STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hood, P.J., Redford and Maldonado, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellee.
_____/

Supreme Court No. 166923

Court of Appeals No. 355925

Emmet County Circuit Court No.: 20-005054-FC

PEOPLE OF THE STATE OF MICHIGAN'S APPENDIX

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Michael H. Schuitema (P72718)
Emmet County Prosecutor

Christopher M. Allen (P75329)
Assistant Solicitor General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628

Brent E. Morton (P58526)
Assistant Attorney General
Criminal Appellate and
Parole Appeals Division

Attorneys for Plaintiff-Appellant

Dated: November 20, 2024

TABLE OF CONTENTS

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024
9:15 a.m.

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

MALDONADO, J.

This case arises from a jury's conclusion that defendant and his romantic partner, Brandie DeGroff, stole nearly $70,000 from their neighbor's safe. Thus, defendant was found guilty of safe breaking, MCL 750.531, larceny of property valued at $20,000 or more, MCL 750.356(2)(a), receiving or concealing stolen property valued at $20,000 or more, MCL 750.535(2)(a), larceny from a building, MCL 750.360, and conspiracy to commit each of those offenses, MCL 750.157a. Defendant was sentenced to serve concurrent terms of 10 to 20 years' imprisonment for the safe-breaking conviction, 9 to 20 years' imprisonment each for the larceny-of-property and receiving-or-concealing convictions, and 3 to 15 years' imprisonment for the larceny-from-a-building conviction, plus terms for each conspiracy conviction matching the sentence for its underlying offense. At defendant's trial, particularly damning was a series of text messages exchanged between defendant and DeGroff in which the couple made numerous references to the crimes for which defendant was convicted. Police obtained these messages following a search of defendant's phone which was executed pursuant to a warrant. However, the warrant was not obtained until after the phone was seized because the phone was seized incident to defendant's arrest. Defendant now raises numerous arguments, most of which framed as ineffective assistance of counsel, regarding the initial seizure of the phone, the warrant supporting the search of its contents, and the actual search of the phone.

As a threshold matter, we hold that it violates the prohibition against multiple punishments for the same offense for a person to be convicted of both larceny and receiving or concealing stolen property when the convictions arise from the same criminal act because a person who steals property necessarily possesses stolen property. Furthermore, it is well established that a search

made pursuant to a general warrant cannot stand; thus, we hold that the warrant authorizing the search of defendant's cell phone violated the particularity requirement because it authorized a general search of the entirety of the phone's contents. Finally, we hold that the fruits of this search cannot be saved by the good faith exception to the exclusionary rule because the warrant was plainly invalid. Accordingly, we reverse each of defendant's convictions and remand for additional proceedings. Because these holdings are sufficient to wholly resolve this appeal and provide guidance on remand, we decline to address other various matters raised by defendant.

I. BACKGROUND

A. UNDERLYING FACTS

Defendant and DeGroff were neighbors of Don Billings. Billings, due to his various health problems, was planning to sell off much of his property so that he could eventually move in with his brother. Defendant had experience with selling goods online, so Billings enlisted the assistance of defendant and DeGroff with selling his property in exchange for them receiving 20% of the proceeds. Defendant was given keys to Billings's home and was also granted license to look through and rearrange much of Billings's property. This operation was ongoing from the summer of 2019 until September or October of the same year.

Billings did not trust banks, so he stored his life's savings, along with miscellaneous other documents and valuable goods, in a pair of 40-year-old safes that he kept in his house. The cash was estimated to equal more than $60,000, and it was in hundred-dollar-bills that were divided into $1,000 bundles. The safes could be opened by combination or key, but Billings only used the combination and could not remember where in the house he stored the key. At some point after defendant and DeGroff were no longer assisting Billings, he decided for no particular reason to open the safes. However, he was not able to make the combinations work and ultimately needed to elicit the assistance of a locksmith. Upon opening the safes, Billings discovered that all of the cash was gone. Billings testified that between then and the last time he had opened the safe, only defendant and DeGroff had access to them. However, he never gave them permission to open the safes or attempt to sell any of the safes' contents.

Other circumstantial evidence connected defendant and DeGroff to the theft of the contents of the safes. For example, the police obtained records from a jewelry store indicating that defendant purchased a $1,490 wedding ring on August 6, 2019. The police also obtained a search warrant for records regarding defendant's and DeGroff's joint bank account for each month from October 2018 to November 2019. These records indicated that they had $283.13 in the account at the end of July 2019; that they deposited a total of $9,300 in September 2019; and that their September deposits exceeded every other month during that period by approximately $4,000. However, defendant's employer from April 2, 2019 until August 2, 2019 testified that defendant's net pay during that entire period was approximately $8,400. He further testified that defendant quit because "he ran across some money and some valuables, gold I believe, in a locker that he bought online, or through some kind of a transaction . . . so, [defendant] had a lot of money that [sic] he didn't need to work for a while, or something." Alan Olsen, who lived with and paid rent to defendant and DeGroff from August 2018 until September 2019, testified that the couple was having financial difficulties and that he paid extra rent the final month he lived there to help them.

However, Olsen also testified that in August 2019, the couple began going out "every night," and they would tell him that they were either getting dinner or going to the casino.

Finally, the Slot Director for the Odawa Casino testified that the casino used "players club cards" to track players' earnings because once a certain threshold was exceeded the earnings were subject to income taxation. He explained that the machines at the casino tracked the total money that a player put into the machine, irrespective of wins or losses. In 2019, defendant put a total of $122,000 into the gaming machines at the Odawa Casino, including approximately $57,000 in August of that year. In 2019, defendant's total losses were approximately $5,000, including just shy of $4,000 in losses from August of that year. Meanwhile, Brandy DeGroff put $47,619 into gaming machines at the Odawa Casino in 2019, including $12,919 in August. DeGroff lost $6,021 in 2019, including $2,368 in August.[1]

Defendant was arrested on February 26, 2020. Police arrived at defendant's home at approximately 4:00 a.m., and defendant answered the door wearing only shorts. Prior to escorting him out, Detective Midyett allowed defendant to smoke a cigarette and get dressed. Detective Midyett escorted defendant to his bedroom to get dressed, and while defendant was sitting on his bed tying his shoes, Detective Midyett noticed a cell phone connected to a charger nearby. Detective Midyett asked defendant if the cell phone was his, defendant answered in the affirmative, and the phone was seized. Later, police sought and obtained a warrant to search the phone's contents and discovered text messages exchanged between defendant and DeGroff that proved to be critical to the prosecution's case.

At the trial, the prosecution asked Detective Matt Leirstein to read from a text conversation extracted from defendant's phone, dating from August 5-6, 2019:

> *Q*. [C]an you tell us who's sending this text message?
>
> *A*. This looks like it is from [defendant].
>
> *Q*. Okay. What does it say?
>
> *A*. "Don and Judy were investors in the stock market, complete records for hundreds of thousands of dol1ars."
>
> *Q*. And what is [DeGroff's] response . . . ?

[1] At the time of the investigation, this author was employed as the Chief Judge of the Tribal Court for the Little Traverse Bay Bands of Odawa Indians, and as such, this author was the signatory of an order giving full faith and credit to a subpoena issued by the circuit court seeking these casino records. The parties were notified of this connection to their case in writing on August 23, 2023, and the parties were assured that this ministerial act in no way impacted the ability of this panel to fairly decide the issues before it. This Court did not receive any requests for this author's recusal, and any objections from defendant were affirmatively waived at oral arguments.

A. "Wow that's crazy. Have you found any records of what's in the space yet?"

Q. And . . . what's [defendant's] response to that?

A. [Defendant's] response is, "In the, what, yet?"

Q. And what does [DeGroff] say?

A. "Lol, laugh out loud, safe," meaning, safe.

Q. What is [defendant's] response to that text . . . ?

A. "No. I'm guessing it's all on the computer."

Q. How does [DeGroff] respond?

A. "I'm turning it on . . . when I get to go up there again."

Q. And then what's [defendant's] response?

A. "I just did. . . . Home screen says, 'Welcome Don.' "

Q. [DeGroff's] response?

A. "Does it ask for security?"

Q. What does [defendant] say to that?

A. "No. Opens right up. There isn't anything on it that I can see. You look later. This is more your field."

Q. The next text message that [defendant] sends to [DeGroff]—what does that say?

A. "We need to go through those pennies. If there's a 1943 copper penny in there, it's worth millions, these people said. Also, the 1943s pennies can go for twenty thousand dol1ars each—or, $20,000 each." It doesn't say dollars.

Q. What does [DeGroff] say?

A. "Holly Molly! [sic] That's a lot . . . of money."

Q. Alright. [Defendant's] response?

A. "I'm thinking that these guys cashed out stocks, and whatnot, and converted to cash and gold and silver in the safes."

* * *

Q. What's this text message [defendant] sends to [DeGroff] at about 4:29 p.m. on August 5 . . . ?

A. "These are the keys that you're thinking are safe keys, I think that these are lockbox keys from a bank."

Q. And what's [DeGroff's] response?

A. "Might be."

The prosecution later asked about an exchange between defendant and DeGroff from August 13, 2019:

Q. And what does [defendant] say to [DeGroff]?

A. "I'm totally confused. Does he not know there's a million dollars in those safes?"

Q. And how does [DeGroff] respond?

A. "I really don't think he does. I think he opened it up, . . . threw that money in there and closed it."

The prosecution asked about an exchange between defendant and DeGroff from September 2019:

Q. . . . Do you recall the testimony of Mr. Billings that he had confronted the defendant about coins missing from the bedroom of his house?

A. Yes, I do.

Q. Alright. When are the text messages . . . here, what's the dates ?

A. . . . It's gonna be September 15th, 2019 at 4 p.m.

Q. . . . The text message I'm highlighting, this is from [defendant] to [DeGroff], is that right?

A. Correct.

Q. And what does it say?

A. "It amazes me that he's worried about a few rolls of coins and never went into the safes."

* * *

Q. Go to page 6. This highlighted text from [defendant] to [DeGroff], when was that sent?

A. It looks like, September 15th, 2019 at 10:12 p.m.

Q. Okay. And what does [defendant] say to [DeGroff] in this text that I'm highlighting?

A. "He must've tried to get into the safe and couldn't and then thought there was a ton of money in that chest."

Finally, the prosecution asked about a pair of exchanges between the couple from October and November 2019:

Q. I want you to read for the jury the text message [defendant] sends [DeGroff] on October 29 at about 4:15 p.m. . . . What did [defendant] say to her?

A. "Yeah, right. It's all you've done is use me and cheat on me."

Q. . . . [DeGroff's] response . . . ?

A. "Right. Um, use you for what? 'Cause I haven't made any money or help you steal sixty thousand dollars? And cheat? When? Tell me when I had the opportunity to fucking cheat? You are the one who didn't work most of the summer and hasn't held a single job."

Q. . . . Like you to read the text message the defendant sent [DeGroff] on November 24 at 10:51 a.m. . . . What does [defendant] say to Brandy DeGroff in this text message?

A. "I just need to go. . . . I'm always full of anger and everyone at home is in line of fire and it's not fair to all of you. It's just best I, not, be there until I get some sort of help to calm me and help me sleep. It doesn't help that I'm overly stressed over our finances. . . . I wish now that I had a way to go rob those entire safes. Tomorrow I'm taking all that other money to the bank and just deposit it . . . . Fuck chasing shit around. I'm trying to sell shit and bring money in but it's not working. I'm a mixed ball of everything and I'm going fucking crazy."

B. POSTCONVICTION HISTORY

Defendant was found guilty as described in the opening paragraph of this opinion, *supra*, was sentenced in December 2020, and filed a claim of appeal in this Court on January 4, 2021. On September 10, 2021, while this appeal was pending, defendant filed a motion for a new trial in the circuit court. Defendant argued that his cell phone was seized pursuant to an impermissible warrantless search; that the police impermissibly questioned defendant regarding his ownership of the phone without having first issued *Miranda*[2] warnings; that the affidavit in support of the police's request for a search warrant was inadequate in that it failed to establish probable cause to

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

believe that the cell phone would contain relevant evidence; that the prosecution had impermissibly added charges in retaliation to defendant's motion to suppress; and that defense counsel's failure to raise these issues constituted ineffective assistance of counsel. On October 21, 2021, the circuit court ordered additional briefing, and on December 30, 2021, the trial court ordered a *Ginther*[3] hearing.

The *Ginther* hearing was conducted on April 28, 2022, and defendant's trial attorney, Duane Beach, testified extensively regarding the matters raised in defendant's motion. The relevant details of Beach's testimony are presented in Section II, *infra*, of this opinion. At the hearing's conclusion, the court elected to engage in further deliberations. On May 17, 2022, the circuit court issued a written opinion and order denying defendant's motion for a new trial. In relevant part, the court concluded that (1) Beach erred by failing to seek suppression of defendant's admission to police that he owned the cell phone, but this was harmless because the circumstantial evidence of defendant's ownership was overwhelming; (2) Beach should have filed a motion to suppress the contents of defendant's cell phone "if only to preserve the appeal," but this error was likewise harmless because even if the warrant was deficient, the good faith exception to the exclusionary rule would apply; (3) Beach's decision not to file a motion to quash the amended information was a reasonable strategic choice; (4) defendant's evidentiary arguments were without merit; and (5) defendant's convictions of both larceny of stolen property and receiving and concealing stolen property did not raise double jeopardy concerns.

Following the conclusion of postconviction matters in the circuit court, this appeal proceeded.

II. DISCUSSION

Defendant argues that finding him guilty of larceny and receiving and concealing stolen property for the same act violated his double jeopardy rights. Defendant further argues that the contents of his cell phone were inadmissible because they were seized pursuant to a facially invalid search warrant and that Beach rendered ineffective assistance by failing to seek exclusion pursuant to these grounds. We agree. Because these conclusions are dispositive, we do not reach defendant's remaining arguments.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Id*. Questions of constitutional law are reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A. DOUBLE JEOPARDY

Defendant's double jeopardy rights were violated because his convictions of larceny and receiving or concealing stolen property arose from the same act—the theft of the money taken from Billings's safe.[4]

The Double Jeopardy Clauses of the federal and state Constitutions prohibit placing a criminal defendant twice in jeopardy for a single offense. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994), citing US Const, Ams V, XIV and Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

The Legislature retains the option, however, of punishing a crime through creating the possibility of multiple convictions and sentences stemming from a single criminal act. See *People v Wafer*, 509 Mich 31, 38; 983 NW2d 315 (2022). Where the Legislature has not clearly indicated its intent to allow cumulative punishments, it is necessary to "examine the *abstract legal elements* of the two offenses, rather than the facts of the case, to determine whether the protection against multiple punishments for the same offense has been violated." *People v Dickinson*, 321 Mich App 1, 15; 909 NW2d 24 (2017) (emphasis added). When applying the "abstract legal elements test," we are instructed to determine whether "each of the offenses for which defendant was convicted has an element that the other does not." *People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015) (quotation marks, citation, and alteration omitted). This test can be satisfied and dual convictions may stand even if there is "a substantial overlap in the proof offered to establish the crimes." *Nutt*, 469 Mich at 576, quoting *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

This issue was addressed more than 30 years ago when this Court decided *People v Johnson*, 176 Mich App 312; 439 NW2d 345 (1989), a case which defendant views as dispositive. In *Johnson*, the defendant pleaded guilty to larceny of property worth more than $100 and possession of stolen property worth more than $100 following the theft of 14 shirts from a store. *Id*. at 313. To resolve the defendant's double jeopardy argument, this Court inquired "into whether the Legislature intended to authorize multiple punishment under different statutes for a single criminal transaction." *Id*. This Court concluded "that the Legislature did not intend to provide for multiple punishment under both these statutes" because "the punishment provided by each statute is exactly the same" and because "[e]ach statute prohibits conduct which violates the same social

[4] While the discussion regarding the contents of defendant's cell phone found in section II.B, *infra*, is sufficient to wholly adjudicate this appeal, the double jeopardy argument still merits addressing because it will be an issue if defendant is tried again on remand. See *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010) (explaining that an issue is not moot if its resolution will have practical effects on the case).

norm: theft of property." *Id*. at 314. This Court concluded that the purpose of the statutory framework was "to enlarge the prosecutor's arsenal to allow alternate charging and conviction of a thief under either the larceny statute or the receiving and concealing statute. Defendant could have been charged and convicted under either statute for this theft, but not under both of them." *Id*. at 315.

The prosecution reminds us that *Johnson* predates the conflict rule, MCR 7.215(J)(1), and thus is not binding precedent. However, although "[d]ecisions published before November 1, 1990, are not binding on this Court . . . , those decisions are entitled to deference under traditional principles of stare decisis and should not be lightly disregarded." *People v Haynes*, 338 Mich App 392, 415 n 1; 980 NW2d 66 (2021). We view *Johnson*'s reasoning as sound, and we reaffirm its conclusion that the legislature did not intend for cumulative punishments pursuant to these two statutes. The true problem with *Johnson* as it applies now is that, because of the state of double jeopardy law at the time it was decided, it did not apply the abstract legal elements test. Thus, as the law currently stands, *Johnson*'s analysis is incomplete. We therefore will finish what *Johnson* started and apply the abstract legal elements test to these two statutes as they are currently written.

We conclude that it is not possible for a person to be guilty of larceny without also being guilty of receiving or concealing stolen property; therefore, the same act cannot give rise to convictions for both crimes. MCL 750.356(1) provides:

> A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> (b) A bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order, or certificate.
>
> (c) A book of accounts for or concerning money or goods due, to become due, or to be delivered.
>
> (d) A deed or writing containing a conveyance of land or other valuable contract in force.
>
> (e) A receipt, release, or defeasance.
>
> (f) A writ, process, or public record.
>
> (g) Scrap metal.

On the other hand, MCL 750.535(1) provides: "A person shall not buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted."

The catchall term "property" as it is used in MCL 750.535(1) subsumes the entire list provided in MCL 750.356(1)(a)-(g). In other words, if a person steals one of the items articulated

in the list provided in MCL 750.356(1), then the person has necessarily stolen "money, goods, or property" as the term is used in MCL 750.535(1). Additionally, a person who steals necessarily possesses the item that was stolen. Thus, a person who steals one of the items articulated by MCL 750.356(1) has necessarily possessed stolen money, goods, or property. Moreover, MCL 750.356(1)(a) establishes that stealing another's money, goods, or chattels is a crime by itself; Subsections (2) through (5) set forth different penalties depending on the value of the property stolen, covering the whole gamut of possibilities, from under $200 under Subsection (5), to $20,000 or more under Subsection (2). Similarly, MCL 750.535(1) establishes that possessing property actually or constructively known to be stolen is a crime by itself, and the subsections that follow set forth different penalties depending on the value of the property stolen, covering values from under $200 under Subsection (5), to $20,000 or more under Subsection (2)(a). This alignment of statutory provisions thus guarantees that any theft pursuant to MCL 750.356 will constitute possession of stolen property pursuant to MCL 750.535.

For these reasons, we conclude that a person cannot be convicted of both larceny and receiving or concealing stolen property as a result of the same criminal act. However, for the purposes of this case, our analysis does not end here. This was raised through the analytical framework of ineffective assistance, and we still must establish whether defendant has established ineffective assistance of counsel. Little discussion is needed to answer this question in the affirmative. "To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (quotation marks, citation, and alteration omitted). Defense counsel erred by allowing defendant to be punished twice for the same offense, and the outcome of the proceeding would have been different if not for this error because it would have prevented defendant's conviction of one of these two offenses as well as the accompanying conspiracy charge. Therefore, defendant's double jeopardy argument establishes a claim of ineffective assistance of counsel.

In conclusion, the constitutional double jeopardy protections bar defendant from being reconvicted of both larceny and receiving or concealing stolen property, as well as both corresponding conspiracy charges, if he is tried again on remand.[5]

B. CONTENTS OF DEFENDANT'S CELL PHONE

The warrant authorizing a search of the contents of defendant's cell phone was too broad in violation of the particularity requirement, and the good faith exception is inapplicable to these

[5] In other words, defendant can permissibly be convicted of conspiracy to commit larceny or conspiracy to commit receiving or concealing stolen property but not both. This is because, pursuant to the same analysis, a person cannot conspire to steal property without also conspiring to possess the same stolen property, so a conviction of both would violate the constitutional double jeopardy protections.

facts. Therefore, defense counsel's failure to seek exclusion of the phone's contents for these grounds was ineffective assistance warranting reversal.

1. PARTICULARITY REQUIREMENT

The search warrant in this case was invalid because it failed to particularly describe what the police sought to search and seize.

"[T]he general rule is that officers must obtain a warrant for a search to be reasonable under the Fourth Amendment." *People v Hughes*, 506 Mich 512, 525; 958 NW2d 98 (2020). The warrant requirement applies to searches of cell phone data. *Id*., citing *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed2d 430 (2014). The Fourth Amendment only allows search warrants "particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. A substantially similar provision can be found in the Michigan Constitution. Const 1963, art 1 § 11.[6] "The purpose of the particularity requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure." *People v Unger*, 278 Mich App 210, 245; 749 NW2d 272 (2008) (quotation marks and citation omitted). "A search warrant is sufficiently particular if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the people and property subject to the warrant." *People v Brcic*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 359497); slip op at 4 (quotation marks and citation omitted). Whether a warrant satisfied the particularity requirement depends on "the circumstances and the types of items involved." *Unger*, 278 Mich App at 245. It is "well settled that a search may not stand on a general warrant." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). In the context of cell phone data, the Michigan Supreme Court has concluded that "allowing a search of an entire device for evidence of a crime based upon the possibility that evidence of the crime could be found anywhere on the phone and that the incriminating data could be hidden or manipulated would render the warrant a general warrant . . . ." *Hughes*, 506 Mich at 542, quoting *People v Herrera*, 357 P3d 1227 (Colo 2015).

In this case, the warrant itself described the "person, place, or thing to be searched" as the "[c]ellular device belonging to [defendant] and seized from his person upon arrest."[7] The property to be searched for and seized was described as follows:

[6] The Michigan Supreme Court has held that these two provisions are "to be construed to provide the same protection" unless there is a "*compelling reason to impose a different interpretation*." *People v Katzman*, 505 Mich 1053, 1053; 942 NW2d 36 (2020) (quotation marks and citation omitted).

[7] When assessing whether the warrant sufficiently described the places to be searched and items to be seized, we have *not* considered the contents of the supporting affidavit because the warrant did not contain "appropriate words of incorporation" directing the officers to refer to the affidavit during execution of the search. See *Brcic*, ___ Mich App ___; slip op at 4 (quotation marks and citation omitted).

> Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for such items, searching agents may seize and search the following: cellular devices; Any [sic] physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any [sic] passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This [sic] shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

Simply put, this was a general warrant that gave the police license to search *everything* on defendant's cell phone in the hopes of finding anything, but nothing in particular, that could help with the investigation. This warrant did not place any limitations on the permissible scope of the search of defendant's phone. The only hint of specificity was the opening reference to "the investigation of Larceny in a Building and Safe Breaking," but this small guardrail was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents.

The evidence clearly established that there was probable cause to believe that defendant and DeGroff collaborated to break into Billings's safe and steal its contents, which included his entire life's savings. Given the nature of defendant's and DeGroff's relationship, there was likewise probable cause to believe that defendant had used his phone to communicate with DeGroff regarding these crimes. Therefore, it would have been wholly appropriate to issue a warrant authorizing the police to engage in a search of the phone's contents limited in scope to correspondence between these two regarding the crimes; this would include SMS messages, internet-based messaging applications such as Messenger or SnapChat, direct messages sent through social media platforms such as Instagram or Twitter, emails, and other similar applications. The warrant that was actually issued placed no limitations on the scope of the search and authorized the police to search everything, specifically mentioning photographs and videos. Authorization for a search of defendant's photographs and videos, despite there being no evidence suggesting that these files would yield anything relevant, is particularly troubling in light of the tendency of people in our modern world to store compromising photographs and videos of themselves with romantic partners on their mobile devices. Moreover, people usually can directly access file storage systems such as Dropbox and Google Drive directly from their phones, creating a whole new realm of personal information that the police was given free license to peruse. The pandemic also saw the emergence of applications such as "BetterHelp" and "Talkspace" through

which people can have text message-based sessions with their psychotherapists, and applications such as "MyChart" allow mobile storage of detailed medical records as well as private conversations between patients and doctors. Simply put, this warrant authorized precisely the form "wide-ranging exploratory searches the framers intended to prohibit." *Hughes*, 506 Mich at 539 (quotation marks and citation omitted). Indeed, there are likely many people who would view an unfettered search of the contents of their mobile device as more deeply violative of their privacy than the sort of general search of a home that the framers originally intended to avoid.

We are living in a time during which it can be reasonably assumed that any given person essentially has their entire life accessible from their phones. The Unites States Supreme Court commented on this fact when it decided *Riley*:

> [T]here is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. . . . A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. [*Riley*, 573 US at 395 (citations omitted).]

Thus, warrants for searching and seizing the contents of a modern cell phone must be carefully limited in scope. This is not to say that the police must be told precisely what they are looking for or where to find it, but there must be guardrails in place. The warrant in this case authorized the modern equivalent of the police combing through a person's entire home in search of any evidence that might somehow implicate the person in the crime for which they were a suspect.

We are aware of no binding authority[8] discussing the analysis of whether the language of a warrant authoring a search of cell phone data comports with the particularity requirement; however, several other states have likewise concluded that it is inappropriate for a warrant to authorize an unfettered search of a phone's entire contents. For example, in *State v Smith*, 344 Conn 229, 250-252; 278 A3d 481 (2022), the Connecticut Supreme Court concluded that a warrant "which allowed for a search of the entire contents of the cell phone" was invalid "because it did not sufficiently limit the search of the contents of the cell phone by description of the areas within the cell phone to be searched, or by a time frame reasonably related to the crimes." In *State v Bock*, 310 Or App 329, 335; 485 P3d 931 (2021), the Oregon Court or Appeals concluded that a "warrant that authorizes seizure of any item on a cell phone that might later serve" as evidence of

[8] The specifics of the Michigan Supreme Court's opinion in *Hughes* are not entirely on point because the Court was examining whether the police, by examining the phone's entire contents, acted within scope of the warrant. See *Hughes*, 506 Mich at 539-550. In this case, the issue we are discussing is whether the scope of the warrant was too broad, not whether the police acted within the scope of the warrant.

a crime "is tantamount to a general warrant." Additionally, in *People v Coke*, 461 P3d 508, 516 (Colo 2020), Colorado's Supreme Court invalidated a search warrant that allowed police "to search all texts, videos, pictures, contact lists, phone records, and any data that showed ownership or possession." Numerous other examples establish that many states have joined in our conclusion that that the particularity requirement disallows the issuance of warrants authorizing police to search the entirety of a person's cell phone contents for evidence of a particular crime; the massive scale of the personal information people store on their mobile devices means that there must be some limits to the scope of the search. See, e.g., *Richardson v State*, 481 Md 423, 468; 282 A3d 98 (Md Ct App 2022) ("While reasonable minds may differ at times on whether a warrant is sufficiently particular, one thing is clear: given the privacy interests at stake, it is not reasonable for an issuing judge to approve a warrant that simply authorizes police officers to search everything on a cell phone."); *State v Wilson*, 315 Ga 613, 615; 884 SE2d 298 (2023) (invalidating warrant that provided a "limitless authorization to search for and seize any and all data that can be found on [the defendant's] cell phones").

For these reasons, we conclude that the search warrant in this case did not satisfy the particularity requirement.

2. GOOD FAITH EXCEPTION

The good faith exception to the exclusionary rule does not apply because this was a facially invalid general warrant upon which no reasonable officer could have relied in objective good faith.

"The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreasonable searches and seizures." *People v Hawkins*, 468 Mich 488, 498; 668 NW2d 602 (2003). In general, this rule bars admission of evidence that was obtained during an unreasonable search. *Id*. at 498-499. However, the exclusionary rule has been "modified by several exceptions" that allow such evidence to be admitted under certain circumstances. *Id*. (citation omitted). The purpose of the exclusionary rule is not "to 'make whole' a citizen who has been subjected to an unconstitutional search or seizure. Rather," the rule's purpose is to deter future police misconduct. *Id*. at 499. For this reason, the United States Supreme Court carved out the "good-faith" exception to the exclusionary rule when it decided *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed2d 677 (1984). The good-faith exception "renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid." *People v Hughes*, 339 Mich App 99, 111; 981 NW2d 182 (2021). This exception has also been recognized by the Michigan Supreme Court. *People v Goldston*, 470 Mich 523, 525-526; 682 NW2d 479 (2004). The rationale behind this exception is that the exclusionary rule was crafted to deter police misconduct and therefore should not apply when a *magistrate* made an error rather than the police. *Hughes*, 339 Mich App at 111.

The good-faith exception does not mean that evidence obtained pursuant to a search warrant will always be admitted, and the United States Supreme Court explained scenarios in which this exception will not apply when it decided *Leon*:

> Suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role . . . ; in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in *failing to particularize the place to be searched or the things to be seized*—that the executing officers cannot reasonably presume it to be valid. [*Leon*, 468 US at 923 (citations omitted; emphasis added).]

There is little guidance offered by Michigan caselaw on the applicability of the good-faith exception in the context of a search warrant violative of the particularity requirement. This Court has suggested that a search warrant is "plainly invalid" if "it failed to describe the type of evidence to be sought." *Brcic*, ___ Mich App at ___; slip op at 4, quoting *Groh v Ramirez*, 540 US 551, 557; 124 S Ct 1284; 157 L Ed2d 1068 (2004). However, this statement was not made in the context of a good-faith exception analysis. There is some guidance from other jurisdictions, but the results are mixed. For example, in *Richardson*, 481 Md at 470-472, the Maryland Court of appeals concluded that the good-faith exception did apply, reasoning that the officers who executed the warrant could not have known that it was impermissible to search the entire phone. However, in *Burns v United States*, 235 A 3d 758 (DC Ct App 2020), the District of Columbia Court of Appeals concluded that the good-faith exception did not apply because of the obvious overbreadth of the warrant. One difficulty that arises when looking to other states for guidance is that there is significant variance in the extent to which each state has adopted this exception to the exclusionary rule. For example, in *State v McLawhorn*, 636 SW3d 210, 245 (Tenn Ct Crim App 2020), the Tennessee Criminal Court of Appeals concluded that the good-faith exception did not apply in a case in which a warrant impermissibly authorized "an unfettered search of all data on the Defendant's cell phone," but Tennessee had only adopted a limited version of the good-faith exception that applied to "evidence which had been seized in accord with binding precedent existing at the time," cases involving technical flaws to otherwise valid warrants, and cases involving negligence as opposed to "systemic error or reckless disregard of constitutional requirement." *Id*. (quotation marks and citation omitted). In Michigan, while there is no caselaw suggesting that our good-faith exception is coextensive with its federal counterpart, there likewise appears to be no caselaw restricting its applicability in manners not present in federal caselaw.

We conclude that the warrant in this specific case was so facially deficient by virtue of its failure to particularize the places to be searched and things to be seized that the executing officers could not have reasonably presumed it to be valid. See *Leon*, 468 US at 923. As discussed in detail in section II.A, *supra*, this case involved a general warrant authorizing a search of the phone's entire contents for any incriminating evidence. It is common knowledge that people store an incredible amount of personal data on their phones, and the prohibition against general warrants is long-established. The plainly invalid breadth of this warrant is further evidenced by the fact that the police ultimately seized approximately *1,000 pages of personal information* from defendant's phone that consisted of all of its contents. No officer could reasonably have believed that such a

far-reaching search complied with the constitutional demand for particularity. Lack of good-faith is further evidenced by the affidavit submitted by the police when they sought the search warrant because the police made no secret of their intent to engage in a fishing expedition. In particular, the following paragraph is alarming:

> Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.

The preparing officer essentially admitted knowledge of the breadth of personal information available on modern cell phones, as was detailed above,[9] and stated his intent to comb through all of it.

To be clear, we do *not* hold that searches executed pursuant to a warrant that is defective by virtue of allowing an overly broad search of a person's cell phone can *never* be saved by the good-faith exception. However, given the particularly egregious facts of this case, we conclude that the good faith exception does not apply, and the contents of defendant's cell phone should not have been admitted at his trial.

3. INEFFECTIVE ASSISTANCE

Reversal of defendant's conviction is warranted because defense counsel's failure to seek exclusion of the cell phone's contents on this basis constituted defective representation, and there is a reasonable probability that the outcome of defendant's trial would have been different but for defense counsel's error.

The Sixth Amendment of the United States Constitution guarantees that criminal defendants receive effective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed2d 674 (1984). Michigan's Constitution affords this right the same level of protection as the United States Constitution. *People v Pickens*, 446 Mich 298, 318-320; 521 NW2d 797 (1994). Accordingly, "[t]o prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (quotation marks, citation, and alteration omitted). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). This Court presumes counsel was effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539.

As discussed above, the contents of defendant's cell phone were inadmissible because the warrant's total failure to comply with the particularity requirement rendered it facially invalid. Despite this, defense counsel did not move for the exclusion of the cell phone records on this basis.

[9] See section II.A, *supra*.

Such matters are presumed to be an exercise of reasonable trial strategy by defense counsel, *People v Traver*, 328 Mich App 418, 422-423; 937 NW2d 398 (2019), but after reviewing the record, we conclude that the presumption has been overcome. Defense counsel did not have a valid strategic reason for failing to seek exclusion of the cell phone's contents as violative of the particularity requirement.

Attorney Beach testified about this issue at the *Ginther* hearing. Beach described portions of the warrant's supporting affidavit as "weasel language" and acknowledged that the warrant authorized seizure of all of the phone's contents, but he did not believe suppression on this basis would have been warranted because it "got really specific towards the end." Beach explained why he did not file a motion to suppress the contents of the cell phone in addition to his motion to suppress the phone itself:

> Well, because the Affidavit was fine. I—I thought in my mind that [the trial judge erred by not granting the motion to suppress the cell phone] . . . . [A]nd then I look at this search warrant, and frankly, this search warrant probably provides a basis to look for that cell phone. And after that, the content of the cell phone is basically pro forma. I'm surprised it said as much as it did. If they got the cell phone, they're going to look at it.

Beach appeared to be suggesting a mistaken belief that once the police had a lawful basis for seizing the phone they also had the right to search the entirety of its contents. Therefore, once he failed to convince the court that the warrantless seizure of the device itself was unlawful, he did not seem to believe he had any recourse. In other words, Beach's failure to seek exclusion of the phone's contents was based on a misunderstanding of the law rather than trial strategy.

Turning to the second prong, it is not difficult for us to conclude that there is a reasonable probability that the trial would have had a different outcome had the contents of the cell phone not been admitted.[10] We acknowledge that there was persuasive circumstantial evidence outside of the phone's contents connecting defendant to the crimes. The properly admitted evidence established that defendant did not have a significant source of income when he began selling property for Billings and that he and DeGroff only had $283.13 in their joint bank account at the end of July 2019. However, in September 2019, not long before Billings discovered that the contents of the safes were missing, defendant deposited nearly $10,000 into the bank account he shared with DeGroff, and in August 2019 defendant put $57,000 into the gaming machines at the Odawa Casino. Also, defendant quit his job and told his boss that he no longer needed the work because he had found valuables in a locker he purchased online. Moreover, Billings testified that only defendant and DeGroff could have accessed the safes during the period when they were

[10] Indeed, even the trial court, following the *Ginther* hearing, described "[t]he contents of the phone—specifically the text messages" as "integral to the Prosecutor's case" and opined that there was "a reasonable probability that the outcome of the trial would have been different" if the phone's contents had been excluded. The reason the court did not grant a new trial, however, was due to its erroneous conclusion that the good-faith exception applied.

emptied. This evidence was sufficient to prove beyond a reasonable doubt that defendant and DeGroff conspired to steal the contents of Billings's safe.[11]

While the properly admitted evidence was persuasive, the tainted evidence was essentially definitive. Indeed, defendant and DeGroff each made several statements that could fairly be characterized as confessions. For example, on August 5, defendant sent DeGroff a text telling her that he believed he had found keys to the safes. On August 13, defendant told DeGroff that there was "a million dollars in those safes," and DeGroff speculated that Billings just "threw that money in [the safe] and closed it." On October 29, DeGroff insinuated that she helped defendant "steal sixty thousand dollars." On November 24, defendant wished he "had a way to go rob those entire safes." The value of these text messages to the prosecution's case-in-chief, other persuasive evidence notwithstanding, cannot be overstated.

Had the jury been presented only the properly admitted evidence, a guilty verdict would have been unsurprising. When this evidence is taken in conjunction with the text messages, a not guilty verdict would have been shocking. Therefore, we conclude that there is a reasonable probability that the outcome of the proceeding would have been different if not for Beach's mistakes.

III. CONCLUSION

Defendant's convictions are reversed. We remand for additional proceedings consistent with this opinion. If defendant is retried, evidence regarding the contents of defendant's cell phone shall not be admitted. Additionally, defendant shall not be reconvicted of both larceny of property valued at $20,000 or more and receiving and concealing stolen property valued at $20,000 or more. Nor shall defendant be convicted of the corresponding conspiracy counts for both of those charges. We do not retain jurisdiction.

/s/ Allie Greenleaf Maldonado
/s/ Noah P. Hood

[11] Indeed, given the strength of the properly admitted evidence, it is not obvious that the outcome of this appeal would be the same if we were reviewing through a different reversal standard, such as plain error or harmless error, rather than the *Strickland* "reasonable probability" test.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

HOOD, P.J. (*concurring*)

I agree completely with the majority's analysis and conclusions. I write separately only to highlight that in addition to the warrant being overbroad and therefore facially deficient, I would conclude that the warrant affidavit fails the nexus requirement for search warrants. *People v Hughes*, 506 Mich 512, 527 n 6; 958 NW2d 98 (2020). The description of probable cause does not describe the target phone or in any way link it to the underlying investigation. It contains only the most general description of criminals (like everyone else) using cellphones. This is insufficient.

The majority opinion accurately states the factual and procedural background of this case. One point however warrants amplification: the affidavit supporting the search warrant application failed to explain how or why the target device would contain evidence, fruits, or contraband related to the crimes under investigation: namely, larceny and safe breaking.

As the majority observes, the warrant application and affidavit identified the target device as a "Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest." It further identified the device by make, serial number, and location (the county sheriff's property room). Again, the majority correctly observes that the items to be seized encompassed all data on the device with little to no limitation, an obvious issue regarding particularity and overbreadth.

But the warrant affidavit also fails to explain what basis the investigator's had for believing evidence of larceny in a building and safe breaking would be on Carson's cell phone. Unquestionably, the warrant affidavit provides a detailed description of the investigation current

through the date of the affidavit, including evidence linking Carson to the suspected larceny and safe breaking. The affidavit, however, makes little mention of cell phones generally and no mention of Carson's specific cell phone. The only references are in paragraphs 3.w., 3.x., and 3.y. of the affidavit. The affiant attested:

> w) Based on your affiant's training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence. Therefore, data obtained from mobile communication devices and records created by these devices can assist law enforcement in establishing the involvement of a possible suspect or suspects.
>
> x) Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.
>
> y) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

None of these paragraphs discuss how, based on the affiant's training and experience, cell phone data impacts investigations involving larceny or safe cracking. Critically, the affidavit does not mention the target cell phone at all. On its terms, there is no information about how the cell phone was seized, whether Carson used or possessed it, or how long he used or possessed it (including whether he had the same phone at the time of the suspected offense). The affidavit is conspicuously silent on any link between the cell phone and Carson or the cell phone and the investigation into larceny and safe breaking.

The majority correctly states the standard of review. Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). We review the fact findings for clear error. *Id*. We review de novo legal questions including questions of constitutional law. *Id.*

I agree with the majority that the warrant here was overly broad. But I believe the warrant was invalid for another reason: the supporting affidavit failed to establish a nexus between the target cell phone, Carson, and the alleged conduct. *Hughes*, 506 Mich at 527 n 6. See *Zurcher v Stanford Daily*, 436 US 547, 556; 98 S Ct 1970; 56 L Ed 2d 525 (1978); *Riley v California*, 573 US 373, 399; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

The so-called "nexus" requirement is an aspect of both probable cause and particularity. See *Hughes*, 506 Mich at 527 n 6 and 538-539. "Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). See also US Const Am IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); Const 1963, art 1, § 11 ("No warrant to search any place or to seize any person or things or to access electronic data or electronic

communications shall issue without describing them, nor without probable cause, supported by oath or affirmation."). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418, 605 NW2d 667 (2000) (citation omitted). Regarding the nexus requirement, our Supreme Court has stated that "some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality." *Hughes*, 506 Mich at 538-539, citing *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967) ("There must, of course, be a nexus . . . between the item to be seized and criminal behavior. Thus . . . , probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.").

"A magistrate's finding of probable cause and his or her decision to issue a search warrant should be given great deference and only disturbed in limited circumstances." *People v Franklin*, 500 Mich 92, 101; 894 NW2d 561 (2017). Our Fourth Amendment jurisprudence requires a magistrate to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). See also *United States v Carpenter*, 360 F3d 591, 594 (CA 6, 2004) ("To justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place. There must, in other words, be a nexus between the place to be searched and the evidence sought.") (quotation marks and citation omitted); *United States v Corleto*, 56 F4th 169, 175 (CA 1, 2022); *United States v Lindsey*, 3 F4th 32, 39 (CA 1 2021); *United States v Mora*, 989 F.3d 794, 800 (CA 10, 2021); *United States v Johnson*, 848 F3d 872, 878 (CA 8, 2017); *United States v Freeman*, 685 F2d 942, 949 (CA 5, 1982).[1] Without a sufficient nexus, a judge may not issue a search warrant. See *United States v Tellez*, 217 F3d 547, 550 (CA 8, 2000) ("We agree, of course, that there must be evidence of a nexus between the contraband and the place to be searched before a warrant may properly issue"). Like other probable cause determinations, whether a sufficient nexus exists is a fact specific question requiring consideration of the totality of the circumstances. *Gates*, 462 US at 238. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher* 436 US at 556. To simplify, if law enforcement seeks a warrant to search an individual's cell phone for evidence of safe breaking, the warrant application needs to explain not only why an individual is suspected of safe breaking, but also why law enforcement expects to find that evidence *in the individual's cell phone*.

Applying these principles to this case, the warrant fails the nexus requirement for two reasons: (1) the general description of the usefulness of cell phone data in investigations is insufficient to establish a nexus to the suspected crimes in this case; and (2) the warrant does not

[1] Though nonbinding on state courts, we may consider lower federal court decisions for their persuasiveness. *People v Brcic*, 342 Mich App 271, 280 n 3; 994 NW2d 812 (2022).

provide the magistrate with any factual information about the phone: who owned it, who used it, how it was recovered, or how long it was used. These failings are obvious from the face of the warrant and affidavit.

Regarding the first issue, the warrant affidavit only contains bald assertions regarding crime and cell phones; there is nothing specific to larceny, safe breaking, or this defendant. In *Hughes*, our Supreme Court expressed reservation about finding a sufficient nexus to issue a warrant to search and seize cell-phone data based solely on the nature of the crime alleged. *Hughes*, 506 Mich at 527 n 6. The Court ultimately declined to answer the question whether the affidavit, stating that the detective's training and experience informed him that drug traffickers commonly use cell phones to aid their criminal enterprise, was insufficient to provide probable cause that the defendant's cell phone would contain evidence of drug trafficking because it concluded that the warrant was invalid for other reasons. *Id*. But even in that case, the affidavit provided some minimal link between the suspected class of crime and use of cell phones. Here, however, that is wholly absent. There is only a reference to criminals using cell phones. This is insufficient. See *id*. (citing approvingly language in *Riley*, 573 US at 399, that "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone"); *United States v Brown*, 828 F3d 375, 384 (CA 6, 2016) ("[I]f the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, . . . it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer"). If we were to conclude that the bald assertions in paragraphs 3.w. and 3.x, that criminals use cell phones, are sufficient to authorize the search in this case, then we will effectively render the warrant requirement a mere formality.

Second, and more critically, even if we were to look past the limited discussion of the affiant's experience regarding criminals generally using cell phones, the affidavit in this case does not identify the target cell phone, let alone who owned it, who used it, when they used it, how it was seized, or how in any way that cell phone specifically ties to this case. The affidavit does not contain even the most minimal connection between the cell phone identified on the first page of the warrant application and the investigation. The investigators could have provided this information through common investigative tactics (i.e., a search warrant to Carson's service provider to determine how long he had the device or when it was last used), or even by adding details about Carson's arrest and the seizure of the device. We cannot overlook this glaring deficiency. The reviewing magistrate also should not have overlooked this.

These reasons, in addition to those stated in the majority opinion, provide a basis for concluding that the warrant was invalid, law enforcement could not have reasonably relied on it, and the good-faith exception does not apply.

/s/ Noah P. Hood

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

REDFORD, J. (*dissenting*).

I conclude that the record does not support the majority's determination that there was a double jeopardy violation that warrants vacating some of defendant's convictions. Therefore, defendant's trial counsel did not render ineffective assistance by failing to raise a double jeopardy argument. I further conclude that the search warrant authorizing the search of defendant's cell phone did not violate the "particularity" requirement of the Fourth Amendment. To the extent that the search warrant satisfied the Fourth Amendment only with respect to retrieval of the text messages, the constitutionally infirm portion of the warrant could be severed, allowing admission of the text messages. Moreover, even were the search warrant constitutionally defective, the good-faith exception to the exclusionary rule would apply. Additionally, assuming that the text messages extracted from defendant's cell phone were inadmissible under the exclusionary rule, defendant has not established the requisite prejudice in light of the overwhelming untainted evidence of guilt. Thus, defendant's claim of ineffective assistance of counsel relative to his Fourth Amendment "particularity" argument cannot serve as a basis to reverse his convictions. Finally, in my view, none of defendant's appellate arguments left unaddressed by the majority merit reversal. I would affirm defendant's convictions and sentences. Accordingly, I respectfully dissent.

I. INEFFECTIVE ASSISTANCE OF COUNSEL – GENERAL PRINCIPLES

Whether defense counsel was ineffective presents a mixed question of fact and constitutional law, and factual findings are reviewed for clear error, whereas questions of law are subject to de novo review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In

People v Carbin, 463 Mich 590, 599-600; 623 NW2d 884 (2001), the Michigan Supreme Court recited the principles that govern our analysis of a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test . . . . First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 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. [Quotation marks and citations omitted.]

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

"This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Traver (On Remand)*, 328 Mich App 418, 422-423; 937 NW2d 398 (2019) (quotation marks and citation omitted). But "a court cannot insulate the review of counsel's performance by [simply] calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "Initially, a court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. (quotation marks, citation, and brackets omitted).

II. DOUBLE JEOPARDY

Under the Michigan and federal constitutions, the state cannot twice place an accused in jeopardy for the same criminal offense. See US Const, Am V; Const 1963, art 1, § 15; *People v Beck*, 510 Mich 1, 11-12; 987 NW2d 1 (2022).[1] The protection against double jeopardy attaches when a defendant is placed on trial before a jury or a judge. *Beck*, 510 Mich at 12.[2] Although we need not construe our Constitution consistently with comparable provisions of the United States Constitution, "past interpretations of the [Fifth Amendment's] Double Jeopardy Clause have

[1] I also note that the double jeopardy prohibition secured by the Fifth Amendment constitutes a fundamental constitutional right applicable to the states through the Fourteenth Amendment. *Beck*, 510 Mich at 11 n 1.

[2] In a jury trial, jeopardy generally attaches when the jurors are selected and sworn. *Id.*

accurately conveyed the meaning of Const 1963, art. 1, § 15. … Therefore, our analysis is the same under each." *Id.* at 11 n 1.

"The prohibition against double-jeopardy protects individuals in three ways: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015) (quotation marks and citation omitted). Relevant to the instant case, the third constitutional protection is referred to as the "multiple punishments" strand of double jeopardy. *Id.* With respect to the multiple punishments strand, the Supreme Court in *Miller* explained:

> The multiple punishments strand of double jeopardy is designed to ensure that courts confine their sentences to the limits established by the Legislature and therefore acts as a restraint on the prosecutor and the Courts. The multiple punishments strand is not violated where a legislature specifically authorizes cumulative punishment under two statutes. Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.
>
> The Legislature, however, does not always clearly indicate its intent with regard to the permissibility of multiple punishments. *When legislative intent is not clear*, Michigan courts apply the "abstract legal elements" test[.] [*Id.* at 17-19 (quotation marks, citations, brackets, and ellipses omitted; emphasis added).]

In this case, the majority frames the issue as concerning multiple punishments for the "same act." I cannot conclude, however, that the double jeopardy issue squarely and solely involves multiple punishments for the "same act." At trial, the prosecution focused on defendant's actions in "concealing" the money stolen from the safes for purposes of proving the charge of receiving or concealing stolen property valued at $20,000 or more (RCSP), MCL 750.535(2)(a).[3] MCL

[3] In his closing argument, the prosecutor contended:

> Now, the defendant, basically, commits this crime once he takes possession of Don's property. So at that point he's possessing stolen property knowing that it's stolen. But the defendant[] commits the crime in another way. Also, it has to be twenty thousand dollars or more. But the defendant also commits this crime in another way. We don't have to prove he committed it two ways, but he did, 'cause he concealed the stolen property, he concealed the stuff he stole from Don. Concealed means to hid[e], disguise, get rid of, or do any other act to keep the property from being discovered. And the defendant did that [in] all sorts of ways in this case. He got rid of it in all sorts of ways. He ran a bunch of it through the casino. He bought a pickup truck with it. He paid for the engagement ring on Brandy's

750.535(1) provides that "[a] person shall not buy, receive, possess, conceal, *or* aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted." (Emphasis added.) The crime can be accomplished by knowingly *concealing* stolen property. When instructing the jury on the elements of RCSP, the trial court touched on the various ways to commit the offense, i.e., buying, possessing, receiving, or concealing stolen property. Consistently with M Crim JI 26.2(4), the trial court instructed the jury that "[t]o conceal means to intentionally hide, disguise, get rid of or do any other act to keep the property from being discovered."

With respect to the elements of larceny, a prosecutor is required to prove beyond a reasonable doubt that the defendant took someone else's property without consent, that there was some movement of the property, that the defendant intended to permanently deprive the owner of the property, and that the property had a certain fair market value. See M Crim JI 23.1; see also *People v Williams*, 323 Mich App 202, 205; 916 NW2d 647 (2018), rev'd in part on other grounds 504 Mich 892 (2019).[4] In this case, the evidence demonstrated that defendant committed and completed the crime of larceny when, without consent, he removed the cash from the safes owned by Mr. Billings and left Billings's home with the money. Although defendant possessed and arguably "received" stolen money at that point for purposes of adjudicating the RCSP charge, the acts of concealment of the stolen cash as argued and relied on by the prosecution occurred long after the larceny. In other words, the offense of larceny was completed before the crime of *concealment* of stolen property—as urged and theorized by the prosecutor—took place, even though the offense of RCSP would have occurred almost simultaneously with the larceny if "possessing" or "receiving" stolen property served as the basis of the charge. This Court has ruled that a defendant's protection against double jeopardy is not violated if one crime is complete before the other crime takes place, even when the offenses share common elements or one constitutes a lesser offense of the other. *People v Bulls*, 262 Mich App 618, 629; 687 NW2d 159 (2004); *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002); *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

There is no way for us to ascertain whether the jury convicted defendant of RCSP premised on concealment, possession, or receipt of the stolen money, or a combination of these theories.[5] But if the jury convicted defendant of the crime of RCSP in whole or in part on the basis of concealment of the stolen cash long after the larceny was completed, which is certainly possible if not likely in light of the evidence and the prosecution's closing argument, the majority's finding

---

> finger with it. That's how he got rid of – concealed this, he converted it into other things: into gaming at the casino, into personal property, into rent payments, into all sorts of stuff.

[4] The jury was instructed consistently with M Crim JI 23.1.

[5] I recognize the likelihood that if the jury found that defendant had concealed the stolen money, it also found that defendant had received and possessed the cash because concealment would be difficult to accomplish without first having received and possessed the property.

of a double jeopardy violation effectively vacates convictions that were supported by a theory—post-larceny concealment of the stolen cash—that did not trigger double jeopardy protection. While a double jeopardy infringement warranting reversal might very well be found if the jury convicted defendant of RCSP on the basis of possessing or receiving the stolen cash and not concealment, the same is not true in relation to an RCSP conviction predicated on post-larceny concealment of the stolen money because that crime had yet to occur when the offense of larceny had been completed. The "act" of stealing the money was separate and distinct from the subsequent "act" of concealing the cash; they were not the "same act."[6] I agree with the following position adopted by the Texas appellate courts as set forth in *Langs v State*, 183 SW3d 680, 687 (Tex Crim App, 2006):

> [W]e [have] reasoned that, when separate theories for an offense are issued to the jury disjunctively, a double jeopardy violation is not clearly apparent on the face of the record if one of the theories charged would not constitute a double jeopardy violation and there is sufficient evidence to support that valid theory. The fact that the jury's verdict could have relied on a theory that would violate the Double Jeopardy Clause, is not sufficient to show a constitutional violation clearly apparent on the face of the record. [Quotation marks and citation omitted.]

In this case, there was more than sufficient evidence to convict defendant of RCSP on the post-larceny concealment theory proffered by the prosecution, which, in my opinion, did not result in a double jeopardy violation. The majority necessarily and implicitly finds a double jeopardy violation meriting the vacation of convictions on the basis of an assumption that the jury did not convict defendant of RCSP under the concealment theory framed by the prosecutor, even though that theory was the focus of the prosecution's RCSP closing argument and, again, patently supported by the evidence. And then the majority compounds that error by concluding that trial counsel's performance was deficient because of a failure to raise the double jeopardy argument. That analysis and ruling are much too tenuous given the existing record.

Because the jury may have convicted defendant in whole or in part of RCSP on the post-larceny concealment theory, I conclude that the record does not support vacating the RCSP or larceny conviction, or the related conspiracy convictions, on double jeopardy grounds. Contrary to the majority's holding, a defendant can be convicted of larceny and RCSP without offending the Double Jeopardy Clauses of the Michigan and federal constitutions where the RCSP conviction is based on the theory that the defendant engaged in acts to conceal the stolen property after earlier having completed the theft of the property. And counsel does not render ineffective assistance by failing to raise a futile or meritless objection or issue. See *People v Putman*, 309 Mich App 240, 245; 870 NW2d 593 (2015). Moreover, on the record before us, I cannot conclude that trial counsel's performance was deficient and fell below an objective of reasonableness. See *Toma*, 462 Mich at 302.

[6] Of course, concealment of stolen property can occur almost immediately after or hand-in-hand with a larceny, but in this case the prosecution pointed the jury to acts of concealment that took place well after the larceny had transpired.

The majority states that it views the reasoning in *People v Johnson*, 176 Mich App 312; 439 NW2d 345 (1989), "as sound, and [that] we reaffirm its conclusion that the [L]egislature did not intend for cumulative punishments" in relation to the offenses of RCSP and larceny. In *Johnson*, the Court's full recitation of the facts was as follows:

> Defendant's convictions arose out of his theft of fourteen shirts from a store in February of 1987. Defendant ran into the store, snatched the shirts from a rack, and ran back out and into a waiting car. Police stopped defendant and his driver later that day. [*Id.* at 313.]

The *Johnson* panel indicated that its analysis required an inquiry into "whether the Legislature intended to authorize multiple punishment[s] under [the] different statutes for a single criminal transaction." *Id.* The Court ruled:

> Each statute prohibits conduct which violates the same social norm: theft of property. Although one statute prohibits the actual theft and the other prohibits reaping the fruits by buying, receiving, possessing, or concealing stolen property, each statute operates so as to discourage the theft of property, although in different manners. Thus, we must conclude that the Legislature did not intend to provide for multiple punishment under both these statutes.
>
> * * *
>
> We conclude that the Legislature did not intend to authorize punishment under both these statutes for a single criminal act. Defendant's multiple convictions for this single theft violate the constitutional prohibition against double jeopardy. In view of this conclusion, we vacate defendant's conviction and sentence on the charge of possession of stolen property under MCL 750.535[.] [*Id.* at 314-315.]

Johnson is distinguishable because it spoke of "single" criminal transactions or acts and, as I stated earlier, defendant's actions here in concealing the money were separate and distinct from his much-earlier act involving the larcenous taking of money. Indeed, there is no indication that the defendant in *Johnson* concealed the stolen shirts or that the prosecution even pursued a theory or made an accusation that the defendant had concealed the shirts.[7] Moreover, *Johnson* does not constitute binding precedent, MCR 7.215(J)(1), and I do not find it persuasive for our purposes because it did not take into consideration the subtleties created by the different theories that can be charged or argued by a prosecutor under MCL 750.535.

Additionally, the reasoning in *Johnson* that the Legislature did not intend multiple punishments simply because the statutes both generally addressed the "theft" of property is legally questionable. First, the *Johnson* panel did not state whether the legislative intent was *clearly* indicated, which assessment is required by Supreme Court precedent. See *Miller*, 498 Mich at 18 (multiple punishments for the same offense violate double jeopardy when "the Legislature

[7] I note that the opinion in *Johnson* merely stated that the defendant had pleaded guilty to "*possession* of stolen property over $100." *Johnson*, 176 Mich App at 313 (emphasis added).

expresses a clear intention in the plain language of a statute to prohibit multiple punishments"). Second, as but one example, convictions for armed robbery and bank robbery arising out of the same incident are not barred by double jeopardy protections, even though both offenses involve "theft." See *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004) ("[N]either the Double Jeopardy Clause of the United States Constitution nor the Double Jeopardy Clause of the Michigan Constitution precludes defendant's conviction and sentence for both bank robbery and armed robbery arising out of the same incident."). With respect to legislative intent, I see nothing in the two statutes at issue, MCL 750.356 and MCL 750.535, that, pertinent to this case, "specifically authorizes cumulative punishment," or that "expresses a clear intention in the plain language of [the] statute[s] to prohibit multiple punishments[.]" *Miller*, 498 Mich at 18 (quotation marks, citations, and brackets omitted).

After concluding that the Legislature did not intend for multiple punishments in regard to convictions for larceny of property and RCSP, the majority posits that it is next necessary to apply the abstract-legal-elements test because the *Johnson* panel did not do so given that it was decided before the test was adopted by our Supreme Court. In *Miller*, 498 Mich at 19, the Supreme Court defined the abstract-legal-elements test:

> This test focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if each of the offenses for which defendant was convicted has an element that the other does not. This means that, under the . . . test, two offenses will only be considered the "same offense" where it is impossible to commit the greater offense without also committing the lesser offense. [Quotation marks, citations, and ellipses omitted.]

I respectfully disagree with the majority's analysis because caselaw provides that once it is determined that the Legislature clearly intended to either authorize or prohibit multiple punishments, the analysis must stop, absent the need to apply the abstract-legal-elements test. In *People v Wafer*, 509 Mich 31, 38-39; 983 NW2d 315 (2022), our Supreme Court observed:

> [W]e set forth a two-part test to determine when multiple punishments are, or are not, permitted. The first step is to look to the ordinary meaning of the statute. If the Legislature has *clearly indicated* its intent with regard to the permissibility of multiple punishments, *the inquiry ends here*. The touchstone of legislative intent is the statute's language, and we accord clear and unambiguous language its ordinary meaning. However, if the intent is not apparent from the text, Michigan courts apply the abstract-legal-elements test. [Quotation marks, citations, and brackets omitted; emphasis added.]

Both *Miller* and *Wafer* expressed that the Legislature's intent is to be evaluated with respect to both the authorization of and the prohibition against cumulative or multiple punishments, and the abstract-legal-elements test is only analyzed if clear legislative intent cannot be discerned one way or the other. *Wafer*, 509 Mich at 38; *Miller*, 498 Mich at 18. In *Miller*, the Court determined that the Legislature had clearly intended to prohibit multiple punishments under the statutory

provisions in dispute, and the Court therefore did not apply the abstract-legal-elements test. *Miller*, 498 Mich at 25-26.

Accordingly, after determining that the Legislature did not intend multiple punishments for the crimes of larceny and RCSP, the majority's analysis should have ended without consideration and application of the abstract-legal-elements test. The majority opinion incorrectly suggests that even when legislative intent can be ascertained, the abstract-legal-elements test must still be analyzed. I also note that the majority concludes that the Legislature "did not intend for cumulative punishments," but as stated in *Wafer*, we are required to assess whether the Legislature has "*clearly* indicated its intent." *Wafer*, 509 Mich at 39 (emphasis added).

With respect to the majority's application of the abstract-legal-elements test, it concludes "that it is not possible for a person to be guilty of larceny without also being guilty of receiving or concealing stolen property; therefore, the same act cannot give rise to convictions for both crimes."[8] While it is arguable that one cannot commit a larceny without committing the offense of RCSP because merely *possessing* stolen property suffices for a conviction under MCL 750.535(1), the crime of larceny can be committed without "concealing" pilfered property. For example, if, with the requisite intent and without consent, an individual grabbed an unattended purse belonging to another and openly walked away with it and was then caught, there would be a larceny yet no basis for an RCSP conviction predicated on concealment. In a somewhat similar vein, a defendant can be guilty of merely possessing, receiving, or concealing stolen property without having committed the underlying crime of larceny in regard to that property. The point of my discussion is that when a prosecutor proceeds on a theory that a defendant stole property and then subsequently concealed the property, the crimes of larceny and RCSP each have elements that the other does not—taking or stealing property and concealing stolen property. This creates a problem with the majority's application of the abstract-legal-elements test to find a double jeopardy violation that warrants vacating any conviction.

Respectfully, the primary flaw in the majority's resolution of the double jeopardy issue is the failure to consider that the crime of RCSP can be based on concealment of stolen property that took place long after the property was stolen, which theory was argued by the prosecution at trial and supported by the evidence yet disregarded by the majority in its opinion.

III. VALIDITY OF THE SEARCH WARRANT

I generally agree with the majority's recitation of the law regarding the search of a cell phone pursuant to a search warrant and the principles regarding the "particularity" requirement of the Fourth Amendment. In *People v Hughes*, 506 Mich 512, 537-539; 958 NW2d 98 (2020), the Michigan Supreme Court explained:

> This Court has yet to specifically address the Fourth Amendment requirements for a search of digital data from a cell phone authorized by a warrant.

[8] The majority appears to take the position that the offense of RCSP is a lesser offense of larceny of property (greater offense); however, both crimes are ten-year felonies. See MCL 750.356(2)(a) and MCL 750.535(2)(a).

> In considering this issue, we are guided by two fundamental sources of relevant law: (a) the Fourth Amendment's "particularity" requirement, which limits an officer's discretion when conducting a search pursuant to a warrant and (b) [the] recognition of the extensive privacy interests in cellular data. In light of these legal predicates, we conclude that as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be "reasonably directed at uncovering" evidence of the criminal activity alleged in the warrant and that any search that is not so directed but is directed instead toward finding evidence of other and unrelated criminal activity is beyond the scope of the warrant.
>
> The Fourth Amendment requires that search warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV. A search warrant thus must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. . . . That is, some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality. . . . . [Quotation marks, citations, and emphasis omitted; second alteration in original.]

The manifest purpose of the particularity requirement is to prevent law enforcement from conducting general searches. *Id.* at 539. The particularity requirement guarantees that a search will be carefully tailored to its justifications by limiting the authorization to search to the specific areas and things for which there existed probable cause to search. *Id.* The requirement is meant to prevent wide-ranging exploratory searches that the Framers intended to prohibit. *Id.*

In this case, the search warrant indicated that it pertained to defendant's cell phone that had been seized when he was arrested, and it described the data, materials, and information subject to search and seizure as follows:

> Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data

> on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

The majority rules that "this was a general warrant that gave the police license to search *everything* on defendant's cell phone in the hopes of finding anything, but nothing in particular, that could help with the investigation." The majority further concludes that the search "warrant did not place any limitations on the permissible scope of the search of defendant's phone."

I do not agree with this construction of the search warrant in light of the introductory sentence, which, again, provided for the search and seizure of "[a]ny and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking." This opening sentence provided context for all that followed in the paragraph, necessarily placing limitations and parameters on the nature and scope of the information and data that could be sought or retrieved by law enforcement when searching the cell phone's digital record. Indeed, the second sentence of the search warrant began, "*As used above*, the term records or documents includes . . . ." (Emphasis added.) This language necessarily pulled all of the subsequent references in the paragraph to data, e-mails, text messages, and other electronic information into the introductory sentence and its confinement to the investigation of larceny and safe breaking. The search warrant supplied context connecting the particularized description of the venue to be searched, i.e., the cell phone, and the data and information to be seized with the larcenous, safe-breaking criminal conduct that was suspected. See *Hughes*, 506 Mich at 538. The search warrant was not directed toward finding evidence of other or unrelated criminal activity. *Id.*

The majority acknowledges the search warrant's opening sentence but then states that "this small guardrail was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents." For the reasons I noted above, the majority too easily dispenses of the first sentence of the warrant. The language was not a small guardrail; rather, the sentence plainly set forth the boundaries of the entire warrant. The majority cites nonbinding opinions from other jurisdictions regarding cell-phone search warrants in which the courts found that there was a lack of compliance with the particularity requirement of the Fourth Amendment. We are compelled, however, to comply with Michigan precedent, and in *Hughes*, 506 Mich at 552-554, our Supreme Court held:

> The ultimate holding of this opinion is simple and straightforward—a warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant. Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant, and an officer is not required to discontinue a search when he or she discovers evidence of other criminal activity while reasonably searching for evidence of the criminal activity alleged in the warrant. However, respect for the Fourth Amendment's requirement of particularity and the extensive privacy interests implicated by cell-phone data . . . requires that officers reasonably limit the scope of their searches to evidence related to the criminal activity alleged in the warrant and not employ that

> authorization as a basis for seizing and searching digital data in the manner of a general warrant in search of evidence of any and all criminal activity. We hold that, as with any other search, an officer must limit a search of digital data from a cell phone in a manner reasonably directed to uncover evidence of the criminal activity alleged in the warrant.

In this case, the search warrant, as I construe it, was consistent with the directives set forth by the *Hughes* Court—it limited the extent of the search of defendant's cell phone by the police to data and information related to the acts of larceny and safe breaking.[9] The search warrant did not authorize the police to search for evidence of any and all criminal activity, and nothing seized by law enforcement was used to charge defendant with crimes unrelated to the theft of Billings's money.

The majority takes particular exception with the fact that the search warrant encompassed photographs and videos, indicating that there was "no evidence suggesting that these files would yield anything relevant[.]" As reflected in the search warrant affidavit, the police had information that defendant and Brandie DeGroff had stolen the money out of Billings's safes and were living lavishly on the cash. I believe that it would certainly be reasonable for the police to have believed that photos or videos on defendant's cell phone might lend support for those averments. The fact that there were no such photos or videos did not render the search warrant constitutionally defective. "Courts should . . . keep in mind that in the process of ferreting out incriminating digital data it is almost inevitable that officers will have to review some data that is unrelated to the criminal activity alleged in the authorizing warrant." *Hughes*, 506 Mich at 547. "So long as it is reasonable under all of the circumstances for officers to believe that a particular piece of data will contain evidence relating to the criminal activity identified in the warrant, officers may review that data[.]" *Id.*

Nevertheless, assuming that the search warrant was constitutionally defective by authorizing the search of photos and videos on defendant's cell phone, as well as other data except for text messages, the exclusionary rule would not require us to bar the admission of the text messages. The United States Court of Appeals for the Sixth Circuit has stated that "infirmity due to overbreadth does not doom the entire warrant; rather, it requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant[.]" *United States v Greene*, 250 F3d 471, 477 (CA 6, 2001) (quotation marks, citation, and ellipses omitted); see also *United States v Blakeney*, 942 F2d 1001, 1027 (CA 6, 1991) ("Our finding of overbreadth regarding the use of the generic term 'jewelry' does not require suppression of all of the items seized pursuant to the warrant. We believe

---

[9] The majority discounts *Hughes* to a degree by asserting that *Hughes* dealt with the question whether the police in searching the entirety of a cell phone's contents acted within the scope of the search warrant, whereas in the instant case we are addressing whether the scope of the warrant was overly broad. Although this distinction is accurate, the *Hughes* Court's discussion setting the parameters of what the police can seek and seize when conducting a search of a cell phone necessarily translates to setting the parameters required of a search warrant regarding a cell phone.

the proper approach to this dilemma is to sever the infirm portion of the search warrant from the remainder which passes constitutional muster."). "When a warrant is severed (or redacted) the constitutionally infirm portion—usually for lack of particularity or probable cause—is separated from the remainder and evidence seized pursuant to that portion is suppressed; evidence seized under the valid portion may be admitted." *United States v George*, 975 F2d 72, 79 (CA 2, 1992).[10]

With respect to the text messages, and regardless of the other data and information mentioned in the search warrant, I simply cannot find a violation of the particularity requirement of the Fourth Amendment. The search warrant authorized the search for text messages on defendant's cell phone pertaining to the investigation of the larceny and safe breaking in which thousands of dollars were stolen. The search warrant affidavit contained numerous averments regarding defendant and DeGroff and their *joint connection* to the crimes and their spending spree thereafter, and the affiant averred that based on his "training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence." Commonsense and reasonable inferences arising from the averments dictated that the couple likely had cell-phone communications by text or otherwise that touched on the crimes and the pair's use of the cash that was stolen from Billings.[11] See *People v Nunez*, 242 Mich App 610, 612-613; 619 NW2d 550 (2000) (search warrants and underlying affidavits must be read in a commonsense and realistic manner); *People v Sloan*, 206 Mich App 484, 486; 522 NW2d 684 (1994) (search warrant affidavits must contain averments that justify any inferences). This issue is all about the text messages, and even assuming a constitutional infirmity concerning almost all the data and information referenced in the search warrant, if the warrant was constitutionally sound

---

[10] In *United States v Cook*, 657 F2d 730, 735 (CA 5, 1981), the United States Court of Appeals for the Fifth Circuit observed:

> We . . . hold that in the usual case the district judge should sever the infirm portion of the search warrant from so much of the warrant as passes constitutional muster. Items that were not described with the requisite particularity in the warrant should be suppressed, but suppression of all of the fruits of the search is hardly consistent with the purposes underlying exclusion. Suppression of only the items improperly described prohibits the Government from profiting from its own wrong and removes the court from considering illegally obtained evidence. Moreover, suppression of only those items that were not particularly described serves as an effective deterrent to those in the Government who would be tempted to secure a warrant without the necessary description. [Citations omitted.]

[11] The concurrence argues that the search warrant affidavit failed the nexus requirement for search warrants. Quoting three of 24 averments, my concurring colleague maintains that "[n]one of these paragraphs discuss how, based on the affiant's training and experience, cell phone data impacts investigations involving larceny or safe cracking." This argument essentially gives no weight to the 21 other averments in the affidavit, fails to appreciate the substance of those assertions that discussed defendant and DeGroff's joint connection to the crimes and expenditures, and pays no heed to the commonsense inference that the couple likely communicated by phone, some of which communications may have entailed texts or e-mails that provided some evidence or insight regarding the crimes.

in regard to the text messages, which I believe is the case, severance should take place and the exclusionary rule should not be applied to preclude the admission of the text messages.

Next, assuming that the search warrant was constitutionally defective in total, I would find that the good-faith exception to the exclusionary rule would apply. In *People v Goldston*, 470 Mich 523, 525-526; 682 NW2d 479 (2004), our Supreme Court held:

> In this case, we must determine whether to recognize a "good-faith" exception to the exclusionary rule. In *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984), the United States Supreme Court interpreted US Const, Am IV and adopted a good-faith exception to the exclusionary rule as a remedy for unreasonable searches and seizures. Under *Leon*, the exclusionary rule does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant ultimately found to have been defective. The exclusionary rule in Michigan is a judicially created remedy that is not based on the text of our constitutional search and seizure provision, Const 1963, art 1, § 11. Indeed, records of the 1961 Constitutional Convention evidence an intent on behalf of the people of Michigan to retreat from the judge-made exclusionary rule consistent with the United States Supreme Court's interpretation of the Fourth Amendment in *Leon*. We therefore adopt the good-faith exception to the exclusionary rule in Michigan. The purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant.

In *People v Czuprynski*, 325 Mich App 449, 472; 926 NW2d 282 (2018), this Court discussed the circumstances in which the good-faith exception does not apply, stating:

> Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his or her reckless disregard of the truth; (2) if the issuing judge or magistrate wholly abandons his or her judicial role; or (3) if an officer relies on a warrant based on a "bare bones" affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

The majority holds "that the warrant in this specific case was so facially deficient by virtue of its failure to particularize the places to be searched and things to be seized that the executing officers could not have reasonably presumed it to be valid."

For the reasons stated earlier, I conclude that the search warrant was not facially deficient and that the particularity requirement of the Fourth Amendment was not violated. Therefore, in my opinion, there is no basis to find that law enforcement acted in any manner other than good faith. The police recovered the text messages in objective, good-faith reliance on a search warrant that was confined to seeking evidence pertaining to defendant's participation, if any, in the acts of larceny and safe breaking. There was no police misconduct; therefore, application of the exclusionary rule serves no valid purpose.

Finally, assuming that the text messages extracted from defendant's cell phone were inadmissible under the exclusionary rule, defendant has not established the requisite prejudice in light of the overwhelming untainted evidence of guilt. *Carbin*, 463 Mich at 600. The following evidence was presented at trial: defendant and DeGroff had direct access to the safes; the balance in the couple's joint bank account dramatically increased after the larceny absent explanation for the funds; defendant quit his job following the theft indicating that he "ran across some money"; defendant and DeGroff began making costly purchases after the larceny; the couple started regularly going out to dinner and the casino following the theft, spending enormous sums of money; items belonging to victim Billings other than the money were found in defendant's home; and the amounts spent by defendant and DeGroff corresponded to the sums stolen from Billings. This evidence constituted overwhelming untainted evidence of guilt. Defendant has not shown the existence of a reasonable probability that, but for counsel's presumed error, the result of the proceedings would have been different. *Id.* While the text messages undoubtedly strengthened the prosecution's case, they simply made an overwhelming case of guilt an insurmountable case of guilt. My confidence in the outcome has not been undermined. *Id.* I cannot conceive of any possibility that the jury would have acquitted defendant absent the text messages.

IV. CONCLUSION

I conclude that the record does not support the majority's determination that there was a double jeopardy violation that would warrant vacating some of defendant's convictions. Therefore, defendant's trial counsel did not render ineffective assistance by failing to raise a double jeopardy argument. I further conclude that the search warrant authorizing the search of defendant's cell phone did not violate the "particularity" requirement of the Fourth Amendment. To the extent that the search warrant satisfied the Fourth Amendment only with respect to retrieval of the text messages, the constitutionally infirm portion of the warrant could be severed, allowing admission of the text messages. Moreover, even were the search warrant constitutionally defective, the good-faith exception to the exclusionary rule would apply. Assuming that the text messages extracted from defendant's cell phone were inadmissible under the exclusionary rule, defendant has not established the requisite prejudice in light of the overwhelming untainted evidence of guilt. Thus, defendant's claim of ineffective assistance of counsel relative to his Fourth Amendment "particularity" argument cannot serve as a basis to reverse his convictions. Finally, in my view, none of defendant's appellate arguments left unaddressed by the majority merit reversal.[12] I would affirm defendant's convictions and sentences. Accordingly, I respectfully dissent.

/s/ James Robert Redford

[12] For purposes of my dissent, it is unnecessary to engage in an analysis of defendant's arguments that the majority did not need to reach. I have examined these arguments and conclude that none of them merit reversal.

20-005054-FC JUDGE JOHNSON FILE 05/21/20 ADJ DT 10/21/20 CLOSE 12/15/20
EMMET COUNTY COD SCAO:SEC B LINE 01

D 001 CARSON,MICHAEL,GEORGIE DOB: 06/16/81 SEX: M RACE:
SSN: XXXXXXXXX
6535 HONEYSETTE RD CTN:242000014801 TCN:O820125240A
ALANSON, MI 49706 SID:2022962T PIN:5778-19
DLN:XXXXXXXXXXXXX ST:XX
ATY: BEACH,DUANE J., PROSECUTOR: SCHUITEMA,MICHAEL H.,
P-34655 231-330-5333 APPOINTED P-72718
LOWER DISTRICT: 9000 CTY# 24 CASE# 20-0145 PRELIM: WAIVE 08/01/19
INCARCERATION DATE: 08/01/19 DISTRICT ARRAIGNMENT: 02/26/20

Bond History

Num	Amount	Type	Posted Date	Status
1	$100,000.00	Cash/Surety		

Charges

Num	Type	Charge(Pacc)	Asc/Trf	Charge Description	Offense Dt	Dsp	Evt
01	ORG	750.531-B		SAFE BREAKING	08/01/19	GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
02	ORG	750.3562A		LARCENY OVER $20,000	08/01/19	GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
03	ORG	750.5352A		REC & CON PROP 20,000 +	08/01/19	GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
04	ORG	750.360		LARCENY BUILDING	08/01/19	GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
05	ORG	750.531-B	C	SAFE BREAKING		GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
06	ORG	750.3562A	C	LARCENY OVER $20,000		GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
07	ORG	750.5352A	C	REC & CON PROP 20,000 +		GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			
08	ORG	750.360	C	LARCENY BUILDING		GTY	JTW
	NTC	769.12		HABITUAL OFFENDER 4TH CON			

Assessments

Account	Ordered	Paid	Balance
STATE MINIMUM COSTS	$544.00	$.00	$544.00
RESTITUTION - CIRCUIT CT	$77,510.00	$.00	$77,510.00
CRIME VICTIM RIGHTS	$130.00	$.00	$130.00
COST VRF	$2,500.00	$.00	$2,500.00
TOTAL:	$80,684.00	$.00	$80,684.00

PAYMENT DUE: 12/21/20 LATE FEE DATE: 2/16/21

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments	
1	05/21/20	JOHNSON		RETURN TO CIRCUIT COURT	CLK MLK
				SET NEXT DATE FOR: 05/26/20 8:30 AM	CLK

			SCHEDULING CONFERENCE	
2	05/22/20		INFORMATION	CLK MLK
			WITNESS LIST; CONSECUTIVE	CLK
			SENTENCE IS NOT APPROPRIATE;	CLK
			POS	CLK
3	05/26/20		SCHEDULING CONFERENCE ORDER	CLK MLK
			SET NEXT DATE FOR: 08/05/20 8:30 AM	CLK
			JURY TRIAL	
			(2 DAYS)	CLK
			PLEA AGREEMENT CUTOFF AND	CLK
			MOTIONS NOT LATER THAN 7/7/20	CLK
4	05/27/20		LIST OF WITNESSES; POS	CLK EEF
5	06/23/20		AMENDED LIST OF WITNESSES	CLK MLK
			THE PROS INTENDS TO CALL TRIAL	CLK
			POS	CLK
6	06/26/20		NOTICE	CLK MLK
			SET NEXT DATE FOR: 07/07/20 2:15 PM	CLK
			MOTION HEARING	
			MOTION TO SUPPRESS THE	CLK
			CELLPHONE TAKEN FROM HIS HOME	CLK
			ON THE DAY OF HIS ARREST AND	CLK
			EXCLUDE ALL EVIDENCE DERIVED	CLK
			BRIEF; POS	CLK
7	06/29/20	D 001	FOURTH REQUEST FOR DISCOVERY;	CLK MLK
			POS	CLK
8	07/01/20		PEOPLE'S RESPONSE TO MOTION	CLK EEF
			TO SUPPRESS CELLPHONE; POS	CLK
9	07/02/20		INFORMATION	CLK MLK
			AMENDED INFORMATION	CLK
10	07/07/20		MOTION HEARING	CRT MLK
			MOTION TO SUPPRESS EVIDENCE	CRT
11	07/15/20		MISCELLANEOUS ORDER	CLK MLK
			OPINION AND ORDER- MOTION	CLK
			TO SUPPRESS IS DENIED	CLK
12	07/17/20		PEOPLE'S PROPOSED JURY	CLK MLK
			INSTRUCTIONS; POS	CLK
13	07/21/20		SECOND AMENDED LIST OF	CLK MLK
			WITNESSES THE PROS INTENDS	CLK
			TO CALL AT TRIAL; POS	CLK
14	07/23/20	D 001	SET NEXT DATE FOR: 08/03/20 9:30 AM	CLK MLK
			MOTION HEARING	
			MOTION IN LIMINE; BRIEF IN	CLK
			SUPPORT; POS	CLK
15	07/24/20	D 001	WITNESS AND EXHIBIT LIST; POS	CLK MLK
16			PEOPLE'S RESPONSE TO DEFT'S	CLK MLK
			MOTION IN LIMINE; POS	CLK
17	07/29/20		LIST OF WITNESSES THE PROS.	CLK MLK
			INTENDS TO CALL AT TRIAL; POS	CLK
18	07/31/20	D 001	REQUEST TO CHARGE THE JURY;	CLK MLK
			POS	CLK
20	08/04/20		MISCELLANEOUS ORDER	CLK MLK
			SET NEXT DATE FOR: 08/31/20 11:00 AM	CLK
			MOTION HEARING	
			MOTION IN LIMINE	CLK
			STIP AND ORDER TO ADJOURN	CLK
			DEFT'S MOTION IN LIMINE	CLK
21	08/05/20		FOURTH AMENDED LIST OF	CLK MLK

			WITNESSES; POS			CLK
22	08/06/20	D 001	FIFTH REQUEST FOR DISCOVERY			CLK MLK
			SUBPOENA DUCES TECUM; POS			CLK
23	08/18/20		NOTICE SENT FOR: 08/24/20 SCHEDULING CONFERENCE	8:30	AM	CLK CLF
24	08/24/20		SCHEDULING CONFERENCE ORDER			CLK MLK
			SET NEXT DATE FOR: 10/19/20 JURY TRIAL	8:30	AM	CLK
			(3 DAYS)			CLK
			PLEA AGREEMENT CUTOFF AND			CLK
			MOTIONS NOT LATER THAN			CLK
			9/25/20			CLK
25	08/28/20		NOTICE OF INTENT TO USE TECH'S			CLK MLK
			REPORT IN LIEU OF TESTIMONY;			CLK
			POS			CLK
26			FIFTH AMENDED LIST OF			CLK MLK
			WITNESSES THE PROS. INTENDS			CLK
			TO CALL AT TRIAL; POS			CLK
27	08/31/20		MOTION HEARING			CRT MLK
			MOTION IN LIMINE IS DENIED			CRT
28			SUBPOENA DUCES TECUM			CLK MLK
30	09/23/20	D 001	SET NEXT DATE FOR: 10/06/20 MOTION HEARING	2:45	PM	CLK MLK
			MOTION FOR ORDER TO SHOW			CLK
			CAUSE			CLK
			POS			CLK
31	09/24/20		PEOPLE'S RESPONSE TO DEFT'S			CLK MLK
			MOTION FOR ORDER TO SHOW			CLK
			CAUSE; POS			CLK
32	10/01/20		MISCELLANEOUS ORDER			CLK MLK
			STIP AND ORDER TO ALLOW			CLK
			JUDY BILLINGS TO TESTIFY			CLK
			VIA VIDEO TECHNOLOGY			CLK
33	10/05/20		INFORMATION			CLK MLK
			AMENDED INFORMATION			CLK
34	10/06/20	D 001	APPEARANCE OF CO-COUNSEL			CLK MLK
			(PRO BONO)			CLK
35			WITHDRAWAL OF MOTION FOR			CLK EEF
			ORDER TO SHOW CAUSE; POS			CLK
36	10/14/20		SET NEXT DATE FOR: 10/19/20 MOTION HEARING	2:30	PM	CLK MLK
			MOTION IN LIMINE			CLK
			PEOPLE'S MOTION IN LIMINE TO			CLK
			EXCLUDE CERTAIN TRIAL			CLK
			EXHIBITS DISCOVERED BY DEFT;			CLK
			POS			CLK
37	10/16/20		PEOPLE'S WITHDRAWAL OF MOTION			CLK MLK
			IN LIMINE TO EXCLUDE CERTIAN			CLK
			TRIAL EXHIBITS DISCOVERED BY			CLK
			DEFT; POS			CLK
38	10/19/20		JURY TRIAL WHOLE DAY			CRT EEF
39	10/20/20		JURY TRIAL WHOLE DAY			CRT EEF
40	10/21/20	00099	JURY TRIAL WHOLE DAY			CRT MLK
			FOUND GUILTY			CRT
			PSI ORDERED; PROS. MOTION			CRT
			TO CANCEL BOND IS DENIED;			CRT
			DEFT TO WEAR A GPS MONITOR			CRT

41 NOTICE SENT FOR: 12/15/20 9:15 AM CLK CJB
SENTENCING
42 12/08/20 MONEY ORDERED CRT MLK
$544.00 STATE MINIMUM COSTS 80,010.00 RESTITUTION - CIRCUIT CT
$130.00 CRIME VICTIM RIGHTS
43 12/11/20 D 001 MOTION FOR BOND PENDING CLK MLK
APPEAL; OBJECTION TO SCORING CLK
OFFENSE VARIABLE 10; POS CLK
44 PEOPLE'S RESPONSE TO DEFT'S CLK MLK
MOTION FOR BOND PENDING CLK
APPEAL; POS CLK
45 12/14/20 D 001 LETTERS SUBMITTED TO THE COURT CLK MLK
ON BEHALF OF MICHAEL CARSON CLK
46 12/15/20 CO-DEFENDENTS/CONSOLIDATED CLK MLK
BRANDIE DEGROFF CLK
47 00001 SENTENCING CRT MLK
SENTENCES TO BE SERVED CRT
CONCURRENTLY TO EACH OTHER. CRT
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
CONCURRENT 10-MMM-DDD 20-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
48 00002 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
9-MMM-DDD 20-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
49 00003 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
9-MMM-DDD 20-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
50 00004 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
3-MMM-DDD 15-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
51 00005 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
10-MMM-DDD 20-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
52 00006 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
9-MMM-DDD 20-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
53 00007 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
9-MMM-DDD 20-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
54 00008 SENTENCING CRT MLK
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
3-MMM-DDD 15-MMM-DDD YYY-MMM- 1
BEGIN 12/15/20
55 MOTION HEARING CRT MLK
MOTION FOR BOND PENDING CRT
APPEAL IS DENIED CRT
56 FINAL ORDER OR JUDGEMENT FILED CLK MLK
JUDGMENT OF SENTENCE TO MDOC CLK
57 12/21/20 MONEY ORDERED CRT MLK
$2,500.00- RESTITUTION - CIRCUIT CT 2,500.00 COST VRF
..... END OF SUMMARY .....

Original - Court
1st copy - Corrections
2nd copy - Corrections (for return)
3rd copy - Michigan State Police CJIC
4th copy - Defendant
5th copy - Prosecutor

Approved, SCAO

STATE OF MICHIGAN 57TH JUDICIAL CIRCUIT EMMET COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 20-005054-FC-P

ORI: MI-240015J

Court Address: 200 DIVISION STREET, COUNTY BUILDING, PETOSKEY, MI 49770

Court Telephone no.: 231-348-1744

Police Report No. 5778-19

THE PEOPLE OF THE STATE OF MICHIGAN

V

Defendant's name, address, and telephone no.
MICHAEL GEORGIE CARSON
6535 HONEYSETTE RD
ALANSON, MI 49706

CTN/TCN	SID	DOB
242000014801	2022962T	6/16/81

Prosecuting attorney's name: SCHUITEMA, MICHAEL H., Bar no.: 72718

Defendant attorney's name: BEACH, DUANE J., Bar no.: 34655

THE COURT FINDS:

1. The defendant was found guilty on 10/21/20 (Date) of the crime(s) stated below.

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC code
1			X		SAFE BREAKING HABITUAL OFFENDER 4TH CON	750.531-B 769.12
2			X		LARCENY OVER $20,000 HABITUAL OFFENDER 4TH CON	750.3562A 769.12
3			X		REC & CON PROP 20,000 + HABITUAL OFFENDER 4TH CON	750.5352A 769.12
4			X		LARCENY BUILDING HABITUAL OFFENDER 4TH CON	750.360 769.12
5			X		SAFE BREAKING HABITUAL OFFENDER 4TH CON	750.531-B CONSPIRE 769.12
6			X		LARCENY OVER $20,000 HABITUAL OFFENDER 4TH CON	750.3562A CONSPIRE 769.12
7			X		REC & CON PROP 20,000 + HABITUAL OFFENDER 4TH CON	750.5352A CONSPIRE 769.12
8			X		LARCENY BUILDING HABITUAL OFFENDER 4TH CON	750.360 CONSPIRE 769.12

*Insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill, "D" for dismissed by court, or "NP" for dismissed by prosecutor/plaintiff.

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.625(21)(b).

Defendant's driver's license number

☐ 3. HIV testing and sex offender registration are completed.

☐ 4. The defendant has been fingerprinted according to MCL 28.243.

☐ 5. A DNA sample is already on file with the Michigan State Police from a previous case. No assessment is required.

IT IS ORDERED:

☐ 6. Probation is revoked.

7. Participating in a special alternative incarceration unit is ☐ prohibited. ☐ permitted.

8. The defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

SEE NEXT PAGE

STATE OF MICHIGAN 57TH JUDICIAL CIRCUIT EMMET COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 20-005054-FC-P

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	Days	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
1	12/15/20	10			20			12/15/20		1	
2	12/15/20	9			20			12/15/20		1	
3	12/15/20	9			20			12/15/20		1	
4	12/15/20	3			15			12/15/20		1	
5	12/15/20	10			20			12/15/20		1	
6	12/15/20	9			20			12/15/20		1	
7	12/15/20	9			20			12/15/20		1	
8	12/15/20	3			15			12/15/20		1	

☐ 9. Sentence(s) to be served consecutively to (If this item is not checked, the sentence is concurrent.)
☐ each other. ☐ case numbers _____.

10. The defendant shall pay: $544.00 STATE MINIMUM COSTS $80010.00 RESTITUTION - CIRCUIT C
$130.00 CRIME VICTIM RIGHTS $80684.00 TOTAL $80684.00 BALANCE

The due date for payment is 12/15/20. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

☐ 11. The defendant is subject to lifetime monitoring under MCL 750.520n.

12. Court recommendation:
SENTENCES TO BE SERVED CONCURRENTLY TO EACH OTHER.

12/15/20
Date

Judge CHARLES W. JOHNSON 28926
Bar no.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver the defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

LAST PAGE

CC 219b (3/16) JUDGMENT OF SENTENCE, COMMITMENT TO DEPARTMENT OF CORRECTIONS
MCL 765.15(2), MCL 769.1k, MCL 769.16a, MCL 775.22, MCL 780.766, MCR 6.427

STATE OF MICHIGAN

IN THE EMMET COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

V Case No. 20-005054-FC

MICHAEL GEORGIE CARSON,

Defendant.
_____/

MOTION TO SUPPRESS

BEFORE THE HONORABLE CHARLES W. JOHNSON, TRIAL JUDGE

Petoskey, Michigan - Tuesday, July 7, 2020

APPEARANCES:

For the People:
MR. MICHAEL A. SCHUITEMA, P72718
Assistant Prosecuting Attorney
200 Division Street, Ste. G42
Petoskey, MI 49770
(231) 348-1725

For the Defendant:
MR. DUANE J. BEACH, P34655
909 N. Washington Avenue
Lansing, MI 48906
(231) 330-5333

RECORDED BY: Monica Klawuhn, Video Operator

TRANSCRIBED BY:
Vivian V. Burton, CER-3572
Certified Electronic Recorder
(269) 449-1099

TABLE OF CONTENTS

A Yes, sir.
Q What was the sum and substance of that conversation?
A That the cell phone had... That... That the cell phone would be beneficial to the case to have that and if the cell phone was discovered, to seize the cell phone.
Q Okay. Did you verify that an arrest warrant had been issued for Mr. Carson?
A I did.
Q And what, if you know, was the potential evidence or value of Mr. Carson's cell phone?
A I'm not a hundred percent sure on that, sir. I was told that it would be beneficial to have the--the--what--the contents of the cell phone, but.
Q Okay. So how did you go about arresting Mr. Carson?
A Mr. Carson met us at the front door. I adv-- I advised him to step outside. I saw that his... We... We also, unfortunately, woke up his children when we were knocking on the door, so I advised him to step outside 'cause I didn't want the--the children to hear. I advised him that he did have the arrest (sic). He was still in... I believe it was a pair of gym shorts and a tee-shirt that he was sleeping in the night before, so he advised he wanted to go inside. He asked if he could smoke a cigarette, I allowed him to; and then advised that he wanted to change, so I allowed him to enter the residence. I just told him that I had to be with him when we entered the residence

MR. BEACH: --expected it, judge. I didn't think we were gonna watch it today, so.

THE COURT: Alright. Here, why don't you give that to me, Mr. Schuitema. Thank you.

BY MR. SCHUITEMA:

Q So Mr. Carson comes out of the house, and you tell him he's under arrest?

A Yes, sir.

Q Does Mr. Carson end up going back inside the house?

A Yes.

Q What do you tell him when he goes back inside the house?

A I told him it was okay for him to en--to enter the residence but at that time I advised him that he was under arrest, so I had to be with him anywhere that he went in that residence.

Q Does Mr. Carson... And did he say that was okay, did he go in the house allowing you to go in as well?

A Yes.

Q At some point did Mr. Carson go into his bedroom?

A Yes.

Q And before he did, did you again tell him that you had to stay with him?

A Yes. He advised that he wanted to change, and I told him it's...I mean, absolutely, you have the right to change but I have to be there with you if you're going to change.

Q Alright. When Mr. Carson went into the bedroom, did you see a

phone you believed to be Mr. Carson's cell phone?
A Yes, sir.
Q Where was it in the bedroom?
A It was on the nightstand. It was actually where he...he went to that side of the bed to, I believe he was putting on his socks at that point on--on that side of the--the bedroom, that side of the bed, and it was on the nightstand, plugged in.
Q When the cell phone was on the nightstand would it have been in arm's reach of Mr. Carson?
A Yes, sir.
Q What about Brandy DeGroff, was she also at the residence--
A Yes, sir.
Q --during the time you arrested Mr. Carson?
A Yes, sir.
Q When you saw the phone did you do anything to figure out whose phone it was on the nightstand next where--next to where Mr. Carson sat down?
A I asked Mr. Carson if that was his cell phone.
Q What did he say?
A He said, "Yes sir."
Q And then what did you decide to do?
A I told him that I would be seizing that phone as part of the investigation.
Q And again, why did you seize it?
A Because it was within arms renght--arm's length of him at that

point and I believed that it was going to be beneficial to the case at that point.

Q Okay. Were there any concerns on your part that if you didn't seize the cell phone that whatever evidence was on it could be lost?

A Yes, sir.

Q How so? How would that evidence be lost?

A Given the relationship with himself and Brandy and--I mean, at this point they were now made aware that this was an--an active that was going on and he was being arrested for the--the actions that he had taken previously.

Q So did you have concerns that the phone would be left within the control of Miss DeGroff?

A Yes, sir. If it was left at the home.

Q Were you... What are you concerned about, that she might do something to--

A Destruction.

Q --the phone?

A Tampering of it now that she... now that Mr. Carson was arrested for those.

Q Okay. If Mr. Carson had been so inclined while he was in the bedroom, could he have picked up the phone and attempted to tamper with the data on it?

A He could have.

Q Once the phone was obtained, were any other steps taken by you

or Deputy Wollen to ensure that nothing would happen to the data on the phone?

A Yes, sir. It was taken by Deputy Wollen. He... He asked Mr. Carson for the passcode to his cell phone, which Mr. Carson gave him, and then he placed the cell phone in airplane mode.

Q Okay. And does airplane mode do?

A Airplane mode just shuts off any wireless connection to that cell phone so that there can't be any wireless tampering to that cell phone, it shuts down at... all wireless, cellular, anything to that cell phone.

Q So it would prevent the ability to wireless... to remotely wipe the data on that phone?

A Correct.

Q Based on your initial conversation with Mr. Billings, were you aware that Brandy DeGroff is also a suspect in this case along with Mr. Carson?

A Yes, sir.

MR. SCHUITEMA: One moment, judge. Nothing further, judge.

THE COURT: Cross examination.

MR. BEACH: Thank you, judge.

CROSS EXAMINATION

BY MR. BEACH:

Q Good afternoon, deputy.

A Good afternoon, sir.

THE COURT: --seat.

THE WITNESS: Thank you.

THE COURT: Thank you.

BY MR. SCHUITEMA:

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

A Detective Sergeant Matt Leirstein; that's M-A-T-T, last name Leirstein, L-E-I-R-S-T-E-I-N.

Q You're a Detective Sergeant with the Emmet County Sheriff's Department?

A That is correct. Yes.

Q How long have you been in law enforcement?

A Almost 15 years.

Q How long have you been a detective?

A Wa... Consider my time working undercover narcotics and as my current position, roughly, 5 years.

Q And were you assigned to investigate the theft from Mr. Billings' safe after Deputy Midyett took the initial report?

A Yes, I was.

Q When the arrest warrant for Mr. Carson in this case was issued, did you have a conversation with Deputy Midyett?

A I did.

Q What did you tell him?

A I advised him that we had an arrest warrant for Mr. Carson, and I asked him to affect his arrest, and that if Mr. Carson did

STATE OF MICHIGAN

IN THE EMMET COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,	
V	Case No. 20-005054-FC
MICHAEL GEORGIE CARSON,	
Defendant.	
/	

JURY TRIAL - VOLUME I OF III

BEFORE THE HONORABLE CHARLES W. JOHNSON, TRIAL JUDGE

Petoskey, Michigan - Monday, October 19, 2020

APPEARANCES:

For the People:	MR. MICHAEL A. SCHUITEMA, P72718 Assistant Prosecuting Attorney 200 Division Street, Ste. G42 Petoskey, MI 49770 (231) 348-1725
For the Defendant:	MR. DUANE J. BEACH, P34655 909 N. Washington Avenue Lansing, MI 48906 (231) 330-5333
RECORDED BY:	Monica Klawuhn, Video Operator
TRANSCRIBED BY:	Vivian V. Burton, CER-3572 Certified Electronic Recorder (269) 449-1099

TABLE OF CONTENTS - Volume I

THE COURT: Come right on around here. And before you sit down, raise your right hand and she will swear you in.

THE CLERK: Do you solemnly swear or affirm that the testimony you give in this cause shall be the truth, the whole truth and nothing but the truth, so help you god?

MR. BILLINGS: I do.

THE COURT: Take a seat now please. Once you sit down, while you're testifying, please remove your mask. When you get back up, before you go out, pull it up over your nose to cover properly, it ought to cover your nose as well as your mouth, okay? Go ahead, Mr. Schuitema.

MR. SCHUITEMA: Thank you.

DON BILLINGS

called by the People at 2:11 p.m., sworn by the clerk, testified:

DIRECT EXAMINATION

BY MR. SCHUITEMA:

Q Mr. Billings, can you please introduce yourself to the jury, tell them your name, and can you spell your last name for the record as well?

A Don Billings, B-I-L-L-I-N-G-S.

Q Now, Mr. Billings, how old are you?

A Sixty-nine.

Q Sure about that?

A (unintelligible)

Q Do you see Mike in the courtroom here today?
A Yes, I do.
Q Can you point out where he's sitting, color of shirt that he's wearing?
A Black, with the black mask, black coat.
MR. BEACH: Right here.
MR. SCHUITEMA: If the record could reflect the witness has identified the defendant?
THE COURT: Yes.
BY MR. SCHUITEMA:
Q When you were living on Honeysette Road did Mike, did he live with anyone else, was he in a relationship?
A He had his girlfriend--
Q What was--
A --with him.
Q --her name?
A Her name was Brandy.
Q Do you remember her last name?
A DeCroff or De... Hon-- Honestly, I don't remember this moment.
Q Okay.
A I think it was DeGroff or DeGroat. Probably nothing else right at all.
Q In the past year or so have you struggled with some health problems?
A Yes, I have.

Q What kinds of problems?
A The... I did a hip surgery and then I had to go immediately after that into back surgery; and, very rough.
Q Were you experiencing back pain before you had the surgery?
A Yes.
Q How bad was it?
A Severe.
Q In your house do you have to-- In the house in Alanson on Honeysette, did you have to go up and down stairs?
A Yes, I did. Two flights.
Q Okay. Where was your bedroom, the first floor or the second floor?
A Second.
Q How did that work with your back problems?
A Very bad.
Q Were you able to go up and down the stairs?
A If I was lucky enough to make it up one time of day that would be my limit, totally.
Q Okay.
A It was not working out.
Q Did you ultimately have a medical procedure to help you with your back pain?
A Right. I had to go to therapy.
Q Did you ever have surgery?
A After the surgery, yes.

Q Okay. You had therapy after the surgery?
A Yes.
Q Okay. Do you remember when you had surgery on your back?
A In '19.
Q 2019?
A Yes.
Q Do you remember the month or roughly the month where--
A Roughly--
Q --this happened?
A --August.
Q August of 2019?
A Yes.
Q Okay. Before having that surgery in August of 2019, did you make the decision to move out of your house in Alanson temporarily?
A Yes. In, roughly, September while I was in therapy I decided, temporarily, move out.
Q Okay. Do you have a brother who lives in Cheboygan?
A Yes, I do.
Q Did you ever move in with him?
A Yes, I did.
Q In fact, do you still live with him?
A Right now.
Q Did you move in with your brother before or after your surgery?
A It was after the surgery.

Q Okay. Around this time were you also selling some things from your...from your house, selling some of your personal property?
A Yes, I was. Selling--
Q Why--
A --some things.
Q Okay. Why were you doing that?
A Mainly to just downsize.
Q Were you gonna downsize the house or just get rid of stuff?
A I was just trying to get rid of a lot of things.
Q Okay. Did you... Had you collected a lot of things over the course of your life?
A Yes.
Q Okay. What kind of things would you collect?
A Well, just salt spoons for one example, salt holders for salt spoons. I collected a lot of coins over the years. I had quite a bit of silver that I started almost 40 years ago.
Q Did you have like, antiques, just general old decorations and--
A Antiques.
Q --stuff like that?
A Yes, I did. I have several different antiques, a lot of collector's items, like, wall-hanging boats for decorative and...
Q Did the defendant and Brandy, did they become aware that you were selling things from your house?
A Yes. I had mentioned it, that I was trying to sell things.

Q Okay. Did the defendant say anything about helping you?
A Yes.
Q What did he say?
A That, he knew how to sell online, and it would be a lot easier, which was what we were working on.
Q Okay, he said he...he could sell things online and it's easier?
A Yes, it would be easier.
Q Did you and the defendant enter in--into any arrangement or agreement where he would actually help you sell things?
A Yes. I agreed to give him 20 percent of--towards the different things that he was to sell.
Q Okay. So, if he sold something for a hundred bucks, he'd keep twenty dollars and give you eighty?
A That was the agreement, yes.
Q Okay. At this time were you... When the defendant was gonna sell things for you online were you still in your house in Alanson or had you moved to your brother's in Cheboygan?
A I was... I was in Cheboygan--
Q Okay.
A --when we more or less started it.
Q So how is this working when it began? How did the defendant know what you wanted sold, what you didn't want sold?
A We talked about it.
Q So you...
A And there were certain things I didn't wanna sell, and I told

him that, and, there were some things I wanted to sell, like, a deep freezer, fishing boat.

Q Did you actually go through the house with the defendant and show him things you sold or kept?

A Yes, we did--

Q Okay.

A --go through it. Things were to be in the curio were to be left alone.

Q At some point did you end up giving a house key to the defendant?

A Yes, I did.

Q Why did you decide to do that?

A It was pointed out that it'd be lot easier than them waiting for me to come from Cheboygan over to Alanson, it'd just be easier if they just had a key and make it handy.

Q So, initially, you would what, come from Cheboygan to Alanson and let them in the house to get things?

A (no verbal response)

Q You have to say yes or no.

A Yes.

Q Okay.

A Excuse me.

Q Who... Who pointed it out to you that it'd be easier if they had--just had a key?

A I think both of them were there when we were talking about it,

was just going through 'em and sorting them out.

Q Did you ever tell the defendant, or Brandy, what was in your safes?

A Never do.

Q Do you ever tell the defendant and Brandy's roommate, Alan Olsen, what was inside the safes?

A Never did.

Q Do you ever tell Alan Olsen that you had money wrapped in yellow bands?

A Never did.

Q Did you ever open the safes in front of the defendant or Brandy?

A Nobody. No.

Q Did you ultimately ask for your key back from the defendant and Brandy?

A Yes.

Q Do you remember, roughly, when this was?

A Either September or October.

Q Of 2019?

A Of '19.

Q Why did you decide to ask for your key back?

A Because a few times that I was able to go up there into my house was--with my... my pastor is the one that helped me get up and down the stairs and just to make sure I was okay, I noticed that money was missing, the coins was missing, the pennies were missing.

Q Where were the pennies missing from?
A In the bedroom.
Q So you kept pennies in your bedroom?
A Yes, I did. I was sorting 'em.
Q Okay. Were they just loose in the bedroom, were they in a container?
A They were in a small box, and they were marked, twenty, thirty, forty and fifties.
Q Okay. Did you ever confront the defendant about these missing pennies?
A Yes, I did.
Q What did he tell you?
A The... The words that I remember was, "We would not take those. We love you and we wouldn't do that to you seniors," that's what words are used.
Q Was anything else missing that you noticed?
A Well, in one of the lockers that I have in my--throughout my house - I have quite a few of 'em but, I had two lockers--three lockers in the bedroom and I went over to that and, that night, I would just take my quarters and dimes and roll 'em up and just put 'em into one of the lockers for change to have on-hand, and there was probably, of the quarters, there's about 200 rolls, and dimes, probably another hundred different rolls, and that was just my spending money if I needed something. But then I noticed that was missing so I went and confronted him about it.

Q And again, this is stuff, not that was kept in the safe, but in a different part of your home?
A In the bedroom, yes.
Q Okay. Was that what led to you taking your key back?
A And that's when I got the key back and it was real close to that time.
Q Okay. In all, about how much money did you get from the defendant and Brandy for selling things from your house?
A Total, I would have to guess, I only got about $1500, $1700 maybe. But that was including the big, ticket items, like the boat--fishing boat that was loaded.
Q They sold your boat?
A Yes.
Q When you got your key back from the defendant, did they return any property to you?
A Yeah. I got some things back, yes, like a camera case, a...
Q Did the defendant say if he had anything else of yours at his house that you needed to get or pick up?
A No.
Q Was it your impression that there was anything else at his house?
A Say that one more time.
Q Was it-- Was it your impression that any of your property was left at his house?
A Not to my understanding, yeah, nothing was left.

Q Did the defendant ever come over after you got your key back to return additional property?
A No.
Q So you got your key back in September or October of 2019 - the key to the house. When's the next time you tried to get into your safe--or, your safes?
A I-- I couldn't begin to tell you the date on that. It would probably be the date that's on a police report.
Q Okay. The date that...
A I just tried one day, nothing would work, and just, nothing would work.
Q Alright. Did you try--
A So I--
Q --the com did you try the combination?
A I tried the combinations.
Q Wouldn't work?
A No way.
Q Okay. So what did you do to try to get into the safes?
A I ended up calling a--a locksmith.
Q Did you see what he did to open the safes?
A He tried to use the--a pick on the key section - couldn't get it. He tried to... He was... Well, I take that back. He tried the combination first, many a times, on both safes and he couldn't get it to work at all, and then he had to go to work on the key section on both of 'em.

Q Okay.
A He ended up, finally, getting 'em open but he said they were jammed, is all he said to me.
Q Okay. When you opened up your safes... Did he get both of them open?
A Yes, he did open both of 'em.
Q What did you discover when the safes were opened?
A When the safes were opened, the first thing I asked the man was to take that little...the little safe out and set it up on the radial arm saw and that's when I opened it up to see--to make sure that was there--
Q Was it?
A --and it was completely empty?
Q All the cash was gone?
A Every bit of it was gone.
Q What did you do when you realized that?
A I ended up calling the State Police immediately and they came out and did an investigation on it.
Q We've talked about other valuables you had in the safe - silver certificates, coins, silver bars, silver pieces; what about those things, were they still in the safes or were they gone?
A No, they were gone.
Q Were there some items remaining? Were there some coins or silver pieces or--or was anything left behind?
A There were some collector books of coins, mostly the quarters,

nickels, dimes - those collector books, as they call 'em, they're just, something you give to your grandkids 30 years later or something.

Q What--

A A bunch of those were left.

Q What about those ten-ounce bars of silver, any of those remaining?

A No.

Q Did you have any gold in the safe?

A Yes. There was one nugget. It was extremely small. It wasn't refined in any way. It was just a little--a little nugget was all it was.

Q Was that left behind?

A Yep. They didn't... They didn't find that because it was in a--just a bag where--after I looked.

THE COURT: Mr. Schuitema? Would counsel approach please?

(At 2:55 p.m., bench conference)

(At 2:56 p.m., bench conference concluded)

MR. SCHUITEMA: Alright, judge, at this time I'll move to admit People's Exhibit number 1 into evidence. It's a composite exhibit, 9 photographs of the scene.

THE COURT: Response, Mr. Beach?

MR. BEACH: I have no objection, judge.

THE COURT: Exhibit 1 is received.

STATE OF MICHIGAN

IN THE EMMET COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,	
V	Case No. 20-005054-FC
MICHAEL GEORGIE CARSON,	
Defendant.	
_____/	

JURY TRIAL - VOLUME II OF III

BEFORE THE HONORABLE CHARLES W. JOHNSON, TRIAL JUDGE

Petoskey, Michigan - Tuesday, October 20, 2020

APPEARANCES:

For the People:	MR. MICHAEL A. SCHUITEMA, P72718 Assistant Prosecuting Attorney 200 Division Street, Ste. G42 Petoskey, MI 49770 (231) 348-1725
For the Defendant:	MR. DUANE J. BEACH, P34655 909 N. Washington Avenue Lansing, MI 48906 (231) 330-5333
RECORDED BY:	Monica Klawuhn, Video Operator
TRANSCRIBED BY:	Vivian V. Burton, CER-3572 Certified Electronic Recorder (269) 449-1099

TABLE OF CONTENTS - Volume II

Q Okay.

MR. SCHUITEMA: Your Honor, I'd move to admit at this time payroll records from Firman Irrigation for Mike Carson.

MR. BEACH: No objection.

THE COURT: Exhibit number?

MR. SCHUITEMA: Exhibit number 5.

THE COURT: Exhibit 5 is received.

(At 8:48 a.m., PX 5 received)

BY MR. SCHUITEMA:

Q Mr. Firman, do you know when Mike Carson's first day of employment was and his last day of employment?

A Yeah. April 2nd to August 2nd.

Q Of 2019?

A Correct.

Q So, about a 4-month period of time he worked for you?

A Yes.

Q I'm gonna just open up these payroll documents we got from your company. They're on the screen behind you. This look like just the normal paystub information you get when you pay an employee?

A Yes.

Q I'm gonna scroll down to the last paystub, which will be page 10 of 10; and does this paystub indicate that during the four months Mike Carson worked for you his net pay was about $8,400?

A Yes.

Q Okay. Did you fire Mr. Carson, or did he quit on his own?

A He quit on his own.
Q Did you have a conversation with Mr. Carson when he quit?
A Yes.
Q Did Mr. Carson tell you why he was quitting?
A Yes.
Q What did he tell you?
A He told me that he ran across some money and some valuables, gold I believe, in a locker that he bought online, or through some kind of a transaction, bel--buying and selling things. So he buys things and then fixes 'em and sells 'em or something like that, and ran across all this stuff and so, had a lot of money that he didn't need to work for a while, or something.
Q So he said he bought a--a locker or some container on a website?
A Yeah.
Q And then what did he say was inside the locker when he got it?
A I believe it was gold and maybe silver, I don't remember, and value--
Q What--
A --money I believe.
Q Did he say how much--
A Valuables.
Q --money?
A Didn't really tell me how much, just, a lot.
Q So he didn't tell you how much. Did he tell it was a lot or, did he say nothing about how much?

just--just stick money straight in the machine?
A Yes, it is.
Q Would that be tracked by these records?
A Not generally. The only time we would do that if we were doing a close watch on somebody; but, generally, it's just the-- anything on here would be, like you said, play--using the player card--
Q Okay.
A --except the jackpots may include the W2-Gs if they're taxable--
Q Okay.
A --that would've been tracked also 'cause it just naturally is.
Q So this first column, total coin-in, is that the amount of money placed into gaming machines?
A It is. That's the total amount that's run through. You may win--win or lose while you're playing and that's just the continuation of what the total coin-in is, that doesn't reflect what he's lost but that's the total amount that was run through the machine--
Q Okay.
A --the--the machines.
Q So the grand total amount for Mike Carson, the grand total of money that he put into gaming machines in 2019 was $122,000?
A Correct.
Q And in August of 2019 it was about fifty-seven thousand dollars?
A That's how much was run through the machine, correct.

Q Okay.
A Or the machines.
Q Again we talked about jackpots. So, this would be the total number of those twelve hundred dollars or more taxable winnings?
A Generally it is, unless he was using a card and a smaller one may have shown up on that record also.
Q And then the total coin-out is how much money he took back out of the machine when he was done playing?
A Yeah. That's how it shows on the win/loss. Usually, you take the coin-in minus the jackpots and the coin-out.
Q Alright. And then, the difference between the amount you put in and the amount you take out is the total win or lost?
A Correct.
Q So, in total, in 2019 Mr. Carson lost just shy of five thousand dollars?
A Yes.
Q And in August of 2019 lost about four thousand dollars?
A In August? Correct. The thirty-nine ninety-three, yes.
Q This figure right there?
A Yes.
Q Okay. Does the win/loss take into account the amount won for jackpots as long as a card was used?
A Yes, it does.
Q I'm gonna put different players records up behind you. Are these... I'll zoom in. This is for the record People's Exhibit

7. Is this the record of Brandy DeGroff's players club card usage in 2019?

A That's what it looks like from the summary there.

Q At both... I mean, you have two sites, right, Mackinaw and Petoskey?

A Yes. From-- It looks like from the site it's including, both, Mackinaw and Petoskey. And as you see on the tabs on the right, both of those are highlighted, so it'd be 2019 for both Mackinaw and Petoskey.

Q How much, total, money did she put--did Brandy DeGroff put in gaming machines in 2019?

A That one looks like $47,619, total coin-in.

Q That would be...this number right here?

A Correct.

Q And then how much money did she put in in August alone?

A Twelve thousand nine hundred and nineteen.

Q Alright. The total win or loss for 2019 for Miss DeGroff?

A Six thousand twenty-one dollars.

Q And the total loss in August?

A Two thousand three hundred and sixty-eight dollars.

Q I'm gonna show you People's Exhibit number 8. Alright, is this the 2019 players club card activity for Alan Olsen?

A Yes.

Q And again, it covers both locations, Mackinaw and Petoskey?

A Correct.

for Brandy around this time?
A Yes.
Q Was this while Mike was working or while he wasn't working?
A It was such on and off, you know. I was watching the kids a lot, so--
Q Okay.
A --I don't know if he was working or...
Q By the time you moved out was he working?
A I don't remember. I don't think so.
Q Okay. Do you know what Mike did when he would leave the house, where he would go?
A Sometimes he would go to his brother's and paint, and other times, they would just say, well, we're going to dinner and then come back.
Q And when they left, what were you doing?
A Watching kids.
Q Did there come a point in time where Mike and Brandy started going out more often?
A Yes. It was more that, all day, early morning, kind of deals.
Q When--
A They would leave like, after dinner, then they wouldn't get back till early morning.
Q When did this start happening?
A That house, specific, or
Q You moved out in September--

A Yes. Before that, yes, they were gone often.
Q Okay. Did there ever come a point where they were gone more often or where these trips overnight started occurring more often?
A Like I say, August, it was constant.
Q Starting in August it was constant?
A Yes. For them to be leaving every night.
Q And then you were watching the kids during that time?
A Yes.
Q Did they say where they would be going?
A Sometimes they said to the casino, sometimes they said out to dinner.
Q Did you ever go to the casino with Mike and Brandy?
A I went to the casino with Mike.
Q Not with Brandy?
A No.
Q When did that start?
A Well, I had I remember this because they came back and Brandy didn't wanna go so they said, well, you need to go, and I was like, I haven't been to the casino since May, and I didn't wanna go to the casino and they talked me into, so I went with--
Q Alright. Do--
A --Mike.
Q Do you know when that was; was it August, before August--
A It was August.

Q Now, Deputy Midyett also testified that he obtained the cellphone for Mr. Carson; did you end up taking possession of that cellphone?
A I did.
Q Did you prepare a search warrant to analyze the contents of that cellphone?
A I did.
Q And how--how is that happen, how are the contents of a cellphone extracted or analyzed?
A Typically what we do is, we send the phones or electronics, any type of electronics, to the commuter--computer crime unit down in Traverse City. They usually do our forensic analysis for us. And what they'll do is, they'll mark certain items for us for review.
Q And did you do that and get the resulting report?
A I did.

MR. SCHUITEMA: People would move to admit People's Exhibit 9. One moment.

THE COURT: Response, Mr. Beach?

MR. BEACH: There's already a court order in the file, finding those admissible, so, I have no comment on it.

MR. SCHUITEMA: And for the record, it's--People's Exhibit 9 is 10 pages long of text messages, the last page is a contacts sheet.

MR. BEACH: You ruled prior to trial that those were--

THE COURT: Mr. Beach--

MR. BEACH: --admitted.

THE COURT: --I remember my ruling it wasn't for the admissibility of this evidence it was in response to a motion you made--

MR. BEACH: Right.

THE COURT: But in--

MR. BEACH: So--

THE COURT: --any event, you're not--do you have any grounds for objection to this exhibit?

MR. BEACH: No.

THE COURT: Okay. Received.

(At 2:26 p.m., PX 9 received)

MR. SCHUITEMA: Thank you.

BY MR. SCHUITEMA:

Q When you got the report had the analysist isolated a certain text message conversation?

A I believe so, yes.

MR. SCHUITEMA: For the record I'm showing People's Exhibit 9 on the screen.

BY MR. SCHUITEMA:

Q This may be hard for the jury to see but, can you tell the jury what we're looking at here? It looks like there's boxes of two different colors involved in this conversation.

A Correct. The conversation is taking place between Mr. Carson

and Brandy DeGroff. Mr. Carson has listed Brandy as--as a contact in his phone as "My love". In this conversation, the blue and the green being the conversation between the two of them.

Q So, the messages that Mr. Carson is sending are on the--on the right here?

A Correct.

Q And these are...it may be hard for some people to see but these are actually colored green.

A Correct.

MR. BEACH: Is that true?

BY MR. SCHUITEMA:

Q And the text messages that Miss DeGroff is sending are blue on the left?

A Correct.

Q And you mentioned that Brandy--the contact name for Brandy is, "My love"?

A Correct.

Q Did you get this - And I'm gonna show you page 10 of this exhibit; did you get that from the contact sheet on page 10 here?

A That is correct. The number that-- I don't know if the--the jury can see it, but the mo--the noble--mobile number that's highlighted there over that phone 231 881-6388, that number was provided to me by Brandy during the course of this investigation

where I could contract--contact her at. So I knew that number to be belonging to her.

Q When... Is there a date stamped for when these text messages were sent?

A Yes. Up here on the left-hand side, again it may be difficult for the jury, but it's August 5th, 2019 at about 3:26 p.m. is when the first recorded message came in.

Q Okay. And, you're to go to page 9 of 10. So the last date for the records we have... What date are we looking at here; the last--

A The last date here would be November 27th, 2019 at 9:11 a.m.

Q Okay. Then, because it might be hard for the jury to see, I'm gonna have you read off a few of the texts from these pages. But, before I do that, the--the dates for the text messages sent on page 1, what dates are those through?

A August 5th, 2019 and, it looks like the last one ends at 4:23 p.m.

Q So, beginning August 5th, 2019 at 3:26 p.m., ending August 5th, 2019 at 4:23 p.m.?

A Correct.

Q That's page 1?

A Yes, sir.

Q Alright. Page 2 beginning when?

A Same date, August 5th, 2019 and it picks up at 4:24 p.m.

Q And the last text on that page?

A Same date, August 5th, 2019 at 4:29 p.m.
Q First text on page number 3?
A Same date of August 5th, 2019. I think that might be the same page.
Q Okay.
A There you go.
Q Then the end of page 3?
A August 6, 2019 at 9:17 a.m.
Q Alright. So the first three pages are about a day's...maybe a little days...a day-plus worth of text messages. Is that right?
A Correct. Yes.
Q Once you... I'd like you to read this text message to the jury that I've highlighted. And t--before you do that, I'm sorry, can you tell us who's sending this text message?
A This looks like it is from Mike Carson.
Q Okay. What does it say?
A "Don and Judy were investors in the stock market, complete records for hundreds of thousands of dollars."
Q And what is Brandy's response on the left?
A "Wow that's crazy. Have you found any records of what's in the space yet?"
Q And what--what's Mr. Carson's response to that?
A Mike's response is, "In the, what, yet"?
Q And what does Brandy say?
A "Lol, laugh out loud, safe", meaning, safe.

Q What is Mike's response to that text, the one I've highlighted?
A "No. I'm guessing it's all on the computer."
Q How does Brandy respond?
A "I'm turning it on when I go--when I get to go up there again."
Q And then what's Mike's response?
A "I just did. It says... Home screen says, 'Welcome Don'".
Q Brandy's response?
A "Does it ask for security?"
Q What does Mike say to that?
A "No. Opens right up. There isn't anything on it that I can see. You look later. This is more your field."
Q The next text message that Mike sends to Brandy - I'm gonna highlight it - what does that say?
A "We need to go through those pennies. If there's a 1943 copper penny in there, it's worth millions, these people said. Also, the 1943s pennies can go for twenty thousand dollars each--or, $20,000 each." It doesn't say dollars.
Q What does Brandy say?
A "Holly Molly! That's a lot... That's the most of money."
Q Alright. Mike's response?
A "I'm thinking that these guys cashed out stocks, and whatnot, and converted to cash and gold and silver in the safes."
Q And the next few text messages are just about their phones?
A Yes.
Q What's this text message Mike sends to Brandy at about 4:29 p.m.

on August 5 - I'll highlight it a moment - this one right here?

A "These are the keys that you're thinking are safe keys, I think that these are lockbox keys from a bank."

Q And what's Brandy's response?

A "Might be."

Q As part of your investigation, did you have-- I'm gonna switch just for a minute from these text messages to something else. As part of your investigation, did you have a deputy who--who works for you, Deputy Garst, obtain records from Reusch Jewelers in town?

A Yes, I did.

Q What did you have her obtain for you?

A She retained a receipt for purchase of a 10-carat wedding ring that Mr. Carson had purchased.

MR. SCHUITEMA: I'm gonna move to admit People's Exhibit number 10 into evidence, the receipt from Reusch Jewelers.

MR. BEACH: Okay. No objection.

THE COURT: Exhibit 10 is received.

(At 2:34 p.m., PX 10 received)

BY MR. SCHUITEMA:

Q I'm gonna put this up on the screen for you, Detective Leirstein. Is this the re--the receipt you obtained?

A That is correct.

Q Up in here, who does it indicate the receipt is for?

A Mike Carson.
Q And the date of the receipt?
A August 6th, 2019.
Q What's the - I guess as much as you can tell, the description of the item that was purchased?
A Looks like, "Lady's 10 carat yellow gold ring, with round MJ Diamond .17Ct, GI1 with halo of Malay Diamond and Diamond Pave set-down shoulders, .49 carat, ETW, I'm not sure what that means.
Q Okay. Under here, under payments, what payment is described here?
A A cash payment of $1,490.
Q And the date of that payment?
A That would be August 6th, 2019.
Q We focus in on another text message. This one... I guess we're on page 4 now. On the top of page 4, what dates did the text messages begin at?
A This is August 13th, 2019 at 12:07 p.m.
Q What tes... Text message on the right is from Mike, is that--
A From--
Q --right?
A --Mike. Correct.
Q And what does he say to Brandy?
A "I'm totally confused. Does he not know there's a million dollars in those safes?"

Q And how does Brandy respond?
A "I really don't think he does. I think he opened it up, three that money in there and closed it." I think she meant to put "threw that money in there and closed it".
Q Alright, now I'm gonna go to page 5. Do you recall the testimony of Mr. Billings that he had confronted the defendant about coins missing from the bedroom of his house?
A Yes, I do.
Q Alright. When are the text messages on page 5 here, what's the dates?
A This is going to be September...maybe it looks like, 14th, 2019 at 7:08. No, I take that back. It's gonna be September 15th, 2019 at 4 p.m.
Q So... Okay. What... The text message I'm highlighting, this is from Mike to Brandy, is that right?
A Correct.
Q And what does it say?
A "It amazes me that he's worried about a few rolls of coins and never went into the safes."
Q And what does his next text say?
A "Should we be worried now?"
Q The next text messages are unrelated?
A Correct.
Q Go to page 6. This highlighted text from Mike to Brandy, when was that sent?

A It looks like, September 15th, 2019 at 10:12 p.m.
Q Okay. And what does Mike say to Brandy in this text that I'm highlighting?
A "He must've tried to get into the safe and couldn't and then thought there was a ton of money in that chest."
Q I'm gonna pivot again away from these text messages onto another part of your investigation.
A Yes, sir.
Q Did you also obtain a search warrant for financial records for Mike Carson and Brandy DeGroff?
A I did.
Q Was that from St. Francis Credit Union?
A Yes.
Q And is this an account held by one of them or both of them together, jointly?
A It is a joint account.

MR. SCHUITEMA: People would move to admit People's Exhibit number 11 into evidence. These are financial records from St. Francis Credit Union.

MR. BEACH: May I examine them just for a minute to make sure? Thank you.

THE COURT: Response, Mr. Beach?

MR. BEACH: No objection to those, judge.

THE COURT: Eleven is received.

(At 2:40 p.m., PX 11 received)

MR. BEACH: You know, the record should reflect that I received those well in advance, judge.

THE COURT: Thank you.

BY MR. SCHUITEMA:

Q Was there a spreadsheet summary created of the monthly financial situation of Mike and Brandy Carson based on these financial records?

A Yes, there was.

Q And does--do these financial records cover from October of 2018 through November 2019?

A They do.

Q And does summary include... Let me back up. The financial records you obtained, are these monthly statements of the activity within a bank account

A They are.

Q And does it include ending balances for each month?

A Yes, they do.

MR. SCHUITEMA: People would move to admit People's Exhibit number 12. It's a summary of the financial information in People's Exhibit number 11.

MR. BEACH: May I voir dire this witness, judge?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. BEACH:

Q This summary was prepared by you?

A Negative, sir. That was prepared by Mr. Schuitema and it was reviewed by me for accuracy.
Q And so you're agreeing that this is accurate?
A Yes, sir.
Q How did you review it by--for accuracy, did you compare it to the record?
A Yes, sir, I did.

MR. BEACH: No objection.

THE COURT: Exhibit 11 (sic) is received.

(At 2:41 p.m., PX 11 (sic) received)

MR. SCHUITEMA: That's 12, judge.

THE COURT: I'm sorry; 12, right.

(At 2:41 p.m., PX 12 received)

DIRECT EXAMINATION CONT.

BY MR. SCHUITEMA:

Q I show you People's 12 behind you, Detective Leirstein. So, going through Mike Carson and Brandy DeGroff's monthly bank statements, this describes the ending balance for each month between October of 2018 and November of 2019?
A That is correct, yes.
Q And also the total monetary amount of deposits for each month during that timeframe as well?
A That is correct. Yes.
Q At the end of July 2019, how much was in Mike and Brandy's bank account?

A Two hundred and eighty-three dollars and thirteen cents.
Q Which month saw the largest amount of deposits?
A That would be September of 2019.
Q And how much was deposited in that month?
A That deposit was ninety-three hundred dollars.
Q Is that about four thousand more than any other month during that year?
A Just about, yes.
Q Gonna go back to People's Exhibit number 9, now page 7. I want you to read for the jury the text message Mike sends Brandy on October 29 at about 4:15 p.m. I'll highlight it for you. What did he say to her?
A "Yeah, right. It's all you've done is use me and cheat on me."
Q I'm gonna highlight Brandy's response but can you read it in case anyone can't see it?
A "Right.. Um, use you for what? 'Cause I haven't made any money or help you steal sixty thousand dollars? And cheat? When? Tell me when I had the opportunity to fucking cheat? You are the one who didn't work most of the summer and hasn't held a single job."
Q For the record I'm going to page 8. Like you to read the text message the defendant sent Brandy on November 24 at 10:51 a.m. Then I'll zoom in a little bit and highlight it. What does Mike Carson say to Brandy DeGroff in this text message?
A "I just need to go. I can't keep doing this to you and the

kids. I never get sleep and I'm always full of anger and everyone at home is in line of fire and it's not fair to all of you. It's just best I, not, be there until I get some sort of help to calm me and help me sleep. It doesn't help that I'm overly stressed over our finances. We were fucking stupid with tons of money this year. I wish now that I had a way to go rob those entire safes. Tomorrow I'm taking all that other money to the bank and just deposit it in--in there. Fuck chasing shit around. I'm trying to sell shit and bring money in but it's not working. I'm a mixed ball of everything and I'm going fucking crazy."

Q Do you recall Mr. Billings' testimony that there were some coins and other valuables left inside the safes after the robbery?

A Yes.

Q Mr. Carson mentions in his text message taking money to the bank and depositing it. Was there a... I'll bring up People's Exhibit 12 again. Was there ever a large deposit in Novem-- November of 2019?

A I wouldn't call it large. It was seven hundred and twenty-five dollars.

Q Was that, in fact, the least amount of money deposited in the-- in the prior year?

A That is correct.

Q Have both Mike and Brandy been charged with a theft from Mr. Billings' safe?

A Yes, they have.
Q Is Brandy's case still pending and making its way through the system?
A It is currently working its way through the system, in fact, I believe we have a trial date set for December of this--this year.
Q Alright.

MR. SCHUITEMA: Nothing further.

THE COURT: Mr. Beach?

MR. BEACH: Thank you, judge.

THE COURT: Whenever ready.

MR. BEACH: I am. Maybe I'm not ready. I have two Carson trial exhibits; do you know where my exhibits went to?

Thank you.

CROSS EXAMINATION

BY MR. BEACH:

Q So, Detective Leirstein, you're the off--deputy in charge on this; in fact, you're a detective, correct?
A Correct.
Q Which means you supervise all the deputies and move 'em where they're supposed to go, things of that nature?
A I supervise the detectives.
Q Okay.
A And I--(unintelligible)--reserve officer, our undercover detective and then the other detective that would assist me with

STATE OF MICHIGAN

IN THE EMMET COUNTY TRIAL COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

V Case No. 20-005054-FC

MICHAEL GEORGIE CARSON,

Defendant.
_____/

JURY TRIAL - VOLUME III OF III

BEFORE THE HONORABLE CHARLES W. JOHNSON, TRIAL JUDGE

Petoskey, Michigan - Wednesday, October 21, 2020

APPEARANCES:

For the People:

MR. MICHAEL A. SCHUITEMA, P72718
Assistant Prosecuting Attorney
200 Division Street, Ste. G42
Petoskey, MI 49770
(231) 348-1725

For the Defendant:

MR. DUANE J. BEACH, P34655
909 N. Washington Avenue
Lansing, MI 48906
(231) 330-5333

RECORDED BY: Monica Klawuhn, Video Operator

TRANSCRIBED BY:

Vivian V. Burton, CER-3572
Certified Electronic Recorder
(269) 449-1099

TABLE OF CONTENTS - Volume III

Don and Mike; selling things for him, Don brought some things down to Mike, Mike came and got some things. The trial's not about that.

The defense wants you to focus on that 'cause they don't want you to focus on the evidence of the safe robbery, which is what the defendant is actually on trial for. But that's what we're gonna focus on right now.

Let's look at the evidence in this case. Like I said from the beginning, the defendant and Brandy have a strong financial motive. What's theft about? It's about greed; stealing money, either because you need it, or you want it. In this case the defendant probably did both, needed it and wanted it.

This may be hard to see but this is a--a page out of the defendant's and Brandy's financial records. It's a statement for July 1 to 31. It shows, on July 31, the defendant and Brandy had two hundred and eighty dollars to their name in the bank.

Now, I know Dwight Carson just testified about all this money he's making, all this money he's given to the defendant, but his credibility is suspect, at best. He has a history of dishonesty with embezzlement, a history of theft. He's paying under the table, so taxes don't need to be taken out. He's trying to help his brother out, right? He loves his brother, doesn't want him to get in trouble. That's where his

testimony came from, not from any truth in fact.

What is true is when the defendant was interviewed by Detective Leirstein, he never evens mentions working for Dwight Carson, for his brother, 'cause he wasn't. He wasn't. He was blowing through Don's cash.

So at the end of July, the defendant and Brandy are basically out of money. So when they get access to Don's house they start looking through records. They start looking for keys for this safe. They wanna know how much money they can rip off from Don.

And here's the text messages. The defendants are in green on the right, Brandy's are in blue on the left. August 5. August 5. The defendant sends a text to Brandy saying, "Don and Judy were investors in the stock market. Complete records for hundreds of thousands of dollars." I mean, the defendant is supposed to be in this house, what, maybe looking for things to sell at his yard sale, maybe sell online? That's not what he's doing. That's not what he's there for. He's there to look through financial records, see how much money they have, see what they have in the safe. Brandy responds by saying, "Wow, that's crazy. Have you found any records of what's in the safe yet?" She misspells safe. "Have you found any records of what's in the safe yet?" They're talking about this. They see the safe. They found the safe. They're talking about trying to find out what's in it and she wants to know: Hey, you're there.

You got these records. Have you found anything about what's in the safe, where the real valuables are? He says, "Nope. Not yet. I'm guessing it's all on the computer." Brandy, for her part, says, "Well, I'm turning it on when I get up there again. So the defendant is at Don's house, Brandy, maybe she's at work at daycare, maybe she's at home with the kids, maybe they're taking turns going into Don's house searching for his stuff, and she says, "When I go up there time, I'm turning on the computer to see if I can find the records of what's in that safe." But the defendant's ahead of her. He says, "I just did. Just turned on the computer. Home screen says, 'Welcome Don'. Brandy wants to know, "Does it does it ask for a security?" "Nope. Opens right up" he says Mike. "There isn't anything on it that I can see. You look later. This is more your field."

So not only does he look--rifle through Don's financial records, his paper records, he goes onto Don's private computer looking for records of what's in the safe. Again, this has nothing to do with selling property out of Don's house. This has to do with the defendant trying to find out if it's worth ripping off those safes - how much money is in 'em.

As an aside, I think this is also interesting and corroborates, supports, what Don said. Right after this, also I believe on Oct August 5, although the date's cut off on this screen, the defendant tells Brandy, "We need to go through those pennies. If there's a 1943 copper penny in there, it's worth

millions these people said." Millions. These are the pennies in Don's bedroom, right? They... The defendant wants to go through 'em, not to help Don out in any way. There's no way if he finds a penny, he believes is worth millions of dollars, he's gonna go bring it to Don and say, Hey Don, you're rich. He wants that for himself. He's going through the pennies, they're going through financial records, computer records, and now Don's changed to see if they can find anything of value.

The defendant continues to speculate. I'm thinking that these guys cashed out stocks, and whatnot, and converted it to cash and gold and silver in the safes. So now he's got his mind made up, right? There's cash, gold and silver in these safes. It turns out he's right. That's pretty much exactly what Don had in his safes, a whole lot of cash, silver bars, a piece of gold, also coins.

But they're also looking for the safe key. I mean, they can see the safe as well as anyone else. They can see it's got a combination and they can see it's got a lock. They find the combination on one of the papers--or, both of the papers found in the house. But what about the safe key? They need to find that, right? Don said, the safes, I bought 'em brand new. They had a key, but I never used it. I used the combination. I lost track of the key years ago somewhere, never knew where it was 'cause I didn't need to use it. The defendant and Brandy, however, had pretty much all day everyday to go through Don's

stuff, which they were clearly doing, to try and find the safe key. The defendant says to Brandy, "These other keys that you're thinking are safe keys, I think these are lockboc-- lockbox keys from a bank." And she says, "Might be." So she, at this point, must've already been in the house, right, looking for the keys? Somehow laid them out for the defendant, said, here they are, check out those keys, those might be keys to the safe. He goes in there. He looks at 'em. He says, Yea, I'm not sure. Maybe lockbox keys. For all we know, they were the-- the safe keys. Maybe they tried 'em after this and saw that they fit. Then right after this happens, right around the time this happens, the defendant and Brandy, their behavior, especially their financial behavior, changes dramatically. Before this, they were living paycheck to paycheck. They had two hundred and eighty dollars at the end of July. And despite all this, what does the defendant do?

Early August, he's done working and Firman Irrigation. They got no money, no money in the bank, but he quits his job. And does he quit his job for a better job? Does he quit his job 'cause he gets hurt and he's going on disability? Does he make a Workman's Comp claim? No. No. No. None of those reasons. Quits his job because he tells his boss he bought a locker online and it had a lot of money inside and gold and silver. What does that remind you of? A metal container with cash, gold and silver inside? Guessing these guys cashed out stocks and

whatnot and converted it to cash and gold and silver in the safes. It's really about as close to the truth as the defendant could get with someone without admitting, straight up, that he committed a serious crime. But a locker online had a lot of money, gold and silver.

Remember in jury selection we talked about common sense. But as a juror, you're not supposed to check your common sense at the door. One of your greatest tools is to apply your common sense to the evidence in this case. This doesn't pass the common-sense test. This doesn't happen in real life. I mean this is the greatest set of coincidence in the history of humanity, the defendant buys a locker online that just happens to have cash, gold and silver in it? Just happens to be at the same time he has access to Don's house? Just happens to be at the same time case, gold and silver is stolen out of Don's safe?

But after quitting his job, right, his last day of work was August 2, he goes on a spending spree. Goes on a spending spree. August 6, four days after quitting his job, he pays cash, about fifteen hundred dollars for an engagement ring for Brandy. Cash they don't have. Mid-August, the defendant pays three thousand six hundred dollars cash for a trunk, pays entirely in one-hundred-dollar bills. Again, there's no explanation for where this cash comes from. This is cash he doesn't have on his own. Not in the bank. Not with Brandy.

Again, remember, Brandy is making, what, two hundred

and...roughly two hundred and fifty bucks a rent, their rent was what, twelve hundred dollars a month? It's not even covering rent. Brandy, for her part, also is giving large amounts of money away. Around this time she gives one thousand six hundred dollars, all, or most of that in hundred-dollar bills, towards fundraiser. I mean, maybe at this point Brandy feels a little remorse about what she did, maybe; maybe this makes her feel a little bit better about stealing from Don if some of this money goes to a good cause. But, either way, it wasn't her money to donate, and she wasn't donating her money, it was Don's. Despite all this or, I should say, on top of all this, the defendant and Brandy continued to pay twelve hundred dollars rent, in cash, on time, usually with all one-hundred-dollar bills courtesy of Don Billings.

What about the casino activity? There's a lot of testimony about what these numbers mean, right? But on thing...a few things we know for sure from these numbers. The defendant's gambling activity significantly increased around the time he got access to Don's house.

In August of 2019, he plays fifty-seven thousand dollars at the casino through gambling machines. That is, by far, the most he gambles in any month in 2019, almost half of his total for the year of a hundred twenty-two thousand. Before that, it's...it's much smaller. We also know that he's losing money at the casino, right? I mean, Dennis Shananaquet gave us

a little inside baseball on how the casino works, which I don't know about you, but I didn't know this before I talked to him. But, the casino sets gaming machines with a certain percentages that they hold back. So what does that mean? If you play long enough, the casino wins, right? I mean, they eventually keep your money. That's how they stay in business. You can win in the short-term but in the long-term, they're taking your cash.

But it wasn't just Mike doing this. Brandy, her gambling activity significantly increases, again, August of 2029. Her... Her highest activity month of the entire year. Again, as we would expect, she's also losing money at the casino.

Alan Olsen. You remember Alan. Said he gave his players club card to the defendant. His highest game-winning month, July/August. Of course he's losing money as well.

Then the defendant is seen with the stolen money. I don't know about you, but I--it was pretty clear to me that Alan Olsen wasn't really excited to be a witness in this case. It's not easy for him to sit here and testify against Mike, who he used to live with, used to consider a friend, against Brandy who he'd known for what, eight or nine years? To come in here and face them and testify about things like this. It's not easy for someone to do. I don't think Alan felt good about it. He didn't want to do it, but he did. And Alan told us that he saw the defendant with several stacks of hundred-dollar bills,

wrapped in yellow paper straps, just like the money stolen out of Don's safe.

I think what's important about this is, there's no way beforehand for Alan to know Don's safe was full of money wrapped in yellow paper bands. Don didn't tell Alan. Leirstein--Detective Leirstein didn't tell Alan. The way he knows is because he saw the defendant in possession of them.

But then they talk about the--the robbery. And this is probably the most compelling evidence in this case. They talk about robbing Don.

The date is cut off here but, I know it's September 14 of 2019, which lines up with Don's testimony. He said, "In September, these coins are missing from my house." Mentions other things that is mi--that are missing as well. "That's when I go to Mike and I get--and I confront him about these coins, and I end up taking my key back." I confront him about these coins September or October. So middle of September, the defendant sends a text to Brandy, saying, "It amazes me that he's worried about a few rolls of coins and never went into the safes. Should we be worried now?" Don confronts the defendant about one theft, the theft of those coins.

The defendant saying, Well, okay, he's on to us there, knows that we stole some of the coins, but he never went into the safes. Because, if he had gone into the safes, what would he have discovered? That is money is gone. And he didn't

up exactly with what Don is saying was stolen from the safe, sixty thousand dollars. "And cheat, when? Where would I have the opportunity to cheat? You're the one who didn't work most of the summer and hasn't held a single job." Right? 'Cause, after they steal from the safes, he takes time off. He's in vacation mode. He's not working anymore. Brandy actually still goes to work. And he has the audacity to say, she's using him. Especially after she helped him steal sixty thousand dollars. That's how loyal she is to him.

Then the defendant's text. This is in November, after the defendant and Brandy have blown through a significant amount of this cash. Sixty thousand dollars sounds like a lot of money, and it is, but it can go fast. It doesn't last forever, especially if you're blowing it at the casino.

In this text he's venting to Brandy. He's saying, "I just need to go. I can't keep doing this to you and the kids. I never gonna sleep. I'm always full of anger. Everyone at home is in the line of fire. It's not fair to all of you. It's just best I not, be there until I can calm down and sleep. And it doesn't help-- Here's where it gets important. "It doesn't help that I'm overly stressed out over finances. We were fucking stupid with tons of money this year." They were stupid with ton--tons of money, even by November he hadn't worked a regular job in several months. But yet they were stupid with tons of money this year. "Tomorrow, I'm taking all of that

proof.

At the beginning of this I said that Mr. Schuitema couldn't prove that anyone, not just Mike Carson, broke into that safe. And I submit that's still true. And, at the end of Detective Leirstein's testimony, when we looked at all of the things - the checking accounts, the casino records, everything, I said, You have nothing that proves that anyone broke into these safes, not the spending habits, nothing. And then he said, "Well, I have the text statements" was his first response. And so I admitted and said, In other words, you have nothing but the text response to prove every single element of every single crime beyond a reasonable doubt? And he said, "Yes." That's their case. So your job is to take those text messages and look at those elements. Look at those elements.

Remember, that a reasonable doubt is a fair and honest doubt rising out of the evidence. And the last part of that phrase we often overlook but it's just as true as the rest of that phrase: Or the lack of evidence.

I'm gonna switch to a little conversation about Donald Billings.

First off, you're not to let sympathy - if you have sympathy for Donald Billings, and I would--certainly, I'm going to argue that he's not a very sympathetic character. He had sixty thousand dollars in his safe, and he doesn't pay his bills. He had sixty thousand dollars in his safe... Well, he

of the safe. He's accusing him of it. That's what he said. He just told you that. So, when I asked about the deposits - I mean, I actually made them show you the deposits instead of that summary - what did we learn? Mike Carson had sold a car for four thousand dollars and he'd sold a pickup truck for forty-five hundred dollars, and those cashier checks were deposited into that account. If ever there was attempt missed a--a jury by evidence. That was it. So that money of ninety-three thousand dollars meant absolutely nothing.

The other thing that they tried to show was that Mike and Brandy Carson were somehow living above their means. The two things that the casino records show is, according to Mr. Shananaquet, not me, according to the records, in September or August, I guess it was in August, Brandy had a twelve thousand six hundred dollar walk-a-way, as he said, jackpot at the casino. That's twelve thousand six hundred dollars. And on those same records for Mike Carson, Mike Carson had a twelve thousand five hundred - he just showed it you - walk-a-way jackpot from the casino. Means, they take their money, as Mr. Shananaquet said, and walk out of the casino.

And then Brandy takes part of her money and makes a donation, a charitable donation, and somehow that's a bad thing. She takes twelve thousand six hundred dollars away from the casino and then she donates it to a good cause and that shows she's a criminal.

So we have unaccounted for income here that the prosecutor didn't even consider, obviously, that these two had twelve thousand six hundred, and, twelve thousand five hundred in income in August. Walk-a-way money.

So how much did... The one part of Mr. Shananaquet's testimony, after I fought with him for 35 minutes, was that, those sheets have no evidentiary value as far as how much money was deposited into the--into the slot. Coin-in means, whatever the casino gave him. Coin-in means whatever money he had on the receipts. Coin-in means, his original investment of course. And, that's exactly what it means. And, what did Mr. Shananaquet tell you? One hundred dollars looks like a thousand dollars. Five hundred dollars looks like five thousand dollars. In this case, the investment by Mike Carson could have been five thousand dollars. That was his testimony. But his other testimony was, actually, coin-in means nothing as far as cash invested in the machine. He said it twice after fighting with me for--for 35 minutes. And that, I believe on that occasion, twenty-eight hundred dollars, he said, would have to be paid when Mike--at the end of the day; twenty-eight hundred dollars. And how much did he lose all year? Five thousand dollars loss.

And we know Mike, for whatever reason... I mean, there are some people that just do well at casinos and gambling. I don't happen to be one of those people, I--because I don't gamble, but there are other people I know of that have literally

driven themselves into bankruptcy. But that's not the case for Mike. He wins jackpots and text them with pictures to - I stuck my finger in my eye, I wish I hadn't done that - pictures of--to his brother, Dwight. That he was always carrying around wads of hundreds, before and after all of this. And when the casino pays out, they pay in hundreds. They pay in hundreds and fifties. When they go to the bank to deposit this money, and that's a 4Front account that the police apparently didn't even look for, that's what was done with this cash. They went to the bank and converted it into hundred-dollar stacks; and took it with them. That's what happened. And, frankly, they have no evidence to the contrary of that, it's completely unopposed. And why was it unopposed? 'Cause they didn't look for it, they didn't gather evidence to oppose that.

While we're talking about lack of evidence, what was there lacking about the safes? No one fingerprinted the outside of the safe, no one took DNA from the outside of the safe, no one took fingerprint evidence inside of the safe, no one took DNA evidence inside of safe, and importantly, no one evidence from all of those documents inside the safe. And we know from the testimony of the forensic fingerprint ex--expert that that evidence, as she says, can last forever. Yet, those things, even up to the day of trial, were never tested. They got this paperwork back. They thought enough to go to the to the slips and have those fingerprinted, but did they go to any of the

documents in the safe? The s... The money... The documents that would've had to have been moved, according to Mr. Billings, to get access to that can? Did they do that? Did they? No. I would submit that..., you know, this--those documents could've proved another person did the crime. Did they look for evidence that anybody else had done this crime? No.

They also, one of their big theory was, no one ever had access to that safe. How do we know that? How do I know? Was this house sitting completely empty, big as a bird, visible from the side of the road, all through the winter? Yes. Were there other people that had access to this home? Alan Olsen lived across the street. Brother Don, who apparently had a third interest in the contents of this safe, was right there. We never heard any evidence at all about whether or not he had a combination. The key was under the block going to the front door of the house. That's original. No one would ever think to look there if they wanted to get into the house.

Mr. Swadling had evidence (sic) to the house. Pretty amazing. Did they look at any of those people? Did they really question them? Did they tell you that they did and eliminated them? No, they didn't.

Remember, we're talking about lack of evidence which is part of reasonable doubt.

Another thing about manipulating the case that bothered me at the time, a lot, was that my client was charged

in March and the charges--the evidence was essentially the same. But, in June two things happened. One, they find a surveillance device that had been attached, apparently, to Mr. Carson's truck. That's evidence that they had no evidence at that point. And the other thing they did was, they arrested Brandy DeGroff who tried to turn herself in at the jail immediately. I was a prosecutor for 30 years and I know that if there's a way to keep a witness off the stand is to charge 'em with a crime, 'cause then they can't testify without incriminating themselves. So it's a simple device. I'm not saying that Mr. Schuitema thought about that but it's certainly true in this case that it happened that way. She had stuff to explain what was going on, could she give it to Detective Leirstein after that? Absolutely not. 'Cause any good lawyer is gonna tell their client, hey, don't cooperate anymore. And that cooperation also includes testifying on behalf of somebody. So, immediately, I lost a witness at trial, Brandy DeGroff, who's sitting right there. I lost her.

You had testimony from Dwight Carson who, as a brother, employed Mike. Of course he had some credibility issue and that is that he's related to Mr. Carson. But, on the other hand, he also testified, under oath, looking at you and looking at me, and said, "We worked all alone." We did. Is there any evidence on the record to refute that? No. It's unopposed. Unopposed. The other thing that he said is, "Mike and I would

go to 4--4Front Credit Union." And did they ever look for a 4Front? No. Did they ever run a search warrant on Mike Carson's social security number? Because they did for Brandy. They didn't do that either.

Let's talk a little bit about Mr. Schuitema's discussion of a criminal record.

Does Criminal Sexual Conduct between two teenagers have anything to do with a theft crime? We spent a good deal of time talking about that. Does it really matter a hill of beans about the theft crime? If it doesn't, what's the purpose of introducing it to you guys? He wants you to convict Mike Carson because he's a bad person. I mean, that's patently obvious. We got this guy that was having sex with a teenager. Oh, by the way, the girl was a teenager, and they were living together. And the charge was, at the time, she was 13 to 15. No one says that she was 13, but he jumped to that because it's the worst possible scenario. She could've been 15. And the date of the crime, as you know, isn't the date that the charges were brought, and it's certainly not the date the conviction entered. So, Mr. Carson could've been... I mean, look at this case. This alleged curred--occurred in August of 2019, and when...when is it at trial? October of 2020. So does that criminal history give you any evidence about--concerning the circumstances of a...actually, Attempted Criminal Sexual Conduct? It doesn't. I'm sorry. But it doesn't.

the prosecutor's timeline, all this money was gone, gone. Funny thing about conspiracy as part of the instruction is, that they have to be doing something in furtherance of the conspiracy, actively participating in a crime and actively pursuing.

So this is in October. Under the prosecutor's theory, the crime happened in October--or, in August. And Brandy and Mike are fighting. You don't see the whole argument here but it's...it's an argument. And, what is said is, "'Cause I haven't made any money" - she was only making two hundred and forty-five dollars a week - "or didn't help you steal sixty thousand dollars..." So, if you gotta believe that she's not making any money and she was making two forty-five, then you also have to believe that she didn't help steal sixty thousand dollars. If you look at it, common sense. And this is in October. And it's also after, after the so-called conspiracy.

In November, November 24th, Mike Carson says to Brandy, again, "I just need to go. I can't dee--keep doing this to you and the kids. I never get sleep, and I'm always full of anger and everyone at home in the line of fire and it is not fair to all of you." He was convicted of Domestic Violence. It's just best that I not, be there until I can get some sort of help to calm me and let me sleep. It doesn't help that I'm overly stressed over finances. We were stupid with tons of money this year." Did they make a lot of money this year? They did. At the casino. No doubt. They made a lot of money. A lot of cash

out if you look at the records. Jackpots. So, they had cash money coming in. Bought a car cash. Did all this stuff.

"We were... I wish now I had a way...I had a way to rob those entire safes." Wished he had a way to do it. Does that say that he'd already robbed the safes and was coming back to him? No. Does wishing a crime? No. It said that he didn't have a way to rob the safes. That's exactly what it said.

Again, you can speculate about what that says, but when you speculate, that means reasonable doubt. And as I said the meaning of these texts, if it's gonna carry their whole entire case, has to be crystal clear. No evidence on the safe. No evidence based upon finances. In fact, their attempt to show that finances were out of order show that two checks were deposited, and that's the only evidence you saw.

No evidence that there was large losses of cash at this casino. No evidence that more than five thousand dollars was deposited. And even that he said that the statement of the coin-in doesn't show cash investment. It shows receipts and money run through that slot. That's why it's called coin--coin-in. That's not called cash invested... It's not called anything else. It's called coin-in. It means absolutely nothing.

The one thing that is evidentiary according to Mr. Shananaquet is that they only lost, all year, five thousand dollars, more or less. So we have...that failed. That failed the--showing that Mr. Carson had a gambling problem and spent

all this money. It failed that the bank accounts showed an unusual upkeep--or, upswing in September of money going into the bank. When you looked at it and broke it down it was two checks from two sales of vehicles. It failed that you don't hear what the 4Front bank accounts had, because they didn't do it, they didn't do their jobs.

So, remember when I told you that there was a difference between not guilty and innocent, you don't even have to decide if he's innocent, in fact, you're not supposed to, you have to decide, as Mr. Schuitema told you at the beginning of all this mess, is whether he carried his burden of proof. And so, the burden of proof here is whether he proved beyond a reasonable doubt that these text messages is all he needs to commit my crime of eight serious crimes. That's their contention. That's Detective Leirstein's contention. And he can talk about evidence all day long if he wants, but at the end of the day, we've got them telling you that the only evidence they have are these eight pages with the few text messages that he discussed with you. And it hasn't changed. During the... During the time coming up to the trial, they managed to get Mr. Billings' fingerprints on his own slips, they didn't fingerprint the envelope they were in, the storage where these were, to look for anybody's prints. They didn't do it. They didn't prove whether or not Mr. Billings had key for the safe in the house. Didn't do it. Didn't prove that anybody, not much less Mr.

Carson, was in those safes. They didn't prove that the only people who had access to those safes, or even an opportunity, that's what we call, opportunity, was Mike Carson. It wasn't proved. When it comes right down to it, you can dress up their case and put lipstick on it, but they've already admitted, the only thing in here that they have are the text messages.

So, your job is to look at the text messages and say, You know what, I'm comfortable enough to convict Mike Carson beyond a reasonable doubt based upon text messages that occurred in October and November, which is way after the crime was supposedly committed, and the ones in front where they're talking about how rich Mr. Carson is and how much money he would've had in his safe, there's still no evidence that anybody went into that safe. None.

Thank you.

THE COURT: Mr. Schuitema.

MR. SCHUITEMA: Thank you, judge.

This always seems to be the part of the trial where I remind jurors of an instruction the judge is gonna give you, which is, what the lawyers says isn't evidence. We don't testify. We don't swear to tell the truth. We're not examined. We can get things wrong accidently or on purpose. The evidence comes from the witnesses and the exhibits in evidence. And, when Mr. Beach spoke to you, there were several things that he just flat out got out--got wrong.

truth.

The text messages in this case. Mr. Beach wrote--read a portion of them. When you read them yourselves and read the context of them, it's gonna be crystal clear what everyone is saying, it's gonna be crystal clear, they robbed Don's safe when you consider all the other evidence - the finances, the money, the explicable spending of money. The defendant's own crazy statement to Mr. Firman about miraculously finding lots of money. All those things together, not just the text, but all those things together prove beyond any and all reasonable doubt, the defendant committed all these crimes and I ask you to return verdicts finding him guilty of all these crimes. Thank you.

THE COURT: Jurors, the evidence and argument in the case is completed. The next phase of the trial is for me to instruct you on the law and then after I do that, you'll be sent to the jury room to deliberate.

My instructions will take 20 minutes, perhaps, and you've all been sitting for a while. Shall I press on or is a break something that would be helpful at this point?

UNIDENTIFIED JUROR: Kind of feel like I'd like to hear what you have to say and then deliberate, rather than, hear what you have to say and go to lunch. So, personally--

THE COURT: So take--

UNIDENTIFIED JUROR: --I would--

THE COURT: --a break--

this trial--in this trial in some private and convenient place, that you will suffer no communication to be made to them; that you will not communicate with them yourself unless ordered by the Court; and that you will not, until they shall have rendered their verdict, communicate to anyone the state of their deliberations or the verdict that they may have agreed upon, so help you God?

THE BAILIFF: Yes, I do.

THE COURT: Alright. Jurors, at this time I'm going to direct you to go to the jury room and commence your deliberations.

THE BAILIFF: All rise.

(At 1:20 p.m., jury deliberates)

THE COURT: We can go off the record. Anyone need anything on the record?

MR. SCHUITEMA: No, judge.

MR. BEACH: No, thank you, judge.

THE COURT: Okay.

(At 1:20 p.m., court recessed)

(At 2:54 p.m., court reconvened)

THE COURT: Where's Mr. Schuitema?

MR. SCHUITEMA: Right here.

THE COURT: Oh. Okay. Bring the jury in.

(At 2:54 p.m., jury returns)

THE COURT: You may take your seats.

We're back on the record in the case of People of the State of Michigan versus Michael Carson; and have been informed that the jury has reached a verdict.

Who is your foreperson?

THE JURORS: (indicating)

THE COURT: Miss Weld?

THE FOREPERSON: That is correct.

THE COURT: Thank you. Would you please stand and read the verdict from the verdict forms for us?

THE FOREPERSON: Can I remove my mask, your Honor?

THE COURT: Pardon?

THE FOREPERSON: Can I remove my mask, so it'd be--

THE COURT: Yes.

THE FOREPERSON: --easier to be heard?

In the matter of the People of the State of Michigan versus Michael Georgie Carson, we, the jury, in the above matter find as follows: Count 1, guilty of safe-breaking. Count 2, guilty of larceny $20,000 or more. Count 3, guilty of receiving and concealing stolen property $20,000 or more. Count 4, guilty of larceny in a building. Count 5, guilty of conspiracy to commit safe-breaking. Count 6, guilty of conspiracy to commit larceny $20,000 or more. Count 7, guilty of conspiracy to commit receiving and concealing stolen property $20,000 or more. Count 8, guilty of conspiracy to commit larceny in a building.

THE COURT: Thank you. Would you hand that to the

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EMMET

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No. 2020-5052-FC
Hon. Jennifer Deegan

MICHAEL GEORGIE CARSON,

Defendant.

_____/

PROCEEDING: MOTION FOR GINTHER HEARING

LOCATION: Emmet County Courthouse
(Transcript from video recording)

DATE: Thursday, April 28, 2022

TIME: 1:00 p.m.

Electronic recording transcribed in the above-entitled cause, before Stefanie S. Pohl, Certified Shorthand Reporter, CSR 5616, and Notary Public for the County of Clinton.

APPEARANCES:

STEPHEN B. GRAHAM, ESQUIRE
Emmet County Prosecutor's Office
200 Division Street, Suite G42
Petoskey, Michigan 49770-2438
Appearing on Behalf of the Plaintiff.

J. NICHOLAS BOSTIC, ESQUIRE
Bostic & Associates
909 North Washington Avenue
Lansing, Michigan 48906-5137
Appearing on Behalf of the Defendant.

I N D E X

suppress the contents of the cell phone?
A Yes.
Q And what was the result of that conversation?
A I'm still reading the search warrant.
Q Okay.
A Can I just note for the record that the Affidavit is some five pages long, so.

Before trial, I did not consider this. And after trial I think we proved that he had taken exactly, or lost exactly, $12,000 at the casino. I think that was pretty clear. But as far as this goes, no, I didn't file a motion to suppress.

Q You testified that you did discuss filing a motion to suppress the contents with Mr. Carson, but my last question was: What was the result of that conversation?
A Actually I discussed it with Brandie, but either way, I left it that I wasn't going to file the motion.
Q Okay. And why not?
A Well, because the Affidavit was fine. I -- I thought in my mind that Judge Johnson made a decision that was contrary to two on-point Court of Appeals cases that I cited to him, and as I walked out of the courtroom, Mr. Schuitema said to me he did not know what he was going to do --

MR. GRAHAM: I'm going to object to what Mr. Schuitema said as hearsay.

THE COURT: Well, I'm going to allow it because it's going towards his -- his state of mind.

THE WITNESS: It's my frame of mind. Thank you, Judge.

THE COURT: Yeah.

MR. GRAHAM: Okay.

THE WITNESS: That he did not know what he was going to do without that cell phone in evidence. In other words, even he thought that motion shouldn't have been granted. But it was, and then I look at this search warrant, and frankly, this search warrant probably provides a basis to look for that cell phone. And after that, the content of the cell phone is basically pro forma. I'm surprised it said as much as it did. If they got the cell phone, they're going to look at it.

Q (By Mr. Bostic) Okay. I want to --

A And, again, there's -- like I said, there's two Court of Appeals cases on point, but -- and I agree with it.

Q Right. And you may have noticed I didn't ask you questions about the motion to suppress.

A Right, but --

Q Because Judge Deegan has declined to revisit that at

all records or documents. Have you in the course of your practice seen that broad phrase discussed at a weakness in search warrants?

A I have. I drafted this language, by the way.

Q Pardon me?

A I drafted this language when I worked in the prosecutor's office, or something very similar to it. If you get to the end of it, it includes additional information regarding cell phones, et cetera.

Q Well, in that first line still, after any all records or documents --

A Uh-huh.

Q Then the next phrase is pertaining to the investigation of larceny in a building and safe breaking?

A Correct.

Q So the words pertaining to the investigation, or sometimes you see related to the investigation, are you aware that that is also sometimes a weakness in search warrants?

A It's weasel language, I agree with you. Unfortunately this one got really specific towards the end.

Q In paragraph -- so now we're on page 3 of the Affidavit, paragraph 3-W. The Affiant talks about based upon training and experience. But did you see anywhere else in the Affidavit where his training and

AFFIDAVIT for SEARCH WARRANT

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

Detective Sergeant Matt Leirstein, Affiant(s) state(s) that:

1. **The person, place or thing to be searched is described as and is located at:**

Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest.

- LG Cellular phone blue in color with Serial# GPLML713DCGB2NFL713DL. This device is currently located at:

The Emmet County Sheriff's Office Property Room
3460 Harbor Petoskey Rd
Harbor Springs, MI 49770

2. **The PROPERTY is to be searched for and seized, if found, is specifically described as:**

Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

3. **The facts establishing probable cause or the grounds for search are:**

This affidavit consists of: 4 pages.

Affiant: [signature]

Review on: 2-27-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 3-3-2020
Date

C Verhard
~~Judge~~/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

a) Your Affiant is employed by the Emmet County Sheriff's Office as a Detective Sergeant and certified police officer in the State of Michigan through MCOLES.
b) Your affiant is investigating a complaint of Larceny in a Building and Safe Breaking whereas Donald Billings, the victim of the named crimes has estimated to having $70,000 stolen from a safe at his residence.
c) Your affiant spoke with Billings and who indicated he allowed access of his residence to Michael Carson and Brandie Degroff to sell items for him on Buy, Sell, Trade sites on the internet.
d) Billings indicated he allowed access to his residence between the months of August 2019 through October 2019. Billings indicated he provided a key to his residence to Degroff and Carson for the purpose of them finding items to sell for him.
e) Affiant was advised by Billings that Carson and Degroff never once had permission to enter into the safes at his residence.
f) Billings advised the safe at his residence is only accessed by a combination, however there was also a key lock that would also allow entry. Billings indicated he does not have a key for the safe and has only accessed it via combination lock.
g) Billings indicated he had roughly $70,000 inside the safe which was contained inside a small lock-box type safe. Billings stated this cash was his life savings from his years of work and selling items privately.
h) Billings stated the cash was wrapped with yellow bands in $1000 increments.
i) Billings indicated he last knew there was roughly $70,000 in approximately August or September of 2019. Billings stated he went to check on the money in October of 2019 and noted the combination to the safe was not working. Billings indicated he contacted a locksmith to assist him with the safe.
j) Billings stated the safe was opened by the locksmith, however the locksmith indicated the safe was locked using the key lock, which Billings does not have.
k) Billings stated upon opening the safe he noted the $70,000 was missing, leading him to contact law enforcement and report the theft.
l) Billings indicated he only allowed Carson and Degroff inside his residence and no one else should have been inside.
m) Billings indicated he learned from Carson and Degroff they allowed Alan Olsen access to the residence on one occasion.
n) Deputy Robert Poumade handled a theft complaint where Degroff was having money taken from her bank account fraudulently. Degroff voluntarily provided Deputy Poumade a print out of her bank statement. I noted Degroff deposited roughly $11,500 from August

This affidavit consists of: 4 pages.

Affiant: _____

Review on: 2-27-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 3-3-2020
Date

_____
Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

2019 through the end of October 2019. The deposits do not contain any information to indicate where the money had come from.

o) Affiant interviewed Degroff on 11/26/2019 and inquired about the deposits. Degroff stated she won the money while gambling at the casino and had receipts to prove it. Degroff indicated she makes roughly $245.00 weekly and Carson was not currently working due to an injury. Degroff stated with all her monthly bills she and Carson are generally short of money and are hurting financially.

p) Affiant asked Degroff if she took any money from Billings safe and she indicated she did not take any money from the safe.

q) Affiant interviewed Alan Olsen on 12/26/2019 about this complaint and asked if he was involved on taking money from the safe at Billing's residence. Olsen stated he did not take any money from the safe at Billing's residence.

r) Olsen indicated he knew Degroff and Carson were gambling quite a bit at the casino and in fact he recalled a time where Carson had several stacks of $100 bills wrapped in yellow bands. Olsen stated the stacks were a $1000 each and Carson had 3 to 5 stacks in his hand. Olsen stated that Carson told him not to let Degroff know Carson showed him the money.

s) Olsen stated there was one time Carson took him to the casino and gave him $500 to gamble. Olsen stated on this occasion Carson spent approximately $4000 at the casino.

t) Affiant spoke with Billings after interviewing Olsen and inquired about the money he had stolen from his safe. Billings indicated he had between 62 to 67 stacks of $1000 dollars wrapped in yellow bands that are now missing.

u) In addition to the money stolen from the safe Billings has had silver and steel pennies taken.

v) Affiant executed a search warrant at the Odawa Casino and learned Michael Carson spent an approximate total of $70,740.25 dating from August 1, 2019 through December 31, 2019. In addition, affiant learned Brandie Degroff spent an approximate total of $14,716.39 from August 1, 2019 through December 31, 2019.

w) Based on your affiant's training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence. Therefore, data obtained from mobile communication devices and records created by these devices can assist law enforcement in establishing the involvement of a possible suspect or suspects.

x) Records created by mobile communication devices can also assist law enforcement in establishing communication activity/ behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing

This affidavit consists of: 4 pages. Affiant: [signature]

Review on: 2-27-2020 (Date)

By: Mike Schuitema (Prosecuting Official)

Subscribed and sworn before me on: 3-3-2020 (Date)

[signature] (Judge/ Magistrate)

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

a larger segment of records ranging prior to and after the incident under investigation if possible.

y) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

Affiant further sayeth not.

This affidavit consists of: 4 pages.

Affiant: _____

Review on: 2-27-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 3-3-2020
Date

_____
Judge/ Magistrate

SEARCH WARRANT

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

Detective Sergeant Matt Leirstein, Affiant(s) state(s) that:

1. **The person, place or thing to be searched is described as and is located at:**

Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest.

- LG Cellular phone blue in color with Serial# GPLML713DCGB2NFL713DL. This device is currently located at:

The Emmet County Sheriff's Office Property Room
3460 Harbor Petoskey Rd
Harbor Springs, MI 49770

2. **The PROPERTY is to be searched for and seized, if found, is specifically described as:**

Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: I have found that probable cause exists and you are commanded to make the search and seize the described property. Leave a copy of this Search Warrant with Return and Tabulation (a written inventory of all property taken) with the person

SEARCH WARRANT

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

from whom the property was taken, or at the premises. You are further commanded to promptly return this Search Warrant and Return and Tabulation to the Court.

Issued: 3-3-2020
Date

C. Murad
Judge/Magistrate

STATE OF MICHIGAN

IN THE 57TH CIRCUIT COURT FOR THE COUNTY OF EMMET

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

File No 20-5054-FC
Honorable Charles W. Johnson

MICHAEL GEORGIE CARSON,

Defendant.

Opinion and Order

Defendant is charged with safe breaking and other theft charges. Police seized a cell phone from his home during his arrest, and later searched the phone pursuant to a warrant. Defendant moves to suppress the cell phone and evidence obtained from it. For the reasons which follow, the motion is denied.

Background.

Defendant and his spouse Brandi DeGroff became suspects in an investigation of the theft of money and valuables from a safe . A warrant for the arrest of Defendant was issued and at about 4am on February 26, 2020, two deputies from the Emmet County Sheriff's Department arrived at his house to arrest him.

Defendant answered the door and came outside. After he was placed under arrest, he asked to go back into his home to get his shoes and to say goodbye to his daughter. The deputy advised Defendant that because he was under arrest, he would need to accompany him into the house and wherever he went. He agreed to this.

While inside, Ms. DeGroff requested that Defendant be allowed to go to the bedroom to get dressed. He was again told that the deputies would have to accompany him, and did not object.

Defendant and the deputies proceeded to his bedroom which had a bed in the center, a nightstand to either side, and a closet to the right, when viewed from the doorway. Two cellphones were visible in the bedroom, one on each nightstand. People's Exhibit 1.

Defendant went first to the left far side of the bed to put on his socks. He then moved about the bed to the closet to get dressed. He then went to the foot of the bed and used a notebook and pen to write some instructions to Ms. DeGroff. After he handed the written note to her, one deputy pointed to the nightstand on the left side of the bed and asked

Defendant if that cell phone was his. When he acknowledged it was his cell phone, the deputies informed him they would be seizing it as part of the investigation.

Defendant walked to the nightstand, got the phone and charging cord, and handed them to the deputy. He was asked for the PIN number which he provided and he also used his fingerprint to unlock the phone. It was then placed into "Airplane Mode" to disconnect it from the cellular wireless network. No search of the phone was made until the deputies received a separate search warrant in early April, 2020. Defendant does not challenge the search of the phone pursuant to the warrant.

Applicable Law.

A motion to suppress relies on the so-called 'exclusionary rule'; a rule enunciated by the Supreme Court which "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis v United States*, 564 US 229, 237; 131 S Ct 2419 (2011). The exclusionary rule is not found in the Constitution, but was created as a remedy for a Fourth Amendment violation. As a prophylactic rule, any "analysis must also account for the substantial social costs generated by the rule." *Id.* (internal quotation omitted).

The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." It has long been accepted that a search incident to arrest is reasonable. *United States v Robinson*, 414 US 218, 224; 94 S Ct 467 (1973). The *Robinson* Court recognized two distinct lines of authority regarding a search incident to arrest:

> It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

The Michigan Court of Appeals recognizes that the need "to search the place where the arrest is made in order to find and seize things connected with the crime" is inherent in the exception. *People v Herrera*, 19 Mich App 216, 229; 172 NW2d 529 (1969), citing *Agnello v United States*, 269 US 20, 30; 45 S Ct 4 (1925). Though typically applied in the context of searching an automobile's passenger compartment, the Supreme Court has consistently held that "[t]here is ample justification . . . for the search of the arrestee's person and the area within his immediate control." *Herrera*, 19 Mich App at 232, citing *Chimel v California*, 395 US 752, 762; 89 S Ct 2034 (1969).

The *Chimel* Court went on to define such area as "the area from which he might gain possession of a weapon or destructible evidence." *Chimel*, 395 US at 763. Thus, pursuant to a lawful arrest, police are able to preserve destructible evidence located within the area of control of the arrestee. Detective Leirstein testified that in his experience, cell phones often contain evidence of crime. Deputy Midyett testified that there is a concern that if not seized,

any evidence on the phone could be lost. He also testified that the phone was placed in airplane mode to prevent remote wiping of its contents.

"Under some circumstances, a contemporaneous search of a residence without a search warrant may be deemed lawful if it is incidental to a valid arrest." *People v Giacalone*, 23 Mich App 163, 166; 178 NW2d 162 (1970). However if the arrest is only incidental to the search, such that the police only intended to search the premises and the arrest was a "sham," then suppressing the evidence would be proper. *Id.* at 172.

Another reasonable search and seizure is the "Plain View" doctrine. "The plain view exception . . . allows a police officer to seize items in plain view if . . . the evidence is obviously incriminatory." *People v Mahdi*, 317 Mich App 446, 463; 894 NW2d 732 (2016).

Analysis.

In *Mahdi*, the defendant's cell phone was seized purportedly under the plain view exception. The Court of Appeals soundly rejected that theory as "without merit." As "further investigation there was necessary to establish a connection between the [phone] and the suspected criminal activity," the cell phone itself was not "immediately incriminating."

The facts of this case are no different. Aside from the ubiquitous nature of a cell phone and the deputies' subjective expectations that a search would reveal incriminating evidence on the phone, there is nothing "immediately incriminating" about a suspect owning a cell phone. The deputies did not identify anything unique or exceptional that made Defendant's cell phone more incriminating than his spouse's cell phone on the other nightstand. The plain view exception does not apply.

The crux of the motion lies in whether the search was incident to a lawful arrest or if the arrest was a "sham" for the purpose of seizing evidence. In *Giacalone*, the arresting officers suggested the defendant go to the bedroom to change his clothes. As he approached his dresser to get socks, the officers stopped him and conducted a search of it, seizing "a small arsenal of weapons."

Officers then asked the defendant to reveal a hidden safe, which he did. The officers then proceeded to on a two-hour search of the home. The trial court, in a statement cited favorably by the Court of Appeals, admonished the officers for "becloud[ing the case] with the possibility that there were purposes beyond the mere arrest of" the defendant. *Id.* at 170.

The search was upheld and the evidence was admitted. While finding a "dual purpose" to the officers' actions, the defendant was arrested under a valid warrant. Significantly, the Court found that the suggestion to change clothes was reasonable and the defendant was not under "duress or sense of compulsion" to do so. *Id.* at 173-74.

The facts in the instant case weigh more favorably to the People. The suggestion to change clothes came from Defendant's wife, not the officers. Like in *Giacolone*, there was a valid

warrant for Defendant's arrest. His movement through the home was after a warning the deputies would have to accompany him. He did not go anywhere he did not choose to go.

When he sat on the bed next to the nightstand to put on his socks, his cell phone was in his immediate reach. During this time, as Defendant was aware, he was under arrest. Further, as Ms. DeGroff was a suspected co-conspirator and was to remain in the residence, officers had a concern that she could access the phone and destroy any evidence contained therein.

The officers followed Supreme Court dicta from *Riley v California*, 573 US 373, 134 S Ct 2473 (2014), by simply putting the phone in airplane mode and not searching it until a warrant was obtained. In rejecting the Government's claim that the search incident to arrest doctrine covered searching the contents of the cell phone, allegedly out of a concern of remote wiping, the *Riley* Court noted:

> In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. They may not be a complete answer to the problem . . . but at least for now they provide a reasonable response. [*Id.* at 390 (internal citations omitted).]

The deputies here disconnected the phone from the cellular network. As Defendant's suspected co-conspirator was remaining in the house, the deputies also had a conern of the physical destruction of the phone. After seizing and disconnecting it, the investigating detective waited until he had a search warrant before further analyzing the phone.

Conclusion.

The deputies seized Defendant's phone as part of a "dual purpose" to their arrest after he chose to go to his bedroom and place his cell phone within his "immediate area of control." Seizing the cell phone was pursuant to a valid search incident to a lawful arrest. Defendant's motion to suppress is denied.

SO ORDERED.

Date: 7/15/20

Charles W. Johnson (P28926)
Circuit Court Judge

cc: Mr. Duane Beach
Mr. Michael Schuitema

STATE OF MICHIGAN

IN THE 57th CIRCUIT COURT FOR EMMETT COUNTY

People of the State of Michigan, Plaintiff, v. Michael Georgie Carson, Defendant.	Docket No. 20-005054-FC Hon. Jennifer Deegan Circuit Court Judge

/

Emmet County Prosecutor's Office Attorney for Plaintiff 200 Division St., Suite G42 Petoskey, MI 49770 231-348-0686	J. Nicholas Bostic P40653 Attorney for Defendant 909 N. Washington Ave. Lansing, MI 48906 517-706-0132

/

DEFENDANT'S MOTION FOR NEW TRIAL

Michael G. Carson, for his motion, states:

1. The police seized a cell phone from Mr. Carson's home at the time of his arrest three months after the investigation started.

2. The government asserts that the seizure was incident to the arrest on an arrest warrant.

3. The body camera footage and the circumstances of the arrest demonstrate that the government failed to prove that the warrantless seizure was within the scope of the asserted exception.

4. The trial court previously ruled that the phone was not unlawfully seized but the presentation by the defense was ineffective and the telephone and its fruits should have been suppressed.

5. A review of the testimony of the motion hearing and the body camera footage at the time of the arrest reveals inarguably that Mr. Carson was under arrest when the arresting deputy asked Mr. Carson if the cell phone on a nightstand was his.

6. The questioning of Mr. Carson was without the required warnings concerning Mr. Carson's right to counsel or his right to remain silent and there was no waiver of those rights.

7. Mr. Carson answered the officer's question and established a connection between the cell phone and Mr. Carson.

8. Trial defense counsel was ineffective for failing to raise this issue before trial and have the statement suppressed.

9. The day after the cell phone was seized, a detective prepared an affidavit for a search warrant to search the contents of the phone.

10. The affidavit is defective in that it only asserts that a review of the contents will assist the investigation and does not establish probable cause to believe the cell phone contains any evidence.

11. Trial defense counsel was ineffective for failing to raise the issue before trial and have the contents of the cell phone suppressed.

12. Four months after the arrest, the detective obtained a search warrant for Mr. Carson's home.

13. The warrant is defective because the affidavit relied on illegally seized evidence and otherwise fails to allege probable cause based on validly seized evidence.

14. Trial defense counsel was ineffective for failing to raise a challenge to this evidence.

15. Trial defense counsel was ineffective for failing to challenge retaliatory amendments to the information and failing to remand for a preliminary hearing on the new charges.

16. Trial defense counsel was ineffective for failing to raise objections during trial to hearsay, a co-conspirator's out-of-court statements, and proper foundation for conclusory testimony regarding the origination of text messages found on Mr. Carson's phone.

17. Mr. Carson's trial was not a proper adversarial proceeding that complied with several concepts of the United States Constitution.

RELIEF REQUESTED

WHEREFORE, Mr. Carson respectfully requests this Honorable Court conduct the necessary hearing in this matter, vacate the conviction and sentence, and set this matter for trial.

9/10/2021
Date

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Attorney for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

United States Supreme Court

Michigan Supreme Court

Michigan Court of Appeals

Sixth Circuit Court of Appeals

Other Federal Courts

Court Rules

STATEMENT OF JURISDICTION

Judgment entered on December 15, 2020. ROA 56. Mr. Carson filed his claim of appeal of right with the Court of Appeals on January 4, 2021. Pursuant to extensions, Mr. Carson's brief on appeal is due on September 10, 2021. This motion is brought pursuant to MCR 7. 208(B)(1). See also MCR 6.431(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL INCLUDES A REQUIREMENT THAT COUNSEL PERFORM EFFECTIVELY. COUNSEL MUST, AT A MINIMUM, ASSIST THE COURT IN COMPLYING WITH DUE PROCESS AND ASSIST THE DEFENDANT WITH PRESENTING A DEFENSE. WHERE TRIAL COUNSEL FAILED TO ARTICULATE THE PROPER LEGAL STANDARD FOR THE SCOPE OF A SEARCH INCIDENT TO ARREST, WAS MR. CARSON DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL INCLUDES A REQUIREMENT THAT COUNSEL PERFORM EFFECTIVELY. COUNSEL MUST, AT A MINIMUM, ASSIST THE COURT IN COMPLYING WITH DUE PROCESS AND ASSIST THE DEFENDANT WITH PRESENTING A DEFENSE. WHERE TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS STATEMENTS OBTAINED DURING CUSTODIAL INTERROGATION WITHOUT THE REQUIRED WARNINGS, WAS MR. CARSON DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

III. THE SIXTH AMENDMENT RIGHT TO COUNSEL INCLUDES A REQUIREMENT THAT COUNSEL PERFORM EFFECTIVELY. COUNSEL MUST, AT A MINIMUM, ASSIST THE COURT IN COMPLYING WITH DUE PROCESS AND ASSIST THE DEFENDANT WITH PRESENTING A DEFENSE. WHERE TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE CONTENTS OF THE CELL PHONE BASED ON A DEFECTIVE SEARCH WARRANT, WAS MR. CARSON DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

IV. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS GOVERNMENT ACTION IN RETALIATION FOR THE EXERCISE OF A CONSTITUTIONAL OR STATUTORY RIGHT. WHERE TRIAL COUNSEL FAILED TO CHALLENGE THE AMENDMENTS BY MOVING FOR A PRELIMINARY EXAMINATION OR TO DISMISS FOR A CONSTITUTIONAL VIOLATION AFTER THE PROSECUTOR AMENDED THE INFORMATION BY ADDING FOUR CONSPIRACY COUNTS A FEW DAYS AFTER MR. CARSON FILED HIS MOTION TO SUPPRESS, WAS MR. CARSON DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

V. THE SIXTH AMENDMENT RIGHT TO COUNSEL INCLUDES A REQUIREMENT THAT COUNSEL PERFORM EFFECTIVELY. COUNSEL MUST, AT A MINIMUM, ASSIST THE COURT IN COMPLYING WITH DUE PROCESS AND ASSIST THE DEFENDANT WITH PRESENTING A DEFENSE. WHERE TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE ITEMS SEIZED FROM THE HOME BASED ON A DEFECTIVE SEARCH WARRANT, WAS MR. CARSON DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

FACTS

The facts pertinent to this motion are partly of record in the transcripts and papers on file with the clerk. Most of the issues concerning ineffective assistance of trial counsel are not yet of record. Mr. Carson's affidavit and the contents of the existing record demonstrate that an evidentiary hearing is warranted on the ineffective assistance of counsel claim. Specific facts relevant to a particular claim are inserted into this brief where they apply.

LAW/ARGUMENT

I. WHERE TRIAL COUNSEL FAILED TO ARTICULATE THE PROPER LEGAL STANDARD FOR THE SCOPE OF A SEARCH INCIDENT TO ARREST, MR. CARSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standards.

The exclusionary rule operates to prevent use of evidence obtained either directly or indirectly by unlawful conduct. ***Segura v United States***, 468 US 796, 804; 104 SCt 3380; 82 LEd2d 599 (1984). This principal has become established as the "fruit of the poisonous tree" doctrine. ***Wong Sun v United States***, 371 US 471; 83 SCt 407; 9 LEd2d 441 (1963). Thus, in accordance with the exclusionary rule, Mr. Carson sought suppression of the cellular telephone seized purportedly incident to his arrest but without a warrant.

The Fourth Amendment provides that individuals shall be secure in their person and property from unreasonable search and seizure. U.S. Const., Amend IV; ***Rakas v Illinois***, 439 US 128, 148; 99 SCt 421; 58 LEd2d 387 (1978); ***United States v Padilla***, 508 US 77; 113 SCt 1936; 123 LEd2d 635 (1993). A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. See ***United States v Place***, 462 US 696; 03 SCt 2637; 77 LEd2d 110 (1983).

Due to space limitations, a thorough discussion of the history of the search-incident-to-arrest exception has been removed from this brief. Mr. Carson will file an ex parte motion seeking to exceed page limitations and submit a supplemental brief.

In ***Chimel v California***, 395 US 752; 89 SCt 2034; 23 LEd2d 685 (1969), the United States Supreme Court rejected the expansive language of ***United States v Rabinowitz***, 339 US 56; 70 SCt 430; 94 LEd 653 (1950) and noted the lack of decisional analysis that led to the exception in the first place. *Id.*, 759-760. The ***Chimel*** Court explained:

> Even in the *Agnello* case the Court relied upon the rule the '(b)elief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' 269 U.S., at 33, 46 S.Ct., at 6. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and '*the burden is on those seeking (an) exemption (from the requirement) to show the need for it* * * *.' *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59.
> ***Chimel***, *supra*, at 762 (emphasis added).

The ***Chimel*** Court agreed with an interpretation of the exception because "a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" was justified by the history of the exception (in a constitutional sense) and logic. Any justification was lost, however when the exception was applied in "any room other than that in which an arrest occurs." ***Chimel***, *supra*, at 763.

In ***Chimel***, the entire house was searched but the Court said that any limitations based on such considerations as the number or size of rooms would be artificial and inconsistent with the history of the Fourth Amendment. *Id.*, 766. The Supreme Court was also aware that police could deliberately choose the location of the arrest as a ruse to engage in a search for evidence. *Id*, at 767. In ***Chimel***, the three officers arrested the defendant in his home in the afternoon. They then

told him they were going to look around to which he objected. They then proceeded to search the entire three bedroom home including the attic, the garage, and a workshop. *Id*, at 753-754. The Court concluded by holding that the search beyond the area where he could reach evidence to be used against him was unconstitutional and it overruled ***Harris*** and ***Rabinowitz*** to the extent they were inconsistent. *Id*, at 768.

In ***United States v Johnson***, 16 F3d 69 (CA 5 1994), a municipal employee was arrested in his office on a warrant. The defendant was told to sit behind his desk and – after getting up two or three times – then remained seated. The officers conducted a cursory search in the office and obtained some evidence. *Id*, at 70. The search covered several items in the 10 x 12 office including a briefcase on a chair approximately eight feet from where the defendant was sitting. All evidence except a memo that was within the defendant's reach was suppressed. *Id*, at 73.

In ***United States v Darden***, 353 FSupp3d 697 (M D Tenn 2018), a federal court suppressed cellphones and their contents which were seized incident to arrest. Mr. Darden was about five feet away from a car in a car wash stall when arrested. The phones were located on top of a car and were seized after he was arrested and admitted ownership of one of them (without Miranda warnings). *Id*, at 716-717. The seizure of the phones exceeded the search incident to arrest exception. *Id*, at 717.

In ***People v Fernengel***, 216 Mich App 420; 549 NW2d 361 (1996), the Court of Appeals held that search of a vehicle was unlawful as a search incident to arrest. The defendant (a restaurant owner) had brought food to the police station at their request. He was walking toward the building and was about twenty to twenty-five feet from the van when he was arrested. The Court of Appeals held that the search was unlawful and vacated the convictions associated with evidence found in the van. *Id*, at 425-426.

In the context of moving about the home to get dressed after the arrest, a Michigan case with similar facts does exist but it is from 1970 which pre-dates some developments as discussed above. In ***People v Giacalone***, 23 Mich App 163; 178 NW2d 162 (1970), the police arrived at 6:00 a.m. in May 1968 to make an arrest on an arrest warrant. Mr. Giacalone was dressed in short pajamas, slippers, a robe, and a prosthesis on his leg. An officer ordered him to the bedroom to get dressed and he complied. As he was about to open a drawer for socks, an officer stopped him and searched the drawer finding a blackjack. *Id*, at 165-166. The Court of Appeals affirmed denial of the motion to suppress but the case is still instructive.

First, the defendant in ***Giacolone*** intended to open a specific drawer that could have easily held offensive weapons. The search by the officer fell completely in the wheelhouse of ***Chimel*** regarding a check for weapons to protect safety. In the instant case, Mr. Carson neither directly nor implicitly made any suggestion that he wanted to pick up his phone for any reason. It was open and obvious to everyone in the room and is certainly not dangerous. It therefore does not fall within the historical premise of the exception.[1]

Second, the trial court and the Court of Appeals expressed recognition of the requirement that the purpose of the entry be to make an arrest and not to conduct a search. As noted above, this was also recognized as a concern by the United States Supreme Court. Notwithstanding a factual dispute about the origin of a request to get dressed, Mr. Giacalone voluntarily went to his bedroom with the officers to get dressed. The dual purpose in Giacolone was not enough to vitiate the presumption that the officers were there to make an arrest. Contrasting that case to the instant case leads to a much greater concern. As noted above, this arrest followed many months of investigation

[1] A second blackjack found in a downstairs closet while Mr. Giacalone was upstairs with other officers was suppressed and this was affirmed on appeal. ***People v Giacalone***, 24 Mich App 492; 180 NW2d 289 (1970).

and occurred at 4:00 a.m. in February in the northern lower peninsula of Michigan. The need to get dressed is patently obvious. The "voluntariness" is not the issue. The issue is the improper motive to be allowed to have a "floating" situs of the arrest as a subterfuge for exploring for evidence. This is aptly explained in ***Giacalone*** with excerpts from ***United States v James***, 378 F2d 88 (CA 6 1967). In ***James***, the warrant was not obtained until three and one-half months after the purported offense. Approximately 10 agents and police officers were used to execute the arrest warrant. No search warrant was sought contemporaneous with the arrest warrant. The searching of all the rooms continued for one hour. The Sixth Circuit easily concluded that the entry was for the purposes of the search instead of the arrest, reversed the conviction, and suppressed the evidence. ***James***, ***supra***, at 168.[2]

B. The suppression hearing.

A suppression hearing was conducted on July 7, 2020. The prosecution presented Deputy Tyler Midyett who executed the arrest warrant and took the original report from Mr. Billings. Deputy Midyett provided the following facts relevant to the seizure of the phone:

- Deputy Midyett was asked by a detective to arrest Mr. Carson on the warrant and he chose the morning of February 26, 2020. Deputy Midyett acknowledged that he woke Mr. Carson up at 4:00 a.m. by banging on the front door to execute the arrest warrant. Mr. Carson was wearing a t-shirt and basketball shorts. The Deputy acknowledged that there was snow on the ground and it was cold.

[2] Mr. Giacalone filed for habeas relief which was denied. The Sixth Circuit stated the test in an interesting way: "Certainly, if immediately after a lawful arrest, the arrestee reads the arrest warrant and without coercion consents to go to his bedroom to change into more appropriate clothing, the arresting officers – incident to that arrest – may search *the areas upon which the arrestee focuses his attention* and are within his reach to gain access to a weapon or destroy evidence. ***Giacalone v Lucas***, 445 F2d 1238, 1247 (CA 6 1971) (emphasis added).

- Deputy Midyett explained that D/Sgt. Leirstein had said the phone would be beneficial and if it was discovered to seize it. Deputy Midyett did not know its evidentiary value. He was informed it would be beneficial to have the contents of the cell phone.
- The Plaintiff's Exhibit 1 at the motion was the body camera video. The Parties agreed that the trial court could view it in camera as part of the motion. The timing and some detail of the movements is outlined below.
- Deputy Midyett testified that he did not believe Mr. Billings had any phone conversations with Mr. Carson. Deputy Midyett admitted that at the time of the seizure, he did not know what detectives would be looking for on the phone.
- D/Sgt. Matt Leirstein was also called as a witness. He concurred with Deputy Midyett that he had asked Deputy Midyett to seize the phone if he found it during the arrest. When asked what the evidentiary connection was to the investigation, D/Sgt. Leirstein relied only on his experience in other investigations. He claimed that his experience established that cell phones are used to plan, commit, document crimes or to identify perpetrators among other things. He "believed" there may be conversations between co-Defendant DeGroff and Mr. Carson about the allegations but did not state the basis for his belief. D/Sgt. Leirstein admitted that if Deputy Midyett was unable to seize the phone, the plan was to obtain a search warrant or seize it after his arrest. Government Exhibit 2 was the search warrant/affidavit for the phone contents and it was admitted at the hearing.

A time line of the body camera review is at Appendix 6 for convenience. In closing arguments, trial defense counsel argued no probable cause. The written motion also failed to specifically claim that the seizure was outside the scope of the "incident to arrest" exception. The

written motion did sufficiently establish that the seizure was without a warrant, that it was presumed unreasonable, and that it was the prosecutor's burden to establish the reasonableness of the seizure. Motion to Suppress, Brief, ROA 6.

The search warrant affidavit for the cellular phone was admitted as government's exhibit 2. A review of that affidavit shows that there was no evidentiary connection known to the police at the time of the arrest on February 26, 2020. More importantly, the affiant does not even attempt to assert probable cause but simply concludes the affidavit by admitting that he wants to search the contents of the phone to "assist with the furtherance of this criminal investigation." The affiant made no effort to identify what evidence was contained on the phone or what evidence the phone would lead them to. It was clearly a fishing expedition.

D. Analysis.

The government has completely failed to meet the standards for a search incident to arrest in this case. At the time of the arrest, the phone had no evidentiary value. Paragraphs 3 a) through u) explain the information provided by the victim and an interview with Brandi DeGroff and Alan Olsen. There is no mention of any person involved using a computer or a cellular telephone in any way as part of the crime. Paragraph 3 v) relays information about a search warrant execution on gambling documents from a casino and there is no mention of an online account or use of a phone. Paragraphs 3 w), x) and y) explains how the phone will assist the investigation based on the affiant's training and experience. The training and experience, however, is not included.

The investigation had been ongoing for months. The investigation started on November 29, 2019 when Deputy Midyett responded to Mr. Billings' home. Jury Trial, Vol 1, p. 107 (JT1). The police chose 4:30 a.m. on February 26, 2019 to make the arrest at Mr. Carson's home. *Id,* p. 109, 114. In the interim, the police had conducted numerous interviews and executed search

warrants on the illegally seized phone and financial institutions. The police had obtained an arrest warrant which Deputy Midyett was executing. *Id*, p. 109. The police clearly had sufficient time to obtain a search warrant for the phone. As the suppression hearing established, the detective asked the deputy to look for the phone and seize it if he found it. In other words, the time necessary to prepare the affidavit for the search warrant would have added little or nothing to the time necessary to prepare the affidavit of probable cause for the arrest. See Appendix 2.

The prosecutor argued that the moving about in the house was consensual. When the police arrest a man inside his house at 4:00 a.m. in late February in Alanson, Michigan, it is obvious that he will need to get dressed appropriately to go outside. It is plainly obvious in this case that the timing of the execution of the search warrant was a ruse to search for the phone.

E. Ineffective assistance of counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." ***People v LeBlanc***, 465 Mich 575, 579; 640 NW2d 246 (2002). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In ***People v Ginther***, 390 Mich 436; 212 NW2d 922 (1973), the Michigan Supreme Court set the standards for properly presenting a claim of ineffective assistance of counsel on appeal. When a defendant asserts that his assigned lawyer was ineffective, the trial court should consider the claim and take testimony on factual disputes. The findings and conclusions should be made a part of the record. *Id*, at 441 – 442. Such claims are rarely of record and claims as to whether certain defenses are viable and whether the defense presented was adequate frequently require a testimonial record in connection with a motion for new trial to provide evidential support for the claim. *Id*, 443.

"Basic procedural errors are also considered in determining whether assistance of counsel has been constitutionally adequate." ***Beasley v United States***, 491 F2d 687, 693 (CA6 1974). Most significantly, ***Beasley*** holds that trial counsel "must assert defenses in a proper and timely manner." *Id*, at 696 (emphasis added). A misunderstanding of or disregard of interpretations of statutes and their application has long been established as outside the range of professionally competent assistance. ***United States v Ocampo***, 919 FSupp2d 898, 909 (E D Mich 2013).

1. Deficient performance.

As noted above, Mr. Carson's trial counsel failed to argue the issue of the scope of the search incident to arrest exception to the warrant requirement. The motion touches on issues of consent, probable cause, and plain view. It fails, however, to mention the 1969 ***Chimel***, *supra*, case. That United States Supreme Court case set the standard for analyzing the scope of the search incident to arrest exception. Failing to recognize controlling or potentially controlling authority regarding a legal issue is deficient performance. ***United States v Frost***, 612 FSupp2d 903, 910-912 (N D Ohio 2009). The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel. See ***Murray v Carrier***, 477 US 478, 488; 106 SCt 2639, 2646; 91 LEd2d 397 (1986).

In ***Strickland,*** the Supreme Court explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 US, at 685 (quoting ***Adams v United States ex re. McCann***, 317 US 269, 275, 276; 63 SCt 236; 87 LEd 268 (1942)). "Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 US, at 688. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id*, at 689. In making the competency

determination, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id*, at 690.

In ***Byrd v Skipper***, 940 F3d 248 (CA 6 2019), the Sixth Circuit held that an attorney's misunderstanding of the law applicable to the issues in the case fell below on objective standard of reasonableness. The attorney misunderstood the law as to the defense of abandonment of a crime and the elements of aiding and abetting under Michigan law. ***Byrd***, *supra* at 253-254. See also, ***United States v Shepherd***, 880 F3d 734, 740 – 742 (CA 5 2018).

During the suppression hearing, Mr. Carson's counsel did agree to have the body camera footage from the arresting officer admitted as an exhibit. Trial counsel also agreed to have the trial court review the video in camera due to time limitations. This deprived trial counsel of an opportunity to highlight two extremely important points. First, Mr. Carson had walked away from the phone and it was no longer within his wingspan when the officer posed the question about ownership. Second, a significant amount of time had elapsed since Mr. Carson had been near the phone before the deputy asked about its ownership. While there were questions about the distance asked (to the point where the trial court cut off defense counsel), the video showed the actual walking distance. That distance included walking the width of the bed and then the length of the bed to get to the phone. When combined with the failure to cite to prevailing United States Supreme Court interpretations, this fell below a standard of objective reasonableness.

2. Prejudice.

Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel. ***Glasser v United States***, 315 US 60, 76; 62 SCt 457; 86 LEd 680 (1942); ***Chapman v California***, 386 US 18, 23; 43, 87 SCt 824; 17 LEd2d 705

(Stewart, J., concurring) (1967). To satisfy the prejudice prong, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, *supra*, at 694.

In the instant case, the failures of trial defense counsel led to denial of the motion to suppress. As noted above, Deputy Midyett testified at trial that Mr. Carson admitted ownership of the phone. Text messages and other information from the phone were then admitted at trial. Detective Leirstein testified to the text messages retrieved from the cellular telephone before the jury. Jury Trial, Vol. II, pp. 203-211. On page 3 of the opinion, the trial court said that the "crux of the motion lies in whether the search was incident to a lawful arrest or if the arrest was a 'sham' for purposes of seizing evidence. ROA 11. This is incorrect because the first issue to decide is whether the phone was within the scope of the search incident to arrest exception *at the time of seizure*. It clearly was not.

During the hearing, trial counsel and the Court noted that trial counsel had cited to ***People v Mahdi***, 317 Mich App 446; 894 NW2d 732 (2016). The search in ***Mahdi*** was conducted pursuant to consent of the homeowner (defendant's mother). The issue was the scope of the consent, whether the plain view exception applied and whether the doctrine of inevitable discovery applied. The ***Mahdi*** Court held none of these applied. The ***Madhi*** opinion was not helpful.

The failure to articulate the proper standard to the trial court led to the erroneous ruling. The denial of the motion to suppress led to the improper admission of the text messages and other contents of the phone into the trial for consideration by the jury. While not direct admissions, the jury was free to make incriminating inferences. Because Mr. Billings had such vague recollections and no direct knowledge, it is inarguable that the outcome would have been different if the unlawfully acquired evidence would have been precluded from trial.

II. WHERE TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS STATEMENTS OBTAINED DURING CUSTODIAL INTERROGATION WITHOUT THE REQUIRED WARNINGS, MR. CARSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standards.

In order to protect the right against self-incrimination under the Fifth Amendment of the United States Constitution, an accused must be given a series of warnings before being subjected to a custodial interrogation. ***People v Tanner***, 496 Mich 199, 207; 853 NW2d 653 (2014), citing ***Miranda v Arizona***, 384 US 436, 444–445; 477–479; 86 SCt 1602; 16 LEd2d 694 (1966). "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." ***People v Henry (After Remand)***, 305 Mich App 127, 144; 854 NW2d 114 (2014) (quotation marks omitted), citing ***Miranda***, 384 US at 444.

B. Analysis.

The body camera details are recited in the issue above. Mr. Carson was clearly under arrest based on both the verbal statements of Deputy Midyett and the physical behaviors of the deputies. While ***Miranda*** was aimed at the coercive nature of jail house interrogations, it is equally coercive to have two deputies accompany you wherever you go to include the most private place in the house (the bedroom) and stand nearby while placing on underwear. There is no authority available to the prosecutor to argue that the there is a *degree* of custody before ***Miranda*** is triggered. If a person meets the tests cited above, ***Miranda*** applies.

As also established at the suppression hearing, Deputy Midyett was under instructions to actually look for and seize the cellular telephone. While the investigation apparently had no evidence to establish that this particular phone contained evidence, Detective Leirstein certainly

believed it did and that is why he wanted it seized. The purpose of the question posed to Mr. Carson was to elicit an incriminating answer – which it did.

C. Ineffective assistance of counsel.

1. Deficient performance.

Defense trial counsel represented to the trial court at the suppression hearing that he had reviewed the body camera recording. During questioning of Deputy Midyett, the Deputy confirmed verbally telling Mr. Carson he was under arrest and would have to be accompanied wherever he went to get dressed. These facts obviously established the Fifth Amendment issue. Defense trial counsel never discussed with Mr. Carson the potential of raising a challenge to admission of the answer regarding ownership of the phone. See Affidavit of Michael Carson, Appendix 1. The record contains no evidence that defense trial counsel filed a motion to suppress that answer.

If a suppression motion would be successful, an attorney is guilty of ineffective assistance if he does not file the motion. On the other hand, if such a motion would fail, counsel may not be criticized for having accurately assessed his client's chances of successfully challenging the admission of the evidence. Thus, whether trial counsel was incompetent for not filing a motion to suppress depends upon the merits of the search and seizure question. ***Worthington v United States,*** 726 F2d 1089, 1093–94 (CA 6 1984) (Contie, concurring). See also, ***Kimmelman v Morrison***, 477 US 365, 383; 106 SCt 2574; 91 LEd2d 305 (1986).

2. Prejudice.

As noted above, the trial court allowed into evidence before the jury Mr. Carson's answer to Deputy Midyett. This established Mr. Carson's ownership of the phone and infers knowledge of the contents of the phone. This was an extremely damaging piece of evidence in light of the

deficiencies discussed above in the testimony of Mr. Billings. The legal standards for ineffective assistant claims are cited above and apply here. In ***McFarland v Yukins***, 356 F3d 688 (CA6 2004), the Sixth Circuit addressed an issue of ineffective assistance of appellate counsel. In discussing the factors to be used in deciding whether the selection of issues to challenge was ineffective, the Court weighed the missing issues against the raised issues. In the end, however, the Court noted that, where the issue is known to counsel through an examination of the record or what was in the record to be found, failure to raise an issue which counsel has clearly been made aware of can make a case for ineffective assistance. Based on this standard, the failure to raise the challenge to the custodial admission regarding ownership of the phone fell far below an objective standard of reasonableness.

In ***People v Ackley***, 497 Mich 381; 870 NW2d 858 (2015), the Michigan Supreme Court held that a strategy must be sound and objectively reasonable. ***People v Trakhtenberg***, 493 Mich 38, 52; 826 NW2d 136 (2012). The choices must be made after reasonable decisions that make a particular investigation unnecessary. ***Strickland***, 466 US at 690–691. Unreasonable decisions that leave a reasonable probability of error which undermine confidence in the outcome are below the standard. ***Trakhtenberg***, 493 Mich at 51; ***Strickland***, 466 US at 694. No advice given after failing to investigate at all can be objectively reasonable.

Because the admission of ownership of the phone was submitted to the jury, the jury was able to infer that Mr. Carson was aware of its contents. As noted above, some of those contents were inferentially incriminating and were also admitted into evidence. Absent the ability to connect those statements to Mr. Carson, there is a reasonable probability that the outcome of the trial (or at least some of the counts) would have been different. This is especially true as to the conspiracy charges.

In certain situations, the prejudice analysis mirrors the deficient performance analysis. This is one of those cases. Allowing the jury to hear the admission of ownership of the cell phone is deficient performance and its prejudice to Mr. Carson is starkly obvious. See ***Hendrix v Palmer***, 893 F3d 906, 923 (CA 6 2018).

III. ADDITIONAL AND MULTIPLE INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL OCCURRED BEFORE AND DURING TRIAL.

Due to the page limitations of MCR 2.119(A)(2)(a) of 20 pages, Mr. Carson will simply summarize the remaining claims by topic. An ex parte motion seeking to exceed the page limitations and file a supplemental brief will accompany the filing of this motion.

A. A motion to suppress the cellular phone contents should have been filed.

The contents of the phone were obtained via a search warrant. That warrant was lacking in probable cause for the same reason there was no evidentiary connection to it the previous day when it was seized. The search warrant and affidavit are at Appendix 2. The first issue with the search warrant affidavit appears in Paragraph 1 which describes the phone to be searched: the serial number is included in the description. The only way to get the serial number is to either scroll through the settings menu to find the telephone information or to remove the cover (and perhaps the battery) to find the label. Such activity constitutes a search.

The affiant's *belief* is totally irrelevant. It is the reviewing magistrate's conclusion that is important. For the magistrate to be able to properly perform this official function, the affidavit presented must contain adequate supporting *facts* about the underlying circumstances to show that probable cause exists for the issuance of the warrant. ***Whiteley v Warden***, 401 US 560, 564; 91 SCt 1031, 1034–35; 28 LEd2d 306 (1971); ***Nathanson v United States***, 290 US 41, 47; 54 SCt 11, 13; 78 LEd 159 (1933). The affidavit must contain more than mere beliefs and conclusions. ***People***

v Martin, 271 Mich App 280, 298; 721 NW2d 815 (2006);The affiant points to absolutely nothing in the application to support his belief (because there is nothing in it).

The challenge to the search warrant for the phone is two-fold. First, the warrant is facially invalid for failing to establish – even allege – the existence of probable cause for presence of evidence. Second, the method of the search and the scope of the seizure are invalid because the government performed a "dump" of the phone which is simply obtaining even single item of data and capturing it for forensic examination. The "dump" of the phone is a single .pdf file consisting of 935 pages. It is 10.7 megabytes in size. Page 2 is at Appendix 3. It is a summary showing the number of items included in the report by category.

B. The amended information should have been challenged or remanded.

The original complaint in this case alleged Count 1 – Safe Breaking, Count 2 – Larceny $20,000 or more, Count 3 – Receiving & Concealing Stolen Property $20,000 or more, and Count 4 – Larceny in a Building. After the preliminary examination was waived, the matter was bound over on the same charges with the information being filed on May 22, 2020. Information, ROA 2. On June 26, 2020, Mr. Carson filed his motion to suppress the cellular telephone. The prosecutor's office responded to the motion on July 1, 2020 (ROA 8) and the following day filed an amended information. ROA 9. The amended information added a conspiracy charge to each of the existing charges and identified them as counts 5 through 8.

The only additional investigation that occurred between the original information and the amended information was execution of a search warrant on Mr. Carson's home. The only new information in the search warrant for the home consisted of items found from the illegal seizure and search of the cellular phone. See Affidavit for Search warrant of 6/23/2020 at Appendix 4.

"Prosecutorial vindictiveness" is a term of art with a precise and limited meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. ***United States v Goodwin***, 457 US 368, 372; 102 SCt 2485; 73 LEd2d 74 (1982). In an obscenity case, a District Court in Tennessee adopted a D.C. Circuit Court's description of how a vindictive prosecution claim is analyzed. First, a defendant may show "actual vindictiveness" with objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. Second, a defendant may in certain circumstances rely on a presumption of vindictiveness: when the facts indicate "a realistic likelihood of 'vindictiveness,' " a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action. If the government produces such evidence, the defendant's only hope is to prove that the justification is pretextual and that actual vindictiveness has occurred. But if the government fails to present such evidence, the presumption stands and the court must find that the prosecutor acted vindictively. ***United States v Toushin***, 714 FSupp 1452, 1458 (M D Tenn. 1989), citing ***United States v Meyer***, 810 F2d 1242, 1245 (D C Cir1987) (citations omitted).

C. The search warrant for the home was defective and a motion should have been filed.

The affidavit and search warrant issued in June 2020 for Mr. Carson's home is at Appendix 4. Most of the paragraphs are identical to the search warrant for the cellular phone. An additional interview of Mr. Olsen is in Paragraph 3. v) and the detective learned that Mr. Carson may have had additional casino winnings than originally thought which actually decreases any probable cause that Mr. Carson was obtaining money through sales of stolen items. Paragraph 3. w) confirms that the search warrant was executed on the phone. Paragraph 3. x) inserts a claim that the affiant observed a comment from Ms. DeGroff to Mr. Carson establishing involvement in the theft by

both of them although it is primarily a conclusion by the affiant instead of a quote from what was observed. Paragraph 3. z) claims that the affiant knows that Mr. Carson and Ms. DeGroff "have not had sales of silver certificates, silver coins, silver bars, and collectible pennies." The affidavit fails to establish how the affiant can establish this negative statement. The affidavit fails to establish how or why anyone would believe that the voluminous list of items would be inside Mr. Carson's home.

The legal concepts of the requirements of a search warrant from Issue IV above are incorporated herein by reference. The legal issues regarding good faith reliance on a facially defective warrant are also incorporated herein by reference.

D. Ineffective assistance of counsel regarding evidentiary issues.

1. Mr. Carson's credit union statements.

The materials seized from Ms. DeGroff's credit union accounts (statements, transaction records, checks, etc) were disclosed to the defense in discovery. A joint credit union account records and a summary were admitted into evidence by the government. Exhibits 11 and 12. Jury Trial, Vol. II, pp. 211-212. The omitted records and Mr. Carson's own separate credit union account records would show two vehicle sales by Mr. Carson in September 2019. They show other automatic deposits from online sales. These records would have raised a serious question as to the prosecutor's theory about financial distress had they been used by defense trial counsel. These were not used and their use or lack of use was not discussed with Mr. Carson by trial counsel. Appendix 1.

There could be no strategic reason for not presenting this evidence to the jury. Mr. Carson had presented these to trial defense counsel. See Affidavit at Regarding prejudice, the jury was allowed to hear about Mr. Carson quitting his job in August 2019 and a purported explanation of

why he quit. Testimony of Dave Firman, Jury Trial, Vol. II, pp.19-26. Left unexplained, this testimony was very damaging but could have been countered with financial records in the possession of trial counsel.

2. Hearsay from Brandy via Mr. Billings, Mrs. Swadling, and Det. Leirstein.

During the testimony of Mr. Billings, he was asked on direct examination whether Ms. DeGroff or Mr. Carson had said that some items were still at their home. The question and answer were:

> Q. Had the defendant or Brandy told you that they had those items at their house?
> A. Well, yeah. We - - I - - We had - - they - - I knew they had some items downs at the house.
> Jury Trial, Vol. I, p. 60.

The question was seeking hearsay because any statement by Brandy in this situation would have been an out of court statement about a factual matter by her. At that point, such a statement would not have been in furtherance of the conspiracy. This should have triggered an objection before the answer was given. After the answer was given, an objection should have been stated and a curative instruction requested.

Carrie Swadling was a former employee of Ms. DeGroff. She was asked about Ms. DeGroff giving her $1600.00 in one-hundred-dollar bills in the summer of 2019 to pay for a fundraiser for a seizure dog for a child. She was asked and allowed to give an explanation purportedly from Brandy as to how and why she chose the method of donation. This was hearsay and there was no objection.

On cross-examination, Det. Leirstein was asked when he learned that Mr. Billings' property was still located at the Carson residence. He answered the question but then added the content of the interview where he learned that piece of information. The non-responsive portion

was "she [Brandy] said that she still had a few items of his at her house." Jury Trial, Vol. II, p. 230. Defense trial counsel did not object or ask for a curative instruction.

3. Evidence with insufficient foundation.

Det. Leirstein was allowed to testify to text messages and text conversations during his testimony to the jury. The text messages were admitted into evidence and he repeatedly explained which portion of the messages were from Brandy along with the content. The content of the text messages themselves were from Mr. Carson's phone but the conclusion that they were actually from Brandy was never properly established. There were no records admitted from her telephone company (or Mr. Carson's) confirming the metadata that is transmitted with short-message-service (SMS) message. While the content of the message speaks for itself, the detective was allowed to testify to all of his personal conclusions about who was sending messages to Mr. Carson. There was no objection to this lack of foundation.

CONCLUSION

The trial result in this case is not reliable as the adversary system did not work as designed. Unlawfully seized evidence was admitted and unreliable evidence was presented. Mr. Carson is entitled to a new trial.

RELIEF REQUESTED

WHEREFORE, Mr. Carson respectfully requests this Honorable Court conduct the necessary hearing in this matter, vacate the conviction and sentence, and set this matter for trial.

9/10/2021
Date

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Attorney for Defendant

CERTIFICATE OF SERVICE

J. Nicholas Bostic certifies and says that on the 10th day of September, 2021, he served a copy of Defendant's Motion for New Trial on the Emmett County Prosecutor's Office, Attorney for Plaintiff at the address above by personal service. I declare that the above statement is true to the best of my information, knowledge and belief.

9/10/2021

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Attorney for Defendant

STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title:	Case Number:
PEOPLE OF MI V MICHAEL GEORGIE CARSON	355925

1. Title(s) of the document(s) served:

Filing Type	Document Title
Lower Court/Tribunal Pleading	MOTION.NEW.TRIAL-short

2. On 09-09-2021, I served the document(s) described above on:

Recipient	Address	Type
Paas Division Michigan Department of Attorney General	paasdivision@michigan.gov	e-Serve
Jessie Kanady Michigan Department of Attorney General	KanadyJ1@michigan.gov	e-Serve
John Pallas Michigan Department of Attorney General P42512	PallasJ@michigan.gov	e-Serve
J Nicholas Bostic Bostic & Associates P40653	barristerbosticlaw@gmail.com	e-Serve
Jennifer Boyer Emmet County Prosecutor's Office	jboyer@emmetcounty.org	e-Serve
Michael Schuitema Emmet County Prosecutor's Office P72718	mschuitema@emmetcounty.org	e-Serve

This proof of service was automatically created, submitted and signed on my behalf through my agreements with MiFILE and its contents are true to the best of my information, knowledge, and belief.

09-09-2021
Date

/s/ J Nicholas Bostic
Signature

Bostic & Associates

STATE OF MICHIGAN

IN THE 57th CIRCUIT COURT FOR EMMETT COUNTY

People of the State of Michigan,
Plaintiff,

v.

Michael Georgie Carson,
Defendant.

Docket No. 20-005054-FC

Hon. Jennifer Deegan
Circuit Court Judge

/

Emmet County Prosecutor's Office
Attorney for Plaintiff
200 Division St., Suite G42
Petoskey, MI 49770
231-348-0686

J. Nicholas Bostic P40653
Attorney for Defendant
909 N. Washington Ave.
Lansing, MI 48906
517-706-0132

/

APPENDIX TO DEFENDANT'S MOTION FOR NEW TRIAL

CONTENTS

STATE OF MICHIGAN

IN THE 57th CIRCUIT COURT FOR EMMETT COUNTY

People of the State of Michigan,
Plaintiff,

v.

Michael Georgie Carson,
Defendant.
/

Docket No. 20-005054-FC

Hon. Jennifer Deegan
Circuit Court Judge

DEFENDANT'S MOTION FOR NEW TRIAL

AFFIDAVIT OF MICHAEL G. CARSON

COUNTY OF JACKSON)
) ss:
STATE OF MICHIGAN)

Michael G. Carson, upon his oath, states:

1. Affiant is an adult and competent to testify to the matters herein on personal knowledge unless otherwise stated.

2. During trial preparations, defense trial counsel, Mr. Beach, was informed that the alleged victim, Mr. Billings, had signed many receipts for cash he was given after his items were sold for him.

3. It is my understanding that these were not allowed into evidence as hearsay but Mr. Beach never discussed with me how to obtain them in an admissible form.

4. Mr. Beach never discussed with me the option of retaining a handwriting expert to examine the signatures.

5. During trial preparation, Mr. Beach was informed that the alleged victim had engaged in insurance fraud whereby he made a false claim of paying for removal of a junk metal structure from his property. Mr. Billings had actually allowed the crew that removed it to be paid by junking

the metal as scrap. Mr. Billings then falsely told his insurance company that he paid the crew. When the check arrived from his insurance company, he had Brandi DeGroff sign his estranged wife's name to the draft.

6. It is my understanding that Mr. Beach filed a motion for show cause to have those records produced but Mr. Billings claimed he no longer had the documents and Mr. Beach dropped the issue.

7. Mr. Beach never discussed with me alternative ways to obtain the documents such as a subpoena to the insurance company.

8. The total time I spent in trial preparation with Mr. Beach alone was about 30 minutes. On one occasion, I displayed on my phone documentation from Facebook Marketplace the account history showing payments so they could be matched with what was paid to Mr. Billings. Mr. Beach could not get the application to open on his computer so he took photographs of the screen of my phone. Mr. Beach did not discuss with me how to obtain those records in admissible form.

9. The total time I spent in trial preparation with Mr. Beach and others was about 45 minutes. During these times, Brandi DeGroff and my brother Dwight Carson were present.

10. During trial preparation, Mr. Beach was informed that Mr. Billings had asked me to help him load his vehicle and a trailer with property because he was moving in with his brother due to a recent surgery and an inability to deal with steps. I helped Mr. Billings load several things into a vehicle and onto a trailer. This included household items and occurred after he ~~had called the police~~ noticed items missing. After loading these items at Mr. Billings' home, we travelled to my home at which time we loaded his four-wheeler ATV, helmets, and a shop-vac onto the trailer.

11. Mr. Beach did not discuss with me using this information to challenge the credibility of Mr. Billings.

12. Mr. Beach did not have me attend the hearing on the motion in limine on August 31, 2020.

13. Mr. Beach pre-labeled over 30 exhibits in preparation for trial but did not discuss with me why he did not admit any more than he actually did admit.

14. During trial preparation, Mr. Beach was informed about accounts Affiant had at 4-Front Credit Union and copies of those statements were obtained and provided to him. Mr. Beach did not discuss with me why he did not use those documents or present them as evidence.

15. Ms. DeGroff informed me that Mr. Beach admitted to her during a conversation that he was on a significant number of medications that impacted his mental functioning and that he believed he had probably presented ineffective assistance of counsel during the trial.

16. Mr. Beach never discussed with me raising a challenge to the search warrant for the contents of the cellular telephone seized from my home.

17. Mr. Beach never discussed with me raising a challenge to the admission at trial or during the suppression hearing the fact that the officer failed to advise me of my rights to counsel and to remain silent before he asked me about ownership of the cellular telephone.

FURTHER YOUR AFFIANT SAYETH NOT.

Michael G. Carson

Subscribed to and sworn before me this 24th day of August, 2021.

Notary Public

My Commission Expires: 5/2022

AFFIDAVIT for SEARCH WARRANT Page 1

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

Detective Sergeant Matt Leirstein, Affiant(s) state(s) that:

1. **The person, place or thing to be searched is described as and is located at:**

Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest.

- LG Cellular phone blue in color with Serial# GPLML713DCGB2NFL713DL. This device is currently located at:

The Emmet County Sheriff's Office Property Room
3460 Harbor Petoskey Rd
Harbor Springs, MI 49770

2. **The PROPERTY is to be searched for and seized, if found, is specifically described as:**

Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

3. **The facts establishing probable cause or the grounds for search are:**

This affidavit consists of: 4 pages.

Affiant: [signature]

Review on: 2-27-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 3-3-2020
Date

[signature]
~~Judge~~/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

a) Your Affiant is employed by the Emmet County Sheriff's Office as a Detective Sergeant and certified police officer in the State of Michigan through MCOLES.
b) Your affiant is investigating a complaint of Larceny in a Building and Safe Breaking whereas Donald Billings, the victim of the named crimes has estimated to having $70,000 stolen from a safe at his residence.
c) Your affiant spoke with Billings and who indicated he allowed access of his residence to Michael Carson and Brandie Degroff to sell items for him on Buy, Sell, Trade sites on the internet.
d) Billings indicated he allowed access to his residence between the months of August 2019 through October 2019. Billings indicated he provided a key to his residence to Degroff and Carson for the purpose of them finding items to sell for him.
e) Affiant was advised by Billings that Carson and Degroff never once had permission to enter into the safes at his residence.
f) Billings advised the safe at his residence is only accessed by a combination, however there was also a key lock that would also allow entry. Billings indicated he does not have a key for the safe and has only accessed it via combination lock.
g) Billings indicated he had roughly $70,000 inside the safe which was contained inside a small lock-box type safe. Billings stated this cash was his life savings from his years of work and selling items privately.
h) Billings stated the cash was wrapped with yellow bands in $1000 increments.
i) Billings indicated he last knew there was roughly $70,000 in approximately August or September of 2019. Billings stated he went to check on the money in October of 2019 and noted the combination to the safe was not working. Billings indicated he contacted a locksmith to assist him with the safe.
j) Billings stated the safe was opened by the locksmith, however the locksmith indicated the safe was locked using the key lock, which Billings does not have.
k) Billings stated upon opening the safe he noted the $70,000 was missing, leading him to contact law enforcement and report the theft.
l) Billings indicated he only allowed Carson and Degroff inside his residence and no one else should have been inside.
m) Billings indicated he learned from Carson and Degroff they allowed Alan Olsen access to the residence on one occasion.
n) Deputy Robert Poumade handled a theft complaint where Degroff was having money taken from her bank account fraudulently. Degroff voluntarily provided Deputy Poumade a print out of her bank statement. I noted Degroff deposited roughly $11,500 from August

This affidavit consists of: 4 pages.

Affiant: [signature]

Review on: 2-27-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 3-3-2020
Date

[signature]
Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

2019 through the end of October 2019. The deposits do not contain any information to indicate where the money had come from.

o) Affiant interviewed Degroff on 11/26/2019 and inquired about the deposits. Degroff stated she won the money while gambling at the casino and had receipts to prove it. Degroff indicated she makes roughly $245.00 weekly and Carson was not currently working due to an injury. Degroff stated with all her monthly bills she and Carson are generally short of money and are hurting financially.

p) Affiant asked Degroff if she took any money from Billings safe and she indicated she did not take any money from the safe.

q) Affiant interviewed Alan Olsen on 12/26/2019 about this complaint and asked if he was involved on taking money from the safe at Billing's residence. Olsen stated he did not take any money from the safe at Billing's residence.

r) Olsen indicated he knew Degroff and Carson were gambling quite a bit at the casino and in fact he recalled a time where Carson had several stacks of $100 bills wrapped in yellow bands. Olsen stated the stacks were a $1000 each and Carson had 3 to 5 stacks in his hand. Olsen stated that Carson told him not to let Degroff know Carson showed him the money.

s) Olsen stated there was one time Carson took him to the casino and gave him $500 to gamble. Olsen stated on this occasion Carson spent approximately $4000 at the casino.

t) Affiant spoke with Billings after interviewing Olsen and inquired about the money he had stolen from his safe. Billings indicated he had between 62 to 67 stacks of $1000 dollars wrapped in yellow bands that are now missing.

u) In addition to the money stolen from the safe Billings has had silver and steel pennies taken.

v) Affiant executed a search warrant at the Odawa Casino and learned Michael Carson spent an approximate total of $70,740.25 dating from August 1, 2019 through December 31, 2019. In addition, affiant learned Brandie Degroff spent an approximate total of $14,716.39 from August 1, 2019 through December 31, 2019.

w) Based on your affiant's training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence. Therefore, data obtained from mobile communication devices and records created by these devices can assist law enforcement in establishing the involvement of a possible suspect or suspects.

x) Records created by mobile communication devices can also assist law enforcement in establishing communication activity/ behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing

This affidavit consists of: 4 pages. Affiant: _____

Review on: 2-27-2020 (Date)

By: Mike Schuitema (Prosecuting Official)

Subscribed and sworn before me on: 3-3-2020 (Date)

_____ (Judge/ Magistrate)

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

a larger segment of records ranging prior to and after the incident under investigation if possible.

y) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

Affiant further sayeth not.

This affidavit consists of: 4 pages.

Affiant: _____

Review on: 2-27-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 3-3-2020
Date

Judge/ Magistrate

SEARCH WARRANT

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

Detective Sergeant Matt Leirstein, Affiant(s) state(s) that:

1. **The person, place or thing to be searched is described as and is located at:**

Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest.

- LG Cellular phone blue in color with Serial# GPLML713DCGB2NFL713DL. This device is currently located at:

The Emmet County Sheriff's Office Property Room
3460 Harbor Petoskey Rd
Harbor Springs, MI 49770

2. **The PROPERTY is to be searched for and seized, if found, is specifically described as:**

Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: I have found that probable cause exists and you are commanded to make the search and seize the described property. Leave a copy of this Search Warrant with Return and Tabulation (a written inventory of all property taken) with the person

SEARCH WARRANT

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 5778-19

from whom the property was taken, or at the premises. You are further commanded to promptly return this Search Warrant and Return and Tabulation to the Court.

Issued: 3-3-2020 (Date) C. Menard (Judge/Magistrate)

Device Information

Name	Value
File System	
Android ID	e8d8bde260e46ea3
Advanced Logical	
Android ID	e8d8bde260e46ea3
Detected manufacturer	lge
Detected model	LML713DL
Phone revision	8.1.0 OPM1.171019.019 1933820564c0b.FG
IMEI	355388094499803
Phone date/time	3/19/2020 16:07 -04:00
Client Used for Extraction	Yes

Image Hash Details (3)

Hash data is available for this project.

#	Name	Info	
1		Path	Backup
		Size (bytes)	0
2		Path	XML
		Size (bytes)	0
3	Backup	Path	Detected Model_LML713DL.zip
		Size (bytes)	1095276350
		SHA256	AB624165CE12A3CC7DC215993A536A2BD17E22C2173F295C49CD576336D990BC

Plugins

#	Name	Author	Version
1	Pre Project		
2	ContactsCrossReference Cross references the phone numbers in a device's contacts with the numbers in SMS messages and Calls. Will fill in the Name field of calls and SMS if there's a match.	Cellebrite	2.0
3	Project Processor Finisher		
4	Post Project		

Contents

Type	Included in report	Total
Calendar	100	100
Call Log	1980	1980
Contacts	146	146
Cookies	11	11
Locations	15	15
MMS Messages	195	195
SMS Messages	5083	5083
User Accounts	1	1
Timeline	7437	7437
Data Files	1410	1411
Archives	1	1
Audio	133	133
Configurations	12	12
Databases	46	46
Documents	1	1
Images	978	979
Text	199	199
Videos	40	40

AFFIDAVIT for SEARCH WARRANT

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 19-5778

Detective Sergeant Matt Leirstein, Affiant(s) state(s) that:

1. **The person, place or thing to be searched is described as and is located at:**

The residence of Michael Georgie Carson, d.o.b. 06/16/1981 and Brandie Marie Degroff, d.o.b. 08/29/1984

6365 Honeysette Rd.
Township of Littlefield
County of Emmet
State of Michigan

This residence is described a single family dwelling structure with grey siding, white trim, dark colored shingles and a gravel drive leading to an attached two-door garage. The residence has a white in color mailbox with pine trees painted on east of the gravel drive. On the mailbox post the numbers "6365" are attached.

2. **The PROPERTY is to be searched for and seized, if found, is specifically described as:**

Any and all property related to the larceny and safebreaking at the residence of Donald William Billings, d.o.b. 04/06/1951. This shall include but not limited to silver certificates in denominations of $100.00, $20.00, $2.00 and $1.00, silver half-dollar coins, silver bars, 3 - boxes containing roughly 8000 pennies each, rolls of dimes and quarters and any and all cash, bank bands, storage containers, safes or any other item used to secure money.

Any and all items that identify the owner of such items as Donald William Billings. This shall include but is not limited to the following items:

(12) Hand carved fishing lures estimated at $40 per piece. Estimated value: $480.00
(1) Air compressor with hoses unknown make, model estimated value: $150.00
(1) Mountain Camp Stove. Estimated total: $50.00
(1) Mantle Clock estimated value: $3500.00
(Unknown amount) Pure silver salt spoons, plus holder estimated value: $300.00
(1) Craftsman circular saw and case, estimated total: $80.00
(1) Unknown brand Trolling motor with equipment (weights, pole holders) estimated value: $125.00

This affidavit consists of: 6 pages. Affiant: [signature]

Review on: 6-23-2020 Date

By: Mike Schuitema Prosecuting Official

Subscribed and sworn before me on: 6-23-2020 Date

[signature] Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 19-5778

(4) Japanese tea pots valued estimated to be $75.00 each for an estimated total: $300.00
(Unknown amount) Craftsman tools (included knives and test meters) estimated value: $300.00
(1) Unknown make/model commercial sewing machine estimated value: $525.00
(5) Cast Iron skillets valued at $25.00 for an estimated total: $125.00
(10) Sets of Corning Ware estimated total: $400.00
(1) NEW Kitchen-Aide Mixer estimated value: $450.00
(1) Unknown make/model organ with stand estimated value: $375.00
(1) Set of trailer mirrors estimated value: $125.00
(1) Kitchen-Aide bread maker estimated value: $50.00
(1) Whirlpool Pro blender estimated value: $80.00
(1) Cutting Board estimated value: $30.00
(1) Moose Coat Hanger estimated value: $75.00
(1) Lipton Ice Tea Maker estimated total: $30.00
(6) John Wayne collectible mugs $10.00 per mug, estimated total: $60.00
(4) Collector's Item/Books estimated $40 per book for estimated total: $160.00
(2) Wet/Dry Grind wheel $50.00 each for estimated total: $100.00
(1) Unknown make/model 2-wheel bench grinder estimated total: $40.00
(4/6) Portable TV Tables estimated total: $50.00
(4) Bullfrog Candles estimated total: $120.00
(4) Heather Men's Belts estimated total: $200.00
(2) NEW utility trailer tires estimated value: $120.00
(2) Cast Iron Pots estimate value: $120.00
(1) Coleman camp stove estimated value: $70.00
(1) Keurig coffee maker estimated value: $60.00
(3) Decorative Boat Wood shelves estimate total: $900.00
(3) Beer signs and lighted mirrors estimated value: $300.00
(2) Hand carved ducks, estimated value: $100.00
(1) Saws-All with case and 18 replacement blades, estimated value: $100.00
(1) Men's Cowboy Boots size 9.5 estimated value: $120.00
(8) Sets of Gorilla brand Ratchet straps estimated value: $125.00
(1) Automatic Air Pump unknown make/model estimated value: $45.00
(10) Tie-down straps unknown make/model with an estimated value: $50.00
(1) Set wrench sockets possibly Craftsmen, estimated value: $75.00
(1) 12,000 lumens hand-held spot light with cord, estimated value: $50.00
(1) Unknown make/model Wolf blanket estimated value: $30.00
(1) Unknown make snow-mobile gloves, estimated value: $40.00

This affidavit consists of: 6 pages. Affiant: _____

Review on: 6-23-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 6-23-2020
Date

C. Verna
Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 19-5778

(25) Pole Frame Joints at $25 each for estimated value: $500.00
(40) Lag bolts with an estimated value: $80.00
(1) Mikita Hand-held grinder, estimated value: $60.00
(1) Mikita Hand-held cutter, estimated value $60.00
(1) Mikita Battery powered handsaw with 2 batteries, estimated value: $100.00
(Unknown amount) Mikita saw blades, estimated value: $100.00
(1) Hi-Fi Dehumidifier 70 pint unknown make/model, estimated value: $125.00
(1) Full size tackle box filled with tackle, weights, leads and other fishing equipment, estimated value: $190.00
(1) NEW Craftsmen Circular Saw w/case, estimated value: $75.00
(12) Men's Turquoise BOLO Ties, estimated value: $144.00
(2) Men's Turquoise Belt Buckles, estimated value: $80.00
(1) Unknown make/model travel steam iron, estimated value: $25.00
(11) Cornell Oven pans with lids, estimated value: $110.00
(2) Heavy Duty Pruning Lobbers, estimated value: $100.00
(1) Electric Black & Decker Leaf Blower, estimated value: $75.00
(30) Craftsmen box of wrenches, estimated value: $400.00
(2) 25ft. Tape Measures, unknown make/model, estimated value: $60.00
(2) Buck lock-back pocket knives, estimated value: $55.00
(1) Rambo Collector Item $25.00
(2) Ka-Bar full size fixed 7in. blade, estimated value: $148.00
(1) Case 385 Hunter 5in. knife, w/leather handle, estimated value: $73.00
(1) Alaska Bush camp fixed 6in. blade, estimated value: $104.00
(1) Dewalt router w/stand, estimated value: $600.00
(1) Dewalt drill, estimated value: $150.00
(1) Nikon Zoom Binoculars, estimated value: $ 130.00
(12) Eight Shakespeare Rod and reels and four ugly stick rods at $25.00 each and an estimated total: $300.00
(1) Minolta SR Camera with tele-lens 50/500, camera case, filters and flash gun, estimated value: $3500.00

Any banking statements or articles which contain banking information related to Donald William Billings. This shall include but not limited to stock portfolios, financial institution transactions, account information, bills of sale related to the trade or sale of commodities, specifically silver, vehicle titles, boat titles or any other mode of transportation that is titled or registered to Donald William Billings.

This affidavit consists of: 6 pages. Affiant: _____

Review on: 6-23-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 6-23-2020
Date

_____
Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 19-5778

3. **The facts establishing probable cause or the grounds for search are:**

a) Your Affiant is employed by the Emmet County Sheriff's Office as a Detective Sergeant and certified police officer in the State of Michigan through MCOLES.
b) Your affiant is investigating a complaint of Larceny in a Building and Safe Breaking whereas Donald Billings, the victim of the named crimes has estimated to having $70,000 stolen from a safe at his residence.
c) Your affiant spoke with Billings and who indicated he allowed access of his residence in Littlefield Township, Emmet County, Michigan, to Michael Carson and Brandie Degroff to sell items for him on Buy, Sell, Trade sites on the internet.
d) Billings indicated he allowed access to his residence between the months of August 2019 through October 2019. Billings indicated he provided a key to his residence to Degroff and Carson for the purpose of them finding items to sell for him. Billings said nobody else had access to his home during this timeframe other than himself, Degroff, and Carson.
e) Affiant was advised by Billings that Carson and Degroff never once had permission to enter into the safes at his residence.
f) Billings advised affiant the safe at his residence is only accessed to Billings by a combination, however there was also a key lock that would also allow entry. Billings indicated he does not have a key for the safe and has only accessed it via combination lock.
g) Billings indicated he had roughly $70,000 inside the safe which was contained inside a small lock-box type safe. Billings stated this cash was his life savings from his years of work and selling items privately.
h) Billings stated the cash was wrapped with yellow bands in $1000 increments.
i) Billings indicated he last knew there was roughly $70,000 in approximately August or September of 2019. Billings stated he went to check on the money in October of 2019 and noted the combination to the safe was not working. Billings indicated he contacted a locksmith to assist him with the safe.
j) Billings stated the safe was opened by the locksmith, however the locksmith indicated the safe was locked using the key lock, which Billings does not have.
k) Billings stated upon opening the safe he noted the $70,000 was missing, along with some raw silver and silver certificates, leading him to contact law enforcement and report the theft.

This affidavit consists of: 6 pages. Affiant:

Review on: 6-23-2020 Date

By: Mike Schwiferna Prosecuting Official

Subscribed and sworn before me on: 6-23-2020 Date

Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 19-5778

l) Billings indicated he only allowed Carson and Degroff inside his residence and no one else should have been inside.
m) Billings indicated he learned from Carson and Degroff they allowed Alan Olsen access to the residence on one occasion.
n) Deputy Robert Poumade handled a theft complaint where Degroff was having money taken from her bank account fraudulently. Degroff voluntarily provided Deputy Poumade a print out of her bank statement. I noted Degroff deposited roughly $11,500 from August 2019 through the end of October 2019. The deposits do not contain any information to indicate where the money had come from.
o) Affiant interviewed Degroff on 11/26/2019 at the address listed in paragraph #1 and inquired about the deposits. Degroff stated she won the money while gambling at the casino and had receipts to prove it. Degroff indicated she makes roughly $245.00 weekly and Carson was not currently working due to an injury. Degroff stated with all her monthly bills she and Carson are generally short of money and are hurting financially.
p) Affiant asked Degroff if she took any money from Billings safe and she indicated she did not take any money from the safe.
q) Affiant interviewed Alan Olsen on 12/26/2019 about this complaint and asked if he was involved on taking money from the safe at Billing's residence. Olsen stated he did not take any money from the safe at Billing's residence.
r) Olsen indicated he knew Degroff and Carson were gambling quite a bit at the casino and in fact he recalled a time where Carson had several stacks of $100 bills wrapped in yellow bands. Olsen stated the stacks were a $1000 each and Carson had 3 to 5 stacks in his hand. Olsen stated that Carson told him to not let Degroff know that Carson told him about the money.
s) Olsen stated there was one time Carson took him to the casino and gave him $500 to gamble. Olsen stated on this occasion Carson spent approximately $4000 at the casino.
t) Affiant spoke with Billings after interviewing Olsen and inquired about the money he had stolen from his safe. Billings indicated he had between 62 to 67 stacks of $1000 dollars wrapped in yellow bands that are now missing.
u) In addition to the money stolen from the safe Billings stated that raw silver and silver certificates in various denominations were stolen from the safe.
v) Affiant spoke Alan Olsen in reference to his player club card information. Olsen indicated Michael Carson was using his card, but he (Olsen) was reaping the benefits from the comps earned on the card. Olsen further indicated Carson instructed Olsen to obtain the card during one of their visits to the casino. Olsen stated he is not in possession of the card and as far as he knows, Carson still has it.

This affidavit consists of: 6 pages. Affiant:

Review on: 6-23-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 6-23-2020
Date

Judge/ Magistrate

State of Michigan
County of Emmet

Police Agency: Emmet County Sheriff's Office
Report Number: 19-5778

w) Affiant obtained a search warrant for the cellular device belonging to Michael Georgie Carson and noted text messages whereas he and Brandie Marie Degroff talk about looking for certain items listed in paragraph #2.
x) Affaint further observed a comment from Brandie Degroff whereas she comments to Michael Carson that she aided him in stealing $60,000.00
y) Your affiant contacted Donald William Billings in reference to the items stolen from his residence during the timeframe that Brandie Degroff and Michael Carson had access to his home and he specifically mentioned the items with the quantities and values of the items listed in paragraph #2.
z) Your affiant knows throughout this investigation Carson and Degroff have not had sales of silver certificates, silver coins, silver bars, and collectible pennies.
aa) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation and provide evidence of criminal activity related to Michael Carson and Brandie Degroff.

Affiant further sayeth not.

This affidavit consists of: 6 pages.

Affiant: _____

Review on: 6-23-2020
Date

By: Mike Schuitema
Prosecuting Official

Subscribed and sworn before me on: 6-23-2020
Date

_____
Judge/ Magistrate

A review of government's motion Exhibit 1 (body camera of arrest), reveals the following:

- 4:14 a.m. two uniformed officers knock on the front door, dogs bark.
- 4:15 a.m. knock again, female voice says "I'm coming." Porch light is turned on.
- 4:16 a.m., Brandi DeGroff opens the front door. Deputy Midyet asks if Mr. Carson is there and she asks "what's this about?" A female child then comes out and asks "Is Daddy going?" Deputy Midyett said "I just gotta talk to him."
- 4:17 a.m., Mr. Carson steps out and is dressed in a t-shirt with shorts and is barefoot. He is informed of the warrant. Ms. DeGroff asks for bond and Deputy Midyett said it is $100,000.00. Mr. Carson asks for her to get the children out of view. Mr. Carson finishes a cigarette and, during this time, Deputy Midyett makes it clear that he is under arrest and that he has to stay with Mr. Carson. They go inside.
- 4:20 a.m. – Deputy Midyett is standing at the foot of the bed. Mr. Carson walked up to the nightstand and put his lighter down right next to the phone. He had lit another cigarette on the way to the bedroom. Mr. Carson retrieved socks out of the drawer and put his socks on while sitting on bed.
- 4:20:54 – Mr. Carson finished putting on his socks and walked away from his sitting position and away from the phone toward the foot of the bed.
- 4:21:07 – Mr. Carson walked around to the closet side of the bed (from window side) and retrieved underwear out of the drawer of a dresser that was inside the closet. There was a brief discussion where Mr. Carson apologized because he was about to drop his shorts to put on underwear. Deputy Midyett states that is understood and repeats again technically you are under arrest so he has to remain with Mr. Carson.

- 4:21:29 – Mr. Carson picked up a pair of blue jeans off the floor and put them on. Deputy Midyett does not ask to inspect them or search them first.
- 4:21:38 – Mr. Carson puleds items out of the pocket and gave them to Brandi.
- 4:21:42 – Deputy Midyett noticed a knife on the belt or in a pocket and said "you wanna just leave that here" and Mr. Carson threw it on the bed in plain view of everyone.
- 4:22:20 – Mr. Carson went to the foot of the bed and retrieved a notebook and pen off a table and started writing.
- 4:23:02 – Deputy Midyett is standing just inside the doorway. Brandi is slightly off to his left holding the notebook Mr. Carson just wrote on. Mr. Carson took the money and credit cards back from her and he was standing about arms length from Deputy Midyett. They are at the opposite side and opposite corner of the bed from the phone. Mr. Carson went going through the money and credit cards looking for something. Deputy Midyett then says "Mike, is that your phone there." They are the entire diagonal distance of the bed from the phone.
- 4:23:06 – Mr. Carson said "yes" and Midyett informed him that the phone and charging cord were coming with them as well. Mr. Carson asked "Why are you seizing my cell phone." The Deputy's answer reasonably included a strong inference that there was a warrant for it. The Deputy said:

  "We're seizing your cellphone as part of the investigation. Okay. You'll get the warrant for that at the jail when the detective comes and talks to you there. All right. [Mumble] . . get a search warrant for it."
- Mr. Carson walked toward the nightstand to get the phone and the Deputy said "I'll grab it." Due to the limited space, Mr. Carson picked it up and Deputy Midyett was

right behind him. Mr. Carson handed it and the charging cord to Deputy Midyett. Deputy Midyett handed it to the other deputy. They all walked to the front door. As they were walking, they asked him for the lock screen code and he provided it.

- 4:24:04 Mr. Carson took the phone out of the other Deputy's hand and showed him how to make the lock screen appear and he handed it back.

STATE OF MICHIGAN
IN THE 57TH CIRCUIT COURT FOR THE COUNTY OF EMMET

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Honorable Jennifer E. Deegan
File No. 20-5054-FC

MICHAEL GEORGIE CARSON,

Defendant.

OPINION AND ORDER FOLLOWING GINTHER HEARING

Defendant was convicted of Safe Breaking, Larceny $20,000 or More, Receiving and Concealing Stolen Property, $20,000 or More, Larceny in a Building, and 4 corresponding Conspiracy Charges, after a three day jury trial. Hon. Charles W. Johnson presided over the trial.

The People were represented by Michael H. Schuitema, Chief Assistant Prosecuting Attorney. Defendant was represented by Attorney Duane Beach.

Defendant was sentenced on December 20, 2020 by Hon. Charles W. Johnson.

Attorney J. Nicholas Bostic was retained to represent Defendant in his appeal. Defendant brought an action for a new trial alleging due process violations, and a denial of his right to a fair trial. He also alleged ineffective assistance of counsel.

Hon. Jennifer E. Deegan, has since been appointed to the bench. The Court issued an opinion dated December 30, 2021 and granted a *Ginther* hearing. The hearing was held on April 28, 2022.

Facts

Defendant lived next door to Don Billings. While Billings was living with his brother in Cheboygan for health reasons, he gave Defendant permission to enter his house and sell some of his possessions for a commission. Billings also had two safes in the home with significant amounts of silver, coins and cash in them that were not part of the sales/commission agreement with Defendant.

Billings checked on the house several times and noticed items were missing that were not part of the sale agreement. When he checked the safes, he found the cash, silver and other items of value missing.

Defendant was charged in the original complaint with 4 counts: 1) Safe Breaking; 2) Larceny $20,000 or more; 3) Receiving and Concealing Stolen Property $20,000 or more; and 4) Larceny in a Building. A warrant was issued and Defendant was arrested on February 26, 2020. During the arrest, Defendant's cellphone was seized.

A search warrant was issued for the contents of Defendant's cellphone on February 27, 2020. A search warrant to search Defendant's home was issued on March 3, 2020.

Defendant filed a motion to suppress the seizure of the cellphone. This motion was denied by the Trial Court on July 15, 2020.

After Defendant filed his motion to suppress the seizure of the cellphone, the Prosecutor's Office filed an amended information adding the Conspiracy charges. The amended information was filed approximately 4 months prior to trial.

The Prosecution's case was based in part on text messages exchanged between Defendant and his then girlfriend (later his wife) on his cellphone; Defendant's bank accounts and receipts of sale which showed that he initially had a very low balance but then was spending a great deal of money; testimony from Defendant's former employer that Defendant quit his job after he reportedly bought a locker on line with silver and cash in it; and casino records documenting his gambling at the casino.

Defendant did not testify but he presented evidence to show his income stream, including that he had income from working with his brother, that he had won money at the casino, and also that he had sold two vehicles.

Standard of Review

MCL 769.26 governs request for new trial,

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has *resulted in a miscarriage of justice.*

Ineffective Assistance of Counsel

The Michigan and United States Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const. Am VI; Const. 1963, art 1. § 20. *People v LeBlanc*, 465 Mich 575, 578 (2002). In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary [*Ginther*] hearing. *People v Sabin*, 242 Mich App 656, 658 (2000). The trial court's factual findings are reviewed for clear error, while the ultimate

constitutional issue is reviewed de novo. *People v Traver (On Remand)*, 328 Mich App 418, 422 (2019).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel. *People v Riley*, 468 Mich 135 (2003).

To demonstrate ineffective assistance, a defendant must show that their attorney's performance fell below an objective standard of reasonableness. *People v Grant (William)*, 470 Mich 477, 485 (2004). The defendant must show also that this performance so prejudiced them that they were deprived of a fair trial. *Id.* at 486. To establish prejudice, they must show a reasonable probability that the outcome would have been different but for counsel's errors. *Id.* See *Strickland v Washington*, 466 US 668, 687-688 (1984); *People v Pickens*, 446 Mich 298, 302-303 (1994).

Findings

Issue I: Trial Counsel was ineffective in failing to cite the correct law in his motion to suppress the seizure of the cellphone.

This Court previously denied Defendant's motion for the reasons as set forth in the December 30, 2021 opinion.

Issue II: Trial Counsel was ineffective in failing to move to suppress Defendant's statement.

A warrant was issued for Defendant's arrest. Deputy Midyett went to Defendant's home in the early morning hours. Defendant was allowed to get dressed and say goodbye to his children. He was in the home for approximately 10 minutes while accompanied by Deputy Midyett. While in the home, Defendant was not handcuffed or physically restrained; he was allowed to move freely; he drank soda and smoked a cigarette; he gave money to his wife from his wallet and spoke with her. The interaction between Midyett and Defendant was respectful and polite.

Deputy Midyett had been previously instructed to retrieve Defendant's cellphone during the arrest. While in the bedroom, Deputy Midyett asked Defendant if the cellphone on the bedside table was his and his response was, "It is." *Miranda* warnings had not been given at this point.

Defendant argues that Trial Counsel should have filed a motion to suppress his statement, "It is", as it was evidence of ownership of the cellphone. The Court agrees that ownership of the phone was an integral part of the evidence against Defendant. In that sense, the statement was important.

In *Miranda v Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court created a set of prophylactic safeguards to insure protection of the

Fifth Amendment right to be free from compelled self-incrimination during custodial interrogation. The stated goal of *Miranda* is to protect against the inherently coercive nature of custodial interrogation. Id. At 467, 86 S.Ct. at 1624.

In an attempt to dissipate the coercion found to be inherent in custodial interrogation, thus protecting a defendants Fifth Amendment right, the *Miranda* Court created the familiar litany:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, ... [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires. *Id.* at 478–479, 86 S.Ct. at 1630.

To admit a confession in its case in chief, the state bears the burden of proving that the confession was voluntarily given by the defendant, thereby fulfilling the due process guarantee of the Fourteenth Amendment. *Colorado v. Connelly,* 479 U.S. 157, 170, 107 S.Ct. 515, 523, 93 L.Ed.2d 473 (1986). In addition, if the confession was the result of custodial interrogation, the state must prove that the police properly informed the defendant of his *Miranda* rights and obtained a valid waiver. *People v Cheatham*, 453 Mich 1 (1996).

Trial Counsel testified that he chose not to file a motion to suppress the statement as a matter of trial strategy. He did not believe he was likely to prevail given his experience with the Trial Court. From an objective standpoint, it would have been reasonable and prudent to file a motion to suppress the statement. But the critical factor is whether filing the motion would have changed the outcome of the case.

Even if Defendant's response had been suppressed, there was additional evidence of ownership of the phone. The phone was seized from Defendant's bedroom. The jury reviewed text messages that were downloaded from the phone. Many of those messages identified Defendant as the sender and recipient by virtue of the content of the conversations.

Therefore, even if the statement was suppressed, there was sufficient evidence for the jury to conclude that Defendant owned the phone. As such, there was not a miscarriage of justice.

Issue III: Trial Counsel was ineffective in failing to move to suppress the contents of Defendant's cellphone.

On March 3, 2020, a search warrant was issued for the contents of the cellphone. This warrant was not contested.

At the *Ginther* hearing, Trial Counsel conceded that he should have filed a motion to suppress the contents of the cellphone. He testified that he did not file the motion

because he did not believe that he would prevail given his experience as a prosecutor and defense attorney.

The contents of the phone – specifically the text messages- were integral to the Prosecutor's case. If they had been suppressed, there is a reasonable probability that the outcome of the trial would have been different. The Court agrees that a motion should have been filed, if only to preserve the appeal. But again, at this stage of the proceedings, the crux of the issue is whether such a motion would have produced a different outcome.

The Fourth Amendment of the United States Constitution, *US Const, Am IV*, and its state constitution counterpart, *Const 1963, art 1, § 11*, prohibit "unreasonable searches and seizures absent a warrant based upon probable cause[.]" *People v Kazmierczak*, 461 Mich 411, 417 (2000). The Michigan Constitution affords the same protection. *People v Katzman*, 505 Mich 1053, 1053 (2020).

"Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings." *In re Forfeiture of $176,598*, 443 Mich 261, 265 (1993); see *Mapp v Ohio*, 367 US 643 (1961). The exclusionary rule "is a cornerstone of American jurisprudence that affords individuals the most basic protection against arbitrary police conduct." *Id.* However, there are exceptions to the exclusionary rule and situations in which the exclusionary rule does not apply. *People v Hellstrom*, 264 Mich App 187, 193-194 n 3 (2004).

Michigan has adopted the good faith exception to the exclusionary rule. *People v Goldston*, 470 Mich at 526 (2004). Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his or her reckless disregard of the truth; (2) if the issuing judge or magistrate wholly abandons his or her judicial role; or (3) if an officer relies on a warrant based on a "bare bones" affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *People v Czuprynski* 325 Mich App 449 (2018) citing *United States v. Leon*, 468 U.S. 897, 915, 923, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984); *Goldston* at 531.

A reviewing court should defer to a magistrate's determination of probable cause to issue a search warrant. *People v. Russo*, 439 Mich. 584, 604 (1992). The *Russo* Court stated:

> In sum, a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Russo* citing *Czuprynski* at 469-470.

Importantly, only when material misstatements or omissions *necessary to the finding of probable cause* have been made should a search warrant be invalidated. *People v Mullen*, 282 Mich App 14, pps 23-24 (2008).

Defendant argues that the search warrant is facially invalid because it does not establish probable cause and also because it resulted in a "dump" of data rather than specifying with detail what they were searching for on the phone. He further argues that the good faith exception to the exclusionary rule does not apply in this case.

Assuming for the sake of argument that the Trial Court would have invalidated the warrant for lack of probable cause or for lack of specificity, the main crux of the issue at this stage of the proceedings is whether the good faith exception applies. Defendant argues that it does not apply because the affidavit was so factually deficient that no reasonably well-trained officer would have believed it established probable cause.

Defendant's argument fails. The affidavit provided sufficient evidence for an officer to believe it established probable cause. Therefore the good faith exception would apply and there is no resulting miscarriage of justice from Trial Counsel's failure to file the motion.

Issue IV: Trial Counsel was ineffective in failing to object to the amendments to the Information.

The original complaint charged Defendant with 4 counts: 1) Safe Breaking; 2) Larceny $20,000 or more; 3) Receiving and Concealing Stolen Property $20,000 or more; and 4) Larceny in a Building. After Defendant filed his motion to suppress the seizure of the cellphone, an amended information was filed adding 4 additional counts of Conspiracy to the original charges. This was filed approximately 4 months prior to trial.

Defendant contends that Trial Counsel erred in not moving to quash the amended information based on prosecutor vindictiveness and by failing to remand for a preliminary examination.

Trial Counsel testified that he did not seriously consider moving to quash the amended information because there was no basis to do so. There was no prejudice to his client in his ability to prepare for trial. Further, he testified that he did not believe that it was vindictive on the part of the prosecutor to add charges at that stage. He testified that in his experience the decision to amend the information was a "classic prosecution tactic 101" – one that he had employed when he was a prosecutor. He also noted that the Conspiracy charges could not have been charged until the text messages from the cellphone were reviewed.

Trial Counsel also testified that he decided to waive the original preliminary examination as the victim was older and not healthy. He did not want Billings' testimony preserved in the event he was not available for trial. He indicated that he followed similar trial strategy with the amended information.

This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn,* 279 Mich App 31, 39, (2008). In this case, Trial Counsel's trial strategy did not fall below an objectionable standard of reasonableness.

Issue V: Trial Counsel was ineffective in failing to move to suppress the evidence seized from Defendant's home.

On June 23, 2020, a search warrant was issued to search Defendant's home. The police sought a number of missing items from Billings' home. Trial Counsel did not contest the warrant.

At the *Ginther* hearing, Trial Counsel testified that he did not file a motion because he did not believe that he would prevail on such a motion given his experience as a prosecutor and defense attorney. He also noted that Ms. Degroff initially invited law enforcement to come to the house and look around.

The applicable law is cited in Issue III, intra. Again, assuming for the sake of argument that the Trial Court would have quashed the warrant, the crux of the issue is whether the outcome would have been different. Defendant argues that the good faith exception to the exclusionary rule does not apply because affiant lied in the affidavit for probable cause.

Defendant argues that statement (x) of the affidavit, "Affiant further observed a comment from Brandie Degroff [1] whereas she comments to Michael Carson that she aided him in stealing $60,0000" was misleading and not accurate. This argument lacks merit. The affiant's interpretation of the exchange was reasonable in the context of the allegations of the case. Therefore the good faith exception would apply and there is no resulting miscarriage of justice from Trial Counsel's failure to file the motion.

Issue VI: Trial Counsel was ineffective in failing to object to multiple evidentiary errors.

The arguments contained in Issues VI & VIII question Trial Counsel's strategy during the actual trial. Defendant argues that the errors, taken as a whole, necessitate a new trial. He particularly stressed that once the Conspiracy charges were added, Trial Counsel should have employed an entirely different trial strategy

The holding of *People v. Unger*, 278 Mich. App. 210, 242-243 (2008) provides guidance on these issues,

> We cannot omit mention of the fact that defendant was represented by capable defense counsel throughout the proceedings below. As an experienced attorney, lead defense counsel was certainly aware that "there are times when it is better not to object and draw attention to an improper

---

[1] Defendant: "Yeah right. It's all you've done is use me and cheat on me."

Response: "Right... Um use you for what? 'Cause I haven't made any money or help you steal sixty thousand dollars? And cheat? When? Tell me when I had the opportunity to fucking cheat? You are the one who didn't work most of the summer and hasn't held a single job." Trial Transcript, Vol II/III. P. 214

> comment." *People v Bahoda*, 448 Mich 261, 287(1995). Furthermore, declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58 (2004). We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76–77 (1999). Defendant has simply failed to overcome the strong presumption that trial counsel's performance was strategic. *Matuszak*, supra at 58–59. Nor can we conclude that, but for counsel's alleged errors, the result of defendant's trial would have been different. Id.

Trial Counsel has been practicing law since the 1980s, and has significant criminal law experience both as a prosecutor and defense attorney. He also had extensive experience in front of the Trial Judge. Trial Counsel noted he interviewed every potential witness, and that his trial documents filled two bankers' boxes. He reviewed potential exhibits and made assessments on same. He had regular contact with Defendant or Defendant's wife, as part of his trial preparation.

Trial Counsel was well versed in the evidentiary issues and strengths/weaknesses of the case. He was able to articulate game call decisions he made during trial, including whether to object to potential hearsay. He acknowledged his mistakes and gave reasonable answers as to his decisions.

Every trial will have errors and every attorney can find fault in how they handled a particular issue even when the case resolves successfully in their favor. This is the nature of trial work. This case is no different. However, this Court is not persuaded that any alleged errors on the part of Trial Counsel would have resulted in a different outcome at trial.

Issue VII: Trial Counsel was ineffective in failing to raise double jeopardy regarding counts 2 and 3.

Defendant argues that his due process was violated because he was convicted of both Larceny of stolen property and Receiving & Concealing the same stolen property. He relies on the holding of *People v Johnson*, 176 Mich App 312 (1989) which states that a defendant cannot be convicted of both crimes for a single criminal act.

The Prosecuting Attorney notes that Defendant was convicted of Larceny for stealing money and other valuables from Billings' safe. He was convicted of Receiving and Concealing for using the money to purchase jewelry and household items, pay rent and gamble. Since these are separate acts, *Johnson* does not apply and Defendant's convictions do not violate due process.

Issue VIII: Trial Counsel was ineffective in failing to object to hearsay statements.

This issue is denied for the reasons as discussed in Issue VI, infra.

Defendant's request for a new trial is denied. Defendant shall prepare an order consistent with this opinion.

Dated: May 17, 2022

Hon. Jennifer E. Deegan
Emmet County Circuit Court

xc: James Linderman
J. Nicholas Bostic