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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. 165296

Court of Appeals No. 353052

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

LANTZ HOWARD WASHINGTON

Defendant—Appellee.
_____/

PLAINTIFF--APPELLANT'S BRIEF ON APPEAL

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

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STATEMENT OF JURISDICTION

Plaintiff-Appellant appeals from the December 1, 2022 published opinion and order of the Court of Appeals vacating Defendant's conviction and remanding for a new trial. The decision was not unanimous. The People filed a timely motion for reconsideration on December 14, 2022, denied by non-unanimous order dated January 12, 2023. The People filed an application for leave to appeal in this Court on February 1, 2023. On May 24, 2023, this Court granted the People's application. Jurisdiction is therefore proper under MCL 600.215 and MCR 7.303(B)(1).

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STATEMENT OF QUESTIONS PRESENTED

Defendant-Appellee drove a blue Ford F-250 pickup truck at a high rate of speed through a Port Huron, Michigan outbound Blue Water Bridge toll booth without paying the required toll. Defendant crossed over the Blue Water Bridge, entering into Canada where Canadian Border Services Agency Officers (CBSA officers) immediately apprehended him. CBSA officers performed the ministerial task of returning Defendant, the pickup truck, and body armor to United States Customs and Border Protection Officers (CBP officers) on the American side of the bridge. A CBP Officer took custody of Defendant, contacting the Port Huron Police Department (PHPD). A PHPD officer arrived at the bridge, met with the CBP officer, and arrested Defendant as a violent felon unlawfully possessing body armor. The PHPD officer overheard Defendant admit wearing the body armor to booking deputies at the jail. Defendant also admitted wearing body armor during a recorded telephone conversation with his mother.

The Canadian government did not permit its CBSA officer to testify at Defendant's trial, rendering him "unavailable." The trial court admitted the body armor into evidence at trial, limiting the CBP officer's testimony to what he did – collected a toll jumper, his vehicle, and property from Canadian officers – but not what the parties said during the ministerial exchange.

Defendant stipulated to having prior violent felony convictions that prohibited him from lawfully possessing body armor, leaving one issue in dispute at trial – possession. The trial prosecutor admitted circumstantial and direct evidence

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establishing possession, including Defendant's admissions to wearing body armor. Under these facts:

I. Did the prosecution commit error by introducing "implied testimonial hearsay" statements against Defendant in violation of the 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: YES
The Plaintiff-Appellant answers: NO
The Defendant-Appellee answers: YES

II. Did the trial court reversibly err, admitting Defendant's admissions of fact into evidence in violation of the corpus delicti rule?

The trial court answered: NO
The Court of Appeals answered: YES
The Plaintiff-Appellant answers: NO
The Defendant-Appellee answers: YES

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STATEMENT OF FACTS

On April 8, 2019, CBSA officers apprehended Defendant, Lantz Howard Washington, on the Canadian side of the Blue Water Bridge immediately after he drove a blue Ford F-250 pickup through an outgoing toll lane without paying fare, crossing over the bridge into Canada. The Canadian officers returned Defendant to the United States, turning over Defendant, the pickup truck, and body armor to CBP officers.

There are no places for motorists to stop and obtain body armor between the United States toll booth and Canada – including on the Blue Water Bridge.[1]

A. The Blue Water Bridge is a border crossing, linking the United States and Canada.

The Blue Water Bridge extends over the St. Clair River, connecting the United States and Canada. Michigan Department of Transportation Bridge Safety Officers collect tolls from motorists travelling from Port Huron, Michigan into Canada via the Blue Water Bridge.[2] The Bridge Safety Officers collect tolls from motorists from the inside of toll booths. Travel lanes adjacent to toll booths are equipped with stop signs and lift gates, preventing vehicles from passing through without paying the toll. The lift gates raise after the motorist pays their toll, enabling vehicles to proceed over the bridge into Canada. The gates return to the original position after vehicles pass, preventing the next vehicle from driving through the lane without paying a fare.[3]

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[1] Appx A: 38a-39a (Jury Trial ("JT"), dated 1/28/20, p. 159-160)
[2] Appx A: 17a, 20a (JT, dated 1/28/20, p. 122, 128)
[3] Appx A: 18a (JT, dated 1/28/20, p. 124)

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B. On April 8, 2019, a pickup truck jumps the toll at 5:00 p.m.

On April 8, 2019, Bridge Safety Officer Denise Fenner was assigned to collect tolls from motorists in the eastbound lane, travelling "out" of the United States into Canada. At approximately 5:00 p.m., a pickup truck "blew through [her] lane" without paying a toll.[4] Officer Fenner notified her supervisor that a motorist "jumped the toll." The supervisor is responsible for notifying authorities about toll jumping.[5]

The toll booth had a video camera that recorded a blue Ford F-250 pickup truck speeding through the lane next to Officer Fenner's Booth. The high speed of the pickup truck rendered identification of the driver impossible.[6] Still photographs taken from the video surveillance depicted a red object in the front seat of a blue Ford F-250 pickup truck. Officer Fenner observed 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 the video and still photographs into evidence.

C. CBP Officer Stockwell took custody of Defendant from CBSA Officer Lavers.

Officer Paul Stockwell is a supervisor with CBP, overseeing shift operations at the passenger processing building at the Blue Water Bridge.[9] His job responsibilities include inspecting individuals returning to or re-entering the United States to determine whether the individual is permitted to enter the country.[10] On April 9,

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[4] Appx A: 21a, 24a (JT, dated 1/28/20, p. 130, 135)
[5] Appx A: 21a-22a (JT, dated 1/28/20, p. 130-131)
[6] Appx A: 23a (JT, dated 1/28/20, p. 132)
[7] Appx A: 26a-27a (JT, dated 1/28/20, p. 139-140)
[8] Appx A: 25a, 27a (Jury Trial, dated 1/28/20, p. 136, 140)
[9] Appx A: 28a (JT, dated 1/28/20, p. 147)
[10] Appx A: 28a-29a (JT, dated 1/28/20, p. 147-148)

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2019, Officer Stockwell received a call from the "supervisor on the other side just [to] let us know that [Defendant] was coming back."[11] Officer Stockwell saw two CBSA vehicles and a Ford pickup roll into lane "5A," next to the passenger processing building at 6:00 p.m. Defendant was in the backseat of the first CBSA cruiser.[12] Officer Stockwell removed Defendant from the cruiser, taking him into custody.[13] Defendant was wearing a red shirt.[14] CBSA Officer Matt Lavers also turned over body armor and the Ford pickup truck to Officer Stockwell.[15]

While Defendant was in CBP custody, officers checked Defendant's criminal history for open warrants. During this search, officers discovered Defendant's prior convictions for violent felonies. Officers also searched databases for reports that the Ford F-250 pickup truck had been stolen, but found none. Based on Defendant's prior criminal record, Officer Stockwell contacted the Port Huron Police Department (PHPD) to determine whether it would seek a felony charge of possession of body armor by a violent felon.[16]

PHPD Officer Kyle Whitten arrived at the bridge between 6:40 p.m. and 7:00 p.m. to meet with Officer Stockwell. Officer Stockwell released Defendant, the body armor, and pickup truck to Officer Whitten.[17] A tow truck company impounded the

[11] Appx A: 29a (JT, dated 1/28/20, p. 148)
[12] Appx A: 30a (JT, dated 1/28/20, p. 149)
[13] Appx A: 31a (JT, dated 1/28/20, p. 151)
[14] Appx A: 36a (JT, dated 1/28/20, p. 157)
[15] Appx A: 32a (JT, dated 1/28/20, p. 152)
[16] The prosecution admitted a United States Custom and Border Protection report (Appx J) as a preliminary examination exhibit.
[17] Appx A: 33a-34a (JT, dated 1/28/20, p. 153-154)

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pickup truck at Officer Whitten's direction.[18] Officer Stockwell confirmed there are no places for motorists to stop and obtain body armor between the United States toll booth and Canadian customs – including on the Blue Water Bridge.[19] Defendant was charged under state law for possession or use of body armor by a violent felon, contrary to MCL 750.227g(1).

D. The trial court admitted the body armor into evidence over Defendant's objection.

At the January 28, 2019 jury trial, Defendant's trial counsel objected to the admission of the body armor, arguing a lack of foundation for its admissibility without CBSA Officer Lavers.[20] The trial court overruled trial counsel's objection based on the grounds alleged, addressing the corpus delicti rule in its analysis. The trial court analogized the body armor to the discovery of a dead body, stating:

> 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 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

[18] Appx A: 36a (JT, dated 1/28/20, p. 157)
[19] Appx A: 37a-38a (JT, dated 1/28/20, p. 159-160)
[20] Appx A: 8a-12a (JT, dated 1/28/20, p. 87-91). The Canadian government denied the prosecution's request to produce CBSA Officer Matt Lavers four days before trial commenced. See Appx A: 6a (Motion Hearing ("MH"), dated 1/27/20, p. 8)

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> 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, 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.[21]

The prosecution honored the trial court's ruling, avoiding any questions as to what Officer Lavers said to Officer Stockwell. Here is the colloquy between the prosecution and Officer Stockwell:

[21] Appx A: 13a-15a (JT, dated 1/28/20, p. 98-100)

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.

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 –

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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.[22]

The trial court admitted the body armor into evidence over trial counsel's relevancy objection under MRE 401.[23] Officer Stockwell was subject to cross-examination by trial counsel, conceding he did not personally see Defendant wearing or possessing the body armor prior to collecting it from Officer Lavers.[24]

[22] Appx A: 31a-33a (JT, dated 1/28/20, p. 151-153)
[23] Appx A: 35a (JT, dated 1/28/20, p. 155)
[24] Appx A: 37a (JT, dated 1/28/20, p. 158)

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E. Defendant stipulated having prior convictions for violent felonies.

Defendant stipulated to having a prior conviction for a violent felony, making him ineligible to possess body armor.[25] At trial, the trial prosecutor placed this stipulation on the record in the presence of the jury.[26]

F. Defendant's admissions of fact connected him to the body armor.

PHPD Officer Kyle Whitten placed Defendant under arrest.[27] He took possession of evidence, including the body armor.[28] PHPD Officer Whitten transported Defendant to the St. Clair County Intervention Center (Jail). While completing Defendant's paperwork, Officer Whitten overheard Defendant tell corrections deputies "he was wearing the body armor because he was afraid people were going to kill him."[29]

Defendant also admitted wearing body armor to his mother in a recorded phone call from the jail on April 27, 2019.[30] The trial prosecutor played the recording for the jury, transcribed below:

> BY MR. SODERBERG:
>
> Q. And again, Detective Fantin, this is only an audio recording; is that correct?

[25] Appx A: 5a (MH, dated 1/27/20, p. 7)
[26] Appx A: 16a (JT, dated 1/28/20, p. 120)
[27] Appx A: 40a-41a (JT, dated 1/28/20, p. 161-162)
[28] Appx A: 42a (JT, dated 1/28/20, p. 163)
[29] Appx A: 43a, 44a (JT, dated 1/28/20, p. 167, 169)
[30] Appx A: 3a-4a (MH, dated 1/27/20, p. 4-5)

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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."

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"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."

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

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"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."[31]

G. Defendant's trial testimony.

Defendant testified at trial, denying that he told corrections deputies that he had worn body armor on April 8, 2019. He admitted calling his mother on April 27, 2019, but claimed his statements about body armor concerned a different incident.[32] Defendant told his mother that "James gave him a bulletproof vest" and "I put on the bulletproof vest," but alleged he was unable to recall whether the bulletproof vest

[31] Appx A: 46a-49a (JT, dated 1/28/20, p. 174-177)
[32] Appx A: 50a-52a (JT, dated 1/28/20, p. 180-182)

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introduced into evidence was the same bulletproof vest that "James" had given him.[33] Defendant evaded the trial prosecutor's questions, at one point even feigning lack of memory about whether he even received body armor, what he was wearing the day of his arrest, and what pickup truck he drove over the bridge.[34]

H. Jury instruction for possession of body armor and guilty verdict.

The trial court instructed the jury on the law, including the law related to possession of body armor by a violent felon, and the meaning of possession:

> 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.
>
> Possession may be sole where one person alone possesses the thing. Possession may be joint where two or

[33] Appx A: 56a (JT, dated 1/28/20, p. 186)
[34] Appx A: 53a-57a (JT, dated 1/28/20, p. 183-187)

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> 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.[35]

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 on March 2, 2020.[36] He was released from jail the same day as his sentencing.

The trial court denied Defendant's Motion for a New Trial by opinion and order dated September 27, 2021.[37]

I. The Court of Appeals vacated Defendant's conviction and remanded for a new trial.

On December 1, 2022, the Court of Appeals vacated Defendant's conviction and remanded the case for a new trial in a non-unanimous opinion, holding the trial court abused its discretion by admitting "implied testimonial hearsay" from CBP Officer Stockwell about his interaction with CBSA Officer Lavers. The majority found the error was not harmless beyond a reasonable doubt because the only other evidence connecting Defendant to the body armor were his own statements admitted in violation of the corpus delicti rule. *People v Washington*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 353052).[38] The dissent rejected the "implied assertion" based on established Michigan precedent. The dissent declined to characterize the alleged "implied assertion" as testimonial in nature, concluding it was not intended to be used

[35] Appx A: 58a-59a (JT, dated 1/28/20, p. 219-220)
[36] Appx A: 60a-69a (Disposition Hearing ("DH"), dated 3/2/20)
[37] Appx B: 70a-84a
[38] Appx C: 85a-96a

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as evidence against defendant at the time it was made. Finally, the dissent 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 at ___ (MARKEY, J., dissenting).[39]

The People filed a Motion for Reconsideration,[40] which was denied. Judge Markey would have granted the motion, finding "palpable error in the majority opinion."[41]

J. This Court granted Plaintiff-Appellant's Application for Leave to Appeal.

The People filed a timely Application for Leave to Appeal pursuant to MCR 7.305(B)(5)(a) and (b), believing the published decision by the Court of Appeals majority was clearly erroneous, would cause material injustice, and conflicted with prior Michigan Supreme Court and Court of Appeals cases.[42]

Defendant filed an Answer in Opposition to Plaintiff-Appellant's Application for Leave to Appeal, arguing the Court of Appeals majority opinion correctly decided the case.[43]

On May 24, 2023, this Court granted the application for leave to appeal, directing the parties address: (1) whether evidence directly implying the substance

[39] Appx D: 97a-104a
[40] Appx E: 105a-130a
[41] Appx F: 131a-132a
[42] Appx G: 133a-167a
[43] Appx H: 168a-198a

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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 Defendant's incriminating statements were admissible under the corpus delicti rule.[44]

ARGUMENT

I. The trial prosecutor did not violate Defendant's rights by admitting alleged "implied testimonial hearsay" in violation of the Sixth Amendment of the United States Constitution and Article 1, § 20 of the Michigan Constitution.

A. Standard of Review

Whether a defendant's Sixth Amendment right of confrontation has been violated is a question of constitutional law this Court reviews de novo. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018). De novo review permits this Court to independently review whether the admission of so-called "implied testimonial hearsay" violates the Confrontation Clause without deference to lower courts. *Id*. citing *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996).

A harmless error analysis applies to Confrontation Clause claims of error. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). "[A] 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." *Id*. (quotation marks and citation omitted).

[44] Appx I: 199a-200a

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B. Analysis

1. The relationship between the hearsay rule and Confrontation Clause.

A defendant's rights under the Confrontation Clause are intertwined with but are separate from the rules prohibiting hearsay. *Ohio v Roberts*, 448 US 56, 62; 100 S Ct 2531 (1980). Hearsay is a statement other than one made by the declarant while testifying at a trial or hearing, offered into evidence to prove the matter asserted. MRE 801 (c). Even if an out-of-court statement falls within a recognized exception to the hearsay rule, the "right of confrontation" provided by the Sixth Amendment overrides the hearsay exception, barring its admission.

The Confrontation Clause of 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. In *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011), this Court observed, "Since its birth as a state, Michigan has [ ] afforded a criminal defendant the 'right to be confronted with the witnesses against him,' adopting this language in every one of our state constitutions." See Const 1963, art 1, § 20. The protections provided by the Confrontation Clause apply only "to statements used as substantive evidence." *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012). Its protections are triggered by a "specific type of out-of-court statement" identified as "testimonial." *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354 (2004). *Crawford* bars "admission of testimonial statements of a witness who did not appear at trial unless he was available to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53-54. While

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Crawford did not provide an exhaustive list of out-of-court statements deemed "testimonial," it recognized a "core class of testimonial statements," including police interrogations that "fall squarely within that class." *Id.* at 52-53.

The Court further clarified the meaning of "testimonial" in *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266 (2006), as a statement intended to establish or prove past events potentially relevant to later prosecution at the time it was made. In other words, where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay appears at trial and is subject to cross-examination; or is unavailable for trial and subject to previous cross-examination. Conversely, if an out-of-court statement is offered to prove something other than the truth of the matter asserted or if a testimonial statement is offered to show something other than the truth of its substance, no violation of the Confrontation Clause has occurred.

2. Applying these well-established principles, it is clear that the prosecution did not trigger Sixth Amendment protections by introducing testimonial hearsay through Officer Stockwell.

CBP Officer Stockwell testified about what led to his involvement in the case, his personal observations, taking custody of Defendant, a pickup truck, and body armor, and the actions he took after Defendant was in CBP custody. Officer Stockwell did not testify about what Officer Lavers said to him when he received custody of Defendant, the pickup truck, and body armor. Defendant argued Officer Stockwell's testimony about his "communications" with Officer Lavers "implied" that Defendant was wearing body armor, thereby violating his rights under the Confrontation

Clause. The Court of Appeals majority agreed, creating and applying a new theory of "implied testimonial hearsay" premised on a speculative conclusion that Officer Stockwell's testimony effectively introduced by implication Lavers "affirmation" Defendant had worn body armor. *Washington* ___ Mich App at ___; slip op at 5. The People disagree. Officer Stockwell's testimony, as introduced, neither expressly nor impliedly conveying testimonial hearsay:

> 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?

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A. Yes, sir. [45]

Setting aside the inherent impracticality of an "implied testimonial hearsay theory" for now, it is critical to identify three errors committed by the majority in reaching its decision. First, Officer Stockwell was Defendant's accuser, not Officer Lavers. Second, the prosecution offered Officer Stockwell's testimony to explain his involvement in the case, including taking custody of the body armor. It was not offered to prove the truth of the matter asserted. Third, the majority overemphasized the importance of Officer Lavers as the only witness who connected Defendant to the body armor, ignoring the totality of evidence establishing possession.

a. Not all out-of-court statements are testimonial in nature and not all out-of-court testimonial statements trigger Confrontation Clause protections.

Whether a statement ranks as testimonial in nature turns on whether the information is "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" at the time it was made. *Davis*, 547 US at 826. Officer Lavers was not Defendant's accuser. He did not intend to "bear testimony" against a toll jumper, merely performing a ministerial duty of returning Defendant, a truck, and property to United States Customs and Border Protection officers.

CBSA officers immediately apprehended Defendant after he jumped the toll on the United States outbound side of the Blue Water Bridge. CBSA Officer Lavers assisted in returning Defendant, a pickup truck, and body armor to CBP Officer

[45] Appx A: 33a-34a (JT, dated 1/28/20, p. 152-153)

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Stockwell within an hour. Whatever Officer Lavers said to Officer Stockwell during this exchange was "simply to provide Officer Stockwell with the information necessary for Officer Stockwell to formally take defendant into custody and not to arrest Defendant." *Washington* ___ Mich App at ___ (MARKEY, J., dissenting); slip op at 5. While Officer Lavers turned body armor over to Officer Stockwell at the same time he transferred custody of Defendant, body armor and its use and/or possession is not illegal *per se*. Whether or not Defendant possessed or had worn body armor was immaterial to Officer Lavers, a Canadian officer vested with the responsibility to return Defendant, an American citizen, to the United States. It was only Defendant's status as a "violent felon" which made it illegal for *him* to possess body armor. Defendant's "violent felon" status was the critical fact discovered by Officer Stockwell, not Officer Lavers.

Viewing Lavers' involvement through this "ministerial" lens, it is reasonable to conclude that Lavers' statements were not "[m]ade under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *Crawford*, 541 US at 51, but was information relayed during a routine delivery of a United States citizen that had crossed the bridge without paying a toll. Should this Court disagree and find these communications "testimonial," the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 US at 59 n 9 citing *Tennessee v Street*, 471 US 409, 414; 105 S Ct 2078 (1985) (Detective's testimony regarding non-testifying accomplice's confession did not

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violate Confrontation Clause when it was offered to refute defendant's claim of coercion and not offered for its truth).

In the dissent, Judge Markey closely examined Lavers out-of-court communications with Stockwell, correctly concluding the communications were non-testimonial, offered to establish a series of events and chain-of-custody, and not offered to prove Defendant possessed body armor:

> 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 involvement in the case, including taking control of the bulletproof vest. [*Washington*, ___ Mich App at ___ (MARKEY, J., dissenting); slip op at 5.]

In *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), a detective testified to receiving a call from an FBI agent, advising one of the agent's informants identified defendant in a still photograph taken from surveillance video. Based on that information, the police set up surveillance on defendant's house. Police officers arrested defendant after he arrived at the house wearing a jacket similar to the jacket in the surveillance video. *Id*. at 3-4. The Court of Appeals rejected defendant's argument that the detective's testimony violated his right to confront the non-

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testifying declarant, finding the detective's testimony was "offered to establish and explain why the detective organized a surveillance of defendant's home and how defendant came to be arrested." *Id.* at 11. Under those circumstances, "[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." *Id.* at 10. See also *People v Putman*, 309 Mich App 240, 247; 870 NW2d 593 (2015) (finding Confrontation Clause did not bar detective's testimony about the contents of a tip that explained why he included a photograph of defendant in a photographic array); *People v McPherson*, 263 Mich App 124; 687 NW2d 370 (2004) (rejecting defendant's claimed Confrontation Clause violation where unavailable co-defendant's testimonial statement to police identifying defendant as the murderer was admitted at trial for the non-hearsay purposes of establishing defendant's awareness the co-defendant "ratted [him] out" and also for impeachment); and *U.S. v Henderson*, 626 F3d 326 (CA 6, 2010) (finding no Confrontation Clause violation where out-of-court statement by murder victim to FBI about defendant was a "verbal act" admitted at trial to establish victim's murder fell within the protection of the law punishing retaliation, and not offered for its substance).

Similar to the detective's testimony in *Chambers*, Officer Stockwell's testimony was offered for a non-hearsay purpose, explaining his actions and involvement. Officer Lavers turned over Defendant and body armor to Officer Stockwell. Officer Stockwell took "custody" of Defendant and his property to determine whether Defendant was eligible to re-enter the United States.

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Officer Stockwell's subsequent discovery of Defendant's status as a violent felon while he was in CBP custody – corroborated by the U.S. Customs and Border Protection Record admitted as substantive evidence at Defendant's preliminary examination[46] – caused him to contact the Port Huron Police Department, inquiring whether it would seek criminal charges against Defendant for possession of body armor by a violent felon. Officer Stockwell provided the following chain-of-custody testimony regarding the transfer of Defendant and body armor from CBP to PHPD:

> 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?

[46] Appx J: 201a-203a. Officer Stockwell did not testify about the information contained in the United States Customs and Border Protection report based on Defendant's stipulation to having a prior violent felony conviction. Notwithstanding, the report is part of the trial record, providing contextual support that Officer Lavers conveyed "non-testimonial statements" to Stockwell, Officer Stockwell was Defendant's "accuser," and the statements whether "testimonial" or "non-testimonial" were not offered to prove the truth of the matter asserted.

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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.[47]

Evaluating Officer Stockwell's testimony in this context demonstrates there was no Confrontation Clause violation because it was never implicated either by express or implied assertions. It necessarily follows that the Court of Appeals majority erred in its Confrontation Clause analysis.

3. Michigan courts have consistently rejected an "implied assertion" theory, and have never recognized an "implied testimonial hearsay theory" until now.

The Court of Appeals first considered the viability of an "implied assertion theory" in *People v Jones*, 228 Mich App 191; 579 NW2d 637 (1998). *Jones* involved the admissibility of a non-appearing declarant's out-of-court statements, "Bitch come out I'm gonna kick your ass. And, Alphonzo don't want you, Alphonzo don't love you." *Id*. at 203. Defendant alleged these out-of-court statements were inadmissible hearsay, "implying" he was "angry" and had a motive to kill. *Id*. at 205. The *Jones* court parsed through the statements, focusing on whether the statements met the definition of "assertion" under MRE 801 (c), capable of being proven true or false. The court identified declarant's out-of-court statement "Bitch come out" as a direction. Declarant's statements about defendant "Alphonzo" were assertions, offered to show

[47] Appx A: 33a-34a (JT, dated 1/28/20, p. 153-154)

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an "integral part of the series of events that led to the shooting of the victim," rather than to prove the truth of the matter asserted. *Id.* at 205.

The *Jones* court analyzed the "implied assertion theory," harkening back to its first application in the 1838 English common-law case *Wright v Doe d Tatham*. In its thorough analysis, it found issues involving non-assertive conduct and implied assertion were "generally ignored" by courts over decades. The *Jones* court soundly rejected a theory advancing "implied assertion," reasoning:

> 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.]

The Court of Appeals recently reaffirmed this position in *People v Propp* (*On Remand*), 340 Mich App 652, 667; 987 NW2d 888 (2022), during its analysis of alleged "hearsay" statements by the victim to several prosecution witnesses. The prosecution argued the trial court properly admitted these statements because the statements were either nonassertive (non-hearsay) or admitted for non-hearsay purposes. *Propp*, 340 Mich App at 662-663. The court found several reasons supporting the admissibility of these statements for non-hearsay purposes, including evidence of the victim's state of mind and also to show the effect the statements had on defendant. *Id*. at 667-668. *Propp* also firmly rejected the implied assertion theory, stating "Michigan does not recognize the implied assertion theory that has been adopted in some other jurisdictions." *Id*. at 667. Yet, the majority in this case dismisses legal

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precedent, creating a new evidentiary theory that categorizes all out-of-court verbal statements as inadmissible testimonial hearsay if it is offered to prove s*omething* – the "something" determined by the reviewing court and not the trial court.

The majority here refused to consider whether the alleged "implied testimonial hearsay" was anything other than an accusation by Lavers against Defendant that he had been 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 implied communication is precisely what makes the theory of "implied testimonial hearsay" so *dangerous* – the reviewing court basing its conclusions on its own interpretation of testimonial hearsay without considering whether the testimony actually violated the hearsay rule or the Confrontation Clause.

Finding no authority in Michigan to support its creation of the "implied testimonial hearsay" theory, the majority relies on federal cases from other circuits that lack precedential value and are factually distinguishable in three important ways. First, all but one of the cases involved a police officer testifying about out-of-court statements made by an unavailable co-defendant or co-conspirator during a police interrogation – identified as a "core class of testimonial statements" in *Crawford*. The one "outlier" to the cases relied on by the majority did not involve "implied testimonial hearsay," but considered the admissibility of DNA expert testimony providing substantive evidence identifying defendant as the victim's

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assailant based on DNA testing and analysis performed by non-testifying forensic analysts. *Young v United States*, 63 A3d 1033, 1044-1045 (US App DC, 2013). In *Melendez-Diaz v Massachusetts*, 557 US 305, 310; 129 S Ct 2527 (2009), the United States Supreme Court concluded "there is little doubt" such documents fall within the "core class of testimonial statements."

Second, the police officer's testimony introducing the "implied testimonial hearsay" of non-testifying co-defendants or co-conspirators was the only incriminating evidence establishing defendant's guilt. While the prosecution may have introduced other evidence, the police officer would not have known about defendant absent information discovered during their interrogations.

Third, the police officers specifically testified to hearsay statements provided by or learned from the unavailable declarant. Two of the cases relied on by the majority illustrate these critical distinctions.

In *Mason v Scully*, 16 F3d 38 (CA 2, 1994), the lead detective who investigated the robbery arrested three suspects based on information supplied by an informant one month after the incident. After conducting a line-up, the detective interviewed one of the suspects. Relying solely on the suspect's information, the detective arrested Mason. No other evidence linked Mason to the crime scene. *Id*. at 40-41. The *Mason* court determined the detective's testimony violated defendant's right of confrontation, plainly implicating the conversation between the detective and co-

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defendant led to Mason's arrest. The implication was "plain" because no other police work led to the discovery or identification of Mason as a suspect. Id. at 44.

Unlike the facts in *Mason*, one month or other unreasonable amount of time had not elapsed after the toll jumping incident. Rather, Officer Lavers promptly returned Defendant, wearing a red t-shirt, a pickup truck, and body armor, one hour after he jumped the toll. In addition, Officer Stockwell independently investigated Defendant's background, identifying prior violent felony convictions while Defendant was in CBP custody. Defendant's status as a violent felon rendered him ineligible to possess body armor, a fact that Stockwell discovered on his own.

In *United States v Kizzee*, 877 F3d 650 (CA 5, 2017), defendant objected to the lead detective's testimony at trial, arguing it was hearsay and violated the Confrontation Clause. 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 detective's interrogation of another suspect named Brown. During trial, the prosecution and detective admitted into evidence Brown's out-of-court statements implicating Kizzee during his police interview. This information led to Kizzee's arrest. Kizzee challenged the detective's testimony on appeal, arguing it "implicitly" introduced substantive, testimonial statements against him. *Kizzee*, 877 F3d at 656. The United States Court of Appeals for the Fifth Circuit agreed, concluding:

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> [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 interrogation was "readily inferred" from the detective's testimony. *Id*. at 658. *Kizzee* did not establish a bright-line rule prohibiting police officers from testifying about out-of-court statements – which the majority opinion does here – recognizing such information can be offered for non-hearsay purposes, stating:

> Testifying 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.]

Kizzee found 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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Critical to this case, the trial prosecutor did not elicit CBSA Officer Lavers' statements through CBP Officer Stockwell. While Stockwell testified about having "communications" with Lavers, *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 majority based its conclusion on incorrectly identifying CBSA Officer Lavers as Defendant's accuser, instead of CBP Officer Stockwell – who discovered Defendant's prior violent felony convictions after taking Defendant into custody. And, perhaps even more alarming, the majority's assumption that Stockwell intended to communicate Laver's "affirmation" that he had worn body armor, is premised on what it believes the prosecution intended (an end-run around the Confrontation Clause) instead of what CBSA Officer Lavers intended; specifically, returning Defendant and his property to the United States. In doing so, the majority ignores the *Jones* holding, which, in defining the "implied assertion" theory, focused on the "actor's intent" to communicate the matter to be proved in court, and not the prosecution's nefarious intent to circumvent the Confrontation Clause.

The theory of "implied testimonial hearsay" created by the majority as applied under these circumstances will effectuate a profound change to the legal landscape. Unlike the cases relied on by the majority, this case did not involve statements or

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information provided by a non-testifying co-defendant or co-conspirator during an interrogation. Instead, this case involved a ministerial delivery of a toll jumper who possessed body armor by Canadian authorities to the United States. If the mere act of handing over body armor – or any other evidence – is now considered "accusatory," any 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 an unavailable witness's "statement" – inevitably reaching the same conclusion – if it is offered or potentially 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 "thing of the past" because every out-of-court statement – 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 reverse the Court of Appeals, affirming Defendant's conviction and sentence.

II. Defendant's admissions of fact were properly admitted as trial evidence and did not violate the corpus delicti rule.

The Court of Appeals vacated Defendant's conviction, finding the prosecution was unable to demonstrate the alleged error was harmless beyond a reasonable doubt. In doing so, it concluded 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

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circumstantial evidence that Washington possessed the vest, the prosecution had no evidence that any crime had been committed." *Washington* ___ Mich App at ___; slip op at 11. This is a mistaken application of the corpus delicti rule, which exists not to free the patently guilty, but protect the innocent where no crime was actually committed.

A. Standard of Review

A reviewing court examines a trial court's decision regarding the corpus delicti rule for an abuse of discretion. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

As this Court is aware, the abuse of discretion standard is not understood to mean if, in the opinion of the reviewing court, it would have ruled differently. In *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995), this Court emphasized:

> [c]lose questions arising from the trial judge's exercise of discretion on matters concerning the admission of evidence do not call for appellate reversal because the reviewing justices would have ruled differently. Reversal is warranted only if the resolution of the question by the trial court amounted to an abuse of discretion. The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion. [*Bahoda* at 289 quoting *People v Golochowicz,* 413 Mich. 298, 322, 319 N.W.2d 518 (1982).]

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Preliminary questions of law regarding the admissibility of evidence are reviewed de novo on appeal. *People v Small*, 467 Mich 259, 261-261; 650 NW2d 328 (2002).

B. Analysis

In *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995), this Court recognized the purpose of the corpus delicti rule is to "prevent the use of a defendant's confession to convict him of a crime that did not occur." *Konrad* spelled out the requirements under the corpus delicti rule as follows:

> [t]he rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury. [*Konrad*, at 269-270.]

1. The corpus delicti rule is implicated by "true confessions of guilt" and not "admissions of fact."

The Court of Appeals majority erroneously concluded that the People failed to demonstrate any error was harmless beyond a reasonable doubt because the Defendant's statements were inadmissible under the corpus delicti rule. *Washington* ___ Mich App at ___; slip op at 11. In reaching this decision, the majority mistakenly conflated confessions of guilt with admissions of fact. The dissent did not make the same mistake, recognizing the rule is only triggered by confessions. It recognized: "'[T]he corpus deliciti 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

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guilt.'" *Washington* at ___ (MARKEY, J., dissenting); slip op at 5 quoting *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). The dissent correctly addressed the differences between "true confessions of guilt," which can implicate the corpus delicti rule, and "mere admissions of fact" that do not, relying on *People v Porter*, 269 Mich 284; 257 NW 705 (1934), in which this Court stated:

> 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 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. [*Porter*, at 290.]

Here, Defendant's statements to booking officers and his mother fall far short of being a direct acknowledgment of guilt or an acknowledgment of the truth of the crime for which Defendant was charged. Neither statement made by Defendant included a statement that he was a violent felon, a necessary element for the criminal charge. The lack of this required element in either statement is fatal to the majority's analysis. The dissent also correctly determined that in Defendant's mind, his statements were "expressions of or attempts at exculpation." *Washington* ___ Mich App at ___ (MARKEY, J., dissenting); slip op at 6. Defendant did not believe he had committed a crime, evidenced by his assertion that he was wearing body armor due to fear for his own life based upon death threats made by others. The facts presented in his statements do not themselves show guilt, requiring proof of other facts (status as a "violent felon") not admitted by Defendant.

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Defendant's admissions were not made under circumstances which suggest, let alone establish, they were not freely and voluntarily made. The statements were not made during a police interrogation and did not emanate from coercion, pressure, inducement, or confusion. Defendant's statements were not "true confessions of guilt" as contemplated by *Porter*, 269 Mich at 290. A plain reading of Defendant's statements make crystal clear that he did not believe he had committed any crime. Reviewed under the proper abuse of discretion standard, the trial court properly admitted these statements into evidence.

2. The majority opinion erroneously required independent "direct or circumstantial evidence" that Defendant possessed body armor.

The majority opinion is inconsistent with this Court's holding in *Konrad*, 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

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circumstantial evidence *independent* of these statements – which were not to the police, and do not constitute confessions – "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 violent felon, all independent of Defendant's statements admitting that he put on the bulletproof vest. His statements were then admissible to prove that *he* possessed the body armor.

Further, the majority's belief that the prosecution "lacked any testimony that could serve as a foundation for the vest's admission, to establish the chain of custody, or prove that a crime had been committed," ignored this Court's instruction that the prosecution is not required to present independent evidence of every element of the offense before a defendant's confession may be admitted. *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985). As stated in *Konrad*, such an interpretation loses sight of the purpose of the rule and "would require that the entire crime be proved before a confession could ever be admitted." *Konrad*, 449 Mich at 270.

The majority also disregarded the direct and circumstantial evidence connecting Defendant to the body armor. A toll jumper driving a Ford pickup truck jumped the toll, driving across the Blue Water Bridge into Canada. CBSA officers returned Defendant, a Ford pickup truck, and body armor within one hour of the toll jumping incident. The Ford pickup truck was the same truck that jumped the toll. Defendant was wearing a red t-shirt – a red colored object in the cab of the pickup

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truck depicted in the still photos was introduced as evidence at trial. The Defendant could not have obtained body armor between the two countries, or on the bridge connecting the two countries. Like the "drops of water on a raincoat" being circumstantial evidence that it is raining, the body armor CBSA Officer Lavers returned with Defendant and the Ford pickup truck is circumstantial evidence of possession. See *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993) ("Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime."). A jury could accept the proposition drawn from reasonable inferences that Defendant had possessed body armor, but was not required to do so. Regardless, the trial court did not abuse its discretion by determining the prosecution established a foundation for its admissibility.

3. Defendant's admissions of fact are also admissible under MRE 804(b)(3), as substantive evidence of possession.

The statements made by Defendant, while admissions, are also substantively admissible as Statements against Interest pursuant to MRE 804(b)(3),[48] 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

[48] 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*, at 376. This 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 admissions to corrections deputies, which were overheard by Officer Whitten were sufficiently reliable. The statements were not given during the course of a police interrogation, but made spontaneously during a routine booking into the jail.

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Defendant's admissions to wearing body armor to his mother are even more sufficiently reliable, favoring their admission 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. 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 erroneous.

4. This case illustrates the need to revisit the corpus delicti doctrine, an antiquated rule that no longer serves its historical purpose.

The origins of the corpus delicti rule are traced back to seventeenth century English common law. Legal scholars attribute Lord Hale as its originator, as he wrote: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." 2 Matthew Hale: The

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History of the Pleas of the Crown 290 (S. Emlyn ed., 1736). Hale's announcement followed the execution of defendants convicted of murdering missing victims who were later found "very much alive." Hale's requirement for the prosecution to produce a victim's body in a case charging homicide was never accepted in English common law and is scarcely used today.[49] While the corpus delicti rule is rooted in seventeenth century English common law murder cases without a body, American jurisprudence applied it to all criminal offenses. In 1954, the United States Supreme Court replaced the corpus delicti rule with the "trustworthiness doctrine," a test focusing on the reliability of a confession irrespective of the quantum of independent evidence establishing the corpus delicti. *Opper v U.S.*, 348 US 84; 75 S Ct 158 (1954). Colloquially known as the "*Opper* test," it – or a substantially similar standard – is the rule in the federal judiciary, ten states, and the District of Columbia.[50]

This Court last addressed the corpus delicti doctrine in *People v McMahan*, 451 Mich 543; 548 NW2d 199 (1996). In its decision, the Court re-affirmed that the corpus delicti doctrine "[r]emains the rule of law in this state." *McMahan*, at 548. In the dissent, Justice O'Boyle advocated replacing the corpus delicti doctrine with the trustworthiness doctrine embraced in *Opper*, recognizing the "[c]ommon-law serves no contemporary purpose and inhibits conviction of the admittedly guilty, this Court should embrace the rule adopted more than forty years ago by the United States

[49] Joukov and Caspar, *WHEREFORE IS FORTUNATO? HOW THE CORPUS DELICTI RULE EXCLUDES RELIABLE CONFESSIONS, HELPS THE GUILTY AVOID RESPONSIBILITY, AND PROVES INCONSISTENT WITH BASIC EVIDENCE PRINCIPLES*, 41 Am. J. Trial Advoc. 459 (Spring, 2018).

[50] Joukov and Caspar, p. 472-480

Supreme Court." *McMahan*, 451 Mich at 558-559 (O'BOYLE, J., dissenting). While this Court's order did not request the parties to address the continued viability of the corpus delicti rule, the People believe the Court of Appeals overly expansive *misapplication* of the rule to exclude Defendant's voluntary admissions of fact spotlights a need to revisit whether *McMahan* was wrongly decided and whether now is the time to replace the corpus delicti doctrine. Irrespective of whether this Court accepts this invitation to do so, the decision of the Court of Appeals should be reversed. Defendant's conviction and sentence should be affirmed.

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RELIEF REQUESTED

WHEREFORE, for the reasons state above, the Plaintiff-Appellant requests this Honorable Court 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: September 22, 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 10,511 countable words. The document is set in Century Schoolbook and the text is in 12-point type, double spaced.

Respectfully Submitted,

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Dated: September 22, 2023