and eliciting testimony and presenting argument regarding the Defendant's retrospective assessment of his ability to retreat, was objectively reasonable; even if Defense counsel had objected to the prosecutor's errors, there was no reasonable probability that the results of the proceeding would have changed

A

The decision to not object to the prosecutor's errors of asking the jury to consider the Defendant's "moral duty" to retreat from his own dwelling in relation to his self-defense claim and eliciting testimony and presenting argument regarding the Defendant's retrospective assessment of his ability to retreat was objectively reasonable

Defense counsel is faulted for failing to object to certain arguments, questions, and evidence involving the Defendant's moral duty to retreat. The Supreme Court has determined the admission of certain evidence and the People's argument was in error. The question is whether Defense counsel's failure to object constituted the ineffective assistance of counsel.

There is nothing more common in the experience of this Court than lawyers purposefully relinquishing objections to inadmissible arguments and evidence. Hearsay, speculation, conjecture, and inappropriate appeals to sympathy or prejudice are just a few of the areas where this is routine. This happens for a variety of reasons. First, the lawyer may actually want the argument or evidence before the jury. Second, the lawyer may want to accept

that evidence or argument so that it can open a door to other arguments or evidence the lawyer desires to present. Third, the lawyer may want to present to the jury that the lawyer is professional, and each objection raises the danger of irritating the jury and poisoning the goodwill that the jury might have for the lawyer and his or her client. There is a balancing act - do I object for the fifth time in the last hour and raise the ire of the jury? Fourth, the objection runs the substantial risk of highlighting for the jury the evidence or argument that is objectionable. There could be a protracted argument in front of the jury about whether the evidence or argument is permissible. All the while it is spinning around in the ether in front of the jury. Often, it is best to stay silent and let it pass. Fifth, the objection could run the risk of the jury wondering what is the party hiding? Sixth, the lawyer may believe that he or she can defeat the evidence or arguments with counter-evidence or counter-argument. Seventh, the lawyer may believe he or she can defeat the evidence or arguments through cross-examination. Eighth, the lawyer may understand that the jury instructions will remedy the error. Ninth, time. Although perhaps not a consideration when reviewing the cold transcript, time is of the essence in a trial. The parties and judge have projected a time by which the trial will be done. Objections can consume an inordinate amount of time which slows down the proceedings. Such protraction can affect the jury in ways negative to the objecting party. Tenth, flow. Again, perhaps a silent consideration when reviewing a transcript, trials and testimony have flows. Sometimes an adverse witness's testimony or

argument is rapidly proceeding, perhaps to the detriment of the adverse party as it flies by the jury, and objecting and slowing down the testimony or argument by objecting is exactly the wrong thing to do. Eleventh, interruption. Here, the concern is that excessive objections during a witness's testimony or closing argument will mean that the other side will feel emboldened to do the same. This is a bit akin to the theory of Mutually Assured Destruction ("MAD") that stopped nuclear Armageddon during Cold War (i.e., that America and the Soviet Union [and their allies] were deterred from striking with a nuclear weapon, because the assured retaliation would wipe out the planet). For example, the desire to have an uninterrupted closing may mean an attorney declines to interrupt an opponent's closing. Yet again, this may not be revealed by the transcript – quite the opposite – but it is a practical reality and a tactical decision that attorneys across the country make every day. In fact, objections in closing are rare just for this reason. Twelfth, the counsel might believe an objection would be overruled, and he or she look like a fool in front of the jury, or at least his or her position or credibility would undermined. This is a danger even if the objection appears to have merit – the Court might overrule what seems to the lawyer to be a valid objection for any number of reasons. There are others.

The heart of Defense counsel's explanation falls directly in the cluster of concerns outlined above. Counsel specifically testified he did not object because he (1) believed he could address these issues in cross-examination, (2)

believed he could address these issues in his closing argument, (3) believed the Court would properly instruct the jury about there being no duty to retreat, (4) he did not like to object, especially in closing arguments, because jurors did not like such objections, and (5) he was fearful that the objections would highlight the prosecutor's arguments. These concerns were well-grounded. And the Court finds his testimony credible in this regard. However, as noted above, his subjective view is immaterial. Nevertheless, examining what happened from an objective viewpoint, the decision not to object based on the foregoing concerns was objectively reasonable. Defense counsel did present counter-evidence, addressed the issue in cross-examination, and made arguments in closing that addressed these issues. He avoided highlighting the issue by not objecting. In addition, the Court read the correct jury instruction. The decision to not object was reasonable.

In addition, there are several other objective reasons not to object. For example, this case took over 5 days to try. The concern of time supports avoiding an objection. Likewise, the concerns of flow, interruption, jury suspicions of hiding evidence, and professionalism all bolster this finding of reasonability. As also revealed by the People's briefing, that the Supreme Court would necessarily find such objections valid was not necessarily clear. This is especially so in light of the prosecutor's concession during closing argument that there was no duty to retreat. Trial counsel and the Court do not have the benefit

of months of briefing and reflection, staff attorneys at the ready, and perfect recollection of the record in connection with making objections and rulings. In fact, an esteemed panel of three veteran Court of Appeals Judges denied the appeal on the assertion of error. This risk that the objections would be overruled, even if ungrounded in hindsight, was another reasonable reason to forgo objections.

In light of the concerns of professionalism; highlighting the prosecutor's position; preventing the jury from speculating about what the Defendant was hiding; the ability to confront the issue with counter-evidence, cross examination and argument; time; flow; interruption; and concerns of being overruled all reveal that the decision to forego objections was objectively reasonable.

B

Even if Defense counsel had objected to the prosecutor's errors, there was no reasonable probability that the results of the proceeding would have changed

Simply put, the evidence of first-degree premeditated murder was overwhelming.[6]

In addition, because the jury found the Defendant guilty of that crime, rejecting the lesser offenses of second-degree murder and manslaughter, the

[6] The Court relies upon the People's Briefing in connection with this showing.

defense of self-defense (and correspondingly PTSD) was rejected by the jury and the objections in effect were moot. See, e.g., *People v Bynum,* 496 Mich 610, 634 (2014).

Furthermore, the Court cured any prejudice by reading the correct jury instruction which specifically instructed the jury that the Defendant had no duty to retreat. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham,* 256 Mich App 265, 279 (2003). See also *Richardson v Marsh,* 481 US 200, 211; 107 S Ct 1702; 95 L Ed 1d 176 (1987) ("juries are presumed to follow their instructions"); *People v Briendnbach,* 489 Mich 1, 13 (2011) ("juries are presumed to follow the instructions of a trial court"); *People v Groves,* 458 Mich 476, 486 (1998) ("It is well established that jurors are presumed to follow their instructions:"); *People v Hana,* 447 Mich 325, 351 (1994); *People v Erickson,* 288 Mich 182, 199-200 (2010). The Defendant has failed to overcome this presumption, either by citing authority that this type of error would necessarily require reversal or otherwise. As such, the Court must presume that this jury followed the instructions, and any error has been cured.

In short, there was no reasonable probability that the objections at issue would have changed the jury's verdict.

FINDING & ORDER

In light of the foregoing, the Court FINDS that Defense counsel did not engage in the ineffective assistance of counsel and ORDERS that the Defendant's request for a new trial based on a such finding is DENIED.

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the attorneys for record or the parties not represented by counsel in the above case by mailing it to their addresses as disclosed by the pleadings of record with prepaid on
March 9, 2020

Chelsea Juracek