

STATE OF MICHIGAN  
IN THE SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v.

No. 154814

DARRELL JOHN WILDER,  
Defendant-Appellant.

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Court of Appeals No. 327491  
Circuit Court No. 14-004600

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF  
BY DIRECTION OF THE COURT'S ORDER OF MAY 26, 2017

ORAL ARGUMENT REQUESTED

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## COUNTERSTATEMENT OF JURISDICTION

The Court has jurisdiction over defendant's appeal from the Court of Appeals' opinion affirming his convictions.

**COUNTERSTATEMENT OF QUESTIONS PRESENTED**

**I**

**A party may cross-examine a witness about any relevant matter, including credibility. After defendant's wife testified that she did not know defendant to carry weapons or guns, the prosecutor questioned her about her knowledge of defendant's two convictions of carrying a weapon. Did the trial court abuse its discretion in allowing the prosecutor to question defendant's wife about her knowledge of defendant's prior convictions to contradict her denial of knowing him to carry weapons?**

**The People answer: NO.**

**Defendant answers: YES.**

**The Court of Appeals answered: NO.**

**II**

**A prosecutor may question a testifying witness about any relevant matter, including credibility, but when the matter is a collateral one, extrinsic evidence is inadmissible to impeach the witness. After defendant's wife testified that she did not know defendant to carry weapons or guns, the prosecutor questioned her about her knowledge of defendant's two convictions of carrying a weapon. Did the prosecutor impermissibly use extrinsic evidence to impeach defendant's wife's testimony?**

**The People answer: NO.**

**Defendant answers: YES.**

**The Court of Appeals answered: NO.**



### III

The Court may not reverse a conviction on grounds of the improper admission of evidence unless the error has resulted in a miscarriage of justice. The testimony regarding defendant's prior convictions was brief, the prosecutor argued the evidence only as it pertained to the truthfulness of other testimony from defendant's wife, and two police officers unequivocally testified that they saw defendant put the gun in the trunk of the car. Did error, if any, in the references to defendant's prior convictions during impeachment of defendant's wife result in a miscarriage of justice?

The People answer: NO.

Defendant answers: YES.

The Court of Appeals did not address the question.

## COUNTERSTATEMENT OF FACTS

This case arises out of the recovery of a stolen 9 mm Glock handgun and 50-round drum-style magazine from the trunk of a car owned by Charmel Richardson, defendant's cousin. 4/1/15, 157-160; 4/2/15, 6-7, 57-58. Police Officers David Shaw and Steven Fultz identified defendant Darrell Wilder as the man they saw put the gun in the trunk. 4/1/15, 150-153; 202-203.

Officers Shaw and Fultz were patrolling in their marked squad car in the area of Eastlawn and Vernor in the City of Detroit on the afternoon of May 16, 2014. As they travelled southbound on Eastlawn, with Shaw driving and Fultz in the passenger seat, they saw a group of people near a car parked in a vacant lot. 4/1/15, 147-149; 169, 199-202. The hood of the car was up. 4/1/15, 172. The officers saw defendant standing at the side of the car with an object protruding from the right front pocket of his pants. Officer Fultz recognized the object as a cylinder that holds a large amount of ammunition for a handgun. 4/1/15, 150-151, 160-161, 203-206.

Both officers saw defendant look toward them before walking to the rear of the car, with Officer Fultz also observing defendant retrieve a small object from defendant's cousin, Richardson, the only woman present.<sup>1</sup> 4/1/15, 151-153, 201. Both officers saw defendant open the trunk, put the handgun with the drum in the trunk, shut the trunk, and return to his previous position by the car. 4/1/15, 151-153, 199-202, 206-207. As defendant returned to the side of the car, Officer Fultz saw him hand something to Richardson. 4/1/15, 151-154. Officer Fultz did not see anyone else walk to the rear of the car or move away from the car. 4/1/15, 154.

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<sup>1</sup> The officers did not identify Richardson by name, but Richardson testified that she was the only woman present. 4/2/15.

The officers approached defendant on foot, and Fultz ordered defendant to raise his hands. Defendant complied. After handcuffing defendant, but not the others present, Fultz asked Richardson, who had indicated that she was the owner of the car, for the car keys. Defendant and Richardson replied that the car battery was dead and the trunk would not open without charging the battery. After 30 seconds of back and forth discussion with defendant and Richardson, Fultz told Richardson that if she did not give him the keys, he would use a crowbar to open the trunk. Richardson then told him that she did not want her car damaged because she was trying to sell it. She gave him the keys. 4/1/15, 154-156, 170, 207-209.

Officer Fultz opened the trunk with the key and saw the handgun with the drum in the otherwise empty trunk. 4/1/15, 157. The drum contained forty-three live rounds, and the gun had one round in its chamber.<sup>2</sup> 4/1/15, 163, 210-211.

Richardson denied that the gun belonged to her, although she admitted that she saw it after the police retrieved it that day. 4/2/15, 12-14. She maintained that her car had been in the vacant lot for two or three days. 4/2/15, 38-39. That afternoon, her cousin Carlos, who was planning on buying the car, was boosting the battery with his truck and pulling on the fender of the car. 4/2/15, 16-18, 36. Richardson had looked in the trunk for something to help with the fender, and was standing outside the car on the driver's side with defendant. 4/2/15, 9, 19. Richardson agreed that she gave the police the keys to the car. 4/2/15, 22. She told the police the trunk could not be opened because the battery was dead. 4/2/15, 11-12. According to Richardson, the police said they would "bash" the car, and obtained an object from the police car before threatening to smash her car if she did not give them the keys. 4/2/15, 11-12, 22-24.

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<sup>2</sup> The Michigan State Police determined that the gun was operational. In accordance with State Police policy, the gun was not examined for fingerprints. 4/2/15, 41-43.

Richardson initially said she provided the keys only after the car had been “boosted,” but later said that the car had been jumped before the police arrived. 4/2/15,12, 18. The trunk, she admitted, opened for the police. 4/2/15, 28. Richardson said an officer swore at her when she asked for the return of her keys. 4/2/15, 21. Fultz denied swearing at anyone. 4/1/15, 175.

The People charged defendant with felon in possession of a firearm,<sup>3</sup> carrying a concealed weapon,<sup>4</sup> and felony-firearm.<sup>5</sup> Defendant’s trial was scheduled to begin on September 1, 2014, but he did not appear, although his wife and mother were present. He was arrested in January 2015. 4/2/15, 46-47, 79-80.

Defendant called two witnesses at his trial in April 2015: his wife, Tameachi Wilder, and his brother, Carlos Wilder. Defendant’s wife testified that they had an off-and-on relationship during their sixteen years together and nine years of marriage, and they were living together in May 2014. 4/2/15, 67-68, 76-79. On May 16, 2014, defendant received a phone call, and told her that he was leaving with his brother Carlos. Defendant’s wife saw the Yukon owned by defendant’s brother outside, but did not see defendant leave with Carlos. 4/2/15, 72-74.

On direct examination, defense counsel asked defendant’s wife about defendant’s connection to guns. In response to the question whether she saw defendant with a gun when he left the house that day, the witness answered “no.” When asked whether to her knowledge defendant owned a gun, she answered “no.” Finally, when asked whether she had weapons in her house, the witness answered “no.” 4/2/15, 75.

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<sup>3</sup> MCL 750.224f.

<sup>4</sup> MCL 750.227.

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

On cross-examination, the prosecutor asked whether defendant's wife knew defendant to carry weapons. She answered "no." When asked whether she knew him to carry guns, she answered "no." 4/2/15, 81.

Outside the presence of the jury, the prosecutor requested permission to question defendant's wife about defendant's 2007 and 2010 felony-firearm convictions. Over defendant's objection, the trial court permitted the questioning. 4/2/15, 82-83.

On resuming her testimony, defendant's wife confirmed that she and defendant were together in 2007, and although they were separated in 2010, defendant was living in her home and seeing his children every day. 4/2/15, 83-86. On questioning by the prosecutor, she admitted that she knew that defendant was convicted of carrying a weapon in 2007. She said that she did not "know" that he carried weapons, but knew that he had been convicted, and added that she did not see a weapon in her home. 4/2/15, 85. With regard to defendant's 2010 conviction, she admitted that she knew he had been convicted of having a weapon, but maintained the gun was not in her house. 4/2/15, 86.

Defendant moved for a mistrial at the conclusion of the testimony of defendant's wife. The court denied the motion. 4/2/15, 93-95.

Defendant's brother then testified about the events of May 16, 2014. Carlos Wilder testified that he drove defendant to the vacant lot to buy a car from their cousin, Richardson. He said they popped the hood and were about to connect cables to start the car when he turned his attention to a fender. According to Wilder, Richardson was in the car when they tried to bend the fender using a crowbar. 4/2/15, 96-102.

Carlos maintained that eight or nine people were in the area when he saw the police make a U-turn and drive up Eastlawn. Some of those present were interested in buying the car. 4/2/15, 102-105. As the police pulled up, a couple of men quickly walked away. 4/2/15, 106.

Carlos testified that he did not see defendant walk to the back of the car and did not see the trunk open. 4/2/15, 107, 122. He said defendant was next to him, pulling on the bumper, when the police jumped out and grabbed them. He claimed one officer patted them down and asked them their names while the other searched the car. 4/2/15, 107-109. An officer handcuffed defendant and one other man, but not Carlos. 4/2/15, 123. Then, when an officer asked Richardson for the keys, Carlos injected himself into the conversation, saying that the car could not move. According to Carlos, the officer became angry when Richardson told him the keys would not open the trunk. The officer swore at her and threatened to damage the car before he went to the police car and retrieved an object Carlos described as something one would use to knock down a door. The officer then again threatened to damage the car. According to Carlos, he questioned the officer about why he was acting that way. Richardson then began to cry, saying that they had to boost the battery to open the trunk. 4/2/15, 109-114.

Carlos testified that Richardson gave the officer the keys. He said the officer tried the key, but it did not work. Then, at Richardson's urging, the officer pressed the button and the trunk opened. 4/2/15, 114-115. According to Carlos, the officer threw a few items from the trunk on the ground before saying he found a gun. Carlos saw the gun as the officer walked toward the police car. 4/2/15, 115-116, 126. The gun, Carlos said, did not belong to him. 4/2/15, 127.

The jury found defendant guilty of felon in possession of a firearm and felony-firearm, but acquitted him of carrying a concealed weapon. 4/3/15, 10-11.

On April 28, 2015, the trial court sentenced defendant to ten years' imprisonment for felony-firearm and probation for felon in possession of a firearm. 4/28/15, 16-17.

The Court of Appeals affirmed defendant's convictions on September 27, 2016.<sup>6</sup>

Defendant appealed, and on May 26, 2017, the Court directed the Clerk to schedule oral argument on whether to grant the application or take other action. The Court further ordered the parties to file supplemental briefs within 42 days addressing: "(1) whether the trial court erred by allowing the prosecutor to cross-examine the defendant's wife about his prior firearms convictions; (2) whether the prosecutor improperly raised a collateral issue to admit evidence of the defendant's prior felonies through impeachment, compare *People v Stanaway*, 446 Mich 643 (1994), with *People v Kilbourn*, 454 Mich 677 (1997); see also *People v Vasher*, 449 Mich 494 (1995); and (3) whether any error was harmless."<sup>7</sup>

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<sup>6</sup> *People v Darrell Wilder*, unpublished per curiam opinion of the Court of Appeals, issued September 27, 2016 (Docket No. 327491).

<sup>7</sup> The Court subsequently granted the People's motion for an additional 28 days in which to file the People's supplemental brief.

## ARGUMENT

### I.

**A party may cross-examine a witness about any relevant matter, including credibility. After defendant's wife testified that she did not know defendant to carry weapons or guns, the prosecutor questioned her about her knowledge of defendant's two convictions of carrying a weapon. The trial court did not abuse its discretion in allowing the prosecutor to question defendant's wife about her knowledge of defendant's prior convictions to contradict her denial of knowing him to carry weapons.**

#### **Standard of Review**

The Court reviews preserved claims of evidentiary error for an abuse of discretion.<sup>8</sup> A court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes.<sup>9</sup>

#### **Discussion**

The trial court properly exercised its discretion to grant the prosecutor's request to ask relevant questions during cross-examination of defendant's wife. Relevancy is the primary limitation on the scope of cross-examination. Where relevant, evidence is admissible, subject to the trial court's discretion to exclude evidence under MRE 403 for reasons such as the danger of unfair prejudice substantially outweighing the probative value of the evidence. Unlike the use of evidence of prior convictions to impeach a witness' general credibility<sup>10</sup> and as substantive

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<sup>8</sup> *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014). The issue was preserved by counsel's objections. In objecting to the prosecutor's request to impeach defendant's wife with her knowledge of defendant's convictions, defendant argued that the convictions were not relevant. 4/2/15, 82. Later, in moving for a mistrial, counsel argued that the convictions were unfairly prejudicial and not relevant, and that she did not open the door to the questioning. 4/2/15, 93-94.

<sup>9</sup> *Id.*

<sup>10</sup> MRE 609.



evidence showing a propensity to commit crimes,<sup>11</sup> no special rule exists with regard to the use of evidence of a defendant's convictions to impeach specific testimony given by defendant or any other witness. The evidence is admissible if relevant and not otherwise excluded by a trial court exercising its discretion under MRE 403.

Here, defendant placed his wife's credibility at issue when he solicited her testimony in support of his defense theory that he never possessed the gun recovered by the police. By calling her as a witness and asking her about defendant's connection to guns, defendant exposed her to cross-examination "on any matter relevant to any issue in the case, including credibility."<sup>12</sup> Having testified on direct examination regarding her knowledge about defendant's possession of a gun, defendant's wife was subject to cross-examination about her knowledge. When she denied knowing that defendant had carried a weapon or gun on cross-examination, her knowledge of defendant's weapon-related convictions became relevant to her credibility, as the jury could infer from her answers that she had not been entirely truthful during her prior testimony. The trial court's reasonable decision to allow the questioning was not an abuse of discretion.

***Relevancy is the Primary Limitation on the Scope of Cross-Examination***

Relevancy is the touchstone of admissibility under the rules of evidence.<sup>13</sup> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, [the rules of evidence], or other rules adopted by the Supreme Court."<sup>14</sup> Relevant evidence is defined broadly. It is evidence having "any tendency to

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<sup>11</sup> MRE 404.

<sup>12</sup> MRE 611(c).

<sup>13</sup> *People v Musser*, 494 Mich 337, 354; 835 NW2d 319 (2013).

<sup>14</sup> MRE 402.

make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>15</sup>

Relevancy therefore is the primary limitation on the scope of cross-examination. Under MRE 611(c), a prosecutor, like defense counsel, may cross-examine a witness on any matter relevant to any issue in the case, including credibility. The foundation for that rule lies in the role of cross-examination in adversarial trial proceedings. Cross-examination, the United States Supreme Court recognized long ago, is the principal means by which the truth of a witness’ testimony is tested.<sup>16</sup> “Subject always to the broad discretion of the trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness.”<sup>17</sup>

This Court has embraced “the general canon that on cross-examination the range of evidence that may be elicited for any purpose of discrediting is to be very liberal.”<sup>18</sup> The Court’s recent jurisprudence has made clear that the Rules of Evidence, particularly MRE 402 and 403, govern the scope of cross-examination. Rules prohibiting inquiry into particular matters on cross-examination thus have fallen into disfavor, and this Court has distanced itself from its decisions holding otherwise. For example, over forty years ago, the Court held in *People v Falkner*<sup>19</sup> that cross-examination of a witness regarding prior arrests or charges that did not result in conviction was prohibited. The Court, however, since has narrowed that holding. In

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<sup>15</sup> MRE 401 (emphasis added).

<sup>16</sup> *Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974).

<sup>17</sup> *Id.*

<sup>18</sup> *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981), quoting 3A Wigmore, Evidence (Chadbourn Rev.), § 944, p 778; see also *People v Layher*, 464 Mich 756, 768; 631 NW2d 281 (2001).

<sup>19</sup> *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973).

*People v Layher*,<sup>20</sup> the Court held that, where relevant to bias, evidence of a prior arrest is admissible as long as its probative value is not substantially outweighed by the danger of unfair prejudice. Rather than barring an entire category of evidence, the Court instructed the bench and bar to employ the “evidentiary safeguards” already present in the rules of evidence in determining admissibility.<sup>21</sup>

The evidentiary safeguards referenced by the Court are MRE 402 and MRE 403. Relevant evidence generally is admissible,<sup>22</sup> but even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the misleading of the jury.<sup>23</sup> A trial court has discretion in determining relevance and considering the possibility of unfair prejudice when ruling on the propriety of questions asked on cross-examination.<sup>24</sup>

***Relevant Evidence of a Defendant’s Prior Convictions May Be Admitted on Cross-Examination to Impeach Specific Testimony of a Witness***

A trial court’s discretion to allow cross-examination extends to permitting questioning regarding a defendant’s prior convictions. Where relevant, the evidence generally is admissible.<sup>25</sup> Evidence is relevant if it is material and has probative value.<sup>26</sup> Material facts are those that are “of consequence,” a determination a court makes by examining “the relation

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<sup>20</sup> *Layher*, 464 Mich at 768.

<sup>21</sup> *Id.* at 769.

<sup>22</sup> MRE 402.

<sup>23</sup> MRE 403.

<sup>24</sup> *Layher*, 464 Mich at 761; see generally *People v Sabin*, 463 Mich 43, 60; 614 NW2d 888 (2000) (an appellate court reviews a trial court’s determinations under MRE 402 and 403 for an abuse of discretion).

<sup>25</sup> MRE 402.

<sup>26</sup> *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010); MRE 401.

between the propositions for which the evidence is offered and the issues in the case.”<sup>27</sup> Any tendency to prove a fact of consequence “constitutes sufficient probative value for purposes of relevancy.”<sup>28</sup> When the evidence is material, therefore, the evidence is relevant if it has *any* probative value.

The credibility of the witnesses offering testimony unquestionably is material. It is “of consequence” to a determination of guilt or innocence.<sup>29</sup> In *People v Mills*,<sup>30</sup> the Court explained:

“[M]atters in the range of dispute may extend somewhat beyond the issues defined in the pleadings . . . . [T]he parties may draw in dispute the credibility of the witnesses and, within limits, produce evidence assailing and supporting their credibility.” [1 McCormick, Evidence (4<sup>th</sup> ed) § 185, p 185]. As noted in Weinstein & Berger, [1 Weinstein & Berger, Evidence, ¶ 401[05], p 401-29], evidence may be admitted to assist in the evaluation of “the credibility of a witness.” Here, the test is “whether the evidence will aid the court or jury in determining the probative value of other evidence *offered to affect the probability of the existence of a consequential fact.*” *Id.* (emphasis provided).

Evidence of a defendant’s criminal history may be material to a witness’ credibility when it serves to contradict specific testimony. The Court recognized that theory of relevance over seventy-five years ago in *People v Foley*.<sup>31</sup> There, the Court considered a prosecutor’s use of a defendant’s prior arrests during cross-examination. The defendant was charged with receiving the earnings of a prostitute. On direct examination, the defendant testified that she had been convicted of a prohibition violation and that she never saw the prostitute do anything wrong at her house. On cross-examination, the prosecutor questioned her about her arrests and

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<sup>27</sup> *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), quoting McCormick, Evidence (4<sup>th</sup> ed), § 185, p 773.

<sup>28</sup> *People v Starr*, 457 Mich 490, 497-498; 577 NW2d 673 (1998).

<sup>29</sup> *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995).

<sup>30</sup> *Id.*

<sup>31</sup> *People v Foley*, 299 Mich 358; 300 NW 119 (1941).

convictions, and the number of times she had been arrested with the prostitute. The Court discerned no abuse of discretion in permitting the cross-examination. The testimony on cross-examination was used to impeach the direct examination of the same witness, and the Court ruled it was within the trial court's discretion to permit cross-examination within reasonable bounds.<sup>32</sup>

It matters not that evidence of a defendant's convictions may be inadmissible for other purposes. The theory of "multiple admissibility" underlies the rules of evidence. The Court has long recognized that, under that theory, "evidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded."<sup>33</sup> This principle applies to evidence of a defendant's prior convictions. That the evidence may not be admissible to impeach a defendant's general credibility under MRE 609, or for substantive purposes as other-acts evidence under MRE 404, does not preclude its admission to impeach specific testimony.

*People v Taylor*<sup>34</sup> illustrates this point. In *Taylor*, two men forced the victim into a car and drove him through a neighborhood. One of the men beat and strangled the victim in the back seat before the car stopped. The man shot the victim to death, and took the victim's money and jewelry. Both men then fled on foot. Testifying in his own defense in his trial on felony murder and other charges, the defendant claimed that he did not know of his codefendant's intent to rob the victim before his codefendant forced the defendant at gunpoint to drive the car. In an effort to explain why he did not flee when his codefendant was in the back seat with the victim, the defendant claimed that he was hysterical and did not understand what his codefendant

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<sup>32</sup> *Id.* at 363.

<sup>33</sup> *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993); see also MRE 105.

<sup>34</sup> *People v Taylor*, 422 Mich 407; 373 NW2d 579 (1985).

intended to do with the gun. The trial court then permitted the prosecutor to impeach the defendant with evidence of the defendant's prior conviction of assault with intent to commit robbery while armed. This Court held that the trial court did not abuse its discretion in determining that the evidence was relevant, reasoning that the evidence showed the defendant's awareness of an attempted armed robbery in the past.

The *Taylor* Court explained that MRE 609 does not bar admission when evidence is offered for a purpose other than to impeach a witness' general credibility. Evidence offered to rebut specific testimony, the Court held, does not fall within MRE 609 because it is not impeachment of a witness' "credibility for truthfulness or veracity in general, but rather for the narrow purpose to rebut specific testimony . . . ." <sup>35</sup>

Similarly, MRE 404, like MRE 609, is not a general bar to the admission of evidence of a defendant's convictions. While the Court once viewed evidence of a defendant's other crimes as suspect and generally inadmissible, <sup>36</sup> the Court later clarified that MRE 404 is inclusionary rather than exclusionary. <sup>37</sup> MRE 404 limits only one theory of logical relevance—"that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question." <sup>38</sup> MRE 404 does not preclude using the evidence for other relevant purposes. <sup>39</sup>

Therefore, no rule prohibits references to defendant's prior convictions to impeach the specific testimony of a witness. Rather, the trial court must determine whether the evidence is

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<sup>35</sup> *Id.* at 415.

<sup>36</sup> See e.g. *People v Robinson*, 417 Mich 661, 664; 340 NW2d 631 (1983).

<sup>37</sup> *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990).

<sup>38</sup> *VanderVliet*, 444 Mich at 62.

<sup>39</sup> *Sabin*, 463 Mich at 56.

relevant and otherwise admissible. The court's discretion in that regard is broad. Only if a court abuses its discretion will an appellate court disturb its ruling.<sup>40</sup>

***The Trial Court Did Not Abuse its Discretion in Allowing Impeachment of Defendant's Wife with Her Knowledge of Defendant's Prior Convictions.***

The trial court did not abuse its discretion in permitting cross-examination of defendant's wife regarding her knowledge of defendant's prior convictions. Her credibility was "of consequence" to the determination of defendant's guilt or innocence because she specifically testified about defendant's possession of a gun in support of the defense theory that defendant never possessed the gun recovered from the trunk of the car. On direct examination, she testified that she did not see defendant with a gun when he left the house on the day of the crime. She also testified regarding her knowledge of whether defendant owned a gun and whether weapons were in the house. 4/2/15, 75. Defense counsel and the witness, not the prosecutor, thus injected into the trial her knowledge of defendant's gun possession.

The prosecutor permissibly explored the witness' knowledge during cross-examination. The prosecutor need not have accepted the witness' answers to the questions posed on direct examination, and could delve into those issues with additional, probing questions.<sup>41</sup> The witness' credibility was at issue, and evidence discrediting her prior testimony unquestionably was relevant.

The prosecutor therefore permissibly inquired whether the witness knew defendant to carry weapons and guns. When the witness answered "no" to those questions, the trial court properly exercised its discretion to allow impeachment of the witness with her knowledge of

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<sup>40</sup> *Douglas*, 496 Mich at 565.

<sup>41</sup> See 1 McCormick, *Evidence* (7<sup>th</sup> ed, Practitioner Series), §49, pp 322-323 ("During cross-examination, the questioner may attempt to challenge virtually any aspect of the witness's direct examination").

defendant's prior convictions. The witness, on further cross-examination, confirmed that she had been living with defendant at the time of defendant's prior convictions and knew of the convictions. While she sought to explain away her prior answers by drawing a distinction between knowing of the convictions and knowing defendant had a weapon, a reasonable juror would view that distinction with skepticism. A jury then rightfully could weigh her deception regarding her knowledge of defendant's possession of weapons in deciding whether she was truthful when she testified that she did not see defendant with a gun on May 16, 2014.

The danger of unfair prejudice did not substantially outweigh the probative value of that evidence as it pertained to the credibility of defendant's wife. Under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A determination whether evidence is merely prejudicial is not the test for exclusion under the rule. The Court has explained that MRE 403 "involves two sides of a scale—a probative side and a prejudicial side."<sup>42</sup> All relevant evidence is prejudicial. "It is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403."<sup>43</sup>

This is not a case in which marginally probative evidence might be given undue or preemptive weight by the jury.<sup>44</sup> The evidence was highly probative of the credibility of a defense witness. Defendant's wife played an essential role in the defense theory. Because the gun with the ammunition drum was not easily concealed, her testimony, if believed, could be

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<sup>42</sup> *People v Watkins*, 491 Mich 450, 486; 818 NW2d 296 (2012).

<sup>43</sup> *Mills*, 450 Mich at 75, quoting *United States v McRae*, 593 F2d 700, 707 (CA 5, 1979).

<sup>44</sup> See generally *Crawford*, 458 Mich at 398 ("evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury").



deemed to establish that the gun recovered by the police did not belong to defendant. That finding would make it less likely that defendant possessed the gun while at the vacant lot later that day. But on learning that the witness was less than truthful when testifying about her knowledge of defendant's possession of weapons in the past, a jury could find that she was not a credible witness and reject her testimony.

The danger of unfair prejudice from the admission of the evidence regarding the witness' knowledge did not substantially outweigh the probative value of the evidence. A determination of unfair prejudice requires a "balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects."<sup>45</sup> Those factors favor admission of the evidence in this case.

The witness' knowledge of defendant's convictions was very important, as exposing her lack of truthfulness surely would influence a jury's determination whether to credit her testimony that defendant did not possess a gun. Despite defendant's wife's attempts to explain her prior testimony, the evidence showed that she had not been truthful. Admission of that strong evidence of deception by the witness did not prolong the trial. The admission of the evidence caused no delay, the additional questioning was brief, and the evidence was not cumulative.

It is unlikely that a jury hearing the testimony would be confused or misled with regard to the purpose for which it was admitted. The questions were phrased in terms of the witness'

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<sup>45</sup> *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008), quoting *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).

knowledge and did not delve into the acts underlying defendant's convictions. The witness' answers also addressed her knowledge. She sought to explain her answers by attempting a distinction between being aware of defendant's *convictions* and being aware that defendant *carried a weapon*. A jury hearing those questions and answers would understand that the evidence pertained to the truthfulness of the witness, and would be unlikely to consider the evidence for other purposes.

Finally, the witness' knowledge of defendant's convictions could not be proven in any other way than to reference the convictions during cross-examination. As this Court stressed in *People v Jackson*,<sup>46</sup> whether the evidence could have been limited in a way that would "meaningfully reduce the risk of this impermissible inference while still preserving the testimony's legitimate probative value" is an important factor in the MRE 403 analysis. In *Jackson*, the defendant was charged with sexually abusing a young member of the church where he served as pastor, and the trial court admitted testimony regarding the defendant's prior sexual relationships with other parishioners. The evidence, the Court held, was relevant to counter the defendant's theory that the victim fabricated her allegations at the witness' behest.<sup>47</sup> The Court then concluded that MRE 403 did not bar the evidence. The Court observed that the evidence was "tailored to its proper purpose, and did not delve into unnecessary detail or unduly invite the jury to draw an impermissible character-to-conduct inference from it."<sup>48</sup>

Similarly, here, the evidence was tailored to its proper purpose. The questioning focused on defendant's wife's knowledge of defendant's convictions as it pertained to the truthfulness of her answers to prior questions. The witness' answers also focused on her knowledge, as she

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<sup>46</sup> *People v Jackson*, 498 Mich 246, 277; 869 NW2d 253 (2015).

<sup>47</sup> *Id.* at 277.

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

sought to explain that she had given truthful answers. The questions and answers did not delve into the details of defendant's convictions or the names of the offenses. The jury only learned that defendant had been convicted of carrying or having a weapon or gun. The questions asked by the prosecutor and the answers provided by the witness thus did not unduly invite the jury to draw any impermissible inference from the evidence.

MRE 403, therefore, did not preclude admission of the evidence. The danger of unfair prejudice did not substantially outweigh the probative value of evidence of the witness' knowledge of defendant's prior convictions. Because the evidence was relevant, and MRE 403 did not preclude its admission, the trial court did not abuse its discretion when it granted the prosecutor's request to question defendant's wife about her knowledge of defendant's prior convictions.

### ***Conclusion***

The trial court did not abuse its discretion in allowing the prosecutor to cross-examine defendant's wife regarding her knowledge of defendant's prior convictions of carrying or having a weapon. Where relevant, evidence of a defendant's prior convictions may be admissible to impeach specific testimony of a witness. The evidence was relevant in this case because it demonstrated that defendant's wife had not been truthful when she denied knowing that defendant had carried a weapon in the past. The credibility of defendant's wife was at issue because she testified in support of the defense theory that defendant did not possess the gun recovered by the police, and a jury could weigh her lack of truthfulness in deciding whether to believe her testimony that she did not see defendant with a gun on the day of the crime. The probative value of the evidence in that regard was not substantially outweighed by the danger of

unfair prejudice. The evidence was tailored to its proper purpose—the witness’ knowledge—and did not invite the jury to consider it for improper purposes.

The trial court’s decision to permit the questioning was within the range of permissible outcomes. That some jurists may disagree with the court’s decision does not demonstrate an abuse of discretion.<sup>49</sup> The trial court, not an appellate court, had the benefit of observing defendant’s wife’s demeanor and hearing her testimony, and was in a superior position to weigh those factors in deciding whether the impeachment value of the evidence was substantially outweighed by any danger of unfair prejudice.<sup>50</sup> Even if the question could be considered a close one, this Court has emphasized that a trial court’s decision on a close evidentiary question ordinarily cannot be an abuse of discretion.<sup>51</sup>

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<sup>49</sup> *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

<sup>50</sup> See *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010) (a trial court is better positioned to make MRE 403 determinations because it can make a “contemporaneous assessment of the presentation, credibility, and effect of testimony”).

<sup>51</sup> *Hine*, 467 Mich at 250.

## II.

**A prosecutor may question a testifying witness about any relevant matter, including credibility, but when the matter is a collateral one, extrinsic evidence is inadmissible to impeach the witness. After defendant's wife testified that she did not know defendant to carry weapons or guns, the prosecutor questioned her about her knowledge of defendant's two convictions of carrying a weapon. The prosecutor permissibly questioned defendant's wife, and did not use extrinsic evidence to impeach her.**

### Standard of Review

The Court directed the parties to address whether the prosecutor improperly raised a collateral issue to admit evidence of “defendant’s prior felonies”<sup>52</sup> through impeachment. But because defendant did not object to the prosecutor’s questions on that ground at trial, the issue is not preserved for review.<sup>53</sup> To obtain relief based on unpreserved error, defendant must demonstrate “(1) an error occurred, (2) the error was ‘plain’--i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected.” If a defendant satisfies his burden in this regard, the Court still must exercise its discretion in deciding whether to reverse. Reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings.<sup>54</sup>

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<sup>52</sup> The jury did not learn that the offenses were felonies. The prosecutor’s questions and defendant’s wife’s answers did not label the offenses as felonies and did not indicate the names of the offenses. The convictions were described as prohibitions on carrying a weapon or a gun.

<sup>53</sup> *People v Douglas*, 496 Mich 557, 574; 852 NW2d 587 (2014).

<sup>54</sup> *People v Cain*, 498 Mich 108, 117; 869 NW2d 829 (2015).

## Discussion

The People permissibly questioned defendant's wife about matters affecting her credibility. Whether a defense witness has provided truthful testimony is always relevant,<sup>55</sup> and a prosecutor is permitted to test the witness' credibility through probing questions designed to expose false or misleading testimony.<sup>56</sup> That a prosecutor may be precluded from calling another witness to impeach the witness' testimony regarding those matters does not affect the propriety of the initial questioning. Exposing a witness' deceit through cross-examination is an essential component of the trial process. It provides the jury with key information the jury may use in evaluating the witness' credibility and determining the weight to give the remainder of the witness' testimony. A prosecutor, like a defense attorney, may ask relevant questions that advance the truth-seeking function of trial.

### *The Rule Limiting Impeachment on Collateral Matters*

The rule limiting impeachment on collateral matters restricts the use of *extrinsic* evidence to impeach, not the questioning of a testifying witness regarding those same matters. Neither *People v Stanaway*,<sup>57</sup> *People v Kilbourn*,<sup>58</sup> nor *People v Vasher*<sup>59</sup> prohibit a prosecutor from asking a relevant question on cross-examination of a *defense* witness. *Stanaway* concerned a prosecutor's impeachment of a *prosecution* witness who provided no relevant testimony. The prosecutor called the defendant's nephew as a witness in a criminal sexual conduct case because

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<sup>55</sup> *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995) (“[i]f a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact”).

<sup>56</sup> See *Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (“[c]ross examination is the principal means by which the believability of a witness and the truth of his testimony are tested”).

<sup>57</sup> *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

<sup>58</sup> *People v Kilbourn*, 454 Mich 677; 563 NW2d 669 (1997).

<sup>59</sup> *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995).

the nephew had told the police about the defendant's statement regarding sexual contact with a young girl. The nephew had no direct knowledge of the charged crimes and was out of town when they allegedly occurred. When asked at trial, the nephew stated that he did not remember the defendant's statement. The prosecutor then called a police officer to testify about the nephew's report of the defendant's statement.

The *Stanaway* Court held that the impeachment was improper. Explaining that the substance of the nephew's prior statement went to the central issue of the case, and that the only relevance of the nephew's testimony was whether he made a statement regarding the defendant's alleged admission, the Court observed that the evidence served the improper purpose of proving the truth of the matter asserted. This was so, the Court reasoned, because "[w]hether the witness could be believed in general was only relevant with respect to whether that specific statement was made."<sup>60</sup> The impeachment thus served no purpose other than to inject inadmissible hearsay.

The Court accentuated that "a prosecutor may not use an elicited denial as a springboard for introducing *substantive* evidence under the guise of rebutting the denial."<sup>61</sup> In *Stanaway*, the prosecutor used the elicited denial as a means of introducing extrinsic evidence of a prejudicial admission that otherwise would have been inadmissible. "Absent any remaining testimony from the witness for which his credibility was relevant," the Court held, the trial court should have disallowed the impeachment.<sup>62</sup>

*Stanaway* therefore limits the prosecutor's ability to impeach a witness with inconsistent statements under narrow circumstances. Only where the witness offers no other testimony for

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<sup>60</sup> *Stanaway*, 446 Mich at 692-693.

<sup>61</sup> *Id.* at 693 (emphasis added).

<sup>62</sup> *Id.*

which her credibility is relevant *and* the substance of the statement goes to the central issue of the case is the impeachment improper.

Notably, three years after its decision in *Stanaway*, the Court confirmed that *Stanaway* must not be read as a broad limitation on the prosecutor's ability to question witnesses and present evidence. *People v Kilbourn*<sup>63</sup> clarified *Stanaway*'s holding:

The rule set forth in *People v Stanaway* is that the impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case.

In *Kilbourn*, the Court held that the "very narrow" *Stanaway* rule did not apply.<sup>64</sup> There, the defendant was convicted of two counts of assault with intent to do great bodily harm less than murder for shooting at his father's neighbors in apparent retaliation for the neighbors' report to the police that they had observed fighting at the father's home. A trail of damage revealed that the shooter or shooters had withdrawn in the direction of the father's home, and one of the complainants testified that the father had threatened her in a phone call after the police investigated the report of fighting earlier that day. The prosecutor called the father as a witness to testify. The father confirmed that the defendant and others were drinking alcohol and partying, but denied threatening the complainants. He admitted that he telephoned the complainants, but maintained that he did not threaten them and claimed one of the complainants became irate during the conversation.

The prosecutor also inquired whether the father told a police officer that the defendant was responsible for the shooting. He testified that he did not recall the statement. The

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<sup>63</sup> *Kilbourn*, 454 Mich at 683.

<sup>64</sup> *Id.*



prosecutor later questioned the officer about the conversation. He related that the father told him that the defendant was the person who shot into the house.

The *Kilbourn* Court held that the *Stanaway* rule did not apply because the second prong was not met. While the substance of the statements went to the central issue of the case, the father provided other relevant testimony for which his credibility was relevant. The father testified regarding events that preceded the shooting and was a “key actor” in some of those events.<sup>65</sup>

*Stanaway*, as clarified by *Kilbourn*, consequently does not stand for the general proposition that a prosecutor must refrain from asking relevant questions during cross-examination that might expose the jury to information that would not be admissible for other purposes. *Stanaway* instead is a very limited exception to the general rule that the prosecutor may ask those questions and may impeach a witness with a prior inconsistent statement. *Stanaway* bars impeachment only where the inconsistent statement is relevant to the central issue of the case *and* the witness offers no other testimony for which his credibility is relevant.

*Stanaway* carves an exception to the rule that extrinsic evidence may be admitted to impeach a witness on a non-collateral matter. It has long been the rule in Michigan that a cross-examining attorney must accept the answer given by a witness on a collateral matter. *People v Vasher*,<sup>66</sup> cited in this Court’s order directing supplemental briefing, stands for that proposition, as do other decisions of the Court spanning over one hundred years.<sup>67</sup> *Stanaway*, however, did not involve a collateral matter. It involved a non-collateral matter—the inconsistent statement

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<sup>65</sup> *Id.*

<sup>66</sup> *Vasher*, 449 Mich at 504.

<sup>67</sup> See e.g. *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002); *People v Hillhouse*, 80 Mich 580, 585; 45 NW 484 (1890); *Hamilton v People*, 46 Mich 186, 188; 9 NW 247 (1881).

was relevant to the central issue of the case. Under those circumstances, extrinsic evidence is barred only where there is no other testimony for which the witness' credibility is relevant.<sup>68</sup>

Cross-examination alone does not implicate the rule limiting impeachment on collateral matters. A prosecutor can ask additional questions of the witness without implicating *Stanaway* or *Vasher*. Asking those questions is not extrinsic evidence. The Court recognized this distinction in *People v Foley*,<sup>69</sup> a case discussed in the prior section of this brief. In concluding that the trial court did not abuse its discretion in permitting cross-examination, the Court distinguished questioning a witness to test credibility from the use of extrinsic evidence to impeach the witness. The Court observed: "We are not dealing with the testimony of other witnesses introduced to impeach the credibility of a given witness, but with the testimony on cross-examination used to impeach testimony on direct examination of the same witness."<sup>70</sup> Quoting from *People v MacCullough*,<sup>71</sup> the Court explained that "[o]ne may be asked if he has been charged with crime and his answers are admissible although, if the witness denies such accusation has been made, he may not be impeached because such matters are collateral."<sup>72</sup>

*MacCullough* expanded on this point. Cross-examination of a witness relating to facts at issue and relevant facts is a "matter of right."<sup>73</sup> A court, however, has discretion with regard to "its method and duration" even when the object of the questioning is to "ascertain the accuracy or credibility of a witness."<sup>74</sup> Relevancy is the determining factor when considering the propriety of a prosecutor's questioning. "A witness may not be cross-examined as to any facts

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<sup>68</sup> *Kilbourn*, 454 Mich at 683-684.

<sup>69</sup> *People v Foley*, 299 Mich 358; 300 NW 119 (1941).

<sup>70</sup> *Id.* at 363.

<sup>71</sup> *People v MacCullough*, 281 Mich 15, 27; 274 NW 693 (1937).

<sup>72</sup> *Foley*, 299 Mich at 363.

<sup>73</sup> *MacCullough*, 281 Mich at 25.

<sup>74</sup> *Id.* at 25.

which, if admitted, would not only be collateral but wholly irrelevant to the matter in issue and which would in no way tend to affect his credit, nor can a witness be cross-examined as to an irrelevant matter in order to contradict him.”<sup>75</sup>

In Michigan, therefore, a prosecutor may cross-examine a witness regarding relevant matters, including questions designed to test the witness’ credibility and elicit testimony that impeaches testimony previously given. But the prosecutor’s use of extrinsic evidence to impeach a witness is limited. Extrinsic evidence is not admissible to impeach a witness on a collateral matter. And where extrinsic evidence consists of an inconsistent statement that is relevant to the central issue in the case (a non-collateral matter), the evidence nevertheless is inadmissible if there is no other testimony for which the witness’ credibility is relevant.

***No Expansion of Stanaway Is Warranted***

The Court should not expand *Stanaway* to bar a prosecutor from asking relevant questions on cross-examination. It is the presentation of *extrinsic* evidence that implicates *Stanaway*, *Kilbourn*, and *Vasher*. A prosecutor, like defense counsel, is not limited to cross-examining a witness regarding non-collateral matters. “A witness may be cross-examined on *any* matter relevant to *any* issue in the case, including credibility.”<sup>76</sup> *McCormick on Evidence*<sup>77</sup> explains that allowing a questioner great leeway during cross-examination is the norm:

During cross-examination, the questioner may attempt to challenge virtually any aspect of the witness’s direct testimony. An error in any facet of the direct examination can reflect adversely on the witness’s perceptual ability, memory, narrative ability, or sincerity; and all those factors are relevant to the jury’s assessment of the witness’s credibility. Subject to the trial judge’s discretionary control under Rule 403, the cross-examiner can question about these factors to her heart’s content. Moreover, even if the witness initially gives the cross-examiner

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

<sup>76</sup> MRE 611(c) (emphasis added).

<sup>77</sup> 1 McCormick, Evidence (7<sup>th</sup> ed, Practitioner Series), §49, pp 322-323.

an unfavorable answer, the questioner may apply pressure during cross by, for example, reminding the witness of the penalties for perjury. The courts sometimes say that when the collateral fact rule applies, the cross-examiner must “take the witness’s answer,” but that expression does not mean that the cross-examiner is obliged to accept the initial answer out of the witness’s mouth.

Restricting a prosecutor’s questioning on cross-examination to non-collateral matters would be an unwarranted interference in the trial process and the jury’s central role in the administration of justice. By foreclosing inquiry into matters a trier of fact may deem of use in evaluating the witness’ testimony, including those revealing of a witness’ lack of truthfulness, the additional restriction would inhibit a jury’s ability to judge witness credibility and weigh testimony. It is not improper for a prosecutor to ask relevant questions, and the extrinsic-evidence rule mitigates prejudice and possible jury confusion by prohibiting the admission of evidence through another witness to impeach a witness on a collateral matter. Moreover, the trial court may exercise its discretion to prohibit specific questions under MRE 402 and MRE 403. Application of these evidentiary rules guards against the admission of both irrelevant evidence and evidence of minimal relevance that creates a danger of unfair prejudice or confusion of the issues. Case specific applications of MRE 402 and MRE 403, not a general rule limiting cross-examination, serve to protect a defendant’s right to a fair trial.

***The Prosecutor Properly Questioned the Witness in this Case***

The prosecutor’s questions did not violate the *Stanaway* rule. First, *Stanaway* involves impeachment by *extrinsic evidence* of inconsistent statements, not questioning regarding a witness’ knowledge of a matter that suggests the witness had been untruthful when responding to an earlier question. Moreover, even if that matter is deemed collateral, *Stanaway* and *Vasher* do not apply because no extrinsic evidence was offered. Second, the witness, defendant’s wife, provided other testimony for which her credibility was relevant. She testified that she did not see

defendant with a gun on the day of his arrest, indicated that defendant did not possess a gun, and maintained that guns had not been in the home she shared with defendant. Her testimony was important to defendant's defense because the gun discovered by the police was not easily concealed.

It was not error for the prosecutor to question defendant's wife regarding relevant matters in an effort to expose her deception. The prosecutor's good-faith attempt to elicit testimony was not error.<sup>78</sup> The prosecutor appropriately raised the issue outside the presence of the jury and requested permission from the court to question the witness about her knowledge of defendant's gun convictions. The trial court exercised its discretion and permitted the questioning. There is nothing improper about the prosecutor's reliance on a court's evidentiary ruling.<sup>79</sup>

### ***Conclusion***

The prosecutor permissibly cross-examined defendant's wife regarding her knowledge of defendant's prior convictions after she denied knowing that defendant had carried a weapon or a gun in the past. Defendant's wife's credibility was at issue, and the prosecutor's questions revealed that she had been deceptive when answering other questions. Asking relevant questions, whether on a collateral matter or not, is entirely proper. Only where a prosecutor admits evidence to contradict the witness after his or her testimony ends are the rules of *Stanaway*, *Kilbourn*, and *Vasher* implicated. Because the prosecutor did not use extrinsic evidence to impeach defendant's wife, and acted in accordance with the trial court's evidentiary ruling, the prosecutor's actions were entirely proper. No error, let alone plain error, occurred.

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<sup>78</sup> *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

<sup>79</sup> *People v Blackmon*, 280 Mich App 253, 269 n 7; 761 NW2d 172 (2008).

### III.

The Court may not reverse a conviction on grounds of the improper admission of evidence unless the error has resulted in a miscarriage of justice. The testimony regarding defendant's prior convictions was brief, the prosecutor argued the evidence only as it pertained to the truthfulness of other testimony from defendant's wife, and two police officers unequivocally testified that they saw defendant put the gun in the trunk of the car. Error, if any, in the references to defendant's prior convictions during impeachment of defendant's wife did not result in a miscarriage of justice.

#### Standard of Review

An appellate court may not reverse a conviction on the ground of the improper admission of evidence unless the error has resulted in a miscarriage of justice.<sup>80</sup>

#### Discussion

The trial court did not abuse its discretion in allowing the prosecutor to question defendant's wife about her knowledge of defendant's prior convictions, but if the Court determines otherwise, the trial court's error was harmless. Reversal is unwarranted, whether based on preserved arguments (relevance and unfair prejudice) or unpreserved argument (the prosecutor raising a collateral issue to admit evidence through impeachment). The questioning was brief, and the prosecutor argued the evidence only as it pertained to whether the witness had lied during her testimony. Considering all the evidence, including the unequivocal testimony of the police officers, error, if any, was harmless.

#### *Preserved Claim of Error*

MCL 769.26 controls when an appellate court is determining whether preserved, non-constitutional error warrants reversal of a conviction.<sup>81</sup> The statute provides:

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<sup>80</sup> MCL 769.26.

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Defendant must show that the error resulted in a miscarriage of justice. He must show that, absent the error, it is “more probable than not” that a different outcome would have resulted.<sup>82</sup>

Defendant has not satisfied his burden in this case. The jury was aware that defendant previously had been convicted. The parties stipulated that defendant had been convicted and was ineligible to possess or use a firearm. 4/2/15, 4. While the nature of the prior conviction was not revealed by the parties’ stipulation, the prosecutor’s questions during cross-examination disclosed only that defendant had twice been convicted of carrying a weapon or gun. The references were fleeting and revealed no details about the incidents underlying the convictions. The questions and answers did not suggest that the jury should consider the evidence for purposes other than determining whether defendant’s wife had provided false testimony regarding her knowledge of defendant’s possession of weapons.

Nor did the prosecutor stray from the proper purpose when commenting on the evidence during closing argument. The prosecutor argued that defendant’s wife had lied, not that the jury should consider defendant’s convictions as evidence that he committed the charged offenses:

You also heard from Mr. Wilder’s wife and Mr. Wilder’s wife testified that she did not know her husband to carry a firearm. She testified however that she’s been with him for 16 years and that she had been married to him for nine years, and she testified that she was just not familiar with that. Why would she say that? She would say that just for the same reason that Carlos Wilder would come in here and say that the police searched that vehicle and that other person was handcuffed. They say that to help or try to protect Darrell Wilder. We know, based on the question that I asked Mrs. Wilder, that the defendant had had some

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<sup>81</sup> *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010).

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

contact with weapons in the past and she knew about it. She lied to you. She knew about those things. [4/2/15, 153]

That the totality of the evidence in this case was strong further demonstrates that the jury verdict did not hinge on the references to defendant's convictions. All the witnesses agreed that the police retrieved the gun from the trunk of the car. Two police officers testified unequivocally that defendant was the man they saw place the gun in the trunk of the car. Defendant's brother and cousin, in contrast, provided conflicting testimony in an effort to exonerate defendant. They could not agree on what defendant and his brother were doing when the police arrived, where they were relative to each other, and whether the car battery had been charged before the police arrived.

The jury did not deliberate long in reaching a verdict after presentation of all the evidence. Jury deliberations began at 3:14 p.m. on April 2, 2015, and the jury returned its verdict at 11:36 a.m. the following morning. 4/2/15, 182; 4/3/15, 10. Although the jury had reported that it could not reach a verdict at one point, it returned a verdict within an hour of receiving the deadlocked jury instruction. 4/3/15, 6-10. Granted, the record indicates that there was loud debate among the jurors, 4/3/15, 4-5, but it is far more likely that the jurors were debating the testimony of the police officers and defendant's cousin and brother instead of considering defendant's prior convictions.

It is not probable that the jury would have reached a different verdict had defendant's prior convictions not been mentioned on cross-examination of defendant's wife. Because no miscarriage of justice resulted from the admission of the evidence, error, if any, was harmless.

***Unpreserved Claim of Error***

Defendant likewise has not satisfied his burden of demonstrating his entitlement to relief based on the unpreserved argument addressed in Issue II of this brief. For unpreserved errors, a



defendant must show that that the error affected the outcome of the trial.<sup>83</sup> Appropriate considerations involved in that inquiry include the extent of the evidence, the prosecutor's use of the evidence, and the relative strength of the other evidence against defendant.<sup>84</sup> As explained above, the testimony was brief, the prosecutor argued the evidence only as it pertained to the defendant's wife's credibility, and the evidence against defendant was strong. Error, if any, did not affect the outcome of the trial.

Further, even if the Court concludes that defendant has made that showing, reversal is not warranted. The Court may reverse only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings.<sup>85</sup> Reversal based on unpreserved arguments is required "only in the most serious cases, those in which the error contributed to the conviction of an actually innocent person or otherwise undermined the fairness and integrity of the process to such a degree that an appellate court cannot countenance that error."<sup>86</sup> Here, defendant is not actually innocent. Two police officers saw him place the gun in the trunk of the car. Nor did the limited questioning of defendant's wife undermine the fairness and integrity of judicial proceedings. To find error, the Court would have to create a new restriction on the prosecutor's use of relevant evidence. A violation of a restriction that did not exist at the time of trial is not unfair and does not undermine the integrity of judicial proceedings.

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<sup>83</sup> *People v Borgne*, 483 Mich 178, 196-197; 768 NW2d 290 (2009).

<sup>84</sup> See *id.* 197-198 (in determining whether the prosecutor's erroneous use of a defendant's post-*Miranda* silence was prejudicial, the Court considered "the extent of the prosecutor's comments, (2) the extent to which the prosecution attempted to tie defendant's silence to his guilt, and (3) the relative strength of the other evidence against defendant").

<sup>85</sup> *Id.* at 197.

<sup>86</sup> *People v Cain*, 498 Mich 108, 119; 869 NW2d 829 (2015).

**RELIEF**

THEREFORE, the People request that this Honorable Court either affirm the Court of Appeals' decision or deny defendant's application for leave to appeal.

Respectfully submitted,

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