

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSTIN GORDON,

Defendant-Appellant.

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UNPUBLISHED

June 17, 2003

No. 236355

Wayne Circuit Court

LC No. 00-010163-01

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

I. Introduction

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twenty-five to forty-five years' imprisonment for the second-degree murder conviction and a consecutive two-year prison term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

II. Facts Produced At Trial

Defendant's convictions arise from allegations that, on the evening of August 15, 2000, he intentionally shot and killed the victim in their home in Belleville, Michigan. Deborah Gordon was both defendant and the victim's biological mother. John Gordon was the victim's biological father and defendant's adoptive father. Deborah and John married when defendant was four, but, in 1999, they separated and both children remained with John. There was evidence that defendant and the victim had a tumultuous relationship, allegedly fueled by defendant's jealousy of the victim. Deborah denied that defendant and the victim had a bad relationship, indicating that their relationship was normal, that the victim was not afraid of defendant, and that, although defendant was bossy at times, the two only engaged in normal horseplay. John testified that the two had a "normal brother/sister relationship, with roughhousing at times that seemed a little more than it should be, but . . . all in all they seemed to get together--seemed to get along." John also testified that defendant verbally and physically "picked on" the victim "more than just the normal brother/sister thing at times."

Eric Roig, a family friend, testified that defendant often angrily complained that the victim "got everything," but that he had to work to buy things. Michael Owens, a family friend, testified that defendant was jealous of the victim. He further testified that, a few months before

the victim was killed, defendant said that the victim “is spoiled,” and, when John died, she would receive the greater inheritance because she was his biological daughter. Roig testified that, on several occasions, defendant said, “One of these days I’m going to kill that bitch.” Several witnesses, who were family friends, testified that defendant often called the victim derogatory names, including “nasty bitch,” “slut,” and “whore.”

Witnesses also testified that there were occasions when defendant was physically aggressive with the victim. Rachel Johnson, the victim’s friend, testified that she observed defendant hit the victim five or six times, “body slam” her over a couch, and grab and pull her hair, causing her to become upset and cry. Ashley Ely testified that she observed defendant throw the victim on the ground, hit her once or twice, and say that he was going to kill her. Roig testified that he observed defendant hold the victim’s head under water until she was choking, and did not stop until someone came to the victim’s assistance. Owens indicated that he observed defendant punch the victim in the arm. Owens and Ely also testified that, approximately two weeks before the shooting, the victim stated that “[defendant] and a few of his friends had beaten her up . . . real bad” at their house. Witnesses also testified that the victim was afraid of defendant.

Johnson, Michael Pritchard, and Kevin Pritchard each testified that, before the shooting, they observed defendant with a handgun. Roig testified that defendant told him that he could get him a handgun with the serial numbers scratched off. Heather London testified that she observed defendant shooting a handgun at road signs. Ashley Peters, defendant’s girlfriend, testified that, two or three weeks before the shooting, she saw defendant shooting a handgun at cardboard boxes in his basement. She further testified that she observed him place a handgun under a cushion of a chair in his room.

On the day of the shooting, John testified that he had spoken with defendant and described him as being frustrated because he had been terminated from his job at McDonald’s. He also indicated that, on that day, he bought the victim a cell phone and planned to pay for the usage. He did not purchase one for defendant, but indicated that defendant had one previously, which was paid for by defendant or Deborah. John indicated that, later that evening, defendant and his girlfriend, Peters, were visiting in defendant’s room. At approximately 8:00 p.m., Deborah came to the house and took the victim shopping. They returned at approximately 9:00 p.m. At approximately 9:30 or 10:00 p.m., Deborah left for the evening and gave defendant’s girlfriend a ride home. John testified that he thereafter said goodnight to the children, and locked the doors of the house. John explained that his bedroom was on the first floor of the house and “very close” to the front door, the victim’s bedroom was on the second floor, and defendant’s bedroom was on the third floor. John indicated that, approximately twenty minutes after saying goodnight to the children, he heard a loud noise that sounded like a “thump sound.” Within five minutes, he heard running on the second floor, heard someone run down the stairs, and then heard the front door open. He then loudly called defendant’s name, but did not get an answer. John indicated that, a few minutes later, defendant appeared outside of his bedroom, hysterically stating that they had to call 911 because the victim had been shot. John indicated that he did not see anything in defendant’s hands at that time. John testified that he went upstairs to defendant’s room and saw the victim lying on the floor with a severe head wound. Defendant went into the kitchen, called 911, and stated that “somebody shot my sister.” The medical examiner indicated that the victim was shot at close range in the face above the left eye.

At approximately 10:30 p.m., Belleville Police Officer Todd Schrecengost arrived at the scene. When asked what happened, defendant told the officer that “somebody shot my sister,” and that he “[did not] know who it was.” When asked what the shooter was wearing, defendant said that he was wearing all black or dark clothing, and that he thought he was white. He explained that the shooter “ran in the front door, ran upstairs, shot her and ran back down the same way he came.” The police eventually searched the house and the surrounding area. The murder weapon, a nine-millimeter semiautomatic handgun, was found in the backyard of defendant’s house along a fence near a lake. The police discovered a spent bullet near defendant’s bedroom, and a corresponding bullet hole in the base of the wall that had been covered by bed linens from defendant’s bed. Inside defendant’s bedroom, the police discovered a magazine for a nine-millimeter handgun, which contained two live rounds, under a chair cushion. In the basement, the officers discovered bullet holes and spent bullets in boxes of old magazines, in a concrete portion of the basement wall, in a box containing exercise equipment, and in a plastic bag containing a down comforter. A firearms examiner testified that the spent bullets found in defendant’s basement were fired from the murder weapon.

Defendant was ultimately arrested. Defendant’s girlfriend testified that, during a telephone conversation that occurred after the arrest, defendant told her that “it was an accident,” but did not provide any details. During trial, the defense maintained that the shooting was accidental, that defendant was playing with the gun, and that defendant never intended to harm the victim. The defense contended that defendant initially lied about having shot the victim because he is young and panicked.

### III. The Legal Issues

Defendant first claims that the trial court erred by impermissibly allowing “bad acts” and hearsay evidence concerning his relationship with the victim. We disagree. We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

#### A.

With regard to the admissibility of “bad acts” evidence, defendant contends that evidence that he struck the victim, called her names, held her head under water, said that he was going to kill her, and previously possessed a handgun, was inadmissible under MRE 404(b). Evidence of a defendant’s other crimes, wrongs, or acts is admissible under MRE 404(b) if it is offered for a proper purpose, i.e., one other than to prove the defendant’s character or propensity to commit the crime, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *Id.* at 75.

We conclude that the trial court did not err by admitting the challenged evidence under MRE 404(b). The trial court held a two-day pre-trial evidentiary hearing on the use of this evidence and, after considering the briefs, articulated a cogent rationale for its ruling which excluded some, but not all of, the evidence objected to. The evidence allowed into evidence was not simply offered to show that defendant had a bad character. Rather, the evidence regarding defendant's prior physical assaults and threats toward the victim was probative of defendant's intent to kill, cause great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, see *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), and of his common scheme, plan, or system for harming the victim. In addition, the evidence concerning defendant's familiarity and experience with handguns was probative of the absence of mistake or accident, and assisted the jury in weighing the witnesses' credibility, particularly where defendant contended that he did not intend to shoot the victim. Simply put, the theories for which the evidence was admissible were legitimate, material, and contested grounds on which to offer the evidence. Moreover, the evidence was not inadmissible simply because the very nature of the evidence was prejudicial. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, and defendant has not demonstrated that he was unfairly prejudiced. See *Starr, supra* at 499. Moreover, the trial court gave a limiting instruction to the jury concerning the proper use of the evidence during a witness' testimony, and again in its final instructions, thereby alleviating the potential for unfair prejudice. *VanderVliet, supra*. Accordingly, this claim does not warrant reversal.

#### B.

With regard to the admissibility of alleged hearsay evidence, defendant contends that evidence that the victim said she was afraid of defendant was inadmissible under MRE 803(3), and that evidence that, two weeks before the shooting, the victim said that defendant and his friends had beaten her, was inadmissible under MRE 803(24). We conclude that the victim's statement concerning her fear of defendant was admissible under MRE 803(3).<sup>1</sup> The victim's statement plainly expressed her state of mind at the time it was made and, thus, was admissible as a statement "of the declarant's then existing state of mind, emotion, [or] mental feeling." MRE 803(3). Moreover, because defendant claimed that he did not intend to shoot the victim, evidence that the victim feared him was relevant because it suggests that it is unlikely that the death was an accident. See *People v Furman*, 158 Mich App 302, 315; 404 NW2d 246 (1987). Accordingly, the statement was properly admitted.

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<sup>1</sup> MRE 803(3) provides that the following statements are not excluded by the hearsay rule, even though the declarant is available as a witness:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Although the trial court premised its ruling on MRE 803(24), it noted that the evidence was "probably" admissible under MRE 803(3).

We further conclude that, under the circumstances of this case, even if the trial court abused its discretion by admitting the statements indicating that defendant and his friends had beaten the victim a few weeks before she was killed under MRE 803(24), such error would have been harmless. In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error was outcome determinative, i.e., the error undermined the reliability of the verdict. *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, not only was there strong evidence of defendant's guilt, there was overwhelming admissible evidence that he was physically abusive toward the victim, and struck her on numerous occasions. Accordingly, defendant has not established that it is more probable than not that the alleged error was outcome determinative. Thus, reversal is not warranted on this basis. *Id.*

### C.

Defendant next argues that there was insufficient evidence to support his conviction of second-degree murder. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996) (citations omitted). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Aldrich, supra*. Malice includes the intent to kill, the intent to do great bodily harm, or the intent to commit an act in wanton and wilful disregard of the likelihood that death or great bodily harm will occur. *Id.* Malice can be inferred from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999).

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to enable a jury to infer all the necessary elements of second-degree murder. First, the victim died on August 15, 2000. Second, as to defendant causing her death, the prosecution presented evidence that defendant, who was familiar with handguns, was jealous of the victim, previously threatened to kill her, and, after the shooting, attempted to cover up his crime. More particularly, there was evidence that defendant was angry and envious of the victim because she was the "spoiled" biological child of their parents, and was concerned that, once their father died, she would receive the greater inheritance. There was also evidence that, on several occasions, defendant called the victim derogatory names, physically assaulted her, and threatened to kill her, and that the victim was afraid of defendant.

The evidence also showed that, on the evening of the shooting, the parties' father said goodnight to the children and secured the doors of the house. Approximately twenty minutes later, their father heard a loud noise. Within five minutes, their father heard running on the second floor, heard someone run down the stairs, and then heard the front door open. He then loudly called defendant's name, but did not get an answer. A few minutes later, defendant appeared outside of his bedroom, hysterically stating that they had to call 911 because the victim had been shot. Their father went upstairs to defendant's room and saw the victim lying on the floor with a severe head wound. The victim had been shot in the face, above the left eye, at close range. Defendant called 911 and said, "[S]omebody shot my sister." Defendant consistently maintained that someone else shot the victim, and told the responding officer that he "[did not] know who it was," but that the shooter was wearing all black or dark clothing, and was white. Defendant also told the officer that the shooter "ran in the front door, ran upstairs, shot her and ran back down the same way he came."

The police eventually found the murder weapon, a nine-millimeter semiautomatic handgun, in defendant's backyard along a fence near a lake. The police discovered a spent bullet near defendant's bedroom, and a corresponding bullet hole in the base of the wall that had been covered by bed linens from defendant's bed. Inside defendant's bedroom, the police discovered a magazine for a nine-millimeter handgun, which contained two live rounds, under a chair cushion. In the basement, the police discovered bullet holes and spent bullets in boxes of old magazines, in a concrete portion of the basement wall, in a box containing exercise equipment, and in a plastic bag containing a down comforter. A firearms examiner testified that the spent bullets found in defendant's basement were fired from the murder weapon. Before the shooting, defendant's girlfriend observed defendant shooting a handgun at cardboard boxes in his basement, and also observed defendant place a handgun under a cushion of a chair in his room. Further, there was evidence that defendant's father had never fired a weapon in the house, and was unaware that a gun was in the house.

Finally, the evidence showed that, after defendant was arrested, he told his girlfriend that "it was an accident," but did not provide any details. There was evidence, however, that the murder weapon was tested and found to be fully operational and never accidentally fired, and that the safety never accidentally disengaged. In addition, there was evidence that defendant was familiar with handguns. All of this evidence, when viewed in a light most favorable to the prosecution, was sufficient for the jury to conclude beyond a reasonable doubt that defendant caused the death of Crystal with a deadly weapon without justification or exercise. The evidence was therefore sufficient to sustain defendant's conviction for second-degree murder.<sup>2</sup>

D.

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<sup>2</sup> Within this issue, defendant suggests that this Court should not consider the challenged "bad acts" and hearsay statements concerning his relationship with the victim in determining whether the evidence was sufficient to sustain his convictions. However, the statements were admitted into evidence and, when determining whether sufficient evidence was presented to support a conviction, this Court considers all the evidence admitted at trial. See *Wolfe, supra*.

Defendant also argues that the trial court abused its discretion by denying his motion for a new trial on the basis of prosecutorial misconduct. We disagree. This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). With respect to the underlying claims of prosecutorial misconduct, this Court reviews those unpreserved issues for plain error affecting defendant's substantial rights, i.e. that affected the outcome of the proceedings. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To the extent defendant claims that his right to due process was violated by the prosecutor's failure to disclose exculpatory evidence, defendant presents a constitutional question subject to de novo review. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998).

We reject defendant's claim that he is entitled to a new trial because the prosecutor presented perjured testimony. The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *Id.* However, absent proof that the prosecution knew that the trial testimony was false, reversal is unwarranted. *Herndon, supra* at 417-418. In addition, even if the prosecution failed to correct the false testimony, automatic reversal is not required. *Lester, supra* at 280. Rather, a new trial is required only if there is a reasonable likelihood that the false testimony could have affected the verdict. *Id.*; see also *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986).

Here, defendant argues that the prosecutor failed to correct the untruthful testimony of defendant's girlfriend regarding the amount of time he possessed the murder weapon. Defendant's girlfriend testified that she observed defendant firing a handgun in his basement two or three weeks before the shooting. However, a police report, which was not admitted at trial, apparently indicated that the gun was stolen from a family friend's house only nine days before the shooting. We initially note that defendant has failed to present on appeal the police report that confirms that the witness' statements were false. However, even if we accept defendant's claim regarding the temporal discrepancy, reversal is not required because it is highly unlikely that the alleged false testimony affected the verdict. Simply put, in the context of the evidence presented at trial, the fact that defendant possessed the handgun nine days before the shooting, as opposed to two or three weeks before the shooting, was inconsequential. Further, despite defendant's assertions, there is no evidence, beyond mere speculation, that the prosecutor attempted to present false testimony, or conceal the alleged facts concerning the stolen handgun from defendant. Accordingly, because there is no tangible indication that the prosecutor engaged in any misconduct or that the evidence could have affected the verdict, defendant has failed to demonstrate plain error. Therefore, reversal is not warranted on this basis.

Defendant also argues that the prosecutor impermissibly commented on his right to remain silent and shifted the burden of proof during closing and rebuttal arguments when she stated the following:

As I prepared my closing argument this weekend, I kept struggling with the concept of what the defendant told his girlfriend on the phone, that it was an accident.

Ask yourself, what else would he tell her? What else would he tell his girlfriend only days after the murder besides it was an accident? *But does he tell*

*anybody who really matters in the grand scheme of things that it was an accident?*  
No.

\* \* \*

And did you hear one witness testify, well, yeah, he thought it was empty.  
No.

\* \* \*

Did anybody say this gun was unloaded or he thought it was unloaded.  
No. [Emphasis added.]

The prosecutor may not comment on a defendant's failure to testify because such an argument infringes on the right against self-incrimination. *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). Further, a prosecutor may not imply that a defendant must prove something or present a reasonable explanation, because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). However, it is permissible for a prosecutor to observe that evidence against a defendant is undisputed, and, although a defendant has no burden to produce any evidence, once he advances a theory, argument with regard to the inferences created does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

Here, the prosecutor's comments were focused on refuting defense counsel's claim made during opening statement and closing arguments that the shooting was accidental, and were based on the evidence admitted at trial that defendant never told his father or the police that the shooting was accidental. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Further, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Moreover, the trial court instructed the jury that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the prosecutor's remarks were not improper, defendant has failed to demonstrate plain error.

Defendant also argues that the prosecutor "sought to vouch and unduly impress the jury" with her ten years of experience:

You know, *having been a criminal prosecutor for almost ten years*, it never ceases to amaze me the fingerprinting that goes on.

We had the Twinkie defense. Remember that? I committed the crime because I ate too many Twinkies. We've had the I was abused as a child defense. We have the, you know, I woke up, but I just wasn't feeling right defense.

Now, today we have the blame all the kids who didn't tell anybody about the gun defense. As I quote, if one of these kids had come forward, this accident wouldn't have happened. [Emphasis added.]

Here, the prosecutor's comments, which were made during rebuttal argument, were focused on contesting defense counsel's claim made during closing argument that the people who failed to report defendant's gun possession, as opposed to defendant, were culpable. Although the prosecutor improperly mentioned that she had ten years of experience, the remark was fleeting, involved only a brief portion of the argument, and was not so inflammatory that defendant was prejudiced. Moreover, the trial court's instructions that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the law as instructed by the court were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281; *Graves*, *supra*. Accordingly, this claim does not warrant reversal.

We also reject defendant's claim that he is entitled to a new trial because the prosecutor withheld the victim's school counseling records, which may have contained exculpatory information.<sup>3</sup> "A criminal defendant has a due process right of access to certain information possessed by the prosecution." *Lester*, *supra* at 281, citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Id.* at 281-282.

Initially, we note that defendant has failed to proffer the school counseling records for our review, which makes it uniquely difficult to determine if the record contained evidence favorable to defendant. More compelling, however, is that, according to defendant, the victim's counseling records may have indicated that the victim reported to her school counselor that defendant physically abused her. Thus, this evidence was not favorable to defendant. Moreover, although defendant speculates and makes general observations concerning how the receipt of the information may have affected his defense strategy and the outcome of his case, he makes no specific claims regarding the *actual* effect. In sum, defendant has failed to show a plain error affecting his substantial rights. *Carines*, *supra*. Accordingly, reversal is not warranted on the basis of this unpreserved issue.<sup>4</sup>

E.

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<sup>3</sup> Defendant appears to be arguing that the prosecutor violated the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), given that he suggests that the information may have been exculpatory.

<sup>4</sup> Defendant also argues that the prosecutor "sandbagged" him, and improperly elicited "bad acts" testimony from defendant's mother, which will be addressed in part III F, *infra*.

Defendant next argues that the trial court impermissibly limited his cross-examination of the lead investigator of the case, thereby violating his constitutional right to present a defense and confront his accusers. We disagree. This Court reviews a trial court's limitation of cross-examination for an abuse of discretion. *People v Jensen*, 162 Mich App 171, 180; 412 NW2d 681 (1987). A defendant's constitutional right to present a defense and confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski, supra*. Rather, a court has wide latitude to impose reasonable limits on cross-examination based on concerns such as, inter alia, prejudice, confusion of the issues, or questioning that is only marginally relevant. *Id.*

Immediately before the following exchange, defense counsel and the detective commented on the fact that the detective belonged to a small police department, that he was the only investigator, and that he did not have anyone to follow him on the case. The following exchange then took place:

Q. And you really had to do a lot more than you would see normally being done by an officer in charge?

A. That is true.

Q. You got a little pressure I think politically to get the thing wrapped up--

[Prosecutor]: Judge, I'm sorry. Objection, relevancy. Going far field.

[Trial court]: You need to rephrase the question.

[Defense counsel]: Well, I will ask him if he felt the pressure.

[Prosecutor]: Again, relevancy. We all feel pressure.

[Trial court]: You need to rephrase the question.

Q. Did you feel any pressure to get this thing wrapped up?

[Prosecutor]: Same question; same objection.

[Trial court]: Sustained.

Q. If you would have had more time, sir, would there have been other things that you would have done in this investigation?

A. Possibly. I don't know. I can't think of anything specifically.

We find no abuse of discretion. Defendant apparently sought to demonstrate that the detective performed a hurried investigation because of extraneous influences. However, during

trial, there was no indication that the detective failed to appropriately investigate the case because he was under political pressure. Therefore, the proffered evidence was not relevant without a proper foundation. MRE 401. As such, the inferences defendant was trying to draw between the detective not having any assistance and failing to fully investigate the case because he was under political pressure to “wrap things up” were highly tenuous and may have confused the issues. MRE 403.

We also reject defendant’s claim that the trial court’s evidentiary ruling deprived him of his constitutional right to present a defense. The trial court’s ruling did not amount to a blanket exclusion of all evidence challenging the detective’s credibility. In fact, defense counsel cross-examined the detective at length, and specifically asked the detective if he would have done anything differently if he had more time. Moreover, contrary to defendant’s implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636, 645 (1986). Therefore, we are not persuaded that the trial court abused its discretion by limiting the cross-examination.

F.

Defendant also argues that the prosecutor improperly elicited irrelevant and prejudicial evidence from defendant’s mother. We disagree.

During defense counsel’s direct examination of defendant’s mother, he questioned her regarding the nature of her relationship with defendant. She testified that there were “no problems” and “nothing wrong” with their relationship, and that both children wanted to be with her. Defendant now challenges the following portion of the prosecutor’s cross-examination of defendant’s mother:

Q. And you indicated there was never a problem with the kids, that they always wanted to be with you; isn’t that correct? That’s what you said on direct examination.

\* \* \*

Q. [Defendant’s mother], during the time you were living with your kids, did you yourself ever have physical alterations with [defendant]?

A. I think I tried to slap him a couple of times for what came out of his mouth.

Q. And is that the extent, that corrective slap? Is that your testimony?

A. Um, we had an altercation when we moved to Belleville right when John and I were both desperately--

Q. What year did you move to Belleville [defendant’s mother]?

A. In ’96, ’97. We had an altercation at that time at a counselor’s office. That was also started over a slap because of something that came out of his mouth that was horrible.

Q. Okay. And isn't it true that that incident that happened in 1997 the police were called to the clinic because the two of you were slapping each other; isn't that correct?

A. Yes.

\* \* \*

Q. Okay, so we have an incident where the two of you are so physical with each other the police had to be called; correct?

A. Well, yes, they were called.

Q. Okay. And it's your testimony that that's the only time that you've seen [defendant] be physical at all to you is that incident?

A. I don't--well, because there--I am--I don't recall other ones. If you want to refresh my memory.

[Defense counsel]: Your, honor, I'm going to object. Can we approach?

[Off the record sidebar]

[Trial court]: [Prosecutor], you may proceed.

Q. I asked you, [defendant's mother], you've already indicated there was an incident where your son was being so physical with you and you being so physical back to him the police had to be called to break it up. Remember telling me about that [defendant's mother]?

A. That was at the counselor's office, yes.

Q. And could you tell me, there has been other incidences where [defendant] has been physically assaultive or aggressive towards [sic] you; isn't that correct?

[Defense counsel]: Objection, irrelevant, your Honor.

[Trial court]: Overruled.

\* \* \*

A. No. There were times there was, you know, I mean, like he would be in my car and I would make him get out because of his behavior. . . .

Q. And what did he do, [defendant's mother]?

A. Just--was it pushed me, grabbed me. As far as beating me up, my son has never beat me up.

A prosecutor may question witnesses on those matters that were raised by the defense on direct examination. *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). Here, the prosecutor's cross-examination of defendant's mother was responsive to her direct examination testimony that she and defendant had an unproblematic relationship. Moreover, a defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. In other words, defendant "opened the door" to the challenged evidence. See generally *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). We also note that defendant's conclusory argument that the prosecutor "sandbagged" him by improperly withholding this "bad acts" evidence is without merit. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Accordingly, defendant is not entitled to relief on this basis.

#### IV. Conclusion

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under the cumulative error theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Donald S. Owens  
/s/ Richard A. Bandstra  
/s/ Christopher M. Murray