

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 164307
Court of Appeals No. 353548
Lower Court No. 2019-002838-FH

V

MARQUIS DEANGELO NELSON,
Defendant-Appellant,

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Index of Authorities..... iii
 Counter-Statement of Jurisdiction v
 Counter-Statement of Questions vi
 Counter-Statement of Facts..... 1

Argument:

I. The Court of Appeals did not err in determining that plain error did not occur during the sergeant’s testimony and the court properly analyzed the officer’s testimony for prejudice pursuant to *People v Carines*, 460 Mich 750 (1999)..... 15

A. Sergeant Roth’s testimony focused on what he perceived and did not result in plain error..... 18

B. The Court of Appeals correctly analyzed the error in this case for prejudice under the *Carines* standard..... 21

II. The Court of Appeals correctly applied the prejudice prong of the test for ineffective assistance of counsel pursuant to *Strickland v Washington*, 466 US 668, 694-695 (1984) 28

Request for Relief..... 35

Certificate of Compliance..... 36

INDEX OF AUTHORITIES

CASES:	PAGES:
<i>Cullen v Pinholster</i> , 563 US 170; 131 S Ct 1388; 179 L Ed 2d 557 (2011).....	31
<i>Harrington v Richter</i> , 562 US 86; 178 L Ed 2d 624 (2011).....	31, 34
<i>People v Armstrong</i> , 490 Mich 281; 806 NW2d 676 (2011).....	29, 31
<i>People v Carines</i> , 460 Mich 750; 597 NW2d 130 (1999).....	<i>passim</i>
<i>People v Dobek</i> , 274 Mich App 58; 732 NW2d 546 (2007).....	20, 21
<i>People v Grant</i> , 445 Mich 535; 520 NW2d 123 (1994).....	15, 16
<i>People v LeBlanc</i> , 465 Mich 575; 640 NW2d 246 (2002).....	28
<i>People v Murray</i> , 234 Mich App 46; 593 NW2d 690 (1999)	18, 19
<i>People v Nelson</i> , unpublished per curiam opinion of the Court of Appeals, issued February 24, 2022 (Docket No. 353548).....	<i>passim</i>
<i>People v Pickens</i> , 446 Mich 298; 521 NW2d 797 (1994)	29, 31
<i>People v Randolph</i> , 502 Mich 1; 917 NW2d 249 (2018)	27, 33, 34
<i>People v Thorpe</i> , 504 Mich 230; 934 NW2d 693 (2019).....	15, 17, 27
<i>Strickland v Washington</i> , 466 US 668 (1984)	<i>passim</i>
<i>United States v Olano</i> , 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993)	16, 17, 27

STATUTES:	PAGES:
MCL 333.7401(2)(a)(iv)	32

COURT RULES:	PAGES:
MCR 7.312(E)	v
MRE 701	19, 20

INDEX OF AUTHORITIES - Continued

COURT RULES:	PAGES:
MRE 701(a).....	20
MRE 701(b).....	20
MRE 702	4

COUNTER-STATEMENT OF JURISDICTION

On December 9, 2022, the Court ordered oral argument on Defendant-Appellant's application for leave to appeal the February 24, 2022 decision of the Court of Appeals, directing the parties to file briefs in accordance with MCR 7.312(E). Defendant-Appellant filed a supplemental brief on May 3, 2023 simultaneously with a motion to extend time to file his supplemental brief. Plaintiff-Appellee filed a motion to extend time to file its supplemental brief which this Court granted, extending the time for filing Plaintiff-Appellee's brief until on or before June 14, 2023. 5/10/23 Order, p 1.

COUNTER-STATEMENT OF QUESTIONS

- I. Whether the Court of Appeals erred in determining that plain error did not occur during the sergeant's testimony and the court properly analyzed the officer's testimony for prejudice pursuant to *People v Carines*, 460 Mich 750 (1999)?

The Court of Appeals answered, "No."

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

- II. Whether the Court of Appeals correctly applied the prejudice prong of the test for ineffective assistance of counsel pursuant to *Strickland v Washington*, 466 US 668, 694-695 (1984)?

The Court of Appeals answered, "Yes."

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

COUNTER-STATEMENT OF FACTS

Sergeant Kurt Roth had been a police officer for many years and said that during that time, he had experience with narcotics investigations, including hand-to-hand transfers. Sergeant Roth's experience came from on-the-job training. 113a-114a. Sergeant Roth affirmed he was familiar with the term counter-surveillance as a term used in his line of work and that there were different types of counter-surveillance. 115a. Sergeant Roth testified that, "there's lots of different types of counter-surveillance. When you're on your surveillance point you want to make sure that nobody is watching you . . . [w]hen we're following a vehicle . . . they will typically do different things in their vehicle, driving down one way streets or cul-de-sacs . . ." 115a.

On October 30, 2018, Sergeant Roth was engaged in surveillance of a residence after receiving information about narcotics activity in the area. 115a-116a. Other officers involved in the surveillance included: Detective Huggett, Sergeant Bentley, and Officer Ziegler. 118a. Sergeant Roth said that they saw Defendant-Appellant Marquis Deangelo Nelson ("Nelson") come out the door that they were watching. 117a.

Sergeant Roth recalled they had information about the vehicle Nelson may be driving – a gray Hyundai Tucson with Illinois registration. Around 3:15 p.m., Sergeant Roth recalled seeing this vehicle pass by the residence, and saw it again later. Other members of the surveillance team followed the vehicle and it pulled into an apartment complex, Freedom Lane Apartment. 119a-120a. There are two

entrances to the apartment complex; Sergeant Roth remained on Carl Avenue watching the exits. After a few minutes, the vehicle came out of the apartment complex, out the exit Sergeant Roth watched, passing him, and went south on Carl Avenue. 120a-121a. Sergeant Roth was in the back of a surveillance van so he communicated to other officers while he moved to the front seat and waited for traffic to clear. 121a-122a. Sergeant Roth regained sight of the vehicle five to ten minutes later in the Urbandale area/neighborhood and saw it proceed to an address on Kellogg Street. 122a. He saw the vehicle in the driveway at this address and watched as it left a minute or two after which it went to another apartment complex across the street, the Bent Tree Apartment Complex. 123a-124a. The officers did not follow the vehicle into the apartment complex to avoid being detected. 124a. A few minutes later, the vehicle exited the apartment complex and went down the street that Sergeant Roth was parked on (Shellenberger Avenue) and towards him but he still could not see who was in the gray Hyundai. 125a.

The Hyundai parked two or three car-lengths from where Sergeant Roth was parked. A white Dodge Dakota pickup truck pulled up directly behind the Hyundai. 126a. Sergeant Roth saw a white male exit the pickup truck on the driver's side and walk to where the driver of the Hyundai had the window of his vehicle rolled down. Sergeant Roth said there was a "quick exchange with some hand movements, like he gave him something, something was given back, they met for maybe five or ten seconds and then the meeting was done and the person got back into their white Dodge Dakota and they both left after that." 127a. Sergeant Roth could not see who

was seated in the Hyundai at this time but said he knew, based on other surveillance vehicles who could see and called out who was driving the vehicle. 128a. Sergeant Roth said that both vehicles went to a “cut out” where they both turned around, and back on to Shellenberger Avenue. The Dodge Dakota left, going onto Bedford while the Tucson parked between where Sergeant Roth and Officer Ziegler were parked. 127a.

Sergeant Roth confirmed that he was not able to see what was in their hands when he saw the white male approach and hand something to the Hyundai driver. Sergeant Roth described the hand motions that he saw as “Just like you’re giving somebody something and they’re giving you something back. So, it’s that kind of hand motion.” 128a. Asked, based on his years of experience and training in narcotics investigations what his indication was as to what was happening, Sergeant Roth answered, “[i]t’s a narcotics buy, it’s a hand to hand.” 128a. Nelson was subsequently pulled over by other officers. 129a-130a.

On cross-examination, Sergeant Roth stated that the first time he saw the Hyundai was when it was parked on LaVista and that other officers followed the vehicle. 131a. Sergeant Roth confirmed that no one followed the Hyundai into the apartment complex because they did not want to be spotted and he did not know what happened there. 133a. Counsel confirmed that Sergeant Roth could not state what happened inside the residence after the Hyundai pulled into its driveway; nor could he state what happened at the apartment complex. 135a. When the Hyundai parked on Shellenberger Avenue, it was on the opposite side of the street, across

from where Sergeant Roth parked. 136a. After confirming that Sergeant Roth saw the white male get out of the Dodge Dakota, counsel asked the sergeant whether he actually saw what happened inside the vehicle or whether he was assuming what had happened; whether he was sure that it was an “exchange,” or he was calling it that. 137a. Sergeant Roth answered that he was calling it an exchange. 137a.

Sergeant Roth confirmed that he saw the white male who exited the Dodge Dakota and that it appeared he spoke to the driver of the Hyundai, but he also agreed it was possible that the man spoke to someone else inside the Hyundai. 137a-138a.

Officer Mikael Ziegler testified that he has specialized training in the field of narcotics, including narcotics sales and trafficking. 140a. Through training he was educated on how drug traffickers may deliver and sell narcotics and their methods of doing so, including locally, which he explained. He confirmed he was also trained on counter-surveillance techniques used by drug traffickers and provided examples. 141a-142a. Officer Ziegler testified to the many narcotics investigations he had been involved with, including as an undercover officer. 144a-145a. The prosecution offered Officer Ziegler as a drug-trafficking expert pursuant to MRE 702. There was no objection and the trial court instructed the jury that:

[S]ometimes experts are people who have more education in a certain area and sometimes they are people who have more experience in a certain area and they're allowed to give their opinions because they can help you [as] jurors understand things better than simply listening to the testimony, that's why different sides will [present] experts, [t]hey're asking him to be an expert in drug trafficking because of his experience and education in that particular area. Most people can't give opinions when they testify in Court for obvious reasons, we don't want to hear opinions, we want to hear facts. Experts are different, they can give their opinions to help you. And so, I'm

[going to] declare him an expert in drug trafficking so he can help you understand that particular aspect of the case[.]

145a-146a.

On October 30, 2018, Officer Ziegler, working undercover, was assigned a surveillance position to assist in an investigation involving Nelson. 146a-147a. Officer Ziegler was alerted that Nelson was driving a gray Hyundai Tucson with its license plate information and he saw a vehicle matching the description drive by him on LaVista; he followed it. 149a. As he followed, Officer Ziegler identified Nelson as the Hyundai's driver when Nelson pulled into a driveway, backed out, then crossed paths with Officer Ziegler. 151a.

Nelson stopped at 42 Ridge Street where Officer Ziegler saw Nelson and a black male who was in the front passenger seat, exit the vehicle, and was there for under three minutes, before proceeding to the Freedom Lane Apartments area. 152a-153a. Officer Ziegler said he and Sergeant Roth remained outside the apartment complex to avoid being detected. Less than five minutes later, Nelson, still driving, headed back to 42 Ridge Street where Officer Ziegler saw Nelson go in and out of the house, and leave in less than three minutes. 153a-154a. Officer Ziegler testified that in his experience, it was not unusual for frequent deliveries to take place at a user's residence and having investigated this residence in an undercover capacity, it would not be unusual there. 154a.

Officer Ziegler followed Nelson towards the north-side of town to the intersection of Angel and Dickman Roads. But he lost sight of Nelson's vehicle for a couple of minutes after Officer Ziegler said that Nelson "rammed the train track",

avoiding the crossing arms that were falling, disregarding the train crossing, which Officer Ziegler stated was another counter-surveillance technique because – to avoid being hit by the train – Officer Ziegler had to drive around and catch up to Nelson. 155a. Officer Ziegler was able to catch up to Nelson at the next location, 23 Kellogg Street, another residence Officer Ziegler was familiar with. 155a-156a. Nelson's vehicle pulled into the driveway and was there for under a minute before it left again. 156a. Officer Ziegler testified, that in his experience, either this was a counter-surveillance technique to determine whether they were being followed, or a narcotics transaction took place. 156a. Although he was not able to see whether Nelson exited the vehicle at this location, Officer Ziegler confirmed that he saw Nelson driving the vehicle when it backed out of the driveway. 156a.

Nelson drove a few blocks to the Bent Tree Apartments, remaining there for about ten minutes. 156a-157a. Officer Ziegler parked on Shellenberger Avenue so that he could observe the one way in and out of the apartment complex. 157a. Officer Ziegler observed Nelson exit the apartment complex, driving the Hyundai, and park on Shellenberger Avenue, about forty yards away from him. 157a. Less than a minute later, a Dodge Dakota parked directly behind Nelson's vehicle. The driver of the Dodge Dakota exited his truck and walked up to the driver's-side of Nelson's vehicle, where he sat in the driver's seat. 158a. At that point, Officer Ziegler said he observed a hand-to-hand transaction take place between the white male that got out of the Dodge Dakota and Mr. Nelson. 159a.

Officer Ziegler described what he had seen: the man reaching into his pocket, handing an item into Nelson's vehicle, then returning his hand out after exchanging something with Nelson, and putting his hand back into his pocket. 160a. Asked, in his opinion, what happened, Officer Ziegler stated that the Dakota driver reached into his pocket to retrieve money which he handed to Nelson, who handed the man narcotics which he placed in his pocket. 160a-161a. The two men drove in different directions and Officer Ziegler followed Nelson. 161a.

Asked whether he had seen anyone else approach Nelson's vehicle before he departed, Officer Ziegler recalled seeing a person he recognized, talking on his phone and "pointing out the police cars." 161a. Officer Ziegler recalled seeing this man exit the apartment complex and stood at the nearby intersection, acting as a lookout, which he affirmed was based on his expertise in drug trafficking, after Nelson had exited the apartment complex and parked on Shellenberger Avenue. 162a-163a. Specifically, Officer Ziegler recalled the man looking up and down the road, talking on a phone, and pointing to a marked patrol vehicle. 163a. After going to the driver's window of Nelson's vehicle, the man walked back to the apartment complex. 164a.

Following Nelson's vehicle when it left Shellenberger Avenue, Officer Ziegler said they went around the block and drove by where other officers had the Dodge Dakota pulled over. 164a. Officer Ziegler confirmed that it was the same man, and same vehicle that interacted with Nelson moments before. 164a. Both Nelson's vehicle and the Dodge Dakota were kept under constant surveillance after they

separated on Shellenberger Avenue. 165a. Officer Ziegler continued to follow Nelson's vehicle, confirming he saw Nelson in the driver's seat and affirmed he observed further counter-surveillance driving. Based on all that he observed, Officer Ziegler stated it was his opinion that Nelson made several stops that day to deal narcotics. 167a.

On cross-examination, Officer Ziegler said he could see that there were two people in the car he observed. Counsel recalled the officer's testimony about Nelson pulling off LaVista, into a driveway, and whether it possible that Nelson missed a turn, been distracted, and pulled into the driveway to turn around. The officer agreed this was possible 168a. Counsel asked Officer Ziegler to confirm that, at 42 Ridge Street, when Nelson and another man went inside for a few minutes, that they could have been looking for someone. The officer agreed that he could have. 168a-169a. Officer Ziegler also agreed that they could have returned because the person they had been looking for was there. 169a.

Counsel then asked Officer Ziegler, "[b]ecause if they were drug trafficking they would typically, based on your testimony, make those same deals at the same time to get rid of drugs before they catch up with officers or officers catch up with them?" 169a. Officer Ziegler answered affirmatively, stating further that there were times that one went back to a house again, perhaps for a "different customer" who may have arrived. 169a. Counsel repeated that Officer Ziegler testified that "[he'd] said that they try to get rid of narcotics as soon as possible . . ." which the officer affirmed. 169a. Next, counsel asked Officer Ziegler to recall that he testified that

when the car went into the Freedom Lane apartment complex no one followed him and that Nelson stayed less than five minutes and that Sergeant Roth said it was between five and fifteen minutes, following with asking Officer Ziegler, "So, you just have different perceptions of what actually happened that day?" 169a-170a.

Referring to the time when the parties were parked on Shellenberger Avenue, after establishing the distance (approx. 40 yards) and he was parked on the opposite side of the road, counsel asked Officer Ziegler to describe the white male who arrived, and whether he was "taking up the space of the driver's window . . ." 170a. Officer Ziegler answered in the negative and stated that he was not leaning inside the window, rather, he stuck his hand in the window. 171a. Officer Ziegler affirmed that anything that happened, happened inside the window's threshold. 171a. Counsel asked the officer again to confirm that he was "almost half a football field away and you can see exactly what is happening?" 171a.

A: Correct.

Q: So, what you described is, he put his hand in his pocket, he put it in the vehicle, took it out of the vehicle and put his hand back in his pocket?

A: Correct.

Q: So, you don't know what he did in the vehicle?

A: Well, from my experience, I saw a - -

Q: Nope, I'm saying what did you see?

A: I'm trying to explain from my experience what I saw, so.

Q: Okay.

A: What I saw was a hand to hand drug transaction between [J.B.] and Mr. Nelson. However, I couldn't see a direct item because they don't typically, during a drug deal, hold up a bag of drugs and look at it like this to make sure it is what it is due to its packaging and size they quickly try to put that item into a secure location and get it out of their hands to make sure that that hand to hand transaction isn't seen. So, due to the speed of the transaction and the size of the item, is why I couldn't identify that exact item, but otherwise I knew what I was seeing.

171a-172a.

Counsel followed by asking whether the officer knew whether the men were simply shaking hands. Officer Ziegler testified that he did not believe they were to which counsel stated; "But you can't tell[,]” and recalled the distance. 172a. Counsel also questioned the officer about the identity of the individual he referred to as a lookout. 172a. Officer Ziegler confirmed he described this individual as being on the phone but also said that he could see Nelson and he was not on the phone. Officer Ziegler could see the driver's seat of Nelson's vehicle but not the passenger seat so he could not see whether the passenger was on a phone. 173a. Officer Ziegler agreed that he did not know the nature of the conversation. 174a.

On re-direct, Officer Ziegler affirmed he was cross-examined about several possible innocuous scenarios for Nelson's actions that day. 174a. But, based on training and experience, based on the driving, multiple counter-surveillance measures, frequent stops, hand-to-hand transaction, the lookout pointing at police while talking on a phone and then facing back towards Nelson, "all of those things combined tell me that more than likely and very reasonably that Mr. Nelson was

dealing narcotics on that day.” 174a-175a. On re-cross examination, Officer Ziegler denied it was possible that he was predisposed to seeing certain things. 176a-177a.

The court permitted questions from the jury (after providing counsel time to review them). 177a. In response to these questions, Officer Ziegler stated that he was not involved in a traffic stop or search of the pickup truck. And, in response to the question: “Hand to hand transaction, did you actually see any money in hand[.]” Officer Ziegler denied that he had. 178a. (“No, [I] did not see either of the items that were exchanged.”)

On October 30, 2018, [witness J.B.] was stopped by the police as he drove his Dodge Dakota truck. 182a-183a. The officers told J.B. that they had been watching him. 184a. J.B. affirmed that he purchased drugs shortly before he was pulled over and that it “was literally minutes after, they basically followed me from where I was.” 183a, 185a. J.B. did not know him by name but identified Nelson as the person he purchased narcotics from. 186a-187a. J.B. recounted walking up to the driver’s-side of Nelson’s vehicle. He said not much was said, but he handed Nelson twenty dollars and Nelson handed him narcotics before he walked back to his truck and drove away. 187a-189a.

J.B. testified that he was charged with a felony but pled guilty to a misdemeanor. Thus, he did not have charges pending when he testified and was not promised anything in exchange for his testimony. As he explained, “No . . . what I was charged with [is] now resolved.” 188a-190a. He denied that officers told him to cooperate or he would be charged or that he felt pressured to provide information.

190a-191a, 194a. He also affirmed that he was under subpoena to testify and that his life was affected after his conviction. 196a-197a.

Officer Day was on patrol on October 30, 2018, with Corporal Longon, when he stopped the Dodge on North Bedford Road. J.B. was the only occupant of the truck. 199a-200a. Officer Day recalled locating needles and a bottle cap in the cup holder/arm-rest area of the vehicle and a needle cap on J.B.'s person that Officer Day placed on the front of the patrol car. 202a. After the officers told J.B. he could go, Officer Day saw J.B. walk toward the front of the patrol car, took the needle cap, look inside, which he showed to the officers, stating that it appeared that heroin had made it into the needle cap. 203a. Officer Day looked inside the needle cap where he saw a chunky, brown substance. He placed it in an envelope and transported it to the station where he entered into evidence and it was admitted as an exhibit at trial ("PX 1"). 203a-205a.

Amy Maile, a forensic specialist for the Battle Creek Police Department, analyzes and identifies controlled substances. She was qualified as an expert in controlled substance identification. 226a-229a. Maile analyzed the substance from PX 1 (0.1299 grams) and determined that it contained heroin and Fentanyl. 234a-235a.

Nelson testified that he had October 30, 2018, off from work and he went to the mall for Halloween items. From the mall, Nelson said his girlfriend's brother called, needing a ride. After picking him up, Nelson said he went to 42 Ridge Street to pick up his girlfriend and her daughter where her grandparents lived while he

and his girlfriend lived at 121 LaVista. 241a-243a. Accompanied by his girlfriend, her daughter and brother, Nelson said he next went to the Freedom Lane Apartments where his girlfriend had a hair appointment. Nelson said they only stayed ten or fifteen minutes because the intent had been to see if the hairstylist was ready and that they had to take his girlfriend's daughter to a babysitter. 243a-244a.

Nelson said that the hairstylist was not ready and they went back to 42 Ridge Street to pick up something for the appointment and his girlfriend went inside to use the restroom and get her purse. From there, Nelson said they went to the Bent Tree Apartments across town to drop off his girlfriend's daughter. 245a-246a. Nelson said that he waited in the car while his girlfriend went inside for about ten minutes before she came back out with her daughter who he said could not stay there. 246a. Nelson said that the child was kicking and screaming so he pulled over. 246a-247a.

Nelson said that someone pulled behind him (indicating the man who testified previously) and that he had never seen this man before. Nelson said that the man walked up to his window, and Nelson asked if he needed help with directions he had written on a piece of paper. 247a-248a. Nelson said they told him no, and the man thanked them and left. Nelson said that he turned around in the street when his girlfriend's brother told him to pull over and proceeded to talk to someone who came up to the passenger-side of his car. 248a. Next, Nelson said they went to Jackson Street when the child started kicking and screaming again so he

turned on to 20th Street, pulling into Alro Steel. 249a. After the child calmed down, Nelson said he told the others they were going back to the grandparents' residence because he did not want to drive with the child not in a car seat. 250a. But before reaching Ridge Street, Nelson said he was pulled over. 250a. Nelson said the officers did not tell him why they pulled him over and did not mention anything about drugs. Nelson gave them permission to search but they did not find anything and let him go. 252a-253a.

The jury found Nelson guilty of the delivery of a controlled substance, less than 50 grams. 299a. Additional facts will be set forth as necessary to the arguments below.

ARGUMENT

- I. The Court of Appeals did not err in determining that plain error did not occur during the sergeant's testimony and the court properly analyzed the officer's testimony for prejudice pursuant to *People v Carines*, 460 Mich 750 (1999).

Standard of Review:

An unpreserved nonconstitutional error is reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Thorpe*, 504 Mich 230, 252-253; 934 NW2d 693 (2019).

Discussion:

This Court has directed the parties to address: “whether the Court of Appeals correctly held that only Officer Ziegler exceeded the scope of permissible drug profile testimony, and that Sergeant Kurt Roth did not;” 12/9/22 Order, p 1. This Court has also directed the parties to address: “whether the Court of Appeals correctly applied the prejudice prongs of the analys[is] for plain error, see *People v Carines*, 460 Mich 750, 763-764 (1999)[.]” 12/9/22 Order, p 1. The People answer these questions affirmatively: the Court of Appeals correctly held that Sergeant Roth's testimony did not exceed the scope of permissible drug testimony and it correctly applied the prejudice prong in its analysis of this unpreserved nonconstitutional issue, consistently with *Carines*.

This State has “long recognized the importance of preserving issues for appellate review.” *Carines*, 460 Mich at 762. (citing *People v Grant*, 445 Mich 535, 550-551; 520 NW2d 123 (1994)). The policy behind this principle “encourages litigants to seek a fair and accurate trial the first time” because “trial is ‘by far the

best time to address a defendant’s constitutional *and* nonconstitutional rights.” *Carines*, (quoting *Grant*, 445 Mich at 551) (cleaned up). “[R]equiring a contemporaneous objection provides the trial court ‘an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant’s constitutional and nonconstitutional rights.” *Carines*, 460 Mich at 764-765 (quoting *Grant*, 445 Mich, at 551.) Therefore, a right may be forfeited if a party does not timely assert it. *Carines*, 460 Mich at 763 (citing *Olano*, 507 US at 731.)

Here, trial counsel did not object to Officer Ziegler’s or Sergeant Roth’s testimony during trial; therefore, the Court of Appeals examined this issue for plain error affecting the defendant’s substantial rights. See 307a (“Defendant did not object to the admission of the challenged testimony at trial. Accordingly, this evidentiary claim is unpreserved . . . unpreserved evidentiary error is reviewed for plain error.”) (Citations omitted). After noting that this evidentiary issue was unpreserved, the Court of Appeals correctly analyzed the issue for plain error, in accordance with *People v Carines*, 460 Mich at 763. See 307a.

In *Carines*, this Court recalled that it “examined federal authority in adopting an issue forfeiture rule,” and “relied primarily” on *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). *People v Carines*, 460 Mich at 763. Thus, to avoid forfeiture under the plain error rule, the following requirements must be met:

[1] error must have occurred, [2] the error was plain, i.e., clear or obvious, [3] and the plain error affected substantial rights. [*Olano*, 507

US at 731-734]. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Olano*, 507 US at 734].

Carines, 460 Mich at 763 (citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993)). See also *Thorpe*, 504 Mich at 252-253 (citations, footnotes omitted) (“If the constitutional or nonconstitutional error is not preserved, the defendant must show a plain error that affected substantial rights. . .”). “It is the defendant rather than the Government who bears the burden with respect to prejudice.” *Carines*, 460 Mich at 763 (quoting *Olano*, 460 Mich at 763 (footnote omitted)).

If the first three requirements are shown, the appellate court then “must exercise its discretion in deciding whether to reverse.” *Carines*, 460 Mich at 763. “Reversal is warranted only when” either: (1) a “plain, forfeited error resulted in the conviction of an actually innocent defendant” or when (2) “an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Carines*, 460 Mich at 763-764 (quoting *Olano*, 507 US at 736-737) (cleaned up).

Here, the Court of Appeals did not err in concluding that the requisite prejudice was not shown under the appropriate standard with respect to Officer Ziegler’s testimony and that plain error did not occur with respect to Sergeant Roth’s testimony. See 309a (“Considering the other evidence of defendant’s guilt, defendant has failed to show that the error in the admission of Officer Ziegler’s drug profile testimony affected the outcome of the trial. *Carines*, 460 Mich at 763.

Accordingly, reversal is not warranted.”) See also 309a-310a (no plain error in the admission of Sergeant Roth’s testimony).

A. Sergeant Roth’s testimony focused on what he perceived and did not result in plain error.

“Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of case, and the possession of razor blades and lighters in order to package [drugs] for sale.” *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999) (citations omitted). Although it may be difficult at times, “courts must take into consideration the particular circumstances of a case and enable profile testimony that aids the jury in intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers, but stop short of enabling profile testimony that purports to comment directly or substantively on a defendant’s guilt.” *Id.* 56.

Factors the court may take into consideration when determining admissibility include (as set forth by the Court of Appeals below):

“First, the reason given and accepted for the admission of the profile testimony must only be for a proper use—to assist the jury as background or modus operandi explanation.” *Id.* at 56. “Second, the profile, without more, should not normally enable a jury to infer the defendant’s guilt.” *Id.* at 57. “Third, because the focus is primarily on the jury’s use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence. Thus it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony.” *Id.* “Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant’s characteristics to the profile in such a way that guilt is necessarily implied.” *Id.*

307a-308a (quoting *People v Murray*, 234 Mich App 46, 56-57; 593 NW2d 690

(1999). However, here, Sergeant Roth was not qualified as an expert witness at trial and his testimony was admissible as a lay witness pursuant to MRE 701:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 701. The Court of Appeals did not err in concluding "there was no plain error in its admission." 310a.

Viewing Sergeant Roth's testimony "in its entirety," the Court of Appeals determined that the sergeant's testimony "did not amount to an opinion that defendant was guilty merely because he fit the drug profile evidence." 309a. "Roth testified on the basis of his experience with narcotics sales that the movements between defendant and the other man looked like a hand-to-hand narcotics transaction. However, his testimony was clear that he did not actually see what was transferred." 309a.

The Court of Appeals was correct: Sergeant Roth testified based on what he witnessed, testifying in part that: A "[w]hite male gets out of the Dodge Dakota, meets up with [the] gray Tucson, there's a quick exchange with some hand movements, like he gave him something, something was given back . . ." 127a. The prosecutor confirmed that Sergeant Roth was not able to see what was in the individuals' hands; Roth confirmed he was not. 128a. Thus, the Court of Appeals

reasonably concluded that there was an important distinction between Officer Ziegler's testimony and Sergeant Roth's:

Roth focused on his perception of the hand motions defendant and the other man made, whereas Ziegler compared defendant's behavior to the typical behavior of drug dealers and used those comparisons to form conclusions about defendant's actions and, ultimately, his guilt. Because Roth's statement was based on his perception, and assisted the jurors in determining whether defendant was involved in narcotics trafficking, it was admissible under MRE 701, and there was no plain error in its admission.

309a-310a.

The Court of Appeals did not err in concluding that Sergeant Roth's testimony was admissible under MRE 701 as he testified based on what he perceived, and, further, it was "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701(a), (b). Moreover, as the Court of Appeals noted, it had "little doubt that Sergeant Roth would have qualified as an expert on the basis of his experience and training." 309a. Where a witness would have qualified as an expert witness but was not, "any error in failing to qualify that witness as an expert is harmless. 309a (citing *People v Dobek*, 274 Mich App 58, 76-79; 732 NW2d 546 (2007)).

Sergeant Roth had been a police officer for twenty-four years. During that time, he testified that he had conducted or been involved in over a thousand narcotics investigations, estimating between 200 and 300 of these investigations involved transferring drugs from one person to another. 113a-114a. The Court of Appeals did not clearly err in determining that Sergeant Roth's testimony, based on his perceptions, was admissible under MRE 701 and did not constitute plain error.

But, also, based on his experience and training, that Sergeant Roth would have qualified as an expert, and any error in failing to qualify him as an expert was harmless. 309a (citing *People v Dobek*, 274 Mich App 58, 76-79; 732 NW2d 546 (2007)).

B. The Court of Appeals correctly analyzed the error in this case for prejudice under the *Carines* standard.

After setting forth the appropriate standard of review it is apparent from its detailed analysis that the Court of Appeals conducted a thorough review of the record to determine whether, under *Carines*, prejudice had been shown – whether error with Officer Ziegler’s testimony occurred that “affected the outcome of the trial.” 309a (citing *Carines*, 460 Mich at 763.) The Court of Appeals ruled in pertinent part that:

[D]efendant has not shown that the error affected the outcome of the proceedings in light of the strength of the other evidence. Not all of the officers’ testimony was objectionable, and even without Officer Ziegler’s impermissible opinions, the remaining police testimony indicated that defendant drove around town making short stops at a variety of residences, which was consistent with typical drug-dealing behavior, engaged in driving maneuvers consistent with counter-surveillance techniques, and participated in a short exchange with a man on the side of the road where defendant and the man traded items before parting ways.

Additionally, the man who engaged in the short transaction with defendant on the side of the road testified at trial, and his account of the exchange aligned with the officers’ observations. The man confirmed that he purchased heroin from defendant during that transaction, and the substance found in the man’s possession immediately following the exchange tested positive for heroin. Considering the other evidence of defendant’s guilt, defendant has failed to show that the error in the admission of Officer Ziegler’s drug profile testimony affected the outcome of the trial. *Carines*, 460 Mich at 763. Accordingly, reversal is not warranted.

309a. The Court of Appeals did not err in concluding that “defendant has not shown that the error affected the outcome of the proceedings in light of the strength of the other evidence . . .” 309a.

Sergeant Roth testified to his observations on the date in question; that he and other officers were engaged in surveillance of a residence after receiving information about narcotics activity. 115a-116a. Sergeant Roth stated they saw Nelson come out the door of the residence they were watching. 117a. Sergeant Roth recalled they had information about the vehicle Nelson may be driving – a gray Hyundai Tucson with Illinois registration. Around 3:15 p.m., Sergeant Roth saw this vehicle pass by the residence, and saw it again later. Other members of the surveillance team followed the vehicle and it pulled into an apartment complex, Freedom Lane Apartments. 119a-120a. Sergeant Roth remained on Carl Avenue watching the exits. After a few minutes, the vehicle came out of the apartment complex, out the exit Sergeant Roth watched, passing him, and went south on Carl Avenue. 120a-121a.

Sergeant Roth was in the back of a surveillance van so communicated to other officers while he moved to the front seat and waited for traffic to clear. 121a-122a. Sergeant Roth regained sight of the vehicle five to ten minutes later in the Urbandale area/neighborhood and saw it proceed to an address on Kellogg Street. 122a. He saw the vehicle in the driveway at this address and watched as it left a minute or two after which it went to another apartment complex across the street, the Bent Tree Apartment Complex. 123a-124a. A few minutes later, the vehicle

exited the apartment complex and went down the street where Sergeant Roth was parked. 125a.

The Hyundai parked two or three car-lengths from where Sergeant Roth was parked. A white Dodge Dakota pickup truck pulled up directly behind the Hyundai. 126a. Sergeant Roth described watching a white male exit the pickup truck on the driver's side and walk to where the driver of the Hyundai had the window of his vehicle rolled down. Sergeant Roth said there was a "quick exchange with some hand movements, like he gave him something, something was given back, they met for maybe five or ten seconds and then the meeting was done and the person got back into their white Dodge Dakota and they both left after that." 127a. Sergeant Roth could not see who was seated in the Hyundai at this time but said he knew, based on other surveillance vehicles who could see and called out who was driving the vehicle. 128a. Sergeant Roth said that both vehicles went to a "cut out" where they both turned around, and back on to Shellenberger Avenue. The Dodge Dakota left, going onto Bedford while the Tucson parked between where Sergeant Roth and Officer Ziegler were parked. 127a.

On October 30, 2018, [witness J.B.] was stopped by the police as he drove his Dodge Dakota truck. 182a-183a. The officers told J.B. that they had been watching him. 184a. J.B. affirmed that he purchased drugs shortly before he was pulled over and that it "was literally minutes after, they basically followed me from where I was." 183a, 185a. J.B. did not know him by name but identified Nelson as the person he purchased narcotics from. 186a-187a. J.B. recounted walking up to the

driver's-side of Nelson's vehicle. He testified that not much was said, but that he handed Nelson twenty dollars and Nelson handed him narcotics before he walked back to his truck and drove away. 187a-189a.

J.B. testified that he was charged with a felony but pled guilty to a misdemeanor. He did not have charges pending when he testified and was not promised anything in exchange for his testimony. As he explained it, "No . . . what I was charged with [is] now resolved." 188a-190a. He also denied that officers told him to cooperate with them or he would be charged or that he felt pressured to provide information. 190a-191a, 194a. He also affirmed that he was under subpoena to testify. 196a-197a.

Officer Day testified at trial that he was on patrol on October 30, 2018, with Corporal Longon, when he stopped the Dodge on North Bedford Road. J.B. was the only occupant of the truck. 199a-200a. Officer Day recalled locating needles and a bottle cap in the cup holder/arm-rest area of the vehicle and a needle cap on J.B.'s person that Officer Day placed on the front of the patrol car. 202a. After the officers told J.B. he could go, Officer Day saw J.B. walk toward the front of the patrol car, take the needle cap, look inside, which he showed to the officers, stating that it appeared that heroin had made it into the needle cap. 203a. Officer Day looked inside the needle cap where he saw a chunky, brown substance. He placed it in an envelope and transported it to the station where he entered it into evidence and it was admitted as an exhibit at trial ("PX 1"). 203a-205a.

Amy Maile, a forensic specialist for the Battle Creek Police Department, analyzes and identifies controlled substances. She was qualified as an expert in controlled substance identification. 226a-229a. Maile analyzed the substance from PX 1 (0.1299 grams) and determined that it contained heroin and Fentanyl. 234a-235a.

Nelson testified on his own behalf at trial, affirming that he stopped at the Freedom Lane Apartments, the Bent Tree Apartments, and 42 Ridge Street, and that he went back to 42 Ridge Street, but stating that he was with his girlfriend who got out to retrieve her purse. 255a-256a. On cross-examination, the prosecutor confirmed:

Prosecutor: Your girlfriend got out of the car to go in and get her purse, correct?

Nelson: Yes, ma'am.

Prosecutor: But you heard the officers testify that they saw only men getting out of the car at that time. So are the officers lying then?

Nelson: I'm not [going to] say they're lying. I'm just [going to] say that either they miss seen something or they're not saying everything that they seen.

256a.

In his testimony, Officer Ziegler confirmed that he saw Nelson driving his vehicle by him, and when he stopped at 42 Ridge Street he saw: "Mr. Nelson and a black male who was in the front passenger seat . . ." get out of the vehicle. 151a-152a. Officer Ziegler confirmed that Nelson went into the residence and that when he left he was accompanied by the same individual. 152a-153a. From there, he

stated they traveled to the Freedom Lane Apartments, then back to 42 Ridge, in and out of the house, in less than three minutes before leaving again and he confirmed he saw Nelson exit his vehicle again at 42 Ridge. 153a-154a.

After Nelson left 42 Ridge Street the second time, Officer Ziegler recalled that Nelson disregarded a train-crossing sign as the “arms were falling down[.]” 155a. To avoid being hit by an oncoming train, Officer Ziegler testified that he had to go around and catch up to Nelson, who had stopped at 23 Kellogg, pulling in and out of the driveway in less than a minute. 155a-156a. From this address, Nelson proceeded to the Bent Tree Apartments before parking on Shellenberger Avenue, where less than a minute later, the Dodge Dakota parked behind Nelson’s vehicle and Officer Ziegler saw the man walk up to Nelson’s vehicle. 157a-158a.

In short, although the Court of Appeals held that Officer Ziegler’s “testimony went beyond what was permissible when he commented substantively on defendant’s guilt[.]” it did not clearly err in determining that, despite plain error occurring with Officer Ziegler’s testimony, “[n]ot all of the officers’ testimony was objectionable” and “[c]onsidering the other evidence of defendant’s guilt,” *Nelson*, op op 5, including the testimony of the man Nelson sold drugs to and the expert’s testimony confirming the substance collected contained heroin, the Court of Appeals did not err in concluding that “defendant has failed to show that the error in the admission of Officer Ziegler’s drug profile testimony affected the outcome of the trial.” 309a.

Additionally, if all three requirements of the plain error rule have been met, the appellate court must also determine whether reversal is warranted under the circumstances. *Carines*, 460 Mich at 763. Here, it was not. “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.” *Carines*, 460 Mich at 763-764 (cleaned up; quoting *Olano*, 507 US at 736-737.) “The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Thorpe*, 504 Mich at 252-253 (citing *Carines*, at 763-764.)

As discussed above, there was ample evidence admitted at trial to substantiate guilt in this matter for the jury to find Nelson guilty of the delivery of a controlled substance, less than 50 grams, 299a. More-than-sufficient non-objectionable testimony was admitted during trial in support of the jury’s verdict. Reversal was not warranted in this case, as the Court of Appeals reasonably determined, consistently with its appellate discretion and with the proper standard set forth by this Court in *Carines*. See 309a. (“Accordingly, reversal is not warranted.”)

Further, the Court of Appeals considered this evidentiary issue and the ineffective-assistance-of-counsel issue presented in this case independently, in accordance with *People v Randolph*, 502 Mich 1, 22; 917 NW2d 249 (2018) (“Courts must independently analyze each claim, even if the subject of a defendant’s claim

relates to the same error.”) See 307a (II. Improper Testimony); p 6 (III. Ineffective Assistance of Counsel.)

In sum, the Court of Appeals correctly held that although Officer Ziegler exceeded the scope of permissible drug testimony at points during his testimony, Sergeant Roth’s testimony did not result in plain error. Further, the Court of Appeals properly applied the prejudice prong for plain error in *People v Carines*, 460 Mich 750, 763-764 (1999). Reversal was not warranted in this case and the People respectfully request that the Court of Appeals opinion, affirming the jury’s verdict, be affirmed.

ARGUMENT

II. The Court of Appeals correctly applied the prejudice prong of the test for ineffective assistance of counsel pursuant to *Strickland v Washington*, 466 US 668, 694-695 (1984).

Standard of Review:

An issue concerning the effective assistance of counsel presents a mixed question of fact and constitutional law: findings of fact are reviewed for clear error; questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002) (citations omitted).

Discussion:

This Court has directed the parties to address: “whether the Court of Appeals correctly applied the prejudice pron[g] of the analys[is] for . . . ineffective assistance of counsel, see *Strickland v Washington*, 466 US 668, 694-695 (1984). 12/9/22 Order, p 1. The People answer in the affirmative: the Court of Appeals correctly applied the

prejudice prong in its ineffective-assistance-of-counsel analysis, consistent with *Strickland v Washington*, 466 US 668, 694-695.

The Supreme Court “has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.” *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Both the federal constitution and state constitution guarantee a criminal defendant the effective assistance of counsel. *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994). This Court adopted the federal constitutional standard for review of ineffective-assistance-of-counsel claims in *People v Pickens*:

[T]o find that a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.

Pickens, 446 Mich at 302-303.

The first part of the test for ineffectiveness set forth in *Strickland v Washington*, requires a defendant asserting he or she was deprived of the effective assistance of counsel to show that counsel’s performance was constitutionally deficient. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011); *Strickland*, 466 US 668, 687-688; 104 S Ct 2052 (1984). The defendant must show that counsel’s performance “fell below an objective standard of reasonableness.” *Armstrong*, 490 Mich at 290. There is a strong presumption that counsel exercised reasonable strategy. To overcome this presumption, the defendant must show that

counsel's performance was not reasonable, "considering all the circumstances."
Strickland, 466 US at 688.

The Court of Appeals disagreed with the People's argument below that counsel was engaged in trial strategy when she did not object to the officers' testimony and utilized their testimony to support the defense that the officers were mistaken in their observations – that they were predisposed to seeing drug deals. See 310a. For example, in her cross-examination of Sergeant Roth, counsel asked whether he had actually seen what happened; whether he was certain that it was an "exchange" or whether he was calling it one 137a. Sergeant Roth answered that he was calling it an exchange. 137a. Counsel also asked Officer Ziegler to confirm that he was "almost half a football field away and you can see exactly what is happening?" 171a.

A: Correct.

Q: So, what you described is, he put his hand in his pocket, he put it in the vehicle, took it out of the vehicle and put his hand back in his pocket?

A: Correct.

Q: So, you don't know what [he] did in the vehicle?

A: Well, from my experience, I saw a - -

Q: Nope, I'm saying what did you see?

A: I'm trying to explain from my experience what I saw, so.

Q: Okay.

A: What I saw was a hand to hand drug transaction between [J B.] and Mr. Nelson. However, I couldn't see a direct item because

they don't typically, during a drug deal, hold up a bag of drugs and look at it like this to make sure it is what it is due to its packaging and size they quickly try to put that item into a secure location and get it out of their hands to make sure that that hand to hand transaction isn't seen. So, due to the speed of the transaction and the size of the item, is why I couldn't identify that exact item, but otherwise I knew what I was seeing.

171a-172a.

However, in addition to deficient performance, the defendant must show that he or she was prejudiced under the second prong of the *Strickland* analysis and this Court has directed the parties to address whether the Court of Appeals correctly applied the prejudice prong in its analysis of the ineffective-assistance issue.

“To find prejudice, a court must conclude that there is ‘a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.’” *Pickens*, 446 Mich at 312 (quoting *Strickland*, 466 US at 695.) “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cullen v Pinholster*, 563 US 170, 189; 131 S Ct 1388; 179 L Ed 2d 557 (2011) (quoting *Strickland* at 694.) Accord *Armstrong*, 490 Mich at 290. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Pinholster*, 563 US at 189 (quoting *Strickland*, 466 US at 694.) “That requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Id.* (quoting *Harrington v Richter*, 562 US 86, 112; 178 L Ed 2d 624 (2011).)

Here, the Court of Appeals correctly applied the prejudice prong of the *Strickland* test and reasonably concluded that the requisite prejudice had not been shown:

[D]efendant has not shown a reasonable probability that, but for defense counsel's error, the result of the proceeding would have been different. As explained above, other evidence was admitted to support defendant's guilt, including the testimony of the man who purchased heroin from defendant. Moreover, not all of Officer Ziegler's testimony was objectionable. Even without the impermissible testimony, the evidence indicated that defendant drove around town making short stops at a variety of residences, engaged in evasive driving maneuvers, and participated in a short exchange on the side of the road where defendant and the other man traded items before parting ways. The prosecution presented ample evidence for the jury to find defendant guilty of the charged offense, and it is unlikely that an objection to Ziegler's objectionable testimony would have affected the outcome of the trial. Therefore, defendant's ineffective assistance claim must fail.

310a-311a. The Court of Appeals reasonably determined that, "[e]ven without the impermissible testimony," the prosecution presented "ample evidence" supporting the jury's verdict. *Id.*

There was substantial evidence admitted in support of the jury's verdict, finding Nelson guilty of delivering less than 50 grams of heroin, contrary to MCL 333.7401(2)(a)(iv). In short, the officers properly testified to observing Nelson making multiple, quick, stops; driving evasively (including disregarding a train-crossing, resulting in Officer Ziegler driving around to avoid the oncoming train); observing Nelson engaging in a short transaction from his parked vehicle with an individual who testified at trial, confirming that he purchased a controlled substance from Nelson. And "the substance found in the man's possession immediately following the exchange tested positive for heroin." 309a. In light of this

evidence, had counsel objected to the testimony in question, it does not reasonably follow that there was a substantial likelihood of a different result.

Moreover, there is indication in the record that the jury considered counsel's questions and argument (that the officers were predisposed to see drug transactions and questioning what they had observed) which supports that counsel's failure to object did not result in prejudice.

The trial court permitted questions from the jury, 177a, and in response to these questions, Officer Ziegler testified that he was not involved in a traffic stop or search of the pickup truck. In answer to the particular question: "Hand to hand transaction, did you actually see any money in hand[,]" Officer Ziegler denied that he had. 178a. ("No, [I] did not see either of the items that were exchanged.") This indicates that the jurors considered counsel's questions regarding what the witnesses had specifically observed or whether assumptions were being made about what they witnessed. Counsel's failure to object did not prejudice the defense.

It is apparent from the opinion below that the Court of Appeals considered this ineffective-assistance-of-counsel issue independently from the evidentiary issue. See 307a (II. Improper testimony); p 6 (III. Ineffective Assistance of Counsel). In *People v Randolph*, this Court concluded that "[c]ourts must independently analyze each claim, even if the subject of a defendant's [ineffective-assistance] claim relates to the same error." *Randolph*, 502 Mich at 22. The opinion below shows that the court analyzed each issue independently, consistent with this Court's precedent.

In sum, the Court of Appeals correctly applied the analysis for prejudice pursuant to *Strickland v Washington*, 466 US 668, 694-695 (1984), reasonably determining that there was not a substantial likelihood of a different result in this case. *Richter*, 562 US at 112 (“likelihood of a different result must be substantial, not just conceivable.”) The jury’s verdict should be affirmed.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff-Appellee, the People of the State of Michigan, respectfully request that this Honorable Court deny Defendant-Appellant Nelson's request for relief and affirm the decision of the Court of Appeals, affirming Nelson's conviction for delivery of a controlled substance, less than 50 grams.

Respectfully submitted,


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DATED: JUNE 12, 2023

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Certificate of Compliance

I hereby certify that this document complies with MCR 7.212(B) and contains **9,752** countable words. The document is set in Century Schoolbook and the text is in 12-point type.


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