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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Gleicher, C.J., and Markey and Patel, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

vs.

Supreme Court No. 165296

Court of Appeals No. 353052

St. Clair County Circuit Court
No. 19-002078-FH

LANTZ HOWARD WASHINGTON,

Defendant—Appellant.
_____/

APPENDIX
TO
PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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RECEIVED by MSC 9/22/2023 10:02:13 AM

INDEX TO APPENDIX

A. Relevant transcript pages

B. Trial court opinion and order denying Defendant-Appellant's motion to vacate conviction and / or for new trial and request for evidentiary hearing

C. *People v Washington*, ___ Mich App ___; ___ NW2d ___(2022) (Docket No. 353052).

D. *People v Washington*, ___ Mich App ___; ___ NW2d ___(2022)(Docket No. 353052)(MARKEY, J., dissenting).

E. Plaintiff-Appellee's Motion for Reconsideration

F. Order dated January 12, 2023, denying Plaintiff-Appellee's Motion for Reconsideration (Markey, J., would grant motion for reconsideration)

G. Plaintiff-Appellant's Application for Leave to Appeal

H. Defendant-Appellee's Answer in Opposition to Leave to Appeal

I. Michigan Supreme Court Order dated May 24, 2023 granting application for leave to appeal

J. Customs and Border Protection (CBP) report

RECEIVED by MSC 9/22/2023 10:02:13 AM

APPENDIX A

(Relevant transcript pages)

RECEIVED by MSC 9/22/2023 10:02:13 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Case No. K-19-002078-FH

LANTZ HOWARD WASHINGTON,

Defendant.
_____/

MOTION

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE ELWOOD L. BROWN, Judge, 31st Judicial Circuit, at Courtroom 3500, County Building, Port Huron, St. Clair County, Michigan, on Monday, January 27, 2020.

APPEARANCES:

PAUL SODERBERG, ESQ.
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201 McMorran Boulevard, Suite 3300
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On behalf of the People:

PATRICK J. POLITANO, ESQ.
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On behalf of the Defendant:

RECEIVED by MSC 9/22/2023 10:02:13 AM

preparation for this trial, Detective Fantin last week went back and started reviewing those jail recordings, and discovered that the April 27th phone call, the Defendant, from the People's position, makes admissions relevant to this case on that one call to his mother. Once the People received that from Detective Fantin, we immediately copied that full jail call, and sent that to Mr. Politano. Additionally, we provided Mr. Politano with a redacted version of that phone call, which is to the relevant portions of that phone call because there is other non-relevant information that wouldn't be -- could be potentially prejudicial to the jury. People redacted that out. So essentially the People provided Mr. Politano with both sets of calls, which is of the same one, and the redacted one, which is about three minutes in length. As a result of that, again, the People weren't aware of that phone call, did not have that in our possession as part of the discovery process. Once we did get that, we provided it, turned over.

The People move to amend for good cause under 762.40(A)(4) to include a jail/Securus recording call representative for, to get those recordings into evidence as in the recordings kept in the normal course of business. We provided that notice and filed a motion to amend that.

RECEIVED by MSC 9/22/2023 10:02:13 AM

MR. POLITANO: And your Honor, I did respond. Mr. Soderberg is right, he provided this to me Wednesday, the redacted version, which I appreciate. And I was able to go to the jail Thursday to play it for Mr. Washington. Judge, this happened in April, this phone call. This could have been listened to -- the People are in possession of that at the jail the entire time. We've known this case was going to trial since preliminary exam. We certainly knew it as of the 20th or the 13th of January when we had the final pretrial in this case. This case was going to trial. And I don't think there is good cause for information that could have been discovered in April, May, June, July, August, September, October, November, December to four days before trial have me be able to go and play this for Mr. Washington. So we would ask that the People's motion be denied, your Honor.

MR. SODERBERG: Your Honor, there is no undue prejudice to the Defendant. It was a three minute phone call. It's a phone call that he made. While the calls are recorded, those are not calls that are part of any standard investigation. Those aren't in the custody of the, of the detective that's interviewing -- or reviewing the case. Frankly, they are in the custody of the Securus recording system. So this witness would be a representative of that Securus recording system who works

violent felon. In this case, if the Defendant doesn't stipulate to his prior sets of convictions, which the People have certificate records on, then it's the People's position that we would be able to present that those two certified convictions with the name of the convictions to the jury at a trial in part of its proofs. However, and I think the law is pretty clear, if the Defendant stipulates to those convictions, then the instructions that would be given to the jury would be specifically that the People have to prove up the violent felon, that he was convicted of a violent felon, the Defendant stipulates to being a violent felon, not being able to possess body armor. And that would be the only thing that we would be able to say to the jury. Of course, the People with submit the certified convictions outside the presence of the jury for the record. And if that's the case, the People will, will design its instructions related to the stipulation. Otherwise, if it's not stipulated to, we would have to do the other instructions.

MR. POLITANO: It's so stipulated to, your Honor. Mr. Washington and I have discussed this matter and obviously we would not like to have those read to the jury so we would stipulate to those so the jury instructions can be created accordingly.

THE COURT: Okay. Given that stipulation then,

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

it will be -- the jury then would, of course, be instructed that Mr. Washington is, has been convicted of a violent felony and is a felon. So -- and the question for them remains that whether or not he is in possession of body armor?

MR. SODERBERG: Correct, your Honor.

THE COURT: Okay. Thank you.

MR. SODERBERG: And then the last housekeeping matter that -- and so I am again, it's a quick matter, the People have been attempting for numerous occasions, just to give everyone a heads up to get Officer Lavers from the Canadian Border Services Agency over here to testify in this case. The Canadian government has officially as of Friday evening denied that request to get him over here. Therefore, the People -- he is unavailable to the People. People have certainly all the communications through e-mails and requests. Because that officer is not present, the People will not be able to produce him. He is unavailable from the People's perspective. I'm not sure if Mr. Politano wants to argue differently. We can prepare for that. But that stated, because that officer is not going to be available, the People will not be proceeding on the driving while license suspended charge. We will only be proceeding on the felon in possession -- violent felon in possession of body armor. And I just

RECEIVED by MSC 9/22/2023 10:02:13 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

THE PEOPLE OF THE STATE OF MICHIGAN,

v. Case No. K 19-002078 FH

LANTZ HOWARD WASHINGTON,

Defendant.
_____/

JURY TRIAL
VOLUME 1

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE ELWOOD L. BROWN, Judge, 31st Judicial Circuit, at Courtroom 3400, County Building, Port Huron, St. Clair County, Michigan, on Tuesday, January 28, 2020.

APPEARANCES: PAUL J. SODERBERG, P70205
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On behalf of the People

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MARINE CITY, MICHIGAN 48039

On behalf of the Defendant
Lantz Howard Washington

here today, first of all, I want to thank you for the time you spent with us this morning. Go ahead and have a seat.

It's part of the process, so you sat here, you weren't called but you might of been. It was important that we have everybody here, the jurors here today. You are not needed in any other courtroom today. I'm told though that you should call next Monday after 5:00 to see if you're needed next week. You're excused for the rest of this week.

(Jury panels excused at 11:04 a.m.)

THE COURT: Mr. Politano, you have filed a couple of motions this morning, so I'm going to allow you to proceed with those. Please identify which one you're proceeding with first.

MR. POLITANO: Absolutely. The first one I would like to proceed with, your Honor, is the Motion in Limine regarding the potential exhibits by the Plaintiff.

THE COURT: Go ahead.

MR. POLITANO: Judge, yesterday, the reason this is filed as an emergency motion is, Judge, yesterday at about 1:30 when we were in here on a different motion the Court was informed by the People that Officer Lavers who is the Canadian Border Patrol officer was not going to be

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

appearing because Canadian government would not let him come across.

So, Officer Lavers, your Honor, is the only witness really to any of the facts of this case. He is the person who was in Canada who allegedly saw the Defendant wearing a bulletproof vest who then removed that bulletproof vest and then turned that over and made statements to the American officers.

So, your Honor, the People are seeking to admit, they were kind enough to show me yesterday several exhibits. There's a reference to some exhibits involving a knife in here, your Honor. I talked to Mr. Soderberg, those aren't going to be used, so we don't need to address that. But there were multiple pictures of a bulletproof vest. And then the corpus delicti itself. The bulletproof vest itself is, of course, going to be sought to be introduced as an exhibit.

There is no witness on the witness list who can establish a foundation for those pictures or that bulletproof vest to come in. The only person who could do that would be Officer Lavers because he's the only one who took it allegedly off of Mr. Washington and then turned it over to the American police officers.

So we have basically three problems for anyone else trying to establish foundational evidence. The first

RECEIVED by MSC 9/22/2023 10:02:13 AM

is the two American officers have no personal knowledge to establish foundation. Judge, foundation would be established by Rule 901, and it can be established by a witness testifying. However, MRE 602 says a witness may not testify to a manner unless evidence is introduced sufficient to support a finding that that witness has personal knowledge of the matter. The two officers, Stockwell and Whitten, do not have and personal knowledge of anything involving Mr. Washington. All they have is hearsay knowledge. They've been told things by Officer Lavers, the Canadian officer. And the police report's attached, your Honor. Both of their statements in the police report say that. They have this encounter with Lavers, he tells them, hey, this is what happened and turns evidence over to them.

We cannot, we cannot allow a foundation based purely on hearsay when we have no witness who can authenticate this at all. We certainly have a chain of custody issue. Now, normally as the case law says, chain of custody normally, and that's the word that is used, is just a question of how you weigh the evidence. But in this case we have no way to establish anything involving both the pictures and this body armor, this bulletproof vest because we don't have the person who allegedly saw Mr. Washington in possession of it, who then removed it

RECEIVED by MSC 9/22/2023 10:02:13 AM

and then turned it over to the Americans.

Officer Lavers is essential. He has to be here to establish those foundational questions. Without that there is no foundation for this evidence. And I bring this motion, your Honor, before we actually get into the officer's testimony because we have the police reports. They're very short, they're one page. They explicitly say this. The police reports and the officers are explicit, they weren't there, they didn't see anything. They just talked to Lavers. Lavers told them stuff and turned evidence over to them. He is completely necessary. There is no way to move forward to admitting the pictures of the bulletproof vest without Officers Lavers here. And that's not Mr. Soderberg's fault that he's not here, the Canadian government wouldn't let him come. But that's not Mr. Washington's problem or fault.

This is key, your Honor, because I, I, under the Sixth Amendment Mr. Washington would have a right to examine Officer Lavers to find out his foundation, what he said. I think that is a bigger issue for the trial in general because he was on t heir witness list and he's really the complaining witness. And if you read *Crawford versus Washington* I don't think anyone can doubt having read that wonderful opinion by Justice Scalia that if you don't have the ability to cross-examine the real witness,

RECEIVED by MSC 9/22/2023 10:02:13 AM

because the only one who saw you do anything, you're being denied your right to a fair trial and there's a Sixth Amendment violation.

So, Judge, you have three reasons to exclude that evidence and this is critical, your Honor, because there's allegations that Mr. Washington made statements. Those statements without the bulletproof vest are not enough to convict him. The rule of corpus delicti is clear. I can give you five or six cases right in front of me now.

Without the bulletproof vest being admitted into evidence this case is done and we can go forward, but I would be making an oral motion for a directed verdict at the end of the Plaintiff's proofs because his statement would not be enough. That is clear in law. There can be, there is no foundation without Officer Lavers, at all, period. It's as clear as day, as clear as any criminal issue I've ever had to deal with in my career. Thank you.

THE COURT: Mr. Soderberg.

MR. SODERBERG: Your Honor, Mr. Politano and I disagree about what's clear in this case. In order for the People to respond to that, essentially the People have to take your Honor through what the proofs will be in this case. But I'm glad Mr. Politano did bring up the corpus delicti issue, because I do believe that's really what the

RECEIVED by MSC 9/22/2023 10:02:13 AM

Lavers is key. Without him, who's the only person who say this, there's no connection to bring that vest into evidence or the pictures. There's nothing. It could have been anything turned over to Stockwell.

THE COURT: It's the same argument made initially made and responded to. So, I get your argument, I get the response.

Corpus delicti, I mean it's like having a, you know, you find a dead body in the middle of the road, nobody's around, but eventually you find out that somebody's a suspect and you end up talking to that person and they make admissions. The corpus delicti in that particular case is the body. Somebody killed the person. You don't know who did it.

The corpus delicti in this case is the body armor.

MR. POLITANO: I agree.

THE COURT: It is as to whether or not the Defendant possessed it is the question of fact for the Jury, and his admissions to having possessed it is evidence of his, of his possession.

So, you don't have to actually, just like the dead body in the street, you don't have to actually have somebody say I saw him wearing it, if you can prove it some other way. The fact that you've got body armor, and

RECEIVED by MSC 9/22/2023 10:02:13 AM

as far as that body armor goes it can be admitted by the person who acquired that body armor from the Canadian Customs. The person cannot testify to what the Canadian Customs officer told him because that's hearsay. But he can say factually I received this from a Canadian Customs officer at the same time I received the Defendant, as well as his truck was turned over. That then is okay. You've got those circumstances.

How do you prove that Mr. Washington actually was the person in possession of that? Well, you can do it in one of two ways. You could have Officer Lavers say I saw him in possession of it, or at that point you've already established, there's already a corpus delicti. There exists body armor. Mr. Washington has a violent felony. Did he possess that body armor? If he made statements that acknowledge he possessed it that then proves that he possessed it. That then proves that he possessed it.

So, it's a lot like the same person, as a person says I killed him, I did kill him, that body that you found in the street. The fact that that person wasn't standing over him with a knife or a gun doesn't mean that he didn't do it. So, the corpus delicti is not that you have to prove the identity of the person or that you have to prove that part of it. If, if that's all you have, if,

RECEIVED by MSC 9/22/2023 10:02:13 AM

if you have no evidence of a crime, all you had was a statement, that doesn't prove a crime. But in this case you have evidence of a crime. You have a man that by checking his record has a violent felony conviction, and you have body armor. How you put the two together is up to the Prosecutor.

Your motion actually is denied at this time. You can remake it if the Prosecutor doesn't establish the evidence that he claims he's going to establish through this motion, as how I've heard his offer of proof. So, that motion's denied.

MR. POLITANO: Judge, the second motion would be statements, and this would include statements made at the jail. From the time that this incident happened Mr. Washington was mentally ill. The Court ordered on April --

THE COURT: Was there an adjudication of mental illness?

MR. POLITANO: There was adjudication was incompetent, Judge.

THE COURT: All right. That's different than --

MR. POLITANO: I'll amend myself --

THE COURT: -- mentally ill.

MR. POLITANO: -- that he was incompetent. So, he was not competent on April 27th or any of the times

RECEIVED by MSC 9/22/2023 10:02:13 AM

And as you consider that, you're asked of course as part of the jury instruction that he has, is a violent felon. And you can't use, you can use that to meet that part of the elements of the crime, but not to convict him simply because of that. So I ask for your attention and your patience as we get through this. And at the end you're going to see exactly what I've been talking about in this opening. Thank you.

THE COURT: Now, are there any, before we get into presentation of evidence, are there any stipulations that the parties wish to present?

MR. SODERBERG: Yes, your Honor.

Your Honor, there is a stipulation between the Defense, between the Defendant and the People specifically as it relates to the first element in this case, which is the question of whether the Defendant has a conviction for a violent felon, or a felony. And in this case the stipulation is that the Defendant stipulates to being convicted of a violent felony that prohibited the Defendant from possessing body armor in this case.

MR. POLITANO: That is correct, your Honor.

THE COURT: All right.

Ladies and gentlemen, that stipulation is evidence that you may consider, and you may present your first witness.

RECEIVED by MSC 9/22/2023 10:02:13 AM

MR. SODERBERG: Thank you, your Honor.

D E N I S E F E N N E R

(Witness sworn at 11:55 a.m.)

DIRECT EXAMINATION

BY MR. SODERBERG:

Q Good morning.

A Good morning.

Q Can you please state and spell your name for the record.

A Denise Fenner, F-E-N-N-E-R.

Q Ms. Fenner, where are you currently employed?

A At the Blue Water Bridge.

Q Are you employed by the Michigan Department of Transportation?

A Yes, sir.

Q What is your title at that, with that position?

A I'm a bridge safety officer.

Q How long have you been a bridge safety officer?

A About three and a half years.

Q And generally speaking your position there does that involve working the outgoing toll booths to Canada?

A Yes, sir.

RECEIVED by MSC 9/22/2023 10:02:13 AM

A Yes, sir.

Q And once that toll is paid the arm goes up and the car can pass through?

A Correct.

Q Does the arm stay up or does it go back down?

A It goes back down.

Q Okay.

Until the next person pays?

A Correct.

Q Okay.

I want to take your attention, Ms. Fenner, back to on or about April the 8th, 2019. Do you recall working in that capacity as a bridge safety officer at the Blue Water Bridge?

A Yes, sir.

Q And you were working that, around 5:00 p.m. that day?

A Correct.

Q And just for clarification where that toll is located where is that located in this state?

A In this state?

Q What city is that in?

A Oh, Port Huron, Michigan.

Q In St. Clair County?

A Yes.

Q Okay. And so on that date in question was that a, was

RECEIVED by MSC 9/22/2023 10:02:13 AM

that a normal working day for you?

A Yes.

MR. SODERBERG: Your Honor, permission to approach the witnesses?

THE COURT: Go ahead.

MR. SODERBERG: Your Honor, if I may have continuing permission?

THE COURT: You don't need to ask anymore.

MR. SODERBERG: Thank you.

THE COURT: Don't stay up by the witness after you're finished.

MR. SODERBERG: Yes, sir.

BY MR. SODERBERG:

Q Ms. Fenner, I'm going to show you what's been marked for identification purpose as People's Exhibit 1, 2, 3, 4 and 5. Do you recognize what those are aerial photographs of?

A They are aerial photographs of the Blue Water Bridge plaza.

Q Okay.

A Blue Water Bridge.

Q And does, just essentially like Google aerial photographs, would you agree with that?

A Yes.

Q Are those fair and accurate depictions of what the Blue Water Bridge looks like?

RECEIVED by MSC 9/22/2023 10:02:13 AM

So east would be going to Canada?

A Yes, sir.

Q West would be coming back from Canada?

A Yes.

Q And so the eastbound traffic, would that be towards the bottom or towards the top of this picture if it's going to Canada (indicating)?

A Eastbound would be towards the bottom.

Q So would that be this area right here (indicating)?

A Yes.

Q And so would that be fair to say that this area would be where the toll booths are located?

A Correct.

Q Okay. And so on that day in question you would have been working in this area; is that correct (indicating)?

A The center one.

Q Somewhere in here (indicating)?

A Yes.

Q Okay. And again, once the people pay they go this way across the bridge (indicating)?

A Yes.

Q Okay.

People Exhibit 3, that's just a further up photograph of the American side, is that correct, of the Blue Water Bridge?

A Yes, sir.

Q -- at the bridge. Okay.

Ms. Fenner, around 5:00 p.m. on that date in question, April the 8th, 2019 at the bridge, do you recall what toll you were working? What toll number?

A Toll booth number four.

Q Okay. And did anything unusual happen around that time frame that you recall?

A We had a vehicle that actually blew through my lane.

Q Okay. And explain what you mean by blew through your lane?

A Blew through without stopping or paying the toll or acknowledging anything.

Q Okay.

Was the draw arm up or down when the person blew through your lane?

A It was up.

Q Okay. And how would it have been up at that point?

A The vehicle before him had just exited.

Q Okay.

Paid and allowed the draw arm to go up?

A Yes.

Q And so he, he, whoever that, whatever vehicle that was driving through blew through that lane?

A Yes.

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Okay.

When that vehicle blew through that lane, were you able to identify any person in the car?

A No, sir.

Q You weren't able to see who was in the car or anything about that?

A No, sir.

Q Okay.

When that individual drove through the lane without paying, or blew through the toll booth, what did you do?

A I picked up my too-two way radio, advised my supervisor what was going on because anything unusual I have to report.

Q Okay. And you're familiar with the process of the bridge or what happens when a person blows through a toll booth like that and you radio to your supervisor what the process is?

A Yes, I call my supervisor and then he takes it.

Q Okay.

A You know, contacts whoever he needs to from there.

Q Okay.

So there is a notification process to let any authorities that be know that there's a person that jumped the toll?

RECEIVED by MSC 9/22/2023 10:02:13 AM

A Yes.

Q Okay. And that's what you did in this case?

A Yes.

Q Okay.

Ms. Fenner, there is your, you're familiar with the fact that your actual toll booth has a recording system?

A Yes.

Q Is that a video recording system?

A Yes, sir.

Q And where would that camera be located in relation to your toll booth for that recording system?

In other words is that camera inside your toll booth?

A Yes. Yes, it's inside.

Q Okay. And I'm going to show you what's been marked for identification purposes as People's Exhibit 13. Have you seen the recording of the video that's involved in this case?

A Yes.

Q And was there a video that recorded this case?

A Yes.

Q And is that recorded, and that was turned over to law enforcement?

A Correct.

A Yes.

Q Okay.

I'm going to play the video all the way through and then I'm going to ask you some questions about it.

(Video played.)

BY MR. SODERBERG:

Q So is it accurate to the say that you just took a full, a toll from as large semi truck?

A Yes.

Q And that truck is passing through?

A Yes.

Q And it looks like another large semi truck has pulled up to your toll; is that correct?

A Yes, sir.

Q And that semi truck has now just pulled through?

A Correct.

Q And you would agree that now it appears that a van of some sort is pulled up to pay; is that correct?

A Yes.

Q And is the vehicle that pulls through without paying right behind that vehicle at this point?

A Correct.

Q Okay. And did that vehicle just pull through without

RECEIVED by MSC 9/22/2023 10:02:13 AM

paying now (indicating)?

A Yes, it did.

Q And it looks like you have gone outside to the toll booth at that point?

A Yes, sir.

Q And what are you doing outside the toll booth there?

A I have my two-way radio and I'm calling my supervisor to report the truck that went through my lane without paying the toll.

Q Okay. And that completes the video there; is that correct?

A Yes.

Q Okay.

Again, you didn't see the person who was driving the vehicle?

A No, sir.

Q You weren't able to identify any features of the person?

A No, sir.

Q Okay.

I'm going to show you what's been marked for identification purposes as People's Exhibit 6 through 11. Are you familiar with what these are screen shot photographs of?

A Yes, of me taking tolls in the booth.

Q Okay.

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

truck is, and the driver's side door is parallel to your toll booth entrance --

A Yes.

Q -- or pay window?

A Yes.

Q Are you familiar with vehicles?

A No, sir.

Q You're not familiar with trucks or anything other thing?

A No, sir.

Q I'm going to approach you with the actual People's Exhibit 8. And I'm turning it sideways, are you able to see any sort of car detail on the side of that door there, that may identify the type of car it is (indicating)?

If you can't that's okay.

A I can't.

Q Okay.

People's Exhibit 9, that's a freeze frame of the, the, the next frame I guess where there's the window of the driver's side door, would you agree with that display (indicating)?

A Yes.

Q You're not able to make out any individual on this video; is that correct?

A No, sir.

Q And again, you weren't able to make out the individual as

RECEIVED by MSC 9/22/2023 10:02:13 AM

he drove by, or the individual drove by, I'm sorry?

A No, sir.

Q And People's Exhibit 10, showing you People's Exhibit 10, if you want to look at that. That's the next frame up where the vehicle is gone a little bit farther; is that correct?

A Yes, sir.

Q And again, this is the driver's side window; is that correct?

A Yes.

Q Are you able to make out any colors in that window based on your, your view?

A Just red clothing.

Q Okay.

There is red clothing or what appears to be red clothing in that window there?

A Yes, sir.

Q Thank you.

A You're welcome.

Q And I'm going to s how you lastly People's Exhibit 11. That's the vehicle as it passes by; is that correct?

A Yes, sir.

Q Your heard is turned?

A Yes, sir.

Q Okay. And so as we have this 360 view, the truck, the

RECEIVED by MSC 9/22/2023 10:02:13 AM

A Supervisory officer.

Q So you go by Officer Stockwell; is that correct?

A Yes, sir.

Q Officer Stockwell, how long have you been working for Customs and Border Protection?

A About 12 years.

Q And in general what, what job do you do there?

A I was, I was an officer up until about two years ago. And then two years ago I got promoted to a supervisor position where I oversee shift operations.

Q And part of your Border Protection, Customs and Border Protection duties are you stationed anywhere in particular?

A Passenger processing building.

Q Okay. And is that at the Blue Water Bridge?

A It is, yes.

Q And would that be a point of entry into the United States?

A Yes, sir.

Q And, and the departure, as well?

A Yes.

Q And so in general when individuals leave or more specifically when they return to the United States, it's your agency's job to question who those people are and determine if they are permitted to come to the country and so forth?

A Yes, we'll inspect every single person that re-enters into the U.S.

Q Okay.

I want to take your attention back to on or about April the 9th, 2019 of last year. Do you recall if you were working as a supervisory manager at the Blue Water Bridge on that occasions?

A I was, yes, sir.

Q And again, that's for Customs and Border Protection?

A It was.

Q And on or about that day, around 6:00 p.m., did you make contact with anyone from the Canadian Border Service Agency?

A Yes.

Q With who did you make contact?

A The, the supervisor on the other side just let us know that he was coming back.

Q Okay.

Well, without, without saying --

A Yep.

Q -- what anyone said.

A So, so then they, they showed up at the lane 5A at the Blue Water Bridge.

Q Okay.

A And met with CBSA Lavers.

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Okay.

That's Canadian Border Service?

A I'm sorry, yes. Canadian Border Service Agency, CBSA.

Q Okay. And that's Officer Lavers --

A Yes.

Q -- from that agency.

What was Officer Lavers doing or what did he, what did he do when he came to lane five?

A There was CBSA cruiser first and then there was a follow-up vehicle also belonged to CBSA, and then a Ford pick up truck. The three of them all rolled into 5A together, one after the other. And they had an individual in the back of the cruiser in the first car, and then there was five or six CBSA officers in tow as well.

Q Okay.

I'm going to turn your attention just briefly to the screen there for what's already been admitted as People's Exhibit 3. Do you recognize what that's an aerial photograph of?

A Yes, sir.

Q And would this, what is this area right here (indicating)?

A So, on the top side of that is all entry into the United States.

Q Okay.

A And then on the bottom side is commercial trucks, and then

RECEIVED by MSC 9/22/2023 10:02:13 AM

your agency?

A He was.

Q Do you see that individual here in the courtroom today?

A I do, yes, sir.

Q Can you point him out and identify a piece of clothing item that he's wearing, the color clothing that he's wearing?

A The dark sweatshirt there, sitting at the table.

MR. SODERBERG: Okay.

Your Honor, I ask that that reflect identification.

THE COURT: Record will reflect the witness has identified the Defendant.

BY MR. SODERBERG:

Q And that, that Defendant's name, do you recall his name?

A Mr. Washington.

Q Okay. And you were able to identify him?

A Yes, sir.

Q Okay.

Who gave you custody of the Defendant at that location?

A I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.

Q Okay, so a collective group of you?

RECEIVED by MSC 9/22/2023 10:02:13 AM

A There was.

Q Okay.

A There was about six of us.

Q And you were a part of that process?

A I was.

Q At some point did Officer Lavers from the Canadian services hand you any other evidence?

A Yes, he did.

Q What did he hand you?

A He handed --

Q Just specifically related to any armor.

A A body armor.

Q Yes, sir.

A A piece of body armor that you would --

Q And so that was turned over to you, as well?

A It was, yes, sir.

Q Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

A There were.

Q Okay. And, and, and based on those communications you took custody of the Defendant?

A Yes, we did.

Q And you took possession of the body armor that was turned over at the same time?

A Yes, sir.

Q Did you take, you said you took possession -- I'm sorry, you said there was a truck that was returned?

A There was.

Q What type of truck was returned?

A It was a Ford pick up truck.

Q Okay.

Do you recall what the make and model was?

A I think it was a F-250.

Q Okay.

But you definitely know it was a truck?

A It was definitely a truck.

Q Okay.

A And it was, it wasn't a standard half ton.

Q Okay. And that, upon taking possession of the Defendant and body armor, you also took possession of the truck --

A We did.

Q -- at that point?

And that was done by just parking it at the place?

A Yes, sir.

Q Okay.

What did you do after taking possession of those things?

A We contacted Port Huron Police Department.

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Okay.

Did anyone from the Port Huron Police Department make their way to the bridge --

A They did.

Q -- at that point?

A Yes, sir.

Q And would that have been around 6:40 p.m. if you know?

A Yes, it probably -- 6:40, seven o'clock.

Q Okay.

A Ballpark.

Q And then do you recall which officer came from Port Huron at that point?

A Officer, I believe his name is Whitten.

Q Okay. And was, was anything done with Officer Whitten at that time?

A We transferred custody of the body armor that we received and of Mr. Washington.

Q Okay.

Agent Stockwell, I'm sorry, Officer Stockwell, I'm going to show you what's been marked for identification purpose as People's Exhibit 20. Do you recognize what this is?

A Yes, sir.

Q What is that?

A This is a piece of body armor.

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Okay.

A This is the body armor we received.

Q Okay.

Specifically where did that body armor come from?

A It came from, this was turned over to me from CBSA.

Q Okay, from Officer Lavers and the CBSA?

A Yes, sir.

Q And that was taken into possession at the bridge on that day in question?

A Yes, sir.

MR. SODERBERG: Your Honor, at this time the People would move to admit People's Exhibit 20.

MR. POLITANO: Judge, I would object to the admission of People's Exhibit 20. There's been no showing that it has any relevance to this case or any connection to the Defendant.

THE COURT: I'll receive Exhibit 20.

MR. SODERBERG: Okay, thank you.

(People's Exhibit 20 was received.)

BY MR. SODERBERG:

Q Just for the record, Officer Stockwell, what is, what does that say on the cover of this?

RECEIVED by MSC 9/22/2023 10:02:13 AM

the Defendant, you also provided him with the body armor, as well?

A We did. I did, yes, sir.

Q And then where did, what did Officer Whitten do at that point?

A He took custody of the body armor and of Mr. Washington and then had the truck towed later on.

Q Okay.

So he took possession of all three of those, the Defendant, the truck, and the body armor?

A Yes, sir.

Q And then he was transported away from the Blue Water Bridge at that point?

A Yes, we just assisted in getting Mr. Washington in the vehicle and then --

Q Okay, if I may have one moment, your Honor.

When you took custody of the Defendant, holding him for the Port Huron Police Department, do you recall any clothing that the Defendant would have been wearing at the time?

A He had a red shirt on, and I believe blue jeans.

MR. SODERBERG: Okay. No further questions.

THE COURT: Mr. Politano.

MR. POLITANO: Thank you, your Honor.

RECEIVED by MSC 9/22/2023 10:02:13 AM

CROSS-EXAMINATION

BY MR. POLITANO:

Q Good afternoon, Officer.

Officer, when you had contact with the CBSA was that bulletproof vest on Mr. Washington?

A It was not on Mr. Washington.

Q Did have ever observe Mr. Washington wearing that bulletproof vest?

A I did not.

Q Did you ever observe that bulletproof vest being taken off by anyone from your department or from the CBSA?

A I did not observe it.

Q Did you ever observe Mr. Washington operating a motor vehicle in St. Clair County or being in St. Clair County prior, on that day, prior to your contact with the CBSA?

A I did not.

Q Now, as I look at this, this looks like a relatively common kind of generic item. How can you be certain, sir, that this is the item that the CBSA turned over to you?

A Well, I'm not, I'm not familiar with that particular vest myself that brand. I have used vests in the military in, in another career of mine, and I wear a vest in my current career, and I'm not familiar with that particular one. So it stands out because I've never seen it before.

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q But do you have any of knowledge how common this brand is or how often it's used?

A I don't.

Q So would it be fair to summarize, Officer, you have no direct knowledge of Mr. Washington having possession of that, seeing him in possession of it in any of way, shape or form; is that correct?

A No direct knowledge.

MR. POLITANO: Thank you.

THE COURT: Mr. Soderberg.

MR. SODERBERG: Briefly.

RE-DIRECT EXAMINATION

BY MR. SODERBERG:

Q Between the, going to People's Exhibit 1, you recognize that as, what do you recognize that -- do you recognize that?

A Yes, that's the Blue Water Bridge with both, both crossings on -- the CBSA and our side, Customs and Border Protection.

Q Is there anywhere between the American side and the Canadian side for a person to pick up body armor?

A There is not.

Q Is there anywhere on the bridge to stop and pick up body

RECEIVED by MSC 9/22/2023 10:02:13 AM

armor?

A No, sir.

Q Is there anywhere before getting through customs on the Canadian where a person can pick up body armor?

A No, sir.

MR. SODERBERG: No further questions.

THE COURT: You may step down.

(Witness excused at 2:00 p.m.)

MR. SODERBERG: If I may get my next witness, your Honor. The People call Officer Whitten.

THE COURT: Raise your right hand.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

THE COURT: Be seated, please.

O F F I C E R K Y L E W H I T T E N

(Witness sworn at 2:00 p.m.)

DIRECT EXAMINATION

BY MR. SODERBERG:

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Can you please state and spell your name for the record?

A Kyle Whitten, last name is W-H-I-T-T-E-N.

Q Where are you currently employed?

A Port Huron Police Department.

Q How long have you been employed at the police department?

A Two years.

Q And what is your current position with the police department?

A Police officer assigned to road patrol.

Q Back on April the 8th of 2019, were you assigned to that same position?

A I was.

Q And in working in that capacity at some point were you dispatched to the Customs and Border Protection office at the Blue Water Bridge?

A I was.

Q And for what purpose were you dispatched to that location?

A I was dispatched in response to an individual who had an altercation with Canadian --

Q Okay.

Well, without getting into, without getting into --

A Yeah.

Q -- of that, did you go to for a person in possession of body armor at the bridge?

RECEIVED by MSC 9/22/2023 10:02:13 AM

A I did.

Q Okay.

Did you make your way to that location and investigate that?

A I did.

Q When you got to that location, who did you make contact with?

A Agent Stockwell.

Q When you, when you made contact with Officer Stockwell, he's the, the individual that works at the Customs and Border Protection?

A That's correct.

Q Did you have communications him at that location?

A I did.

Q And as a result of that communication what did you do? Did you take custody of anyone?

A I did.

Q Who did you take custody of?

A Mr. Lantz Washington.

Q Okay.

Do you see that individual in the courtroom here today?

A I do.

Q And do you, do you recognize him and can you point him out and identify the color of clothing that he's wearing?

RECEIVED by MSC 9/22/2023 10:02:13 AM

A Sure, he's seated to my right at the defense table wearing all black and white framed glasses.

MR. SODERBERG: Your Honor, I ask that that reflect identification, as well.

THE COURT: Record may so reflect.

BY MR. SODERBERG:

Q You took possession, did you take possession of any body armor at that time, as well?

A I did.

Q And I'm going to show you what's been admitted as People's Exhibit 20. Do you recognize this?

A I do.

Q What do you recognize this item to be?

A The body armor that I collected on the dated in question.

Q And this was transferred over to you by Officer Stockwell?

A That's correct.

Q When you took possession of the Defendant was he wearing any specific type of clothing that you recall?

In other words do you recall what his shirt would have looked like?

A I don't.

Q You don't, okay.

In addition to that, was there anything else that was, was there a vehicle that was impounded as a part of your investigation?

RECEIVED by MSC 9/22/2023 10:02:13 AM

THE COURT: What the Defendant said?

MR. POLITANO: Yeah.

THE COURT: No, it's not hearsay.

MR. POLITANO: Okay.

THE COURT: I don't find it's hearsay. Go ahead.

BY MR. SODERBERG:

Q What did you overhear the Defendant say specifically as it relates to this case?

A I overheard the Defendant say that he was wearing the body armor because he was afraid people were going to kill him.

MR. SODERBERG: May I have one moment, your Honor? No further questions, your Honor.

THE COURT: Mr. Politano.

MR. POLITANO: Briefly, your Honor.

CROSS-EXAMINATION

BY MR. POLITANO:

Q Good afternoon, Officer.

A Good afternoon. How are you?

Q Good, how are you?

A Good.

Q When you came into contact with Mr. Washington was he wearing the body armor?

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Larger.

When he was being booked who was in the room with him?

A Myself and jail deputies.

Q How many deputies?

A I can't tell you.

Q And was there a discussion going on between the deputies and Mr. Washington while he was being booked? Were the deputies talking to Mr. Washington?

A Yes.

Q Were any of the deputies talking among themselves?

A I don't recall that.

Q Were you any part of the conversation with the deputies or the conversation with Mr. Washington?

A Are you asking if I ever conversed with the deputies while I was in that room?

Q Yes. So there's a conversation going on as he's being booked, correct?

A Well, as far as the conversation I can't say for sure, but they do speak to each other. They ask him questions and they talk back and forth, yes.

Q And were you a part of that process of them talking?

A I don't believe I was, but I would have been there filling out paperwork while they were doing that.

Q And so at least in the room there were some deputies which

RECEIVED by MSC 9/22/2023 10:02:13 AM

A I listened to it at my desk in my office.

Q And who would that have been a jail call between?

A A part of the jail call, the inmate would have been Lantz Washington making a phone call and identified his mother, his mother on the other end.

Q Okay. And when would that call have been made?

A I believe it was made April 27th at approximately 1:00 p.m. 1:30 p.m.

Q Okay.

A One, thirty p.m.

MR. SODERBERG: Your Honor, at this time the People would move to admit People's Exhibit 19.

MR. POLITANO: Judge, this has been provided to us, we've reviewed it, so we would have no objection.

THE COURT: Can I see that? Can I see the attorneys at the bench?

MR. SODERBERG: Yes, sir.

(Bench conference held.)

MR. POLITANO: Judge, revising my statement, I would object as to the 403 value of this and I would ask that the exhibit not be admitted.

THE COURT: The issue of admission has been previously addressed by the Court so I already ruled it

RECEIVED by MSC 9/22/2023 10:02:13 AM

would be admissible.

MR. SODERBERG: Thank you.

THE COURT: I'll receive it into evidence.

(People's Exhibit 19 was received.)

MR. SODERBERG: Your Honor, at this time the People would just load it up and will play it on the speakers.

BY MR. SODERBERG:

Q And again, Detective Fantin, this is only an audio recording; is that correct?

A That's correct.

Q There's no visual component to it, correct?

A Correct.

"Hello. This is a collect call from Lantz, an inmate at St. Clair County Jail. You may reject this call. To use your credit or debit card, please press one. To decline this call press four. If you would like to permanently block your number from receiving calls from this facility press six. If you do not want to connect this call, but elect to fund an account to pay for future calls please hang up and dial 800 -- this call will cost 21 cents per minute, plus any applicable federal, state and local taxes and the one-time transaction fee of $3.00.

RECEIVED by MSC 9/22/2023 10:02:13 AM

You will only be charged the per minute rate for the amount of time you were on the phone. If you do not want to connect this call, but would like to fund the account to pay for future calls please hang up and dial 800-844-6591. This call is subject to recording and monitoring. To continue press one. To disconnect press two. Thank you for using Securus. You may start the conversation now.

"Mother."

"What is it?"

"I don't mean to bother you, but --"

"Well, you are."

"I know. I know. I know. But all deeds are in my name and I can't do nothing without James Griffin because his name is on the title too. And what I need is for him to get Dr. Buzzard (phonetic). He can get it from Johnny. Dr. Buzzard will give him the money to get me out and I, we can, we intend to go get the money or whatever. I can't do nothing without him."

"What is Johnny's number?"

"248-636-6338."

"I already called that number and they, they, they said I have the wrong number."

"It's 248."

"I got 248-636-6368."

RECEIVED by MSC 9/22/2023 10:02:13 AM

"No, no, 6338."

"Then why did you give me 6368?"

"I don't know if I gave you 6 -- 248 --"

"638."

"Nope. 248-636."

"Yep."

"6338."

"That's not enough numbers."

"What else you got?"

"248"

"Yep."

"636"

"Yep."

"6338."

"Yeah. That's enough numbers."

"Okay, I'll call him."

"Okay."

"I want to know what the hell is going on because I, I can't keep paying for these calls. What the hell --"

"I'll pay for it. I'll pay for all the calls."

(Inaudible).

"What did you do? What happened?"

"What happened is I was getting threats, right, and James gave me a bulletproof vest. I put on the

bulletproof vest."

"That's what I heard, you had a bulletproof vest on."

"And I went to the police with it on. I was fear for my life, they was threatening me."

"Why you in Port Huron?"

"I went to Port Huron because Tamika was looking up the property and the lawyer's in Port Huron that I had for the property."

"So what are you being charged with?"

"Possession of body armor, which is no charge. They're just holding me to protect me, mother."

"So how come you can't tell them you want to go?"

"Ma, it's a long story, I can't explain it all. It's, it's a whole lot to it."

MR. SODERBERG: Your Honor, the People have no further questions.

THE COURT: Mr. Politano.

MR. POLITANO: I have no questions, your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you.

(Witness excused at 2:18 p.m.)

RECEIVED by MSC 9/22/2023 10:02:13 AM

RECEIVED by MSC 9/22/2023 10:02:13 AM

BY MR. POLITANO:

Q Speak a little bit louder than that, Lantz, okay.

Can you state your name for the record?

A Lantz Washington.

Q Ms. Graham, can you hear him?

You can, okay.

THE COURT: Mr. Politano --

MR. POLITANO: I apologize.

THE COURT: -- you cannot talk to the Jury.

MR. POLITANO: I apologize, your Honor.

BY MR. POLITANO:

Q Mr. Washington, I want you, you've heard some testimony that, from a Deputy Whitten that you made statements at the St. Clair County Jail on April 8th, 2019. Did you hear that testimony?

A Yes, I did.

Q Did you tell any of the deputies at the jail that day that you were in possession of body armor?

A No, I was just telling them what I was arrested for.

Q Hold on one second. What did you tell the deputies?

A I told them that I should not be arrested for possession ever body armor.

Q Did you tell them that you were wearing it, that someone was trying to kill you?

A No, I did not.

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q How many people do you remember were in the booking room with you?

A It was a couple of deputies, and it was a couple of, it was some other people in there getting booked, too.

Q Were you standing or seated, sir?

A I was seated.

Q And were you seated with Officer Whitten or was there another officer, another deputy?

A It was several other deputies.

Q Now, you also, sir, heard a phone recording between you and your mother, correct?

A Yes, uh-hum.

Q Now, in that phone recording you stated that you had been wearing body armor, correct?

A Yes.

Q Was this on April 8th, 2019?

A No.

Q Was this a day prior to that?

A It was a few days before that when I went to the police station in Idlewild.

Q And why did you go to the police station in Idlewild, sir?

A Because I had purchased some property and I needed them to show me where the property was.

Q Did you stay in Idlewild?

A Huh?

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Did you stay in Idlewild? Did you stay overnight or did you head somewhere else?

A Yes, we stayed there overnight and we left the next day.

Q When you left the next day where did you go?

A I went back to Detroit.

Q Did you come to Port Huron any time after that?

A A few days later. Well, I came to Port Huron a couple of times. I came one day and I gave the deeds to my cousin Tamika so she could tell me what property I had, and then I left and went back to Detroit.

Q And did you ever come up to Port Huron to meet with a lawyer?

A Yes, I did.

Q Who was your lawyer, sir?

A I don't know, but I was -- I forgot his name. I had it in my phone. I was supposed to meet the lawyer at 316 McMorran. I remember the address.

Q Did you have a meeting with the lawyer that day?

A No, I did not.

Q So, what were you referencing in the phone call with your mother about body armor? Was it April 8th or was it a previous incident?

A It was the previous days.

MR. POLITANO: I have no further questions, your Honor.

RECEIVED by MSC 9/22/2023 10:02:13 AM

THE COURT: Mr. Soderberg.

MR. SODERBERG: Yes, sir, your Honor.

CROSS-EXAMINATION

BY MR. SODERBERG:

Q Mr. Washington, on April the 8th, 2019, do you recall being taken into custody?

A Yes, I do.

Q Do you recall being taken into custody on the Canadian side of the Blue Water Bridge?

A I don't recall what happened over there.

Q You don't recall what happened over there?

A No.

Q Were you driving a blue Ford F-250 pick up truck that day?

A I don't recall.

Q I'm going to show you, do you recall wearing a red shirt that day?

A No, I don't recall. I went, when I was arrested what they immediately sent me to a --

Q Well, just, I just ask you to answer the questions.

MR. POLITANO: Judge, I'm going to object. I think this exceeds the scope of what my direct examination was.

THE COURT: Cross-examination is unlimited to

RECEIVED by MSC 9/22/2023 10:02:13 AM

the scope of direct. Only re-direct is limited to the scope of cross-examination.

Mr. Washington, just answer the question. Don't offer anything other than the answer to the question.

BY MR. SODERBERG:

Q And so, and Mr. Washington if you don't understand anything that I'm asking you, you can say that and I'll repeat the question, okay.

Is that yes for the record?

A Yes.

Q Okay.

Mr. Washington, I'm going to show you what's been entered as People's Exhibit 7, and I have put it up on the screen over there. Do you see that screen?

A Yes.

Q On this screen, and you were, you were present when that video was played earlier today, correct?

A Yes.

Q And so you saw this blue truck driving through the toll booth without paying, do you recall that --

A Yes.

Q -- seeing that?

A Yes.

Q That's your truck, isn't it?

A No, that's James' truck.

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q That's James' truck?

A Uh-hum.

Q And you were driving that truck on that day; is that correct?

A I don't recall.

Q You don't recall?

A Uh-uh.

Q That, you do not recall?

A I don't recall.

Q Okay. And I'm going to show you, and James' truck was a F-250 Ford pick up truck, right?

A Yes, and F-350.

Q And he had a F-250 and a F-350?

A And a F-350.

Q Okay. And that one was a F-250?

A I, I --

Q From what you recall?

A I don't recall.

Q Okay.

I'm going to show you People's Exhibit 8, I'm sorry, People's Exhibit 9. I'm sorry, let's go to People's Exhibit 10. Mr. Washington, I am approaching you with the actual printout. Do you see the individual in the driver's seat there?

A No, I can't see no one in the driver's seat.

RECEIVED by MSC 9/22/2023 10:02:13 AM

Q Okay. And you can't see that there's a person wearing red clothing in that window there (indicating)?

A I just see a red spot. I can't see what it is.

Q Okay.

A What it pertains to.

Q You agree that it is a red spot, though?

A Yes, it is.

Q Is it possible that that's your red shirt when you were driving there?

A I don't recall.

Q Okay.

A When I went to the jail they sent me to three west.

Q Well, I'm just asking that you answer the question I ask you, okay.

Mr. Washington, you agree -- I'm going to approach you with People's Exhibit 20. Do you recognize what this is?

A It looks like a vest.

Q Okay.

Was that the vest that James gave you?

A I don't recall.

Q Okay.

You agree that James did give you a bulletproof vest?

A I don't remember. I went through a lot. I don't remember

RECEIVED by MSC 9/22/2023 10:02:13 AM

what was going on that day.

Q Okay.

A I, I don't know if I was drugged or someone had hypnotized me or what was going on. They sent me to Port Huron --

Q Okay.

A -- McLaren Hospital.

Q Okay.

A Psychiatric --

THE COURT: Mr. Washington, you just have to answer questions. You can't just talk. Go ahead.

BY MR. SODERBERG:

Q Just taking a step back, Mr. Washington, do you agree that -- you agree that on, on April the 8th, 2019 in the city of Port Huron you were not allowed to possess body armor? Would you agree with that, Yes or no?

A I don't recall.

Q Okay.

You agree that you were a convicted violent felon, correct?

A Yes.

Q Okay. And because you're a violent convicted felon you would not be allowed to possess body armor; is that correct?

A Yes.

MR. SODERBERG: Okay. No further questions.

RECEIVED by MSC 9/22/2023 10:02:13 AM

and whether you believe them.

When you -- then you must decide whether the testimony and evidence you believe proves beyond a reasonable doubt the defendant is guilty.

You have heard testimony from witnesses who are police officers. That testimony is to be judged by the same standards you use to evaluate the testimony of other witnesses.

The defendant is charged with possession, possessing or using body armor while convicted of a violent felony. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the defendant has been convicted of a violent felony. The defendant has stipulated to having been convicted of a violent felony that prohibited the defendant from possessing body armor.

Second, that on April 8, 2019 the defendant possessed or used body armor. Body armor means clothing or a device designed or intended to protect the individual's body or a portion of the individual's body from injury caused by a firearm.

Possession does not necessarily mean ownership. Possession means that either the person has actual physical control of the thing, as I do with the pen I'm

RECEIVED by MSC 9/22/2023 10:02:13 AM

now holding. I'm not holding a pen. Or that the person has the right to control the thing, even though it is in a different place or room.

Possession may be sole where one person alone possesses the thing. Possession may be joint where two or more people have shared possession. It is not enough that the defendant merely knew about the body armor. The defendant must, the defendant possessed the body armor only if he had control of it or the right to control it, either alone or together with someone else.

When you go to the jury room you should first choose a foreperson. The foreperson should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

During your deliberations please turn off your cell phones or other communications equipment until we recess.

A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.

It is your duty as jurors to talk to each other

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Case No. K-19-002078-FH

LANTZ HOWARD WASHINGTON,

Defendant.
_____/

DISPOSITION

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE ELWOOD L. BROWN, Judge, 31st Judicial Circuit, at Courtroom 3500, County Building, Port Huron, St. Clair County, Michigan, on Monday, March 2, 2020.

APPEARANCES:

PAUL SODERBERG, ESQ.
Assistant Prosecuting Attorney
201 McMorran Boulevard, Suite 3300
Port Huron, MI 48060

On behalf of the People:

PATRICK J. POLITANO, ESQ.
Attorney at Law
420 S. Water Street, #249
Marine City, MI 48039

On behalf of the Defendant:

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	PAGE
SENTENCING:	3

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Port Huron, Michigan

March 2, 2020

* * * * *

THE COURT: People versus Washington.

MR. SODERBERG: Ready, your Honor.

MR. POLITANO: Ready, your Honor. He's in custody.

THE COURT: This is sentencing after jury trial. Counsel, your appearances, please.

MR. SODERBERG: Paul Soderberg on behalf of the People.

MR. POLITANO: Your Honor, Patrick J. Politano on behalf of Mr. Washington, who is here to my right, your Honor.

THE COURT: You are Lantz Washington?

THE DEFENDANT: Yes. Good afternoon, your Honor.

THE COURT: Now, Counsel, have you both had the opportunity to review and Mr. Politano discuss with your client the presentence investigation and recommendation report?

MR. POLITANO: Judge, I have reviewed it. We found it to be factually accurate and relevant. No

objections to the scoring of guidelines.

MR. SODERBERG: Your Honor, yes, the People have reviewed. People have no objection to the PSI.

THE COURT: All right. Mr. Politano.

MR. POLITANO: Judge, I've done a lot of cases with Mr. Green before so usually his recommendations tend to be on the higher end of scoring, shall we say. This is on the lower end I think the reason behind it is pretty clear. I don't think anyone disputes that there was some pretty serious mental health issues that were in the background of the events that occurred here and I think that's why Mr. Green fashioned this recommendation. I think the good thing is that originally while Mr. Washington was incarcerated, he was referred for a psychiatric or for a competency exam and they got him competent by using some psychiatric treatment and medicine. My hope is that he continues on that. Judge, I would ask this recommendation be adopted. I think it's very appropriate based on the underlying facts of the case.

THE COURT: Mr. Washington.

THE DEFENDANT: I don't have anything -- I don't have anything to say, your Honor.

THE COURT: All right.

THE DEFENDANT: I just thank God that we all

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made if here safely.

THE COURT: Mr. Soderberg.

MR. SODERBERG: Yes, your Honor. First and foremost before the People forget, we would ask for a forfeiture of the body armor and will make an order if the Court agrees to that.

MR. POLITANO: There will be no objection, Judge. And I give my colleague -- he will forward me the order and I will sign it or give him permission to sign it so that can be entered.

THE COURT: I will agree to that request.

MR. SODERBERG: Your Honor obviously heard the trial so you know exactly what this case was about. The -- I guess the frustrating part for the People is just the lack of accountability from the Defendant. There were obviously indications of mental health issues and so forth and the People were certainly aware of that and there were discussions between myself and the Defendant before trial, multiple times to try to resolve this without having to go through a trial. Obviously, it's the Defendant's right to take things to trial and the People proved up the case beyond a reasonable doubt. And so that gets to the point that the People are, I guess, frustrated about is again that, that lack of accountability. There is obviously very important policy reasons for felons not to have body

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armor. Obviously, this became an international incident in which the Defendant drove across the bridge and had to deal with customs on the Canadian and American sides, involving him running the toll booths on both sides. So obviously it was scary situation, a dangerous situation, especially for law enforcement and the people on that bridge. And so those are all very concerning things.

His range is 12 to 48 months. So this is the very bottom that this recommendation could be. I respect Mr. Green, as well. Your Honor would certainly be justified in issuing a prison sentence, however, as well.

THE COURT: I notice the recommendation here involves credit for 329 days. Was he out on bond first?

MR. POLITANO: No, Judge. What happened is he was in custody but then he was sent to the Forensic Center and while they have him in custody he gets credit for that time served. He's never been out. So he has basically been in jail for about a year. That's why -- they eventually got him competent, Judge, while they had him in custody.

THE COURT: Mr. Washington, what are, what are you doing with regard to your mental health?

THE DEFENDANT: Well, I've focused on making a better life for myself and everything. Before I was arrested, I did a lot of volunteer work at Brightmore

Pantry. I worked with Forgotten Harvest. I was living with my life coach and my mentor Mr. James Griffin who works at Greek Town Casino. I was doing a lot of things to positive, to make a positive influence on life.

THE COURT: Are you doing anything with regard to counseling or are you receiving mental health treatment?

THE DEFENDANT: Well, they, they say CMH had -- I had received all of the treatment while I was there. You know, and I will continue to stay focused.

THE COURT: You're going to CMH?

THE DEFENDANT: Yes.

THE COURT: You have a therapist there?

THE DEFENDANT: Yes.

THE COURT: Which county is that for?

THE DEFENDANT: Well, I would have to go to Wayne County now or --

MR. POLITANO: Correct, you Honor. He -- he's talking about the treatment he's had here.

THE COURT: While he is here.

MR. POLITANO: Then he understand he's got to do that in Wayne County afterwards. His mother is somebody who can -- she actually lives in Macomb County, but I think she's already indicated willingness to help him with that transition and get him to the proper mental health

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people in Wayne County and the services that he needs.

THE COURT: Mr. Washington, I recognize the straddle cell -- or the scoring here could be, could result in you being incarcerated in prison, but I am not going to do that, largely because -- although you shouldn't have had possession of that body armor, it wasn't a dangerous object in and of itself. The -- there is no reason for you to have it. And because of the, what -- having heard the trial and having heard the statements that you made to, even though it wasn't necessarily admissible to the officers on the Canadian side there, it does sound to me like there is some issues with regard to your perceptions of things.

THE DEFENDANT: Yes.

THE COURT: You need to have that addressed.

THE DEFENDANT: I will, your Honor.

THE COURT: I'm going to follow this recommendation. You are ordered to serve 365 days in the County Jail, with credit for 329 days. You are to pay the state minimum cost of $68, crime victims assessment fee of $130, court cost of $300 and the cost of your court appointed lawyer in an amount to be determined.

Now because this was a result of a conviction as a result of a trial, Mr. Washington, you do have the right to appeal this case to the Court of Appeals. Should you

choose to request the assistance of counsel, you must file that request within 42 days.

MR. POLITANO: Thank you, your Honor.

THE DEFENDANT: Thank you, your Honor.

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REPORTER'S CERTIFICATE

STATE OF MICHIGAN)
) -- ss
COUNTY OF ST. CLAIR)

I, Kimberly A. Torres, an Official Court Reporter in and for the Circuit Court for the 31st Judicial Circuit, State of Michigan, do hereby certify that I have reported stenographically the proceedings had and testimony taken in the above-entitled matter, and I do further certify that the foregoing transcript constitutes a full, true, and complete transcript of said stenographic notes.

Kimberly A. Torres

KIMBERLY A. TORRES, CSR-4247
OFFICIAL COURT REPORTER

DATED: June 15, 2020

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APPENDIX B

(Trial court opinion and order dated 9/27/21)

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CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No: 19-002078-FH
Hon. Daniel A. Damman

LANTZ HOWARD WASHINGTON,

Defendant.

OPINION AND ORDER DENYING DEFENDANT-APPELLANT'S MOTION TO VACATE CONVICTION AND/OR FOR NEW TRIAL OR FOR AN EVIDENTIARY HEARING

Defendant-Appellant Lantz Howard Washington ("Defendant") was convicted by jury on January 28, 2020 in front of the Honorable Elwood Brown (the "trial court") on one count of Weapons – Body Armor – Possess/Use by Violent Felon, contrary to MCL 750.227g(9)(a). Defendant was sentenced to 365 days in jail with credit for 329 days served, and was released from custody on March 2, 2020.

Defendant files this *Motion to Vacate Conviction and/or for New Trial Pursuant to MCR 7.208(B) or, at minimum, for an Evidentiary Hearing* requesting this Court vacate his conviction and grant him a new trial based on three grounds:

(1) That the trial court reversibly erred by denying his *Motion to Quash Bindover and Dismiss* and *Emergency Motion in Limine* to exclude evidence of body armor;
(2) That the trial court reversibly erred by denying his *Emergency Motion in Limine* to exclude a recorded jail phone call; and
(3) That the prosecutor committed prosecutorial misconduct, denying Defendant of a fundamentally fair trial; and, to the extent that Defendant's attorney failed to object, ineffective assistance of counsel.

If the Court does not find errors requiring reversal, Defendant requests this Court to conduct an evidentiary hearing at which Defendant can introduce evidence into the record relevant to his claim of ineffective assistance of counsel that is necessary for appellate review, pursuant to MCR 7.208(B)(3).

RECEIVED by MSC 9/22/2023 10:02:13 AM

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

This Court heard oral arguments on Defendant's Motion on May 24, 2021 and has considered each party's brief at length. This Court finds no error requiring Defendant's conviction to be vacated and/or a new trial be granted, and no basis for an evidentiary hearing. Defendant's Motion is therefore DENIED.

STATEMENT OF FACTS

Defendant was arrested on April 8, 2019 after an incident on the Blue Water Bridge (the "Bridge"). Defendant, while crossing the Bridge from the American to the Canadian side, drove through a toll booth without paying and did not stop until he reached a secondary investigation area on the Canadian side. Defendant then had contact with Canada Border Services Agency ("CBSA") officers, including an Officers Lavers, and it was discovered that Defendant was wearing body armor.

CBSA officers brought Defendant, his truck, and the body armor to U.S. Customs and Border Protection ("CBP") Officer Stockwell. Officer Stockwell then called the Port Huron Police Department ("PHPD") to transfer custody of Defendant and his items to PHPD. Defendant was later charged with one count of Weapons – Body Armor – Possession/Use by Violent Felon.

At a Probable Cause Conference on April 23, 2019, the Honorable Cynthia Platzer ordered Defendant to undergo a forensic psychiatry evaluation to determine if he was competent to stand trial. At a Competency Hearing on May 31, 2019, Judge Platzer declared that Defendant was incompetent to stand trial[1] and entered an order for Defendant to undergo treatment. Defendant appeared again before Judge Platzer on August 27, 2019, when she declared that Defendant's competency had been restored and he was able to stand trial.[2] The matter was scheduled for Preliminary Examination ("Exam").

PHPD Officer Kyle Whitten was the only witness to testify at the Exam. He testified that he took custody of Defendant at the Bridge from CPB officers after talking to a CBSA officer via phone.[3] Based upon the information from both U.S. and Canadian officers, Officer Whitten arrested Defendant for "felon in possession of body armor."[4] Officer Whitten testified that the body armor in question was turned over to him by CPB.[5] Photographs of the body armor were admitted into evidence without objection from Defense Counsel.[6]

The People also admitted a report generated by Blue Water Bridge Port Director Michael Fox (the "Report"), which provided a specific accounting of what

[1] Referencing a report from the Center for Forensic Psychiatry dated May 21, 2019.
[2] Referencing a report from the Center for Forensic Psychiatry dated August 14, 2019.
[3] Preliminary Examination Transcript, p. 6.
[4] Preliminary Examination Transcript, p. 6-7.
[5] Preliminary Examination Transcript, p. 7.
[6] Preliminary Examination Transcript, p. 8-9.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

happened, in lieu of having a CBSA agent testify in person.[7] Defendant's trial attorney ("Defense Counsel") indicated he had previously received a copy of the Report and had no objection to its admittance. Defense Counsel also stipulated as to Defendant's prior convictions that qualified him as a "violent felon" under MCL 750.227g(9)(a). Judge Platzer found sufficient probable cause to bind Defendant over to Circuit Court.

In November 2019, Defense Counsel filed a *Motion to Quash Bindover and Dismiss*, arguing that the People had not produced sufficient evidence to support a finding of probable cause as it related to the possession element of the crime. The trial court determined there was no abuse of discretion by Judge Platzer in her finding and denied the motion. The trial court noted that the Report was offered as a business record at the Exam, but was actually a police report, which are not admissible in criminal cases. However, because Defense Counsel did not object to its admission, Judge Platzer rightly considered it.

The week before Defendant's trial, the People filed a *Motion to Amend Witness List*. The People had uncovered a recorded phone call between Defendant and his mother on April 27, 2019 in which Defendant explained what had happened and admitted that he wore body armor while in Port Huron. The People sought to include the St. Clair County Jail Securus Phone Representative in order to admit the recording at trial. Defense Counsel objected based on lack of notice. The trial court granted the motion, noting that Defendant could not fairly claim lack of notice about a call he participated in. At that same hearing, the People disclosed to the trial court that the Canadian government refused to send CBSA Officer Lavers to the United States to participate in Defendant's trial.

The morning of trial, Defense Counsel filed two emergency motions; an *Emergency Motion in Limine* to exclude the jail phone call on the basis that Defendant was incompetent at the time of the call, and a second *Emergency Motion in Limine* to exclude photos of the body armor and the body armor itself on the basis that the People would not be able to establish the proper foundation to admit those items. The trial court denied both motions. Defense Counsel renewed its objections when the People submitted the evidence for admission.

Defendant chose to take the stand in his own defense. While being cross-examined, Defendant attempted to testify as to his mental state at the time of the incident, but the People and the trial court both redirected Defendant to answer only the questions he was asked. At one point the People asked Defendant to agree that he was a convicted violent felon, which he did.

[7] Preliminary Examination Transcript, p. 9. The People admitted the Report as a business record, and Defense Counsel raised no objection. Specifically, the Report detailed that Defendant attempted to flee from the CBSA secondary checkpoint after driving over the bridge from the American side, and that Defendant was wearing body armor when apprehended.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

During closing arguments, the People referred to the charge as "possession of body armor by a violent felon," and referred to Defendant as "a violent felon." The People included in their closing argument brief statements about the underlying policy of the statute and the need to protect law enforcement.

The jury found Defendant guilty as charged on one count of Weapons – Body Armor – Possess/Use by Violent Felon. Defendant now appeals as of right, pursuant to MCR 7.208(B)(1).

ISSUES

I. Did the trial court err by denying Defendant's motions to quash the bindover and exclude the body armor evidence?

Defendant first argues that the trial court reversibly erred by denying both his *Motion to Quash Bindover and Dismiss* and *Motion in Limine* to exclude the body armor evidence. Defendant claims that the People failed to lay a proper foundation for the admission of the evidence, resulting in a violation of Defendant's due process rights as well as the Michigan Rules of Evidence. As such, according to Defendant, the trial court reversibly erred in admitting the evidence both at the Preliminary Examination and at trial.

Defendant also claims a Confrontation Clause issue, arguing that possession of the body armor was established by indirect hearsay through testimony of officers who never saw Defendant possess the body armor.

II. Did the trial court err by denying Defendant's motion to exclude the jail call recording?

Defendant argues that the trial court reversibly erred in denying his *Emergency Motion in Limine* to exclude the recorded jail phone call. Defense Counsel objected to its admission on two grounds; that the prosecution's failure to review the call sooner did not establish good cause for the late disclosure, and that due to Defendant's incompetency at the time, the call was of limited probative value and was highly and unfairly prejudicial to Defendant. The trial court denied the motion on grounds that there was not a notice problem with regard to the late disclosure by the People, and also that Defendant's competency status at the time of the call was irrelevant. Defendant argues that both of these conclusions were erroneous and must be reversed.

Defendant further argues that the admission of the recording resulted in a fundamentally unfair trial where Defendant had less than a week's notice to prepare to defend against the recording, and where the jury was encouraged to convict Defendant based on his statements but was prevented from hearing anything about Defendant's diminished capacity at the time of the call.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

III. Did the People commit prosecutorial misconduct, thereby denying Defendant a fundamentally fair trial?

Defendant argues that the People committed prosecutorial misconduct in several instances: by referring to Defendant as a "violent felon" in opening and closing argument, by asking Defendant on cross examination if he was a violent felon, by "thwarting" Defendant's attempts to explain his mental state at the time of the incident, and by improperly appealing to the jury's sympathies.

Defendant argues that the People's emphasis on characterizing Defendant as a violent felon during cross examination and opening and closing arguments violated his due process rights as well as Michigan Rule of Evidence 404(b) by encouraging the jury to convict him based on past acts. Defendant claims this amounted to plain error that seriously affected the fairness of his trial, especially given that he was "thwarted" from testifying about his mental state.

Defendant further adds that the People's statements regarding the policy underlying the statute banning felons from possessing or using body armor improperly appealed to the jury's sympathies and was overly prejudicial.

IV. Did Trial Counsel fail to provide effective assistance of counsel?

To the extent that Defense Counsel at trial did not object to the alleged prosecutorial misconduct, Defendant argues he was deprived of effective assistance of counsel. Defendant claims that Defense Counsel's failure to object was not part of a trial strategy and resulted in the presentation of inadmissible and unfairly prejudicial evidence to the jury. Defendant argues that there is a reasonably likely chance that the result of his trial would have been different had Defense Counsel made timely and adequate objections. To that end, Defendant asks this Court to conduct a hearing to examine these allegations, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

LAW & ANALYSIS

I. Trial court's denial of Defendant's motions regarding body armor evidence

Denial of Defendant's Motion to Quash Bindover and Dismiss

A review of a Circuit Court's analysis of the bindover process at preliminary examination is de novo. *People v Reigle*, 223 Mich App 34, 36; 566 NW2d 21 (1997). The reviewing court must determine if the magistrate committed an abuse of discretion in determining whether there was probable cause to believe that the defendant committed the offense charged. *Id.*, at 36-37. An abuse of discretion exists when the court's decision is "so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

of passion and bias." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). In other words, an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*, citing *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

The standard of proof at preliminary examination is probable cause, and the examining court must bind a defendant over if the state has sufficiently established that a crime has been committed and that the defendant committed it. *People v Doss*, 406 Mich 90, 100; 276 NW2d 9 (1979). There must be evidence on each element of the crime charged or evidence from which those elements may be inferred. *People v Oster*, 67 Mich App 490, 495; 241 NW2d 260 (1976). Circumstantial evidence and reasonable inferences arising from the evidence can establish probable cause. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

This Court reviews the Circuit Court's analysis of the bindover at the Exam de novo. The crime Defendant was charged with has two elements that must be established: (1) Defendant possessed/used body armor, and (2) Defendant was previously convicted of a violent felony.[8] Defendant stipulated as to his prior violent felony convictions. That leaves the issue of whether or not the People sufficiently established that Defendant possessed or used body armor.

This Court finds that the trial court did not err in denying *Defendant's Motion to Quash Bindover and Dismiss*. Officer Whitten's testimony taken together with the stipulated exhibits formed sufficient probable cause that Defendant committed the crime he was charged with. The trial court carefully considered the evidence presented at the Exam, including the circumstantial evidence that established Defendant possessed/used the body armor in St. Clair County. Defendant had the body armor on the Bridge; there is nowhere on the Bridge to obtain body armor, so the only explanation is Defendant also possessed the body armor in Port Huron prior to crossing over into Canada. The People showed sufficient probable cause to bind the Defendant over to Circuit Court.

Denial of Defendant's Emergency Motion in Limine to exclude body armor evidence

An appellate court reviews a decision to admit evidence for an abuse of discretion; however, when the decision involves a preliminary question of law, such as whether a rule precludes the admission of evidence, a de novo standard of review should be employed. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Therefore, an abuse of discretion exists when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

[8]The violent felonies as applied to this case are Assault with Intent to Do Great Bodily Harm or By Strangulation and/or Criminal Sexual Conduct 2nd Degree. Both qualify as "violent felonies" under MCL 791.236.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

Michigan Rule of Evidence 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Whether or not an item of evidence has been authenticated is a question reserved for the trial judge in his role as evidentiary gatekeeper. *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154; 908 NW2d 319 (2017). Evidence supporting authentication may be direct or circumstantial and need not be free of all doubt. *Id.* The proponent of the evidence need only make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be. *Id.*, at 155. A sufficient foundation for the admission of tangible evidence "requires that the prosecution show that the object offered is the object which was involved in the incident and that the condition of the object is substantially unchanged." *People v Prast*, 114 Mich App 469, 490; 319 NW2d 627 (1982). Breaks in the chain of custody do not require exclusion of the evidence if the prosecution shows that the item is what it is purported to be and shows that it is connected with the crime. *Id.*

The Confrontation Clause of the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012), quoting U.S. Const., Am. VI. Michigan has adopted this language verbatim into its own Constitution. *Nunley*, at 697. The specific protections the Confrontation Clause affords only apply to statements used as substantive evidence. *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). One of the core protections is related to hearsay evidence that is testimonial in nature. *Nunley*, at 697-698. Specifically, "out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant." *Id.*

When an alleged error is constitutional, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The error is harmless where it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty even absent the error. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Defendant argues that the trial court erred in denying his *Emergency Motion in Limine* to exclude the body armor evidence. Defendant first claims that the admission was in violation of the Michigan Rules of Evidence and his constitutional due process rights because there was not a proper foundation to authenticate it or tie it to Defendant. Defendant claims that hearsay evidence from Officer Lavers is the only nexus connecting Defendant and the body armor. As this issue concerns a rule of evidence, this Court reviews the trial court's decision de novo.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

This Court finds no error in the trial court's admittance of the evidence. The People were able to establish the proper foundation pursuant to MRE 901(a) through their questioning of Officers Stockwell and Whitten. Neither officer testified as to anything specific Officer Lavers said; further, there is no hearsay problem when a statement is not offered to prove the truth of the matter asserted. The questioning of Officer Whitten established that he took custody of Defendant and the body armor, and that based on what he was told from Officer Lavers, he arrested Defendant. Officer Lavers' statements were only addressed to the extent that they explained why the officers did what they did, not to prove that Defendant had possession of the body armor.

Without doubt, the People's case was largely circumstantial without direct testimony from Officer Lavers. But circumstantial evidence is as valid as any other type, and the People opted to try the case with the evidence they had. The circumstantial evidence was sufficient to establish the requisite foundation.

Defendant further argues that he did not have a chance to confront Officer Lavers. As this concerns Defendant's 6th amendment rights under the Confrontation Clause, this Court reviews the trial court's decision de novo. This Court does not find Defendant's argument persuasive. Officer Lavers did not testify and the People did not attempt to introduce any evidence of his actual statements. Rather, the People connected Defendant to the body armor by questioning Officers Stockwell and Whitten while specifically directing them to avoid testifying as to anything Officer Lavers said. The trial transcript reflects the following exchange between the People and Officer Stockwell:

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

RECEIVED by MSC 9/22/2023 10:02:13 AM

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

Q	What did you do after taking possession of those things?
A	We contacted Port Huron Police Department.
Q	Okay. Did anyone from the Port Huron Police Department make their way to the bridge –
A	They did.
Q	– at that point?
A	Yes, sir.
Q	And would that have been around 6:40 p.m. if you know?
A	Yes, it probably – 6:40, seven o'clock.
Q	Okay.
A	Ballpark.
Q	And then do you recall which officer came from Port Huron at that point?
A	Officer, I believe his name is Whitten.
Q	Okay. And was, was anything done with Officer Whitten at that time?
A	We transferred custody of the body armor that we received and of Mr. Washington.[9]

The People questioned Officer Stockwell as to how he came to have custody of Defendant, his truck, and the body armor. At no point was anything specific that Officer Lavers said discussed. Where there is not a statement or a witness, there is no right to confrontation. As such, Defendant's 6th Amendment argument fails.

II. Trial court's denial of Defendant's motion regarding the recorded jail phone call

Admission of the evidence

Michigan Rule of Evidence 403 permits a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *People v Mardlin*, 487 Mich 609, 612; 790 NW2d 607 (2010). Evidence is "unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.*, at 618-619, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (quotation marks omitted).

A defendant who is determined to be incompetent to stand trial cannot be proceeded against while he is incompetent. *People v Kammeraad*, 307 Mich App 98, 137; 858 NW2d 490 (2014); MCL 330.2022(1). Likewise, a defendant must be competent to plead guilty to a crime. *People v Whyte*, 165 Mich App 409, 411; 418 NW2d 484 (1988). The determination of competency is an issue

[9] Trial Transcript, p. 152-154.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

RECEIVED by MSC 9/22/2023 10:02:13 AM

within the trial court's discretion. *People v Lucas*, 47 Mich App 385, 390; 209 NW2d 436 (1973).

Defendant's argument posits that the trial court misapplied a rule of evidence in admitting the recording, which this Court reviews de novo. The recording of the jail phone call between Defendant and his mother was highly probative, as it amounted to what the People considered a confession. While the recording was also prejudicial to Defendant, this Court does not find that it was *unfairly* prejudicial. The People presented a second statement by Defendant where he also admitted to possessing the body armor, overheard by Officer Whitten. The recorded phone call, therefore, is not the only statement of Defendant's in evidence, and the second statement presented corroborates the content of the phone call.

Defendant further argues that he was incompetent at the time of the call and it should have been excluded on that ground. However, there is no case law to support this proposition. A defendant certainly has a right to be competent to stand trial, assist in his defense, and plead guilty a crime. However, there is no support for Defendant's claim that his incompetence at the time required exclusion of the evidence.

This Court finds no error in the admission of the phone call recording pursuant to MRE 403. Even if the trial court did err, the People have shown that it was harmless beyond a reasonable doubt because a rational jury would still have found Defendant guilty based on his other admission that Officer Whitten overheard.

Notice of late additions to witness lists

A prosecutor's late addition of a witness is permitted at *any* time—even in the middle of a trial—upon leave of the court and for good cause shown. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992); MCL 767.40a(4). A trial court's decision whether to allow a late addition to a witness list is discretionary. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). The purpose of a witness list is to avoid "trial by surprise." *Grubor Enterprises, Inc. v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998). An abuse of discretion exists when the court's decision is "so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion and bias." *Ullah*, supra, at 673.

Defendant alleges that he did not have enough time to prepare after the People moved to add a witness the week before trial. The trial court's decision to allow a late addition to a witness list is reviewed for an abuse of discretion. The Court finds that argument to be without merit. Defendant cannot rightly claim to be

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

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surprised when he participated in the phone call with his mother. Further, the jail makes very clear that all phone calls are recorded and may be reviewed. The trial court did not abuse its discretion in allowing the People to add the Securus Phone Representative to their witness list the week before trial.

III. Allegations of prosecutorial misconduct

Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To avoid forfeiting an unpreserved claim, a defendant must demonstrate plain error that was outcome determinative. *Carines*, supra, at 763. If a timely curative instruction could have overcome the prejudicial effect of the prosecutor's comments, no error requiring reversal will be found. *Watson*, at 586, quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Arguments that are little more than an appeal to the jury's sympathy for the victim are improper. *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987). However, a prosecutor's closing argument should be considered in its entirety. *Id.*, at 386, citing *People v Cowell*, 44 Mich App 623, 627; 205 NW2d 600 (1973).

Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or confirm his or her conduct to the requirements of the law. *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), quoting MCL 768.21a(1) (quotations omitted). If a defendant plans to offer testimony to establish insanity at the time of an alleged offense, the defendant must file and serve upon the court and the prosecuting attorney a written notice of his intention to assert the defense of insanity at least 30 days before trial. MCL 768.20a(1).

Defendant argues that the People committed prosecutorial misconduct in several ways. Because Defendant did not object at trial, he failed to preserve this issue. Therefore, this Court reviews for plain error affecting Defendant's substantial rights.

Defendant first claims that the People "thwarted" his efforts during cross-examination to explain why he did not remember details of the incident. Defendant attempted to insert statements about his mental state multiple times while being cross examined by the People:

Q	I'm going to show you, do you recall wearing a red shirt that day?
A	No, I don't recall. I went, when I was arrested what they immediately sent me to a –

RECEIVED by MSC 9/22/2023 10:02:13 AM

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

Q	Well, just, I just ask you to answer the questions.
MR. POLITANO	Judge, I'm going to object. I think this exceeds the scope of what my direct examination was.
THE COURT	Cross-examination is unlimited to the scope of direct. Only re-direct is limited to the scope of cross-examination. Mr. Washington, just answer the question. Don't offer anything other than the answer to the question.
* * *	
Q	Is it possible that that's your red shirt when you were driving there?
A	I don't recall.
Q	Okay.
A	When I went to the jail they sent me to three west.
Q	Well, I'm just asking that you answer the question I ask you, okay. Mr. Washington, you agree – I'm going to approach you with People's Exhibit 20. Do you recognize what this is?
A	It looks like a vest.
Q	Okay. Was that the vest that James gave you?
A	I don't recall.
Q	Okay. You agree that James did give you a bulletproof vest?
A	I don't remember. I went through a lot. I don't remember what was going on that day.
Q	Okay.
A	I, I don't know if I was drugged or someone had hypnotized me or what was going on. They sent me to Port Huron –
Q	Okay.
A	-- McClaren Hospital.
Q	Okay.
A	Psychiatric –
THE COURT:	Mr. Washington, you just have to answer questions. You can't just talk. Go ahead.[10]

Defendant claims that these "thwarts" by the People were impermissible and amounted to prosecutorial misconduct. This Court does not agree. The transcript reflects the People's attempts to redirect Defendant to answer only the questions asked; the trial court likewise instructed Defendant. This Court also finds it telling that Defense Counsel did not object to the People's directing

[10] Trial Transcript, p. 183-187.

CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

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Defendant to answer only the questions asked, and also did not attempt to directly ask Defendant any questions about his mental state. Defendant did not affirmatively claim a legal insanity defense in this case. Instead, Defendant chose to plead not guilty. As such, he was rightfully limited in presenting evidence regarding his mental state at the time of the incident to the jury because it was irrelevant. The People were allowed to try and redirect the Defendant to answer only the questions asked.

Defendant also claims that the People's references to Defendant as a "violent felon" throughout their opening statement and closing argument, as well as on cross examination, amounted to prosecutorial misconduct. Again, this Court does not agree. Defendant was charged with Weapons – Body Armor – Possess/Use by Violent Felon. Being a violent felon is an element of the crime; that is simply the language of the statute. The People were responsible for establishing, beyond a reasonable doubt, that Defendant was a violent felon. Defense Counsel stipulated to the fact that Defendant *was* a violent felon. Requiring the People to avoid the term "violent felon" in a trial where being a violent felon is an element of the crime is nonsensical.

Finally, Defendant claims that the People's reference to the policy underlying the statute he was charged under during closing argument amounted to an improper appeal to the jury's sympathies. This Court finds that argument without merit. While the People did briefly discuss the policies underlying the relevant statute, it was not the main focus of the argument. Considering the People's closing argument as a whole, the People discussed the elements of the crime, the various proofs that were put on, the standard of guilt beyond a reasonable doubt, and the need for the jury to examine the evidence. The brief reference to public policy was not enough to rise to the level of prosecutorial misconduct. Even if it did, a precautionary instruction would have cured it, so this Court does not find any basis for this argument.

This Court does not find that there were any instances of prosecutorial misconduct during Defendant's trial. Defendant has not demonstrated any plain error that was outcome determinative. Even if any of the People's actions did constitute prosecutorial misconduct, a curative instruction would have overcome the prejudicial effect of the prosecutor's comments.

IV. Ineffective assistance of counsel

Michigan courts use a two-pronged test in assessing ineffective assistance of counsel claims. *People v Hunter*, 141 Mich App 225, 229; 367 NW2d 70 (1985). Pursuant to *Strickland v Washington*, 466 US 668; 104 S Ct 2052 (1984), establishing ineffective assistance requires a defendant to show that trial counsel's performance was objectively deficient, and that the deficiency prejudiced the defendant. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). Prejudice in this context means "a reasonable probability that, but for

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CIRCUIT COURT FOR THE 31ST JUDICIAL CIRCUIT OF MICHIGAN

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.*

It is presumed trial counsel provided effective assistance in fact and in law. *People v Tranchida*, 131 Mich App 446, 449; 346 NW2d 338 (1984). To overcome this presumption, a defendant must show that there was failure to perform an essential duty owed by counsel to defendant and that this failure prejudiced the defense. *Id.* Defense counsel is not required to make meritless or futile objections. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012); *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

This Court begins its analysis of this issue presuming that Defense Counsel provided effective assistance of counsel. Keeping that in mind, this Court does not find that Defense Counsel's performance was objectively deficient in failing to object to the People's questioning, opening statement, and closing argument. As discussed above, this Court found no prosecutorial misconduct. The People questioned Defendant and argued its case appropriately. This Court does not find that there was any basis for Defense Counsel to successfully object to either, therefore Defense Counsel's failure to object cannot be said to have been objectively deficient.

Given that this Court finds Defense Counsel's performance to be sufficient, there is no need to discuss the second prong, whether the alleged deficiency prejudiced Defendant. Defendant's claim that Defense Counsel was ineffective for failing to object to the People's questioning and opening and closing arguments fails.

CONCLUSION

Based on the analyses above, this Court DENIES Defendant's request to vacate his conviction and order a new trial. This Court also DENIES Defendant's request for an evidentiary hearing.

IT IS SO ORDERED.

September 17th, 2021

HON. DANIEL A. DAMMAN
Circuit Court Judge

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APPENDIX C

(*People v Washington*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052))

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANTZ HOWARD WASHINGTON,

Defendant-Appellant.

FOR PUBLICATION
December 1, 2022
9:05 a.m.

No. 353052
St. Clair Circuit Court
LC No. 19-002078-FH

Before: GLEICHER, C.J., and MARKEY and PATEL, JJ.

GLEICHER, C.J.

The Sixth Amendment's Confrontation Clause prohibits the admission of a testimonial statement made by an unavailable witness unless the witness was previously made available for cross-examination. The question presented is whether evidence implicitly introducing an unavailable witness's testimonial statement is similarly precluded.

A Canadian Customs and Border Service Agency (CBSA) agent, Officer Matthew Lavers, arrested Lantz Washington after Washington avoided paying the Blue Water Bridge toll in Port Huron. Lavers brought Washington back to the American side of the bridge and reported that Washington was wearing a bulletproof vest under his shirt. The prosecution charged Washington with being a violent felon in possession of body armor contrary to MCL 750.227g.

Lavers did not testify at Washington's trial and was never offered for cross-examination. The prosecution circumvented this Confrontation Clause problem by questioning a United States Customs and Border Protection officer about his "communications" with Lavers. Through this questioning, the prosecution effectively admitted Lavers' unconfronted testimony that Washington possessed the body armor.

Lavers was the only witness who could connect Washington to the body armor, and thus a witness whom Washington had a constitutional right to confront. Because the error in allowing another witness to establish Washington's guilt was not harmless beyond a reasonable doubt, we vacate Washington's conviction and remand for a new trial.

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I. THE TRIAL EVIDENCE

Washington crossed the Blue Water Bridge from Port Huron, Michigan, into Canada without paying the toll. The toll collector, Denise Fenner, recounted that a vehicle "actually blew through my lane." Fenner could not see the vehicle's occupant or discern whether the driver was male or female. From her vantage point, Fenner admitted, she would not have been able to tell if the driver wore a bulletproof vest. Video evidence revealed that the driver wore red clothing and drove a Ford pickup truck. Fenner reported the event to her supervisor.

Paul Stockwell, a supervisory officer with United States Customs and Border Protection, supplied the testimony needed to convict Washington: that Washington was in possession of a body armor. Stockwell explained that he met Officer Lavers and a crew of CBSA officers on the American side of the bridge. They had Washington in a police cruiser. Stockwell's observation of Washington in the Canadian police cruiser was his only relevant first-hand observation.

Because Lavers' did not appear at the trial, the prosecution relied on the following testimony by Officer Stockwell to establish Washington's possession of the vest:

> *Q*. . . . Who gave you custody of [Washington] . . . ?
>
> *A*. I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.
>
> *Q*. Okay, so a collective group of you?
>
> *A*. There was.
>
> *Q*. Okay.
>
> *A*. There was about six of us.
>
> * * *
>
> *Q*. At some point did Officer Lavers from the Canadian services hand you any other evidence?
>
> *A*. Yes, he did.
>
> *Q*. What did he hand you?
>
> * * *
>
> *A*. A body armor.
>
> * * *
>
> *Q*. Now, without saying anything about what was said, the only question I have for you is *were there communications between you and Officer Lavers*?

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A. There were.

Q. Okay. *And . . . based on those communications you took custody of [Washington]*?

A: Yes, we did.

Q. And you took possession of the body armor that was turned over at the same time?

A. Yes, sir. [Emphasis added.]

On cross-examination, Officer Stockwell acknowledged that Washington was not wearing the bulletproof vest when he took him into custody, that he never saw Washington wearing the vest, that he did not witness the vest being removed from Washington's person or possession, and that he had no direct personal knowledge that Washington had ever possessed the vest. The questioning concluded:

Q. So would it be fair to summarize, Officer, you have no direct knowledge of Mr. Washington having possession of [the body armor], seeing him in possession of it in any . . . way, shape or form; is that correct?

A. No direct knowledge.

Officer Stockwell transferred custody of Washington to Port Huron Police Officer Kyle Whitten. Whitten took Washington to the St. Clair County Jail, where he "overheard [Washington] say that he was wearing the body armor because he was afraid people were going to kill him." Like Stockwell, Whitten conceded on cross-examination that he did not have any personal knowledge that Washington had worn or possessed the body armor.

Port Huron Police Officer Ernesto Fantin authenticated a jailhouse recording of a phone call from Washington to his mother. During the call, Washington stated that "James" gave him a bulletproof vest and he "put on the bulletproof vest." The transcribed call continued, "And I went to the police with it on. I was [in] fear for my life, they was threatening me."

Washington testified on his own behalf and denied having made the statement attributed to him by Whitten. He otherwise claimed that he could not recall or remember whether he possessed or wore the bulletproof vest.

The jury found Washington guilty as charged.

II. ANALYSIS

A. HEARSAY AND THE CONFRONTATION CLAUSE

The United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . .

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to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008) (quotation marks and citations omitted). A witness's testimony incriminating a defendant is inadmissible at a trial unless the witness is present for cross-examination or previously submitted to cross-examination by the defendant. *Melendez-Diaz v Massachusetts*, 557 US 305, 309; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

Washington challenges the following portion of the prosecutor's exchange with Officer Stockwell on Confrontation Clause grounds:

> *Q*. At some point did Officer Lavers from the Canadian services hand you any other evidence?
>
> *A*. Yes, he did.
>
> *Q*. What did he hand you?
>
> * * *
>
> *A*. A body armor.
>
> * * *
>
> *Q*. Now without saying anything about what was said, the only question I have for you is *were there communications between you and Officer Lavers*?
>
> *A*. *There were.*
>
> *Q*. Okay. *And . . . based on those communications you took custody of [Washington]*?
>
> *A*. *Yes, we did.*
>
> *Q*. *And you took possession of the body armor that was turned over at the same time?*
>
> *A*. *Yes, sir*. [Emphasis added.]

Our Confrontation Clause analysis of this testimony requires two inquiries: was Lavers "(1) . . . a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562; 802 NW2d 552 (2011). The first question concerns whether Stockwell's questioning introduced a "testimonial" statement. A testimonial statement is one made for an evidentiary purpose. *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Crawford* instructs that for Confrontation Clause purposes, testimonial statements are those in which witnesses " 'bear testimony' " against an accused. *Id.* "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of

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establishing or proving some fact." *Id.* (cleaned up.) The United States Supreme Court has characterized the exclusion of testimonial hearsay as the "primary object" of the Sixth Amendment. *Id.* 53. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

Lavers' "affirmation" that Washington was wearing the body armor, communicated through Stockwell, was testimonial. Lavers told Stockwell about the body armor "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Had the prosecutor simply asked Stockwell, "what did Officer Lavers tell you about the body armor," it is easy to conclude that the Confrontation Clause would have prohibited an answer (and undoubtedly, that is the reason the prosecutor did not ask that question).

But Stockwell's trial testimony conveyed precisely the same information: that Washington had been wearing the body armor when caught by the Canadian authorities. Either recapitulated directly as a statement made by Lavers to Stockwell, or through the implied method used at the trial, *Lavers* was the source of the incriminatory assertion that Washington possessed the body armor. Stockwell was not personally involved in Washington's arrest on the Canadian side of the bridge. He had no reason to know, or even to suspect, that Washington was wearing body armor until he spoke to Lavers. Stockwell relayed to the jury the *substance* of Lavers' out-of-court report and the prosecutor introduced this evidence to prove its truth: that Washington possessed the body armor.

Lavers' assertion of Washington's guilt was incorporated within Stockwell's testimony through an indirect method that checks all the boxes as unconfronted testimonial hearsay: an out-of-court assertion, testimonial in nature, admitted for its truth. Stockwell did not explicitly state that Washington was wearing the vest, but his testimony contained an implicit accusation that he was. And Lavers was Washington's accuser, not Stockwell, despite that Lavers' actual words were never revealed to the jury. Because Lavers never testified, the answer to the second *Fackelman* inquiry is obvious: Washington did not have an opportunity to confront Lavers.

The remaining question is whether the United States and Michigan Constitutions permit the introduction of this implied hearsay testimony.

Other courts have referred to similar end-runs around the Confrontation Clause as the elicitation of implied hearsay. For example, in *Mason v Scully*, 16 F3d 38 (CA 2, 1994), the prosecutor questioned a detective about a conversation the detective had with an armed robbery suspect (George Rivera), who was unavailable to testify at the defendant's trial:

> "*Q.* And, after the lineup . . . was a conversation held with George Rivera? This is a yes or no question.
>
> *A.* Yes.
>
> *Q.* And, after this conversation with George Rivera, were you looking for somebody?

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A. Yes, I was.

Q. And who were you looking for?

A. [The defendant] Terrence Mason." [*Id*. at 40.]

The United States Court of Appeals for the Second Circuit held that the admission of this testimony violated the defendant's right to confront Rivera, whose statement was implicitly introduced through the detective. The Court explained, "To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit." *Id*. at 42-43. That the precise content of Rivera's statement was never revealed was "immaterial," the Court continued, "for the plain implication that the prosecutor sought to elicit, and emphasized in his summation, was that the conversation with Rivera led the police to focus on Mason." *Id*. at 43.

The Second Circuit considered the same legal issue in *Ryan v Miller*, 303 F3d 231 (CA 2, 2002), which arose from the murder of a young boy. Four teenagers were suspected of having killed the child. Detectives questioned many witnesses and possible suspects, narrowing down the potential defendants to Peter Quartararo and three others. *Id*. at 234-235. Detective Palumbo questioned Quartararo while detectives Gill and Reck questioned Thomas Ryan and Robert Brensic. *Id*. at 235. The prosecutor elicited the following testimony from Sergeant Jensen, who oversaw the investigation:

"*Q*. And did something happen at 4:30?

A. Yes, there did.

Q. What?

A. I received a phone call from Detective Palumbo.

Q. Did you then have a conversation with Detective Palumbo on the telephone at about 4:30?

A. Yes, I did.

Q. *Now, as a result of talking with Detective Palumbo at 4:30, did you do something with respect to Gill and Reck?*

A. *Yes, I did.*

Q. *What was that*?

A. *I directed Gill and Reck to advise Tom Ryan and Robert Brensic of their rights.*"

[Defense Counsel]. I'm going to object.

The court. No overruled.

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Q. As to what charge?

A. Murder." [*Id.* at 241.]

The opinion details additional testimony given by the detectives referencing other conversations and inculpatory actions taken after conversations with suspects who confessed (and who did not testify), such as reading another suspect his *Miranda*[1] rights. *Id.* at 241-244.

The Court characterized the objectionable content of the testimony as "accusatory assertions introduced without the testimony of the accuser" in violation of the Confrontation Clause. *Id.* at 247. Recalling *Mason*, the Court reasoned, "Testimony need not contain an explicit accusation in order to be excluded as a violation of the Confrontation Clause," and admonished that "it is well established in this Circuit that lawyers may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." *Id.* at 248.

Other Courts have analyzed similar efforts to avoid the Confrontation Clause and have reached the same conclusion. In *United States v Kizzee*, 877 F3d 650, 653 (CA 5, 2017), a case resembling ours, the prosecutor questioned a detective "about questions he posed to a criminal suspect, Carl Brown, during an interrogation." Brown did not testify. Here is the colloquy:

> "*Prosecutor*. Detective Schultz, did you ask Mr. Brown a series of questions after you arrived at the police department?
>
> *[Schultz]*. Yes, sir, I did.
>
> *Prosecutor*. Did you ask Mr. Brown whether or not he obtained the narcotics that were discovered in his hat from Pereneal Kizzee?
>
> *[Schultz]*. Yes, sir, I did.
>
> *Prosecutor*. Did you ask him if he obtained the narcotics that were discovered in his hat immediately prior to being stopped?
>
> *[Schultz]*. Yes, sir.
>
> *Prosecutor*. Did you ask Mr. Brown whether or not he had seen any additional narcotics at 963 Trinity Cut Off?
>
> *[Schultz]*. Yes.
>
> * * *
>
> *Prosecutor*. Did you ask him whether or not he obtained drugs from Mr. Kizzee on previous occasions?

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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[Schultz]. Yes, sir.

Prosecutor. Based on your observations the day before that involved the surveillance at Mr. Kizzee's residence, the stop by Officer Taylor [Wilkins], the discovery of narcotics, and your subsequent interview of Mr. Brown, what did you and Detective Lehman do?

[Schultz]. I was able to obtain a search warrant for 963 Trinity Cut Off." [*Id.* at 655 (alterations altered).]

The United States Court of Appeals for the Fifth Circuit vacated Kizzee's conviction on Confrontation Clause grounds, explaining:

> This Court has recognized that police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. Where an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered. [*Id.* at 657 (cleaned up).]

The detective's testimony was inadmissible because it allowed the jury "to reasonably infer the defendant's guilt," the Court continued, based on testimonial statements made to the officer by nontestifying witnesses. *Id.* See also *Young v United States*, 63 A3d 1033 (US App DC, 2013); *United States v Meises*, 645 F3d 5, 21 (CA 1, 2011) ("[I]f what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered.").

Michigan has not yet officially weighed in on the evidentiary and constitutional issues presented here. We find the federal implied hearsay cases cited in this opinion persuasive and consistent with our State's Confrontation Clause jurisprudence. Evidence directly implying the substance of a testimonial, out-of-court statement made by an unavailable witness and offered to prove its truth is inadmissible because it violates the Sixth Amendment of the United States Constitution, and Article 1, § 20 of Michigan's Constitution.

Contrary to our dissenting colleague's position, this Court's decision in *Jones (After Remand)*, 228 Mich App 191, is neither dispositive of nor relevant to the evidentiary issue now before us. *Jones* involved only a hearsay question and not a Confrontation Clause issue. A witness testified to having heard another witness shout, " 'Bitch come out, I'm gonna kick your ass. And Alphonzo don't want you, Alphonzo don't love you.' " *Id.* at 203. The defendant objected solely on hearsay grounds. This Court held that the first phrase ("Bitch come out") was not a "statement" for hearsay purposes because it "contains no assertion. It is incapable of being true or false. It is a command, not an assertion[.]" *Id.* at 204-205. The remainder of the testimony was assertive, this Court observed, but was not offered to prove its truth. *Id.* Rather, the words were offered "as an integral part of the series of events that led to the shooting of the victim" and "a component of the threat" made to another witness. *Id.* at 205.

RECEIVED by MSC 9/22/2023 10:02:13 AM

The dissenter in *Jones* maintained that the words contained an "implied assertion" that the speaker was angry, and therefore qualified as hearsay. *Id.* at 227 (O'CONNELL, J., dissenting). The majority rejected the dissent's version of the "implied assertion" theory, defining the concept as follows:

> The use of the term "implied assertion" to denote hearsay has occurred in situations where out-of-court conduct of a person, sometimes verbal and sometimes nonverbal, is offered in evidence to demonstrate that person's belief, from which the inference is offered that the belief is true, *when it was not the actor's intent to communicate the matter to be proved in court.* And so, to use a famous example, if the issue were the seaworthiness of a ship, evidence that the ship captain sailed away with his family aboard after making a thorough inspection of the ship would be considered hearsay as being the captain's implied assertion that the ship was seaworthy. [*Id.* at 207-208 (emphasis added).]

Stockwell's recount of his conversation with Lavers does not fall within this definition of an "implied assertion" because it *was* offered to prove Lavers' intent "to communicate the matter to be proved in court." Unlike an "implied assertion," the term used in *Jones*, the substance of Lavers' conversation with Stockwell on the Blue Water Bridge—that Washington had the body armor in his possession—was offered by the prosecution to prove its truth. And when Lavers handed over Washington and the vest to Stockwell, Lavers made a statement that he intended as accusatory. Unlike the witness quoted in *Jones*, Lavers meant to "bear testimony" against Washington, thereby situating the statement squarely within the definition of unconfronted hearsay. See *Fackelman*, 489 Mich at 515 ("And we understand from the constitution that the right of confrontation is concerned with a specific type of out-of-court statement, i.e., the statements of 'witnesses,' those people who bear testimony against a defendant.").

Notably, the defendant in *Jones* did not challenge the admission of the statements on Confrontation Clause grounds; that case was decided six years before *Crawford*. Through *Crawford*'s lens, the statements would have been admissible because they were not testimonial. The evidence being conveyed was the speaker's state of mind rather than an accusation. *Jones* and its newest progeny, *People v Propp (on Remand)*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 343255), involve communications that were neither hearsay nor testimonial, and lack any relevance here.

We also respectfully disagree with our dissenting colleague's view that the "communication" testimony elicited from Stockwell was intended only to explain why Stockwell took Washington into custody and not to prove that Washington possessed the body armor. Stockwell took Washington into custody because Washington was in possession of body armor. That fact was personally unknown to Stockwell until Lavers shared it. The reason that Stockwell took Washington into custody is logically and legally inextricable from the out-of-court accusation made by Lavers that Washington was wearing the body armor when arrested in Canada. The "explanation" for Stockwell's conduct is relevant only because it inculpated Washington.

The prosecutor asked Officer Stockwell three questions critical to proving Washington's guilt: whether he had "communications" with Lavers, whether "based on those communications [he] took custody of [Washington]," and whether he "took possession of the body armor that was

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turned over at the same time." Implicit within Stockwell's answers is Lavers' out-of-court statement that Washington possessed the body armor when he was arrested. Absent this implied testimonial hearsay, the prosecutor could establish only one crime: jumping the toll. Stockwell did not recount the exact words the two shared, but the substance of Lavers' communication was obvious, and the reason for its introduction was to prove that Washington was wearing the body armor when stopped by the Canadian authorities rather than to explain why he was taken into custody.

Permitting the prosecution to "weav[e] an unavailable declarant's statements into another witness's testimony by implication" violates the Confrontation Clause. *Meises*, 645 F3d at 22. Stockwell's testimony regarding his "communications" with Lavers therefore violated Washington's Sixth Amendment right to confront Lavers. We turn to a discussion of the appropriate remedy for this constitutional violation.

B. PRESERVATION AND OUR STANDARD OF REVIEW

On the morning of the trial, Washington moved in limine to exclude from the trial evidence the bulletproof vest and the recorded jailhouse phone call. Defense counsel maintained that the prosecution could establish an evidentiary foundation for the introduction of the bulletproof vest, "the corpus delicti itself," only through testimony that would violate the Confrontation Clause. Counsel contended, "And if you read *Crawford [v] Washington*, I don't think anyone can doubt having read that wonderful opinion by Justice Scalia that if you don't have the ability to cross examine the real witness, . . . the only one who saw you do anything, you're being denied your right to a fair trial and there's a Sixth Amendment violation." Regarding Washington's alleged statements at the jail and during the phone call, counsel invoked the "rule of corpus delicti."

The trial court denied the motion, but it precluded Officer Stockwell from testifying to any statements made by Officer Lavers. The court explained, "[H]e can say factually I received this from a Canadian Customs officer at the same time I received the Defendant, as well as his truck was turned over. That then is okay. You've got those circumstances."

Counsel also pointed out that Washington had been deemed incompetent to stand trial following a forensic examination conducted approximately two weeks after his arrest, and moved to exclude his statements on voluntariness grounds. Washington was only later deemed competent to stand trial. The court denied that motion, too.

We review de novo whether a defendant's Sixth Amendment right of confrontation has been violated. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018). Because the Confrontation Clause error was preserved by an appropriate objection, we must determine whether the beneficiary of any error has established that the error was harmless beyond a reasonable doubt. *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020). This analysis requires us to assess "the probable effect of that testimony on the minds of an average jury." *Id.* (quotation marks and citation omitted). "Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony" of Officer Stockwell, and the introduction of the body armor. *Id.* (quotation marks and citation omitted). This analysis requires us to consider the remainder of the prosecution's case.

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C. THE APPROPRIATE REMEDY

The prosecution has not demonstrated that the error in this case was harmless beyond a reasonable doubt. The primary evidence linking Washington to the body armor was provided by Stockwell's inadmissible testimony conveying Lavers' statements. Through Stockwell, the prosecution admitted the vest into evidence and connected it to Washington. Absent Stockwell's testimony regarding the substance of his "communications" with Lavers, the prosecution would have lacked any testimony that could serve as a foundation for the vest's admission, to establish the chain of custody, or to prove that a crime had been committed.

The additional evidence linking Washington to the body armor consisted of Washington's alleged jailhouse confession (overheard by an officer), and the recorded telephone conversation with his mother explaining that "James" gave him the vest and he "put it on" because he "was [in] fear for my life, they was threatening me." But without Stockwell's prohibited testimony, the prosecution would have been unable to introduce the vest into evidence. Given that evidentiary vacuum, Washington's statements would have been inadmissible under the corpus delicti rule.

"In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). The "corpus delicti" rule originally applied only to homicide cases, but Michigan applies the rule to other crimes as well. *People v Cotton*, 191 Mich App 377, 384-387; 478 NW2d 681 (1991).

> In defining the concept of corpus delicti, Wigmore notes that an analysis of every crime reveals three components: (1) the occurrence of the specific injury or loss; (2) some person's criminality as the cause of the loss; and (3) the accused's identity as the perpetrator of the crime. In its strictest sense, the term "corpus delicti" refers only to the first of these elements. For example, the corpus delicti of homicide is the fact of death. However, most courts also have included the second element, someone's criminality. On the other hand, most courts have held that the accused's identity as the perpetrator of the crime is not an element of the corpus delicti. [*Id.* at 386.]

Without direct or circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed. Likely the prosecution was aware of this problem and questioned Stockwell regarding his "communications" with Lavers in an attempt to work around it. Regardless, we cannot conclude beyond a reasonable doubt that Washington would have been convicted had the inadmissible testimony been excluded.

We vacate Washington's conviction and remand for a new trial. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Sima G. Patel

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APPENDIX D

(*People v Washington*, ___ Mich App ___; ___ NW2d ___(2022) (Docket No. 353052)(MARKEY, J., dissenting))

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANTZ HOWARD WASHINGTON,

Defendant-Appellant.

FOR PUBLICATION
December 1, 2022

No. 353052
St. Clair Circuit Court
LC No. 19-002078-FH

Before: GLEICHER, C.J., and MARKEY and PATEL, JJ.

MARKEY, J. (*dissenting*).

I would affirm defendant's jury-trial conviction of possession or use of body armor by a violent felon, MCL 750.227g. Accordingly, I respectfully dissent.

I. FACTUAL BACKGROUND

Defendant crossed the Blue Water Bridge from Port Huron, Michigan, into Canada without paying the required toll. The toll booth agent on duty at the time saw red clothing in the cabin of defendant's vehicle, which was a Ford pickup truck. While the gate was still open at the toll station for a van directly in front of defendant's truck, defendant raced forward and proceeded through the open gate. The toll booth agent immediately contacted her supervisor and reported the incident.

Several Canadian authorities quickly pursued defendant's truck. Officer Matt Lavers of the Canada Border Services Agency stopped and apprehended defendant. Officer Lavers observed and reported that defendant was wearing body armor in the form of a bulletproof vest under a red shirt. Officer Lavers then returned defendant to the American side of the bridge.

Officer Lavers turned defendant, his truck, and the bulletproof vest over to United States Customs and Border Protection Officer Paul Stockwell. Officer Lavers did not testify at trial. The focus of this appeal is on the following testimony by Officer Stockwell regarding his interactions with Officer Lavers:

> [*The Prosecutor*]: At some point did Officer Lavers from the Canadian services hand you any other evidence?

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Officer Stockwell: Yes, he did.

[*The Prosecutor*]: What did he hand you?

* * *

Officer Stockwell: A body armor.

* * *

[*The Prosecutor*]: Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

Officer Stockwell: There were.

[*The Prosecutor*]: Okay. And . . . based on those communications you took custody of [defendant]?

Officer Stockwell: Yes, we did.

[*The Prosecutor*]: And you took possession of the body armor that was turned over at the same time?

Officer Stockwell: Yes, sir.

On cross-examination, Officer Stockwell acknowledged that defendant was not wearing the bulletproof vest when he took custody of defendant, that he never saw defendant wearing the body armor, that he did not witness the bulletproof vest being removed from defendant's person or possession, and that he had no direct personal knowledge that defendant had ever worn or possessed the vest.

Officer Stockwell transferred custody of defendant to Port Huron Police Officer Kyle Whitten. Officer Whitten then took defendant to the St. Clair County Jail. Officer Whitten testified that while at the jail, he "overheard the Defendant say that he was wearing the body armor because he was afraid people were going to kill him." Officer Whitten stated that he did not interview or interrogate defendant. Like Officer Stockwell, Officer Whitten conceded on cross-examination that he did not have any personal knowledge that defendant had worn or possessed the body armor.

Port Huron Police Officer Ernesto Fantin testified about a jailhouse recording of a phone call from defendant to his mother in which defendant confessed that "James" had given him the bulletproof vest and that he was wearing it when stopped by police because people were threatening his life. The trial transcript contains a verbatim reproduction of the phone conversation. Defendant took the stand in his own defense, and he testified that he did not make the statement attributed to him by Officer Whitten. Defendant otherwise indicated that he could not recall or remember whether he possessed or wore the bulletproof vest.

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Defendant was charged with one count of possession or use of body armor by a violent felon[1] and one count of operating a vehicle with a suspended license, second offense, MCL 257.904. A nolle prosequi was entered with respect to the suspended-license charge. On the morning of the jury trial, defendant moved in limine to exclude evidence of the recorded jail phone call and evidence of the bulletproof vest. With respect to the bulletproof vest, defense counsel maintained that the only way the prosecution could establish an evidentiary foundation or the chain-of-custody relative to the bulletproof vest was through testimony that would violate the Confrontation Clause because Officer Lavers would not be testifying. The trial court denied the motion, but it precluded the prosecutor from eliciting testimony about any statements made by Officer Lavers, which, as indicated earlier, the prosecutor honored when examining Officer Stockwell. The jury found defendant guilty of possession or use of body armor by a violent felon. The trial court sentenced defendant to a year in jail. The court denied defendant's motion to vacate his conviction or grant a new trial. This appeal followed.

II. ANALYSIS

A. DEFENDANT'S APPELLATE ARGUMENTS

Defendant argues that the prosecution violated his Sixth Amendment confrontation rights when it introduced implied testimonial hearsay statements by Officer Lavers through the testimony of Officer Stockwell. Defendant contends that the plain inference arising from Officer Stockwell's testimony was that Officer Lavers had informed Officer Stockwell that defendant was caught in possession of or using the body armor. Defendant argues that the implied hearsay was offered for the truth of the matter asserted, that defendant had no opportunity to cross-examine Officer Lavers at a prior hearing, that the prosecution cannot demonstrate that the Confrontation Clause violation was harmless beyond a reasonable doubt, and that to the extent that defense counsel failed to properly preserve the issue, his performance was deficient and prejudicial. With regard to his analysis of why the purported error was not harmless, defendant maintains that without the challenged testimony implicitly showing that defendant had worn or possessed the bulletproof vest, the only evidence demonstrating that defendant did so were his confessions in front of Officer Whitten and to his mother, which would not suffice for conviction under the *corpus delicti* rule.

B. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). And this Court reviews de novo the issue whether a defendant was denied his or her constitutional right to confront a complaining witness. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011).

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[1] There was no dispute that defendant was properly characterized as a "violent felon" for purposes of the charged offense. A stipulation was entered recognizing defendant as a violent felon, and the jury was so instructed.

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C. CONFRONTATION CLAUSE PRINCIPLES

Under the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Similarly, under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. The Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant was unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). "[T]he Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11. In *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012), our Supreme Court explained:

> The Confrontation Clause is "primarily a functional right" in which the right to confront and cross-examine witnesses is aimed at truth-seeking and promoting reliability in criminal trials. Functioning in this manner, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> The specific protections the Confrontation Clause provides apply only to statements used as substantive evidence. In particular, one of the core protections of the Confrontation Clause concerns hearsay evidence that is "testimonial" in nature. The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant. [Quotation marks and citation omitted.]

A statement is testimonial in nature when it was produced with the primary purpose of establishing or proving past events that were potentially relevant to a later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Statements made by witnesses during interrogations by law enforcement officers are generally testimonial in nature because they are directed at establishing the facts of a past event in order to identify or provide evidence to convict the perpetrator. *Id.* at 826. A statement is testimonial in nature when made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at trial. *Crawford*, 541 US at 52.

D. DISCUSSION

In *People v Jones*, 228 Mich App 191, 207; 579 NW2d 82 (1998), this Court addressed the issue of "implied assertions" and observed:

> While a number of decisions over the years have regarded "implied" assertions as hearsay, we believe that the theory had a questionable origin, that it

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> has never achieved general recognition in decided cases, that it is expressly negated by the modern rules of evidence, and that it is contrary to Michigan precedent.

After an exhaustive review of federal and Michigan caselaw, the *Jones* panel concluded its opinion by stating that "under the rule definition of hearsay, an 'implied assertion' is a contradiction in terms and a euphemism for declining to apply the rules as they are written." *Id.* at 225-226. Indeed, the rules of evidence make clear that "hearsay" refers to a "statement," MRE 801(c), in the form of "an oral or written assertion," MRE 801(a). This Court recently reaffirmed that "Michigan does not recognize the 'implied assertion' theory that has been adopted in some other jurisdictions." *People v Propp (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 343255); slip op at 8. In my view, we are bound by this precedent under MCR 7.215(J)(1) even if the federal cases the majority cites are viewed as being persuasive.

Proceeding on the *assumption* that the prosecutor effectively introduced an oral statement by Officer Lavers that potentially triggered protection under the Confrontation Clause, I cannot conclude that the assertion was "testimonial in nature." Consequently, there was no confrontation infringement. If the implication or implied statement was that defendant had possessed or used the bulletproof vest, the statement was not produced *at the time it was made* for the primary purpose to establish or prove past events and to use it as evidence in a criminal prosecution in an effort to convict defendant at a later trial. *Davis*, 547 US at 822, 826. Rather, the purpose of the communication was simply to provide Officer Stockwell with the information necessary for Officer Stockwell to formally take defendant into custody from Canadian authorities and proceed with the charging process under Michigan law. The implied statement explained Officer Stockwell's actions and his involvement in the case, including taking control of the bulletproof vest.

Finally, even if Officer Stockwell's challenged testimony should not have been admitted, the Confrontation Clause violation or error was harmless beyond a reasonable doubt given the evidence of defendant's admissions that he was wearing the body armor. See *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (applying the harmless-beyond-a-reasonable-doubt standard to a Confrontation Clause error). The majority relies on the *corpus delicti* rule to conclude that the prosecution fails to demonstrate that any error was harmless beyond a reasonable doubt. "[T]he corpus delicti of a crime must be established by evidence independent of an accused's confession[,]" but "[t]his rule is limited . . . to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt." *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). I would hold that defendant's statements that he put on the bulletproof vest constituted admissions of fact, but they did not amount to confessions of guilt to the charged crime.

In *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934), our Supreme Court discussed the differences between true confessions of guilt, which can implicate the *corpus delicti* rule, and mere admissions of fact that do not implicate the rule:

> Defendant does not distinguish between confessions and admissions of fact. If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt, but needs proof of other

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> facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission, and, therefore, is not within the range of cases cited.

A confession involves a direct acknowledgment of guilt or an acknowledgment of the truth of the crime for which a defendant has been charged, as distinguished from acts, admissions, and exculpatory statements. *Id.* An oral admission of an inculpatory fact from which a juror may infer guilt is not a confession if it falls short of being an acknowledgment of guilt. *Id.* at 291. And the admission to one of the essential elements of a criminal offense, but not all of the elements, does not constitute a confession. *Id.* A mere admission, which needs other facts to support a conviction, is not a confession and is admissible on the *corpus delicti*. *Id.*; see also *People v Schumacher*, 276 Mich App 165, 181; 740 NW2d 534 (2007) (if a defendant does not admit facts that are necessary to establish guilt, there is no confession).

I cannot conclude that defendant's admission to his mother and his admission overheard by Officer Whitten constituted direct acknowledgements of guilt to the offense of possession or use of body armor by a violent felon. I first note that with respect to the essential element of being a violent felon, defendant's statements did not reveal a concession or admission that he was a violent felon. See MCL 750.227g. Regardless, it is clear that defendant's statements were not intended to be confessions to the charged offense. Rather, defendant's statements plainly reflected expressions of or attempts at exculpation, at least in his mind. Although he admitted wearing the bulletproof vest, he claimed that he did so out of fear for his life based on death threats. Defendant's statements indicated that he was simply trying to protect or defend himself and acting out of duress and fear. These were not confessions of guilt to a crime.

In *Smith v United States*, 348 US 147, 152-153; 75 S Ct 194; 99 L Ed 192 (1954), the United States Supreme Court addressed the *corpus delicti* rule and its purposes, observing as follows:

> The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts. Its purpose is to prevent errors in convictions based upon untrue confessions alone; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be involuntary within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. [Citations and quotation marks omitted.]

In this case, defendant's statements were not made to the police during interrogation, did not appear to be involuntary or made as a result of coercion, inducement, strain, or confusion, and were made under circumstances suggesting that they were true. Again, defendant here was giving perceived excuses for his conduct, and the statements were made to his mother on the phone and simply overheard in the other circumstance. I see no reason to invoke the *corpus delicti* rule to bar consideration of the admissions and reverse the conviction considering the purposes of the rule. And if the admissions were admissible and subject to consideration by the jury, the presumed error in admitting Officer Stockwell's testimony about Officer Lavers' implied assertions was most certainly harmless beyond a reasonable doubt.

In sum, I would affirm defendant's jury-trial conviction of possession or use of body armor by a violent felon. Accordingly, I dissent.

/s/ Jane E. Markey

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APPENDIX E

(Plaintiff-Appellee's Motion for Reconsideration)

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

vs.

Court of Appeals No. 353052

St. Clair County Circuit Court
No. 19-002078

LANTZ HOWARD WASHINGTON,

Defendant—Appellant.
_____/

PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Court of Appeals No. 353052

vs.

St. Clair County Circuit Court
No. 19-002078

LANTZ HOWARD WASHINGTON,
Defendant.
_____/

ST. CLAIR COUNTY PROSECUTING ATTORNEY'S OFFICE
By: Melissa J. Keyes (P56532)
Attorney for Plaintiff

STATE APPELLATE DEFENDER OFFICE
By: Douglas Baker (P49453)
Attorney for Defendant
_____/

MOTION FOR RECONSIDERATION

The People of the State of Michigan, by and through their attorney, Melissa J. Keyes, Senior Assistant Prosecuting Attorney for the County of St. Clair, request this Honorable Court grant reconsideration of its opinion issued December 1, 2022[1], vacating Defendant's conviction and remanding for a new trial, and as reasons say as follows:

1. The People seek reconsideration under MCR 7.215(I). Under this rule, a motion for reconsideration is "subject to the restrictions contained in MCR

[1] Exhibit 1 – *People v Washington*, ___ Mich App ___; ___ NW2d ___(2022)(Docket No. 353052)

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2.119(F)(3)." That rule provides that the moving party must show "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." Error that should lead to a different result occurred here.

2. The majority opinion is based on a logical chain. First, the Canadian Border Services Agency Officer ("Canadian officer") who arrested Defendant and turned the body armor over to the United States Customs and Border Protection Officer ("United States officer") did not testify, but the United States officer testified that the Canadian officer had custody of Defendant, turned over custody of Defendant to the United States officer, handed over body armor, and "based on communications" between the two, Defendant was arrested. The majority here has found this to constitute "implicit hearsay" from the Canadian officer, who did not testify, that Defendant had possessed body armor. This, the Court holds, was testimonial hearsay, violating the Confrontation Clause of the Sixth Amendment. Second, without this hearsay, the prosecution could not prove that a crime was committed, for, though Defendant admitted – including in a jail call – that he possessed the body armor, under the corpus deliciti rule, "Without direct or circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed." Slip opinion, p. 11. This is a mistaken view of the corpus delicti rule, which exists not to free the patently guilty, but protect the innocent where no crime was actually committed.

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3. The majority opinion is inconsistent with Michigan Supreme Court authority involving the offense of possession of cocaine:

> [T]he corpus delicti was satisfied by evidence independent of defendant's confession that (1) the cocaine *existed* and (2) was *possessed by someone*. . . .The defendant's contention that proof of the corpus delicti requires evidence *that the cocaine was constructively possessed by the defendant is incorrect.* "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." . . . It is sufficient to show that the crime was committed by someone. . . .In the words of a noted authority, the position that *the corpus delicti of a crime includes the identity of the perpetrator is "too absurd indeed to be argued with,"* because it would require that the entire crime be proved before a confession could ever be admitted. *People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995) (numbering and emphasis supplied).

Here, then, that the People must, to establish the corpus delicti, show that Defendant possessed the body armor by direct or circumstantial evidence independent of this statements – which were not to the police, and do not constitute confessions[2] – "is incorrect." To paraphrase *Konrad*, the People must show "(1) that the body armor existed and (2) was possessed by someone." And, here, the People must also show that Defendant was a felon. The People showed that the body armor existed, that it was possessed by someone, and that Defendant was a felon, all independent of Defendant's statements admitting that he possessed the body armor. His statements were then admissible to prove that *he* possessed the body armor.

---

[2] The People agree with the dissent (Exhibit 2 – MARKEY, J., dissenting) that the statements were admissible to show the corpus delicti, and, for purposes of preservation, submit that *People v McMahan*, 451 Mich 543; 548 NW2d 199 (1996) was wrongly decided; see the dissent by Justice Boyle.

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4. Without a violation of the corpus delicti rule, admission of the "implicit hearsay," even accepting for the sake of argument that it was constitutional error, was harmless beyond a reasonable doubt, given Defendant's statements in jail, including a recorded statement to his mother admitting that he possessed and wore the body armor, admissions which were not implicit but pellucidly clear.

5. The People request that reconsideration be granted, and the conviction affirmed.

WHEREFORE, the People respectfully request this Honorable Court grant reconsideration, and on rehearing, affirm the conviction.

Respectfully Submitted,

Michael D. Wendling
Prosecuting Attorney

By: /s/ *Melissa J. Keyes*

Dated: December 14, 2022

Melissa J. Keyes (P56532)
Senior Assistant Prosecuting Attorney

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EXHIBIT

1

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANTZ HOWARD WASHINGTON,

Defendant-Appellant.

FOR PUBLICATION
December 1, 2022
9:05 a.m.

No. 353052
St. Clair Circuit Court
LC No. 19-002078-FH

Before: GLEICHER, C.J., and MARKEY and PATEL, JJ.

GLEICHER, C.J.

The Sixth Amendment's Confrontation Clause prohibits the admission of a testimonial statement made by an unavailable witness unless the witness was previously made available for cross-examination. The question presented is whether evidence implicitly introducing an unavailable witness's testimonial statement is similarly precluded.

A Canadian Customs and Border Service Agency (CBSA) agent, Officer Matthew Lavers, arrested Lantz Washington after Washington avoided paying the Blue Water Bridge toll in Port Huron. Lavers brought Washington back to the American side of the bridge and reported that Washington was wearing a bulletproof vest under his shirt. The prosecution charged Washington with being a violent felon in possession of body armor contrary to MCL 750.227g.

Lavers did not testify at Washington's trial and was never offered for cross-examination. The prosecution circumvented this Confrontation Clause problem by questioning a United States Customs and Border Protection officer about his "communications" with Lavers. Through this questioning, the prosecution effectively admitted Lavers' unconfronted testimony that Washington possessed the body armor.

Lavers was the only witness who could connect Washington to the body armor, and thus a witness whom Washington had a constitutional right to confront. Because the error in allowing another witness to establish Washington's guilt was not harmless beyond a reasonable doubt, we vacate Washington's conviction and remand for a new trial.

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I. THE TRIAL EVIDENCE

Washington crossed the Blue Water Bridge from Port Huron, Michigan, into Canada without paying the toll. The toll collector, Denise Fenner, recounted that a vehicle "actually blew through my lane." Fenner could not see the vehicle's occupant or discern whether the driver was male or female. From her vantage point, Fenner admitted, she would not have been able to tell if the driver wore a bulletproof vest. Video evidence revealed that the driver wore red clothing and drove a Ford pickup truck. Fenner reported the event to her supervisor.

Paul Stockwell, a supervisory officer with United States Customs and Border Protection, supplied the testimony needed to convict Washington: that Washington was in possession of a body armor. Stockwell explained that he met Officer Lavers and a crew of CBSA officers on the American side of the bridge. They had Washington in a police cruiser. Stockwell's observation of Washington in the Canadian police cruiser was his only relevant first-hand observation.

Because Lavers' did not appear at the trial, the prosecution relied on the following testimony by Officer Stockwell to establish Washington's possession of the vest:

> *Q*. . . . Who gave you custody of [Washington] . . . ?
>
> *A*. I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.
>
> *Q*. Okay, so a collective group of you?
>
> *A*. There was.
>
> *Q*. Okay.
>
> *A*. There was about six of us.
>
> * * *
>
> *Q*. At some point did Officer Lavers from the Canadian services hand you any other evidence?
>
> *A*. Yes, he did.
>
> *Q*. What did he hand you?
>
> * * *
>
> *A*. A body armor.
>
> * * *
>
> *Q*. Now, without saying anything about what was said, the only question I have for you is *were there communications between you and Officer Lavers*?

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A. There were.

Q. Okay. *And . . . based on those communications you took custody of [Washington]*?

A: Yes, we did.

Q. And you took possession of the body armor that was turned over at the same time?

A. Yes, sir. [Emphasis added.]

On cross-examination, Officer Stockwell acknowledged that Washington was not wearing the bulletproof vest when he took him into custody, that he never saw Washington wearing the vest, that he did not witness the vest being removed from Washington's person or possession, and that he had no direct personal knowledge that Washington had ever possessed the vest. The questioning concluded:

Q. So would it be fair to summarize, Officer, you have no direct knowledge of Mr. Washington having possession of [the body armor], seeing him in possession of it in any . . . way, shape or form; is that correct?

A. No direct knowledge.

Officer Stockwell transferred custody of Washington to Port Huron Police Officer Kyle Whitten. Whitten took Washington to the St. Clair County Jail, where he "overheard [Washington] say that he was wearing the body armor because he was afraid people were going to kill him." Like Stockwell, Whitten conceded on cross-examination that he did not have any personal knowledge that Washington had worn or possessed the body armor.

Port Huron Police Officer Ernesto Fantin authenticated a jailhouse recording of a phone call from Washington to his mother. During the call, Washington stated that "James" gave him a bulletproof vest and he "put on the bulletproof vest." The transcribed call continued, "And I went to the police with it on. I was [in] fear for my life, they was threatening me."

Washington testified on his own behalf and denied having made the statement attributed to him by Whitten. He otherwise claimed that he could not recall or remember whether he possessed or wore the bulletproof vest.

The jury found Washington guilty as charged.

II. ANALYSIS

A. HEARSAY AND THE CONFRONTATION CLAUSE

The United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . .

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to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008) (quotation marks and citations omitted). A witness's testimony incriminating a defendant is inadmissible at a trial unless the witness is present for cross-examination or previously submitted to cross-examination by the defendant. *Melendez-Diaz v Massachusetts*, 557 US 305, 309; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

Washington challenges the following portion of the prosecutor's exchange with Officer Stockwell on Confrontation Clause grounds:

> *Q*. At some point did Officer Lavers from the Canadian services hand you any other evidence?
>
> *A*. Yes, he did.
>
> *Q*. What did he hand you?
>
> * * *
>
> *A*. A body armor.
>
> * * *
>
> *Q*. Now without saying anything about what was said, the only question I have for you is *were there communications between you and Officer Lavers*?
>
> *A*. *There were.*
>
> *Q*. Okay. *And . . . based on those communications you took custody of [Washington]*?
>
> *A*. *Yes, we did.*
>
> *Q*. *And you took possession of the body armor that was turned over at the same time?*
>
> *A*. *Yes, sir.* [Emphasis added.]

Our Confrontation Clause analysis of this testimony requires two inquiries: was Lavers "(1) . . . a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562; 802 NW2d 552 (2011). The first question concerns whether Stockwell's questioning introduced a "testimonial" statement. A testimonial statement is one made for an evidentiary purpose. *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Crawford* instructs that for Confrontation Clause purposes, testimonial statements are those in which witnesses " 'bear testimony' " against an accused. *Id.* "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of

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establishing or proving some fact." *Id.* (cleaned up.) The United States Supreme Court has characterized the exclusion of testimonial hearsay as the "primary object" of the Sixth Amendment. *Id.* 53. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

Lavers' "affirmation" that Washington was wearing the body armor, communicated through Stockwell, was testimonial. Lavers told Stockwell about the body armor "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Had the prosecutor simply asked Stockwell, "what did Officer Lavers tell you about the body armor," it is easy to conclude that the Confrontation Clause would have prohibited an answer (and undoubtedly, that is the reason the prosecutor did not ask that question).

But Stockwell's trial testimony conveyed precisely the same information: that Washington had been wearing the body armor when caught by the Canadian authorities. Either recapitulated directly as a statement made by Lavers to Stockwell, or through the implied method used at the trial, *Lavers* was the source of the incriminatory assertion that Washington possessed the body armor. Stockwell was not personally involved in Washington's arrest on the Canadian side of the bridge. He had no reason to know, or even to suspect, that Washington was wearing body armor until he spoke to Lavers. Stockwell relayed to the jury the *substance* of Lavers' out-of-court report and the prosecutor introduced this evidence to prove its truth: that Washington possessed the body armor.

Lavers' assertion of Washington's guilt was incorporated within Stockwell's testimony through an indirect method that checks all the boxes as unconfronted testimonial hearsay: an out-of-court assertion, testimonial in nature, admitted for its truth. Stockwell did not explicitly state that Washington was wearing the vest, but his testimony contained an implicit accusation that he was. And Lavers was Washington's accuser, not Stockwell, despite that Lavers' actual words were never revealed to the jury. Because Lavers never testified, the answer to the second *Fackelman* inquiry is obvious: Washington did not have an opportunity to confront Lavers.

The remaining question is whether the United States and Michigan Constitutions permit the introduction of this implied hearsay testimony.

Other courts have referred to similar end-runs around the Confrontation Clause as the elicitation of implied hearsay. For example, in *Mason v Scully*, 16 F3d 38 (CA 2, 1994), the prosecutor questioned a detective about a conversation the detective had with an armed robbery suspect (George Rivera), who was unavailable to testify at the defendant's trial:

> "*Q.* And, after the lineup . . . was a conversation held with George Rivera? This is a yes or no question.
>
> *A.* Yes.
>
> *Q.* And, after this conversation with George Rivera, were you looking for somebody?

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A. Yes, I was.

Q. And who were you looking for?

A. [The defendant] Terrence Mason." [*Id.* at 40.]

The United States Court of Appeals for the Second Circuit held that the admission of this testimony violated the defendant's right to confront Rivera, whose statement was implicitly introduced through the detective. The Court explained, "To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit." *Id.* at 42-43. That the precise content of Rivera's statement was never revealed was "immaterial," the Court continued, "for the plain implication that the prosecutor sought to elicit, and emphasized in his summation, was that the conversation with Rivera led the police to focus on Mason." *Id.* at 43.

The Second Circuit considered the same legal issue in *Ryan v Miller*, 303 F3d 231 (CA 2, 2002), which arose from the murder of a young boy. Four teenagers were suspected of having killed the child. Detectives questioned many witnesses and possible suspects, narrowing down the potential defendants to Peter Quartararo and three others. *Id.* at 234-235. Detective Palumbo questioned Quartararo while detectives Gill and Reck questioned Thomas Ryan and Robert Brensic. *Id.* at 235. The prosecutor elicited the following testimony from Sergeant Jensen, who oversaw the investigation:

"*Q*. And did something happen at 4:30?

A. Yes, there did.

Q. What?

A. I received a phone call from Detective Palumbo.

Q. Did you then have a conversation with Detective Palumbo on the telephone at about 4:30?

A. Yes, I did.

Q. *Now, as a result of talking with Detective Palumbo at 4:30, did you do something with respect to Gill and Reck?*

A. *Yes, I did.*

Q. *What was that*?

A. *I directed Gill and Reck to advise Tom Ryan and Robert Brensic of their rights.*"

[Defense Counsel]. I'm going to object.

The court. No overruled.

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Q. As to what charge?

A. Murder." [*Id.* at 241.]

The opinion details additional testimony given by the detectives referencing other conversations and inculpatory actions taken after conversations with suspects who confessed (and who did not testify), such as reading another suspect his *Miranda*[1] rights. *Id.* at 241-244.

The Court characterized the objectionable content of the testimony as "accusatory assertions introduced without the testimony of the accuser" in violation of the Confrontation Clause. *Id.* at 247. Recalling *Mason*, the Court reasoned, "Testimony need not contain an explicit accusation in order to be excluded as a violation of the Confrontation Clause," and admonished that "it is well established in this Circuit that lawyers may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." *Id.* at 248.

Other Courts have analyzed similar efforts to avoid the Confrontation Clause and have reached the same conclusion. In *United States v Kizzee*, 877 F3d 650, 653 (CA 5, 2017), a case resembling ours, the prosecutor questioned a detective "about questions he posed to a criminal suspect, Carl Brown, during an interrogation." Brown did not testify. Here is the colloquy:

> "*Prosecutor*. Detective Schultz, did you ask Mr. Brown a series of questions after you arrived at the police department?
>
> *[Schultz]*. Yes, sir, I did.
>
> *Prosecutor*. Did you ask Mr. Brown whether or not he obtained the narcotics that were discovered in his hat from Pereneal Kizzee?
>
> *[Schultz]*. Yes, sir, I did.
>
> *Prosecutor*. Did you ask him if he obtained the narcotics that were discovered in his hat immediately prior to being stopped?
>
> *[Schultz]*. Yes, sir.
>
> *Prosecutor*. Did you ask Mr. Brown whether or not he had seen any additional narcotics at 963 Trinity Cut Off?
>
> *[Schultz]*. Yes.
>
> * * *
>
> *Prosecutor*. Did you ask him whether or not he obtained drugs from Mr. Kizzee on previous occasions?

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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> *[Schultz]*. Yes, sir.
>
> *Prosecutor*. Based on your observations the day before that involved the surveillance at Mr. Kizzee's residence, the stop by Officer Taylor [Wilkins], the discovery of narcotics, and your subsequent interview of Mr. Brown, what did you and Detective Lehman do?
>
> *[Schultz]*. I was able to obtain a search warrant for 963 Trinity Cut Off." [*Id.* at 655 (alterations altered).]

The United States Court of Appeals for the Fifth Circuit vacated Kizzee's conviction on Confrontation Clause grounds, explaining:

> This Court has recognized that police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. Where an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered. [*Id.* at 657 (cleaned up).]

The detective's testimony was inadmissible because it allowed the jury "to reasonably infer the defendant's guilt," the Court continued, based on testimonial statements made to the officer by nontestifying witnesses. *Id.* See also *Young v United States*, 63 A3d 1033 (US App DC, 2013); *United States v Meises*, 645 F3d 5, 21 (CA 1, 2011) ("[I]f what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered.").

Michigan has not yet officially weighed in on the evidentiary and constitutional issues presented here. We find the federal implied hearsay cases cited in this opinion persuasive and consistent with our State's Confrontation Clause jurisprudence. Evidence directly implying the substance of a testimonial, out-of-court statement made by an unavailable witness and offered to prove its truth is inadmissible because it violates the Sixth Amendment of the United States Constitution, and Article 1, § 20 of Michigan's Constitution.

Contrary to our dissenting colleague's position, this Court's decision in *Jones (After Remand)*, 228 Mich App 191, is neither dispositive of nor relevant to the evidentiary issue now before us. *Jones* involved only a hearsay question and not a Confrontation Clause issue. A witness testified to having heard another witness shout, " 'Bitch come out, I'm gonna kick your ass. And Alphonzo don't want you, Alphonzo don't love you.' " *Id.* at 203. The defendant objected solely on hearsay grounds. This Court held that the first phrase ("Bitch come out") was not a "statement" for hearsay purposes because it "contains no assertion. It is incapable of being true or false. It is a command, not an assertion[.]" *Id.* at 204-205. The remainder of the testimony was assertive, this Court observed, but was not offered to prove its truth. *Id.* Rather, the words were offered "as an integral part of the series of events that led to the shooting of the victim" and "a component of the threat" made to another witness. *Id.* at 205.

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The dissenter in *Jones* maintained that the words contained an "implied assertion" that the speaker was angry, and therefore qualified as hearsay. *Id.* at 227 (O'CONNELL, J., dissenting). The majority rejected the dissent's version of the "implied assertion" theory, defining the concept as follows:

> The use of the term "implied assertion" to denote hearsay has occurred in situations where out-of-court conduct of a person, sometimes verbal and sometimes nonverbal, is offered in evidence to demonstrate that person's belief, from which the inference is offered that the belief is true, *when it was not the actor's intent to communicate the matter to be proved in court.* And so, to use a famous example, if the issue were the seaworthiness of a ship, evidence that the ship captain sailed away with his family aboard after making a thorough inspection of the ship would be considered hearsay as being the captain's implied assertion that the ship was seaworthy. [*Id.* at 207-208 (emphasis added).]

Stockwell's recount of his conversation with Lavers does not fall within this definition of an "implied assertion" because it *was* offered to prove Lavers' intent "to communicate the matter to be proved in court." Unlike an "implied assertion," the term used in *Jones*, the substance of Lavers' conversation with Stockwell on the Blue Water Bridge—that Washington had the body armor in his possession—was offered by the prosecution to prove its truth. And when Lavers handed over Washington and the vest to Stockwell, Lavers made a statement that he intended as accusatory. Unlike the witness quoted in *Jones*, Lavers meant to "bear testimony" against Washington, thereby situating the statement squarely within the definition of unconfronted hearsay. See *Fackelman*, 489 Mich at 515 ("And we understand from the constitution that the right of confrontation is concerned with a specific type of out-of-court statement, i.e., the statements of 'witnesses,' those people who bear testimony against a defendant.").

Notably, the defendant in *Jones* did not challenge the admission of the statements on Confrontation Clause grounds; that case was decided six years before *Crawford*. Through *Crawford*'s lens, the statements would have been admissible because they were not testimonial. The evidence being conveyed was the speaker's state of mind rather than an accusation. *Jones* and its newest progeny, *People v Propp (on Remand)*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 343255), involve communications that were neither hearsay nor testimonial, and lack any relevance here.

We also respectfully disagree with our dissenting colleague's view that the "communication" testimony elicited from Stockwell was intended only to explain why Stockwell took Washington into custody and not to prove that Washington possessed the body armor. Stockwell took Washington into custody because Washington was in possession of body armor. That fact was personally unknown to Stockwell until Lavers shared it. The reason that Stockwell took Washington into custody is logically and legally inextricable from the out-of-court accusation made by Lavers that Washington was wearing the body armor when arrested in Canada. The "explanation" for Stockwell's conduct is relevant only because it inculpated Washington.

The prosecutor asked Officer Stockwell three questions critical to proving Washington's guilt: whether he had "communications" with Lavers, whether "based on those communications [he] took custody of [Washington]," and whether he "took possession of the body armor that was

RECEIVED by MSC 9/22/2023 10:02:13 AM

turned over at the same time." Implicit within Stockwell's answers is Lavers' out-of-court statement that Washington possessed the body armor when he was arrested. Absent this implied testimonial hearsay, the prosecutor could establish only one crime: jumping the toll. Stockwell did not recount the exact words the two shared, but the substance of Lavers' communication was obvious, and the reason for its introduction was to prove that Washington was wearing the body armor when stopped by the Canadian authorities rather than to explain why he was taken into custody.

Permitting the prosecution to "weav[e] an unavailable declarant's statements into another witness's testimony by implication" violates the Confrontation Clause. *Meises*, 645 F3d at 22. Stockwell's testimony regarding his "communications" with Lavers therefore violated Washington's Sixth Amendment right to confront Lavers. We turn to a discussion of the appropriate remedy for this constitutional violation.

B. PRESERVATION AND OUR STANDARD OF REVIEW

On the morning of the trial, Washington moved in limine to exclude from the trial evidence the bulletproof vest and the recorded jailhouse phone call. Defense counsel maintained that the prosecution could establish an evidentiary foundation for the introduction of the bulletproof vest, "the corpus delicti itself," only through testimony that would violate the Confrontation Clause. Counsel contended, "And if you read *Crawford [v] Washington*, I don't think anyone can doubt having read that wonderful opinion by Justice Scalia that if you don't have the ability to cross examine the real witness, . . . the only one who saw you do anything, you're being denied your right to a fair trial and there's a Sixth Amendment violation." Regarding Washington's alleged statements at the jail and during the phone call, counsel invoked the "rule of corpus delicti."

The trial court denied the motion, but it precluded Officer Stockwell from testifying to any statements made by Officer Lavers. The court explained, "[H]e can say factually I received this from a Canadian Customs officer at the same time I received the Defendant, as well as his truck was turned over. That then is okay. You've got those circumstances."

Counsel also pointed out that Washington had been deemed incompetent to stand trial following a forensic examination conducted approximately two weeks after his arrest, and moved to exclude his statements on voluntariness grounds. Washington was only later deemed competent to stand trial. The court denied that motion, too.

We review de novo whether a defendant's Sixth Amendment right of confrontation has been violated. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018). Because the Confrontation Clause error was preserved by an appropriate objection, we must determine whether the beneficiary of any error has established that the error was harmless beyond a reasonable doubt. *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020). This analysis requires us to assess "the probable effect of that testimony on the minds of an average jury." *Id.* (quotation marks and citation omitted). "Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted testimony" of Officer Stockwell, and the introduction of the body armor. *Id.* (quotation marks and citation omitted). This analysis requires us to consider the remainder of the prosecution's case.

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C. THE APPROPRIATE REMEDY

The prosecution has not demonstrated that the error in this case was harmless beyond a reasonable doubt. The primary evidence linking Washington to the body armor was provided by Stockwell's inadmissible testimony conveying Lavers' statements. Through Stockwell, the prosecution admitted the vest into evidence and connected it to Washington. Absent Stockwell's testimony regarding the substance of his "communications" with Lavers, the prosecution would have lacked any testimony that could serve as a foundation for the vest's admission, to establish the chain of custody, or to prove that a crime had been committed.

The additional evidence linking Washington to the body armor consisted of Washington's alleged jailhouse confession (overheard by an officer), and the recorded telephone conversation with his mother explaining that "James" gave him the vest and he "put it on" because he "was [in] fear for my life, they was threatening me." But without Stockwell's prohibited testimony, the prosecution would have been unable to introduce the vest into evidence. Given that evidentiary vacuum, Washington's statements would have been inadmissible under the corpus delicti rule.

"In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). The "corpus delicti" rule originally applied only to homicide cases, but Michigan applies the rule to other crimes as well. *People v Cotton*, 191 Mich App 377, 384-387; 478 NW2d 681 (1991).

> In defining the concept of corpus delicti, Wigmore notes that an analysis of every crime reveals three components: (1) the occurrence of the specific injury or loss; (2) some person's criminality as the cause of the loss; and (3) the accused's identity as the perpetrator of the crime. In its strictest sense, the term "corpus delicti" refers only to the first of these elements. For example, the corpus delicti of homicide is the fact of death. However, most courts also have included the second element, someone's criminality. On the other hand, most courts have held that the accused's identity as the perpetrator of the crime is not an element of the corpus delicti. [*Id.* at 386.]

Without direct or circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed. Likely the prosecution was aware of this problem and questioned Stockwell regarding his "communications" with Lavers in an attempt to work around it. Regardless, we cannot conclude beyond a reasonable doubt that Washington would have been convicted had the inadmissible testimony been excluded.

We vacate Washington's conviction and remand for a new trial. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Sima G. Patel

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EXHIBIT

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 9/22/2023 10:02:13 AM

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANTZ HOWARD WASHINGTON,

Defendant-Appellant.

FOR PUBLICATION
December 1, 2022

No. 353052
St. Clair Circuit Court
LC No. 19-002078-FH

Before: GLEICHER, C.J., and MARKEY and PATEL, JJ.

MARKEY, J. (*dissenting*).

I would affirm defendant's jury-trial conviction of possession or use of body armor by a violent felon, MCL 750.227g. Accordingly, I respectfully dissent.

I. FACTUAL BACKGROUND

Defendant crossed the Blue Water Bridge from Port Huron, Michigan, into Canada without paying the required toll. The toll booth agent on duty at the time saw red clothing in the cabin of defendant's vehicle, which was a Ford pickup truck. While the gate was still open at the toll station for a van directly in front of defendant's truck, defendant raced forward and proceeded through the open gate. The toll booth agent immediately contacted her supervisor and reported the incident.

Several Canadian authorities quickly pursued defendant's truck. Officer Matt Lavers of the Canada Border Services Agency stopped and apprehended defendant. Officer Lavers observed and reported that defendant was wearing body armor in the form of a bulletproof vest under a red shirt. Officer Lavers then returned defendant to the American side of the bridge.

Officer Lavers turned defendant, his truck, and the bulletproof vest over to United States Customs and Border Protection Officer Paul Stockwell. Officer Lavers did not testify at trial. The focus of this appeal is on the following testimony by Officer Stockwell regarding his interactions with Officer Lavers:

> [*The Prosecutor*]: At some point did Officer Lavers from the Canadian services hand you any other evidence?

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Officer Stockwell: Yes, he did.

[*The Prosecutor*]: What did he hand you?

* * *

Officer Stockwell: A body armor.

* * *

[*The Prosecutor*]: Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

Officer Stockwell: There were.

[*The Prosecutor*]: Okay. And . . . based on those communications you took custody of [defendant]?

Officer Stockwell: Yes, we did.

[*The Prosecutor*]: And you took possession of the body armor that was turned over at the same time?

Officer Stockwell: Yes, sir.

On cross-examination, Officer Stockwell acknowledged that defendant was not wearing the bulletproof vest when he took custody of defendant, that he never saw defendant wearing the body armor, that he did not witness the bulletproof vest being removed from defendant's person or possession, and that he had no direct personal knowledge that defendant had ever worn or possessed the vest.

Officer Stockwell transferred custody of defendant to Port Huron Police Officer Kyle Whitten. Officer Whitten then took defendant to the St. Clair County Jail. Officer Whitten testified that while at the jail, he "overheard the Defendant say that he was wearing the body armor because he was afraid people were going to kill him." Officer Whitten stated that he did not interview or interrogate defendant. Like Officer Stockwell, Officer Whitten conceded on cross-examination that he did not have any personal knowledge that defendant had worn or possessed the body armor.

Port Huron Police Officer Ernesto Fantin testified about a jailhouse recording of a phone call from defendant to his mother in which defendant confessed that "James" had given him the bulletproof vest and that he was wearing it when stopped by police because people were threatening his life. The trial transcript contains a verbatim reproduction of the phone conversation. Defendant took the stand in his own defense, and he testified that he did not make the statement attributed to him by Officer Whitten. Defendant otherwise indicated that he could not recall or remember whether he possessed or wore the bulletproof vest.

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Defendant was charged with one count of possession or use of body armor by a violent felon[1] and one count of operating a vehicle with a suspended license, second offense, MCL 257.904. A nolle prosequi was entered with respect to the suspended-license charge. On the morning of the jury trial, defendant moved in limine to exclude evidence of the recorded jail phone call and evidence of the bulletproof vest. With respect to the bulletproof vest, defense counsel maintained that the only way the prosecution could establish an evidentiary foundation or the chain-of-custody relative to the bulletproof vest was through testimony that would violate the Confrontation Clause because Officer Lavers would not be testifying. The trial court denied the motion, but it precluded the prosecutor from eliciting testimony about any statements made by Officer Lavers, which, as indicated earlier, the prosecutor honored when examining Officer Stockwell. The jury found defendant guilty of possession or use of body armor by a violent felon. The trial court sentenced defendant to a year in jail. The court denied defendant's motion to vacate his conviction or grant a new trial. This appeal followed.

II. ANALYSIS

A. DEFENDANT'S APPELLATE ARGUMENTS

Defendant argues that the prosecution violated his Sixth Amendment confrontation rights when it introduced implied testimonial hearsay statements by Officer Lavers through the testimony of Officer Stockwell. Defendant contends that the plain inference arising from Officer Stockwell's testimony was that Officer Lavers had informed Officer Stockwell that defendant was caught in possession of or using the body armor. Defendant argues that the implied hearsay was offered for the truth of the matter asserted, that defendant had no opportunity to cross-examine Officer Lavers at a prior hearing, that the prosecution cannot demonstrate that the Confrontation Clause violation was harmless beyond a reasonable doubt, and that to the extent that defense counsel failed to properly preserve the issue, his performance was deficient and prejudicial. With regard to his analysis of why the purported error was not harmless, defendant maintains that without the challenged testimony implicitly showing that defendant had worn or possessed the bulletproof vest, the only evidence demonstrating that defendant did so were his confessions in front of Officer Whitten and to his mother, which would not suffice for conviction under the *corpus delicti* rule.

B. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). And this Court reviews de novo the issue whether a defendant was denied his or her constitutional right to confront a complaining witness. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011).

---

[1] There was no dispute that defendant was properly characterized as a "violent felon" for purposes of the charged offense. A stipulation was entered recognizing defendant as a violent felon, and the jury was so instructed.

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C. CONFRONTATION CLAUSE PRINCIPLES

Under the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI. Similarly, under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. The Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant was unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). "[T]he Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11. In *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012), our Supreme Court explained:

> The Confrontation Clause is "primarily a functional right" in which the right to confront and cross-examine witnesses is aimed at truth-seeking and promoting reliability in criminal trials. Functioning in this manner, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> The specific protections the Confrontation Clause provides apply only to statements used as substantive evidence. In particular, one of the core protections of the Confrontation Clause concerns hearsay evidence that is "testimonial" in nature. The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant. [Quotation marks and citation omitted.]

A statement is testimonial in nature when it was produced with the primary purpose of establishing or proving past events that were potentially relevant to a later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Statements made by witnesses during interrogations by law enforcement officers are generally testimonial in nature because they are directed at establishing the facts of a past event in order to identify or provide evidence to convict the perpetrator. *Id.* at 826. A statement is testimonial in nature when made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for later use at trial. *Crawford*, 541 US at 52.

D. DISCUSSION

In *People v Jones*, 228 Mich App 191, 207; 579 NW2d 82 (1998), this Court addressed the issue of "implied assertions" and observed:

> While a number of decisions over the years have regarded "implied" assertions as hearsay, we believe that the theory had a questionable origin, that it

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> has never achieved general recognition in decided cases, that it is expressly negated by the modern rules of evidence, and that it is contrary to Michigan precedent.

After an exhaustive review of federal and Michigan caselaw, the *Jones* panel concluded its opinion by stating that "under the rule definition of hearsay, an 'implied assertion' is a contradiction in terms and a euphemism for declining to apply the rules as they are written." *Id.* at 225-226. Indeed, the rules of evidence make clear that "hearsay" refers to a "statement," MRE 801(c), in the form of "an oral or written assertion," MRE 801(a). This Court recently reaffirmed that "Michigan does not recognize the 'implied assertion' theory that has been adopted in some other jurisdictions." *People v Propp (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 343255); slip op at 8. In my view, we are bound by this precedent under MCR 7.215(J)(1) even if the federal cases the majority cites are viewed as being persuasive.

Proceeding on the *assumption* that the prosecutor effectively introduced an oral statement by Officer Lavers that potentially triggered protection under the Confrontation Clause, I cannot conclude that the assertion was "testimonial in nature." Consequently, there was no confrontation infringement. If the implication or implied statement was that defendant had possessed or used the bulletproof vest, the statement was not produced *at the time it was made* for the primary purpose to establish or prove past events and to use it as evidence in a criminal prosecution in an effort to convict defendant at a later trial. *Davis*, 547 US at 822, 826. Rather, the purpose of the communication was simply to provide Officer Stockwell with the information necessary for Officer Stockwell to formally take defendant into custody from Canadian authorities and proceed with the charging process under Michigan law. The implied statement explained Officer Stockwell's actions and his involvement in the case, including taking control of the bulletproof vest.

Finally, even if Officer Stockwell's challenged testimony should not have been admitted, the Confrontation Clause violation or error was harmless beyond a reasonable doubt given the evidence of defendant's admissions that he was wearing the body armor. See *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (applying the harmless-beyond-a-reasonable-doubt standard to a Confrontation Clause error). The majority relies on the *corpus delicti* rule to conclude that the prosecution fails to demonstrate that any error was harmless beyond a reasonable doubt. "[T]he corpus delicti of a crime must be established by evidence independent of an accused's confession[,]" but "[t]his rule is limited . . . to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt." *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). I would hold that defendant's statements that he put on the bulletproof vest constituted admissions of fact, but they did not amount to confessions of guilt to the charged crime.

In *People v Porter*, 269 Mich 284, 290; 257 NW 705 (1934), our Supreme Court discussed the differences between true confessions of guilt, which can implicate the *corpus delicti* rule, and mere admissions of fact that do not implicate the rule:

> Defendant does not distinguish between confessions and admissions of fact. If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt, but needs proof of other

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> facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission, and, therefore, is not within the range of cases cited.

A confession involves a direct acknowledgment of guilt or an acknowledgment of the truth of the crime for which a defendant has been charged, as distinguished from acts, admissions, and exculpatory statements. *Id.* An oral admission of an inculpatory fact from which a juror may infer guilt is not a confession if it falls short of being an acknowledgment of guilt. *Id.* at 291. And the admission to one of the essential elements of a criminal offense, but not all of the elements, does not constitute a confession. *Id.* A mere admission, which needs other facts to support a conviction, is not a confession and is admissible on the *corpus delicti*. *Id.*; see also *People v Schumacher*, 276 Mich App 165, 181; 740 NW2d 534 (2007) (if a defendant does not admit facts that are necessary to establish guilt, there is no confession).

I cannot conclude that defendant's admission to his mother and his admission overheard by Officer Whitten constituted direct acknowledgements of guilt to the offense of possession or use of body armor by a violent felon. I first note that with respect to the essential element of being a violent felon, defendant's statements did not reveal a concession or admission that he was a violent felon. See MCL 750.227g. Regardless, it is clear that defendant's statements were not intended to be confessions to the charged offense. Rather, defendant's statements plainly reflected expressions of or attempts at exculpation, at least in his mind. Although he admitted wearing the bulletproof vest, he claimed that he did so out of fear for his life based on death threats. Defendant's statements indicated that he was simply trying to protect or defend himself and acting out of duress and fear. These were not confessions of guilt to a crime.

In *Smith v United States*, 348 US 147, 152-153; 75 S Ct 194; 99 L Ed 192 (1954), the United States Supreme Court addressed the *corpus delicti* rule and its purposes, observing as follows:

> The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts. Its purpose is to prevent errors in convictions based upon untrue confessions alone; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be involuntary within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. [Citations and quotation marks omitted.]

In this case, defendant's statements were not made to the police during interrogation, did not appear to be involuntary or made as a result of coercion, inducement, strain, or confusion, and were made under circumstances suggesting that they were true. Again, defendant here was giving perceived excuses for his conduct, and the statements were made to his mother on the phone and simply overheard in the other circumstance. I see no reason to invoke the *corpus delicti* rule to bar consideration of the admissions and reverse the conviction considering the purposes of the rule. And if the admissions were admissible and subject to consideration by the jury, the presumed error in admitting Officer Stockwell's testimony about Officer Lavers' implied assertions was most certainly harmless beyond a reasonable doubt.

In sum, I would affirm defendant's jury-trial conviction of possession or use of body armor by a violent felon. Accordingly, I dissent.

/s/ Jane E. Markey

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APPENDIX F

(Order denying Plaintiff-Appellee's Motion for Reconsideration)

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Court of Appeals, State of Michigan

ORDER

People of MI v Lantz Howard Washington

Docket No. 353052

LC No. 19-002078-FH

Elizabeth L. Gleicher
Presiding Judge

Jane E. Markey

Sima G. Patel

Judges

The motion for reconsideration is DENIED.

Presiding Judge

Markey, J., would grant the motion for reconsideration because there exists palpable error in the majority opinion.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

January 12, 2023
Date

Chief Clerk

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APPENDIX G

(Plaintiff-Appellant's Application for Leave to Appeal)

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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Gleicher, C.J., Markey, and Patel, JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellant,

vs.

Supreme Court No. _____

Court of Appeals No. 353052
Lower Court No. 19-002078-FH

LANTZ HOWARD WASHINGTON

Defendant—Appellee.
_____/

PLAINTIFF–APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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RECEIVED by MSC 2/10/2023 6:31:51 PM

TABLE OF CONTENTS

TABLE OF CONTENTS ii
INDEX OF AUTHORITIES iii
STATEMENT OF JURISDICTION iv
STATEMENT OF ORDER APPEALED FROM vi
STATEMENT OF QUESTIONS PRESENTED vii

I. Did the Court of Appeals clearly err by finding the trial court abused its discretion by admitting "implied testimonial hearsay" against him in violation of the Confrontation Clause, Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution? vii

II. Did the Court of Appeals clearly error by holding the error was not "harmless beyond a reasonable doubt," excluding Defendant's incriminating statements of fact based on the corpus delicti rule? vii

STATEMENT OF FACTS 1
ARGUMENT 13

I. The Court of Appeals decision that CBP Officer Stockwell's testimony was inadmissible under a theory of "implied testimonial hearsay" is clearly erroneous. 13

A. Standard of Review and Preservation of Error 13

B. Analysis 13

II. The Court of Appeals determination that the alleged error was not "harmless beyond a reasonable doubt" is based on an erroneous view of the Corpus Delicti rule. 21

RELIEF REQUESTED 26
CERTIFICATE OF COMPLIANCE 27

RECEIVED by MSC 2/10/2023 6:31:51 PM

INDEX OF AUTHORITIES

Michigan Cases

People v Burns, 494 Mich 104; 832 NW2d 738 (2013) 13
People v Chambers, 277 Mich App 1; 742 NW2d 610 (2007) 17
People v Jones, 228 Mich App 191; 579 NW2d 637 (1998) 15
People v Konrad, 449 Mich 263; 536 NW2d 517 (1995) 22
People v Propp (On Remand), ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 343255) 20
People v Taylor, 482 Mich 368; 759 NW2d 361 (2008) 24, 25
People v Washington, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052) ..... passim

Court Rules

MCR 7.215 15
MCR 7.305 12

Rules of Evidence

MRE 801 (c) 13
MRE 804 23

Other Authorities

United States v. Kizzee, 877 F3d 650 (CA 5, 2017) 18, 19

RECEIVED by MSC 2/10/2023 8:31:51 PM

STATEMENT OF JURISDICTION

Plaintiff-Appellant appeals the December 1, 2022 published opinion and order of the Court of Appeals vacating Defendant's conviction and remanding for a new trial. (Gleicher, C.J., Markey and Patel, JJ.)(Published Opinion - Appendix A). The opinion was not unanimous – Judge Markey writing a dissent. (Dissent – Appendix B). The People filed a timely motion for reconsideration on December 14, 2022 (Appendix C), denied by Order dated January 12, 2023 (Motion - Appendix D) (Judge Markey would grant motion for reconsideration). This application is filed within 56 days of the Court of Appeals' Order as required by MCR 7.305(C)(2)(c).

The People file this application, requesting this Court correct two significant errors. While this Court is not an "error correcting Court," the errors here are jurisprudentially significant. First, the majority for the first time ever recognized and applied a theory of "implied testimonial hearsay." In so doing, the majority rejected *People v Jones*, 228 Mich App 191; 579 NW2d 82 (1998) and *People v Propp* (on remand), ___ Mich App ___; ___NW2d ___ (2022) (Docket No. 343255), creating a new "implied testimonial hearsay" theory.

The second, and perhaps even more legally significant error, is the majority's erroneous view of the corpus delicti rule. The majority determined Defendant's statements to a booking officer (overheard by the officer in charge) and statements to his mother (during a recorded phone call) were admitted in violation of the corpus delicti rule. In reaching its decision, the majority wrongly conflated admissions of

fact with confessions of guilt. The majority's view of the corpus delicti rule conflicts with this Court's holding in *People v Konrad*, 449 Mich 263; 536 NW2d 517 (1995). Because the Court of Appeals decision is clearly erroneous, will cause material injustice, and conflicts with Supreme Court and Court of Appeals decisions, relief is sought under MCR 7.305(B)(5)(a) and (b). Plaintiff-Appellant, therefore, respectfully requests this Court grant their Application for Leave to Appeal, reverse the decision of the Court of Appeals, and affirm the conviction and sentence of the Defendant-Appellee.

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STATEMENT OF ORDER APPEALED FROM

Plaintiff-Appellant seeks review of the published opinion and order vacating Defendant's conviction dated December 1, 2022. (Gleicher, C.J., Markey and Patel, JJ.) Judge Markey issued a separate opinion, dissenting from the majority. The Court of Appeals denied Plaintiff-Appellant's motion for reconsideration by Order dated January 12, 2023. (Judge Markey would grant motion for reconsideration.)

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STATEMENT OF QUESTIONS PRESENTED

The Plaintiff-Appellant states the questions presented as follows:

I. **Did the Court of Appeals clearly err by finding the trial court abused its discretion by admitting "implied testimonial hearsay" against him in violation of the Confrontation Clause, Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution?**

The trial court was not presented with this question.
The Court of Appeals answered: NO
The Plaintiff-Appellant answers: YES
The Defendant-Appellee answers: NO

II. **Did the Court of Appeals clearly error by holding the error was not "harmless beyond a reasonable doubt," excluding Defendant's incriminating statements of fact based on the corpus delicti rule?**

The trial court was not presented with this question.
The Court of Appeals answered: NO
The Plaintiff-Appellant answers: YES
The Defendant-Appellee answers: NO

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RECEIVED by MSC 2/10/2023 6:31:51 PM

STATEMENT OF FACTS

Defendant, Lantz Howard Washington, was arrested on April 8, 2019, on the Canadian side of the Blue Water Bridge after he drove his red truck through the toll lane on the American side without stopping at the booth to pay the toll. The Canadian authorities returned Defendant, truck, and body armor to the American authorities. There are no places for travelers to stop and obtain body armor between the United States and Canada – including on the Blue Water Bridge.[1]

A. **The Blue Water Bridge.**

The Blue Water Bridge is built over the St. Clair River, connecting the United States and Canada. Michigan Department of Transportation Bridge Safety Officers in Port Huron Michigan, working in booths collecting tolls from vehicles travelling over the Blue Water Bridge from the United States to Canada.[2] The toll booth area has a stop sign and lift gate, requiring vehicles to stop and pay tolls before the lift gate raises, enabling vehicles to proceed through to the Bridge over to Canada. The gate returns to its original position after a vehicle passes through, preventing the next vehicle from proceeding through without paying a fare.[3]

B. **Defendant jumps the toll.**

On April 8, 2019, at approximately 5:00 p.m., Officer Fenner witnessed a truck "[blow] through [her] lane" without paying a toll.[4] The arm of the gate was raised at

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[1] Jury Trial, dated 1/28/20, p. 159-160
[2] Jury Trial, dated 1/28/20, p. 122, 128
[3] Jury Trial, dated 1/28/20, p. 124
[4] Jury Trial, dated 1/28/20, p. 130, 135

RECEIVED by MSC 9/22/2023 10:02:13 AM
RECEIVED by MSC 2/10/2023 6:31:51 PM

the time due to a van in front of the truck paying the bridge fare. Officer Fenner notified her supervisor that someone had "jumped the toll."[5] The toll booth was equipped with a video camera that captured the truck toll jumping, although the high speed of the truck made specific identification of Defendant impossible.[6] Still photographs from the video show a red object in the truck's cabin. Officer Fenner testified she saw red clothing in the cabin of the truck.[7] She could not specifically identify the driver based on the truck's speed.[8] The trial prosecutor admitted these still photographs from the video into evidence.

C. After Defendant jumps the toll, he crosses into Canada failing to stop at Canadian Customs.

The truck drove over the Blue Water Bridge into Canada without stopping at Canadian Customs. The truck finally stopped in an area designated for secondary inspections. Canadian Border Services Agency (CBSA) Officers observed Defendant exit the truck and attempt to run away on foot. CBSA officers saw Defendant wearing body armor under his red t-shirt. CBSA officers apprehended Defendant, who physically resisted CBSA Officers' efforts to detain Defendant, place him in a CBSA vehicle, and return him to the United States. CBSA Officers removed the body armor from Defendant prior to returning him to the United States.[9]

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[5] Jury Trial, dated 1/28/20, p. 130 - 131
[6] Jury Trial, dated 1/28/20, p. 132
[7] Jury Trial, dated 1/28/20, p. 139-140
[8] Jury Trial, dated 1/28/20, p. 136, 140
[9] The trial prosecutor admitted a U.S. Customs and Border Protection Record bearing these facts at preliminary examination.

RECEIVED by MSC 9/22/2023 10:02:13 AM
RECEIVED by MSC 2/10/2023 6:31:51 PM

Despite the trial prosecutor's efforts to obtain permission from the Canadian government to produce CBSA Officer Lavers for trial, his request was denied by official response from the Canadian government received January 24, 2020 – the Friday before trial.[10]

D. CBP Officer Stockwell takes custody of Defendant from CBSA Officer Lavers.

CBP Officer Stockwell worked at the passenger processing building at the Blue Water Bridge.[11] His job responsibilities included inspecting individuals re-entering the United States.[12] On April 9, 2019, he received information from CBSA about a border-crossing incident involving Defendant. CBP Officer Stockwell saw Defendant in the backseat of one of their cruisers when he met with CBSA Officers. He also saw CBSA Officers had returned with a Ford pick-up truck.[13] CBP Officer Stockwell took custody of Defendant.[14] CBSA Officer Lavers also turned over body armor to CBP Officer Stockwell.[15] CBP Officer Stockwell turned over Defendant, the body armor, and truck to Port Huron Police Department (PHPD) Officer Kyle Whitten.[16] A tow truck company impounded Defendant's truck.[17] Defendant had on a red shirt.[18]

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[10] Motion Hearing, dated 1/27/20, p. 8
[11] Jury Trial, dated 1/28/20, p. 147
[12] Jury Trial, dated 1/28/20, p. 147
[13] Jury Trial, dated 1/28/20, p. 149
[14] Jury Trial, dated 1/28/20, p. 151
[15] Jury Trial, dated 1/28/20, p. 152
[16] Jury Trial, dated 1/28/20, p. 153-154
[17] Jury Trial, dated 1/28/20, p. 157
[18] Jury Trial, dated 1/28/20, p. 157

RECEIVED by MSC 9/22/2023 10:23:13 AM
RECEIVED by MSC 2/10/2023 6:31:51 PM

There are no places for travelers to stop and obtain body armor between the United States and Canada – including on the Blue Water Bridge.[19]

E. The trial court admitted the body armor into evidence over Defendant's objection.

At the January 28, 2019 jury trial, Defendant's counsel objected to the admission of the bulletproof vest, arguing a lack of foundation for its admissibility without CBSA Officer Lavers.[20] The trial court overruled trial counsel's objection, allowing the body armor into evidence, but concluded any statements made by CBSA Officer Lavers to CBP Officer Stockwell constituted inadmissible hearsay. The following colloquy between CBP Officer Stockwell and the trial prosecutor regarding CBP Officer Stockwell's contact with CBSA occurred during Defendant's trial:

> Q And that, that Defendant's name, do you recall his name?
>
> A Mr. Washington.
>
> Q Okay. And you were able to identify him?
>
> A Yes, sir.
>
> Q Okay. Who gave you custody of the Defendant at that location?
>
> A I, I don't know which specific CBSA officer turned him over to us. We actually, me and the guys that work with me, took him out of the cruiser. So, he was in the back.
>
> Q Okay, so a collective group of you?
>
> A There was.
>
> Q Okay.

[19] Jury Trial, dated 1/28/20, p. 159-160
[20] Jury Trial, dated 1/28/20, p. 87-89

A There was about six of us.

Q And you were a part of that process?

A I was.

Q At some point did Officer Lavers from the Canadian services hand you any other evidence?

A Yes, he did.

Q What did he hand you?

A He handed –

Q Just specifically related to any armor.

A A body armor.

Q Yes, sir.

A A piece of body armor that you would –

Q And so that was turned over to you, as well?

A It was, yes, sir.

Q Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

A There were.

Q Okay. And, and, and based on those communications you took custody of the Defendant?

A Yes, we did.

Q And you took possession of the body armor that was turned over at the same time?

A Yes, sir.

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RECEIVED by MSC 2/10/2023 8:31:51 PM

Q Did you take, you said you took possession I'm sorry, you said there was a truck that was returned?

A There was.

Q What type of truck was returned?

A It was a Ford pick up truck.[21]

The body armor was entered into evidence over trial counsel's objection.[22] During cross-examination, CBP Officer Stockwell admitted that he did not see Defendant wearing or possessing the body armor prior to collecting it from CBSA Officer Lavers.[23]

F. Defendant's statements of fact connected him to the body armor.

PHPD Officer Kyle Whitten placed Defendant under arrest.[24] He took possession of evidence, including the body armor.[25] PHPD Officer Whitten transported Defendant to the St. Clair County Intervention Center (Jail). During the booking process, Officer Whitten overheard Defendant say "he was wearing the body armor because he was afraid people were going to kill him" as he completed the Defendant's paperwork. [26]

Defendant admitted to wearing body armor during a recorded phone call with his mother on April 27, 2019. [27] The trial prosecutor played the recording for the jury:

BY MR. SODERBERG:

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[21] Jury Trial, dated 1/28/20, p. 151-153
[22] Jury Trial, dated 1/28/20, p. 155.
[23] Jury Trial, dated 1/28/20, p. 158
[24] Jury Trial, dated 1/28/20, p. 161
[25] Jury Trial, dated 1/28/20, p. 163
[26] Jury Trial, dated 1/28/20, p. 167, 169
[27] Motion Hearing, dated 1/27/20, p. 4-5

RECEIVED by MSC 9/22/2023 10:02:13 AM
RECEIVED by MSC 2/10/2023 6:31:51 PM

Q And again, Detective Fantin, this is only an audio recording; is that correct?

A That's correct.

Q There's no visual component to it, correct?

A Correct.

"Hello. This is a collect call from Lantz, an inmate at St. Clair County Jail. You may reject this call. To use your credit or debit card, please press one. To decline this call press four. If you would like to permanently block your number from receiving calls from this facility press six. If you do not want to connect this call, but elect to fund an account to pay for future calls please hang up and dial 800 -- this call will cost 21 cents per minute, plus any applicable federal, state and local taxes and the one-time transaction fee of $3.00. You will only be charged the per minute rate for the amount of time you were on the phone. If you do not want to connect this call, but would like to fund the account to pay for future calls please hang up and dial 800-844-6591. This call is subject to recording and monitoring. To continue press one. To disconnect press two. Thank you for using Securus. You may start the conversation now.

"Mother."

"What is it?"

"I don't mean to bother you, but- - "

"Well, you are."

"I know. I know. I know. But all deeds are in my name and I can't do nothing without James Griffin because his name is on the title too. And what I need is for him to get Dr. Buzzard (phonetic). He can get it from Johnny. Dr. Buzzard will give him the money to get me out and I, we can, we intend to go get the money or whatever. I can't do nothing without him."

"What is Johnny's number?"

"248-636-6338."

"I already called that number and they, they, they said I have the wrong number."

"It's 248."

"I got 248-636-6368."

"No, no, 6338."

"Then why did you give me 6368?"

"I don't know if I gave you 6 -- 248 --"

“638."

"Nope. 248-636."

"Yep."

“6338"

"That's not enough numbers."

"What else you got?"

“248"

"Yep."

“636"

"Yep."

“6338."

"Yeah. That's enough numbers."

"Okay, I'll call him."

"Okay."

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RECEIVED by MSC 9/22/2023 10:22:13 AM
RECEIVED by MSC 2/10/2023 6:31:51 PM

"I want to know what the hell is going on because I, I can't keep paying for these calls. What the hell--"

"I'll pay for it. I'll pay for all the calls." (Inaudible).

"What did you do? What happened?"

"What happened is I was getting threats, right, and James gave me a bulletproof vest. I put on the bulletproof vest."

"That's what I heard, you had a bulletproof vest on."

"And I went to the police with it on. I was fear for my life, they was threatening me."

"Why you in Port Huron?"

"I went to Port Huron because Tamika was looking up the property and the lawyer's in Port Huron that I had for the property."

"So what are you being charged with?"

"Possession of body armor, which is no charge. They're just holding me to protect me, mother."

"So how come you can't tell them you want to go?"

"Ma, it's a long story, I can't explain it all. It's, it's a whole lot to it."[28]

G. Defendant's trial testimony.

Defendant testified at trial, denying that he told corrections deputies that he was wearing body armor. He admitted calling his mother on April 27, 2019, but explained that his conversation related to a different incident.[29] Defendant told his mother that "James gave him a bulletproof vest" and "I put on the bulletproof vest,"

[28] Jury Trial, dated 1/28/20, p. 174-177
[29] Jury Trial, dated 1/28/20, p. 180-182

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but alleged he was unable to identify whether the vest introduced into evidence was the same vest that "James" had given him.[30] Defendant evaded the trial prosecutor's questions, at one point even feigning memory about whether he ever received body armor, what he was wearing the day of his arrest, and what vehicle he drove over the bridge.[31]

H. Jury instruction for possession of body armor and guilty verdict.

The trial court instructed the jury on the law, including giving an instruction on possession of body armor by a felon and the meaning of possession as used in the criminal jury instructions:

> The defendant is charged with possession, possessing or using body armor while convicted of a violent felony. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant has been convicted of a violent felony. The defendant has stipulated to having been convicted of a violent felony that prohibited the defendant from possessing body armor.
>
> Second, that on April 8, 2019 the defendant possessed or used body armor. Body armor means clothing or a device designed or intended to protect the individual's body or a portion of the individual's body from injury caused by a firearm.
>
> Possession does not necessarily mean ownership. Possession means that either the person has actual physical control of the thing, as I do with the pen I'm now holding. I'm not holding a pen. Or that the person has the right to control the thing, even though it is in a different place or room.

[30] Jury Trial, dated 1/28/20, p. 186
[31] Jury Trial, dated 1/28/20, p. 183-187

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> Possession may be sole where one person alone possesses the thing. Possession may be joint where two or more people have shared possession. It is not enough that the defendant merely knew about the body armor. The defendant must, the defendant possessed the body armor only if he had control of it or the right to control it, either alone or together with someone else.[32]

The jury convicted Defendant of Possession of Body Armor by a Felon. The trial court sentenced Defendant to 365 days in jail with credit for 329 days served.[33] The jail released Defendant from custody on March 2, 2020.

I. Post-conviction motion and appeal.

The trial court denied Defendant's Motion for a New Trial by opinion and order dated September 27, 2021. On December 1, 2022, the Court of Appeals vacated his conviction and remanded the case for a new trial, finding the trial court abused its discretion by admitting "implied testimonial hearsay" from CBP Officer Stockwell about his interaction with CBSA Officer Lavers. The Court of Appeals found the error was not harmless beyond a reasonable doubt because the only other evidence connecting Defendant to the body armor were statements admitted in violation of the corpus delicti rule. *People v Washington*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052). Judge Markey's dissenting opinion refused to adopt the "implied assertion" theory, relying on established Michigan precedent. Judge Markey also declined to characterize the "implied assertion" as testimonial in nature, concluding it was not intended to be used as evidence against defendant at the time

[32] Jury Trial, dated 1/28/20, p. 219-220
[33] Disposition Hearing, dated 3/2/20

it was made. Finally, Judge Markey determined that even if the contested testimony was improperly admitted, the violation was harmless beyond a reasonable doubt in light of the Defendant's admissions to wearing the body armor. *Washington*, ___ Mich App ___ ; ___ NW2d ___ (2022) (Docket No. 353052) (MARKEY, J., dissenting). A motion for reconsideration was denied, again Judge Markey stating she would grant the motion for reconsideration. This timely application for leave to appeal follows based on MCR 7.305(B)(5)(a) and (b), because the decision of the Court of Appeals was clearly erroneous, will cause material injustice, and conflicts with cases issued by the Michigan Supreme Court and Court of Appeals.

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ARGUMENT

I. The Court of Appeals decision that CBP Officer Stockwell's testimony was inadmissible under a theory of "implied testimonial hearsay" is clearly erroneous.

A. Standard of Review and Preservation of Error

Questions of law are reviewed de novo. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012). A preserved error requires proof that the error was harmless beyond a reasonable doubt. *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020). When evaluating whether erroneously admitted evidence was harmless beyond a reasonable doubt, the Court must determine the probable effect of that testimony on the minds of an average jury. *Id.* (internal citations omitted).

B. Analysis

1. Hearsay

Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801 (c). "Statement" as used in the definition of hearsay means an assertion: A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion. MRE 801 (a).

The trial prosecutor avoided questioning CBP Officer Stockwell about the substance of the communications, relying on other evidence to connect Defendant to the body armor:

Q What did he hand you?

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A He handed –

Q Just specifically related to any armor.

A A body armor.

Q Yes, sir.

A A piece of body armor that you would –

Q And so that was turned over to you, as well?

A It was, yes, sir.

Q Now, without saying anything about what was said, the only question I have for you is were there communications between you and Officer Lavers?

A There were.

Q Okay. And, and, and based on those communications you took custody of the Defendant?

A Yes, we did.

Q And you took possession of the body armor that was turned over at the same time?

A Yes, sir. [34]

* * * *

Q What did you do after taking possession of those things?

A We contacted Port Huron Police Department.

Q Okay. Did anyone from the Port Huron Police Department make their way to the bridge –

A They did.

Q -- at that point? A Yes, sir.

---

[34] Jury Trial, dated 1/28/20, p. 152-153

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> Q And would that have been around 6:40 p.m. if you know?
>
> A Yes, it probably -- 6:40, seven o'clock.
>
> Q Okay.
>
> A Ballpark.
>
> Q And then do you recall which officer came from Port Huron at that point?
>
> A Officer, I believe his name is Whitten.
>
> Q Okay. And was, was anything done with Officer Whitten at that time?
>
> A We transferred custody of the body armor that we received and of Mr. Washington.[35]

2. Michigan Courts have never recognized a theory of "implied testimonial hearsay" by assertion until now.

The Court of Appeals soundly rejected the "implied assertion theory" in *People v Jones*, 228 Mich App 191; 579 NW2d 637 (1998), stating:

> While a number of decisions over the years have regarded 'implied' assertions as hearsay, we believe that the theory had a questionable origin, that it has never achieved general recognition in decided cases, that it is expressly negated by the modern rules of evidence, and that it is contrary to Michigan precedent [*Jones* at 207].

Despite this strong repudiation, the majority concludes *Jones* is not binding precedent under MCR 7.215(C)(2). In its analysis of *Jones*, the majority finds that the statements only addressed statements that "conveyed the speaker's state of mind, rather than an accusation." *Washington* at ___; slip op at 9. The majority's conclusion

[35] Jury Trial, dated 1/28/20, p. 153-154

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is incorrect, mischaracterizing the challenged statements in *Jones*, including the assertions, "I'm gonna kick your ass. And Alphonzo don't want you, Alphonzo don't love you." While it is agreed the statements in *Jones* were not "accusatory," they went beyond the speaker's state of mind, offered as an "integral part of the series of events that led to the shooting of the victim." *Jones*, 228 Mich App at 205.

Similarly, in this case, CBSA Officer Lavers' non-verbal "communications" at the Blue Water Bridge were not *accusatory*. Far from accusatory, his non-verbal "communications" explained the series of events and had a clear, chain-of-custody evidentiary purpose, limited to confirmation of CBP Officer Stockwell's receipt of Defendant, a pick-up truck, and body armor.[36] Yet, the majority is unwilling to consider whether the "implied assertion" is anything other than an accusation against Defendant that he was wearing body armor - inexplicably concluding, "[w]hen Lavers handed over Washington and the vest to Stockwell, Lavers made a statement that he intended as accusatory." *Washington* at ___; slip op at 5. That speculative assumption about non-verbal conduct is precisely what makes the theory of "implied testimonial hearsay" so *dangerous* – the majority basing its conclusions on its own interpretation of a non-verbal act.

The majority also did not consider that CBP Officer Stockwell, whose supervisor duties include inspecting individuals re-entering the United States, would have taken custody of Defendant, his pick-up truck, and any other property for

[36] During cross-examination, CBP Officer Stockwell admitted that he never saw Defendant wearing the body armor nor did he see anyone remove the body armor from Defendant.

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inspection with or without body armor. The dissent correctly views CBP Officer Stockwell's "communication" with CBSA Officer Lavers as ministerial, finding:

> [t]he purpose of the communication was simply to provide Officer Stockwell with the information necessary for Officer Stockwell to formally take defendant into custody from the Canadian authorities and proceed with the charging process under Michigan law. The implied statement explained Officer Stockwell's actions and his involvement in the case, including taking control of the bulletproof vest. [*Washington*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052)(MARKEY, J., dissenting); slip op at 5.]

A statement offered to show why a police officer acted the way he did is not hearsay. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). This testimony was not offered to establish that Defendant wore the body armor – an element not part of the offense – but was offered for non-hearsay purposes – to explain CBP Officer Stockwell's involvement in the case and provide chain-of-custody testimony regarding the body armor.

The majority concludes that CBSA Officer Lavers affirmed through non-verbal conduct precisely the same information he would have conveyed verbally: "[t]hat Washington had been wearing the body armor when caught by the Canadian authorities." *Washington* at ___; slip op at 5. This assumption is incorrectly predicated on what the majority believes the trial prosecutor intended instead of the intent of the CBSA Officer Lavers; specifically, returning Defendant and his property to the United States. In doing so, the majority ignores the *Jones* holding, which, in

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defining the "implied assertion" concept, focused on the "actor's intent" to communicate the matter to be proved in court, and not the trial prosecutor.

Finding no authority in Michigan to support the creation of the "implied testimonial hearsay" theory, the majority relies on federal cases from other circuits that have no precedential value, lack persuasiveness, and are factually distinguishable. One of these cases, *United States v. Kizzee*, 877 F3d 650 (CA 5, 2017), highlights both the factual differences from this case and why the "implied testimonial hearsay" theory should not be adopted in Michigan.

In *Kizzee*, defendant objected to the lead detective's testimony at trial, arguing it violated the rules of hearsay and right to confront witnesses. The detective was the only witness called by the prosecution. A review of the questioning by the prosecutor in *Kizzee* compared to the questioning by the trial prosecutor in this case establishes key factual differences.

Specifically, the prosecutor's questions identified Kizzee by name, linking him to the substance of the detective's interrogation of another suspect, Brown. At trial, the lead detective was allowed to testify about his interview with Brown. After conviction at trial, Kizzee appealed, challenging the admissibility of the detective's testimony regarding the interview of Brown. Although the prosecutor never introduced Brown's statement, defendant Kizzee argued that the detective's testimony and prosecutor's questioning "implicitly" introduced substantive,

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testimonial statements against him. *Kizzee*, 877 F3d at 656. The Court agreed with defendant, concluding:

> "[t]his Court has recognized that police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*; officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant. Where an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged, Confrontation Clause protections are triggered. . . . .Similarly a prosecutor's questioning may introduce a testimonial statement by a nontestifying witness, thus implicating the Confrontation Clause. [*Kizzee* at 657.][internal quotation marks and citations omitted.]

The content of Brown's statements to the detective during the interrogation could be "readily inferred" from the prosecutor's questions and detective's testimony. *Id*. at 658. The Court in *Kizzee* distinguished the testimony in *Kizzee* from testimony that would be admissible for non-hearsay purposes:

> Testifiying officers may provide context for their investigation or explain background facts. Such out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain an officer's actions. [*Kizzee* at 659.]

The Court found that the exchange between the detective and prosecutor exceeded the scope of what was needed to explain the detective's actions. *Id*. at 660. The prosecutor's failure to call Brown as a witness violated the defendant's right to confront witnesses because he could not cross-examine Brown about Brown's ***statements*** to the detective.

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In this case, the trial prosecutor did not elicit CBSA Officer Lavers' statements through CBP Officer Stockwell. Moreover, *Kizzee* recognized that testifying officers can provide context to the investigation or explain background facts without violating the hearsay rules or implicating the Confrontation Clause. Unlike *Kizzee*, the majority would reject that proposition, finding that if the officer's testimony was offered to prove *something* – even if the *something* was not the truth of the matter—it would be inadmissible.

The Court of Appeals recently re-affirmed its position in *People v Propp* (On Remand), ___ Mich App ___; ___ NW2d ___ (2022)(Docket No. 343255), stating "Michigan does not recognize the implied assertion theory that has been adopted in some other jurisdictions." *Id.* at 8. Again, the majority rejects legal precedent, attempting to distinguish this case factually in order to create new precedent that categorizes all non-verbal, assertive conduct inadmissible if it is offered to prove *something*.

If affirmed, this novel theory of "implied testimonial hearsay" will change the legal landscape. If the mere act of handing over body armor is now considered "accusatory," every witness who touches potential evidence will be required to provide trial testimony – regardless of how ministerial or cumulative the testimony may be. This theory will also result in reviewing courts actively interpreting the meaning of a speaker's non-verbal conduct – inevitably reaching the same conclusion – if it is offered to prove something, it is inadmissible "implied testimonial hearsay" even if not offered to prove the truth of the matter asserted. Non-hearsay will become a

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"thing of the past" because all conduct – whether verbal or not – is now inadmissible testimonial hearsay, violating the Confrontation Clause of the Sixth Amendment.

For these reasons, the People request this Court grant its Application for Leave to Appeal.

II. The Court of Appeals determination that the alleged error was not "harmless beyond a reasonable doubt" is based on an erroneous view of the Corpus Delicti rule.

The Court of Appeals vacated Defendant's conviction, concluding that the prosecution could not prove that a crime was committed because though Defendant admitted – including in a jail call – that he possessed the body armor, under the corpus deliciti rule, "Without direct or circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed." *Washington* at ___; slip op at 11. This is a mistaken view of the corpus delicti rule, which exists not to free the patently guilty, but protect the innocent where no crime was actually committed.

As set forth by Judge Markey in her dissent, the United States Supreme Court has addressed the corpus delicti rule and its purpose, stating:

> The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts, Its purpose is to prevent errors in convictions based upon untrue confessions alone; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions

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> may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be involuntary within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made. [*Washington*, ___ Mich App at ___ (MARKEY, J., dissenting); slip op at 5 quoting *Smith v United States*, 348 US 147, 152-153; 75 S Ct 194 (1954).][Internal citations and quotation marks omitted.]

The majority opinion is inconsistent with Michigan Supreme Court authority, which in a case involving the possession of cocaine, held:

> [T]he corpus delicti was satisfied by evidence independent of defendant's confession that (1) the cocaine *existed* and (2) was *possessed by someone*. . . .The defendant's contention that proof of the corpus delicti requires evidence *that the cocaine was constructively possessed by the defendant is incorrect.* "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." . . . It is sufficient to show that the crime was committed by someone. . . .In the words of a noted authority, the position that *the corpus delicti of a crime includes the identity of the perpetrator is "too absurd indeed to be argued with,"* because it would require that the entire crime be proved before a confession could ever be admitted. [*People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995)] [numbering and emphasis supplied.]

Here, as in *Konrad*, the majority's decision that the People must, to establish the corpus delicti,, prove that Defendant possessed the body armor by direct or circumstantial evidence *independent* of these statements – which were not to the

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police, and do not constitute confessions[37] – "is incorrect." To paraphrase *Konrad*, the People must show "(1) that the body armor existed and (2) was possessed by someone." And, here, the People must also show that Defendant was a felon. The People established that the body armor existed, that it was possessed by someone, and that Defendant was a felon, all independent of Defendant's statements admitting that he possessed the body armor. His statements were then admissible to prove that *he* possessed the body armor.

The majority is also mistaken in its conclusion that "Absent Stockwell's testimony regarding the substance of his 'communications' with Lavers, the prosecution would have lacked any testimony that could serve as a foundation for the vest's admissibility." *Washington,* ___ Mich App at ___; slip op at 11. The statements made by Defendant, while admissions, are also substantively admissible as Statements Against Interest pursuant to MRE 804(b)(3),[38] which provides:

> [A] statement which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless

---

[37] The People agree with the dissent (Appendix C – MARKEY, J., dissenting) that the statements were admissible to show the corpus delicti, and, for purposes of preservation, submit that *People v McMahan*, 451 Mich 543; 548 NW2d 199 (1996) was wrongly decided; see the dissent by Justice Boyle.

[38] MRE 804 relates to hearsay exceptions where the declarant is unavailable. Clearly, the Defendant's pre-conviction status as the accused, and his Fifth Amendment privilege, rendered him unavailable as a witness for the prosecution's case-in-chief.

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> corroborating circumstances clearly indicate the trustworthiness of the statement.

The application of this rule has been modified greatly where it concerns the statements of co-defendants or accomplices in cases implicating a defendant's right of Confrontation. Obviously, that is not a consideration in the present case. In *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008), this Court evaluated whether a statement against penal interest that inculpates the declarant – here, the Defendant – is sufficiently reliable to allow it to be used as substantive evidence. *Taylor*, 482 Mich at 376. The Court stated:

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id.* at 376 quoting *People v Poole*, 444 Mich 151, 165; 506 NW2d 505.]

The circumstances surrounding Defendant's telephone call to his mother establish sufficient reliability that favor the statements admissibility as substantive evidence. That particular communication, initiated by Defendant, was voluntarily made because he needed his mother to contact "Johnny." While his mother asked

"what did you do?" and "what happened," Defendant voluntarily told her that "he was given a bulletproof vest. I put on the bulletproof vest." These statements are not testimonial because Defendant made them to his mother, not during a police investigation or other formal proceeding. Non-testimonial statements do not implicate the Confrontation Clause. *Taylor*, 482 Mich at 377-378; 759 NW2d 361 (2008). These indicia of reliability establish that Defendant's statements about wearing the body armor possess the guarantees of trustworthiness that provide the rationale for the admission of statements pursuant to a delineated exception to the general hearsay rule. Contrary to the majority's opinion, this substantive evidence "could serve as a foundation for the vest's admission" and "prove that a crime was committed" because it connects Defendant to the body armor. Accordingly, the majority's finding that the error was not harmless beyond a reasonable doubt is also erroneous.

For these reasons, this Court should grant the People's Application for Leave to Appeal.

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RELIEF REQUESTED

WHEREFORE, for the reasons state above, the Plaintiff-Appellant requests this Honorable Court grant this Application for Leave to Appeal, or reverse the decision of the Court of Appeals, and affirm the conviction and the sentence of the trial court.

Respectfully Submitted,

Michael D. Wendling
Prosecuting Attorney

By: */s/ Melissa J. Keyes*
Melissa J. Keyes (P56532)
Senior Assistant Prosecuting Attorney

Dated: February 1, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212(B)(1) and contains 5,905 countable words. The document is set in Century Schoolbook and the text is in 12-point type, double spaced.

Respectfully Submitted,

Michael D. Wendling
Prosecuting Attorney

By: */s/ MELISSA J. KEYES*
Melissa J. Keyes (P56532)
Senior Assistant Prosecuting Attorney

Dated: February 1, 2023

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APPENDIX H

(Defendant-Appellee's Answer in Opposition to Leave to Appeal)

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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

LANTZ WASHINGTON,

Defendant-Appellee.
_____/

Supreme Court No. 165296

Court of Appeals No. 353052

Circuit Court No. 19-002078-FH

ST. CLAIR COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant
DOUGLAS W. BAKER (P49453)
Attorney for Defendant-Appellee

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

STATE APPELLATE DEFENDER OFFICE

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RECEIVED by MSC 3/10/2023 1:39:54 PM

Table of Contents

Index of Authorities i

Statement of Questions Presented iv

Introduction v

Statement of Facts and Material Proceedings 1

Argument 9

I. The prosecution violated Lantz Washington's Sixth Amendment confrontation rights when it introduced implied testimonial hearsay statements against him, thus laying an improper foundation for the admission of the bulletproof vest into evidence. 9

A. The prosecution impermissibly introduced implied testimonial hearsay through Officer Stockwell. 12

B. The implied hearsay was offered for the truth of the matter asserted. 17

C. Mr. Washington Had No Opportunity to Cross-Examine Officer Lavers at a Prior Hearing. 17

D. The prosecution cannot prove that violation of Mr. Washington's confrontation right was harmless beyond a reasonable doubt. 18

Conclusion 21

Summary and Relief 22

DWB*MSC Answer*32490*March 1, 2023
Lantz Howard Washington

RECEIVED by MSC 9/2/2023 1:02:31 PM

Index of Authorities

Cases

Chapman v California,
386 US 18 (1967) 10
Com. v Farris,
251 Pa Super 277 (1977) 16
Crawford v Washington,
541 US 36 (2004) 10, 11, 12, 17
Davis v Washington,
547 US 813 (2006) 11, 12
Favre v Henderson,
464 F 2d 359 (CA 5, 1972) 13, 14
Mason v Scully,
16 F 3d 38 (CA 2, 1994) 15
Neder v United States,
527 US 1 (1999) 18
Ocampo v Vail,
649 F 3d 1098 (CA 9, 2011) 15
People v Anderson,
446 Mich 392 (1994) 10, 18
People v Borgne,
483 Mich 178 (2009) 10
People v Bruner,
501 Mich 220 (2018) 18
People v Burns,
250 Mich App 436 (2002) 20
People v Carines,
460 Mich 750 (1999) 18
People v Chambers,
277 Mich App 1 (2007) 17
People v Fackelman,
489 Mich 515 (2011) 10, 12
People v Felder,
108 AD2d 869 (NY App Div, 1985) 15
People v Jemison,
505 Mich 352 (2020) 10
People v Jones,
228 Mich App 191 (1996) 13
People v Konrad,
449 Mich 263 (1995) 19
People v McPherson,
263 Mich App 124 (2004) 17

People v Shepherd,
427 Mich 343 (2005) 18
Ryan v Miller,
303 F 3d 231 (CA 2, 2002) 13, 15
United States v Meises,
645 F 3d 5 (CA 1, 2011) 15
Williams v Illinois,
567 US 50 (2012) 11, 12
United States v Kizzee,
877 F 3d 650 (CA 5, 2017) 13, 14, 15
United States v Reyes,
18 F 3d 65 (CA 2, 1994) 14, 15
Young v United States,
63 A 3d 1033 (DC, 2013) 15

Statutes

MCL 600.308(1) iii
MCL 750.227g 1, 2, 5, 6
MCL 770.3 iii
Mich Const 1963, art 1, §20 iii
US Const, Am XI 10

Rules

MCR 6.425(F)(3) iii
MCR 7.203(A) iii
MCR 7.204(A)(2) iii
MRE 801(c) 17
MRE 804(5) 18

RECEIVED by MSC 9/2/2023 12:02:31 PM

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Statement of Jurisdiction

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

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Statement of Questions Presented

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

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

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

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

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

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

Trial Court made no answer or answers "No."

Lantz Howard Washington answers, "Yes."

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Introduction

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

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

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

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

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

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

Professor Friedman agreed with the majority's rationale.

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

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

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

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Statement of Facts and Material Proceedings

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

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

****

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

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

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

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

Arrest

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

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

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Pre-Trial Proceedings

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

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

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

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

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

Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

Verdict, Sentencing, and Post-Trial Proceedings

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

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

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

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

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Argument

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

Issue Preservation and Standard of Review

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Conclusion

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

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

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Summary and Relief

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

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Douglas W. Baker
BY:_____

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With assistance on the brief by:
Gregory Momjian
Erica Arensman
Students, University of Michigan Law School

Dated: March 1, 2023

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APPENDIX

I

(Michigan Supreme Court Order granting
Plaintiff-Appellant's Application
for Leave to Appeal)

Order

Michigan Supreme Court
Lansing, Michigan

May 24, 2023

Elizabeth T. Clement,
Chief Justice

165296

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 165296
COA: 353052
St Clair CC: 19-002078-FH

LANTZ HOWARD WASHINGTON,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the December 1, 2022 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether evidence directly implying the substance of a testimonial, out-of-court statement made by an unavailable witness and offered to prove its truth, i.e., "implied testimonial hearsay," is inadmissible because it violates the Sixth Amendment of the United States Constitution and Article 1, § 20 of Michigan's Constitution; and, if so, (2) whether the defendant's incriminating statements were inadmissible under the corpus delicti rule.

The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 24, 2023

Clerk

a0517

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APPENDIX J

(April 11, 2019 CBP report)

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Blue Water Bridge
1410 Elmwood
Port Huron, MI 48060-5471

U.S. Customs and Border Protection

April 11, 2019

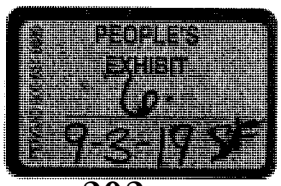
Memorandum For: Roger Wesch, Lieutenant
Port Huron Police Department

From: Michael Fox, Port Director
Port of Port Huron

Subject: Record Request for PHPH Complaint #19-7081

This is in response to your request for information in reference to CBP Port Huron report from 04/08/2019 from the border crossing inspection of WASHINGTON, Lantz Howard. The information requested is provided for the purpose described in the PHPD request from 04/11/2019 request only, may not be employed for any other use inconsistent with that purpose, must not be released to any other agency or any third party without CBP's express written consent, and that in the event of any such unauthorized release, Port Huron Police Department agrees to assume responsibility for any expenses, costs, or liabilities arising from such disclosure. The information provided may be used in any court proceeding that relates to the mater for which it was requested.

On April 8, 2019 at approximately 1800 Canadian Border Services Agency (CBSA) returned WASHINGTON, Lantz Howard 12/13/1961 USC. WASHINGTON was shackled with multiple pairs of handcuffs, including several pairs between the leg shackles and handcuffs on his wrists due to his assaultive behavior in CBSA custody and damaging CBSA vehicles.
WASHINGTON was carried to holding cell #1 [redacted] as witnesses.
CBSA stated that WASHINGTON attempted to run from their secondary while wearing body armor and was injured in the apprehension and continued to fight Canada Border Services Officers when they attempted to place him in their vehicle for transport to the United States. CBSA stated that WASHINGTON was wearing body armor under his tee shirt when apprehended. CBSA stated that WASHINGTON was attempting to enter



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Canada because he claims that he bought property in the United States and someone is trying to kill him. The unbranded body armor in a tactical vest was seized.
Due to WASHINGTON's perceived mental state the entire time he was in CBP custody several CBPOs were present with him, WASHINGTON remained in handcuffs while in the cell. [redacted] authorized a patdown of WASHINGTON at approx. 1810 while removing him from CBSA's handcuffs and shackles. [redacted] was the searching officer with [redacted] as witnesses. The patdown was negative and ended at 1812.
WASHINGTON had no funds on his person. WASHINGTON requested EMS to look at injuries he sustained while in Canadian Border Services Agency's custody. [redacted] contacted EMS via St Clair County Central Dispatch. EMS arrived at 1814. EMS evaluated WASHINGTON and he declined medical attention. WASHINGTON made the following statement to EMS when asked how his injuries occurred: "got them resisting arrest and acting a fool". [redacted] took photos of WASHINGTON's injuries, which were uploaded [redacted].
CBPO Schwander started the [redacted] for WASHINGTON. Criminal checks on WASHINGTON were positive for multiple felony convictions. No NCIC warrants, but 4 NLETS warrants, 3 with 25 mile pickup from Detroit, MI and 1 with 25 mile pickup from Novi, MI. Due to WASHINGTON's criminal record, Port Huron Police Department was contacted by [redacted] at approx. 1810 to see if WASHINGTON would be arrested as a violent felon in possession of body armor and driving while suspended/revoked. The vehicle WASHINTON was driving was driven back from Canada by CBSA Officers. CBP Officers searched the vehicle with negative results. [redacted] ran checks on the vehicle with NCIC and NLETS with no report of it being stolen. Port Huron Police Department (PHPD) Officer Whitten arrived at the Blue Water Bridge at approximately 1930 and was briefed [redacted] about WASHINGTON's possession of and wearing body armor as a convicted violent felon.
PHPD Whitten took possession of WASHINGTON's personal effects, the vehicle. PHPD Whitten arrested WASHINGTON under MCL 750.227g Violent Felon in Possession of Body Armor and Driving While Suspended/Revoked. PHPD Whitten signed 6051S 6825262 taking possession of the body armor. PHPD Whitten had WASHINGTON's vehicle impounded.

If you have any further questions, please feel free to contact Chief CBPO Schrader at (810) 989-8810.