

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON JERMAINE MITCHELL,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2003

No. 234689

Kent Circuit Court

LC Nos. 00-005835-FH;

00-006904-FH

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT AZABEURE MITCHELL, a/k/a  
BOOBIE, a/k/a BOO,

Defendant-Appellant.

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No. 234690

Kent Circuit Court

LC No. 00-005819

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

A joint jury convicted defendant Jason Mitchell of second-degree home invasion,<sup>1</sup> accessory after the fact to murder,<sup>2</sup> accessory after the fact to assault with intent to commit murder,<sup>3</sup> carrying a concealed weapon (CCW),<sup>4</sup> and two counts of possession of a firearm during the commission of a felony.<sup>5</sup> The trial court sentenced Jason Mitchell as a second habitual

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<sup>1</sup> MCL 750.110a(3).

<sup>2</sup> MCL 750.505.

<sup>3</sup> MCL 750.505.

<sup>4</sup> MCL 750.227.

<sup>5</sup> MCL 750.227b.

offender<sup>6</sup> to concurrent prison terms of twelve to twenty-two years for the second-degree home invasion conviction, and three to seven years each for the accessory after the fact and the CCW convictions, to be served consecutive to concurrent two-year terms for the felony-firearm convictions. The joint jury also convicted Jason Mitchell's brother, defendant Robert Mitchell, of second-degree murder,<sup>7</sup> assault with intent to commit murder,<sup>8</sup> and two counts of possession of a firearm during the commission of a felony.<sup>9</sup> The trial court sentenced Robert Mitchell as a second habitual offender to concurrent prison terms of thirty to seventy-five years for the second-degree murder conviction and eighteen to seventy-five years for the assault conviction, to be served consecutive to concurrent two-year terms for the felony-firearm convictions. Both defendants appeal as of right. We affirm.

### I. Basic Facts And Procedural History

On May 24, 2000, Phillip Patterson was returning to his apartment when he observed a red Tempo automobile in his backyard by the garage. At the time, Phillip and his friend, George Woods, were traveling in a van driven by Phillip's neighbor. Phillip Patterson's neighbor cut through the alley behind Phillip Patterson's house and drove toward the red Tempo. As the van approached the Tempo, someone ran from the side of Phillip Patterson's garage and jumped into the passenger seat of the Tempo, which then began to move. The Tempo was forced to stop in the alley because another automobile was blocking its path. Phillip Patterson exited the van and approached the Tempo. He recognized Jason Mitchell as the passenger and briefly spoke with him.

The defendants' cousin, Darnell Triggs, testified that, at Jason Mitchell's direction, he drove to an alley on May 24, 2000. They were in a red Tempo belonging to Joyce Mitchell, the defendants' mother. Triggs testified that he parked behind a garage and Jason Mitchell exited the Tempo. Jason Mitchell was gone for approximately ten minutes.<sup>10</sup> Jason Mitchell returned from the side of the garage, carrying a bag. When Jason Mitchell reentered the car, he put the bag on the floor and told Triggs to "take off." Triggs testified that he started to drive but was stopped in the alley because another vehicle was blocking the way. While Triggs was waiting for the other vehicle to move, a big man<sup>11</sup> walked up to the Tempo and talked to Jason Mitchell. Triggs did not pay attention to what was said in the short conversation. Triggs subsequently drove Jason Mitchell back to their grandmother's house.

Phillip Patterson testified that, after speaking to Jason Mitchell in the alley, he returned to his apartment. He found the door open and the house ransacked. Several items were missing.

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<sup>6</sup> MCL 769.10.

<sup>7</sup> MCL 750.317. Robert Mitchell's judgment of sentence incorrectly reflects that he was convicted under "MCL 750.316C."

<sup>8</sup> MCL 750.83.

<sup>9</sup> MCL 750.227b.

<sup>10</sup> On cross-examination, Triggs testified that Jason Mitchell was gone for less than five minutes.

<sup>11</sup> Phillip Patterson weighed 280 pounds on May 24, 2000.

At 6:10 p.m., Phillip Patterson called his brother, Willie Patterson, and informed him about the occurrence. Phillip Patterson also called Jason Mitchell because he wanted his missing items and believed Jason Mitchell was responsible for their disappearance. Between 6:19 p.m. and 6:34 p.m., several telephone calls were made back and forth between Phillip Patterson and Jason Mitchell while they tried to agree on a place to meet to discuss the missing items. They ultimately agreed to meet at a particular Kentucky Fried Chicken restaurant, which was within walking distance of Phillip Patterson's apartment house. At 6:35 p.m., Phillip Patterson telephoned Willie Patterson and told him about the location of the meeting. Willie Patterson arrived at the Kentucky Fried Chicken restaurant in a rented Intrepid automobile and had at least one passenger in the car with him.

When Willie Patterson pulled into the parking lot, Jason Mitchell was outside of the Tempo, standing near one of the entry doors to the restaurant. Jason Mitchell was wearing a bulletproof vest and, according to some witnesses, was carrying a handgun in the waistband of his pants. Triggs was in the driver's seat of the Tempo and Robert Mitchell was leaning down in the back seat. Willie Patterson exited the Intrepid, approached Jason Mitchell and exchanged words with him. Jason Mitchell told Willie Patterson that he did not have any of Phillip Patterson's belongings. While they were conversing, Phillip Patterson drove his neighbor's van into the restaurant parking lot. Phillip Patterson exited the van and joined the conversation. Robert Mitchell admitted that Phillip Patterson was "pretty nice" and stated that Phillip Patterson did not want trouble, but only wanted his missing items returned. There was no physical confrontation during the conversation. Very shortly after Phillip Patterson arrived, Willie Patterson walked away from the conversation. He seemed upset and headed for a hole in the fence at the back of the parking lot. Willie Patterson's home was located in the direction he was walking.

As Willie Patterson walked away, Robert Mitchell exited the Tempo and began shooting in Willie Patterson's direction using an SKS assault rifle with a banana clip hanging from the bottom. It was undisputed that, when the first shots were fired, Willie Patterson was already running away from Robert Mitchell. Triggs noted that Willie Patterson started running after seeing Robert Mitchell with the weapon. He was running toward garbage cans at the back of the parking lot, a "nice" distance from the cars. A bullet that entered the back of his left shoulder and exited through his right cheek killed Willie Patterson. During the shooting, Phillip Patterson jumped into the van and attempted to move it. While he was doing so, Robert Mitchell shot into the driver's side window of the van, injuring Phillip Patterson. There was no evidence that either Phillip Patterson or Willie Patterson possessed weapons at the time of the shooting. The police recovered twenty 7.62 by 39 millimeter shell casings from the restaurant parking lot. All were determined to have been fired from the same weapon.

When the shooting started, Triggs left the Tempo and ran. He then decided to return to the parking lot. He noticed Willie Patterson on the ground, but did not see Robert Mitchell or the gun. Jason Mitchell was still in the parking lot and said that he could not believe Robert Mitchell shot the rifle. Jason Mitchell and Triggs abandoned the Tempo in the parking lot and ran to their grandmother's house together. While they were running, cutting through yards, Triggs saw Jason Mitchell throw a gun in some bushes. Triggs later turned himself over to the police and told them what he saw. He did so because he was afraid of defendants and thought they planned to harm him.

At trial, Robert Mitchell admitted that he shot Willie Patterson, that Willie Patterson was turning away and trying to run when the shooting started, and that Willie Patterson was headed toward the hole in the fence. Robert Mitchell claimed, however, that Willie Patterson had a reputation for being dangerous and for carrying a gun. Before Willie Patterson walked away from the conversation, Robert Mitchell heard Willie Patterson threaten to kill Jason Mitchell. Robert Mitchell subsequently saw Willie Patterson reach under his shirt while he was walking. Robert Mitchell, believing that Willie Patterson had a gun, exited the Tempo and started shooting. He closed his eyes after the first shot and kept his finger on the trigger. He finally dropped the gun when he heard someone tell him to run. Robert Mitchell testified that he did not remember shooting Phillip Patterson at all.

## II. Sufficiency Of The Evidence

### A. Standard Of Review

Jason Mitchell argues that the circumstantial evidence was insufficient to sustain his conviction for second-degree home invasion.<sup>12</sup> When reviewing the sufficiency of the evidence in a criminal case, we “view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.”<sup>13</sup> All conflicts with regard to the evidence must be resolved in favor of the prosecution.<sup>14</sup> We will not interfere with the jury’s role of determining the weight of the evidence or the credibility of witnesses.<sup>15</sup> “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”<sup>16</sup> “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.”<sup>17</sup> The jury is not prevented from making more than one inference in reaching its decision.<sup>18</sup>

### B. MCL 750.110a(3)

MCL 750.110a(3) provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a

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<sup>12</sup> MCL 750.110a(3).

<sup>13</sup> *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted).

<sup>14</sup> *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

<sup>15</sup> *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Terry, supra*.

<sup>16</sup> *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

<sup>17</sup> *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

<sup>18</sup> *Id.*

person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

### C. The Evidence

Viewed most favorably to the prosecution, the evidence established that, earlier in the day on May 24, 2000, Phillip Patterson spoke to Jason Mitchell. At the time, Phillip Patterson was in a truck and was driving home from a Laundromat where his clothes were in the washing machine. When Phillip Patterson later left his apartment to pick up his laundry, he locked his door with a key. He did not give anyone permission to enter. When Phillip Patterson returned, the door was open, the apartment was ransacked, and several items were missing. The vehicle in which Jason Mitchell was traveling was seen parked by Phillip Patterson's garage during the relevant time frame. There was only a twenty- to thirty-minute interval between the time Phillip Patterson left to pick up his laundry and the time he returned to his apartment. Triggs testified that, during that interval, Jason Mitchell left the Tempo, which was parked by Phillip Patterson's garage, and was gone for approximately ten minutes. Jason Mitchell was empty-handed when he left the car, but returned with a bag that he placed on the floor before telling Triggs to "take off."

There was also evidence that, after Jason Mitchell was charged with the second-degree home invasion, he tried to influence Triggs' testimony. Jason Mitchell wanted Triggs to say that they were driving and were "flagged down" by a man who tried to sell Jason Mitchell a stereo in the alley. Triggs testified that the stereo story was a lie. At trial, Alphonso Edwards, a close friend of the Mitchell family, testified that he was supposed to testify that he saw Jason Mitchell on May 24, 2000, and tried to sell him a stereo that was in a bag. Edwards testified that he changed his mind about falsely testifying because he did not know anything about the case. Evidence of a defendant's attempt to suppress testimony, influence testimony, or induce perjury is admissible as evidence of consciousness of guilt.<sup>19</sup> Viewed most favorably to the prosecution, we conclude that the evidence was sufficient to enable the jury to find beyond a reasonable doubt that Jason Mitchell was guilty of second-degree home invasion in connection with the breaking and entering of Phillip Patterson's apartment.

## III. Prosecutorial Misconduct

### A. Standard Of Review

Jason Mitchell argues that the prosecutor engaged in improper and highly prejudicial closing arguments. He refers to several portions of the prosecutor's closing argument and argues generally that the challenged excerpts denigrated him and his defense, denigrated the presumption of innocence, and placed the prestige of the prosecutor's office behind the prosecutor's personal conclusions with respect to the case. Jason Mitchell also sets forth general legal principles governing the issue of prosecutorial misconduct. He does not, however, relate

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<sup>19</sup> *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981); *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973).

these principles to the challenged portions of argument. Rather, he announces his positions and leaves it to this Court to discover and rationalize the basis for his various claims. This is insufficient to properly present this issue for our review.<sup>20</sup> Moreover, we note that Jason Mitchell's trial counsel failed to object to all but one of the arguments challenged on appeal. Where a defendant fails to object to alleged misconduct by the prosecutor, review is for plain error.<sup>21</sup> A defendant must show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.<sup>22</sup> "It is the defendant who bears the burden of persuasion with respect to prejudice."<sup>23</sup> Here, we conclude, Jason Mitchell has not met his burden of establishing plain error requiring reversal.

With respect to the one preserved issue of prosecutorial misconduct, concerning the prosecutor's rebuttal, we review the challenged rebuttal argument in context to determine whether a defendant received a fair and impartial trial.<sup>24</sup> A prosecutor's comments are to be considered in light of defense counsel's arguments.<sup>25</sup>

#### B. The Prosecutor's Rebuttal

In closing, Jason Mitchell's counsel argued that the evidence did not support his guilt for either home invasion or CCW during the altercation at the Kentucky Fried Chicken restaurant. In his argument, counsel attempted to explain away much of the incriminating evidence. In rebuttal, the prosecutor argued:

One thing I have to respond to is this. Just because you have more evidence, doesn't make it go away. Did you hear anybody explain to you why nine millimeter cartridges that matched identically to the ammo in that weapon found behind Green Street was found at Jason's mom's house?

Did anybody explain to you why a weapon matching the exact description given by the witnesses at the scene would be found behind where this nine-millimeter is later found by just some guy mowin' his lawn?

Did anybody explain to you, if Jason had some legitimate reasons for being out there, why he was out there on Putnam? No. They have to ignore it because they can't tell you.

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<sup>20</sup> *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

<sup>21</sup> *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

We conclude that, evaluated in light of the defense arguments, the prosecutor's rebuttal argument was fair comment designed to call the jury's attention to the fact that, while defense counsel tried to explain away some of the incriminating evidence, he did not address or explain all of it. The prosecutor did not improperly place the burden on Jason Mitchell to explain the evidence. Instead, she pointed out that his attempt to do so was incomplete and that he ignored certain evidence. In addition, the jury was later instructed that the lawyers' arguments are not evidence to be considered in reaching a verdict. We conclude that the prosecutor's argument in her rebuttal did not deny Jason Mitchell a fair trial.

#### IV. Resentencing

##### A. Standard Of Review

A departure from the guidelines must be based on objective and verifiable factors.<sup>26</sup> Whether a factor is objective and verifiable is reviewed de novo as a matter of law, and we review the determination that there are substantial and compelling reasons for a departure for an abuse of discretion.<sup>27</sup> Reasons justifying a departure from the guidelines should irresistibly grab the court's attention and be recognized as having considerable worth in deciding the length of the sentence.<sup>28</sup> Further, the principle of proportionality may be considered in evaluating the extent of a departure.<sup>29</sup>

##### B. The Sentencing Guidelines

The legislative sentencing guidelines apply because the offense was committed after January 1, 1999.<sup>30</sup> MCL 769.34(3) provides:

A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The Court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

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<sup>26</sup> *People v Babcock (Babcock I)*, 244 Mich App 64, 75; 624 NW2d 479 (2000).

<sup>27</sup> *Id.* at 75-76.

<sup>28</sup> *Id.* at 75.

<sup>29</sup> *People v Babcock (Babcock II)*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002), lv gtd 467 Mich 872 (2002), citing *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

<sup>30</sup> MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000).

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

### C. The Trial Court's Departure

Jason Mitchell argues that resentencing is required for his second-degree home invasion conviction. The trial court departed from the recommended minimum sentence range of 29 to 71 months' imprisonment under the legislative sentencing guidelines and sentenced Jason Mitchell to 12 to 22 years' imprisonment. We conclude that the trial court complied with the applicable statute when it departed from the recommended minimum sentence range under the guidelines.

First, the trial court properly articulated its reasons for departing from the recommended range. The prosecutor requested an upward departure because Jason Mitchell's conduct with regard to the home invasion precipitated the subsequent assault and murder. The trial court responded by noting that Jason Mitchell had eighteen prior misdemeanor convictions, most of which were not scored when the guidelines were calculated. The trial court therefore determined that Jason Mitchell's prior criminal history was not adequately taken into account by the guidelines. More importantly, the trial court noted that the facts presented at trial showed that the incident at the Kentucky Fried Chicken restaurant was an ambush and that Jason Mitchell was part of that ambush. The trial court determined that these circumstances surrounding the home invasion were not contemplated by the guidelines. The trial court subsequently articulated that, under the circumstances, it was entitled to depart from the recommended minimum sentence range.

Second, the trial court's reasons for departure were based on objective and verifiable facts. Jason Mitchell's misdemeanor record was extensive. The presentence investigation report indicates that he has eighteen prior misdemeanor convictions in addition to one prior felony conviction and a juvenile record. On appeal, Jason Mitchell does not dispute that the guidelines failed to account for all of his criminal history. In addition, the objective facts indicate that the home invasion was the event that precipitated the later violence. Moreover, even if Robert Mitchell did not have a plan of action at the Kentucky Fried Chicken restaurant, the evidence showed that Jason Mitchell arrived at the meeting prepared for a shooting. It was undisputed that, before the planned meeting, several telephone calls were made between Jason Mitchell and Phillip Patterson. They tried to agree on a meeting place to discuss the home invasion. Jason Mitchell arrived at the meeting wearing a bulletproof vest and carrying a firearm in his pants. The bulletproof vest was later found in the Tempo. The firearm was later found discarded in someone's backyard. When Jason Mitchell arrived at the meeting location, there was also a loaded assault rifle in the back of his mother's car.

Third, the legislative sentencing guidelines prohibit a trial court from basing a departure on characteristics that are already accounted for in the scoring of the sentencing guidelines.<sup>31</sup>

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<sup>31</sup> MCL 769.34(3)(b).



They do not, however, prohibit a trial court from considering additional or other criminal conduct that is not accounted for by the guidelines.<sup>32</sup> It has long been the rule in Michigan that, when sentencing a criminal defendant, a trial court may take into account facts underlying uncharged acts and acquittals.<sup>33</sup> Here, the objective and verifiable facts upon which the trial court relied were not otherwise adequately accounted for by the guidelines, which did not reflect the violent acts that were precipitated by the home invasion offense.

Considering that the home invasion offense led to extensive violence resulting in the death of one individual, we find no abuse of discretion in the trial court's determination that the articulated reasons were substantial and compelling. In considering this issue, we disagree with Jason Mitchell that the trial court made an improper independent finding that he was guilty of crimes greater than those for which he was convicted. A trial court may not make an independent finding of guilt on a crime other than that for which the defendant is being sentenced.<sup>34</sup> It may, however, account for facts underlying uncharged conduct and acquittals.<sup>35</sup> At sentencing, the trial court acknowledged that Robert Mitchell was convicted of second-degree murder and that the jury must have rejected the theory that there was a planned ambush. The trial court subsequently ruled that it was not required to view the facts in the manner that the jury viewed them. The trial court's comments do not reflect that it made an improper independent finding that Jason Mitchell was *guilty* of other crimes. Rather, the trial court took into account the circumstances surrounding the home invasion, which led to a planned ambush at the restaurant.

We also disagree with Jason Mitchell's assertion that his sentence was not individualized. The trial court was familiar with Jason Mitchell's prior record, referred to it when sentencing him, and sentenced him for the charges upon which he was convicted. While the trial court addressed both Robert Mitchell and Jason Mitchell when making general comments at sentencing, it treated Jason Mitchell as a separate defendant when imposing sentence upon him. It considered the circumstances of the offense and the offender and it completed Jason Mitchell's sentencing before sentencing Robert Mitchell.

Finally, we are not persuaded that Jason Mitchell's sentence for home invasion violates the principle of proportionality.<sup>36</sup> The sentence is proportional to the seriousness of the offense and the offender. Jason Mitchell broke into Phillip Patterson's home, stole several items, prompted a confrontation, and arrived at the arranged meeting place armed with a gun and wearing a bulletproof vest. Jason Mitchell's past criminal history demonstrated his complete disregard for the law. Moreover, the evidence at trial indicated that Jason Mitchell was a heavy influence over Robert Mitchell, who was several years younger, idolized Jason Mitchell, and

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<sup>32</sup> MCL 769.34(3).

<sup>33</sup> *People v Ewing (After Remand)*, 435 Mich 443, 446; 458 NW2d 880 (1990) (opinion by Brickley, J.), 473 (opinion by Boyle, J.).

<sup>34</sup> *People v Tyler*, 188 Mich App 83, 85-86; 468 NW2d 537 (1991).

<sup>35</sup> *Ewing (After Remand)*, *supra*.

<sup>36</sup> *Babcock II*, *supra*.

would do anything for him. Jason Mitchell committed the second-degree home invasion, which led to Robert Mitchell's shooting of the Pattersons. Under the circumstances, the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender.<sup>37</sup>

## V. The Prosecutor's Rebuttal Evidence

### A. Standard Of Review

Both defendants challenge the trial court's decision to allow the prosecutor's rebuttal evidence. They contend that the evidence related only to a collateral matter and constituted improper rebuttal. We review a trial court's decision to admit evidence for an abuse of discretion.<sup>38</sup>

### B. Standards Relating To Rebuttal Evidence

In *People v Figgures*,<sup>39</sup> the Michigan Supreme Court stated:

Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.

Contrary to the dissent's insinuation, the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [Citations omitted.]

In *Spanke*,<sup>40</sup> this Court stated:

Although MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters, a party may introduce rebuttal evidence to contradict the answers elicited from a witness

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<sup>37</sup> Jason Mitchell further argues that the trial court did not comply with MCL 769.34(7) because it failed to orally advise him of his right to appeal his sentence. This issue is not properly raised in the statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Regardless, because Jason Mitchell has received appellate review of his sentence, any error was harmless.

<sup>38</sup> *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

<sup>39</sup> *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

<sup>40</sup> *Spanke*, *supra* at 644-645.

on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

It is not error to admit evidence falling within the exception.<sup>41</sup>

### C. The Rebuttal Evidence

In presenting their cases, the defendants tried to portray themselves as loving brothers who looked out for each other and were not violent, unlike Willie Patterson. They also attempted to dismiss Triggs' testimony that he was afraid of them. Jason Mitchell called Trudy Mitchell, the grandmother of Triggs and the defendants. Jason Mitchell's counsel asked Trudy Mitchell whether there was any reason why Triggs would be afraid of being killed by Jason Mitchell. Trudy Mitchell replied that there was no reason other than Triggs' paranoia.

The trial court, citing *Figures*, determined that the proposed rebuttal testimony of Mary Goree was responsive to the defendants' theories that Jason Mitchell was never seen with a gun, that the defendants had characteristics contrary to those they portrayed, and that Triggs had no reason to fear defendants except for his own paranoia. Goree was thereafter allowed to testify that Triggs was with both defendants when Jason Mitchell pistol-whipped Goree's boyfriend and Robert Mitchell repeatedly kicked him. The rebuttal evidence directly contradicted Trudy's Mitchell's testimony that Triggs had no reason to fear the defendants. Indeed, he had seen them participate in acts of extreme violence. The evidence also contradicted and disproved evidence produced by the defendants in which they attempted to portray themselves as nonaggressive. The rebuttal evidence was properly responsive to the theories and themes that defendants introduced and its admission was not an abuse of discretion.

## VI. Evidence Of Past Conduct

### A. Standard Of Review

Robert Mitchell challenges the trial court's ruling precluding him from introducing evidence of specific instances of Willie Patterson's past violent conduct. We review the trial court's decision for an abuse of discretion.<sup>42</sup>

### B. Character And Behavioral Evidence

In *People v Harris*,<sup>43</sup> the Court held that evidence of a victim's character may be admitted to assist the trier of fact in determining who was the aggressor in a particular situation or to assist the trier of fact in determining a defendant's state of mind where the defendant claims

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *People v Harris*, 458 Mich 310, 315-318; 583 NW2d 680 (1998).

self-defense.<sup>44</sup> If the evidence is offered to prove that the victim was the aggressor in a given situation, the defendant's prior knowledge of the victim's violent behavior is not a prerequisite to the admission of the evidence. However, where evidence of the victim's violent character is offered to show that the defendant had a reasonable apprehension of harm, the defendant needs to have prior knowledge of the victim's violent character.<sup>45</sup>

Reputation in the neighborhood where both live is sufficient with nothing more. The strength of the deceased as well as his habitual carrying of weapons or his possession of them at the time of the affray, if known to the defendant, should be considered as properly affecting his apprehensions. The purpose of this evidence is to show the defendant's state of mind; therefore, it is obvious that the victim's character, as affecting the defendant's apprehensions, must have become known to him, otherwise it is irrelevant.<sup>[46]</sup>

The *Harris* Court also addressed the type of evidence that may be admitted, general reputation evidence or evidence of specific acts of violence by a victim:

As a general rule, the character of the victim may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion.

"[W]hen character is not an essential element, it may be shown only by reputation or opinion evidence. . . . Hence, construed liberally, Rule 405 does not permit a defendant to use specific instances to show that the victim was the aggressor since the aggressive character of the victim is not an essential element of the defense of self-defense since the aggressive character of the victim is introduced as circumstantial evidence to show that the victim committed the first or primary *act* of aggression against the defendant, which is to say that the defense of self-defense in this situation makes an act of the victim, rather than a trait of the victim's character, the material issue. [1A Wigmore, Evidence (Tillers rev), § 63.1, p 1382-1383, n 1.]"

On the other hand, rule 405 allows specific instances of violence to be admitted only when character or trait of character is made an essential element of a claim, charge, or defense. *Id.* See *People v Farrell*, 137 Mich 127; 100 NW 264 (1904); *People v Cooper*, 73 Mich App 660; 252 NW2d 564 (1977) (indicating that specific acts may not be shown to establish that the victim was the

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<sup>44</sup> *Id.* at 316.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 316-317.

aggressor; specific acts, however, may be shown to establish reasonable apprehension of harm).<sup>[47]</sup>

The defendant in *Harris* wanted to admit specific prior acts of violence by the victim “as bearing on whether the victim was the aggressor.”<sup>48</sup> The Court held that, under the circumstances, it was not error for the trial court to exclude “specific acts of violence or turbulence committed by the decedent.”<sup>49</sup> The defendant also wanted to include testimony about the victim’s past violent tendencies “as bearing on defendant’s state of mind” relating to the self-defense theory.<sup>50</sup> The Court held that it was improper for the trial court to preclude the reputation testimony that the defendant sought to admit.<sup>51</sup>

In this case, unlike in the situation in *Harris*, Robert Mitchell sought to admit both reputation evidence and evidence of specific instances of Willie Patterson’s violent conduct to establish his state of mind at the time of the shooting. The trial court ultimately ruled that, if Robert Mitchell was aware of Willie Patterson’s reputation, evidence of that reputation could be admitted. However, specific instances of Willie Patterson’s violent conduct would not be admitted regardless of Robert Mitchell’s knowledge about them. Robert Mitchell subsequently testified that Willie Patterson was a dangerous individual who was known to carry a gun and to shoot and hurt people. Robert Mitchell also testified that Willie Patterson was always threatening people and that his nickname was Willie Wild. A stipulation was also read into the record, which informed the jury that, in January 1998, Willie was in possession of a firearm in Grand Rapids.

Evidence of Willie Patterson’s reputation was clearly admissible.<sup>52</sup> We conclude that the trial court abused its discretion, however, when it refused to allow Robert Mitchell to further testify about specific acts of Willie Patterson’s violence about which Robert Mitchell was aware. Robert Mitchell’s state of mind at the time of the shooting was a material element to his defense that he acted to defend another.<sup>53</sup> Thus, evidence of the victim’s specific acts, which were known to Robert Mitchell, was admissible to establish his state of mind.<sup>54</sup>

This evidentiary error does not, however, require reversal. Reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error.<sup>55</sup> “[A] preserved, nonconstitutional error is not a ground

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<sup>47</sup> *Id.* at 319.

<sup>48</sup> *Id.* at 314.

<sup>49</sup> *Id.* at 320.

<sup>50</sup> *Id.* at 314.

<sup>51</sup> *Id.* at 320.

<sup>52</sup> MRE 405; *Harris, supra* at 316, 318-319.

<sup>53</sup> See *id.* at 316.

<sup>54</sup> *Id.* at 319.

<sup>55</sup> *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

for reversal unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.”<sup>56</sup> The necessary inquiry focuses on the type of error and its effect in light of the weight and strength of the untainted evidence.<sup>57</sup>

In this case, Robert Mitchell defended the charges by arguing that he acted in defense of another. However, his own testimony negated this defense. Robert Mitchell testified that the last thing he saw before he discharged the weapon was Willie Patterson turning away, trying to run. Apart from Robert Mitchell’s testimony, the evidence indicated that Willie Patterson was walking away from Jason Mitchell and heading toward the back of the parking lot. Willie Patterson was not in close proximity to Jason Mitchell when Robert Mitchell fired the weapon. Moreover, Robert Mitchell testified about Willie Patterson’s reputation, and other witnesses testified that his nickname was Willie Wild. Thus, the jury was well aware of Willie Patterson’s violent and wild reputation. Under the circumstances, the fact that some specific instances of Willie Patterson’s violence were not presented to the jury was not outcome determinative.

## VII. Severance

### A. Standard Of Review

Robert Mitchell argues that the trial court denied him his right to due process when it refused to sever his case from Jason’s case. We review the trial court’s decision for an abuse of discretion.<sup>58</sup>

### B. The Prosecutor’s Reasons For Joinder And The Trial Court’s Ruling

Citing MCR 6.120 and MCR 6.121, the prosecutor moved to join the charges pending against Jason Mitchell with the charges pending against Robert Mitchell.<sup>59</sup> The prosecutor argued that the home invasion, which occurred twenty to forty minutes before the shooting and within blocks of the shooting, was the catalyst for all of the criminal activity on the day in question. The prosecutor pointed out that, between the home invasion and the shooting, numerous telephone calls were made between Phillip Patterson and Jason Mitchell.

Filing a separate motion, Robert Mitchell moved to preclude joinder of his case with the two cases pending against Jason Mitchell. He argued that the home invasion charge faced by Jason Mitchell and the charges for which he was being tried were not connected in time or

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<sup>56</sup> *Id.* at 495-496.

<sup>57</sup> *Id.* at 495. In *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001), this Court noted that evidentiary errors fall into a nonconstitutional error category.

<sup>58</sup> *People v Hana*, 447 Mich 325, 346, 355; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994).

<sup>59</sup> In LC No. 00-005835-FH, Jason Mitchell was charged with second-degree home invasion. In LC No. 00-006904-FH, Jason Mitchell was charged with several crimes related to the shooting. In LC No. 00-005819, Robert Mitchell was charged with several crimes related to the shootings.

location. After noting the relevant portions of both MCR 6.120 and MCR 6.121, the trial court ruled that the charges represented allegations of a series of connected acts. Therefore, it joined the pending cases.

### C. The Court Rules

MCR 6.121(A) allows permissive joinder of two or more defendants with two or more offenses when the offenses are related as defined in MCR 6.120(B). That rule states, in relevant part, that “two offenses are related if they are based on (1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan.” In *People v Abraham*,<sup>60</sup> this Court determined that the shootings at issue were related because they occurred within several hours of time in the same neighborhood. They were part of a series of events interspersed with target shooting at various objects.<sup>61</sup>

Likewise, in this case, the crimes were related for purposes of the permissive joinder statute. The crimes occurred within a very short time of each other in the same neighborhood, and the evidence indicated that the first crime, the home invasion, precipitated the subsequent shootings. Between the home invasion and the shootings, the victims and the defendants were in continual contact with each other. The shootings occurred at a meeting to discuss the earlier home invasion. Under the circumstances, we conclude that the trial court did not abuse its discretion in joining the offenses. They were part of a series of related or connected acts.<sup>62</sup> Additionally, there was no showing that severance was necessary to avoid prejudice to Robert Mitchell’s substantial rights.<sup>63</sup> There was also no showing that severance was appropriate to promote fairness to the parties or a fair determination of guilt.<sup>64</sup>

Robert Mitchell also argues that the joinder of the cases led to the admission of prejudicial evidence warranting a mistrial in his case. This issue is abandoned on appeal. Robert Mitchell fails to cite authority in support of his position that a mistrial was necessary, and also fails to explain or rationalize his position. “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.”<sup>65</sup>

In his statement of the question presented, Robert Mitchell indicates that the trial court erred in denying his request for a separate jury, but he does not argue this issue in his brief.

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<sup>60</sup> *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003), lv pending.

<sup>61</sup> *Id.*

<sup>62</sup> MCR 6.121(A).

<sup>63</sup> MCR 6.121(C).

<sup>64</sup> MCR 6.121(D).

<sup>65</sup> *Kelly, supra* at 640-641.

Where a defendant raises an issue in his statement of questions presented but fails to argue the merits of the issue in his brief, the issue is abandoned.<sup>66</sup>

### VIII. Robert Mitchell's Juvenile Adjudications

#### A. Standard Of Review

The scope of cross-examination is within the discretion of the trial court.<sup>67</sup>

#### B. Placing Character In Issue

Robert Mitchell challenges the trial court's decision to permit the prosecutor to question him about his juvenile adjudications. If an accused offers evidence of a trait of character,<sup>68</sup> he places his character in issue and the prosecution is permitted, pursuant to MRE 405(a), to cross-examine him about relevant specific instances of conduct.<sup>69</sup> In *Lukity*, the defendant testified on direct examination about his role as a father and provider. He gave examples of the activities he engaged in with his children.<sup>70</sup> The Court found that the defendant's testimony was clearly "evidence of a pertinent trait of character" in the context of a trial on charges that he raped his daughter.<sup>71</sup> It was admissible evidence under MRE 404(a)(1).<sup>72</sup>

This testimony opened the door to cross-examination about whether he considered himself a "role model" and whether he tried to "instill morals and values" in his children. Defendant responded affirmatively to these questions. The prosecutor then asked whether defendant provided marijuana to or smoked marijuana with his son. This cross-examination inquired into a specific instance of conduct to rebut defendant's claim that he only engaged in appropriate activities with his children. Where, as here, evidence of a pertinent character trait is admitted, MRE 405(a) allows cross-examination into relevant specific instances of conduct. Accordingly, the cross-examination regarding whether defendant smoked marijuana with his son was admissible under MRE 404(a)(1) and MRE 405 (a).<sup>[73]</sup>

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<sup>66</sup> *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

<sup>67</sup> *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

<sup>68</sup> MRE 404(a)(1).

<sup>69</sup> *Lukity*, *supra* at 498.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



### C. Standard For Rebuttal Evidence As To Character

In *People v Whitfield*,<sup>74</sup> the Court recognized that a defendant has the right to introduce evidence of his character. A prosecutor is permitted, however, to rebut the offered trait of character by cross-examination about specific instances of conduct.<sup>75</sup> A trial court should consider certain factors before admitting rebuttal cross-examination, including whether the probative value of the line of questioning is substantially outweighed by the prejudicial effect under MRE 403, the basis for the prosecutor's belief that the event being inquired about occurred, and the temporal relationship between the misconduct in question and the offense charged.<sup>76</sup>

Here, over the prosecutor's objection, Robert Mitchell testified on direct examination that Jason Mitchell walked him to school, bought him clothes, made sure he did his homework, and did not let him "go around the neighborhood bein' bad." On cross-examination, the prosecutor inquired whether Jason Mitchell kept Robert Mitchell out of trouble. Robert Mitchell answered, "right." The prosecutor thereafter sought to cross-examine Robert Mitchell with respect to his juvenile record. The trial court ruled that, in his direct testimony, Robert Mitchell "clearly, by virtue of his testimony, portrayed himself as a teenager without any kind of a criminal history, thanks, in large part, to the efforts of his brother." The trial court then allowed the prosecutor to question Robert Mitchell about his juvenile record.

We find no abuse of discretion by the trial court. By testifying that he was kept out of trouble, Robert Mitchell opened the door for the questioning by the prosecutor about his juvenile record. The trial court accurately assessed that Robert Mitchell attempted to portray himself in a false light. He wanted to persuade the jury that the shootings were the reaction of a scared, naive teenager. The prosecutor's questioning of Robert Mitchell about the specific character trait he raised—that he was not a troublemaker or a person who got into trouble—was not improper under the circumstances.<sup>77</sup>

## IX. Expert Testimony

### A. Standard Of Review

Robert Mitchell challenges the trial court's decision to preclude him from presenting expert psychiatric testimony. We review a trial court's decision regarding the admissibility of expert testimony for an abuse of discretion.<sup>78</sup>

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<sup>74</sup> *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986).

<sup>75</sup> *Id.* at 130-131.

<sup>76</sup> *Id.* at 133-134.

<sup>77</sup> *Lukity, supra.*

<sup>78</sup> *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996).

## B. The Mitchells' Relationship

In this case, Robert Mitchell's counsel sought to offer expert testimony to explain that the relationship between Robert Mitchell and Jason Mitchell was like that of father and son or protector and guardian, and that this special relationship was part of Robert Mitchell's state of mind when he acted to protect Jason Mitchell. Counsel argued that the expert testimony was necessary to support the offered defense.

Expert testimony is admissible if it meets certain requirements<sup>79</sup> and is relevant and helpful to explain a specific behavior that might otherwise be misconstrued by the jury.<sup>80</sup> However, for behavioral expert testimony to be admissible, the behavior at issue must require explanation. In *Manser*, for example, the defendant wanted to use expert testimony to explain why he cooperated with the police, agreed to talk to them, and made incriminating statements to them.<sup>81</sup> This Court stated:

This is not behavior that needed to be explained to the jury. It is common knowledge that defendants talk to police for myriad reasons, including that they believe they can convince the police of their innocence. There is no authority to support the conclusion that expert testimony was necessary to explain defendant's behavior. Thus, the trial court did not abuse its discretion in refusing to admit the expert testimony on that issue.<sup>[82]</sup>

Like the behavior in *Manser*, we do not find that the behavior at issue required explanation. The jury was presented with Robert Mitchell's theory and with evidence that he loved Jason Mitchell, looked up to him like a father, and would do anything for him. The jury was also duly instructed with respect to the defense of others. Expert testimony was not necessary to assist the jury in understanding the claimed relationship, the behavior, or Robert Mitchell's theory of defense. We conclude that the trial court did not abuse its discretion by excluding the proposed expert testimony.

## X. Demonstrative Evidence

### A. Standard Of Review

Robert Mitchell contends that the prosecutor's introduction of an assault rifle as demonstrative evidence was irrelevant and prejudicial. The use of the demonstrative evidence was not met with an objection. Thus, we review this issue for plain error.<sup>83</sup>

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<sup>79</sup> MRE 702.

<sup>80</sup> *People v Peterson*, 450 Mich 349, 373-375; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Carines, supra.*

## B. The Admissibility Of Demonstrative Evidence

Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case. As with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice. Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court's decision to admit demonstrative evidence. However, we find persuasive, and adopt for this state's jurisprudence, a test espoused by the Supreme Court of Missouri: A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where substantial evidence attests to the similarity of the exhibit offered to the weapon allegedly used, there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon.<sup>[84]</sup>

## C. The Prosecutor's Use Of The Assault Rifle

Eyewitness testimony indicated that Robert Mitchell used an SKS assault rifle with a banana clip hanging from the bottom. Jeffrey Crump, a firearms examiner, testified that the twenty shell casings recovered in the parking lot were 7.62 by 39 millimeter ammunition casings, which could have been fired from an SKS rifle. The prosecutor showed an SKS rifle to the jury and indicated that it was not the murder weapon, that it would not be admitted as evidence, and that it was just an example. Crump subsequently explained how an SKS rifle can be modified to accommodate a banana clip that holds either twenty or thirty cartridges. Crump also testified that the weapon is heavy, weighing ten to fifteen pounds. In closing argument, the prosecutor argued that Robert Mitchell's actions were premeditated and deliberate. She argued that, for someone who claimed he never fired a gun before, Robert Mitchell was adept at picking up the heavy gun and firing it, discharging it twenty times until it was out of ammunition.

As used by the prosecutor, the demonstrative evidence was relevant and probative. The evidence made the prosecutor's theory that the shooting was premeditated more likely than not.<sup>85</sup> The evidence tended to prove that the firing of the gun and hitting of a target was not a fluke. It was a heavy weapon, modified to fire repeatedly without reloading. Further, the probative value of the evidence was not outweighed by the danger of unfair prejudice.<sup>86</sup> Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable.<sup>87</sup> The record does not

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<sup>84</sup> *People v Castillo*, 230 Mich App 442, 444-445; 584 NW2d 606 (1998) (citations omitted).

<sup>85</sup> MRE 401; MRE 402.

<sup>86</sup> MRE 403.

<sup>87</sup> *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

suggest that the evidence was given undue or preemptive weight, or that its use was inequitable. The prosecutor used it for limited permissible purposes.

In addition, the requirements of *Castillo* were met. Phillip Patterson testified that the gun Robert Mitchell used was an SKS rifle with a banana clip. Phillip Mitchell was familiar with that type of weapon, having seen a similar one on another occasion. Further, SKS assault rifles use the type of ammunition that was found at the scene of the shootings. The evidence supported the similarity between the weapon used to commit the charged crimes and the demonstrative evidence. Additionally, the jury was informed that the weapon was not the murder weapon, but was only for demonstrative purposes. There is no likelihood that the jury failed to understand that the weapon was not the murder weapon. Finally, the defendants were not precluded from cross-examining any witness about the weapon. We conclude that there was no plain error.<sup>88</sup>

## XI. Prosecutorial Misconduct

### A. Standard Of Review

Robert Mitchell contends that the prosecutor committed misconduct during closing argument. The challenged argument was not met with an objection and the issue is therefore unpreserved.<sup>89</sup> In addition, the issue is abandoned on appeal. Robert Mitchell argues that the prosecutor committed misconduct because she requested that a portion of a witness' testimony be transcribed, and then quoted the transcript in her closing argument. Robert Mitchell does not cite to the relevant portion of the record when setting out his argument. Moreover, his argument is cursory and fails to cite any relevant authority for the proposition that it is improper for a prosecutor to quote testimony during closing argument. Defendant erroneously relies on MCR 6.414(H), which governs a trial court's ruling on a jury request to review evidence. "This Court declines to consider issues where they are given cursory treatment with little or no citation to authority."<sup>90</sup>

### B. Plain Error

We nevertheless note that there was no plain error requiring reversal. During closing argument, the prosecutor quoted a short portion of a witness' testimony to support her theory that the shooting of Phillip Patterson was purposeful. Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case."<sup>91</sup> The witness' testimony was evidence in the case, and the prosecutor was entitled to quote it and refer to it in closing argument.

We also note that, in his argument, Robert Mitchell asserts that the prosecutor "crossed the line of proper conduct" by cross-examining him about the veracity of the prosecution's

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<sup>88</sup> *Carines, supra.*

<sup>89</sup> *Aldrich, supra.*

<sup>90</sup> *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995).

<sup>91</sup> *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

witnesses. This issue is not properly presented because it is not raised in the statement of questions presented.<sup>92</sup> Further, Robert Mitchell never objected to the prosecutor's cross-examination in this regard and, accordingly, review is for plain error.<sup>93</sup> We agree that the prosecutor's questions to Robert about the veracity of the prosecution's witnesses constitute plain error.<sup>94</sup> Robert nevertheless fails to argue or demonstrate that the error affected the outcome of the lower court proceedings.<sup>95</sup> Thus, he has not met his burden of demonstrating plain error requiring reversal.<sup>96</sup> Moreover, in light of the overwhelming evidence supporting Robert Mitchell's convictions, we are persuaded that the error did not affect the outcome.

Affirmed.

/s/ William C. Whitbeck  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray

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<sup>92</sup> *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

<sup>93</sup> *Carines, supra*.

<sup>94</sup> *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988), citing *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

<sup>95</sup> *Carines, supra*.

<sup>96</sup> *Id.*