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STATE OF MICHIGAN

IN THE

SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DONALD WAYNE DAVIS,

Defendant-Appellant.
/

Supreme Court
No. 161396

Court of Appeals
No. 343432

Circuit Court
No. 16-40020 FC

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PLAINTIFF-APPELLEE'S ANSWER

IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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NOW COME the People of the State of Michigan, by and through their attorney, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Alena M. Clark, Assistant Prosecuting Attorney, and state in response to Defendant-Appellant's Application for Leave to Appeal:

1. Defendant's application relies on the same arguments he made in the Court of Appeals.
2. The People's Response Brief filed in the Court of Appeals adequately addressed the issues currently raised. The People attach our Appellee's Brief on Appeal, filed in the Court of Appeals as Attachment 1.
3. The Court of Appeals did not clearly err in rejecting Defendant's arguments and determining that there was no merit in the arguments presented. MCR 7.305(B)(5)(a).
4. As the Court of Appeals' majority opinion correctly found, the record does not support the contention that the court was closed to the public. The trial court *cleared* the courtroom because an individual talked to the jury, but there is no evidence that Defendant-Appellant's right to a public trial was violated.
5. Likewise, the Court of Appeals correctly found that the admission of the email did not result in a plain error because there was substantial evidence of Defendant's guilt and the email was of little probative value.
6. Thus, Defendant's application does not demonstrate any other grounds for granting leave to appeal. MCR 7.305(B)(1)–(3).
7. In sum, Defendant's application raises no issues meriting this Court's review.

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RELIEF

WHEREFORE, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Alena M. Clark, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant-Appellant's application for leave to appeal.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

DATED: July 8, 2020

/s/ Alena M Clark
Alena M. Clark (P73252)
Assistant Prosecuting Attorney
Genesee County Prosecutor's Office

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ATTACHMENT1

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DONALD WAYNE DAVIS, JR.,

Defendant-Appellant.
_____/

Court of Appeals
No. 343432

Circuit Court
No. 16-040020-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

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

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question I

Whether the trial court's removal of members of the victim's family after they had improper contact with the jury violated defendant's right to a fair trial where there is no indication that the courtroom was closed to the public, and there is nothing to indicate that anyone other than the disruptive members of the victim's family was excluded? Further, whether the victim's mother being allowed to remain in the courtroom consistent with the Crime Victim's Rights Act interfered with defendant's right to a fair trial?

Plaintiff-Appellee says no.

Defendant-Appellant says yes.

Question 2

Whether Defendant's trial attorney was constitutionally ineffective for not objecting to the removal of the deceased victim's family members where one of them had tried to have improper contact with a juror?

Plaintiff-Appellee says no.

Defendant-Appellant says yes.

Question 3

Whether an email sent by the defendant to Det. Baldwin was properly admitted under MRE 801(d)(2)(a) and MRE 410(4) as relevant to show consciousness of guilt? Whether Defendant's attorney was effective in his objection to the email and whether the prosecutor's argument regarding the email was proper?

Plaintiff-Appellee says yes.

Defendant-Appellant says no.

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COUNTER-STATEMENT OF FACTS[1]

Defendant was charged with ten (10) counts in the shooting death of Davonte Hanson on April 27, 2016 in the City of Flint. The charges were: Count 1) Felony Murder, Court 2) Felony Firearm, Count 3) First Degree Premeditated Murder, Count 4) Felony Firearm, Count 5) Assault with Intent to Rob While Armed, Count 6) Felony Firearm, Count 7) Felon in Possession of a Firearm, Count 8) Felony Firearm, Count 9) Felon in Possession of Ammunition, and Count 10) Felony Firearm.

Prior to trial, the People filed a motion in limine to admit an email which was sent by the defendant from the jail to Det. Chad Baldwin. (Appendix 1, People's Motion in Limine and Brief in Support.) The motion was argued on February 5, 2018. Defendant's trial attorney objected to the admission of the email and the trial court ruled that the email was admissible. (Mtn Hrg, 5-6.)

Defendant's jury trial began on February 21, 2018. During the People's case in chief, the following testimony was elicited:

Jaeqwantae Jackson worked as a security guard with LaGarda Security Company on April 27, 2016. (Tr II, 32.) He worked at 702 Father Dukette Boulevard, Flint, Genesee County, Michigan, otherwise known as the River Village Apartments. (Tr II, 33.) When he arrived at the apartment complex around 5:00 p.m. to begin his shift, he noticed a white car positioned in the entranceway of the parking lot, facing as if it was exiting. (Tr II, 35–36.) Mr. Jackson

[1] The People abbreviate and cite to the relevant transcripts within this Brief as follows:
"Mtn Hrg" – Motion Hearing, February 5, 2018.
"Tr I" – Trial Volume I, February 21, 2018
"Tr II" – Trial Volume II, February 22, 2018
"Tr III" – Trial Volume III, February 27, 2018
"Tr IV" – Trial Volume IV, February 28, 2018
"Tr V" – Trial Volume V, March 1, 2018
"S" – Sentencing Hearing, March 28, 2018

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approached the car to inform the driver he could not park in that spot, and as he did he noticed the car was running and the windows were up. (Tr II, 36–39.) When he looked into the vehicle, he saw black male with a stained red t-shirt, later identified as Devante Hanson, sitting in the driver's seat. (Tr II, 40, 42.) After Mr. Jackson realized the man was injured, he called 911. (Tr II, 43.) Mr. Jackson inspected the outside of the vehicle and did not observe any bullet holes. (Tr II, 45.)

During his testimony, Mr. Jackson watched the surveillance videos and described the area for the jury. (Tr II, 56.) He also identified Spencer Holiday within the videos. (Tr II, 56.) Mr. Jackson knew Spencer Holiday personally from his multiple interactions with him at the apartment complex. (Tr II, 54–56.) Spencer Holiday's father resided in the apartment complex and Spencer stayed with his father to Mr. Jackson's knowledge. (Tr II, 54–55.)

Deputy Ryan Heil was a Deputy Paramedic with the Genesee County Sheriff's Office who responded to the 911 call from Mr. Jackson around 5:00 p.m. (Tr II, 70–72.) On arrival, he observed a white car, all of its doors were closed. (Tr II, 75–76.) He approached the car and saw the male victim, Devante Hanson, in the driver's seat, slumped over slightly, still sitting upright. (Tr II, 76–77.) Deputy Heil opened the car door to check on the male, but the male had no pulse. (Tr II, 77–78.) Deputy Heil checked the male's body, lifted up his bloody shirt, and located a gunshot wound to the chest and right lower abdomen. (Tr II, 78.) He then contacted Hurley Medical Hospital to obtain a time of death, which was determined to be 5:15 p.m. (Tr II, 80–83.)

After the lunch break on February 22, 2018, the court was informed that a member of the victim's family had contact with one of the jurors in the hallway outside the courtroom. (Tr II, 88-92.) The court brought the family member, Daundria Frye, to the podium to ask her about the interaction. (Tr II, 88.) Ms. Frye indicated that she worked at Hurley Hospital and she asked one

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of the jurors if she worked at Hurley Hospital too. (Tr II, 89.) At that point, the trial judge stated that he was going to "bar everyone from this courthouse except for the mother of Devante Harris." (Tr II, 90.) The record is silent as to how many people were in the courtroom at that time or who they were there to support. There is no indication that any of the defendant's family or friends were present or that they were excluded from the courtroom. Thereafter the trial resumed.

Detective Alfino Donastorg of the City of Flint Police Department also responded to the scene around 5:00 p.m. to investigate. (Tr II, 111–13.) He was informed by another responding officer of potential surveillance video of the crime. (Tr II, 116.) He met with Mr. Jackson and reviewed the footage. (Tr II, 117–18, 47–48.) On the footage, Detective Donastorg observed two black males exit Apartment 1111 in the building, which he learned was connected to a person named James Elbert III who can be seen leaving the apartment later in the day after the two black males. (Tr III, 125, 132, 134.) The males walked to the victim's car, one entered on the front passenger seat and the other on the back driver's seat. (Tr II, 118–19.) The victim exited the driver's seat, went to the trunk of the car, retrieved something, and then re-entered the driver's seat. (Tr II, 119.) Thereafter, the car shook. (Tr II, 119.) The two black males then exited the car and went back into the building. (Tr II, 119.) The males then ran out of the back exit to the building, entering a neighboring apartment complex behind the Father Dukette Apartment Complex. (Tr II, 120–21.)

Sara Besson was an Identification Technician with the City of Flint Police Department. (Tr III, 8.) She photographed and collected evidence from the apartment complex and the victim's vehicle. (Tr III.) In particular, she photographed a bullet fragment in the back seat of the vehicle, (Tr III, 18), a bullet hole in the driver's seat of the victim's vehicle, (Tr III, 17), and a

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bullet hole on the inside of the trunk along with a spent bullet, (Tr III, 22, 24.) She collected a bullet fragment from the backseat of the car and a spent bullet from the trunk of the car. (Tr III, 21, 54.)

Dr. Brian Hunter was the Medical Examiner for Genesee County. (Tr III, 81.) He was qualified as an expert in forensic pathology. (Tr III, 88.) He conducted the autopsy of Devante Hanson on April 28, 2016. (Tr III, 88.) He identified the body using AFIS ("Automated Fingerprint Identification System"). (Tr III, 90.) Dr. Hunter recovered a bag of suspected marihuana and $438.00 from the pant pockets of Devante during the examination. (Tr III, 92.) He photographed holes in Devante's t-shirt that he was wearing. (Tr III, 98.) He documented three bullet holes, corresponding to two gunshot wound paths, in Devante's upper torso: one on the right side of the chest, which was an exit wound; and one to the left side of the chest, which was an entrance wound; and one to front of his chest, which was an entrance wound, and the bullet was still lodged in his chest, which Dr. Hunter recovered. (Tr III, 98–103, 108.) The entrance wound on the left of the chest and the exit wound on the right of the chest indicated an intermediate range of fire, approximately three feet. (Tr III, 117–18.) As to the front-chest-gunshot-entrance wound, Dr. Hunter opined that there was an atypical scrape around the wound, which suggested an innerving object in the bullet's path, allowing only for a range of fire to be distant or undetermined. (Tr III, 109, 113.) He expertly opined that a car seat could, hypothetically, be an intervening object in this case, using a demonstrative exhibit in the courtroom to illustrate. (Tr III, 114, 118–19.) He also expertly opined that the dark "L" mark on Devante's chest could, hypothetically, be consistent with a piece of fabric from the car seat. (Tr III, 115.) He expertly opined that Devante Hanson's cause of death was multiple gunshot wounds and the manner of death was homicide. (Tr III, 121.)

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Detectives Chad Baldwin and Stacey Moore were the officers in charge of this case and developed three suspects based on the evidence: Spencer Holiday, Donald Davis, Jr., and James Elbert III. (Tr III, 146.) Detectives learned that James Elbert, III was Spencer Holiday's brother. (Tr III, 148; Tr IV, 12, 82.) Spencer Holiday was a co-defendant in this case, and he was originally charged with one count of Open Murder and an accompanying Felony-Firearm charge. (Tr IV, 13.) The prosecution amended the Open Murder charge to Manslaughter, and he pleaded guilty to that amended charge and the Felony-Firearm charge on June 12, 2017. (Tr IV, 14–16.) The prosecution also recommended within the plea agreement a minimum sentence on 64.5 months on the charge of manslaughter. (Tr IV, 15.) As part of the plea agreement Spencer agreed to "provide truthful testimony as required by the prosecutor consistent with interview by Detective Watson." (Tr IV, 16.) Spencer understood his requirement to provide testimony that was the truth, regardless of whether it helped or hurt the prosecution's case. (Tr IV, 18.) After Spencer provided testimony in this case at a preliminary examination, he was sentenced. (Tr IV, 19.) Due to an error in the initial calculation of Spencer's guidelines range, the trial court sentenced him to a minimum of 53.5 months on the Manslaughter charge with the parties' approval. (Tr IV, 19.)

Spencer Holiday did testify at trial. He lived at the River Village Apartment Complex, in Apartment No. 1111, 702 Father Dukette Boulevard, Flint, Genesee County, Michigan, on in April 2016. (Tr IV, 9.) He lived there with his girlfriend and his father, James Elbert. (Tr IV, 9.) At the time of his testimony, he was incarcerated in the Michigan Department of Corrections based on a plea agreement he made with the prosecution's office, which required his testimony against Defendant, Donald Davis, Jr. (Tr IV, 10.) Spencer knew Defendant as an acquaintance,

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not a friend. (Tr IV, 11.) He only met Defendant for the first time on April, 26, 2016. (Tr IV, 11.) He also knew him by his nickname, "DJ." (Tr IV, 12.)

On April, 27, 2016, around 11:00 a.m., Defendant arrived at Spencer's apartment with Spencer's brother, James. (Tr IV, 21–23.) Defendant was wearing a black hoodie with the word, "Reckless," written on it, and a black and red hat. (Tr IV, 23.) Spencer was wearing a white and orange shirt with the word, "Philly," written on it. (Tr IV, 24.) While in the apartment, Spencer heard Defendant telling James, "That he needed to find a lick." (Tr IV, 25.) To Spencer, that meant Defendant "needed to find somebody he could rob." (Tr IV, 25.)

Spencer admitted that he does sell cocaine and marihuana from his apartment. (Tr IV, 26.) Spencer also illegally possessed a loaded gun on that date. (Tr IV, 26, 28.) The gun was a silver and black .38 revolver. (Tr IV, 27.) Spencer has never used the gun prior to April 27, 2016. (Tr IV, 27.) His gun was sitting on the windowsill in his apartment, which everyone could see. (Tr IV, 27–28.) Spencer and Defendant showed each other the guns they had while in the apartment, even though he testified at the preliminary examination that he was not sure if Defendant knew he had a gun and that he had not shown his gun to Defendant. (Tr IV, 28, 30, 96.) Spencer testified that Defendant possessed what he believed was a black .40 caliber handgun, which he had on his hip. (Tr IV, 31.)

Around 1:00 p.m. on the 27th, Spencer decided to leave his apartment to buy marihuana from a person at a store down the street. (Tr IV, 32–33.) Defendant went with Spencer. (Tr IV, 33.) Spencer watched the video, People's Exhibit 47, and identified himself and Defendant in the video. (Tr VI, 35.) Defendant had his gun underneath his hoodie in the video according to Spencer. (Tr IV, 36.) While in the elevator, Defendant again told Spencer that he wanted to "hit a lick." (Tr IV, 36.) Spencer was surprised by Defendant's statement and thought he was joking.

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(Tr IV, 38.) He told Defendant he does not rob people. (Tr IV, 38.) Spencer told Defendant he was going to buy marihuana when they exited the building. (Tr IV, 40.) On the way out, Defendant was on his phone, then a white car appeared, and Defendant told Spencer he could buy marihuana from the driver. (Tr IV, 39–40.)

Spencer testified that the surveillance video outside of the apartment complex, showed Defendant, Spencer, and Mr. Hanson (the driver/victim), standing at the trunk of Mr. Hanson's car where he showed them his marihuana. (Tr IV, 43–44.) Then, Defendant entered the back passenger seat behind the driver and Spencer entered the front passenger seat. (Tr IV, 44–45.) Mr. Hanson showed Spencer the marihuana, but Spencer did not want that marihuana because it was not the type he buys. (Tr IV, 45–46.) At that time, Mr. Hanson exited his car, went back to his truck, and retrieved different marihuana. (Tr IV, 46.) While Mr. Hanson was outside of his car, Defendant told Spencer, "I'm about to get this nigga," referring to Mr. Hanson. (Tr IV, 47.) Spencer interpreted Defendant's statement to mean that he was going to rob him. (Tr IV, 47–48.) Spencer told him that there were cameras all around the complex. (Tr IV, 48.)

When Mr. Hanson reentered the car, he showed Spencer the second batch of marihuana, and they exchanged money. (Tr IV, 49–50.) Then, Defendant pulled out his gun and held it toward Mr. Hanson. (Tr IV, 51–53.) Spencer testified that he saw Defendant with the gun when Defendant told Mr. Hanson, "[W]hat's up with that shit nigga?" which Spencer interpreted as Defendant trying to rob Mr. Hanson. (Tr IV, 52–53.) Mr. Hanson then turned around in his driver's seat, leaned over the driver's seat, grabbed the gun that Defendant had pointed at him from the back seat, struggled with Defendant, and then the gun went off, striking Mr. Hanson. (Tr IV, 53–54.) Mr. Hanson was now bleeding from his front chest area, near his sternum. (Tr IV, 64.) Defendant pushed Mr. Hanson back, then slid from behind the driver's seat to behind

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Spencer, pointed his gun at Spencer and told him, "[S]hoot him or I'm gonna shoot you." (Tr IV, 55–56, 59–60.) Spencer pulled out his gun, closed his eyes, and shot Mr. Hanson in the left rib area as Mr. Hanson was still bent over the driver's seat facing the back seat. (Tr IV, 57–58.) Spencer testified that he only shot Mr. Hanson because he did not want to die. (Tr IV, 60.)

Defendant told Spencer to get out of the car. (Tr IV, 59.) Defendant exited the back passenger seat on the same side as Spencer, which was not the side on which he entered. (Tr IV, 61.) As they exited, Defendant took a look at Mr. Hanson inside of the car. (Tr IV, 62.) Defendant told Spencer to go to Defendant's sister's house, which was behind the apartment complex. (Tr IV, 65.) When they arrived at the home, some women whom Spencer did not know were present. (Tr IV, 67.) Spencer and Defendant went to the basement where Defendant pulled his gun on Spencer and told Spencer to give him his gun, which Spencer did. (Tr IV, 68.) Defendant wrapped Spencer's gun in a white shirt, but Spencer did not pay attention to what he did with it. (Tr IV, 68.) Defendant asked Spencer to call his brother but not to tell him what happened, which he did and only told James "to come get [him]." (Tr IV, 71, 73.) He did not tell James about the shooting. (Tr IV, 71.) James arrived and picked up Defendant and Spencer. (Tr IV, 73.) Later in the day, after Defendant, Spencer, and James parted ways, Spencer told his brother what had happened. (Tr IV, 74.)

On May 3, 2016, Spencer contacted Detective Stacey Moore to explain what had happened because he felt bad. (Tr III, 155; Tr IV, 74–75, 214.) Defendant had been arrested the same day. (Tr III, 156; Tr IV, 215.) Detective Moore interviewed Spencer in person, and he said that Defendant and James came to his apartment, then Spencer and Defendant left the store to go buy marihuana. (Tr IV, 220–21.) Spencer said they got into Mr. Hanson's car after seeing the marihuana, and when Mr. Hanson went to the trunk of his car a second time, Defendant told

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Spencer he was going to rob Mr. Hanson. (Tr IV, 221.) Both Spencer and Defendant did have guns. (Tr IV, 221–22.) Mr. Hanson turned around and tried to fight Defendant for his gun. (Tr IV, 222.) Defendant's gun then went off at Mr. Hanson. (Tr IV, 222.) Spencer said Defendant told him to shoot Mr. Hanson or Defendant would shoot Spencer. (Tr IV, 222.) Spencer turned himself in to the police on May 4, 2016. (Tr III, 156; Tr IV, 75, 217.)

Sergeant Todd Lanning of the Genesee County Sheriff's Office testified about the communication outlets available to incarcerated individuals at the Genesee County Jail. (Tr IV, 147–48.) He testified about how the jail allows inmates to use an email system associated with their inmate number, a PIN code, and their fingerprint. (Tr IV, 148–50.) When an inmate sends an email, the system software generates a heading with their ID number, name, and the system's email address. (Tr IV, 150–51.) Sergeant Lanning testified as to how the system is able to create a list of all emails sent by an inmate, which is a business record function of the system, and how he is familiar with such records as part of his duties. (Tr IV, 151.) Here, he did review People's Exhibits 51 and 52, which were two emails recorded by the Genesee County Jail inmate email system related to Defendant's account. (Tr IV, 152.)

Detective Chad Baldwin received two emails on his City of Flint Police Department email account from the jail system, indicating that Defendant had sent them. (People's Exhibits 53 and 54.) One email, received on January 5, 2018, from Donald Wayne Davis, stated, "This, Donald Davis 6, you guys told Major White I had info about another case, W-H-A-4-T type of deal can I--what type of deal can I get? Come talk to me." [Sic]. (Tr IV, 246.) A second email, received January 8, 2018, from Donald Wayne Davis, stated, "This is Donald Davis. You guys told Major White I had info about another case that can help me with my case. What kind of deal can I get? Come see me." (Tr IV, 246–47.)

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The parties stipulated that Defendant was previously convicted of a specified felony and was ineligible to possess a firearm and ammunition. (Tr I, 150.)

The jury convicted Defendant as charged of all counts. (Tr V, 93–95.) At sentencing, the trial court merged Count 1, First-Degree Premeditated Murder, with Count 3, First-Degree Felony-Murder, to show one count of First-Degree Murder supported by each theory. (S, 3.) Because Counts 1 and 3 merged into one count of First-Degree Murder, the prosecution dismissed Count 4, the accompanying Felony-Firearm conviction that was attached to the First-Degree Felony-Murder conviction because Count 2 was also a Felony-Firearm conviction attached to First-Degree Premeditated Murder. (S, 10–11.) Defendant agreed that should the case be reversed for any reason, the dismissed Felony-Firearm charge could be reissued by the prosecution. (S, 11–12.) Thus, Defendant waived any future double-jeopardy claim.

The trial court sentenced Defendant to serve a term of life imprisonment without parole for First-Degree Murder, a term of 300 months to 600 months' imprisonment for Assault with Intent to Rob while Armed, a term of 60 months to 120 months' imprisonment for Felon in Possession of a Firearm and Felon in Possession of Ammunition, and the mandatory two years' imprisonment for each Felony-Firearm conviction. (S, 12.) The Felony-Firearm convictions run concurrently with each other but consecutive to the predicate felony. (S, 12–13.) Defendant received no credit as he was on parole at the time of these offenses. (S, 12–13.)

Additional pertinent facts and procedural history will be discussed in the body of the People, Plaintiff-Appellee's, Brief, *infra*, to the extent necessary to fully advise this Court as to the arguments raised on appeal.

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ARGUMENTS

I. The trial court's removal of members of the victim's family after they had improper contact with the jury did not result in an inherently unfair trial where there is no indication that the courtroom was closed to the public, and there is nothing to indicate that anyone other than the disruptive members of the victim's family was excluded. Further, the victim's mother being allowed to remain in the courtroom was consistent with the Crime Victim's Rights Act.

a. Issue Preservation

To preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). This issue was not preserved at the trial court level as the defendant did not object to the removal of the victim's family members at the time it occurred.

b. Standard of Review

Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. An error is plain if it is clear or obvious, and the error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings. *Id*. at 762-765. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error, resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* The

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Michigan Supreme Court has held that the *Carines* rule applies to unpreserved claims of constitutional error, including claims of a violation of defendant's right to a public trial. *People v Vaughn*, 491 Mich 642; 821 NW2d 288 (2012).

c. Argument

A criminal defendant has a constitutional right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. The Michigan Supreme Court has held that while a criminal defendant has the constitutional right to a public trial, "that right is forfeited when no objection is made at the time of the courtroom's closure to members of the public." *People v Vaughn*, 491 Mich 642, 674-676; 821 NW2d 288 (2012). The Court further held that "a forfeited claim of constitutional error … can be redressed if the defendant shows that the court's exclusion of members of the public… was "a plain error that affected substantial rights" and that he either "is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

In this case, the mother of the victim's child, Daundria Frye, was present for the trial. (Tr II, 89.) She was an employee at Hurley Hospital and while the jury was in the hallway, she asked one of the jurors if she worked at Hurley Hospital too. *Id.* She stated that she knew she was not supposed to talk to the jurors. *Id.* In response to this, the trial court stated, "I'm going to bar everyone from the courthouse except for the mother of Devante Harris (sic). The rest of you leave. Don't you come back." *Id.* at 90. He then had them escorted from the courtroom and stated that they were excluded for the remainder of the trial. *Id.* Neither defendant nor his trial counsel objected.

In order to receive relief, "defendant must establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness,

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integrity, or public reputation of judicial proceedings." *Vaughn* at 665 (internal citations omitted).

Defendant has not established that error occurred. It appears that the trial court's removal of people from the courtroom was not to exclude the public, but more to "control courtroom distractions." *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987). The trial court removed a woman from the courtroom who had improper contact with the jury. Ms. Frye even stated that she knew she was not supposed to talk to them, yet she did anyway. (Tr II, 89.) Her removal was a sanction for her behavior and to protect the jury from extraneous influences.

The victim's mother was allowed to stay because that is her right by statute. MCL 780.752(1)(m)(2)(C) defines a victim to include the parent of the deceased victim. A victim has the "right to be present throughout the entire trial of the defendant." MCL 780.761. This right is also guaranteed by the Michigan Constitution. Michigan Constitution, Article 1, Sec 24. The trial court could not exclude the mother from the courtroom, but the court also has an obligation to the jury and as stated, the judge did not want to make the "jury nervous" and he wanted to prevent members of the public from "subvert[ing] the justice system." (Tr II, 90 and 92.)

The record is silent as to who exactly was in the courtroom at the time Ms. Frye was removed, except that Ms. Frye and the victim's mother were present. There is no indication that there were any family or friends of the defendant present in the courtroom. The affidavit attached to the defendant's brief indicates that Bryan Wooten tried to attend the trial, but does not say when Bryan Wooten tried to enter the courtroom. It also does not indicate that he was ever excluded from the courtroom. In fact it says that he actually entered the courtroom and was not prevented from doing so. In his affidavit, he states that he was in the courtroom and was told by the defendant to leave. He does not claim that he was told by the trial court, a deputy, or

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anyone with any authority that he was required to leave. There is no indication that he contacted defendant's trial counsel to see if he could stay or come on a different day. The record is clear only that the mother of the victim's child was excluded from the courtroom due to her attempted contact with a member of the jury. (Tr II, 89.)

Based on the affidavit of Mr. Wooten, it does not appear that the courtroom was locked or that anyone was standing guard, not allowing spectators into the courtroom, so it does not appear that the courtroom was even closed to the general public. The People have agreed to the Defendant's motion for remand to expand the record as to who was actually in the courtroom at the time of this occurrence. It is the People's position based on information and belief that no one from the defendant's family was present in the courtroom at the time, and the only people present were family and friends of the deceased. Therefore, the defendant has failed to establish error.

If the court finds that there was error and the error was plain, there is no indication that the error would have affected defendant's substantial rights. Defendant argues that the presence of the mother in the courtroom unfairly prejudiced the jury. As stated above, victim's mother is allowed in the courtroom by the Michigan constitution and by statute and could not have been excluded. In addition, the jurors are not allowed to let sympathy or prejudice influence their verdict. The judge instructed the jury:

> On the very first day you gave us your promise, you gave us your oath, your affirmation that you would be a true and a just jury and that you would base your decision only on the evidence using only the instructions of the law which the Court gives to you and you said you wouldn't let any sympathy or any prejudice influence your decision. [Tr V, 60.]

Jurors are presumed to follow a trial court's instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). So even if the mother was emotional during the trial, the jurors are

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presumed to have followed their instructions, which included that they would not let sympathy or prejudice influence their decision. We do not know if the mother was present in the courtroom every day, most days or very few days. Furthermore, if the rest of the victim's family had remained in the courtroom for the rest of the trial then the defense could be arguing that having multiple people supporting the victim was unfair prejudice. Regardless of how many spectators are in the courtroom, the jury is instructed to not allow sympathy to influence their verdict. There is no indication that this affected defendant's substantial rights.

The defendant also cannot meet the fourth prong of the *Carines* test. There is no evidence that, if there were an error, the error either resulted in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of judicial proceedings. There is no evidence of, nor is the defendant arguing, actual innocence. And the removal of members of the victim's family did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Defendant's attorney was still able to cross examine all witnesses and present the defendant's defense regardless of who was in the courtroom. During the cross examination of Spencer Holiday, the key witness against the defendant, defendant's trial attorney confronted him with the fact that he had been off his mental health medications and was hearing voices at the time of the incident (Tr IV, 76-77); he confronted him with the fact that he had been selling marijuana out of his home prior to and including at the time of the homicide (Tr IV, 84-86); he confronted him with prior inconsistent statements from the preliminary examination (Tr IV, 95-96, 119) and the multiple statements he made to the police (Tr IV, 96, 111, 119); and he cross examined him at length about his plea agreement with the prosecutor's office which included testimony in this trial (Tr IV, 114-118, 125). During his closing argument, defendant's trial attorney was able to make a thorough closing argument. (Tr

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V, 35-54.) He discussed Mr. Holiday's testimony at length and all of the inconsistencies in his statements. (Tr V, 41-45, 48-52.)

The absence of members of the public did not affect the fairness, integrity of public reputation of the judicial proceedings. The defendant's convictions should be affirmed.

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II. Defendant's trial attorney was not ineffective for not objecting to the removal of the deceased victim's family members where one of them had tried to have improper contact with a juror.

a. Issue Preservation

Defendant preserved this claim by filing a motion for remand for an evidentiary hearing with this Court. *People v Petri*, 297 Mich App 407, 410; 760 NW2d 882 (2008).

b. Standard of Review

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*., citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Where a claim of ineffective assistance of counsel is not addressed in the trial court, the inquiry on appeal is limited to errors apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

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

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otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted).

c. Argument

The United States and Michigan Constitutions guarantee a criminal defendant's right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994)."

To establish a claim of ineffective assistance of counsel, the defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). To prove deficient performance, "[t]he defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "Defense counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable and professional judgment.'" *People v Vaughn*, 491 Mich 64 670; 821 NW2d 288 (2012), quoting *Strickland*, 466 US at 690.

"Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864; 820

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NW2d 922 (2012). It is the Defendant who bears the burden of overcoming this presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

The defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, at 600; *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Additionally, Defendant may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *Petri*, at413.

An appellate court may not substitute its own judgment for that of defense counsel or second-guess defense counsel on matters of trial strategy, as defense counsel has great discretion with respect to the trial tactics that he employs while trying a case. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

As previously stated in Issue 1, it appears that the trial court's removal of people from the courtroom was not to exclude the public, but more to "control courtroom distractions." *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987). The trial court removed a woman from the courtroom who had acknowledged improper contact with the jury. Ms. Frye even stated that she knew she was not supposed to talk to them, yet she did anyway. (Tr II, 89.) Her removal was a sanction for her behavior and to protect the jury.

The victim's mother was allowed to stay because that is her right by statute. MCL 780.752(1)(m)(2)(C) defines a victim to include the parent of the deceased victim. A victim has the "right to be present throughout the entire trial of the defendant." MCL 780.761. The trial

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court could not exclude the mother from the courtroom, but he also has an obligation to the jury and he did not want to make the "jury nervous" and he did not allow members of the public to "subvert the justice system." (Tr II, 92 and 90.)

The record is silent as to who exactly was in the courtroom at the time Ms. Frye was removed from the courtroom, except that Ms. Frye and the victim's mother were present. There is no indication that there were any family or friends of the defendant present in the courtroom at that time. The affidavit attached to the defendant's brief indicated that Bryan Wooten tried to attend the trial, but does not say when Bryan Wooten entered the courtroom. It also does not indicate that he was ever excluded from the courtroom. In fact, it says that he actually entered the courtroom and was not prevented from doing so. In his affidavit, he states that he was in the courtroom and was told by the defendant to leave, not that he was told by the trial court, a deputy, or anyone with any authority to require him to leave. There is no indication that he contacted defendant's trial counsel to see if he could stay or come on a different day. The record is only clear that the mother of the victim's child was excluded from the courtroom due to her attempted contact with a member of the jury. (Tr II, 89.)

Based on the affidavit of Mr. Wooten, it does not appear that the courtroom was locked or that anyone was standing guard, not allowing spectators into the courtroom, so it does not appear that the courtroom was even closed to the general public. The People have agreed to the Defendant's motion for remand to expand the record as to who was actually in the courtroom at the time of this occurrence. It is the People's position based on information and belief that no one from the defendant's family was present in the courtroom at the time, and the only people present were family and friends of the deceased. Because of this, there was no reason for defendant's trial counsel to object to the ejection of those who had engaged in misconduct. The

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only people being excluded were people there to support the victim, one of whom attempted to speak to a member of the jury.

There was no reason for defendant's attorney to object to the removal, therefore it could not be ineffective assistance for him not objecting. It would be a sound strategy to allow the jurors to not be intimidated by the conduct of people in the gallery, and not allowing those people in the courtroom would have allowed the jury to concentrate on the evidence without distraction. There is nothing in the record to indicate that anyone supporting the defendant was ever excluded from the courtroom, therefore defendant's attorney was not ineffective.

Defendant's convictions should be affirmed.

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III. An email sent by the defendant to Det. Baldwin was properly admitted under MRE 801(d)(2)(a) and MRE 410(4) and it was relevant to show consciousness of guilt. Defendant's attorney was not ineffective for failing to object on the grounds asserted by defendant because the email was properly admitted regardless of the objection. The prosecutor's argument regarding the emails was also not in error.

a. Issue Preservation

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant objected to relevancy at the time of the motion. To the extent that defendant challenges the admission of the evidence based on relevancy, the issue is preserved.

Defendant did not object based on MRE 403, therefore that issue is not preserved.

Defendant preserved his claim of ineffective assistance of counsel by filing a motion for remand for an evidentiary hearing with this Court. *People v Petri*, 297 Mich App 407, 410; 760 NW2d 882 (2008).

b. Standard of Review

Relevancy:

When an issue is preserved, a trial court's evidentiary ruling is reviewed for an abuse of discretion. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). Preliminary questions of law underlying the trial court's ruling, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *Id*. A preserved evidentiary error is presumed to be harmless, and defendant bears the burden of proving otherwise. *People v Lukity*, 460 Mich 484, 493-495; 596 NW2d 607 (1999). This Court only reverses if, " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id*. at 495-496, quoting MCL 769.26. The "examination of the entire cause" encompasses evaluating the error in the context of the untainted evidence. *Lukity*, 460 Mich at 495.

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MRE 403:

Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To demonstrate such an error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) "the plain error affected [the defendant's] substantial rights," which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. An error is plain if it is clear or obvious, and the error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings. *Id.* at 762-765. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error, resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Ineffective Assistance of Counsel:

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*, citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance." *People v Walker*, 497 Mich 894, 895; 855 NW2d 744 (2014). To show prejudice, a defendant "must show the existence of a

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reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Gaines*, 306 Mich App 289, 300; 856 NW2d 222 (2014) (quotation marks omitted). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (quotation marks and citation omitted).

c. Argument

The trial prosecutor in this case filed a motion in limine requesting that the trial court rule on the admissibility of an email that the defendant sent to Det. Baldwin in January 2018 requesting a "deal" in exchange for information on another case. (Appendix 1, attached.) The motion in limine was heard by the trial court on February 5, 2018. Both the prosecutor and defendant's trial attorney had an opportunity to make their arguments. Defendant's attorney objected, stating that

> "As far as the substance of the email itself, as far as whether it's consciousness of his guilt at this point, Mr. Davis realizes that he is facing a murder charge, realized that his client (sic) who lied to the police now has a deal where he is looking at doing manslaughter with I believe eight years or so on the minimum at this point in time, and Mr. Davis I think did what any other person would do; hey, if you're giving out deals let me know what I can do and see if I can help myself at this point in time. So, I don't believe it's an indication of guilt, it's just an indication that he has a, basically currency that the police and prosecutor may want at this point in time and he's trying to use that to the best of his ability." (Mtn Hrg, 6.)

While this is not a specific objection stating that he is objecting to relevance, his words make it clear that he did not believe it was probative of any facts at issue in the case. If his argument was that it was not probative, then he was certainly also arguing that it was more prejudicial than probative. Therefore, his objection was completely proper. In his brief,

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defendant indicates that the trial attorney only objected to relevance but should have specifically objected using MRE 403. If his position was that the email was not relevant then there was no need to go further and argue that it did not pass the balancing test. The MRE 403 balancing test is only needed if the evidence is relevant.

The trial court ruled by stating that:

> "It's a random, impulsive, unilateral statement. How one could interpret it is subject to disagreement, but it's not for this Court to determine how to interpret it. That would be a jury job. Because it was a statement volunteered by Mr. Davis, yes, he was in some sort of custodial environment, but it was not a custodial interrogation. And because he brought it up, it's admissible." (Mtn Hrg, 6-7.)

The trial court clearly found that the email was relevant to show consciousness of guilt as requested by the trial prosecutor. This ruling does not specifically use the balancing test in MRE 403, but the court specifically indicated that the jury would need to give it the proper weight. Defendant's argument on appeal that the email cannot be relevant because sometimes innocent people plead guilty does not take away from its relevance to the jury's consideration whether it displays defendant's consciousness of guilt. While there may be times that innocent people inquire as to a guilty plea resolution, there is also probative value in such an unsolicited inquiry displaying a defendant's consciousness of guilt. The prosecutor did not say that because the defendant sent this email he IS guilty, he stated that it showed consciousness of guilt. The jury was then left to determine the weight they wanted to give the email.

During his closing argument the prosecutor specifically stated:

> "These emails; I introduced these emails for consciousness of guilt, that's it. A person's not going to be willing to just straight up plead, ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal." (Tr V, 32)

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This argument by the prosecutor specifically states that it is only to show consciousness of guilt and nothing else. The defendant's brief improperly characterizes a statement made during the motion hearing on February 5, 2018 as a statement made to the jury during his closing argument. The jury did not hear the prosecutor say that the email was "tantamount to any defendant who states to an officer "Hey I did it. What kind of deal can I get though?" (Mtn Hrg, 3-4.)

This Court has previously held that statements made by defendant can be relevant to show consciousness of guilt. See *People v Schaw*, 288 Mich App 231, 236-237; 791 NW2d 743 (2010). The Michigan Supreme Court has held that "[i]t is true that 'flight from the scene of a tragedy may be as consistent with innocence as with guilt'; but it is always for the jury to say whether it is under such circumstances as to evidence guilt." *People v Cipriano*, 238 Mich 332, 336, 213 NW 104, 105 (1927). The email sent to Det. Baldwin by defendant is relevant to show consciousness of guilt, and it was up to the jury to determine what weight to give to it.

Use of the email did not result in a miscarriage of justice

Defendant further argues that use of defendant's email combined with the prosecutor's argument led to a miscarriage of justice which seems to be arguing prosecutorial misconduct, however defendant does not include prosecutorial misconduct in the statement of his issue. Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but a trial court's factual findings will be reviewed for clear error. *People* v *Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). However, this Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People* v *Gaines*, 306 Mich App 289, 308; 856 NW2d 222 (2014). "The test of prosecutorial misconduct is whether the

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defendant was denied a fair and impartial trial." *Brown* at 134. Defendant bears the burden of establishing that such an error occurred, and that it resulted in a miscarriage of justice. *Id.*

The use of the email during the prosecutor's case in chief to establish defendant's consciousness of guilt was not in error, as it was properly admitted and it did not result in a miscarriage of justice. This was one small piece of evidence, argued for only a brief blurb during the prosecutor's closing argument. And the prosecutor was careful to specifically limit his argument as to the point.

The evidence was properly admitted and the defendant's attorney properly objected, therefore defendant's convictions should be affirmed.

Harmless Error

Further, if this Court finds that there was error, any alleged error was harmless and should not result in reversal of defendant's conviction. See MCL 769.26. Reversal of a criminal conviction on the basis of a trial court's erroneous evidentiary ruling is only necessary where the error prejudiced the defendant and resulted in a miscarriage of justice. MCL 769.26; *People v Snyder* (After remand), 301 Mich App 99, 111; 835 NW2d 608 (2013). A defendant seeking reversal "has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp,* 244 Mich App 361, 378; 624 NW2d 227 (2001).

The testimony of Sara Besson, the evidence technician with the Flint Police Department regarding the location of the bullet fragments and bullet holes (Tr. III, 18-24) was consistent with what Dr. Hunter testified to regarding the location of the injuries on the victim (Tr III, 98-103). That was consistent with the testimony of Spencer Holiday regarding what happened inside the vehicle that night. (Tr IV, 49-60.) When looking at the totality of the evidence in this case, if there was error, the error was harmless and defendant's convictions should be affirmed.

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RELIEF

WHEREFORE, the People of the State of Michigan, through David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Rebecca Jurva-Brinn, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm defendant's convictions.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

/s/ Rebecca Jurva-Brinn
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DATED: November 13, 2018

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Court of Appeals
No. 343432

-vs-

Circuit Court
No. 16-040020-FC

DONALD WAYNE DAVIS, JR.,

Defendant-Appellant.
_____/

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

Appendix to Brief on Appeal

Appendix 1 – People's Motion in Limine

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APPENDIX 1

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STATE OF MICHIGAN

IN THE SEVENETH CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

DONALD WAYNE DAVIS, JR.,

Defendant.
_____/

Circuit Court
No. 16-040020-FC

Hon. Geoffrey L. Neithercut

DAVID S. LEYTON (P35086)
Prosecuting Attorney for Genesee County
JOSEPH F. SAWKA (P74197)
Assistant Prosecuting Attorney
Attorneys for Plaintiff

MAJOR J. C. WHITE (P58800)
Attorney for Defendant
majorwhite1966@gmail.com

PEOPLE'S MOTION

NOW COME the People of the State of Michigan, by and through their attorney, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Joseph F. Sawka, Assistant Prosecuting Attorney, and submits the following Motion:

1. Defendant is charged with multiple criminal counts, including first-degree murder and felony-murder.
2. Defendant is currently incarcerated at the Genesee County Jail pending his trial date, which is set for February 21, 2018.

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3. On January 9, 2018, Detective Chad Baldwin informed the undersigned that Defendant voluntarily and without inducement sent him an email, which states:

> THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME

4. The People seek a pre-trial ruling that this email is admissible under MRE 801(d)(2)(a) as an admission of a party opponent, and the People will offer this evidence to show Defendant's consciousness of guilt.

WHEREFORE, the People of the State of Michigan respectfully request this Court to GRANT the People's Motion In Limine.

Respectfully Submitted,



Joseph F. Sawka (P74197)
Assistant Prosecuting Attorney

DATED: January 9, 2018

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BRIEF IN SUPPORT

I. FACTS

Defendant is charged with multiple felony counts. Defendant is currently incarcerated at the Genesee County Jail, pending trial. Defendant's trial is scheduled for February 21, 2018. On January 9, 2018, Detective Chad Baldwin informed the undersigned that he received an email from Defendant at the jail. The email content reads as follows:

> DAVIS, DONALD WAYNE sent the following message and is requesting an email reply:
>
> THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME. [See Appendix 1.]

II. LAW AND ARGUMENT

a. Defendant's statement is not hearsay because it is an admission of a party-opponent under MRE 801(d)(2)(a).

" 'Hearsay' is a statement, other than the 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). "Hearsay is generally not admissible unless an exception to the rule applies." *People v Johnson*, 315 Mich. App. 163, 193; 889 N.W.2d 513 (2016). Certain statements made outside of trial, however, are by definition not hearsay pursuant to MRE 801(d). Specifically, "[a] statement is not hearsay if ... [t]he statement is offered against a party and is [ ] the party's own statement[.]" MRE 801(d)(2)(A). "A statement cannot be used as a party admission unless the

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party made the statement[,]" and it is the burden of the prosecution, as the proponent of the statement, to establish by a preponderance of the evidence that the statement was made by defendant. *Merrow v Bofferding*, 458 Mich 617, 633; 581 N.W.2d 696 (1998).

In order to comply with the preliminary requirement of authentication, MRE 901(a) provides that this condition "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." One of the non-exclusive methods of establishing that evidence is authentic is the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics [of the proffered evidence], taken in conjunction with circumstances." MRE 901(b)(4); *People v Martin*, 150 Mich App 630, 637; 389 NW2d 713 (1986).

Here, the email is Defendant's own statement, thus is meets the definition of non-hearsay under MRE 801(d)(2)(a) because it is a party-opponent admission sought to be introduced by the People. Second, there is sufficient foundation showing that email has been written by Defendant: (1) The email originated from the Genesee County Jail where Defendant resides; (2) Defendant stated that "This is Donald Davis"; (3) Sergeant Todd Lanning will explain how the email system works at the Genesee County Jail, which includes an identification process linking Defendant to his own email.

b. Defendant's email is relevant to show his consciousness of guilt and is admissible for that purpose under MRE 401, 402, and 403

Evidence must be relevant to be admissible at trial. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of

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consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"

Here, Defendant's email to Detective Baldwin is relevant to prove Defendant's consciousness of guilt. Naturally, a person does not seek to offer information pertaining to another case for a "deal" in his or her case without knowledge that he or she is guilty of the crimes with which he/she is charged. Likewise, reasonably, a person does not seek a "deal" unless they are conscious of their own guilt. MRE 401. The probative value of Defendant's statement is high. This is a case where the identification of Defendant as the main perpetrator hinges on the credibility of his co-defendant, Spencer Holiday, who accepted a plea deal to testify against Defendant. Thus, Defendant's statements are highly probative in this case where the evidence against him is slight. There is minimal prejudicial value associated with Defendant's statement because it is direct evidence of his consciousness of guilt, it does not carry with it an improper inference. Accordingly, the probative value of Defendant's statement is *not* substantially outweighed by the danger of *unfair* prejudice.[1]

c. ***Defendant's statement was made to Detective Baldwin of his own volition and does not constitute a statement made in the course of plea negotiations and is not barred by MRE 410(4)***

[1] If anything, the People will acquiesce to a limiting instruction to the jury that they are not to consider the fact that at the time Defendant sent the email that he was in the Genesee County Jail. It must have no bearing on their deliberations other that to determine if he was the sender of the email.

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Finally, in the interest of completeness, MRE 410(4) has no applicability here. MRE 410 provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

MRE 410 was amended to include the specific language that that the statement subject to exclusion must have been made in the course of plea discussions "with an attorney for the prosecuting authority." This way, a defendant could not "spill his guts" to police and later claim he did so in the course of a plea discussion.

In *People v Smart*, 304 Mich 244; 850 NW2d 579 (2014), lv den 497 Mich 950 (2015), the Court of Appeals noted "simply because a defendant seeks to engage in a plea negotiation does not mean that the person to whom he is speaking (a prosecuting attorney or another person) would or must view any discussion with the defendant as a plea negotiation." To assist in such analysis, the Court relied on *People v Dunn*, 446 Mich 409, 415–16; 521 NW2d 255 (1994), which held that MRE 410 applies when "(1) the defendant has an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) that expectation is reasonable given the totality of the objective circumstances." *Smart*, 304 Mich App at 249. Notably, in Smart, the prosecution requested the meeting between the Defendant

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and the police officer/detective that ultimately led to Defendant's charges and convictions.

Here, no one was requested to speak with Defendant. The prosecution did not ask to speak with Defendant, the police officers did not want to speak with Defendant, nor were they asked to speak with Defendant on the prosecution's behalf. Thus, this case is factually unlike *Smart*. Moreover, there were no active plea discussions when Defendant sent his email on January 8, 2018. Thus, Defendant had no actual subjective expectation to negotiate a plea. Even if he did, his expectation was not reasonable. There were no plea negotiations as of January 8, 2018, each party was preparing for trial.

III. CONCLUSION

WHEREFORE, the People of the State of Michigan respectfully request this Court to **GRANT** the People's Motion In Limine.

Respectfully Submitted,



Joseph F. Sawka (P74197)
Assistant Prosecuting Attorney

DATED: January 9, 2018

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APPENDIX 1

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From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:05:33 PM Review Status: System Approved
To : macieharris18@gmail.com
Subject: DJ
Message: AND WHO IS DAT??

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:36:47 PM Review Status: System Approved
To : williamskeme@gmail.com
Subject: DJ
Message: DIS DJ TELL YARNELL I SAID WATUP THO

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:52:06 PM Review Status: System Approved
To : cbaldwin@cityofflint.com
Subject: MR.DAVIS
Message: THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME

From : DAVIS, DONALD WAYNE Sent Date: 1/8/2018 1:59:16 PM Review Status: System Approved
To : jalynbrown45@yahoo.com
Subject: DJ
Message: DIS DJ SINO BROTHER I WAS TRYN TO SEE IS TIM OUT

From : ijabreea@gmail.com Sent Date: 1/8/2018 3:01:49 PM Review Status: System Approved
To : DAVIS, DONALD WAYNE
Subject: DJ
Message: Hell nawl NO KIDS lol and I work at McDonald's and a company called RGIS

From : jalynbrown45@yahoo.com Sent Date: 1/8/2018 4:27:03 PM Review Status: System Approved
To : DAVIS, DONALD WAYNE
Subject: DJ
Message: Naw he not he got sent back to Tennessee and now he doing time up there

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