

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM BENJAMIN STEVENS,

Defendant-Appellant.

SUPREME COURT NO. 149380

COURT OF APPEALS NO. 309481

CIRCUIT COURT NO. 10-005622-FC

JERARD M. JARZYNSKA (P35496)

Prosecuting Attorney

JERROLD SCHROTENBOER (P33223)

Chief Appellate Attorney

312 S. Jackson Street

Jackson, MI 49201-2220

(517) 788-4283

DANIEL D. BREMER (P23554)

Attorney for Defendant-Appellant

1133 East Bristol Road

Burton, MI 48529

(810) 232-6231

APPELLEE'S MCR 7.302(H)(1) SUPPLEMENTAL BRIEF

JERROLD SCHROTENBOER (P33223)

CHIEF APPELLATE ATTORNEY

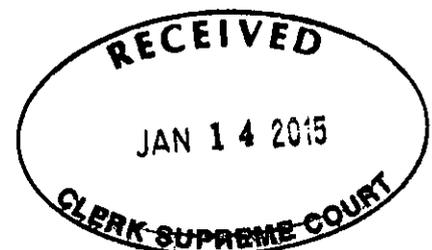


TABLE OF CONTENTS

Index of Authorities	ii-iii
Counterstatement of the Question Presented	iv-v
Counterstatement of Facts	1-3
Argument	4-12
Because the trial court (1) asked questions of about every witness in this case including the prosecutor's expert witness, (2) told the jury that its comments and questions were not to influence its vote or express a personal opinion, and (3) the jury convicted of only lesser offenses, the trial court's asking questions toward the end of this eight-day trial did not inevitably improperly influence the jury.	
Relief	12

INDEX OF AUTHORITIES

<i>Freudeman v Landing of Canton</i> , 702 F3d 318 (CA 6, 2012)	6
<i>McMillan v Castro</i> , 405 F3d 405 (CA 6, 2005)	4, 6, 7, 8, 9, 10
<i>People v Cole</i> , 349 Mich 175; 84 NW2d 711 (1957)	5, 7, 11
<i>People v Wilder</i> , 383 Mich 122; 174 NW2d 562 (1970)	9
<i>People v Young</i> , 364 Mich 554; 111 NW2d 870 (1961)	5, 6
<i>Redmond v Sheer</i> , 370 Mich 670; 122 NW2d 721 (1967)	10
<i>United States v Beaty</i> , 722 F2d 1090 (CA 3, 1983)	6, 7, 9
<i>United States v Castner</i> , 50 F3d 1267 (CA 4, 1995)	6
<i>United States v Martin</i> , 189 F3d 547 (CA 7, 1999), cert den 528 US 1097; 120 S Ct 840; 145 L Ed 2d 705 (2000)	7
<i>United States v Meléndez-Rivas</i> , 566 F3d 41 (CA 1, 2009)	7
<i>United States v Parker</i> , 241 F3d 1114 (CA 9, 2001)	7, 8, 10
<i>United States v Sáenz</i> , 134 F3d 697 (CA 5, 1998)	9
<i>United States v Santana-Pérez</i> , 619 F3d 117 (CA 1, 2010)	7, 11
<i>United States v Tilghman</i> , 328 US App DC 258; 134 F3d 414 (1998)	4, 5
<i>VanLeirsburg v Sioux Valley Hosp</i> , 831 F2d 169 (CA 8, 1987)	7, 10
MCL 750.316(1)(b)	10
FRE 614(b)	8
MRE 614(b)	4

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Where the trial court (1) asked questions of about every witness in this case including the prosecutor's expert witness, (2) told the jury that its comments and questions were not to influence its vote or express a personal opinion, and (3) the jury convicted of only lesser offenses, did the trial court's asking questions toward the end of this eight-day trial inevitably improperly influence the jury?

Defendant-Appellant answers:	Yes
Plaintiff-Appellee answers:	No

COUNTERSTATEMENT OF FACTS

The Court of Appeals' opinion explains what happened in this case:

Defendant was tried for first-degree felony murder¹ and first-degree child abuse in connection with the death of his three-month-old son, Kian (born May 21, 2010). In the early morning hours of August 19, 2010, Blackman Township Rescue was dispatched to the apartment defendant shared with his girlfriend, Crystal Anderson, and their son Kian. Kian was not breathing and had no pulse, defendant was attempting to give Kian mouth-to-mouth resuscitation. Kian was transported to a local hospital, placed on life support, and stabilized before being flown to Mott's Children Hospital at the University of Michigan. Once at Mott, Kian was determined to be brain dead and was found to have suffered hemorrhaging to the brain. He passed away in the afternoon of August 19, 2010. The cause of death was abusive head trauma.

At trial, the prosecution presented evidence that the defendant and Anderson were the only people in the apartment with Kian when he became unresponsive. Anderson testified that she had been sleeping in one of the bedrooms and awoke to hear a strange cry come from Kian, who had been sleeping in the living room. When she went out to the living room, she saw defendant holding Kian upside down with one hand on Kian's back. Anderson took Kian from defendant and saw that he was gasping for air, he then went limp and his eyes rolled back. She called 911 as the defendant performed CPR on Kian. Anderson further testified that defendant had been "rough" with Kian on previous occasions, indicating that although defendant did not intend to hurt him, he played with him as though he was an older child.

In addition to Anderson, the prosecution presented witness testimony from several others: the policemen who were dispatched to the apartment; detectives who investigated the case; Dr. Bethany Mohr, the medical director of the child protection team at Mott; Dr. Jeffrey Jentzen, who testified as an expert in forensic pathology; Rebecca Filip, an expert in

¹Actually, it was felony murder. MCL 750.316(1)(b).

domestic violence in the domestic violence cycle; Deborah Anderson, Anderson's step-mother; and Brandi Johnson, defendant's ex-girlfriend. Dr. Jentzen also testified as a rebuttal witness.

Likewise, the defendant called several witnesses. Along with his own testimony, he called Sandy Williams, the mother of a friend who knew defendant for 23 years; his mother, Kathleen Stevens; and an expert, Dr. Mark Shuman, the associate medical examiner for Miami-Dade County in Florida.

During the course of the trial, the court asked questions of almost all of the witnesses who testified. Of the prosecuting witnesses, the trial court questioned one of the investigating officers, Crystal Anderson, Dr. Mohr, Dr. Jentzen, Rebecca Filip, Deborah Anderson, and one of the detectives. Of the defense witnesses, the Court posed questions to Kathleen Stevens, the defendant, and Dr. Shuman.

The defendant's primary defense was that he had heard Kian crying during the night as he lifted him from the bassinette, defendant tripped on a child's toy and fell, dropping Kian to the floor. Defendant presented the testimony of the pathologist, Dr. Shuman, to establish that the head trauma suffered by Kian could have been caused by a fall such as that described by defendant. Defendant also called on Dr. Shuman to testify that (1) while a baby can be "shaken to death" the death-causing injury or trauma to the neck, not the brain, (2) a shaking for significant enough to cause brain injury leading to death also would cause neck injury in an infant, and (3) Kian showed no signs of neck injury. (Pp 2-3).

Attached are exhibits entered at trial. ##3-1 through 3-8 show the apartment, including the damaged door, the damaged wall, and where the bassinette was. (January 31, 2012, Trial Transcript [Tr II], pp 113, 118). ##5-47 and 5-50 show the subdural hemorrhaging. (February 1, 2012, Trial Transcript [Tr III], pp 113, 118).

Trial lasted eight days. The jury convicted defendant of second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3), on February

9, 2012. Subsequently, on March 22, 2012, Jackson County Circuit Court Judge John McBain sentenced defendant to 25-50 years concurrent to 2 years, 4 months, to 4 years. The Court of Appeals then affirmed on April 10, 2013.

Subsequently, on November 21, 2014, this Court ordered the parties to file supplemental briefs "addressing the appropriate standard for determining whether a trial court's questioning of witnesses requires a new trial, and whether that standard was met in this case." 497 Mich 898; 855 NW2d 752 (2014).

ARGUMENT

Because the trial court (1) asked questions of about every witness in this case including the prosecutor's expert witness, (2) told the jury that its comments and questions were not to influence its vote or express a personal opinion, and (3) the jury convicted of only lesser offenses, the trial court's asking questions toward the end of this eight-day trial did not inevitably improperly influence the jury.

Whether or not the trial court's questioning was less than ideal, in the totality of the circumstances, defendant received a fair trial. This trial lasted eight days. The trial court asked questions from witnesses long before defendant put any witnesses on the stand. Then, after examining some defense witnesses, the trial court resumed questioning with the prosecutor's rebuttal witness. Next, the trial specifically gave an instruction that the jury not allow its questions and comments to influence its vote. Last, the jury did not even convict as charged, finding guilt on only lesser offenses in both counts. Defendant is not entitled to a new trial.

As everyone accepts, the trial court has the right to ask questions. MRE 614(b). Generally, this Court reviews this issue for an abuse of discretion. *McMillan v Castro*, 405 F3d 405 (CA 6, 2005). Yet, as pointed out in *United States v Tilghman*, 328 US App DC 258; 134 F3d 414, 416 (1998):

Drawing the line between appropriate and inappropriate judicial questioning of witnesses presents circuit courts with a challenging task. Appellate records often fail to convey nuance and tone. Unlike many federal court judges, moreover, district judges are experts at supervising trials and managing witnesses. We thus scrutinize trial judge exercise of discretion with both deference and with "respect appropriately respective of the inescapable remoteness of appellate review." [Citation omitted.] At the same time,

because we must ensure that defendants receive fair trials, we will set aside a conviction if witness management decisions by district judges “affect the substantial rights.”

Of course, as is obvious, having a review standard like “denied a fair trial” or “affected substantial rights” does not really say anything. Right now, as this Court’s order implies, the present standard is up to debate. Not only has this Court not addressed this question in decades, but it has in the past used at least two different standards. In *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957), this Court, in a 4-3 decision, reversed a conviction because the trial court’s conduct (judicial advice to the prosecutor and vigorous cross-examination in a “close case”) “may well have created an atmosphere of prejudice which deprived defendant of a fair trial and contributed to his conviction.” Four years later, however, in *People v Young*, 364 Mich 554, 559; 111 NW2d 870 (1961), this Court ignored that standard (despite citing *Cole*) and unanimously reversed because “the circuit judge allowed his disbelief of [an expert witness’ testimony] to become entirely apparent to the jury.” The phrase, “may well have created an atmosphere” cannot be found in *Young*—perhaps because it found something odd about the *Cole* majority opinion. Despite ultimately reversing because what happened “may well have created an atmosphere,” *Cole* earlier said that both the trial court’s refusal to entertain the defendant’s objections until after the witness had testified and the trial court’s intimating (in questioning a witness) that certain records may have been deliberately withheld did not “constitute prejudicial error” even though the intimation “may well have reacted with prejudice on the minds of the jury.” Perhaps *Young* noticed that the *Cole* majority opinion contradicts itself.

Plaintiff asks this Court to adopt the Sixth Circuit's standard. Rather than looking at the possibility that the jury may have been prejudiced, it should reverse only if "the conduct inevitably improperly influenced the jury." *Freudeman v Landing of Canton*, 702 F3d 318, 328 (CA 6, 2012):

"This Court reviews a district court's conduct during trial for an abuse of discretion." [*McMillan*, 405 F3d 409]. The trial judge, as the "governor of the trial," is free to ask questions to clarify a witness's testimony but must remain dispassionate and impartial. [Citation omitted]. A trial judge has considerable discretion to question witnesses in order to "clarify and develop [the] facts." [Citation omitted.] However, it is reversible error for the trial court to belittle counsel, demonstrate outright bias, or "so infect [the trial] with the appearance of partiality" that the trial court's conduct inevitably improperly influenced the jury." [*McMillan*, 405 F3d 409-410]. The "threshold inquiry" is whether the district court's conduct falls outside the realm of acceptable, "though no necessarily model, judicial behavior." *Id.* At 410. In making this determination, we look at a variety of factors including "the nature of the issues at trial" (intervention is often needed in a long, complex trial), the conduct of counsel and witnesses, "the tone of the judicial interruptions, the extent to which they were directed at one side more than the other, and the presence of any curative instructions at the close of the proceedings." *Id.*

Most other circuits have a similar standard. *E.g.*, *United States v Beaty*, 722 F2d 1090, 1096 (CA 3, 1983) ("could not help but conclude that the judge simply did not believe" the witness); *United States v Castner*, 50 F3d 1267, 1273 (CA 4, 1995) ("such a high degree of favoritism or antagonism as to make fair judgment impossible").

A standard reversing only if the "conduct inevitably improperly influenced the jury" is both easier to work with and would better balance the competing factors. Reversing merely because the jury "may well have been influenced" or "quite possibly could have been influenced" fails to adequately say just when an improper question

leads to a reversal. As many courts have said (including this Court in *Cole*), an improper question (even showing bias) does not necessarily call for a reversal. *United States v Meléndez-Rivas*, 566 F3d 41, 50 (CA 1, 2009) (merely crossing the line does not require a reversal); *United States v Santana-Pérez*, 619 F3d 117, 125 (CA 1, 2010) (no plain error even though the question implies that the judge has trouble believing the witness' story); *Beaty, supra*, 722 F2d 1093 (CA 3, 1983) ("The judge's conduct of the trial left much to be desired. Whether or not his conduct was ideal, however, is not the issue before us." The judge had asked a witness if he had lied before the grand jury and had falsely accused someone. The court found no prejudice even though the questions should have been left to the prosecutor.); *McMillan, supra*, 405 F3d 412 ("less-than-model-behavior"); *United States v Martin*, 189 F3d 547, 555 (CA 7, 1999), cert den 528 US 1097; 120 S Ct 840; 145 L Ed 2d 705 (2000) (not necessarily reverse even if the questions suggested that the witness was being untruthful); *VanLeirsburg v Sioux Valley Hosp*, 831 F2d 169, 172 (CA 8, 1987) (an improper question, even if "gratuitous," does not necessarily call for a reversal); *United States v Parker*, 241 F3d 1114 (CA 9, 2001) (even an extreme intervention does not necessarily require a reversal). Yet, with the Court of Appeals dissent's analysis, each of these could easily have required a reversal. Any time that a judge asks a question that he should not have, the jury may well have been influenced.

Instead, a "conduct-inevitably-improperly-influenced-the-jury" standard better balances out the various competing factors. As pointed out above, a trial court has considerable discretion in running a trial:

"The examination of witnesses requires judicial supervision."

[Citation omitted.] Accordingly, under FRE 614(b), a judge generally is free to interrogate witnesses to ensure that issues are clearly presented to the jury. Along with other circuits, we have frequently reminded litigants that “the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting.” [Citation omitted.] Rather than simply being a silent spectator, intelligent questioning by the judge is his prerogative. [Citation omitted.] The occasional questioning of witnesses is one means a judge may use to assist a jury in understanding the evidence. [Citation omitted.] Thus, a trial judge may ask those questions he deems necessary in order to clarify an important issue, as long as he remains impartial. *Parker, supra*, 241 F3d 1119.

The Court of Appeals dissent's standard would lead too often to second-guessing the judge, based on nothing but possibilities.

McMillan 405 F3d 412, itself addresses the valid concern that only reversals will get the trial court's attention and just “go over the line.” It imposed a requirement that, when a lawyer objects to a question, the judge immediately tell the jury that it is not to assume any judicial leaning from the question:

We find it necessary, however, to take this opportunity to emphasize that district courts must always be mindful of their conduct in the presence of the jury and should take necessary precautions to prevent appearing partial to one side. While it was certainly proper for the district court here to issue a curative instruction to the jury at the close of the evidence, we believe that in the future, district courts should issue a curative instruction at the time counsel raises an objection to specific questioning or conduct that could be viewed as hostile or biased. . . . District courts . . . should ask counsel what remedy, short of a mistrial, would be appropriate, and give due consideration as to whether an immediate curative instruction or other remedy can cure any appearance of hostility or bias.

This Court should adopt this rule. A trial court's failure to give such an immediate instruction can then be considered as a factor in whether or not to reverse.

Therefore, using this review standard, defendant is not entitled to a new trial. Not only must the court look at the entire record, but “[t]he cumulative effect must be ‘substantial’ and must prejudice the defendant’s case.” *United States v Sáenz*, 134 F3d 697, 702 (CA 5, 1998). The prejudice must permeate the trial. *McMillan, supra*, 405 F3d 412. The sheer number of questions does not require a reversal. *People v Wilder*, 383 Mich 122, 125; 174 NW2d 562 (1970). In deciding the issue, the court should look at such factors as the trial’s length, how even handed the questions were among the various witnesses, just how blatant the judge’s beliefs were showing, any curative instruction, the verdict’s evidence’s strength, and issue preservation.

Here, the trial lasted eight days, plenty of time to dissipate any shown partiality. Defendant complains about nothing more than questions asked on two days, to only two witnesses. He does not claim that the trial court in any other way showed partiality to plaintiff’s case. As pointed out in *Beaty*, 722 F3d 1094-1095:

The sheer length of this two-week trial makes us cautious about inviting any but the most inflammatory isolated statements with critical importance. We do not believe that a few summary questions or intemperate remarks assumed the same importance in the jury’s mind as they naturally have in counsel’s in preparing this appeal.

As it is, as the Court of Appeals majority pointed out, the trial court asked questions from lots of witnesses, almost all before defendant even put one on the stand. Tr II, pp 69, 73, 91, 100, 112, 158, 160; Tr III, pp 36, 46-47, 71-72, 103, 129, 139, 158-159, 160, 170; February 2, 2012, Trial Transcript, p 76; February 6, 2012 [Tr V], Trial Transcript, pp 39, 51, 59, 90, 123, 138, 146, 158, 162; February 7, 2013[Tr VI], Trial Transcript, pp 14-16, 17-18, 26-27, 48, 52, 61, 70, 80, 110, 112, 118-119, 121, 127).

Although some questions to Dr. Shuman are susceptible to being interpreted to show partiality, they did not inevitably improperly influence the jury. First, the judge subsequently asked the same questions about travelling from Dr. Jentzen. (Tr VI, pp 113, 118-119). Second, Dr. Shuman did a good job in answering the questions about his being merely an assistant and not the boss. In *Redmond v Sheer*, 370 Mich 670; 122 NW2d 721 (1967), this Court refused to reverse where the witnesses (the plaintiff, some doctors, and a chiropractor) “appeared well able to take care of themselves as witnesses,” 370 Mich 673, even though the judge’s questions tended to show an adverse opinion about chiropracty, 370 Mich 678 (Black, J., dissenting). Dr. Shuman was able to bring out his entire position and even testified that he had previously testified for both the prosecution and the defense. (Tr VI, p 20).

Of course, as everyone acknowledges, the judge gave a curative instruction, telling the jury that his comments and questions are not evidence. (February 8, 2012, Trial Transcript [Tr VII], p 80). Defendant had no objections to the jury instructions, Tr VII, p 99, and never did ask for any contemporaneous instruction.

Next, a point the dissent missed, the jury did not convict defendant as charged. It convicted of only second-degree murder and second-degree child abuse. Instead of finding defendant’s conduct intentional, it found it to be reckless. If partiality permeated the entire eight-day trial, then the jury would have convicted as charged, of felony murder. MCL 750.316(1)(b) (a second-degree murder during a first-degree child abuse). Plenty of cases have considered a curative instruction as a factor in not reversing. *E.g.*, *McMillan*, *supra*, 405 F3d 412; *VanLeirsburg*, *supra*, 831 F2d 172; *Parker*, *supra*, 241 F3d 1119.

Next, unlike the evidence in *Cole*, 349 Mich 200, this case was not “close.”

The injuries to the head were just plain too serious to have occurred by a mere short fall. (Tr III, pp 39, 59). The attached exhibits show too much bleeding. The injury occurred very soon before the child died. (Tr III, p 81). In addition, defendant’s story is suspicious in other ways as well. He did not tell anyone about a short fall until two weeks later, after he had been put in the same jail as a defendant who was claiming that his child had died through a short fall. Defendant himself even admitted that he had lied to the police when he told them that he had not accidentally dropped the child (Tr V, p 88-89). In fact, even though he had spoken to Anderson a few times in the meantime, he failed to mention to her the fall until two weeks after the event. (Tr V, p 98). For example, two days after the event, he told her that all that he had done was pick up the child. (Tr V, p 135). In addition, a child’s toy being on the floor does not make particular sense as the child was only three months old (TrIV, p 164) and defendant is a self-professed “neat freak” (Tr V, p 181). In addition, no one testified to finding any such toy. Defendant just made it up.

Last, as he acknowledges, defendant did not object to all of the questions that he raises now. Those matters are addressed for plain error. *Santana-Pérez*, *supra*, 619 F3d 125. As it is, he did not object to a single one of the trial court’s questions to him, including the one that the judge most blatantly should not have asked, about the “alleged” toy. No plain error exists here as, if requested, the trial court could have corrected itself on this point (by repeating the question while omitting the word) and contemporaneously tell the jury not to assume anything from this slip.

In summary, this Court should adopt the Sixth Circuit standard, to reverse

only if "the trial court's conduct inevitably improperly influenced the jury" after considering the totality of the circumstances. Here, given that the judge asked many questions of both side's witnesses, a curative instruction was given, the jury did not even convict as charged, the evidence showing guilt was strong, and defendant did not even object to everything that he is now complaining about, he is not entitled to a new trial.

RELIEF

ACCORDINGLY, plaintiff asks this Court to either deny this application for leave to appeal or affirm.

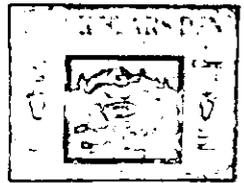
Respectfully submitted,

January 14, 2015


JERROLD SCHROTTENBOER (P33223)
CHIEF APPELLATE ATTORNEY

PEOPLES
EXHIBIT
#3-1





PENGAD 800-331-6988
PEOPLE'S
EXHIBIT
#3-2

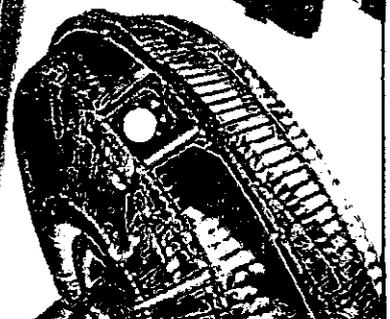


PEOPLE'S
EXHIBIT
3-3

PEOPLE'S EXHIBIT 800-631-6888

PEOPLE'S
EXHIBIT
3-4

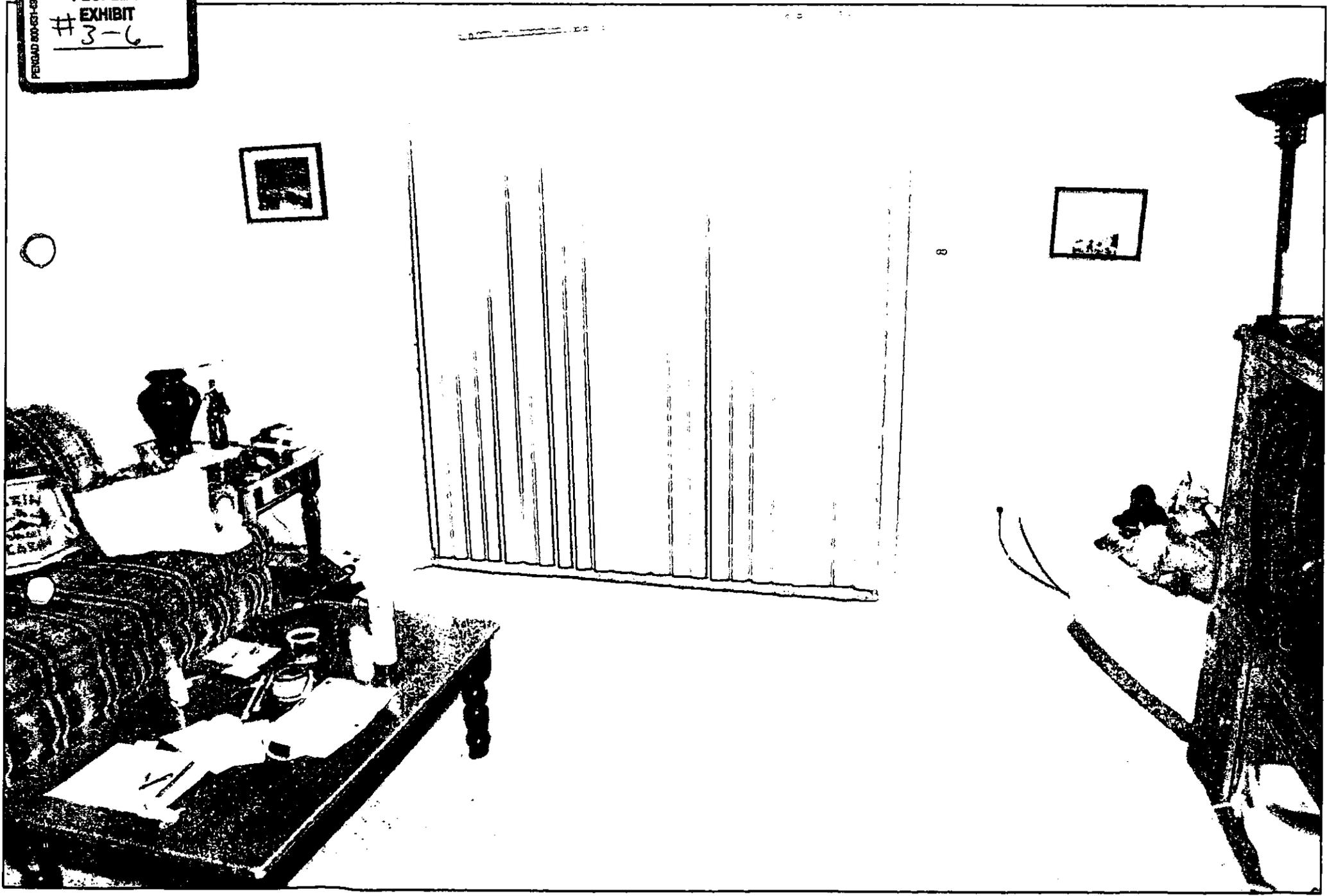
FENGAD 800-631-8883



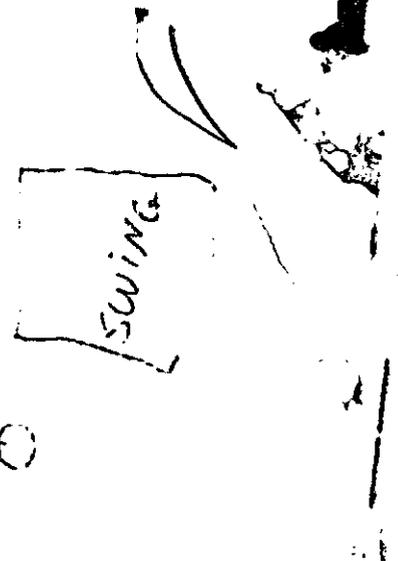
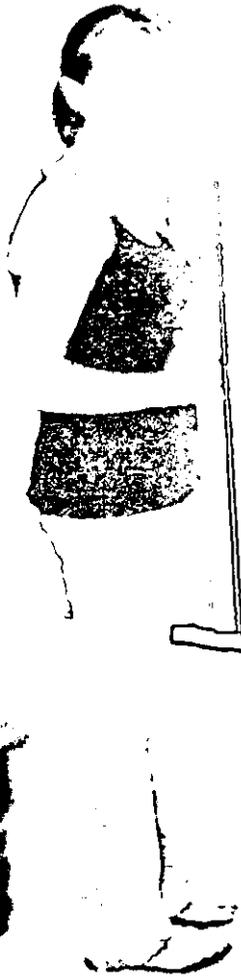


PEOPLE'S
EXHIBIT
#3-S
PENNSAID 800-631-4889

PEOPLE'S
EXHIBIT
3-6



8



PEOPLE'S
 EXHIBIT
 # 3-7

PERIOD 800-651-0389



PENGAD 800-631-4888

PEOPLE'S
EXHIBIT
#3-8



PEOPLE'S
EXHIBIT
S-47
PERGAD 00-03-00



WME. 10.583

PEOPLE'S
EXHIBIT
5-50
PENAD 800-631-6283

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM BENJAMIN STEVENS,

Defendant-Appellant.

SUPREME COURT NO. 149380

COURT OF APPEALS NO. 309481

CIRCUIT COURT NO. 10-005622-FC

JERARD M. JARZYNSKA (P35496)

Prosecuting Attorney

JERROLD SCHROTENBOER (P33223)

Chief Appellate Attorney

312 S. Jackson Street

Jackson, MI 49201-2220

(517) 788-4283

DANIEL D. BREMER (P23554)

Attorney for Defendant-Appellant

1133 East Bristol Road

Burton, MI 48529

(810) 232-6231

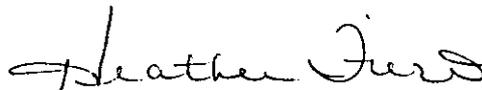
PROOF OF SERVICE

Heather Fiero states that on the 14nd day of January, 2015, she served a copy of: **APPELLEE'S MCR 7.302(H)(1) SUPPLEMENTAL BRIEF** upon:

DANIEL D. BREMER

Attorney for Defendant-Appellant

by First Class Mail at the address listed above.



Heather Fiero
Legal Secretary