STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff- Appellee,

Supreme Court No. 163805
Court of Appeals No. 351791
Lower Court No. 16-020296-FC

vs.

DAMON EARL WARNER,
Defendant-Appellant.

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

PLAINTIFF-APPELLEE'S BRIEF REGRADING ISSUES IDENTIFIED IN THE COURT'S ORDER DATED SEPTEMBER 23, 2022

ORAL ARGUMENT REQUESTED

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Jurisdictional Statement

The People do not dispute jurisdiction.

Statement of Question Presented

I. Whether, under MCL 767.29 and MCR 6.112(H), a trial court may amend an information, over objection, to include a charge that was dismissed pursuant to an order of *nolle prosequi*, without beginning the proceedings anew, "unless the proposed amendment would unfairly surprise or prejudice the defendant?

The Court of Appeals say "Yes"
Plaintiff-Appellee says "Yes"
Defendant-Appellant says "No"
The Trial Court says "Yes"

II. Whether the Eaton County Circuit Court erred in allowing the People to amend the information, over objection, to include a charge that was dismissed pursuant to an order of *nolle prosequi*, without beginning the proceedings anew and whether any error was harmless?

The Court of Appeals say "No error occurred"
Plaintiff-Appellee says "No error occurred"
Defendant-Appellant says "Yes"
The Trial Court says "No error occurred"

III. Whether the trial court abused its discretion by denying the defendant's motion to appoint an expert in false confessions.

The Court of Appeals say "No"
Plaintiff-Appellee says "No"
Defendant-Appellant says "Yes"
The Trial Court says "No"

Introduction

Defendant claims error in the trial court's decision to allow the People to reinstate count one without holding another preliminary exam. However, defense counsel said at the time of the motion hearing that he was not sure that his proffered new evidence – impeachment evidence – would be persuasive to the magistrate. (Final Pretrial and Motions Transcript, September 3, 2019, p 13). Thus, no error occurred where counsel conceded that his requested relief would make no difference in the outcome of the proceedings.

Likewise, Defendant previously received a preliminary examination on count one, was bound over to circuit court, and had a full jury trial. Thus, Defendant received every procedural right and safeguard that he was entitled to.

This Court should not grant leave or otherwise use this case to make or change the law because no error occurred. The results of Defendant's proceedings would have been the same regardless of whether a second preliminary examination occurred. Instead, if the Court feels that a new development in the law is needed, it should wait for a fact patter in which it would correct error – where a defendant had previously waived the exam or had new evidence beyond merely impeachment. As such, this Court should deny defendant's application for leave to appeal and affirm the decision of the Court of Appeals.

Counter-Statement of Facts and Proceedings

Damon Warner (Defendant) entered his step-daughter's bedroom, pulled down her pants and underwear and attempted to rape her. (Jury Trial Transcript, Volume 2, September 16, 2019, p 53). On a separate occasion, Defendant approached his step-daughter in the dining room, stuck his hand down the back of her pants, and forced his fingers into her vagina. PG is the victim of Defendant's sexual assaults. *Id*. at 59. Based on PG's late reporting of attempted rape and digital penetration, Defendant was charged with one count of first-degree criminal sexual conduct, and one count of second-degree criminal sexual conduct. A preliminary examination was held on

October 14, 2016, at which time the case was bound over to circuit court as charged. (Preliminary Examination Transcript, October 14, 2016, p 45). The matter proceeded to trial and the jury returned a conviction on the second-degree criminal sexual conduct charge, but could not come to an agreement on the first count. (Jury Trial Transcript, Volume IV, June 22, 2017, p 23).

Defendant was subsequently sentenced to 10 to 30 years imprisonment. (Sentencing Transcript, August 10, 2017, p 27). Based on the sentence imposed by the trial court and in consultation with the victim, the People filed a *nolle prosequi* on count one – first-degree criminal sexual conduct.

Defendant successfully appealed his conviction and the matter was remanded to the trial court for a new trial. *People v Warner*, unpublished per curiam opinion of the Court of Appeals, Issued March 21, 2019 (Docket No. 340272), p 6. By vacating Defendant's conviction and remanding for a new trial, the Court of Appeals also vacated the basis upon which the People relied when they filed the *nolle prosequi* on count one. Thus, the People moved to amend the information to reinstate count one. (People's Motion to Amend the Information/Reinstate Count 1, August 13, 2019). The trial court granted the People's motion over Defendant's objections. *Id.*

Prior to trial, Defendant motioned the court to appoint an expert to "speak to the attributes associated with false confessions and the interview bias of Det. Derrick Jordan." (Defendant's Motion Requesting the Court to Appoint a False Confession Expert, August 21, 2019, at 1). The trial court denied defendant's motion finding that Defendant's motion sought an expert to testify to a topic expressly rejected by *People v Kowalski*. The matter then proceeded to trial where Defendant was convicted of first-degree criminal sexual conduct and found not guilty of second-degree criminal sexual conduct. Defendant appealed his conviction and sentence to no avail. The Michigan Court of Appeals conducted a thorough review of the issues raised by Defendant and affirmed his conviction and sentence. *People v Warner*, unpublished per curiam opinion of the Court of Appeals, Issued October 7, 2021 (Docket No.251791). Defendant now appeals to the Michigan Supreme Court. In lieu of granting leave to appeal, this Court ordered oral arguments on Defendant's

application. Specifically, the parties have been ordered to address (1) whether, under MCL 767.29 and MCR 6.112(H), a trial court may amend an information, over objection, to include a charge that was dismissed pursuant to an order of *nolle prosequi*, without beginning the proceedings anew, "unless the proposed amendment would unfairly surprise or prejudice the defendant," MCR 6.112(H); (2) if so, whether the Eaton Circuit Court erred by doing so in this case and whether any error was harmless; and (3) whether the trial court abused its discretion by denying the defendant's motion to appoint an expert in false confessions.

Argument

I. Under MCL 767.29 and MCR 6.112(H), a trial court may amend an information to include a charge that was previously dismissed pursuant to an order of *nolle prosequi*, without beginning the proceedings anew, so long as the proposed amendment would not unfairly surprise or prejudice the defendant.

A. Counter-Statement of Issue Preservation

To preserve an issue for appeal, the defendant must raise the claim before the trial court – giving them an opportunity to consider, and rule on the claim. *People v Salloway*, 316 Mich App 174, 197 (2016), *citing People v Connor*, 209 Mich App 419, 422 (1995). In his original motion, Defendant claimed reinstatement of the charge for first-degree criminal sexual conduct, was improper because,

- Reinstatement was not in the interest of justice,
- Reinstatement was only occurring because Warner prevailed on appeal,
- New evidence exists, and had it been presented at the preliminary examination he would not have been bound over on the charge,
- Double-jeopardy attaches because of how the dismissal was obtained, and
- If the Court allows the amendment, Warner is entitled to remand for a new preliminary examination.

(Final Pretrial and Motions Transcript, at 5).

However, in the Court of Appeals, Defendant claimed under *People v Ostafin*, 112 Mich App 712 (1982) and *People v Curtis*, 389 Mich 698 (1973) a reinstatement of a charge may only occur in a new indictment, and that he is entitled to a new trial since the People did not issue a new indictment containing the first-degree criminal sexual conduct charge. Defendant now adds an additional argument that the trial court lacked jurisdiction.

Since Defendant's claims of error on appeal are not the same as presented to the trial court, the issues are not preserved for appellate review.

B. Counter-Standard of Review

Unpreserved claims of error are reviewed for plain error affecting the defendant's substantial rights. *People v Benton*, 294 Mich App 191, 202 (2011). To establish an unpreserved claim, defendant must avoid forfeiture by establishing "(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights." *People v Kowalski*, 489 Mich 488, 505 (2011); *citing People v Carines*, 460 Mich 750, 763 (1999).

Even if plain error is established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Kowalski*, 489 Mich at 506; *citing Carines* 460 Mich at 763; *quoting US v Olano*, 507 US 725, 736-737 (1993).

C. Analysis

MCL 767.29 and MCR 6.112(H) do not run in conflict. They facilitate the People's interest in pursuing justice, while protecting the accused from unacceptable prejudice. The *nolle prosequi* is a red herring. The analysis is whether the amendment or reinstatement causes unfair surprise or prejudice, not whether a *nolle prosequi* was filed by the people and entered by the court.

1. A reinstated charge does not automatically require proceedings to begin anew.

A *nolle prosequi* does not require a subsequently reinstated felony charge to begin anew in district court. It is not the *nolle prosequi* that causes a felony charge to go back to district court. Instead, it is unfair surprise or prejudice, if any, caused by the reinstatement of the charge, that creates the necessity for beginning anew.

MCL 767.29 requires the government to enter a *nolle prosequi* and the reasons therefore into the record. In *People v Curtis*, 389 Mich 698, 705-706 (1973), this Court conducted a review of the common law on *nolle prosequi* prior to the enactment of the forerunner of MCL 767.29. This Court found that under the common law, a *nolle prosequi*, could be retracted at any time prior to it becoming a matter of record. *Id.* at 706. In other words, under the common law, the government could retract a *nolle prosequi* and immediately proceed to trial. *Id.* MCL 767.29 required the government to enter the *nolle prosequi* on the record, thus causing a prosecutor who enters a *nolle prosequi* post indictment, to obtain a new indictment and begin proceedings anew. *Id.*

Unfortunately, *Curtis* did not articulate whether the court was referring to a *nolle prosequi* of the entire indictment or to individual charges contained therein. The Court found, however, that the purpose of MCL 767.29 was to "protect the interests of criminal defendants." *Id.* The interest intended to be protected is a criminal defendant's interest in not being unfairly surprised or prejudiced by the retraction of a *nolle prosequi* immediately preceding trial. Thus, it is not the *nolle prosequi* itself that causes a reinstated charge to begin anew, but instead is a reinstatement that unfairly surprises or prejudices the defendant.

This principle, although not articulated, is seen in *People v Ostafin*, 112 Mich App 712, 715, 716 (1982). There, the government filed a *nolle prosequi* dismissing all charges against the defendant. *Id.* sixty-five days later, the government sought to reinstate the information in circuit court. *Ostafin* cited to *Curtis*, 389 Mich at 706, and concluded that the government was required to begin the case anew. *Ostafin* did not articulate its reasoning for why *Curtis* required that result. However, the Court of Appeals noted that once the *nolle prosequi* was entered, "defendant was a free man; there were no charges outstanding against him, and his conviction had been set aside by the circuit court." *Id.* at 215. The *nolle prosequi* in *Ostafin* would have also divested the circuit court of jurisdiction. A retraction of the *nolle prosequi* in *Ostafin* would have reinstated charges against a free man with no outstanding charges, re-vested the court with jurisdiction, and caused the defendant

to immediately proceed to trial. Thus, the reinstatement of charges in *Ostafin* resulted in unfair surprise and prejudice to the defendant and the correct remedy was for the case to begin anew.

In 1989, sixteen years after *Curtis* and seven years after *Ostafin*, this Court adopted MCR 6.112. By way of subrule (G), now (H), this Court established the method for amending an information, i.e. by motion, and enumerated the very principle and safeguard that it established in *Curtis* and *Ostafin*. MCR 6.112(H) states "[t]he court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence **unless the proposed amendment would unfairly surprise or prejudice the defendant."** (emphasis added). The court rule comports with the holding in *Ostafin* and *Curtis* because it requires there to be an existing information pending in the circuit court and protects the interests of criminal defendants.

In this case, the reinstatement of count of one did not result in unfair surprise or prejudice to Defendant. Defendant was charged in 2016 with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. MCL 750.520b(1)(b), MCL 750.520c(1)(b). A preliminary examination was held on both charges on October 14, 2016. Defendant was bound over to circuit court on both counts after the district court found probable cause to support the charges.

The matter proceeded to trial and on June 22, 2017, the jury was unable to come to an agreement on count one, but found Defendant guilty of count two – second-degree criminal sexual conduct. (Jury Trial Transcript, Volume IV, June 22, 2017, p 23). Defendant was subsequently sentenced to 10 to 30 years imprisonment. (Sentencing Transcript, August 10, 2017, p 27). Based on the sentence imposed by the trial court and in consultation with the victim, the People filed a *nolle prosequi* on count one – first-degree criminal sexual conduct.

Defendant successfully appealed his conviction and the matter was remanded to the trial court for a new trial. *People v Warner*, unpublished per curiam opinion of the Court of Appeals, Issued March 21, 2019 (Docket No. 340272), p 6. Notably, the

Court of Appeals did not limit the remand to a new trial on count two. By vacating Defendant's conviction and remanding for a new trial, the Court of Appeals also vacated the basis upon which the People relied when they filed the *nolle prosequi* on count one. Thus, the People moved to amend the information to reinstate count one. (People's Motion to Amend the Information/Reinstate Count 1, August 13, 2019).

The reinstatement of count one did not unfairly surprise or prejudiced Defendant. Defendant had already received a preliminary examination on that count and was bound over after a finding of probable cause. Defendant's argument that new evidence existed that would result in count one not being bound over is without merit. Defendant's proposed new evidence consisted of the impeachment of witnesses which defense conceded may not persuade the district court to make a different decision. (Final Pretrial and Motions Transcript, September 3, 2019, p 12). Thus, Defendant was not prejudiced by the reinstatement of count one because he had already received the statutory benefit that he was entitled. Moreover, at the first trial, it was made clear on the record and with Defendant present, that the People were free to seek a retrial on count one. (Jury Trial Transcript, Volume IV, June 22, 2017, p 23-24).

The law shows that a *nolle prosequi*, in and of itself, does not require a subsequently reinstated charge to begin anew in district court. There must be something more. The focus of the law in *Curtis* and *Ostafin*, and under MCL 767.29 and MCR 6.112(H) is not on the *nolle prosequi*, but on the reinstatement and the effect thereof. Where a reinstatement would cause unfair surprise or prejudiced, the charge proceeds again in district court. However, where no surprise or prejudice exists, neither does a need for the case to begin anew.

In this case, Defendant was not unfairly surprised or prejudiced by the reinstatement. Therefore, no error occurred. And even if an error had occurred, it would have been a harmless error sinceDefendant had already received every procedural right and safeguard he was entitled.

2. Requiring a charge to begin anew in district court because it was reinstated post *nolle prosequi* would create conflicting outcomes in the law.

Under MCR 6.112(H), an information can be amended to charge a new crime so long as the amendment does not unfairly surprise or prejudice the defendant. *People v. McGee*, 258 Mich App 683, 689-690 (2003); *People v. Goecke*, 457 Mich 442. 450, 458, 462 (1998). Where an amendment charges a new crime, the defendant is entitled to request a remand for a preliminary examination. *People v Jones*, 252 Mich App 1 (2002). However, when the district court binds over on one charge but not another, the People may motion the court pursuant to MCR 6.112(H) to amend the information to reinstate the dismissed charge. *People v Goecke*, 457 Mich 442, 458 (1998). There is no jurisdictional issue because the circuit court obtains jurisdiction over the entire case when the district court files a return with the circuit court. *Id*. at 458-459. In *Goecke*, the Court held that the only legal obstacle to amending an information is if that amendment would unduly prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *Id*. at 462, citing *People v Hunt*, 442 Mich 359, 364 (1993). "where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial." *Id*.

In this case, the People did not seek to amend the information to add a new charge. The Peoples moved to amend the information to reinstated the first-degree criminal sexual conduct charge that was previously bound over after a preliminary examination and resulted in a mistrial. Thus, the circuit court had jurisdiction over the entire case. *Goecke* 57 Mich at 458-459. The only distinction between *Goecke* and the case at bar is that the charge in *Goecke* was dismissed by the district court, whereas here the charge was dismissed by the People. However, in both cases, the reinstatement did not cause unfair surprise or deprive the defendant of adequate notice or a sufficient opportunity to defend at trial. Focusing the analysis on the method of dismissal would cause otherwise identical cases to be treated differently.

There is nothing about a *nolle prosequi* that would automatically make a reinstatement inherently unfair or prejudicial or require a redo of the preliminary examination. There must be some form of unfair surprise or prejudice, otherwise we would be remanding cases and rerunning preliminary examinations simply because of the *nolle prosequi.*

II. The Eaton County Circuit Court did not err in allowing the People to amend the information in this case. If the Court disagrees, however, any possible error was harmless.

A. Counter-Standard of review and issue preservation.

Because Issue I and Issue II are so closely related, the People incorporate by reference the standard of review and issue preservation as set forth in section I (A) and (B) above.

B. Argument

As discussed above, MCL 767.29 and MCR 6.112 allows the trial court to amend an information to include a charge that was dismissed pursuant to an order of *nolle prosequi*. The next question is whether amending the information in this case was error. Simply put, the answer is no.

Defendant was originally charged on August 8, 2016. The matter was bound over to circuit court on October 14, 2016, after the Honorable Julie Reincke's finding of probable cause. (Preliminary Examination Transcript, October 14, 2016, p 45). When the matter was returned to the circuit court for a new trial, the People sought to reinstate Count I so as to proceed to trial on the same two counts as the original trial. (People's Motion to Amend the Information/Reinstate count one, August 13, 2019). Defendant argued in opposition that count one should go back to the district court for a preliminary examination. In support, defense counsel advised the court that he intended to introduce testimony from an impeachment witness. However, defense counsel conceded that he did not believe that it would be persuasive. (Final Pretrial and Motions Transcript, September 3, 2019, pp 13-14).

As discussed in the previous section, an information may be amended to reinstate a previously dismissed count so long as the amendment does not result in unfair surprise or prejudice. Defendant does not argue that he was unfairly surprised, as such an argument would be difficult to sustained given the fact of this case. And Defendant could not have been prejudiced by the reinstatement because he already received a preliminary examination on count one and conceded that his proffered new evidence would likely not be persuasive. Thus, Defendant was not prejudiced by the reinstatement. Thus, the trial court did not err when they allowed the People to amend the information and reinstate count one. Likewise, any possible error was harmless. Considering the offer of proof given by defense counsel at the motion hearing, this matter would have been bound over and proceeded to trial even if returned to the district court for a new preliminary examination.

III. The trial court did not abuse its discretion by denying Defendant's motion to appoint an expert in false confessions.

A. Issue Preservation

The People do not dispute that Defendant preserved this issue for appeal by filing and arguing his motion for appointment of an expert in the trial court.

B. Counter-Standard of Review

The decision regarding appointment of an expert witness is reviewed for an abuse of discretion. *People v Carnicom*, 272 Mich App 614, 616 (2006), *citing* MCL 775.15. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id*. Or, when "a trial court premises its decision on an error of law." *People v Parker*, 319 Mich App 664, 669 (2017).

The trial court's findings of fact are reviewed for clear error. Clear error occurs when "the reviewing court is left with the definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289 (2011);

quoting People v Burrell, 417 Mich 439, 449 (1983); *citing People v Grant*, 470 Mich 477, 484 (2004).

C. Analysis

An indigent defendant is not entitled to an expert at public expense merely because it is requested. Rather, to have an expert appointed at public expense, "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." The defendant must explain "why the particular expert is necessary," and "provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." *People v Kennedy*, 502 Mich 206, 227-228 (2018), *quoting Moore v Kempt*, 809 F2d 702 (CA 11, 1987). A reasonable probability is "a probability sufficient to undermine the confidence in the outcome." *Grant*, 470 Mich at 504 *emphasis omitted*, *quoting Strickland v Washington*, 466 US 668, 694 (1984).

Here, Defendant failed to show how he was indigent and failed to make any showing that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. This is because Defendant requested the appointment of an expert for a wholly inadmissible purpose. Defendant's trial could not be rendered fundamentally unfair based on the trial courts exclusion of inadmissible testimonial evidence. Thus, the trial court's decision to deny Defendant's motion fell squarely within the range of principled outcomes.

1. Defendant failed to show that he was indigent, a threshold requirement to the appointment of an expert.

The appointment of an expert at public expense requires the defendant to initially demonstrate he is indigent. As explained in *Kennedy*, while statue does not require a court to pay for the appointment of an expert, one may be appointed to "an indigent defendant" if he can make a showing based on the facts of the case that the

offered expert "would likely benefit the defense." *Kennedy*, 502 Mich at 221-222, *quoting People v Tanner*, 469 Mich 437, 422-423 (2003). In this case, Defendant never made a showing of indigency warranting consideration of the appointment of an expert.

While trial counsel asserted that Defendant was indigent, he never made any offer-of-proof supporting the claim. Counsel merely asserted that he was not being paid, but failed to provide a single exhibit, bill, contract, affidavit, or any proof that Defendant was no longer paying for representation. Nor did counsel provide any bills, paychecks, bank accounts, or information regarding Defendant's assets.

While counsel had an ethical duty to be candid with the Court, "[t]he lawyer's statements and arguments are not evidence." MRPC 3.3(A)(1); *People v Meissner*, 294 Mich App 438, 458 (2011), *citing People v Unger*, 278 Mich App 210, 235 (2008); *see also People v Brown*, 330 Mich App 223 (2019). And a court cannot base its finding on speculative arguments by counsel. The only information the court had to base its decision on was counsel's assertion and the fact that Defendant was represented by retained counsel. (Final Pretrial and Motions Transcript, September 3, 2019, p 37).

Based on the record, it was not clear error for the trial court to find that Defendant had not established indigency. Therefore, the trial court did not abuse its discretion when it determined that Defendant was not entitled to have an expert appointed at public expense.

2. Defendant failed to establish a reasonable probability that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Defendant's pretrial motion asked the trial court to appoint as experts either Dr. Richard Leo, or Dr. Brian Cutler, to "speak to the attributes associated with false confessions and the interview bias of Det. Derrick Jordan." (Defendant's Motion Requesting the Court to Appoint a False Confession Expert, August 21, 2019, at 1). However, in *People v Kowalski*, 492 Mich 106, 132-135 (2012), this

Court ruled that Dr. Leo's testimony on this exact topic was not admissible because it was based on flawed methodology and therefore unreliable. Further, *Kowalski* also concluded Dr. Wendt could not testify regarding false confessions, because the literature on it was unreliable. *Id*. See also *Vent v State*, 67 P 3d 661, 667-670 (Alaska App 2003).

At the motion hearing, defense counsel attempted to alter his motion by conceding Dr. Leo was excluded by *Kowalski*, but arguing Dr. Cutler should be appointed to do a psychological analysis on Defendant and to testify "to the psychology of whether the attributes of a false confession are present." (Final Pretrial and Motions Transcript, at 36-39, 44-46, and 48). In doing so, counsel was likening Dr. Cutler to Dr. Wendt in the remand portion of *Kowalski*.[1]

Ultimately, the trial judge held counsel to the request in his filing, followed the binding precedent, and denied expert testimony related to false confessions, and bias of law enforcement. (Final Pretrial and Motions Transcript, at 40-42, and 50-51). Defendant never filed a supplemental motion requesting the appointment of an expert to perform psychological analysis on Defendant and to testify to the psychology of whether the attributes of a false confession are present. And the trial court never ruled on that question because it was never properly plead before the court.

Defendant had the burden of showing a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. A reasonable probability is "a probability sufficient to undermine the confidence in the outcome." *Grant*, 470 Mich at 504, quoting *Strickland v Washington*, 466 US 668, 694 (1984). Defendant failed to show any probability that his proposed experts would be of assistance to the defense because Defendant's stated purpose for the expert was impermissible under binding case law. Likewise, Defendant failed to show that denial of his proposed

[1] Warner's motion did not cite *Kowalski*, or reference the remand regarding Dr. Wendt. Defendant's Motion Requesting the Court to Appoint a False Confession Expert.

experts would result in a fundamentally unfair trial. The trial could not have been rendered fundamentally unfair where the excluded testimonial evidence was inadmissible to begin with. The record clearly shows that the trial court did not abuse its discretion by denying Defendant's motion to appoint an expert.

3. The trial court's ruling did not deprive defendant of the ability to put on a defense.

The trial court's ruling in no way prevented Defendant from presenting his claim fairly within the adversarial system. Defendant filed a motion, asking for a court appointed expert to testify about a topic that was deemed inadmissible by this Court because it was based on flawed methodology and therefore unreliable. The trial court properly denied that request. However, the trial court's ruling did not preclude Defendant from filing a subsequent motion seeking appointment of Dr. Cutler for a permissible purpose and providing the court with offers-of-proof to establish indigency and admissibility. Defendant chose not to do so. The trial court's ruling also did not prevent Defendant from presenting his claim that he falsely confessed to the jury. Wherefore, the trial court did not abuse its discretion in denying Defendant's motion.

Conclusion

Under MCL 767.29 and MCR 6.112(H), a trial court may amend an information, over objection, to reinstate a charge dismissed pursuant to *nolle prosequi* without beginning the proceedings anew, so long as the trial court has jurisdiction over the case and the reinstatement does not cause unfair surprise or prejudice to the defendant. As discussed above, this rule complies with the requirements of both the statute and the court rule, as well as related case law interpreting the same. This rule is unambiguous, comports with existing law, and protects the interests of the defendant. This rule also avoids unnecessary expenditure of court resources. The trial court did not err in allowing the People to

amend the information. If any error did occur, it was plainly harmless as Defendant received the benefit of every procedural safeguard he was entitled.

Likewise, the trial court did not abuse its discretion by denying Defendant's motion to appoint an expert in false confessions. Defendant filed a motion asking the court to appoint an expert who would testify to a wholly impermissible topic, rendering that expert's testimony inadmissible. Thus, Defendant failed to show how his expert would be of assistance to his defense. Moreover, defendant also failed to show that denial of expert assistance would result in a fundamentally unfair trial. The trial could not have been rendered fundamentally unfair by the exclusion of inadmissible testimonial evidence. The trial court denied Defendant's motion as it was filed and Defendant chose not to file a subsequent motion establishing indigency and seeking expert assistance for a permissible purpose. Thus, the trial court did not abuse its discretion because its outcome fell within the range of principled outcomes.

Wherefore, the People respectfully ask this Court to **DENY** Defendant's application for leave to appeal and **AFFIRM** the decision of the Court of Appeals and the trial court.

Certificate of Compliance

I hereby certify that this document contains 5,065 countable words.

January 17, 2023

Respectfully Submitted,

Christopher R. Candela

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