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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

LANTZ WASHINGTON,

Defendant-Appellee.
_____/

Supreme Court No. 165296

Court of Appeals No. 353052

Circuit Court No. 19-002078-FH

ST. CLAIR COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant
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ANSWER IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Statement of Jurisdiction

Lantz Howard Washington was convicted in the St. Clair County Circuit Court by jury trial, and a Judgment of Sentence was entered on March 2, 2020. A Claim of Appeal was filed on March 10, 2020, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated March 5, 2020, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

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Statement of Questions Presented

I. Did the prosecution violate Lantz Washington's Sixth Amendment confrontation rights when it introduced implied testimonial hearsay statements against him, thus laying an improper foundation for the admission of the bulletproof vest into evidence?

A. Did the prosecution impermissibly introduce implied testimonial hearsay through Officer Stockwell?

B. Was the implied hearsay offered for the truth of the matter asserted?

C. Did Mr. Washington lack the opportunity to cross-examine Officer Lavers at a prior hearing?

D. Is it true the prosecution cannot prove that violation of Mr. Washington's confrontation right was harmless beyond a reasonable doubt?

E. To the extent trial counsel failed to preserve the issue, was his performance deficient, and did it deny Mr. Washington the effective assistance of counsel?

Trial Court made no answer or answers "No."

Lantz Howard Washington answers, "Yes."

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Introduction

This Court should deny the prosecutor's leave application because the Court of Appeals correctly decided the case.

Officer Lavers was in a position to observe the alleged crime, but did not appear to testify. The prosecution filled the hole in its case with Officer Stockwell. Stockwell testified, over a Confrontation Clause objection, that he'd spoken to Lavers and, as a result, arrested Lantz Washington. The Court of Appeals correctly ruled both that this testimony violated Mr. Washington's right to confront Lavers and that, because the prosecution could not otherwise prove guilt, deprived him of a fair trial. *People v Washington*, ___ Mich App ___, ___ (2022) (2022 WL 17364766) (citing *Crawford v Washington*, 541 US 36 (2004)).

The decision has already been praised by a leading commentator on Confrontation Clause jurisprudence. Richard D. Friedman is the Alene and Allan F. Smith Professor of Law at the University of Michigan, and the 2023 recipient of the John Henry Wigmore Award for Lifetime Achievement bestowed by the Section on Evidence of the Association of American Law Schools. He writes frequently about the Confrontation Clause and, in particular, *Crawford*. He even writes a blog, *The Confrontation Blog*, devoted just to reporting and commenting on developments related to *Crawford*. In a blog entry dated December 27, 2022, he noted the "useful" *Washington* decision and its rationale:

> First, and most significantly, note that no statement by Lavers was actually introduced. But, the majority pointed out, there would have been a clear violation of the Confrontation Clause had the prosecution asked Stockwell,

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> "What did Officer Lavers tell you about the body armor?" And, the court noted, Stockwell's actual testimony "conveyed precisely the same information: that Washington had been wearing the body armor when caught by the Canadian authorities."

http://confrontationright.blogspot.com/2022/12/a-useful-opinion-on-statements-not.html.

Professor Friedman agreed with the majority's rationale.

> This has to be right, I think: What would otherwise be a Confrontation Clause violation cannot be excused by the fact that the in-court witness does not purport to report the actual statement made, if the effect of the testimony is to convey the substance of that statement to the trier of fact.

Id. And he disagreed with the dissenting judge's reasoning, noting it was premised on a "rather clear category error." *Id*.

For these and the reasons that follow, the Court should deny leave to appeal.

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Statement of Facts and Material Proceedings

Lantz Washington stood trial for possessing a bulletproof vest in violation of MCL 750.227g, and a St. Clair County jury convicted him. Circuit Judge Elwood L. Brown, who presided at trial, later sentenced Mr. Washington to serve a one-year jail sentence.

Mr. Washington appealed by right. The Court of Appeals reversed his conviction and granted retrial. The St. Clair prosecutor now seeks leave to appeal.

****

On April 8, 2019, Lantz Washington—experiencing a severe mental breakdown and fearing for his life—crossed the Blue Water Bridge from Port Huron, Michigan, towards Canada, without paying the toll. TT 131, 177; Probable Cause Conference 11. Mr. Washington passed underneath the toll booth draw-arm as it was still raised from the truck that paid ahead of him. TT 123–24. He continued across the bridge until a Canada Border Services Agency ("CBSA") officer, Matt Lavers, stopped him at a Canadian checkpoint. TT 130, 149. Officer Lavers brought Mr. Washington back to the American side of the bridge. TT 151. He turned over Mr. Washington, his truck, and a bulletproof vest to Paul Stockwell, a U.S. Customs and Border Protection ("CBP") officer. *Id*.

Officer Lavers never testified at trial, but Officer Stockwell did. Officer Stockwell only knew that the bulletproof vest and Mr. Washington were turned over to him by Officer Lavers. But the prosecution elicited testimony at trial implying that Officer Stockwell took Mr. Washington into custody because Officer Lavers told

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him that Mr. Washington was in possession of a bulletproof vest at the Canadian checkpoint.[1] TT 152.

The prosecution attempted to bolster its theory that Mr. Washington was in possession of a bulletproof vest, and fill in gaps left by Officer Lavers' unavailability, by introducing statements made by Mr. Washington post-arrest supposedly admitting that he was in possession of a bulletproof vest on the Blue Water Bridge. TT 142, 174. Mr. Washington was incompetent to stand trial when he made these statements. TT 177.

Arrest

Based on his communications with Officer Lavers back on the American side of the Bridge, Officer Stockwell took custody of Mr. Washington, his truck, and the bulletproof vest and contacted the Port Huron Police Department ("PHPD"). TT 152–54. PHPD Officer Kyle Whitten arrived to arrest Mr. Washington, impound his vehicle, and take custody of the bulletproof vest. TT 154. Officer Whitten brought Mr. Washington to the St. Clair County Jail in Port Huron for processing and detention. TT 166. Mr. Washington was charged as a violent felon in possession of a bulletproof vest. *Id*. As other PHPD officers were booking him, Officer Whitten apparently heard Mr. Washington admit that he was wearing a bulletproof vest on the Blue Water Bridge. TT 142.

[1] Mr. Washington cannot possess a bulletproof vest because was previously convicted of two violent felonies. MCL 750.227g. Mr. Washington does not dispute and stipulated at trial that he is a violent felon within the meaning of the statute. TT 120.

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Pre-Trial Proceedings

The District Court held a probable cause conference on April 23, 2019. Probable Cause Conference 3. Judge Cynthia Platzer noted her "concerns about [Mr. Washington's] criminal responsibility and [] his competency" and ordered that he be sent for a forensic examination. *Id.* at 5. Four days later, Mr. Washington called his mother from the St. Clair County Jail, where he continued to be held. TT 174. Mr. Washington explained to his mother that the police charged him with "possession of body armor." TT 176–77. On that phone call to his mother, he explained that a friend gave him a bulletproof vest because he was "getting threats" and was "fear[ful] for [his] life." TT 177. The Jail's standard recording procedures recorded the call. TT 172.

On May 31, 2019, Judge Platzer held a hearing on Mr. Washington's competency. Competency Hr'g I at 3. She adopted the report by the forensic center that Mr. Washington was not competent to stand trial. *Id.* at 4–5. In August, Judge Platzer held a second competency hearing. Competency Hr'g II at 3. Reviewing a new forensic report, Judge Platzer determined that Mr. Washington's condition improved such that he was competent to stand trial.[2] *Id.* at 4–5.

Mr. Washington was bound over to the Circuit Court after a preliminary examination held on September 3, 2019. PHPD Officer Whitten testified on behalf

[2] Although Mr. Washington was referred for both competency and criminal responsibility evaluations, the criminal responsibility evaluation was never completed. TT 54. Trial counsel for Mr. Washington, Patrick Politano, explained at a November 4, 2019 hearing that Mr. Washington refused to participate in the criminal responsibility examination because he wanted to proceed to trial. TT 54–56.

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of the prosecution and stated that he took Mr. Washington into custody based on the "story relayed to [him]" by CBP Officer Stockwell. Preliminary Examination 10. Officer Lavers did not testify.

Trial

On the eve of trial, the prosecution informed the Circuit Court judge, Judge Elwood Brown, that Officer Lavers would be unavailable to testify at trial. Jan 27, 2020 Motion Hearing 3. The prosecution explained that the Canadian government officially denied its request to have Officer Lavers testify. *Id*. at 8. At the same pretrial conference, Judge Brown granted the prosecution's motion to admit Mr. Washington's phone call to his mother made from the St. Clair County Jail as a personal admission. *Id*. at 6.[3]

Trial began on January 28, 2020. Following jury selection, Mr. Washington made an emergency motion *in limine* to (1) exclude admission of the bulletproof vest into evidence; and (2) exclude Mr. Washington's jail phone call to his mother. TT 87.

First, Mr. Washington argued that without the testimony of CBSA Officer Lavers, who was unavailable, the prosecution had insufficient foundation to introduce the vest into evidence given that Officer Lavers was the single person who witnessed Mr. Washington in possession of the vest. TT 87–88. Citing *Crawford v Washington*, Mr. Washington argued that admitting the vest without Officer Lavers would violate his 6th Amendment right to confrontation since Officers Stockwell and Whitten only had secondhand knowledge that Mr. Washington was in

[3] The prosecution admitted the phone call through the testimony of a PHPC detective, Ernesto Fantin. TT 174. Mr. Washington objected to its admission. TT 173.

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possession of a bulletproof vest. TT 90. Mr. Washington argued that Officer Stockwell and Whitten only knew that Mr. Washington possessed a bulletproof vest on the Blue Water Bridge because Officer Lavers told Officer Stockwell, who then told Officer Whitten. *Id*. The prosecution agreed that without Officer Lavers, it did not have a case, but that Officer Stockwell's anticipated testimony that he received Mr. Washington and a bulletproof vest from Officer Lavers combined with Mr. Washington's purported admissions to PHPD and his mother were sufficient to admit the vest into evidence. TT 97.

Judge Brown denied the motion. TT 98. He held that Officer Stockwell's anticipated testimony—that he received Mr. Washington and a bulletproof vest from Officer Lavers—plus Mr. Washington's admission to his mother in the St. Clair County Jail, established a proper foundation to admit the bulletproof vest into evidence. *Id*. Judge Brown was clear, however, that Officer Stockwell could not testify to "what [Officer Lavers] told him because that's hearsay." TT 98–99. Judge Brown ruled that Officer Stockwell could "say factually" that he "received [the vest] from a Canadian Customs officer at the same time he received the Defendant." *Id*.

Second, Mr. Washington argued that because he was incompetent to stand trial when he made apparent admissions to PHPD and his mother that he was wearing a bulletproof vest, the statements should be excluded as overly prejudicial and unreliable. TT 100–01. He argued that the statements would be excluded if Mr. Washington testified as a witness in such an incompetent mental state. *Id.* Judge Brown also denied this motion adopting the prosecution's argument that

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competency to stand trial and competency to testify were not the same thing and that so long as Mr. Washington's admissions were voluntary, they could adequately be admitted against him. TT 103–04.

Because Judge Brown instructed the prosecution not to ask Officer Stockwell what Officer Lavers told him, the prosecution instead asked Officer Stockwell to testify whether he generally had communications with Officers Lavers on the bridge to lay a foundation to admit the vest into evidence. Specifically, the prosecution elicited the following testimony:

> Q: At some point, did Officer Lavers from the Canadian services hand you any other evidence?
> A: Yes, he did.
> Q: What did he hand you?
> A: He handed-
> Q: Just specifically related to any armor.
> A: A body armor.
>
> * * *
>
> Q: Now, without saying anything about what was said, the only question I have for you is, were there communications between you and Officer Lavers?
> A: There were.
> Q: Okay. And . . . based on those communications you took custody of the Defendant?
> A: Yes, we did.

TT 152. Trial counsel waited to object until the prosecution offered the bulletproof vest into evidence. TT 155. Over his objection, Judge Brown admitted the bulletproof vest into evidence. *Id*. Officer Stockwell testified that he did not observe Mr. Washington wearing the bulletproof vest Officer Lavers handed to him and that he has "no direct knowledge of Mr. Washington having possession of [the vest] . . . in any [] way, shape or form." TT 159.

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No other witness physically saw Mr. Washington in possession of the bulletproof vest. The Blue Water Bridge toll operator working the lane Mr. Washington passed through without paying, Denise Fenner, testified that she did not see Mr. Washington wearing a bulletproof vest as he passed under the toll-arm. TT 230. Officer Whitten also did not observe Mr. Washington in possession of a bulletproof vest. TT 256. Officer Whitten testified that he overheard Mr. Washington tell the booking officers that Mr. Washington was "wearing the body armor because he was afraid people were going to kill him" TT 142.

Mr. Washington, testifying in his own defense, denied ever admitting to officers that he was in possession of a bulletproof vest on the Port Huron Bridge; he explained that he was merely informing the booking officers why he was taken into custody. TT 180. Mr. Washington further testified about the call he made to his mother from the St. Clair County Jail. TT 181. He said when he talked about wearing a bulletproof vest in the phone call with his mother, he was not referring to the Blue Water Bridge incident but rather an incident a few days prior. *Id*. When cross examined about these explanations, Mr. Washington testified that he did not remember much of what happened on the day of his arrest. TT 186–87.

Verdict, Sentencing, and Post-Trial Proceedings

Mr. Washington was convicted after deliberation by the jury. TT 231. On March 3, 2020, he was sentenced to 365 days in County Jail. Sentencing Hearing 8. He received credit for the 329 days he already served while held at the St. Clair County Jail awaiting trial. *Id*.

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On March 4, 2021, Mr. Washington moved to vacate his conviction or, in the alternative, for a new trial or evidentiary hearing. Motion to Vacate 1. Mr. Washington argued that the trial court violated Mr. Washington's due process and confrontation rights in denying his motions *in limine* to exclude the body armor from evidence.[4] *Id*.

Judge Daniel Damman denied the motion. *See* Trial Ct. Op. and Order on Mot. to Vacate 1. Judge Damman held that the trial court did not err in admitting the bulletproof vest into evidence because Officers Stockwell and Whitten did not testify as to anything specific Officer Lavers told them and that the prosecution did not attempt to introduce any evidence of Officer Lavers' actual statements. *Id*. at 8.

[4] Additionally, Mr. Washington argued that (1) the trial court violated Mr. Washington's due process rights by allowing the jury to hear the jail phone recording made while Mr. Washington was incompetent; and (2) the prosecution violated Mr. Washington's due process rights in referring to Mr. Washington as a "violent felon" in opening and closing arguments and asking Mr. Washington to agree on cross-examination that he was a violent felon and that to the extent trial counsel failed to object, counsel failed to provide effective assistance of counsel. *Id.* Judge Damman rejected both arguments. *See* Trial Court Opinion and Order on Motion to Vacate 9–14.

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Argument

I. The prosecution violated Lantz Washington's Sixth Amendment confrontation rights when it introduced implied testimonial hearsay statements against him, thus laying an improper foundation for the admission of the bulletproof vest into evidence.

Issue Preservation and Standard of Review

Trial counsel preserved this issue by moving *in limine* to exclude the bulletproof vest from evidence. TT 175. He argued that without testimony from Officer Lavers, the prosecution would be unable to establish a foundation for the bulletproof vest or establish its chain of custody. TT 176 ("There is no witness . . . who can establish a foundation for . . . that bulletproof vest to come in. The only person who could do that would be Officer Lavers."). Significantly, trial counsel argued that, without the testimony of Officer Lavers, any attempt to establish a foundation to admit the vest through another witness would violate Mr. Washington's Sixth Amendment confrontation rights. TT 90 ("[U]nder the Sixth Amendment Mr. Washington would have a right to examine Officer Lavers to find out his foundation [and] what he said."). An in-court witness testifying as to how they came into custody of Mr. Washington and the bulletproof vest would necessarily have to rely on testimonial information provided to them by Officer Lavers, who would be unavailable for cross-examination. Trial counsel again objected to the admission of the bulletproof vest during direct examination of Officer Stockwell. TT 55.

Whether a defendant was denied his right to confront a witness is a constitutional question. *See Crawford v Washington*, 541 US 36 (2004); *see also*

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People v Jemison, 505 Mich 352, 360 (2020). A defendant is entitled to relief from a preserved constitutional error unless that error was harmless beyond a reasonable doubt. The burden of proof to show that the error was harmless lies with the prosecution. *Chapman v California,* 386 US 18 (1967); *see also People v Anderson*, 446 Mich 392 (1994).

Analysis

The Sixth Amendment's Confrontation Clause provides that the accused has a right to confront witnesses against him in court, face-to-face, and subject to cross-examination. US Const, Am XI. In *Crawford v Washington*, the Supreme Court held that the Clause bars the admission of "testimonial" statements of a declarant who did not appear at trial unless the declarant was unavailable to testify, and the defendant had "a prior opportunity for cross-examination." 541 US at 54. The Confrontation Clause prevents the introduction of testimonial hearsay against a criminal defendant to promote the truth-seeking purpose of trial.[5] *Id.* at 53; *People v Fackelman*, 489 Mich 515, 528 (2011).

A statement is testimonial where its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822 (2006). Only testimonial statements offered for their truth trigger the protections of the Confrontation Clause. *Williams v Illinois*, 567 US 50, 58

[5] Although confrontation and hearsay are distinct concepts, *Crawford* constitutionalized hearsay law for testimonial statements and therefore, analyzing a Confrontation Clause issue often overlaps with hearsay law. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 6.

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(2012) ("[T]he Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" (quoting *Crawford*, 541 US at 59–60 n.9)).

It is against this backdrop that this Court must evaluate Officer Stockwell's testimony. Although Officer Stockwell did not explicitly testify as to what Officer Lavers told him, his testimony impermissible *implied* what Officer Lavers told him. Specifically, the prosecution elicited the following exchange on direct examination:

> Q: At some point, did Officer Lavers from the Canadian services hand you any other evidence?
> A: Yes, he did.
> Q: What did he hand you?
> A: He handed-
> Q: Just specifically related to any armor.
> A: A body armor.
>
> * * *
>
> Q: Now, without saying anything about what was said, the only question I have for you is, *were there communications between you and Officer Lavers?*
> A: There were.
> Q: Okay. And . . . *based on those communications* you took custody of the Defendant?
> A: Yes, we did.

TT 152 (emphasis added). Here, the prosecutor introduced, by implication, (1) a testimonial statement; (2) offered to prove the truth of the matter asserted; (3) by an unavailable witness without prior opportunity for cross-examination to admit the bulletproof vest into evidence. *See Williams*, 567 US at 58; *Fackelman*, 489 Mich at 528 (identifying each element of a Confrontation Clause violation). Accordingly, Mr. Washington's Sixth Amendment right to confront Officer Lavers was violated.

A. **The prosecution impermissibly introduced implied testimonial hearsay through Officer Stockwell.**

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Where, as here, a statement is made to a law enforcement officer "to establish or prove past events potentially relevant to later criminal prosecution," the statement squarely falls within the Supreme Court's definition of a "testimonial statement." *Davis*, 547 US at 823 (noting that statements by and to law enforcement officers fall within *Crawford's* definition of testimonial hearsay); *see also Crawford*, 541 US at 50–51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). Officer Lavers is a law enforcement official. So is Officer Stockwell. Therefore, when Officer Lavers presumably told Officer Stockwell that Mr. Washington was in possession of a bulletproof vest, that was a testimonial statement. Officer Stockwell implied the substance of Officer Lavers' testimonial statement when he testified that it was based on his communications with Officer Lavers that he arrested Mr. Washington. TT 152.

The only remaining question is whether such *implied* testimonial hearsay—where the exact substance of a testimonial statement is not explicitly stated but is readily inferable by a fact-finder—also violates the Confrontation Clause. This Court should confirm the Court of Appeal's holding that it does.

Although neither the Court of Appeals nor this Court has in other cases confronted the question of whether implied testimonial hearsay violates the

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Confrontation Clause, several other jurisdictions have.[6] These courts have uniformly concluded that the prosecution cannot circumvent the Confrontation Clause by instructing a witness not to explicitly convey the substance of the testimonial statement previously asserted to them. *See, e.g.*, *Ryan v Miller*, 303 F 3d 231, 248 (CA 2, 2002) ("[L]awyers may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form.").[7]

Most recently, in *United States v Kizzee*, the Fifth Circuit held that where "an officer's testimony leads 'to the clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged,' Confrontation Clause protections are triggered." 877 F 3d 650, 657 (CA 5, 2017) (quoting *Favre v Henderson*, 464 F 2d 359, 362 (CA 5, 1972)). Such testimony is inadmissible and violates the Confrontation Clause where it allows a jury to reasonably infer the defendant's guilt. *Kizzee*, 877 F 3d at 657.

In *Kizzee*, the prosecution examined a detective regarding his questioning of an informant who stated during a police station interrogation that he purchased

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[6] The Court of Appeals *has* considered, and has reached the same conclusion as most courts, that *nonassertive* utterances or conduct do not constitute hearsay. *See People v Jones*, 228 Mich App 191, 205 (1996), *decision modified in part and remanded*, 458 Mich 862 (1998); *accord* 2 McCormick on Evidence § 250 (7th ed. 2013). That holding is inapposite here. Officer Stockwell's testimony embedded an assertation; that is, Officer Lavers told Officer Stockwell that Mr. Washington was in possession of body armor.

[7] A simple example of implied hearsay is illustrative. The issue in a case is whether there were fish in Z's lake. Witness A testifies that before visiting the lake, he called Z on the phone and asked whether there were fish in the lake. If A testifies at trial "Z told me that there were fish in his lake," that testimony would be hearsay. If Z testifies "As a result of Z's answer, I brought my fishing gear to his lake" the testimony is also hearsay because it implied that Z told A that there were fish in his lake. *See* David F. Binder, Hearsay Handbook § 1:10 (4th ed. 2020).

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drugs from the defendant. *Kizzee*, 877 F 3d at 654. The informant did not testify at trial. *Id*. On direct examination, the prosecutor asked the detective whether he asked the informant questions about the defendant and whether it was based on the informant's answers to those questions that the detective obtained a search warrant for the defendant's property. *Id* at 655 (Q: "Based on your . . . subsequent interview of [the informant], what did you do?; A: I was able to obtain a search warrant for [the property]."). The court found that the detective introduced the informant's out-of-court testimonial statements against the defendant by implication. *Id.* at 657. Although the detective did not explicitly testify as to what the informant told him (i.e., that the defendant sold the informant drugs), the detective's testimony conveyed the substance of what the informant told him. *Id*. at 657–58. That testimony allowed the jury to infer the substance of the testimonial statements to "establish identification, guilt, or both." *Id*. at 657 (quoting *Favre*, 464 F 2d at 362).[8] The court remanded for a new trial. *Id.* at 663.

The rationale adopted in *Kizzee* and in other jurisdictions is that prosecutors cannot skirt their Confrontation Clause obligations by weaving an unavailable declarant's testimonial statement into an in-court witness's testimony by

[8] There are other examples. In *United States v Reyes*, a drug case, a U.S. Customs agent testified about her conversations with defendants' co-conspirators who did not testify at trial. 18 F 3d 65 (CA 2, 1994). The customs agent testified that it was because of her discussions with the co-conspirators, she concluded that other individuals (i.e., the Defendants) were involved in the drug enterprise at issue. *Id*. In reversing the convictions, the Second Circuit held that "although the jury was not told exactly what words [the co-conspirators] had spoken, [the custom agent's] testimony clearly conveyed the substance of what they had said. The clear message conveyed to the jury . . . was that [the co-conspirators] had admitted their role in a conspiracy to import the cocaine and had implicated . . . the defendants. *Id*. at 69.

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instructing the witness not to testify to the exact substance of the testimonial statements. *See id*. at 656. Doing so still allows the fact-finder to readily infer what the substance of the testimonial statement was. *See id*.; *see also United States v Meises*, 645 F 3d 5, 22 (CA 1, 2011); *see also Mason v Scully*, 16 F 3d 38, 43 (CA 2, 1994).

The standard and rationale for adopting an implied testimonial hearsay rule are shared widely across federal and state courts. *See Meises*, 645 F 3d at 21 ("If what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered."); *Ocampo v Vail*, 649 F 3d 1098, 1108 (CA 9, 2011) ("[I]n-court descriptions of out-of-court statements . . . are 'statements' and can violate the Confrontation Clause."); *Ryan*, 303 F 3d at 249 ("If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible."); *Mason*, 16 F 3d at 43 ("The fact that the content of [the co-conspirator's] statement to [the detective] was not revealed in detail was immaterial, for the plain implication that the prosecutor sought to elicit . . . was that the conversation . . . led the police to focus on [the defendant]."); *Young v United States*, 63 A 3d 1033 (DC, 2013); *People v Felder*, 108 AD2d 869 (NY App Div 1985); *Com. v Farris*, 251 Pa Super 277 (1977); *see also* Binder, *supra*, § 1.10 (collecting cases). The weight of authority supports adoption of the implied testimonial hearsay rule.

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Here, the prosecution introduced implied testimonial hearsay against Mr. Washington without making the declarant, Officer Lavers, available for cross-examination. To lay a foundation to admit the bulletproof vest into evidence, Officer Stockwell testified to two propositions. First, he testified that Officer Lavers handed him the bulletproof vest. TT 152. Second, he testified that he had communications with Officer Lavers following the bulletproof vest's transfer, and it was "based on those communications" that Officer Stockwell took custody of Mr. Washington. *Id*. Although the prosecution explicitly instructed Officer Stockwell not to reveal what exactly Officer Lavers told him, the implication of Officer Stockwell's communications with Officer Lavers was clear: Officer Lavers told Officer Stockwell that Mr. Washington was in possession of a bulletproof vest. The testimony implied Mr. Washington's guilt by allowing the jury to infer that Mr. Washington was in possession of a bulletproof vest—the only element of the crime at issue. Without Officer Lavers himself testifying to such a proposition, admission of the bulletproof vest through Officer Stockwell's testimonial hearsay was unconstitutional.

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B. The implied hearsay was offered for the truth of the matter asserted.

Officer Stockwell's testimony was offered for the truth of the matter asserted. *See Crawford*, 541 U.S. at 59 n.9 (noting that the Confrontation Clause does not "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *People v McPherson*, 263 Mich App 124, 133 (2004) (same); *see also* MRE 801(c). Officer Stockwell's testimony was not limited to merely explaining his actions. See *People v Chambers*, 277 Mich App 1, 11 (2007) ("a statement offered to show why police officers acted as they did is not hearsay"). Instead, Officer Stockwell's testimony conveyed the substance of his communications with Officer Lavers by implication to prove that Officer Lavers told Officer Stockwell that Mr. Washington was in possession of a bulletproof vest on the Canadian side of the border. Why did Officer Stockwell take Mr. Washington into custody? Because Officer Lavers gave him a bulletproof vest and told him that the vest belonged to Mr. Washington. Officer Stockwell's testimony left the jury with an unmistakable impression that Officer Lavers' communications with him were crucial to his decision to take Mr. Washington into custody.

C. Mr. Washington Had No Opportunity to Cross-Examine Officer Lavers at a Prior Hearing.

Officer Lavers did not testify at Mr. Washington's preliminary examination or at any other adversarial proceeding. Therefore, there was no prior opportunity for cross-examination of Officer Lavers to preserve Mr. Washington's Confrontation Clause rights and accordingly, Officer Stockwell was not permitted to testify about his communications with Officer Lavers. *See Crawford*, 541 US at 59 ("Testimonial

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statements of witnesses absent from trial" may be admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."); *People v Bruner*, 501 Mich 220, 227, 912 (2018) (same).

Under MRE 804(5), a witness is unavailable when he or she is "absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." Indeed, the prosecution did reasonably attempt to secure Officer Lavers' testimony, but the Canadian government denied its request. As a result, Mr. Washington also could not have secured Officer Lavers' testimony by subpoena.

D. The prosecution cannot prove that violation of Mr. Washington's confrontation right was harmless beyond a reasonable doubt.

In assessing a preserved constitutional error, this Court must determine whether the beneficiary of the error has established that it was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774 (1999). The burden of proof to establish harmless error implicating a preserved constitutional issue is on the government. *Anderson*, 446 Mich at 392. To safeguard the jury trial right, the reviewing court must "'conduct a thorough examination of the record' in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd*, 427 Mich 343, 348 (2005) (citing *Neder v United States*, 527 US 1, 19 (1999)).

The prosecution admitted the bulletproof vest into evidence through Officer Stockwell even though he had no personal knowledge that the vest was previously

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in Mr. Washington's possession. Without his testimony that he (1) took custody of the bulletproof vest from Officer Lavers; and (2) that based on his communications with Officer Lavers, he took Mr. Washington into custody, the prosecution had an insufficient foundation to admit the bulletproof vest into evidence. Without the testimony of Officer Lavers to lay a foundation for the bulletproof vest, any witness testifying was impermissibly relying on testimonial hearsay stemming from Officer Lavers. Indeed, at the preliminary examination, Officer Whitten confirmed that any knowledge he had stemmed from Officer Lavers. Preliminary Examination 9 (describing the story "relayed" to him). Officer Stockwell also admitted as much at trial on cross-examination. TT 158 (Q: "Officer, when you had contact with the CBSA was that bulletproof vest on Mr. Washington?" A: "It was not on Mr. Washington."; Q: "Did you ever observe that bulletproof vest being taken off by anyone from your department or from the CBSA?" A: "I did not observe it.").

Importantly, without the testimonial hearsay of Officer Stockwell vis-à-vis Officer Lavers to lay an improper foundation to admit the bulletproof vest into evidence, Mr. Washington's jail admission, as noted by the trial judge, could not satisfy the corpus delicti rule. TT 98–99. The corpus delicti rule "prevents the prosecution from using a defendant's confession in any criminal case unless it presents direct or circumstantial evidence independent of the defendant's confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury." *See People v Konrad*, 449 Mich 263, 269 (1995). Corpus delicti requires evidence—independent from the admission itself—to

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establish the occurrence of (1) a specific injury and (2) criminal agency as the source of the injury. *People v Burns*, 250 Mich App 436 (2002). But because the trial court impermissibly admitted the bulletproof vest using testimonial hearsay evidence which should have been excluded, no such direct or circumstantial evidence would exist for Mr. Washington's admission standing alone to convict him. Officer Whitten did testify that he heard Mr. Washington admit that he was in possession of body armor while Mr. Washington was booked at the St. Clair County Jail. Still, Mr. Washington rebutted this evidence by testifying in his own defense that what Officer Whitten heard was Mr. Washington explaining to the booking officers why he was arrested. TT 167, 181. And without admission of the vest into evidence, Officer Whitten's testimony would be of limited probative value.

Accordingly, the prosecution cannot prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. Given Officer Laver's unavailability, the prosecution could only secure admission of the bulletproof vest into evidence by introducing testimonial hearsay. All the prosecution had left was (1) an admission which legally, on its own, could not establish guilt beyond a reasonable doubt; and (2) conflicting accounts by Officer Whitten and Mr. Washington regarding whether Mr. Washington told PHPD officers that he was wearing a bulletproof vest at the time of his arrest. Neither is sufficient for the prosecution to show that the outcome would have been the same absent the constitutional error.

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Conclusion

No other witness in this case other than Officer Lavers could provide testimony from personal knowledge that Mr. Washington was in possession of the bulletproof vest on the Blue Water Bridge. Officer Lavers' testimony was crucial to establish Mr. Washington's guilt. Still, the prosecution decided it would try to establish a foundation for the bulletproof vest through other witnesses. But predictably, it had to rely on the testimonial hearsay of Officer Lavers to do so. As a result, the introduction of Officer Lavers' out-of-court testimonial hearsay statements through Officer Stockwell violated the Confrontation Clause and was not harmless. And to the extent trial counsel failed to object at the exact moment the prosecution introduced the implied testimonial hearsay, his performance was deficient.

The Court of Appeals correctly reversed. This Court should decline to review.

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Summary and Relief

WHEREFORE, for the foregoing reasons, Lantz Howard Washington asks this Honorable Court to deny the prosecutor's leave application.

Respectfully submitted,

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/s/ Douglas W. Baker
BY:_____

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