S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2012
v	No. 301707 St. Clair Circuit Court
DENNIS ALAN FORGEON, Defendant-Appellant.	LC No. 10-01059-FH0

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree home invasion, MCL 750.110a(3). Because the evidence was sufficient to support his conviction, the evidence adduced at defendant's preliminary examination was sufficient to support his bindover, defendant's challenges to the trial court's evidentiary rulings lack merit, the trial court properly instructed the jury, and defendant was not denied the effective assistance of counsel, we affirm.

I. SUFFICIENCY OF THE EVIDENCE AT TRIAL

Defendant first argues that the evidence was insufficient to support his conviction. We review de novo challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196.

To establish second-degree home invasion, the prosecution must show: (1) that the defendant entered a dwelling, either by a breaking or without permission, and (2) he had the intent to commit a felony, larceny, or assault therein while he was entering the dwelling, or that he committed a felony, larceny, or assault at any time while he was entering, present in, or exiting the dwelling. MCL 750.110a(3). "The prosecution need not negate every theory consistent with innocence, but is obligated to prove its own theory beyond a reasonable doubt, in the face of whatever contradictory evidence the defendant may provide." *People v Chapo*, 283 Mich App 360, 363-364; 770 NW2d 68 (2009). The prosecution may rely on circumstantial evidence and reasonable inferences arising from the evidence to establish the elements of an offense. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). It is the jury's responsibility to determine the weight to be accorded to the inferences. *People v Hardiman*, 466

Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). This Court should not interfere with the jury's role in determining the weight and credibility to be accorded to witness testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

Defendant maintains that the jury convicted him based on insufficient evidence because the prosecution failed to establish that he was the individual who broke into the Marquardts' home. To the contrary, the prosecution presented sufficient circumstantial evidence to allow a rational jury to conclude that defendant was the person who committed the home invasion. Deputy Haley Bonner testified that she responded to a 911 call regarding a home on Delaware Street. She had been given defendant's name and was on the lookout for a white male in his 40's who was wearing tan pants. Deputy George Maschke was patrolling the area and saw defendant walking. When Maschke first saw defendant, he did not notice defendant carrying anything. Maschke lost sight of defendant for a period of time, and, when Maschke saw defendant again, defendant was carrying a black, laptop-style bag, appeared nervous, and was looking around.

In addition to being in the area, defendant was found with a large quantity of gold dollar coins, and the Marquardts reported a large quantity of gold dollar coins missing from their home. The coins recovered from defendant totaled $103.60, and contained 57 gold $1 coins, five silver $1 coins, and several quarters, dimes, nickels, and pennies. Defendant also paid for his taxi ride to the Mt. Clemens area, where he resided, with $50 in gold $1 coins that were recovered from the taxi company. Brent Marquardt testified that the pan in which he kept the coins had contained roughly $200. He was able to estimate the amount because he had counted the contents of the pan many times when the pan was full. Although the Marquardts could not positively identify the gold coins found in defendant's home as belonging to them, they indicated that the coins recovered from defendant looked similar to theirs.

When police officers arrived at defendant's home in Mt. Clemens, they knocked on the door for ten or 15 minutes before defendant answered. When Maschke questioned defendant, defendant gave him conflicting stories. When asked about the gold $1 coins found in his home, defendant initially stated that he and his wife were saving the coins for their daughter's college education. Thereafter, defendant told Maschke that his wife did not know about the coins and that he did not tell her about them because she always took his money. He claimed at that point that his mother had given him the coins. Defendant admitted that he had been in the area of the Marquardts' home that day, including on West Monte Vista, the street where the home is located. Defendant's story regarding which streets he had been on, however, kept changing. Defendant initially denied being on Metcalf Road, but when Maschke told defendant that Maschke had seen defendant on Metcalf Road, defendant admitted being there. Defendant also initially denied being on any side streets in the area, but after Maschke told defendant that police officers had seen him on side streets, he admitted that he had been on some side streets. Maschke did not see any other individuals walking around near the Marquardts' home.

Thus, the circumstantial evidence and reasonable inferences arising from the evidence were sufficient for a reasonable jury to determine that defendant was the individual who broke into the Marquardts' home. When viewed in the light most favorable to the prosecution, the prosecutor presented sufficient evidence to survive defendant's motion for directed verdict and to

allow the jury to conclude that the elements of second-degree home invasion were proven beyond a reasonable doubt. *Ericksen*, 288 Mich App at 196.

II. DEFENDANT'S MOTION TO QUASH

Defendant next argues that the trial court erred by denying his motion to quash the charge against him because of insufficient evidence presented at his preliminary examination. We review de novo a trial court's decision on a motion to quash "'to determine if the district court abused its discretion in binding over a defendant for trial.'" *People v Bennett*, 290 Mich App 465, 479; 802 NW2d 627 (2010), quoting *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000). "The decision to bind over a defendant may only be reversed if it appears on the record that the district court abused its discretion." *People v Henderson*, 282 Mich App 307, 313; 765 NW2d 619 (2009).

The purpose of a preliminary examination is to determine whether probable cause exists to believe that the defendant committed the crime charged. *Bennett*, 290 Mich App at 480. At the preliminary examination stage, the prosecution is not required to demonstrate guilt beyond a reasonable doubt, but it must present some evidence regarding each element of the offense. *Id.; Henderson*, 282 Mich App at 312. Probable cause exists where there is sufficient evidence "to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" of the defendant's guilt. *People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010) (quotation marks and citations omitted). If probable cause is established, the district court must bind the defendant over for trial. *Id.*

Defendant maintains that the prosecution failed to present sufficient evidence to establish probable cause that he committed the offense. To the contrary, the prosecution's evidence was sufficient to support his bindover. Both Krista and Brent Marquardt testified regarding what was taken from their home, including a large amount of gold $1 coins. Deputy Bonner testified that defendant was seen in the area of the Marquardts' home around the time of the break-in, and Deputy Stacy Tunich testified that he responded to defendant's residence in Mt. Clemens later that day. From a shaving kit inside a duffel bag, Tunich recovered a large amount of coins, including numerous gold $1 coins, similar to those missing from the Marquardts' home. Moreover, defendant admitted being in the area of the Marquardts' home earlier that day. Although perhaps not sufficient to convict defendant, this evidence was sufficient to cause a person of ordinary prudence to entertain a reasonable belief that defendant committed the offense. *Plunkett*, 485 Mich at 57. Thus, the district court did not abuse its discretion by binding defendant over for trial.

In any event, any error regarding defendant's bindover was harmless because the prosecution presented sufficient evidence at trial to support defendant's conviction. "[T]he presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless." *Bennett,* 290 Mich App at 481. Thus, because there was sufficient evidence presented at trial to support defendant's conviction, any error pertaining to defendant's bindover was harmless.

III. TRIAL COURT'S EVIDENTIARY RULINGS

Defendant next challenges several of the trial court's evidentiary rulings. In order to preserve for appellate review issues regarding the admission of evidence, a party must object at the time of admission. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Although defendant objected to the admission of some of the evidence that he now challenges, he failed to object to other evidence. Thus, some of defendant's claims of error are preserved for our review and some are not. We review preserved claims of evidentiary error for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217. We review unpreserved claims of evidentiary error for plain error affecting substantial rights, which requires the defendant to show that "he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *Knox*, 469 Mich at 508.

Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has "'any tendency to 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.'" *Yost*, 278 Mich App at 355, quoting MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403. This rule does not require the exclusion of evidence simply because it is damaging to a defendant's case. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). Rather, evidence is unfairly prejudicial when it is marginally probative and there exists a danger that the jury may accord it undue weight. *Id.* The trial court is in the best position to determine if evidence is unfairly prejudicial because the court is able to contemporaneously assess the presentation, credibility, and effect of the testimony. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010).

Defendant argues that the trial court erroneously allowed testimony that tended to show that he was guilty of domestic violence, was a drug user, and was a bad person and thus more likely to have committed the home invasion. Specifically, defendant challenges Deputy Bonner's testimony that she responded to a 911 call at an address on Delaware Street. Bonner testified that she was given defendant's name and was on the lookout for a white male in his 40's who was wearing tan pants. Defendant contends that Bonner testified that she responded to a "domestic call," but the nature of the 911 call was not revealed until defense counsel questioned Bonner as follows:

> *Q.* After you cleared that scene, okay, and did you determine whether or not the, there was a domestic violence or did you determine whether or not - -
>
> *A.* There was another officer that was there prior to my arrival speaking with the complainant. And it was verbal domestic [sic] she had told him.

Thus, defendant, rather than the prosecutor, injected the nature of the 911 call. A defendant cannot claim error to which he contributed by either plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 633 NW2d 499 (2003). Moreover, Bonner's testimony that she was given defendant's name and was looking for a white male in his 40's who was wearing tan pants was relevant to show why Bonner was in the area and searching for a man who matched defendant's

description. The trial court did not abuse its discretion by admitting Bonner's testimony in this regard.

Similarly, defendant challenges Detective Eric Stevens's testimony that there was an incident involving a "domestic" that appeared to involve an individual who matched defendant's description. Because defense counsel did not object to Stevens' testimony, this particular claim of error is unpreserved. Stevens's reference to a "domestic" did not constitute plain error affecting defendant's substantial rights. At that point during the trial, defense counsel had already questioned Bonner and indicated that the 911 call involved a domestic violence incident. Until defense counsel raised the issue, there had been no mention regarding what the 911 call involved. Defense counsel also repeatedly mentioned the nature of the 911 call during his cross-examination of Maschke, whose testimony followed Stevens's testimony. Defendant cannot claim error based on information that his attorney repeatedly presented to the jury.

Defendant also argues that Maschke was erroneously permitted to testify that defendant's wife had informed him that defendant had hiding spots in his home where he kept drugs. The record shows, however, that defense counsel, rather than the prosecution, elicited this testimony. Again, a defendant cannot claim error regarding a matter to which he contributed by either plan or negligence. *Gonzalez*, 256 Mich App at 224. Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Defendant next challenges Deputy Tunich's testimony regarding defendant's financial status. Defendant cites the following testimony:

> *Q*. You indicated you heard maybe some of the conversation that my client said he was saving these coins for his daughter's college education?
>
> *A*. That part I did hear, yes, or that he didn't have money to afford these coins or, I guess, I'm trying to figure out. I know he was all over the place. I guess I'm trying to figure it out.
>
> What I'm saying, sir, that if you don't have a lot of money, it's very odd through my training and experience people that don't have a lot of money aren't going to be saving hundreds of dollars in coins for a college fund when they can't afford to put food on the table. That's what I'm saying to you.

Defense counsel elicited this testimony during his cross-examination of Tunich. Defendant claims that the testimony was improperly used to demonstrate motive and that any relevance of the testimony was outweighed by its prejudicial effect.

Notwithstanding that defense counsel, rather than the prosecution, elicited the challenged testimony, "[e]vidence of poverty, dependence on welfare or unemployment is not admissible to show motive or as evidence of a witness's credibility." *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986). Such evidence usually has limited probative value, pertains to a collateral issue, and may distract the jury. *People v Henderson*, 408 Mich 56, 65; 289 NW2d 376 (1980). Evidence involving a defendant's financial condition may, however, be admissible in certain circumstances. *Id.* at 66.

Here, Tunich's testimony did not suggest that defendant's financial condition was a motive for him to commit the offense. Rather, Tunich testified that he did not believe defendant's claim that he was saving the gold coins for his daughter's education because defendant appeared unable to afford food. Thus, Tunich's testimony pertained solely to defendant's theory of the case and rebutted that theory. Admission of the testimony for this purpose was proper.[1] See *Conte*, 152 Mich App at 14. Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Defendant also challenges the police officers' testimony that they were on the lookout for suspicious behavior because of a rash of burglaries in the area and that defendant appeared to be acting suspiciously. Because defendant did not object to the testimony, our review of this issue is limited to plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508.

Defendant has failed to establish plain error. The testimony regarding the large number of burglaries in the area was admissible because it was relevant to explain why the area was being "flooded" with plain-clothes police officers and officers in unmarked cars. Maschke testified that they were hoping to see something suspicious and catch a break-in in progress. He also testified that the officers were split into two teams, one that roamed the area without focusing on anyone in particular and another that focused on certain persons who were "usual suspects" in the area and were suspected to have committed some of the break-ins. Defendant did not live in the area, and there is no indication that he was one of the "usual suspects."

Maschke also testified that when he saw defendant the second time, defendant appeared to be acting suspiciously and was carrying a bag that he was not carrying the first time that Maschke saw him. Maschke's testimony was admissible under MRE 701, which allows lay opinion testimony that is rationally based on the witness's perception and is not overly dependent on scientific, technical, or specialized knowledge. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified and remanded on other grounds 433 Mich 862 (1989). Maschke's testimony was based on his perception of defendant's behavior and did not depend on any scientific, technical, or specialized knowledge. Thus, it was properly admitted. Defendant has failed to establish plain error affecting his substantial rights.

IV. CAUTIONARY JURY INSTRUCTION

Defendant next contends that the trial court abused its discretion by failing to instruct the jury that it may infer innocence based on the lack of direct evidence. Generally, we review de novo claims of instructional error. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254

[1] Similarly, Tunich testified on direct examination that it struck him as "odd" that defendant would be saving coins for his daughter's college fund when he did not have the financial means to do so. Also, on cross-examination, Tunich testified, "[i]f you can't afford food, I believe that money is going to be gone, that's my personal opinion." In his brief on appeal, defendant does not cite these portions of the record as supporting his claim of error. In any event, similar to Tunich's testimony that defendant does reference in his brief, such testimony merely rebutted defendant's theory regarding why he possessed the coins.

(2003). We review for an abuse of discretion, however, whether a particular instruction is applicable to the facts of a case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). When reviewing a claim of instructional error, we examine the jury instructions as a whole and, even if some imperfection exists, reversal is not warranted if the instructions adequately protected the defendant's rights by fairly presenting the issues to be tried. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

Here, defense counsel requested a jury instruction along the lines of former CJI 4:2:02(7), which provided:

> If the direct and circumstantial evidence, taken together, is open to two reasonable constructions, one indicating guilt and the other innocence, it is your duty to accept the construction indicating innocence. [See *People v Moore*, 176 Mich App 555, 556; 440 NW2d 67 (1989).]

In denying defense counsel's request, the trial court reasoned as follows:

> There is a committee that meets and promulgates rules with regard to jury instructions and presents for comment those instructions. They have for purposes of circumstantial evidence provided a three paragraph instruction that's contained in CJI 2nd [sic] 4.3.
>
> The cautionary instruction that defense counsel is [al]luding to contains language that for many, many years has been deleted from instructions. Instructions that have said if the evidence is open to reasonable construction, one indicating guilt, the other innocence, you have a duty to accept the construction indicating innocence. That particular instruction has been consistently criticized, has been consistently criticized by the appellate courts. And it's indicated that there is no reported case where conviction was reversed because the Court failed to give that instruction. In fact, the United States Supreme Court has abolished the requirement of reading that charge by the Court since 1954. The committee found it to be inappropriate, and it has long been the rule that circumstantial evidence is completely explained and defined and all necessary instructions [] contained in the three paragraphs provided in 4.3, and I'm satisfied that adequately covers the facts in this particular case as well.

The trial court then instructed the jury on circumstantial evidence in accordance with CJI2d 4.3, which it read verbatim.

The trial court did not abuse its discretion by denying defendant's jury instruction request. As the trial court recognized, the United States Supreme Court in 1954 determined that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect[.]" *Holland v United States*, 348 US 121, 139-140; 75 S Ct 127; 99 L Ed 150 (1954). This Court has previously recognized the *Holland* Court's abolishment of the cautionary instruction. See *Moore*, 176 Mich App at 559 (HAMMOND, J., concurring). In his concurring opinion, Judge Hammond noted that the *Holland* Court "found an admonishment unnecessary because it considered circumstantial evidence the

probative equivalent of direct evidence and because reasonable doubt instructions adequately protected a defendant from a poorly proven case." *Id.* The trial court also recognized that the instruction is no longer included in the standard jury instructions. The commentary to CJI2d 4.3 states, "[T]he committee concluded that the special cautionary instruction was inaccurate and improper, and should be deleted." The commentary further indicates that the single instruction on circumstantial evidence is sufficient. Thus, the trial court did not abuse its discretion by declining to give defendant's proposed instruction. Moreover, the trial court's instructions provided to the jury, including its instructions regarding the presumption of innocence and the prosecution's burden to establish guilt beyond a reasonable doubt, were sufficient to adequately safeguard defendant's rights. See *People v McFall*, 224 Mich App 403, 414-415; 569 NW2d 828 (1997).

V. CUMULATIVE EFFECT OF ERRORS

Defendant next argues that the cumulative effect of the errors requires reversal. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal[.]" *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Absent error, however, "there can be no cumulative effect of errors meriting reversal." *Id.* Here, because no error occurred, there is no cumulative effect of errors that requires reversal.

VI. DEFENDANT'S STANDARD 4 BRIEF

In his Standard 4 brief on appeal, defendant argues that he was denied the effective assistance of counsel. Because defendant failed to preserve this issue for appellate review by moving for a new trial or *Ginther*[2] hearing in the trial court, our review is limited to errors apparent on the record. *People v Payne,* 285 Mich App 181, 188; 774 NW2d 714 (2009); *Unger*, 278 Mich App at 253.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's error, a reasonable probability exists that the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant bears the burden of overcoming the strong presumption that his attorney's conduct constituted sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant contends that defense counsel was ineffective in numerous respects, including: (1) failing to effectively cross-examine Maschke; (2) failing to effectively cross-examine Tunich, Wright, and Maschke because of their inconsistent testimony; (3) failing to make a record, obtain a ruling, or have the gold coins excluded from evidence; (4) failing to obtain discovery or request a lineup to determine the identities of other potential suspects; (5) allowing a prejudicial slide show containing inadmissible evidence to be presented to the jury; (6) failing to effectively cross-examine witnesses at the preliminary examination when there was contradictory testimony;

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(7) failing to effectively cross-examine Krista Marquardt regarding why she arrived home later than usual on the day of the break-in; (8) allowing defendant to be convicted based on insufficient evidence; (9) allowing defendant to be bound over without probable cause; (10) failing to introduce evidence of defendant's physical inability to commit the acts attributed to him; (11) failing to file a notice of alibi and produce video records that defendant had been in three different businesses around the time of the break-in; (12) failing to call as a witness a laundromat clerk who could have testified regarding defendant's whereabouts; (13) failing to produce the bus log to demonstrate that defendant was not at the Marquardt home during the break-in; and (14) failing to produce a letter stating that, during the previous summer, defendant was at the Harbor Light treatment facility, which had a machine that dispensed gold coins. Defendant has failed to overcome the presumption that counsel's performance constituted sound trial strategy or fell below an objective standard of reasonableness. *Frazier*, 478 Mich at 243; *LeBlanc*, 465 Mich at 578.

Many of defendant's claims are based on his assertion that counsel failed to effectively cross-examine a particular witness. Decisions regarding the questioning of witnesses are presumed to be matters of trial strategy, and this Court will not second-guess trial counsel on matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant fails to indicate how counsel's questioning was anything but trial strategy.

In addition, defendant's argument regarding the admission of the coins lacks merit. Although defendant indicates that his attorney objected to the admission of the coins, a review of the record fails to disclose that such an objection was made. Moreover, the coins were properly admitted, and the Marquardts never claimed that the coins were the same coins, but merely that they were similar to those taken. Defendant fails to demonstrate how counsel was ineffective in this regard.

Defendant also claims that counsel was ineffective for failing to call various witnesses, produce certain evidence, or request discovery. Defendant fails to overcome the presumption that counsel's decisions constituted sound trial strategy. *Horn*, 279 Mich App at 39. Moreover, the failure to call a particular witness constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *Payne*, 285 Mich App at 190. Defendant fails to make such a showing. He has also failed to demonstrate a reasonable probability that the result of the proceeding would have been different absent counsel's alleged errors. *Frazier*, 478 Mich at 243.

Further, defendant has failed to establish that counsel was ineffective for failing to object to the slide show. It appears that defendant is referring to photos that were depicted on a screen at the beginning of trial. At the beginning of the second day of trial, counsel raised the issue, and the trial court stated that allowing the images to remain on the screen was not intentional, no attention had been drawn to the pictures, and the pictures were not on the screen for a significant amount of time. The trial court also indicated that it was possible that the pictures would be introduced into evidence at a later time. Defendant fails to show that the pictures were not properly admitted as evidence at some point, and fails to demonstrate that the pictures prejudiced him.

Finally, defendant fails to establish prejudice with respect to counsel's performance at his preliminary examination, which he contends resulted in his bindover based on insufficient evidence. As previously discussed, the presentation of sufficient evidence to support a conviction at trial renders harmless any error with respect to a defendant's bindover. *Bennett,* 290 Mich App at 481. Because defendant was convicted based on sufficient evidence presented during his trial, he fails to establish a reasonable probability of a different result absent counsel's alleged deficient performance at his preliminary examination. *Frazier*, 478 Mich at 243.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio