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STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
HOOD, P.J., SWARTZLE AND, REDFORD J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DAVID HENRY SERGES,

Defendant-Appellant.

Supreme Court
No. 167154

Court of Appeals
No. 355554

Circuit Court
No. 18-42951-FC

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PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant David Serges had no reasonable expectation of privacy in the blood of murder victim Gail Anderson on the surface of his pants. The Court of Appeals properly relied upon the precedents of *United States v Edwards*, 415 US 800; 94 S Ct 1234; 39 L Ed 2d 771 (1974), *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020), and *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001) to determine that Defendant failed to establish plain error or the ineffective assistance of counsel with respect to the possible suppression of Defendant's pants. At no point in its decision did the Court of Appeals provide the police with new license to make warrantless seizures or create a "custody exception" to the warrant requirement, as alleged by Defendant. The Court simply found that there were no clear grounds for suppressing the DNA evidence found on Defendant's pants, which were lawfully collected by guards when he was jailed as part of a murder investigation.

Defendant asserts the Court of Appeals' opinion in this case would allow police to test-fire and perform tool-mark examinations on a lawfully owned handgun when the CPL holder is arrested and jailed for a driving offense and to swab the inside of a wallet for invisible drug residue when the owner of the wallet was arrested and jailed for retail fraud. Besides these examples being inapt conjecture, the Court of Appeals opinion is not so broad; it is fact specific and relies upon the precedents of this Court and the United States Supreme Court. Not only that, but these examples also miss entirely that Defendant did not have a reasonable privacy interest in someone else's blood on the surface of his pants in the way that a person may have a reasonable privacy interest in other items. Additionally, the police suspected Defendant of murder and were not on a fishing expedition.

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The Court of Appeals opinion does not create a "custody exception" to the warrant requirement. It certainly does not allow the police to confiscate and search any property that is "near a person upon arrest" – Defendant was wearing his clothes when he was booked into jail. It has long been precedent that police can collect people's clothing upon their entrance to jail and that it is unnecessary for the police to obtain a search warrant to scrutinize the outside of an object or submit it to scientific testing once it is in the police's lawful possession. See *People v Custer*, *Hudson v Palmer*[1], and *United States v Edwards*. In this case, the Court of Appeals correctly determined that the police lawfully obtained Defendant's clothes when he was detained in jail, his pants were then lawfully subjected to scientific testing and examination, and Defendant had no reasonable or justifiable expectation of privacy regarding his pants, especially not someone else's blood on his pants, once taken from him by the jail. *People v Serges*, ___ Mich App ___, ___; ___ NW2d ___ (2024) (Docket No. 355554), slip op at 12; *Id*. (Swartzle, J., concurring dubitante), slip op at 5. After all, "clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis" where those results are admissible at trial. *United States v Edwards*, 415 US at 804.

Although Judge Swartzle found the law in Michigan to be unsettled regarding *People v Carr*, 370 Mich 251; 121 NW2d 449 (1963) and *People v Trudeau*, 385 Mich 276; 187 NW2d 890 (1970), those cases are unnecessary to decide this case, as they are distinguishable and were not relied upon by the majority. The warrantless search of Carr's vehicle in the jail parking lot while Carr served a sentence on an unrelated case was not incident to arrest or part of an inventory search and the vehicle remained in Carr's control. *Serges*, ___ Mich App at ___; slip op at 11. Additionally, Trudeau was required to give the police his shoes when he was in the bullpen at court

[1] *Hudson v Palmer*, 458 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984).

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for a different case, and the Court insinuated that there may not have been a constitutional deficiency if the police had taken the shoes during Trudeau's processing. *Id*.; *Trudeau*, 385 Mich at 281. In this case, the police properly seized Defendant's pants upon his entrance to jail after arrest and he had no right to privacy in the pants or the victim's blood on the outside of his pants. After *Trudeau* was decided, the United States Supreme Court ruled that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson v Palmer*, 468 US 517, 526; 104 S Ct 3194; 82 L Ed 2d 393 (1984). Additionally, despite being decided post-*Katz*[2], the *Trudeau* Court does not address whether Trudeau had a reasonable expectation of privacy in the bottom of shoes that he was wearing in public.[3] *People v Hughes*, 506 Mich 512, 529; 958 NW2d 98 (2020), relied upon by Defendant, is an inapposite comparison to this case since the United States Supreme Court "distinguished cell-phone data from other items subject to a search incident to a lawful arrest in terms of the privacy interests at stake" and this case does not involve cellular data, nor any similarly extensive and intimate personal information. *Hughes*, 506 Mich at 531.

Serges does not create a custody exception to the warrant requirement or perversely incentivize the police. The Court of Appeals relied upon both well-settled and modern precedent to reaffirm lawful police procedures regarding search incident to arrest, inventory searches, and reasonable expectations of privacy. While Judge Swartzle found the lack of other evidence in this case disconcerting, Defendant has never made a sufficiency of the evidence claim, and so that

[2] *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

[3] Defendant claims the *Serges* Court incorrectly relied upon the case of *Lanza v New York*, 370 US 139; 82 S Ct 1218; 8 L Ed 2d 384 (1962) but it did not directly rely upon that case. The Court of Appeals properly relied upon *Hudson v Palmer*, 458 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984) for the proposition that "[l]oss of freedom of choice and privacy are inherent incidents of confinement" and a prisoner did not have a reasonable expectation of privacy in his prison cell enabling him to invoke the protections of the Fourth Amendment. *Serges*, ____ Mich App at ____; slip op at 12. It then used the introductory signal "See also" to cite to *Lanza* as an authority that supports that proposition after another authority that states or directly supports that proposition, in this case, *Hudson*.

concern seems to address an argument that has not been made. The brutality of the murder, the large volume of blood, the condition of the home, the time that lapsed between the murder and the discovery of the victim's body, and the holiday weekend prevented police from obtaining other fingerprint, DNA, and eyewitness evidence. There were no other suspects in this case. What is unsettling is how perilously close Defendant came to getting away with murder.

There are numerous other issues in the case that the majority, including Judge Swartzle, properly found not to be outcome determinative. The issues Defendant raises regarding COVID-19 jury protocols were correctly decided and conform to the national consensus regarding COVID-19 precautions taken by courts at the height of the pandemic. The decision of the Court of Appeals is not clearly erroneous, will not cause material injustice, and does not conflict with a Supreme Court decision or another decision of the Court of Appeals. Defendant's Application for Leave to Appeal should be denied.

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STATEMENT OF JURISDICTION

Defendant-Appellant's statement of jurisdiction is correct. The People do not contest this Court's jurisdiction.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was the evidence police obtained from Defendant's clothing illegally obtained or improperly introduced at trial and was Defendant's trial counsel ineffective for failing to move to suppress the evidence?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

II. Did Defendant suffer prejudice from Detective Freeman's testimony regarding Defendant's behavior during his police interview? Did the Prosecutor engage in misconduct? Was defense counsel ineffective for failing to object to the testimony?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

III. Was the Prosecutor's closing argument improper and was Defendant's trial counsel ineffective for not calling a witness who claimed to see victim alive on the Saturday after Thanksgiving?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

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IV. Did the trial court err when it denied Defendant's request for a new jury panel when a potential juror testified that he worked for the Genesee County Sheriff's Department and saw Defendant and his attorney every day even though it did not impair Defendant's ability to a get fair trial and the trial court's denial of a mistrial was within the range of principled outcomes?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

V. Did the jury selection procedure for Defendant's trial did deny his constitutional right to a trial by a fair cross-section of the community?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

VI. Did requiring Defendant to either wear a mask or sit six feet away from his attorney deny him his right to a fair trial or infringe on his state or federal rights to confront the witnesses against him?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

VII. Did conducting a jury trial during covid-19 create a risk of a coerced jury verdict?

Plaintiff-Appellee contends the answer is: "No."

Defendant-Appellant contends the answer is: "Yes."

The Trial Court answered: "No."

The Court of Appeals answered: "No."

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COUNTER-STATEMENT OF FACTS[4]

Gail Anderson was brutally murdered in her home in November of 2017. Detective Freeman was the officer in charge of the case, and he reported to the scene when Ms. Anderson's body was found on November 27, 2017. 2/1/23 Tr, 20. On November 27 and 28, 2017, the police spoke with Ms. Anderson's neighbors and developed a person of interest – Defendant David Serges.[5] *Id*. at 20–21. Neighbor Sidney Owens told the police that on Thanksgiving Day, November 23rd, she saw a man standing on Ms. Anderson's porch with his hands in his pockets and he had on a hat, Carhartt jacket, work boots or tennis shoes, and dark pants. 9/18/20 Tr, 41, 46–47. Jayme Lee Cosner testified that she saw a man in a grayish blue coat and a hat talking to Ms. Anderson on her front porch on Thanksgiving Day. *Id*. at 93. Admiral gas station surveillance video also showed him in dark shoes, dark pants, a blue hat, and a blue coat on Friday, November 24, 2017, similar to what he was wearing when arrested.[6] 9/22/20 Tr, 44, 45, 84; Trial Exhibit 41. Neighbor Gregory Kotlark saw Defendant in the neighborhood on Saturday, November 25, 2017, and he was acting different than usual. 9/18/20 Tr, 101–103. Neighbors also had surveillance cameras that showed Defendant in the neighborhood wearing the same pants and jacket during the timeframe Ms. Anderson was murdered.[7] 9/22/20 Tr, 39; 2/1/23 Tr, 21, 23.

On November 29, 2017, the police issued a press release to find Defendant and received several tips that he was staying in a house located on Bennett Avenue in Flint. *Id*. When the police arrived, Detective Freeman's partner[8] took Defendant into custody. *Id*. at 22. Detective Freeman

[4] These facts are in addition to what is recited by the Court of Appeals in its Factual and Procedural Background section. *People v Serges*, ___ Mich App ___, ___; ___ NW2d ___ (2024) (Docket No. 355554); slip op at 1–5.
[5] At trial, Detective Freeman testified that more than 10 people drew his attention to David Serges when they initiated their investigation. 9/22/20 Tr, 86.
[6] When Defendant was arrested, he was wearing layers of shirts and pants, a baseball hat, and shoes or boots. 2/1/23 Tr, 23.
[7] A witness saw Ms. Anderson speaking with a man matching Defendant's description on her porch on Thanksgiving Day, November 23, 2017, and her body was discovered on November 27, 2017. 9/18/20 Tr, 93; 9/21/20 Tr, 44.
[8] Detective Schreiber.

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testified that Defendant was arrested on suspicion of homicide. *Id*. at 22, 40. He was also aware Defendant had an outstanding warrant because that information is generally looked up through LEIN prior to arrest. *Id*. Although there was a police report that said Defendant was arrested on outstanding warrants, that police report was incorrect, and Detective Freeman did not author it. *Id*. at 41, 55.

After he was taken into custody, Defendant was interviewed and told the Detective certain things that were not true.[9] *Id*. Afterwards, Defendant was transferred to the City of Flint lockup to be lodged on suspicion of homicide, Defendant's clothing was taken, and he was provided with jail clothing. *Id*. at 26. Detective Freeman could not recall when he noticed a substance on Defendant's pants that appeared to be blood, but he noticed it and discussed it with his office. *Id*. This is consistent with Detective Freeman's testimony at preliminary examination that he did not notice the blood when he was interviewing Defendant. 4/12/18 Tr, 45. It was decided that Defendant's belongings should be collected so Detective Freeman transported them back to the police station and secured them into evidence. 2/1/23 Tr, 26–27.

There were several items that had blood on them collected from the crime scene, such as a hammer, Raid can, lighter, and cigarettes. *Id*. at 28. The Michigan State Police crime laboratory collected evidence at the scene they thought was necessary for testing. *Id*. at 31. Detective Freeman did not control what was collected at the scene by the crime laboratory. *Id*. at 32; 9/22/20 Tr, 46–47. Since the forensic laboratory only allowed the police to send seven items at a time, the police had to prioritize what they thought had high evidentiary value. *Id*.; 2/1/23 Tr, 32–33. The jeans

[9] Defendant first told Detective Freeman that he worked at a brick house with a golden retriever on Covert Road on Thanksgiving Day and the Saturday after Thanksgiving and could not find work on Friday, but the police could not locate any such house. 9/22/23 Tr, 52–54. Defendant then told police that he did not go out on Friday, November 24, 2017, because he had a toothache, but he was on surveillance video at an Admiral gas station near the victim's neighborhood on November 24, 2017. *Id*. at 61. Defendant also said he was in the neighborhood doing handyman work for Richard Srda on Saturday and Sunday, which Mr. Srda said occurred Wednesday. *Id*. at 62.

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Defendant was wearing when he was arrested were not determined to be a priority at that time since there were so many items from the scene of the crime that had blood on them. 2/1/23 Tr, 32. The police were twice given special permission to send additional items to the forensic laboratory for testing and the jeans were in the second batch of items.[10] *Id*. at 33. The second batch consisted of nearly everything that had been collected from Defendant. *Id*.

The jeans were not sent to the forensic laboratory until January 19, 2018. *Id*. at 34. The time lapse between when the jeans were collected to when they were tested occurred because the first seven items were sent, examined by the laboratory, and determined to not be especially useful and then the prosecutor had to write a letter to the laboratory requesting special permission to get additional items tested. *Id*. at 34–35. Detective Freeman had a discussion with the entire detective bureau, including his superiors, about sending the pants sooner, but it was decided that other items would be sent first. *Id*. at 36. The warrant for homicide was denied the first time because the Prosecutor wanted further investigation. *Id*. at 27, 38. After a meeting with the elected Prosecutor, the second warrant request for homicide was granted. *Id*. at 35, 42.

[10] Defendant claims that the police department submitted requests to test items to the MSP Lab on November 27, 2017, EH, 46; December 1, 2017, EH, 48-49; December 7, 2017, EH, 48; January 12, 2018, EH, 50; and January 19, 2018. EH, 51, but this is a mischaracterization of the testimony and the lab reports. Defendant's Application for Leave to Appeal, p 18–19. Detective Freeman testified that every laboratory report generated by the Michigan State Police was not based on more evidence being sent to the laboratory or further requests to test items – instead, the laboratory generated a new report every time it had results from testing evidence. 2/1/23 Tr, 50. During cross-examination of Detective Freeman at the evidentiary hearing, he corrected defense counsel's misunderstanding of the laboratory reports – laboratory reports 1 and 2 were items collected from the scene by the crime laboratory and although reports 4, 5, 6, and 7 technically included items his department had sent to the lab, they memorialized DNA extract results from the previously collected or sent items; the reports were not generated due to newly sent items or new requests. 2/1/23 Tr, 49–50, 57, 60. At trial, the MSP biologists testified from laboratory reports containing the *results* of their testing. See 9/21/20 Tr, 178, 179, 190, 191, 193; 9/22/20 Tr, 10. This Court can review Laboratory Reports 8 and 9, as they are Joint Exhibits D and E (Defendant's Appendix 2), respectively, to see that Laboratory Report 9 contains testing results from some of the items received in Laboratory Report 8 and was not generated due to newly received evidence or requests. In any event, Detective Freeman correctly testified that the first items Burton Police sent to the MSP for testing were documented in Laboratory Report 3 and the second set of items Burton Police sent to the MSP for testing were documented in Laboratory Report 8, which included Defendant's pants. 2/1/23 Tr, 57, 60.

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When pressed about his preliminary examination testimony that he did not notice blood on Defendant's pants during the police interview, Detective Freeman said that Defendant's legs were underneath a small table. *Id*. at 56. Defense counsel was not allowed to re-cross examine Detective Freeman on this point.[11] *Id*. at 64. He believed the request for a homicide warrant was granted the second time because there was more evidence – more witnesses, more camera footage, and a better timeline. *Id*. at 62.

At a *Ginther*[12] hearing, Attorney David Clark testified that he was Defendant's trial attorney for both trials. 2/1/23 Tr, 8–9. He was aware that the Prosecutor's evidence consisted of Defendant's pants, including testimony from forensic scientists about tests performed on the pants and results of those tests. *Id*. at 9. He did not consider filing a motion to suppress the evidence because the small amount of blood on the pants made the People's case weaker due to their theory that Defendant stood over the victim and pounded her with a hammer and then a Raid can, causing blood to go all over the room. *Id*. If this was true, Defendant would have been covered in blood. *Id*. at 9–10. Because Defendant had not changed his pants since the date of the murder, the blood must have been from some other point in time. *Id*. at 10. He also relied on the testimony of the Michigan State Police that there was no indication another person was in the room with the victim. *Id*. at 10.

He also did not file a motion to suppress because he believed Defendant's clothes were seized upon arrest. *Id*. at 13. His trial strategy was to discredit the Prosecution's theory by comparing the small amount of blood on Defendant's pants to the large amount of blood at the scene and to highlight alternative ways the victim could have died that had nothing to do with

[11] As a result, and in the interest of justice, the parties agreed to submit Joint Exhibit G so this Court can itself view the layout of the interview room and the relative positioning of Defendant and Detective Freeman during the interview. Joint Exhibit G will be addressed in more detail in the Argument section of this Brief.
[12] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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Defendant. *Id*. at 14. Attorney Clark did adjust his trial strategy after the first trial resulted in a hung jury, but not in regard to the blood. *Id*. at 15. He thought this was a winnable case, he did not believe Defendant killed the victim, and he was surprised Defendant was convicted. *Id*. at 15.

When asked whether he told appellate counsel that he just did not think of filing a motion, trial counsel responded that the case was 5 years ago, so he did not remember, but from very early on in the case, he realized the pants worked for Defendant more than for the prosecution. *Id*. at 17. "The prosecutor's argument…about him pounding her…did not fit with no blood on the pants, except that little bit…I think I even got the lab people to say it wasn't so much as a drop as it could have been him rubbing his hand off on them." *Id*. He continued, "[t]heir argument from the get go was that he pounded her to pieces and there was blood all over. Couldn't have – it had to be on the pants…so it worked to our advantage not to do it that way." *Id*. at 17–18.

When questioned by the judge, Attorney Clark confirmed that how he approached the issue of Defendant's pants was one of trial strategy. *Id*. at 65. Attorney Clark and Defendant talked about and agreed upon the strategy of embracing the pants – arguing that if Defendant committed the murder, there would be more than a dot of blood on his pants. *Id*. at 66. There was also testimony that Defendant had a prior handyman relationship with the victim and so the trial strategy was to suggest the blood had transferred from a time when Defendant was raking leaves or cleaning the house since the victim was known to have open wounds due to her diabetes. *Id*. at 67–68. His trial strategy, in consultation with his client, was to use the pants as a shield instead of a sword. *Id*. at 69. Attorney Clark admitted that he did not inform Defendant that there may be a Fourth Amendment basis to exclude the pants. *Id*. at 70.

After the evidentiary hearing and written briefs, the trial judge ruled that trial counsel was effective. 7/26/23 Tr, 9. When considering the judge's recollection of the trial, the testimony, and

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the briefs, the trial court determined Attorney Clark made no errors that met the threshold for ineffective assistance of counsel. *Id*. The trial judge did not know if she would have granted a motion to suppress the pants, had one been filed, and did not find it shocking that Defendant's trial counsel had not filed a motion to suppress. *Id*. at 5–6. The trial judge recalled the awful, bloody photos of the crime scene – blood all over the floor, cupboards, living room, and splattered everywhere. *Id*. at 8. Attorney Clark's trial strategy to argue that there would have been more than a "dot" of blood on Defendant's pants if he had committed the murder was sound and indeed led to a hung jury after the first trial, which indicated the argument gave at least one juror pause. *Id*. There was not a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Id*. at 9.

Defendant persistently argues that a suspicious person in the neighborhood the morning the victim was found suggests his innocence but that person, an African American male who pulled into the driveway behind Dallas Robinson (the person who found Gail Anderson's body), was found, and investigated by the police. 9/22/20 Tr, 48. Even though Mr. Robinson did not recognize the man, he was a neighbor who lived down the road and had car trouble on the Monday after Thanksgiving. *Id*. The police determined he had nothing to do with the murder of Gail Anderson. *Id*. Additionally, although Defendant was excluded from a latent fingerprint found on a "FAS rewards card" from the victim's wallet, the fingerprint also did not match to anyone in the Automated Fingerprint Identification System. *Id*. at 151. Testing of numerous items yielded no results. *Id*. at 82, 149.

Defendant's two Motions for New Trial were denied by the trial court and the Court of Appeals Opinion affirmed his conviction in a published opinion. Defendant now requests leave to appeal his conviction to this Court. Defendant's Application for Leave to Appeal should be denied.

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ARGUMENT

I. The evidence police obtained from Defendant's clothing was not illegally obtained or improperly introduced at trial and Defendant's trial counsel was not ineffective for failing to move to suppress the evidence.

A. *Issue Preservation*

To preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). Defendant's trial counsel did not challenge the admission of the evidence the police obtained from Defendant's pants, although appellate counsel did raise the issue in a motion for new trial. The issue is unpreserved.

B. *Standard of Review*

Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 763. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error, resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 763–64.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). Questions of

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law are reviewed de novo. *Id*. This Court reviews for clear error the trial court's findings of fact. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

C. *Discussion*

Defendant's constitutional Fourth Amendment rights to be secure from unreasonable searches and seizures were not violated by the police when blood stains on the pants he was wearing when he was arrested were tested for the victim's DNA without a warrant. The right to be protected against unreasonable searches and seizures is guaranteed by both the United States[13] and Michigan Constitutions.[14] US Const, Am IV; Const 1963, art 1, § 11; *People v Slaughter*, 489 Mich 302, 310–311; 803 NW2d 171 (2011). These constitutional provisions do not forbid all searches and seizures, only those that are unreasonable. *Id*. at 311. In a criminal case, a search or a seizure conducted without a warrant is generally unreasonable unless, under the circumstances, both probable cause and an exception to the requirement of a judicial warrant exists. *People v Borchard-Ruhland*, 460 Mich 278, 293–294; 597 NW2d 1 (1999); *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). The usual remedy if the police have seized evidence in violation of an accused's constitutional protections is to exclude that evidence from any prosecution of the accused. See *People v Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004).

1. Defendant's Fourth Amendment rights were not violated when the police lawfully seized his clothing after arrest and tested the blood stains on his pants for DNA.

[13] The Fourth Amendment of the United States Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v Ohio*, 367 US 643, 655 (1961).

[14] The Michigan Constitution provides, "The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Const 1963, art 1, § 11.

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To be able to assert a claim that an illegal search or seizure has occurred, the police activity must intrude on a constitutionally protected property interest of the accused or have violated an accused's reasonable expectation of privacy. See *United States v Jones*, 565 US 400, 404–406; 132 S Ct 945; 181 L Ed 2d 911 (2012); *People v Gingrich*, 307 Mich App 656, 661–662; 862 NW2d 432 (2014). But "it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *United States v Edwards*, 415 US 800, 806; 94 S Ct 1234, 39 L Ed 2d 771 (1974); see also *People v Brooks*, 405 Mich 225, 247–248; 274 NW2d 430 (1979) (following *Edwards*), and *People v Nesbitt*, 159 Mich App 740, 744; 407 NW2d 4 (1987). Both a person and the property in his or her immediate possession may be searched at the police station after an arrest has occurred at another place and, if evidence of crime is discovered, it may be seized and admitted in evidence. *Edwards*, 415 US at 804. Pursuant to *Edwards*, it was reasonable for the police to examine and hold as evidence Defendant's clothing that they already had in their lawful possession as a result of a lawful arrest.

In *Edwards*, the Supreme Court also found the lower court's distinction that the seizure of clothing had taken place "after the administrative process and the mechanics of the arrest had come to a halt" unjustified. *Edwards*, 415 US at 802, 804–805. Therefore, Defendant's assertion that it was necessary for the police to obtain a warrant to seize the pants he was wearing when arrested because the police had completed their safety and administrative reasons for collecting the clothing is also unjustified.

The police also did not violate Defendant's Fourth Amendment rights by testing the pants in their possession for blood spots without a warrant. "Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected

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to laboratory analysis or that the test results are admissible at trial." *Edwards*, 415 US at 803–804. The Fourth Amendment provides no protection for what a person knowingly exposes to the public. *Katz v United States*, 389 US 347, 351; 88 S Ct. 507, 19 L Ed 2d 576 (1967). This is true whether the thing exposed is examined by artificial means since "[n]othing in the Fourth Amendment prohibits the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology affords them." *US v Knotts*, 460 US 276, 282; 103 S Ct 1081, 75 L Ed 2d 55 (1983). Defendant was wearing his pants and exposing both them and the blood spots to the public so there was no Fourth Amendment protection. Also, pursuant to *Edwards*, the police were allowed to subject Defendant's pants to laboratory analysis and those results were admissible at trial.

Kyllo v United States, cited by Defendant, is distinguishable from this case because it held the Government could not use a device that is not in general public use to explore details of *the home* that would previously have been unknowable minus physical intrusion without a warrant since the Fourth Amendment draws a firm line at the entrance of a house. *Kyllo v United States*, 533 US 27, 40; 121 S Ct 2038, 150 L Ed 2d 94 (2001) (emphasis added). Consequently, a person has no reasonable expectation of privacy against sense-enhancing devices. *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989). Thus, a police officer's use of artificial illumination, such as a flashlight, or an ultraviolet scan of a suspect's hands to detect the presence of "bait" powder is not an illegal search. *Id*. Defendant's reliance on *People v Custer* is likewise misplaced since that Court said,

> [W]e conclude that one's reasonable expectation of privacy is diminished only when an officer lawfully seizes an object from an individual. In order for an officer to lawfully seize an object from an individual, he must satisfy certain constitutional safeguards. Only after these safeguards have been satisfied can a police officer lawfully seize an object from an individual and view its exterior. We merely hold that, once an object has been lawfully seized, the police may shift the object and

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> look at its exterior…our opinion in no way, permits a Fourth Amendment "search" incident to seizure. Instead, we conclude that there was no "search" in this case when the police turned the photographs over to examine their other side because, in order for there to be a "search," one must have a reasonable expectation of privacy in the object being "searched." In this case, the police had already lawfully seized the photographs, and, therefore, defendant's reasonable expectation of privacy in the photographs already had been significantly diminished, at least sufficiently to justify the officer's cursory examination of the other side of the photographs. [*People v Custer*, 465 Mich 319, 343; 630 NW2d 870 (2001)].

The police in this case did not engage in a "search incident to seizure" because, just as there was no "search" in *Custer*, there was no Fourth Amendment "search" here since Defendant had no reasonable expectation of privacy in his clothing, or the victim's blood on the surface of the clothing, once it had been lawfully collected after his lawful arrest. Although Defendant cites to *Riley v California* for the proposition that the United States Supreme Court rejected "that a person loses all expectation of privacy in his effects upon arrest", *Riley* specifically applies to cellular telephones and their data. *Riley v California*, 573 US 373, 403; 134 S Ct 2473, 189 L Ed 2d 430 (2014) (stating, "Our answer to the question of what police must do before searching a *cell phone* seized incident to an arrest is accordingly simple—get a warrant" [emphasis added]). *Riley* also noted that a person has diminished privacy and Fourth Amendment rights upon arrest and a search after arrest only *may* require a warrant when a privacy-related concern is weighty enough, such as a top to bottom search of a person's home or a cellular phone. *Riley*, 573 US at 392. "Unlike a person's cellular telephone or home, which hold "the privacies of life,"[15] Defendant had a diminished expectation of privacy in his pants and a spot of someone else's blood[16] on his pants.

[15] See *Riley v California*, 573 US at 386, 403. *Riley* also notes, "But while *Robinson's* categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones."

[16] Defendant relies upon *Skinner v Ry Lab Executives' Ass'n*, 489 US 602; 109 S Ct 1402; 103 L Ed 2d 639 (1989) to claim that "The United States Supreme Court has recognized that conducting chemical tests on blood samples, subjecting a person to a breath test, and the collection and testing of urine are all Fourth Amendment searches", but that case is distinguishable since that Court was concerned with intrusions into the body for blood and breath tests and the possible privacy implications of collecting and analyzing urine samples of employees required to submit to drug screens. In this case, there was no intrusion into Defendant's body and someone else's blood DNA does not infringe

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The police were allowed to use sense-enhancing devices and laboratory analysis on the pants without a warrant and for that evidence to be admissible at trial.

The fact that Defendant was arrested as part of a murder investigation and subsequently held for an outstanding warrant for failure to appear for arraignment on an ordinance violation does not negate the police's ability to collect and test his clothing. Nothing in the *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), decision indicates that the search incident to an arrest is limited by the prospect that evidence relevant to the subject of the arrest will be found. If that were the standard, there would be few cases in which a search would be justified since the crime under investigation was not characterized by instrumentalities or fruits. If the search satisfies the *Chimel* standard[17], evidence of unrelated crimes may be seized. As Defendant admits, the jail staff lawfully seized Mr. Serges' clothing when he was booked for the outstanding warrant for failure to appear. As part of that lawful seizure, "it is plainly within the realm of legitimate police investigative technique to subject objects properly seized as evidence of crime to scientific testing and examination." *People v Cook*, 24 Mich App 401, 409; 180 NW2d 354 (1970).

Furthermore, the trial court did not interpret *Edwards* to mean that police may search an arrestee's property for evidence of any crime without a warrant and regardless of the reason for arrest. The trial court held that no warrant is required to test clothing that is lawfully seized by the police that was exposed to police view under unobjectionable circumstances since the expectation of privacy has at least partially dissipated. See Defendant's Appendix V, Trial Court Order

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on an expectation of privacy that society is prepared to recognize as reasonable. Additionally, *Skinner* was analyzed in the context of the facts, where railway labor organizations filing suit to enjoin regulations promulgated by Federal Railroad Administration governing drug and alcohol testing of railroad employees, and not in the context of a criminal case or the police taking a person into custody.

[17] Under the US Supreme Court's decision in *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), a police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person and the area "within his immediate control." *Id*. at 763.

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Denying Defendant's Motion for New Trial, p 3–4; *People v Rivard*, 59 Mich App 530; 230 NW2d 6 (1975). The trial court's interpretation is not overbroad but instead is based on an understanding of decades of caselaw that evidence obtained in a search and seizure incident to lawful arrest for a particular offense is admissible in a prosecution for an unrelated offense. See *Chimel v California*, 395 US 752; *United States v Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973); *Gustafson v Florida*, 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973); *People v Cook*, 24 Mich App 401; *People v Rivard*, 59 Mich App 530.

Defendant's reliance on *People v Hughes*, 339 Mich App 99; 981 NW2d 182 (2021) is misplaced. Like *Riley*, *Hughes* concerns the police searching the contents of a cellular phone, which the courts have deemed particularly sensitive due to the highly personal information that is stored in a cellular phone. See *Riley*, 573 US at 395; *People v Hughes*, 506 Mich 512, 527; 958 NW2d 98 (2020). Pants, on the other hand, do not contain the highly personal information of a cellular phone.[18] Defendant's interpretation of *Hughes* is overly broad.

The validity of *People v Trudeau*, 385 Mich 276; 18 NW2d 890 (1971) and *People v Carr*, 370 Mich 251; 121 NW2d 449 (1963) is questionable since, after they were decided, the U.S. Supreme Court ruled that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Hudson v Palmer*, 468 US 517, 526; 104 S Ct 3194; 82 L Ed 2d 393 (1984). In *People v Phillips*, this Court concluded the rationale underlying the Court's decision in *Hudson* applies equally to pretrial detainees and inmates confined in jails. *People v Phillips*, 219 Mich App 159, 162; 555 NW2d 742 (1996). Be that as it

[18] "In 1926, [Judge] Hand observed ... that it is 'a totally different thing to search a man's pockets and use against him what they contain, [than to] ransack[ ] his house for everything which may incriminate him.' If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell-phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Hughes*, 506 Mich at fn 12 (citation omitted in original).

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may, Defendant did not have a reasonable expectation of privacy based on the totality of the circumstances since there was blood on both legs of Defendant's jeans and a neighbor had approached the police about Defendant as a possible suspect prior to him being taken into custody as part of a murder investigation and being held on an outstanding warrant for a different issue. Even if the holdings in *Trudeau* and *Carr* were to survive *Hudson*, neither *Trudeau* nor *Carr* were violated in this case because the search was conducted out of institutional concerns via a jailhouse inventory.

As noted in the Judgement Appealed from and Relief Sought section above, the Court of Appeals did not rely upon *Lanza v New York*, 370 US 139; 82 S Ct 1218; 8 L Ed 2d 384 (1962) for the proposition that an arrestee has no legitimate Fourth Amendment privacy or possessory interest in personal effects. *Serges*, ___ Mich App at ___ (Docket No. 355554); slip op at 12. *Lanza* was a "see also" after citation to *Hudson*. *Id*. *Hudson* was used by the Court to note an arrestee's reduced privacy interests upon being taken into police custody along with the case law of *Rivard*, *Cook*, *Custer*, and *Edwards* to properly conclude that Defendant's pants were lawfully seized when they were taken from him at jail, the police did not meaningfully interfere with his possessory interests or violate his expectation of privacy, the police were allowed to subject the pants to laboratory testing, and no second seizure of Defendant's pants occurred when they were sent for testing. *Id*. at 12–13. The Court of Appeals did not err in this conclusion.

2. <u>The introduction of the evidence obtained through a lawful search and seizure of Defendant's clothing after arrest was not plain error affecting his substantial rights and did not result in a miscarriage of justice.</u>

Since Defendant's Fourth Amendment Constitutional rights were not violated, there was no plain error or miscarriage of justice. No clear or obvious error occurred that affected Defendant's substantial rights. A miscarriage of justice occurs if the error likely led to the

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conviction of an innocent person or if the error were of the sort that would damage the public reputation of judicial proceedings if not corrected despite the absence of proper preservation in the trial court. See *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Defendant did not move to suppress the DNA evidence obtained from the blood on his pants at trial. Defendant has moved for reversal of his conviction, but his Constitutional rights were not violated as the DNA lab results he claims should have been suppressed were lawfully obtained and properly entered into evidence at trial. The police did not conduct an "illegal fishing expedition" but legally collected Defendant's pants upon his arrival at the jail – pants in which Defendant had no reasonable expectation of privacy – and tested the blood spots that were on the pants after he became the main suspect in the investigation of the victim's death. While the blood spot that contained the victim's DNA was small, there were other spots of blood also located on the pants along with potential victim blood on a sweatshirt and boots that he was wearing. Since it was a particularly bloody crime scene, it made sense to test anything that potentially contained human blood, including the pants. There was no error, especially not one that likely led to the conviction of an innocent person or would damage the public reputation of judicial proceedings.

3. Defendant's trial counsel was not ineffective for failing to make a futile motion to suppress the evidence police obtained via Defendant's clothing collected at the jail after his arrest.

Defense counsel was not ineffective for not futilely attempting to suppress the DNA evidence found on Defendant's pants. "To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance." *People v Walker*, 497 Mich 894, 895; 855 NW2d 744 (2014). To show prejudice, a defendant "must show the existence of a reasonable probability that, but for counsel's error, the result of the

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proceeding would have been different." *People v Gaines*, 306 Mich App 289, 300; 856 NW2d 222 (2014) (quotation marks omitted). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted). Defense counsel is not required to make a meritless objection. *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014). Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Failing to file a suppression motion is not per se ineffective assistance; a defendant must still demonstrate that his lawyer's performance was objectively unreasonable and that "but for" that deficient performance, the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich at 51.

The evidence of the victim's blood on Defendant's pants was constitutionally obtained since the clothing was lawfully collected and tested after a lawful arrest. Thus, it was not objectively unreasonable for trial counsel to choose not to move to suppress the evidence. Defense counsel is not ineffective for failing to make futile or meritless arguments.

Defense counsel's trial performance was also not objectively unreasonable. He argued that Defendant could have had drops of the victim's blood on his pants because it was transferred there while he was doing work for her. 9/22/20 Tr, 148. He also argued Defendant's clothes would have had smears or puddles of blood on them if he had killed Ms. Anderson due to the bloody nature of the crime scene and that the victim died of an accident. *Id*. at 149. This was a reasonable trial strategy since no fingerprints, footprints, or other forensic evidence at the crime scene tied Defendant to the death of Ms. Anderson, Defendant occasionally did handyman work for Ms.

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Anderson, and Defendant maintained his innocence throughout the case. Defense counsel was not ineffective and Defendant has failed to meet his heavy burden of proving otherwise.

Both the trial court and the Court of Appeals were correct in their conclusions that defense counsel in this case was not ineffective. Based on the totality of the circumstances, a motion to suppress most likely would have been denied. "[D]efendant's claim that the evidence would have been suppressed had a motion been made falls just short on the facts of this case." *Serges*, ___ Mich App at ___ (Swartzle, J., concurring dubitante); slip op at 5. Defendant's Application for Leave to Appeal should be denied.

II. Defendant suffered no prejudice from Detective Freeman's testimony regarding Defendant's behavior during his police interview, the Prosecutor did not engage in misconduct, and defense counsel was not ineffective for failing to object to the testimony.

A. *Issue Preservation*

To preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). To preserve an issue of prosecutorial error, a defendant must contemporaneously object and request a curative instruction. *People v Bennet*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant's trial counsel did not challenge the testimony of Detective Freeman nor object to the prosecutor's question about whether Defendant did anything strange when the Detective left the interview room at trial. The issues are unpreserved.

B. *Standard of Review*

Since defense counsel did not object, the standard of review is plain error and Defendant needs to show the Detective's testimony affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because no factual record was created in regard to Defendant's claim of ineffective assistance of counsel, the "review is limited

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to mistakes apparent on the lower court record." *People v Solloway*, 316 Mich App at 188. Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). Questions of law are reviewed de novo and factual findings are reviewed for clear error. *Id*.

To preserve a claim of prosecutorial error, the defendant must raise a contemporaneous objection and request a curative instruction. *People v Solloway*, 316 Mich App at 201. Unpreserved prosecutorial error issues are reviewed for plain error affecting substantial rights. *People v Bailey*, 310 Mich App 703, 721; 873 NW2d 855 (2015).

C. *Discussion*

Detective Freeman's testimony was not outcome determinative, and the Prosecutor did not engage in misconduct when she asked a question regarding what Defendant did in the interview room when the Detective left. Defendant's trial counsel's failure to object was one of trial strategy. References to a police officer's training in general are not inappropriate. See, generally, *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Claims of prosecutorial error are reviewed on a case-by-case basis, "with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). To obtain relief generally requires a showing of prejudice; specifically, that the error affected the outcome of the lower court proceedings. *People v Solloway*, 316 Mich App at 202. The court will not find error requiring reversal if a curative instruction could have alleviated the effect of the prosecutor's error. *People v Lane*, 308 Mich App 38, 62; 862 NW2d 446 (2014). The test of prosecutorial error is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

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"To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance." *People v Walker*, 497 Mich 894, 895; 855 NW2d 744 (2014). To show prejudice, a defendant "must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Gaines*, 306 Mich App 289, 300; 856 NW2d 222 (2014) (quotation marks omitted). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted).

During Detective Freeman's testimony, he mentioned that he stepped out of the interview room and observed a live feed of Defendant via a monitor. 9/22/20 Tr, 56–57. The Prosecutor asked, "And when you stepped out and you watched that live feed, did Mr. Serges do something unusual?" *Id*. at 57. The Detective observed Defendant "brushing the top of his legs off, which just based on my experience and my training…grooming techniques are…a pretty good indicator of deception…there's other things too, covering their mouth, cross the arms…and he says, out loud, he says 'they're not going to pin this on me.'" *Id*. at 57. Defense counsel did not object to the Prosecutor's question or the Detective's response.

The testimony did not affect Defendant's substantial rights since it did not affect the outcome of the case. The testimony was limited to a single witness out of 11 witnesses. The Prosecutor did not refer to the testimony in closing arguments or at any other time in the rest of the trial. There were also other reasons for the jury to convict Defendant, such as the unexplained

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spot of the victim's blood on Defendant's pants, Defendant lying about not being in the victim's neighborhood during the time Ms. Anderson was killed, and several witnesses placing Defendant in the neighborhood and with Ms. Anderson around the time she was murdered. Based on the full context of the record, it is not clear the Prosecutor was eliciting improper testimony. Instead, she seemed to be asking about Defendant saying out loud, to himself, that the murder of Ms. Anderson was not going to be "pinned on" him. Defendant was given a fair and impartial trial and suffered no prejudice from this testimony.

Additionally, Defendant's trial counsel was not ineffective. His decision not to object to the Prosecutor's question or the Detective's response was one of trial strategy. When defense counsel began his cross-examination of Detective Freeman, he said, "You know, you've got me a little self-conscious. I feel like I can't brush off any lint or sit there with my arms cross, you'll think I'm a liar, true?" 9/22/20 Tr, 68. To which Detective Freeman replied, "True. Yeah." *Id*. By bringing levity to the assertions, defense counsel was using the trial strategy of discrediting the Detective's testimony since crossing arms and grooming oneself are also common, everyday habits of people who are not lying. Defense counsel also ably cross-examined Detective Freeman by pointing out that there were many people walking through the neighborhood besides Defendant, Defendant felt bad after he was told Ms. Anderson was dead, Defendant did not confess to the crime, and Defendant was a twice-a-day heroin user, which could have contributed to his varying versions of events regarding where he was and when during the period of time the victim was murdered. *Id*. at 68–72. The testimony was brief and discredited by defense counsel's able cross-examination. Defense counsel's trial strategy was reasonable, and Defendant has not overcome the heavy burden of proving that his attorney's performance was objectively unreasonable in light of prevailing professional norms and that he was prejudiced by the deficient performance.

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Unlike *People v Hawkins*, 507 Mich 949; 959 NW2d 179 (2021), this was not a sexual assault case where the detective testified in multiple ways that a child victim he interviewed was being truthful. As with most sexual assault cases, *People v Hawkins* was a credibility contest between the defendant who testified in his own defense and the victim. *People v Hawkins*, 507 Mich at 949. That is not the circumstance here as the case was based on the testimony of 11 total witnesses, DNA evidence, and surveillance video. Detective Freeman's testimony was not outcome determinative, the Prosecutor's question as not error, and Defendant's counsel was not ineffective. The Court of Appeals did not err when it determined the testimony was not outcome determinative. Defendant's Application for Leave to Appeal should be denied.

III. The Prosecutor's closing argument was based on reasonable inferences from the evidence and Defendant's trial counsel was not ineffective for not calling a witness who claimed to see victim alive on the Saturday after Thanksgiving.

A. *Issue Preservation*

Trial counsel did not object to the prosecutor's closing arguments. Appellate counsel raised this issue in a motion for new trial in the lower court and in a motion to remand to this Court, which was denied. The issue is unpreserved.

B. *Standard of Review*

A defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted). To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich at 763. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App at 586 (citation omitted).

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C. *Discussion*

The Prosecutor's closing arguments were a reasonable inference from the evidence, the witness who claimed Ms. Anderson was alive on Saturday was not credible (but defense counsel could have called her and chose not to do so), and defense counsel was not ineffective for failing to object to the Prosecutor's closing arguments. Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A defendant is entitled to a fair trial, not a perfect one. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). "A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Prosecutors are accorded great latitude regarding their arguments and conduct. *People v Cooper*, 309 Mich App 74, 90; 867 NW2d 452 (2015), quoting *Bahoda*, 448 Mich at 282 (citation and quotation marks omitted; alteration in original). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Ms. Novak, victim's friend, testified that she recalled one time when a male came to Ms. Anderson's home and asked if there was any work he could do but Ms. Anderson turned him away. 9/18/20 Tr, 20. Ms. Novak did not identify Defendant as the person who asked for work that day but testified the man the victim turned away came asking for odd jobs and the victim said she had used him before, but he did not finish the job, so she was not going to give him more money when he was not going to do the work. *Id*. at 21. Although the witness thought the man who came to ask for work had brown hair, which Defendant does not, she also mentioned he was under six feet tall,

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which is true of Defendant.[19] Since Defendant was known to walk around the neighborhood asking for odd jobs and had done work for the victim before, it was a reasonable inference of the evidence for the Prosecutor to argue Ms. Anderson had turned Defendant away that day.

Regarding the statement that the victim was worried she would make Defendant angry because she did not want him to do work for her anymore, Defendant's temper was not a subject of this second trial, but it was of the first trial. Even if the Prosecutor misspoke and mentioned testimony provided in the first trial, it did not affect the outcome of this case. If anything, it damages the credibility of the Prosecutor since the jury would recall collectively that Defendant's anger was not part of the evidence. In the preliminary jury instructions, the jury was told closing arguments are not evidence and its verdict must only be based on evidence. 9/17/20 Tr, 25. Additionally, the jury was again instructed prior to deliberation that the lawyers' statements and arguments and any commentary are not evidence. 9/22/20 Tr, 182. It is presumed the jury followed these instructions. Defendant was not prejudiced by the Prosecutor's closing arguments. The trial was fair and impartial. The Court of Appeals determined that this argument was improper because it was not based on admitted evidence, but correctly concluded that it did not affect the outcome of the lower court proceedings. *Serges*, ___ Mich App at ___; slip op at 15–16.

Regarding the statement that Defendant was the last person who saw Ms. Anderson alive, the evidence presented at trial was that Defendant was seen personally speaking with the victim on her porch on Thanksgiving Day and this argument is also reasonable inference of the evidence presented at trial. 9/18/20 Tr, 47, 94. Ashely Durga, who approached the police while they were on the crime scene and made a statement, was not called as witness because the statement she gave

[19] According to the Michigan Department of Corrections photograph that was taken within months of Defendants trial, Defendant has mostly grey and some dark hair and is balding. He is also listed as being a height of 5 feet, 7 inches tall.

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to the police was most likely regarding a different issue – a white male running into a Jeep Cherokee that was driven by a black male who she did not believe lived in the neighborhood. Certainly, it is within the prosecutor's discretion not to call every person who makes a statement to the police, especially when the statement seems incredible or inapplicable to the case at hand.

Ms. Durga's assertion she saw Ms. Anderson checking her mailbox on Saturday was not included in the official case report provided by the Burton Police to the Prosecutor. It is unknown how this information made its way into the Death Scene Investigation Report, but the Medical Examiner Investigator testified that he was learning when he wrote the report for this case and included statements he heard from other people that should not have been included in the report. 9/17/20 Tr, 108. The Deputy Medical Examiner also testified the date of death was not a medical finding and Ms. Anderson could have died on November 26, 2017, or other surrounding dates, instead of the listed date of on or after November 25, 2017. *Id.* at 175. If it was important for Defendant to establish Ms. Anderson was alive on Saturday to contradict the Prosecutor's arguments, defense counsel could have called Ms. Durga. It is not outcome determinative to the case, however, because the testimony only possibly changes the date of death to a day later.

Additionally, even if defense counsel had called Ms. Durga as a witness, it would not have changed the outcome of the trial. Witness Jennifer Winkler testified she saw Defendant in the neighborhood on Saturday. 9/21/20 Tr, 26. Defendant originally told the police he helped a woman who lived in a brick house with a golden retriever on Covert Road that Saturday, but the police were never able to find a house matching Defendant's description on Covert Road (Covert Road is only a half mile walk from the victim's house). 9/22/20 Tr, 54. Defendant next told the police that he went to a house on Melody and did work for Richard Srda on both Saturday and Sunday but when the police checked on this story, Mr. Srda said Defendant was supposed to do work for

him on the Wednesday, but he left immediately after being paid $100.00. *Id*. at 62. Thus, Defendant, while he changed his story, also placed himself in the victim's neighborhood on Saturday. Defendant could have been in the victim's neighborhood and not captured on video. The Prosecutor's closing argument that Ms. Anderson was last seen alive with Defendant was a reasonable inference based on the facts in evidence.

Defense counsel's trial performance was not objectively unreasonable for failing to object to the Prosecutor's closing arguments since they were reasonable inferences from the evidence. The inadvertent misstatement regarding evidence from the first trial was brief, the jury was instructed the closing argument was not evidence, and, if anything, it damaged the People's credibility. Regarding Ashley Durga, there was one line in an investigator's handwritten notes that said Ms. Durga saw Ms. Anderson check her mail on Saturday included with a statement that was most likely irrelevant to the case at hand. Seeing Ms. Anderson check her mail Saturday was not included in the Burton Police Department's Case Reports. This statement also somehow made its way into the Death Scene Investigation Report, but the author of that report testified he was learning when he wrote it, included information he heard from others that should not have been included, and he would not include that information now. Ms. Durga's testimony also would not have affected the outcome of the case, however, since another witness testified Defendant was in the neighborhood Saturday and Defendant, in all his versions of events, told police he was in nearby neighborhoods to victim's home Saturday. Defendant was not prejudiced by his counsel's performance and, even if defense counsel had objected to the Prosecutor's closing argument or called Ms. Durga as a witness, the outcome of the case would be the same.

The Court of Appeals did not err when it concluded that any possible prejudice to the Defendant was minimal and that he failed to establish his substantial rights were affected by any

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prosecutorial errors. *Serges*, ___ Mich App at ___; slip op at 18. The Court of Appeals also pointed out that Defendant improperly expanded the record on appeal by relying upon investigator notes and a death scene investigator report that were outside the trial court record to make these arguments, and appropriately did not consider the documents. *Id*. at 18–19. Despite being informed that such an expansion of the record is not permitted, Defendant has again included these documents as Appendix H and I. This Court should also not consider the improperly submitted documents. Defendant's Application for Leave to Appeal should be denied.

IV. The trial court did not err when it denied Defendant's request for a new jury panel when a potential juror testified that he worked for the Genesee County Sheriff's Department and saw Defendant and his attorney every day because it did not impair Defendant's ability to a get fair trial, the trial court's denial of a mistrial was within the range of principled outcomes.

A. *Issue Preservation*

At the end of the first trial day, Defendant's counsel requested a mistrial because a potential juror, who was excused for cause, stated he was employed as a sheriff's deputy in Genesee County and saw Defendant and defense counsel daily. 9/15/20 Tr, 259. The following day, defense counsel renewed the motion to release the jurors that were questioned the day before and to start over with a new group of potential jurors. 9/16/20 Tr, 6. The motions were denied by the trial court. 9/15/20 Tr, 302; 9/16/20 Tr, 11. Therefore, the issue is preserved.

B. *Standard of Review*

This Court "review[s] a trial court's decision to deny a motion for a mistrial for an abuse of discretion." *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (quotation omitted). A trial court "should only grant a mistrial for an irregularity that is

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prejudicial to the rights of the defendant and impairs his ability to get a fair trial and when the prejudicial effect of the error cannot be removed in any other way." *Lane*, 308 Mich App at 60. (quotation marks and citations omitted).

C. *Discussion*

The trial court did not abuse its discretion when it denied Defendant's motion for mistrial/to excuse the non-empaneled potential jurors and restart voir dire with a new group of potential jurors because the decision did not fall outside the range of principled outcomes. A trial court should grant a mistrial only for an irregularity that impairs the defendant's right to a fair trial and the prejudicial effect of the error cannot be removed in any other way. *Schaw*, 288 Mich App at 236; *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Thus, a mistrial is required if it is supported by manifest necessity. *People v Lett*, 466 Mich 206, 216; 644 NW2d 743 (2002). Manifest necessity refers to "the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

During voir dire, juror number 125 indicated that he worked as a sheriff's deputy at the Genesee County Jail and that he was familiar with people involved in the case because he saw Defendant and his trial counsel "on a day-to-day basis." 9/15/20 Tr, 259. The trial court judge then paused the record, conducted a bench conference with the attorneys, and excused juror number 125 for cause with the agreement of both defense counsel and the Prosecutor. *Id*. at 260–261. After the potential jurors were excused, defense counsel requested a mistrial because potential jurors would be able to infer that Defendant was being held in jail prior to trial. *Id*. at 301. Defense counsel did not request an evidentiary hearing to determine whether other members of the jury

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were prejudiced. The Prosecutor agreed that several people "perked right up" when the deputy said he saw Defendant and his counsel on daily basis and that he was assigned to the jail and stated that no further inquiry was made because she did not want to emphasize the issue. *Id*. at 301–302. The trial court judge denied the motion since the issue was "glossed over…as quickly as possible" and because jurors assuming a defendant is in jail for a murder trial does not have the same psychological impact of an inmate appearing in jail garb and handcuffs. *Id*. at 302. Additionally, the trial court judge found it speculative that the jurors drew the conclusion that Defendant was being held in jail during his trial for murder and that would cause him prejudice. *Id*. Defense counsel's renewed motion the following day to dismiss the jurors from the previous day and start over was again denied but the judge offered to give a curative instruction, which defense counsel said he would consider for final jury instructions. 9/16/20 Tr, 3–12.

Defendant has not demonstrated that what the sheriff's deputy said interfered with his presumption of innocence. Since the potential jurors were advised Defendant was charged with murder, they most likely assumed that he was being held in jail. Although it would not have been difficult to piece together the information, the sheriff's deputy also stated he was assigned to the jail and that he saw both Defendant and his attorney on a daily basis but did not say "at the jail." Furthermore, the issue of Defendant's presumed innocence was thoroughly covered with the jurors during voir dire. See generally, 9/15/20 Tr, 188–288; 9/16/20 Tr, 15–172. Additionally, the trial court instructed the jury four times, including twice during jury selection, that Defendant was presumed innocent and did not have to prove his innocence or produce any evidence. 9/15/20 Tr, 27, 127; 9/16/20 173; 9/17/20 Tr, 25; 9/22/20 Tr, 180. Since jurors are presumed to follow their instructions, it can be presumed that the sheriff's deputy's responses to the court's questions during voir dire did not prejudice them against Defendant. Finally, Defendant's trial counsel was given

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the opportunity for the judge to give the jury a curative instruction and trial counsel declined because "[m]ost of the jurors were excused…[h]aving a jury instruction simply draws more attention to it…[o]f course…half of them never heard it…under the circumstances, I have decided not to draw any more attention to that and to let it go at this point." 9/21/20 Tr, 237–238. The trial court did not abuse its discretion when it denied Defendant's motion for mistrial or to start over with a new jury pool.

The Court of Appeals noted that, in the case of *People v Horton*, 341 Mich App 397; 989 NW 2d 885 (2022), lv den 513 Mich 964 (2024), the court considered the propriety of admitting a video of Defendant that showed him in jail garb and determined that no authority supported the argument that this undermined his presumption of innocence. *Serges*, ___ Mich App at ___; slip op at 20. The Court of Appeals correctly determined that this case was similar to *Horton*, but actually involved even fewer concerning factors. *Id*. Thus, Defendant in this case was not entitled to relief. Defendant's Application for Leave to Appeal should be denied.

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V. The jury selection procedure for Defendant's trial did not deny his constitutional right to a trial by a fair cross-section of the community.

A. *Issue Preservation*

Defendant filed a Motion to Adjourn the trial due to COVID-19 and asserted jury selection would be unfair because potential jurors would be seated in separate courtrooms and listening to voir dire in the main courtroom via closed circuit television, allegedly making it difficult for the attorney to evaluate the jurors. See Defendant's Appendix T. Defense counsel did not, however, argue that the jury selection process denied him the chance to seat a jury that was a fair cross-section of the community, so the issue is unpreserved.

B. *Standard of Review*

Generally, this Court reviews a claim of systematic exclusion de novo. *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000). However, because the argument advanced here was not raised before the trial court, it is again not preserved for this Court's review and so Defendant is entitled to relief only upon showing of plain error affecting his substantial rights. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004) (citations omitted).

C. *Discussion*

The COVID-19 protocol used by the court for jury selection did not deprive Defendant of his constitutional rights to a jury comprised of a fair cross-section of the community. A fair-cross-section claim under the Sixth Amendment requires a defendant to make a prima facie case as set forth by the United States Supreme Court in *Duren v Missouri*. *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed2d 579 (1979). Pursuant to *Duren*, Defendant must show: (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic

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exclusion of the group in the jury-selection process. *Id*. at 364. Here, Defendant claims that the way voir dire was conducted during the COVID-19 pandemic led to the unconstitutional systematic exclusion of distinctive groups from the jury pool.

Prior to the beginning of trial, the 7th Judicial Circuit Court of Genesee County complied with all the safety protocols necessary to begin trial based on executive orders from the State of Michigan, the Michigan Supreme Court, and the State Court Administrative Office. 8/14/20 Tr, 9. The Court also had the approval of the Genesee County Health Department director to begin trial based on all the protocols put into place. 9/15/20 Tr, 15. At the start of voir dire, the trial judge noted the jury coordinator should have additionally screened the pool for people who had someone ill at home, cared for someone, or who was homeschooling children for efficiency. *Id*. at 17.

Defendant has failed to meet his burden pursuant to *Duren*. First, Defendant has not met the burden of proving the group being excluded is a "distinctive group" in the community.[20] The Sixth Amendment's fair cross-section requirement does not guarantee that any particular jury actually chosen must mirror the community nor does it require a county to counteract the influence of social and economic factors on juror participation. *People v Smith*, 463 Mich 199; 615 NW2d 1 (2000); See also *People v Bryant*, 491 Mich 575; 822 NW2d 124 (2012). A county is not required to account for demographic changes in its jury selection process; all that is required is that jury wheels, pools of names, panels, or venires from which juries are drawn cannot systematically exclude distinctive groups. *Id*. COVID-19 is a worldwide pandemic, and the virus can infect anyone and does not discriminate. Although certain people are more vulnerable to the disease, they are not a distinctive group. Two people were excused from the jury pool because they were

[20] The US Supreme Court has not defined "distinctive group", but most courts have incorporated Equal Protection considerations into the "distinctive group" prong, limiting the scope to race, ethnicity, gender, and other "immutable characteristics." With rare exceptions, characteristics that can change (age, education, socioeconomic status, political affiliation) are not recognized as distinctive groups.

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uncomfortable and one person was excused because it would cause him financial hardship to serve on the jury since his wife was working less hours, presumably due to the pandemic. 9/15/20 Tr, 36–37; 94; 127. Others who were taking care of children or family members, were ill, had pre-existing health conditions, or were over a certain age were mostly excused in advance *if they were uncomfortable*. The above reasons were not an automatic opt-out – people who met the criteria to be excused in advance could still report for jury duty. People of every age, sex, and ethnicity contracted and died of COVID-19 and every cross-section of society was impacted by the pandemic.[21] Financial hardship, homeschooling children, taking care of aging or sick family members, or being ill are usually considered valid reasons for asking to be excused from jury duty. The people who were excluded from the jury pool were not a "distinctive group" because they were too diffuse – there was no discrimination based on race, color, religion, national origin, or sex. Although Defendant makes an argument that political affiliation, elderly, poor citizens, and caregivers are distinctive groups, he cites either no cases or cases that are non-binding on this Court to make these assertions. It is also telling that Defendant has resorted to non-binding authority to make his case – there is simply no case law in Michigan stating that political affiliation, elderly, poor citizens, or caregivers are distinctive groups. Furthermore, potential jurors of a certain political affiliation, elderly, poor citizens, and caregivers were not systematically excluded in this case. Thus, Defendant has failed to meet the burden of prong one of *Duren*.

Second, Defendant has not met his burden that the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of such persons in the community. The United States Supreme Court has not identified a method or test that courts must use to measure whether the representation of distinct groups is fair and reasonable.

[21] Centers for Disease Control and Prevention, COVID Data Tracker, available at https://covid.cdc.gov/covid-data-tracker/#demographicsovertime (accessed August 8, 2024).

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People v Smith, 463 Mich 199, 203; 615 NW2d 1 (2000). Considering the United States Supreme Court's decision not to mandate what method or methods should be used, and given the various tests used by lower federal courts, Michigan's Supreme Court concluded in *Smith* that "no individual method should be used exclusive of the others," and adopted "a case-by-case approach." *Id*. at 204. "Provided that the parties proffer sufficient evidence, courts should consider the results of all the tests in determining whether representation was fair and reasonable." *Id*. When applying the relevant statistical tests, *a court must examine the composition of jury pools and venires over time* using the most reliable data available to determine whether representation is fair and reasonable. *Bryant*, 491 Mich at 599–600 (emphasis added). The use of an inadequate sample from only defendant's venire may cause the tests evaluating the degree of any underrepresentation to produce skewed and exaggerated results. *Id*. at 601–602. When only a particular defendant's venire is examined, the results may look more or less significant depending on the actual composition of the individual venire compared to the broader picture. But it is only by considering the broader picture that a court can evaluate whether the representation of a distinct group was fair and reasonable. *Id*. at FN 64. Defendant asserts that his jury venire was likely not fair and reasonable. Defendant, however, has presented no data or statistics regarding whether representation was fair and reasonable in relation to the number of such persons in the community. Defendant's speculation is not enough to satisfy the second prong necessary to establish a prima facie violation. Defendant also only examines his venire, *not jury pools and venires over time*, so he has also failed to meet the burden of prong two of *Duren*.

Finally, Defendant has not shown that the alleged underrepresentation was due to systematic exclusion of the group in the jury-selection process. The people who were excused in advance were not systematically excluded – they were self-selected. Anyone who was summoned

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was welcome to report for jury duty. Defendant also complains that his trial counsel did not have an opportunity to participate in the exemption process and no "articulated standards" were used for the exemptions. In the context of jury selection, prospective jurors can be disqualified from service by statute if they are unable to read or understand English, have a mental or physical disability preventing their service, older than seventy years of age, a nursing mother without input from defense counsel. MCL 600.1307a. The process employed here was substantially the same as that followed before the COVID-19 pandemic. Minor adjustments included a COVID-19-specific questionnaire — asking prospective jurors whether they had tested positive for or been exposed to COVID-19 and whether they had concerns relating to COVID-19-related precautions, among other similar questions. Routine administrative procedures relating to jury selection are not part of the true jury empanelment process in which parties and counsel have a right to participate. Additionally, the criteria used to excuse the jurors was explicitly listed in the supplemental questionnaire.

Furthermore, while a court here and there across the country may have adjourned cases for concerns about whether a jury venire would be drawn from a fair cross-section of the community, Defendant has cited no cases where a count has found a violation of a defendant's cross-section right due to holding a jury trial during the COVID-19 pandemic. Also, courts could not delay criminal trials for the duration of the COVID-19 pandemic. Defendants also have a constitutional right to speedy trial and, while Defendant here complains about his trial with COVID-19 protocols, other Defendants complained that their speedy trial rights have been violated due to the pause in jury trials caused by the pandemic. Thus, practically, the trial court was in a situation where multiple constitutional rights were at stake and a balance needed to be struck so a trial was held with precautions in place for everyone's protection. As the Court of Appeals noted, Defendant

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cannot prove the second prong of *Duren* without an evidentiary hearing, and that evidentiary hearing would produce no information since Genesee County's jury board does not keep records regarding the racial composition of venires. *Serges*, ___ Mich App at ___; slip op at 22. Defendant still cannot The Court of Appeals did not err and Defendant's Application for Leave to Appeal should be denied.

VI. Requiring Defendant to either wear a mask or sit six feet away from his attorney did not deny him his right to a fair trial or infringe on his state or federal rights to confront the witnesses against him.

A. *Issue Preservation*

Defendant's trial counsel raised this issue in a motion to adjourn the trial that was denied. See Defendant's Appendix T. The issue is therefore preserved.

B. *Standard of Review*

Whether a defendant was denied his right to confront a witness is a constitutional question that this Court reviews de novo. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018). When a court reviews a question de novo, it reviews the legal issue independently without deference to the lower court. *Id*. To the extent this Court finds that constitutional error has occurred, "[w]e review preserved issues of constitutional error to determine whether they are harmless beyond a reasonable doubt." *People v Dendel (On Second Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010). "A constitutional error is harmless if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id*. at 475 (quotation marks and citations omitted).

C. *Discussion*

The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. US Const,

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Am VI; Const 1963, art 1, § 20. The United States Supreme Court has recognized that a primary objective of the Confrontation Clause is to compel witnesses to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v United States*, 156 US 237, 242–243; 15 S Ct 337, 39 L Ed 409 (1895). The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *People v Green*, 322 Mich App 676, 686; 913 NW2d 385 (2018) (quotations and citations omitted). The Confrontation Clause reflects a preference for face-to-face confrontation, but that preference must occasionally give way to considerations of public policy and the necessities of the case. *Maryland v Craig*, 497 US 836, 849; 110 S Ct 3157, 111 L Ed 2d 666 (1990). "A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id*. at 850 (citations omitted).[22]

First, it is unclear from the case law whether defendants wearing face masks over their faces means they have not "confronted" their witnesses face-to-face, especially when this Defendant was able to see the witnesses' faces. Second, everyone in the courtroom had to wear masks at certain points in time, including counsel when they were not arguing and so there was no prejudice to Defendant. Third, the trial court said in its preliminary instructions to the jury pool that the court had to be compliant with the guidelines of the local health department, Governor,

[22] *People v Jemison*, held that *Crawford v Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004) did not overrule *Maryland v Craig*, 497 US 836, 110 S Ct 3157, 111 L Ed 2d 666 (1990) but "took out its legs" to include more of a bright line rule that face-to-face cross-examination for testimonial evidence is required unless a witness is unavailable and the defendant had a prior opportunity for cross-examination. *People v Jemison*, 505 Mich 352, 356; 952 NW2d 394 (2020).

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and Center for Disease Control and Prevention and politics did not matter regarding wearing a mask because everyone was there to conduct a trial. 9/15/20 Tr, 17. So, any jury resentment regarding masks, for any reason, would have been directed at the local health department, Governor, Center for Disease Control and Prevention or the trial court, not Defendant.

In this case, the witnesses did not wear face masks while they were testifying but Defendant did so he could be within six feet of his attorney. The primary objective of the Confrontation Clause was met because the witnesses' faces were uncovered, and Defendant and the jurors were able to judge their demeanor and credibility. Additionally, the Governor of the State of Michigan, the Michigan Supreme Court, and the Genesee County 7th Circuit Court all had orders that required people to wear masks or maintain a social distance of at least six feet while over a certain number of people indoors. Surely, Defendant's Confrontation Clause right was not infringed where the witnesses were unmasked and the reliability of their testimony was otherwise assured since they were put under oath, Defendant had the full opportunity for contemporaneous cross-examination, and the judge, jury, and Defendant were able to view the witness's demeanor while he or she testified. See *Maryland v Craig*, 497 US at 851. Defendant's reliance on *Coy v Iowa*, 487 US 1012; 108 S Ct 2798; 101 L Ed 2d 857 (1988) is misplaced since that case is clearly distinguishable. Even if it was considered an error for Defendant to be required to wear a face mask, it was an error that was harmless beyond a reasonable doubt that a rational jury would have found the Defendant guilty absent the error. There is no indication in the record that Defendant was prejudiced by being required to follow reasonable health mandates.

Defendant does not cite any caselaw where a court has found a violation of a defendant's right to confrontation by being required to wear a mask during the pandemic. Indeed, courts across

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the country have found the opposite. *Serges*, ___ Mich App at ___; slip op at 26. The Court of Appeals did not err. Defendant's Application for Leave to Appeal should be denied.

VII. Conducting a jury trial during covid-19 did not create a risk of a coerced jury verdict.

A. *Issue Preservation*

Defendant's trial counsel raised this issue in a motion to adjourn the trial that was denied. See Defendant's Appendix T. The issue is therefore preserved.

B. *Standard of Review*

Claims of coerced verdicts are reviewed case by case and all the facts and circumstances must be considered. *People v Vettese*, 195 Mich. App. 235, 244; 489 NW2d 514 (1992) (citation omitted).

C. *Discussion*

The 7th Judicial Circuit Court of Genesee County did not coerce Defendant's verdict by conducting a trial pursuant to the required health and safety protocols required by the local health department, Michigan Supreme Court, and Center for Disease Control and Prevention. Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered. *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992) (citation omitted). Generally, accusations of verdict coercion are regarding how the trial court judge instructs or communicates with the jury. See generally, *Id*. and *People v Malone*, 180 Mich App 347; 447 NW2d 157 (1989).

In this case, Defendant does not claim that any instructions given to the jury by the trial court were coercive. Defendant instead seems to assert that the pandemic created an atmosphere where jurors were concerned about their health and safety and so rushed to judgment. The jury's verdict, however, was not coerced.

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The jury in this case, as in every case, swore an oath that it would render a true verdict based only on the evidence introduced and in accordance with the instructions of the court. 9/17/20 Tr, 22. Additionally, as discussed above, the jury pool consisted of the people who were comfortable trying a case during the pandemic since they were given the opportunity to excuse themselves from the jury pool from the very beginning if they were opposed to sitting as a juror. The judge also went over with the jury all the safety protocols and procedures the court was using to protect everyone during the trial. 9/15/20 Tr, 16–17; 174. Each juror was provided with gloves, sterilizing alcohol wipes, tissues, and hand sanitizer. 9/17/20 Tr, 22.

Defendant's assertions that the verdict was coerced because the jury "lacked the accumulated wisdom and experience of a diverse cross-section; because the jury felt prejudice toward Mr. Serges because he was wearing a mask; because the jury was too distracted by the virus and safety concerns to notice the holes in the prosecution's case; because the jury resented the [sic] Mr. Serges' insistence on a trial; or because the last hold-out juror surrendered her honest convictions to escape the high risk of infection" are unsupported in the record and speculative. Defendant's Application for Leave to Appeal, p 69. Defendant's trial, even though it was conducted during the pandemic, was safe and fair. Defendant is not entitled to a new trial because there are no grounds that would support appellate reversal of the conviction and the verdict has not resulted in a miscarriage of justice. The Court of Appeals did not err when it concluded that the record did not support Defendant's assertions and that his arguments rested on speculation. *Serges*, ___ Mich App at ___; slip op at 26. Defendant's Application for Leave to Appeal should be denied.

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RELIEF

WHEREFORE, the People of the State of Michigan, through David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Katie R. Jory, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

/s/ Katie R. Jory
Katie R. Jory (P78698)
Assistant Prosecuting Attorney

DATED: August 12, 2024

WORD COUNT CERTIFICATION

I hereby certify that this document contains 15,403 words, including any footnotes, but excluding the cover page, table of contents, index of authorities, statement of jurisdiction, counter-statement of questions presented, and this word count certification. The body of the document is one-inch margins, 12-point Times New Roman font, and set to double spaced lining, except for quotations and footnotes.

/s/ Katie R. Jory
Katie R. Jory (P78698)
Assistant Prosecuting Attorney