STATE OF MICHIGAN
IN THE COURT OF APPEALS

GEORGE RIDER	**Case No. 350096**
Defendant-Appellant	Macomb County Circuit Court
v.	Case No. 17-3420-FC
STATE OF MICHIGAN	**Filed under AO 2019-6**
Plaintiff-Appellee	

Brief on Appeal

— Oral Argument Requested —

Christine A. Pagac (P67095)
State Appellate Defender Office
3031 W. Grand Blvd, Suite 450
Detroit, MI 48223
313-256-9833
cpagac@sado.org
Counsel for George Rider

Date: April 19, 2021

Table of Contents

Index of Authorities

Page(s)

Cases

Statutes

Rules

Statement of Jurisdiction

George Rider was convicted in the Macomb County Circuit Court by jury trial, and a Judgment of Sentence was entered on July 31, 2019. A Claim of Appeal was filed on August 7, 2019 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated August 5, 2019, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

Statement of Questions Presented

I. The police unreasonably searched and seized Mr. Rider as his car was being dried at the neighborhood car wash, in violation of his Fourth Amendment rights. The police unconstitutionally seized three cell phones from his person and vehicle during that warrantless search and seizure. Was trial counsel constitutionally ineffective for confusing a warrant to seize location information with one to seize the phone, and the court committed plain error in denying the motion? Was Mr. Rider prejudiced by counsel's errors as well as the court's? A new trial must be granted.

Trial Court answers, "No."

George Rider answers, "Yes."

II. Did the prosecutor's misconduct during closing and rebuttal deny Mr. Rider his due process right to a fair trial? Should a mistrial have been declared?

Trial Court answers, "No."

George Rider answers, "Yes."

III. Over objection, the court allowed the prosecutor to introduce a text message sent shortly after the murder speculating that Ms. Griffin had "gotten her dog." Did this admission of a witness's opinion on the defendant's guilt violate Mr. Rider's constitutional right to due process?

Trial Court answers, "No."

George Rider answers, "Yes."

IV. Did the trial court deny Mr. Rider a fair trial when it admitted numerous text messages between Ms. Griffin and Mr. Lattner, neither of whom testified? Were all these messages inadmissible hearsay?

Trial Court answers, "No."

George Rider answers, "Yes."

Statement of Facts

At about 7:30 a.m. on January 13, 2017, Julii Johnson was murdered outside of her boyfriend James Lattner's house in Warren. 5/21/19 T 77, 79-80. She had been shot seven times as she left to go to work, the final bullet seemingly shot into her forehead after she was down on the ground. 5/22/19 T 77, 85. She was not robbed. *See* 5/21/19 T 244.

Mr. Lattner did call 911 after Ms. Johnson was shot, but before he did that he tried to call William White. 6/4/19 T 89. Mr. White had been listed in prior police reports with Mr. Lattner. 6/4/19 T 95. Mr. Lattner was pulled over later on the 13th while driving Mr. White's car. 6/4/19 T 185. Mr. White had previous convictions for drug and weapons offenses. 6/4/19 T 102. The police never located Mr. White. 6/4/19 T 105.

After arriving on scene, the police searched the nearby area. A K-9 officer found a pair of brown leather gloves. 5/21/19 T 149, 172. One officer described the location as "along a trail path that led to a [nearby] LA Fitness. 5/22/19 T 21. They did not find a gun near the scene that day.

The police also searched Lattner's home and truck where they found $538,000 in cash and 16 cell phones. 5/21/19 T 262; 5/22/19 T 14; 5/23/19 T 140, 170, 224. A Ruger with its serial number filed off was found in a secret compartment in his truck.5/22/19 26-27; 5/23/19 T 140. This compartment was "consistent with narcotics trafficking." 5/23/19 T 208. Mr. Lattner did not testify at trial after invoking his Fifth Amendment rights. While the Macomb County prosecutor's office was willing to grant him immunity, the federal prosecutor was not. 5/21/19 T 214. In a text, Lattner's ex-girlfriend Marcie Griffin called him the "fentanyl king." 5/31/19 T 123.

On January 16, 2017, the police went to that nearby LA Fitness to look at their video surveillance. In the video, the police observed a dark colored SUV enter the lot and park. 5/23/19 T 22-24. The police could not tell what kind of vehicle it was by watching the video. 5/23/19 T 212. Someone gets out of the car and walks west. 5/23/19 T 33. The

person has a limp, and the police received a "tip[1]" that Dominique Edgerson resembled the person in the video. 5/23/19 T 209, 218 There was a photo of Mr. Edgerson on Mr. Lattner's phone that predated the murder. 6/4/19 T 110.

The police decided to try and duplicate the person's path in the hopes of finding some evidence. 5/23/19 T 37. It took Sgt. James Wolfe about 7 minutes to make the walk. 5/23/19 T 38. Sgt. Wolfe searched in the tall grass near where he believed another officer had found the gloves. 5/23/19 T 29. Sgt. Wolfe found a Smith and Wesson semiautomatic handgun in the tall grass, he estimated 100 yards from where the gloves had been found on the day of the murder. 5/23/19 T 40, 61. A firearms examiner found that spent casings found at the scene were fired from that gun, and the bullets recovered from Ms. Johnson's body were consistent with being fired from that type of gun. 5/30/19 T 182, 194.

Lattner returned the favor by suggesting to the police that Marcie Griffin may have been behind the murder. 5/23/19 T 168. Lattner and Griffin had been together for many years and had two children together. *E.g.* 5/23/19 Tr 148. At trial, the prosecution entered scores of angry text exchanges between Lattner's phone and Griffin's phone from May to December 2016, neither of who testified. 5/31/19 T 79, 97-123; Exhs 53-192. As the trial court summarized these Ms. Griffin as "repeatedly" referring to Ms. Johnson as "ho, young dumb ho, young dummy bitch, slut bitch, stupid bitch, dumb bitch, ugly bitch, ugly funny-ass looking bitch, rat ass, rat hos with zero potential, flat no-shaped slut, flat no-shaped dumb as fuck nothing-ass bitch." 6/6/19 T 22. There was no text where Ms. Griffin wished Ms. Johnson dead, however, and none where she offered to pay anyone to kill her. 6/4/19 T 79. The single jury was not instructed that these texts were only admitted against Griffin. Trial counsel objected on hearsay, relevance and confrontation clause grounds. 5/31/19 T 128.

---

[1] According to the search warrant affidavit for the 4616 phone, the "tip" came from Darchelle Lattner who identified Edgerson as "an associate of Marcie Griffin."

A theme at trial was Griffin's hostility towards Johnson. *E.g.* 5/31/19 Tr 165, A video was played of an angry Griffin at Lattner's car wash shortly before the murder, complaining about Lattner's treatment of their children. 5/31/19 T 156. The prosecution also theorized that Griffin was angry because she believed that Lattner and Johnson had married in Vegas over the New Year's holiday. See, e.g., 5/31/19 Tr 227-231.

But others were angry too. Ms. Johnson had exchanged a number of heated texts with Nathaniel Bailey. 6/4/19 T 169-174. Johnson had "facilitated" flights for Bailey to Detoit and then wire transferred money to pay for his flights. 6/4/19 T 169. The flights were often booked in Mr. Lattner's name as well as William White. 6/4/19 T 169. Bailey had flown to Detroit in early January, but the only phone number of his the police knew about was in Georgia at the time of the murder. 6/4/19 T 171. Bailey was angry because he thought Johnson owed him money. 6/4/19 T 174.

The police seized a phone from Marcie Griffin with a number ending in 4853, and searched it pursuant to a warrant. The police were able to obtain virtually no information from the phone before noon on January 13, 2017, and there were no texts on it before that date. 5/31/19 T 61, 67.

They also obtained a warrant to get information about the number from the cell phone carrier. *See* Ray Aff, attached as Appendix B. They learned from those records that she received texts the night before the murder and a few hours after the murder from the same phone number, one ending in 4616. App B.

The search and seizure of the phones found in Mr. Rider's possession after the police made a "traffic stop" of his car as it was being dried off at the car wash.

On January 27, 2017, the police sought and obtained a warrant for "records associated with" the 4616 number from Metro PCS. Ray Aff, Search Warrant, both attached to the brief as Appendices A and B respectively. The warrant on Metro PCS sought "real time location" of the device, subscriber information and type of phone affiliated with the

account, as well as text detail, call log detail and information about cell towers utilized. Search Warrant, App B. The primary basis for the request was that Marcie Griffin received incoming texts from the 4616 number at 8:44 p.m. on January 12, 2017 and 9:17 a.m. on January 13, 2017. Ray Aff, App A. Based on the timing of these texts, Off. Ray opines that the possessor of the phone "will hold valuable information that will further the investigation of this homicide" and the records will also assist the investigation. Ray Aff, App A. The police did not know, however, what those texts said or who they were from at the time they sought the warrant. 7/19/18 Tr 24.

The search warrant for the data from the phone company was authorized and the police received the records relating to the 4616 number and began monitoring the GPS information on January 30, 2017. Ray 2/4/17 Aff for phone search, attached to the brief as Appendix C. On Saturday February 4, 2017, between 8 and 9 a.m., the phone provided GPS information that made the police believe the phone was at 29801 Greater Mack Avenue in St. Clair Shores, where George Rider lived with Gloria Ray. 5/23/19 T 190.

Sgt. Charles Rushton, one of the Warren officers in charge of the murder investigation, went to the Mack address and set up surveillance for about an hour. 7/19/18 Tr 28; 5/23/19 Tr 109, 193. He saw a man get into a white Ford Explorer leave, and he followed the vehicle. 7/19/18 Tr 29. Sgt. Rushton was speaking to Officer Roy who was in contact with the phone company to track the phone, which seemed to be moving with the vehicle. 7/19/18 Tr 29. Sgt. Rushton "decided to stop the car, not for a traffic stop, but to get the phone." 7/19/18 Tr 30.

In fact, Mr. Rider's vehicle was not moving when the police "stopped" it. It was at a car wash being hand dried. 7/19/18 Tr 10 (witness testifies he was drying the car off when the police approached); 7/19/18 Tr. 30 (car was being dried off when Sgt. Rushton decided to "stop" it); 11/21/18 Tr 9 (car being dried off when blocked in). Mr. Rider was inside of the vehicle. He was ordered out of the vehicle at gunpoint, searched, handcuffed and put in the back of the police car in the lot of the business next door. 7/19/18 Tr 12, 31-32; 11/21/18 Tr 10, 12. The police denied that Mr. Rider was under arrest, removed the cuffs but did put him in a police car parked at a nearby business. 11/21/18 Tr 13. Sgt.

Rushton said that Mr. Rider was not free to leave, but he was not under arrest or in custody. 5/23/19 Tr 201. The police seized two phones from Mr. Rider's person, and then took his wallet and some personal papers and gave them to one of the people who had been drying the vehicle. 7/19/18 Tr 13, 31. Sgt. Rushton could see an iPhone inside of the vehicle, and so he decided to impound the vehicle and get a warrant to search it and the car as well. 7/19/18 Tr 33. Sgt. Rushton claimed he did not know what type of phone the 4616 number was connected to. 7/19/18 Tr 35. After Sgt. Rushton took Mr. Rider's vehicles and his phones, Mr. Rider was allowed to leave. 12/8 Order.

Despite the fact that the car was being dried at a car wash when the police seized it, the phones and Mr. Rider, the police misrepresented in the search warrant for car and the phone that the vehicle and phones had been seized in a "traffic stop." "Officers Lewis and Koerner intercepted the vehicle at 12 Mile and Gratiot where they initiated a traffic stop and detained the driver and sole occupant of the vehicle George Gerald Rider." Ray 2/4/17 Aff, App C, p 3. Omitted from the warrant was the fact that the vehicle was actually being dried off at a car wash and that the sole purpose of the "stop" was to seize the phone. Sgt. Rushton, who ordered the "stop," testified that there was no traffic violation. 5/23/19 T 201. In the warrant to search the car, the affidavit states that given "ping" location data, the 4616 phone was probably in the Explorer or with Mr. Rider, who refused to allow them in the vehicle. Ray 2/4/17 Aff App C p 4.

Sgt. Rushton also repeatedly testified that Mr. Rider and his phones had been seized during a "traffic stop." At the preliminary exam, Sgt. Rushton misleadingly testified, "myself, I believe Officer Koerner and Officer Lewis effected a traffic stop on the vehicle as it left the car wash on Gratiot just north of 12 Mile." PE II 164; PE II 198 (the vehicle "was exiting the car wash before [the car] got back onto Gratiot."). When asked at the exam what the basis for the traffic stop was, Sgt. Rushton said "a phone" before he was cut off by the prosecutor (the same prosecutor who would try the case). PE II 199.

At the hearing on the motion to suppress, Sgt. Rushton did testify that he decided to stop the car "not for a traffic stop, but to get the phone." 7/19/18 Tr 30. Sgt. Rushton testified that "[t]here was no traffic

offense." 7/19/18 Tr 29. In fact, the car was being dried off when he decided to "stop the vehicle at that time" so they would not need to pursue the vehicle. 7/19/18 Tr 30.

Finally, at trial, Sgt. Rushton testified that it was a "vehicle stop," and that there had been no traffic violation. 5/23/19 Tr 200. Sgt. Rushton says that he uses the terms "traffic stop" and "vehicle stop" interchangeably. 5/23/19 Tr 201.

Mr. Rider did not consent to the search or seizure of himself or the phones. 11/21/18 Tr 19. The encounter took about 30 minutes, and did not end with his arrest. 11/21/18 Tr 20.

Before trial, Mr. Rider's counsel filed a motion to suppress the evidence from three phones, numbers ending in 4616, 4392 and 3175. 12/7/18 Order p 1. The motion identifies the warrant to seize location and subscriber information from the cell phone provider as a warrant to seize the phone. *See* Mot. and attached "Exhibit O" (which is the warrant attached to this brief as App B). This error makes it way into the December 2018 order which also mistakenly notes "that the police were executing a search warrant in furtherance of a homicide investigation." 12/7/18 Order p 3. The trial court found that the affidavit provided "probable cause" to locate the 4616 phone, and then to seize it and identify its user. 12/7/18 Order.

The December 2018 order also states that the police initiated a "traffic stop" of the vehicle, despite testimony that there was no traffic violation. 12/7/18 Order p 2. The court finds that the police could seize both phones that Mr. Rider had on his person, apparently because they had probable cause for the 4616 phone and could not in any other way identify that phone (by for instance calling it). 12/7/18 Order p 2.

No appeal was taken of this order, and in March 2019, counsel asked the court to reissue the order to allow an appeal to be taken. *See* 3/11/19 Order. That motion was denied. 3/11/19 Order.

In May 2019, an interlocutory application for leave to appeal was denied because the court was not persuaded of the need for immediate appellate review. 5/9/19 Order. This appeal was of the April 8, 2019

order seeking to exclude text messages from phone 4616 as not properly authenticated. *See* 5/13/19 Order.

Evidence extracted from these phones, or gleaned from the providers, would be the bulk of the prosecution's case against Mr. Rider.

Overall, the police seized and searched a lot of phones. Among those were two of Griffin's phones, one a company phone ending in 4853 and the other a phone ending in 8728. 6/4/19 T 9. Two phones were seized from Mr. Rider's person at the car wash: the 4616 phone and a flip phone ending in 4392. 6/4/19 T 9. Inside the car was an iPhone ending in 3175. 6/4/19 T 9. Three phones were seized from Mr. Gibson, in particular a flip phone ending in 2531. 6/4/19 T 9. The police searched some, but not all, of Mr. Lattner's phones, and may not have even read all of the texts or looked at all of the photos on the phones of his that they did search. 6/4/19 T 61, 86.

Officer Roy testified that the phone numbers "attributable" to Mr. Rider contacted numbers attributed to his brother, Ms. Griffin and Mr. Gibson. 6/4/19 T 13-14. Mr. Gibson's phone only contacted Mr. Rider and his brother, of the numbers searched. 6/4/19 T 14. Ms. Griffin's phones had contact with Mr. Rider, her niece Barbara Bellamy, Mr. Lattner and Mr. Lattner's mysterious contact William White. 6/4/19 T 13.

In the iPhone 3175, Griffin's two numbers were identified as "pretty" and "pretty 1." 5/31/19 Tr 237-238. On January 7, 2017, the iPhone 3175 and the 4853 phone texted about meeting up. 5/31/19 T 238. On January 9, 2017, these same phones exchanged texts about meeting for dinner, with a similar exchange the following day with Griffin's phone seemingly running late to dinner. 5/31/19 T 239-240. Later that same evening, the iPhone 3175 texts to the 4853 phone "I really do like you and I would love to make your live better. I am an astute listener and a wise business man." 5/31/19 Tr 240. At 1:36 a.m. the 4853 phone replies "smiling . . . I would love for you to make my life better. I sure need someone to listen. Wise is definitely what I need." 5/31/19 T 241. The 4853 phone apologizes for being late to dinner, and for not responding sooner. 5/31/19 T 241. On the 12th, midday, "checking in" texts are exchanged between the number. 5/31/19 T 241.

The next texts are between the 4616 and 4853 phones, the 4616 phone asks, "can I see you today for a quick dinner" and the 4853 phone says yes. 5/31/19 T 244. At 3:53 p.m., the 4853 phone texts "you know my nerves bad. Let's meet ASAP I need a hug." 5/31/19 T 245. The 4616 phone says OK a few minutes later but then at 6:35 p.m. texts "I am running behind on that hug, but I would love to see you." 5/31/19 T 245. There are further exchanges that same day about meeting in downtown Detroit. 5/31/19 T 245-246. The last text is at 8:44 pm, an exchange wondering if the person was "still there." 5/31/19 T 246.

The following morning, January 13, at 9:16 a.m the 4616 phone texts to 4853 "good morning sunshine, today is a beautiful day, Friday the 13th." 5/31/19 T 246. The 4853 phone responds "lol" and the 4616 phone says " I hope you understand." 5/31/19 T 246. The 4853 phone replies, "everything about I understand." 5/31/19 T 246. Then 4616 texts "I want to see you smile again. You are too beautiful not to," with a reply "did you find you find your wallet?" 5/31/19 T 246. Then the 4616 phone responds "I will . . ." 5/31/19 T 246. Then late that afternoon the 4616 phone asks the 4853 phone how the day was and the 4853 responds, "good . . . just been dealing with this funeral all day. My best friend aunt passed. I will call you later or tomorrow." 5/31/19 T 246.

Over the course of the next few days, texts are exchanged about getting together, and seeing the person with the 4853 phone "happy and smiling." 5/31/19 T 247-249. On January 17 and 18, there is an exchange about taking a trip maybe to Texas because "I like you and want you to be a part of my life." 5/31/19 T 249. On the 18th, the 4616 phone says they are "on my way to my building" which is 2952 Woodward, as well as other personal exchanges. 5/31/19 T 251.

The prosecution also presented evidence of which cell towers the phones seized from Mr. Rider were using at particular times. 5/31/19 T 255. They all displayed "simultaneously" on a graphic used by Officer Roy. 5/31/19 T 255. On January 12, 2017, the day before Ms. Johnson was murdered, the graphic showed the phones using towers "progressively north and east" from 4:46 until 5:19 p.m until they were "consistent with the original scene and L.A. Fitness" at 12 Mile and Mound. 5/31/19 T 256. Eventually by 7 p.m. the phones were using towers with similar coverage to the ones being used by the phones taken

from Griffin. 5/31/19 T 259. After 9:20 p.m. "the phones attributed to Mr. Rider move towers and start utilizing towers progressively west towards 7307 Fielding in the City of Detroit." 5/31/19 T 260. Mr. Gibson's phone was using similar towers, near the Fielding address, in the late evening hours. 5/31/19 T 262.

Later that night, Mr. Gibson's girlfriend would go over there, and then complain to a friend that "he got her over there just to fall asleep on her." 6/4/19 T 117, 142. She would tell that friend the next day that he had, however, "fucked the shit out of [her] that morning. 6/4/19 T 117.

At about 5:30 a.m. on January 13, 2017, phones "attributed to" Mr. Rider and Mr. Gibson were using similar towers near the Fielding address. 5/31/19 T 264. Calls were made at that time to Gibson's phone from Mr. Rider's iPhone. 5/31/19 T 264; 6/4/19 T 45. At 5:39 a.m. Mr. Gibson called his girlfriend. 6/4/19 T 145. No other calls or texts were received by the phones during those early hours in the morning. Officer Ray admitted that it was not incriminating, or uncommon, for phones to have an absence of activity in the early morning and overnight. 6/4/19 T 147, 149.

At 7:42 a.m. the 4616 phone was interacting with a cell tower in Oak Park at 15100 West Ten Mile. 6/4/19 T 70. At 7:57 a.m. Mr. Gibson's phone interacted with a tower at McNichols and the Southfield Freeway. At 8:09 a.m., Mr. Gibson called his girlfriend and both of their phones used the same sector from 8:12 a.m. until about 4 p.m. 6/4/19 T 146.

Despite the numerous graphics of cell tower locations shown by the prosecution, on cross-examination Officer Ray admitted that the data is not precise enough to put cell phones at any particular location. 6/4/19 T 65. All he could say is that at the time of an event a particular phone is using a certain tower and sector of the tower. 6/4/19 T 65. The coverage area per tower is variable and Officer Ray did not know the coverage area of any particular tower. 6/4/19 T 71, 84.

The prosecution also introduced texts purportedly between Ms. Gibson and her niece Barbara Bellamy the morning of the murder. 6/4/19 T 21. A little after noon, Ms. Bellamy allegedly texted Ms. Griffin "something happened. At Rel house guy called it's on the news." 6/4/19

T 21. Around 2 p.m., Griffin texted back "at a funeral . . . my phone dead one percent he okay?" 6/4/19 T 22. After Bellamy responded, Griffin said not to involve her because she had her own problem. 6/4/19 T 22.

Shortly after texting Ms. Griffin, at 12:10 p.m. Ms. Bellamy allegedly texted someone called "Tone," "I think Marcie got her dog." 6/4/19 T 24. The prosecutor cited this text in his closing argument, saying she was "dying to talk" to someone about Johnson's murder. 6/5/19 Tr 127. This text was also specifically mentioned by the trial court in its denial of the motion for directed verdict. 6/6/19 T 25. The defense objected to the introduction of these texts. 5/24/19 T 172-173, 195.

Mr. Rider was arrested on February 13, 2017 at the Home Depot in Harper Woods. 6/4/19 T 29. In the rental vehicle was mail addressed to Mr. Gibson and a DTE payment coupon addressed to Mr. Rider at 7307 Fielding Street. 6/4/19 T 31. There were also work gloves similar to those found near the crime scene. 6/4/19 T 32.

Gloria Ray

Mr. Rider lived in St. Clair Shores with Gloria Ray and their teenaged son. 5/30/19 T 76. In 2017, their son was going to the Waldorf School in Detroit, and Mr. Rider would drive him to school which started at 8 a.m. 5/30/19 T 96-97, 108.

Eric Gibson is friends with one of her older sons, has been a guest in her home and done jobs for her. 5/30/19 T 79. As far as she knows, Mr. Gibson does not work for Mr. Rider. 5/30/19 T 78.

Ms. Ray is an officer, but not an owner, of Midtown Entertainment, a company that is fixing up the Fine Arts Theater in downtown Detroit. 5/30/19 T 84, 87, 93. Mr. Rider is not "tied into" the business, and is not an officer or owner of the company. 5/30/19 T 93. Mr. Rider and Mr. Gibson were together at a Home Depot a few days before the murder. 5/30/19 T 82.

Ms. Ray rented a Nissan Pathfinder, with Colorado plates, for the business and it was generally available for people to use it to pick up rehab materials. 5/30/19 T 84-86. Mr. Gibson was one of the people with access to it. 5/30/19 T 87, 91. And, in fact, the night before the murder,

Mr. Gibson was pulled over for speeding while driving a Pathfinder with a Colorado plate. 5/31/19 Tr

Midtown Entertainment also had four or five cellphones, left at the theater, for anyone to use. 5/30/19 T 99.

DNA

As noted above, two guns were found: a Ruger in Mr. Lattner's truck and a Smith & Wesson in a grassy area near the murder scene. The grip and the trigger/slide of both guns were swabbed by the MSP lab for DNA testing. 5/29/19 T 11, 99. They were reswabbed because the lab analysts believed there had been a mix up of the swabs during their testing. 5/29/19 T 71, 99, 119.

A forensic biologist used the STRmix computer program to analyze the DNA results from the swabs and concluded that there was "very strong support" that he was one of multiple contributors to the DNA profile on the Smith & Wesson grip and trigger and to the gloves found at the scene. T 168, 173.

Importantly, Jones concluded that there was "very strong support" that Mr. Rider was *not* a contributor to the gloves, or either of the guns. 5/29/19 T 187, 189, 203-204.

During the prosecution's rebuttal, the defense made numerous sustained objections to his attacks on counsel (particularly Mr. Flood) and burden shifting. 6/5/19 T 201, 203, 205-207, 208, 209, 211-212, 213, 215; 6/6/19 T 26 (request for mistrial) Objections to the conduct had been raised throughout trial, but multiple times in closing for (1) noting the defense did not question a witness; (2) appealing to sympathy for the victim; (3) a "mistaken" PowerPoint with a screenshot "wicked Marcie;" (4) calling Mr. Flood's case a "house of cards" and that "he's misrepresenting the facts;" (5) a sustained objection to Mr. Flood having a lot to own in this case; (6) more sustained objections about Mr. Flood's objections and style of questioning, which led the Court to instruct the jury that argument are not evidence; (7) a sustained objection and instruction to disregard to the prosecutor arguing that the car wash video meant that Ms. Griffin was going to kill someone Lattner loved;

(8) the prosecutor stated that Mr. Rider was at the crime scene the night before, another objection and a bench conference where Mr. Fedorak was admonished to stop his pattern of argument; (9) seconds later Mr. Fedorak again asserts Mr. Rider was at the crime scene and, when objected to responds that he will "clean it up;"[2] and then (10) another appeal to sympathy. 6/6/19 T 26-29, 31. Mr. Rider joined the motion. 6/6/19 T 35. The court denied the motion for a mistrial, but agreed to give a special instruction. 6/6/19 T 36. The court instructed the jury, "any argument or statements after the objections, an objection was sustained, is improper and should be disregarded and that includes during the closing arguments and any rebuttal." 6/6/19 T 48.

The jury convicted Mr. Rider of first degree murder on an aiding and abetting theory. Judgment of Sentence. He was sentenced to mandatory life in prison without the possibility of parole. Judgment of Sentence.

[2] 6/5/19 T 212-213

Argument

I. The police unreasonably searched and seized Mr. Rider as his car was being dried at the neighborhood car wash, in violation of his Fourth Amendment rights. The police unconstitutionally seized three cell phones from his person and vehicle during that warrantless search and seizure. Trial counsel was constitutionally ineffective for confusing a warrant to seize location information with one to seize the phone, and the court committed plain error in denying the motion. Mr. Rider was prejudiced by counsel's errors as well as the court's. A new trial must be granted.

Issue Preservation/Standard of Review

Mr. Rider generally preserved this issue through a pretrial motion to suppress "all evidence from the telephones unlawfully taken from George Rider." The motion asserts that Mr. Rider, his vehicle and two phones were taken without probable cause in violation of his Fourth Amendment rights. Mot. to Supress. After the motion was filed, substitute counsel orally argued at the second hearing in front of Judge Toia that there was insufficient probable cause to get a warrant for the 4616 phone. 11/21/18 T 25, 45. She did not address the warrantless seizure of the other phones.

A trial court's findings of fact in denying a motion to suppress are reviewed for clear error. *People v Hyde*, 285 Mich App 428, 436 (2009). The ultimate decision on the motion and whether the Fourth Amendment was violated is reviewed de novo. *Id.*

Counsel erroneously asserted that there was a warrant for the 4616 phone, and to the extent counsel erred in making that assertion and that subsequent counsel limited/changed the motion to one challenging whether the warrant for subscriber data was supported, counsel was ineffective. A claim of ineffective assistance of counsel presents "a mixed question of law and fact," with questions of law reviewed de novo and the trial court's findings of fact reviewed for clear error. *People v Trakhtenberg,* 493 Mich 38, 47 (2012). When a

Ginther hearing is not requested, review is limited to the record. i 250 Mich App 357, 368 (2002).

Argument

The police violated Mr. Rider's Fourth Amendment rights when they seized him at the car wash. They did not have probable cause to arrest him, and did not have a warrant to do so. They did not arrest him. They did not have a warrant to seize any of the phones he had with him. He did not commit a traffic violation, as Sgt. Rushton admitted, and his car was being dried off at the car wash when he was ordered out of it at gunpoint. The warrantless search of Mr. Rider and seizures of all of the phones on his person and his car were unreasonable, in violation of the Fourth Amendment. All of the evidence of the contents of the phone, and the location data from those phones, should have been suppressed as the fruit of the poisonous tree. Since virtually all of the evidence presented against him at trial was the fruit of this poisonous tree his conviction must be vacated, and a new trial ordered without any of the illegally seized evidence.

A. There was not a warrant to seize the 4616 phone from the subscriber. There was only a warrant to seize subscriber data from the service provider, Metro PCS, about that phone.

As an initial matter, the trial court's finding that there was a warrant to seize the 4616 at the time it was taken from Mr. Rider at the car was clearly erroneous. Search Warrant, App B. The warrant the police had at the time of the seizure was for subscriber data information from the cell phone company. It did not authorize the seizure of the phone itself, but rather the "real time location" of the phone, subscriber information and type of phone affiliated with the account as well as other data. Search Warrant, App B. As is plain from the face of the document (as is constitutionally required), the warrant is to Metro PCS, not the subscriber. The warrant does not list the phone as an item to be seized.

The police had the subscriber information, as well as information about the type of phone by January 30, 2017. Ray 2/4/17 Aff, App C. The police did not use the return on the warrant from Metro PCS to obtain a warrant to seize or search the 4616 phone from the subscriber, Midtown Entertainment.

Thus, the trial court committed clear error in finding that there was a warrant to seize the 4616 phone at the time the police took it from Mr. Rider. While the court should have caught the error when it reviewed the warrant in connection with the motion to suppress, this error originated in the motion to suppress itself, and then was perpetuated at the motion hearing by the prosecutor:

> THE COURT: Okay. Are you saying they had a search warrant to seize the phone at the same time they seized Mr. Rider.
>
> MR. FEDORAK: To ping, yes, to ping it and find it. I got the search warrant right here.

7/19/18 T 6. The more candid and correct answer to the court's question would have been "No, but they did have one to ping it and find it." Defense counsel did not catch this very important distinction, and clearly neither did the court. To the extent counsel's error could be viewed as a waiver of the issue of the warrantless seizure of the phone, trial counsel was ineffective.

The Sixth Amendment of the U.S. Constitution guarantees Mr. Rider "the assistance of counsel for his defense." US Const, Am VI. And the right to counsel is recognized as the right to effective assistance of counsel. *Strickland v Washington,* 466 US 668, 685-686 (1984). In order to prevail on an ineffective-assistance-of-counsel claim, Mr. Rider must show that (1) counsel's performance "fell below an objective standard of reasonableness" and (2) but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v Vaughn,* 491 Mich 642, 669 (2012).

Not recognizing that the warrant authorized the seizure only of location information and other data, and not the phone itself, is objectively unreasonable. As constitutionally required, the warrant lists what can be seized, and the phone itself is not listed. Nor is the warrant addressed to the subscriber, who owns the phone, only the phone company. There can be no strategic reason for the error, as counsel moved to suppress the evidence seized from the phones, repeatedly. And, as detailed more in the argument to follow, the second prong of *Strickland* was also met. But, in evaluating that argument, it is important to be crystal clear that at the time Mr. Rider was ordered out of his car at gunpoint by the police, they did not have a warrant to

seize the 4616 phone, or any other phone, from Mr. Rider or the phone's subscriber, Midtown Entertainment.

B. The warrantless search and seizure of Mr. Rider and, and seizure of his vehicle, violated the Fourth Amendment. All evidence obtained should have been suppressed as fruit of the poisonous tree.

On February 4, 2017, as his car was being dried at the car wash, the Warren police blocked the car in and ordered Mr. Rider out at gunpoint. 7/19/18 Tr 10, 30; 11/21/18 Tr 10, 12. The police seized two phones from his person, his car, and a third phone inside the car. 7/19/18 Tr 31, 33.

These warrantless seizures were unconstitutional. The Fourth Amendment of the United States Constitution, and Article 1, § 11 of the 1963 Constitution, protect against unreasonable searches and seizures. *People v Mead*, 503 Mich 205 (2019). The police had no probable cause to arrest Mr. Rider that morning at the car wash, and did not arrest him that day. *See* 11/21/18 Tr 13. But, they certainly seized him when he was ordered out of the car and searched before being cuffed and eventually placed in a police car.

The fact that the police believed Mr. Rider might have information that would assist the investigation of the Johnson homicide does not make the warrantless search and seizure of him reasonable. In *Dunaway v New York*, 442 US 200, 213 (1979)., the U.S. Supreme Court explicitly rejected the argument that a seizure short of an arrest is permissible if the police "had a 'reasonable suspicion'" that the person "possessed 'intimate knowledge about a serious and unsolved crime." *Id.* at 207. "Time and again" the U.S. Supreme Court has made it clear that warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment "subject only to a few specifically established and well delineated exceptions." *Minnesota v Dickerson*, 508 US 366, 372 (1993); *Riley v California,* 573 US 373, 382 (2014)("in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.") In short, U.S. Supreme Court caselaw establishes "that warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.'" *Carpenter v United States,* ___ US ___, 138 SCt 2206, 2221 (2018).

The warrantless search and seizure of Mr. Rider does not fall into any of the exceptions. First, it could not be classified as a search

incident to a lawful arrest because there was no arrest. See *id.* Second, it could not be a consensual search and seizure because Mr. Rider did not give consent. 11/21/18 Tr 19.

Third, the seizure and search also cannot be justified as a *Terry* stop. *Terry v Ohio*, 392 US 1 (1968). Under *Terry*, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 US at 22. An investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *United States v Cortez,* 449 US 411, 417 (1981). Based upon the "totality of the circumstances" the officers must have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* An officer who makes a valid investigatory stop "may perform a limited patdown search for weapons." *People v Champion*, 452 Mich 92, 98 (1996). If, while doing this search, the "plain feel" exception "allows the seizure [of an object] without a warrant . . . *when the identify of the object is immediately apparent and the officer has probable cause to believe that the object is contraband*." *Id.* at 101.

Assuming that the fact that the 4616 phone was "pinging" to Mr. Rider's car could justify a *Terry* stop, the "plain feel" exception could not justify the seizure of the phones on Mr. Rider's person. Phones are not contraband, and there was nothing illegal about Mr. Rider possessing the phones. Even assuming that the search warrant for data somehow transformed the 4616 phone into contraband, the identity of the object was not immediately apparent. Sgt. Rushton testified that he did not know whether any of the phones Mr. Rider had were the 4616 phone. 7/19/18 Tr 35; *see also* 12/7/18 Order p 2. The fact that Sgt. Rushton would have to do additional investigation to establish a connection between the seized phone and suspected criminal activity means that the incriminating nature of the phone

was not "immediately apparent." *See People v Mahdi*, 317 Mich App 446, 462-463 (2016). [3]

Nor could the related "plain view" exception justify the seizure of the vehicle and the phone inside. The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent. *Horton v California,* 496 US 128 (1990). As with the other phones, there is nothing inherently incriminating about having an iPhone (or a Ford Explorer).

Its also clear this was not a traffic stop, and that the trial court clearly erred in its finding to the contrary. Sgt. Rushton testified that no traffic violation had been committed. 7/19/18 Tr 29 ("there was no traffic offense.") The warrantless search of Mr. Rider could not be justified on this basis. *See Whren v United States,* 517 US 806 (1996)(officer may stop a vehicle regardless of motivation if he has seen a traffic violation)

What the police did here was utterly contrary to the Fourth Amendment. They had a warrant to get records for one phone, the 4616 phone, from the cell phone carrier. The warrant included tracking information for the phone, presumably so they could learn the identity of the subscriber and the identify of the person with the phone so they could take constitutionally permissible steps to seize it: such as by getting a warrant to seize the phone itself. That could have been done after they received the subscriber information on January 30, 2017 but before the phone was turned on again on February 4, 2017. That way the police would have had a warrant to seize the phone *in hand* when it turned on, days later. Instead, lacking a warrant to seize the phone, the police unconstitutionally literally took it out of Mr. Rider's pocket.

Having seized all of these phones illegally, any evidence derived from that seizure must be suppressed as the fruit of the poisonous tree. *Wong Sun v United States*, 371 US 471, 484-485 (1963). The fact that

---

[3] To the extent the trial court's concluded that the warrant for subscriber data provided "probable cause" for the warrantless seizure of the phones, and car, that conclusion is contrary to law and so clearly erroneous. Search warrants only permit the seizure of particularly identified things, or items in plain view whose incriminating nature is immediately apparent. U.S. Constit. Amend IV; *Horton, infra*.

the police later got a warrant to search the items will not clear the taint. *See United States v Wanless,* 882 F2d 1459, 1466 (9th Cir 1989). The purpose of the exclusionary rule is to deter "deliberate, reckless, or grossly negligent conduct." *Herring v United States*, 555 US 135, 142 (2009). As shown above, the Fourth Amendment violation is clear, and the misleading wording of the affidavit for the search of the phones shows that the police knew the seizure of the phones and vehicle was unconstitutional.[4] Officer Roy swore in the affidavit that "Officers Lewis and Koerner intercepted the vehicle at 12 Mile and Gratiot where they initiated a traffic stop." App C. But there was no traffic stop. And the vehicle was at a car wash, being dried off, when it was "intercepted." Even if the "good faith exception" would somehow apply, 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." *United States v Leon*, 468 US 897, 922 (1984).

C. The failure to suppress the evidence obtained from the search of the phones, and any additional data from the 4392 and 3175 phones severely prejudiced Mr. Rider. A new trial is warranted.

As noted above, trial counsel confused a warrant authorizing the seizure of subscriber data from the cell phone carrier as a warrant to seize the phone. The prosecutor perpetuated that mistake by responding to a question about whether there was a warrant to seize the phone by saying yes, with the caveat that it was only a warrant to "ping and find" the phone. In ruling on the motion to suppress, the trial court then made the clearly erroneous finding that the warrant to "ping" the phone was actually a warrant authorizing the seizure of the

---

[4] The search warrant for Mr. Rider's vehicle, attached to the motion to suppress, shows that these officers seem to have a habit of seizing phones without making arrests or having warrants authorizing the seizure. "Bellamy refused to provide officers with the call or text message records from her phone while speaking with officers and Bellamy's phone was seized as evidence." (paragraph 16 of Roy aff.) Ms. Bellamy described this as "stealing" her phone. 5/24/19 T 157. When Griffin invoked her right to counsel, her phones were "seized as evidence." (Paragraph 18 of Roy aff.) Notably absent is any mention of the seizure being pursuant to a warrant.

phone itself. And, having confused the warrant, trial counsel originally argued only that the seizure of the flip phone and iPhone was warrantless, and then substitute counsel appears to have abandoned entirely the challenge of the warrantless seizure. She then challenged only the warrant to locate the phone. 11/21/18 T 45; 12/8 Order.

These failures satisfy the first prong of *Strickland*, that counsel's performance "fell below an objective standard of reasonableness" as they should have been able to determine what property the warrant authorized the police to seize. The Fourth Amendment states that warrants must "particularly describe[e] the place to be searched, and the persons or things to be seized. U.S. Constit. Amend IV. If the warrant did not do so, it would have been facially invalid. *Groh v Ramirez,* 540 US 551 (2004). The warrant does not say that the phone can be seized – just that the location information can be seized. Moreover, there can be no strategic reason for viewing the warrant as one to seize the phone, as counsel was clearly trying to suppress the information obtained from the phone. Counsel simply made a mistake, a mistake that also should have been apparent to the trial court reviewing the warrant.

The second prong of *Strickland* is also satisfied: but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Virtually the entire government case was built on evidence obtained from the phones seized from Mr. Rider. The content of every text message purportedly between Mr. Rider and Ms. Griffin before noon on January 13, 2017 was obtained as a result of the warrantless seizure. That includes all of the texts the morning of the murder. That includes all of the location information from Mr. Rider's iPhone and flip phone – information the prosecution displayed "simultaneously" with the 4616 location information for the jury. 5/31/17 T 255. That includes in particular the information that the iPhone called Mr. Gibson early the morning of the murder, using a location near Mr. Gibson's.

Without this information, the prosecution could show that Mr. Rider had the 4616 phone in his vehicle on February 4, 2017 based on Sgt. Rushton's observations. They could also show that the 4616 phone had sent texts to Ms. Griffin's phone the night before and the morning of the murder, but nothing more about those texts. They could show that phone interacted with a tower along 696 in Oakland County shortly after the murder. And they could also show that Mr. Rider was

in a Nissan SUV with Mr. Gibson a few days before the murder. They could show some, but nowhere near all, of the location data, they showed at trial. The centerpiece of the prosecution's case against Mr. Rider would be gone, however. *See* 6/5/19 T 116, 147) But for counsel's errors, there is a reasonable probability of a different outcome. A new trial should be granted.

The trial court also committed plain error in perpetuating the warrant mistake and denying the motion to suppress.[5] The test for plain error is (1) error (2) plain (clear or obvious) (3) that affects substantial rights, which generally requires a showing of prejudice and (4) the appellate court may reverse only where the error "resulted in the conviction of an actually innocent defendant or when an error serious affected the fairness, integrity or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750 (1999).

In the argument above, Mr. Rider has established a plain error with respect to the warrantless search and seizure, and the faulty analysis of the Order denying the motion to suppress. He has also established the prejudice from this failure to correct counsel's misapprehension of the warrant -- and the perpetuation of it in the order denying the suppression motion – resulted in the erroneous admission of all of the information gathered from the search of the unconstitutionally seized phones, including all of the location and other data from the iPhone. The resulting prejudice is the same as that from counsel's errors. Admitting evidence obtained as a result of the obvious Fourth Amendment violations would seriously affect the fairness and integrity of the judicial proceedings. Reversal is thus justified also under the plain error test.

Mr. Rider was prejudiced by counsel's errors, and by the court's error. *People v Randolph*, 502 Mich 1 (2018). A new trial should be granted.

---

[5] In *Randolph,* 502 Mich 10 at note 14, the "obviousness" of the error is one that is such that neither the court nor the prosecutor should have countenanced it. The prosecutor appeared to be aware of the limitation of the warrant, because when asked whether there was a warrant to seize the phone the prosecutor correctly states that the warrant is to 'ping" the phone and locate it. He does not, however, say the warrant is to seize the phone. 7/19/18 T 6

II. The prosecutor's misconduct during closing and rebuttal denied Mr. Rider his due process right to a fair trial. A mistrial should have been declared.

Issue Preservation/Standard of Review

Counsel preserved this issue by objecting multiple times and moving for a mistrial during the prosecutor's rebuttal closing. During the prosecution's rebuttal, the defense made numerous sustained objections to his attacks on counsel (particularly Mr. Flood) and burden shifting. 6/5/19 T 201, 203, 205-207, 208, 209, 211-212, 213, 215; 6/6/19 T 26 (request for mistrial) The motion was denied, but a curative instruction was given. The court denied the motion for a mistrial, but agreed to give a special instruction. 6/6/19 T 36. The court instructed the jury, "any argument or statements after the objections, an objection was sustained, is improper and should be disregarded and that includes during the closing arguments and any rebuttal." 6/6/19 T 48.

The standard of review for allegations of misconduct by a prosecutor is whether a defendant was denied a fair and impartial trial. *People v Green,* 228 Mich App 684, 693 (1998). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether they constitute error requiring reversal. *People v Bahoda,* 448 Mich 261, 282 (1995). This amounts to de novo review of instances of prosecutorial misconduct.

A trial court's decision to deny a motion for mistrial is reviewed for abuse of discretion. *People v Alter,* 255 Mich App 194, 205 (2003). "A trial court abuses its discretion when it fails to select a principled outcome." *People v Horn* 279 Mich App 31, 35 (2008).

As this issue was preserved and constitutional, this Court must decide if the error was harmless beyond a reasonable doubt. *People v Carines,* 460 Mich 750, 774, 597 NW2d 130 (1999). This requires that the court examine the record thoroughly "in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd,* 472 Mich 343, 348 (2005) citing *Neder v US,* 527 US 1, 19 (1999); *Chapman v. California,* 386 US 18, 24, (1967). Those cases require a reviewing court to examine

the entire record when making a harmlessness determination, not just the evidence and theory put forward by the prosecutor. *See, e.g., Chapman, supra,* at 24. Furthermore, the beneficiary of the error is required to prove that the error was harmless beyond a reasonable doubt. *People v Anderson,* 446 Mich 392, 406 (1994).

Argument

For prosecutorial misconduct to constitute a constitutional due process violation under US Const, Ams VI, XIV; Const of 1963, art 1; § 17, the misconduct must have infected the trial to the extent that it made conviction "a deprivation of liberty without due process of law." *People v Blackmon,* 280 Mich App 253, 269 (2008), citing *Donnelly v DeChristforo,* 416 US 637, 643 (1974).

In our constitutional system, due process protects a criminal defendant from being required to prove his or her innocence because the prosecutor has the burden of proving all the elements of a crime beyond a reasonable doubt. See *In re Winship,* 397 US 358 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge."); *Jackson v Virginia,* 443 US 307 (1979). Any suggestion otherwise is improper. For example, a prosecutor "may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda,* 288 Mich App 446, 463-464; 793 NW2d 712 (2010).

In his closing, the prosecutor repeatedly, even after being cautioned, referred to Mr. Rider as being at the scene of the crime the night before. 6/5/19 T 211-213. But, the testimony did not establish that he had been. As Officer Ray admitted, the data is not precise enough to put cell phones at any particular location. 6/4/19 T 65. All he could say is that at the time of an event a particular phone is using a certain tower and sector of the tower. 6/4/19 T 65. The coverage area per tower is variable and Officer Ray did not know the coverage area of any

particular tower. 6/4/19 T 71, 84. Furthermore, the prosecutor made this particular argument right after being admonished and told not to do so.

Even a prosecutor's expressions of opinion, when there is no basis for them in the record, are improper and must be avoided. People v Smith, 158 Mich App 220 (1987). Additionally, while prosecutors may "argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," "[a] prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *People v Unger*, 278 Mich App 210, 236, 241 (2008).

When a prosecutor makes an argument unsupported by the evidence, the defendant is entitled to reversal if prejudiced or if the prosecutor acted in bad faith. *People v Wolverton,* 227 Mich App 72, 77 (1997). In the *Wolverton* case, where the defendant was charged with drunk driving and the prosecutor made the unsubstantiated claim that the defendant's blood alcohol level was twice the legal limit, a cautionary instruction was inadequate to cure the error, and the defendant was entitled to a mistrial.

Likewise, here, in this very circumstantial case the prosecutor made the unsupported assertion that Mr. Rider had been "casing" the murder scene the night before. His own expert said that the cell tower location data would not support such an assertion. An objection to that very assertion had just been made, a bench conference called, and then the prosecutor said the very same thing again and when met with objections said, "oh, I'll clean it up," like a character on Law & Order. The cautionary instruction to ignore the statement and that arguments are not evidence was not sufficient to correct the error. The false assertion coming as it did a second time after a sustained objection appears to have been in bad faith, and in any event also prejudiced Mr. Rider as the case against him was highly circumstantial, particularly when considered with the additional misconduct in closing. Objections to the conduct had been raised throughout trial, but multiple times in closing for (1) noting the defense did not question a witness; (2) appealing to sympathy for the victim; (3) a "mistaken" PowerPoint with a screenshot "wicked Marcie;" (4) calling Mr. Flood's case a "house of cards" and that "he's misrepresenting the facts;" (5) a sustained

objection to Mr. Flood having a lot to own in this case; (6) more sustained objections about Mr. Flood's objections and style of questioning, which led the Court to instruct the jury that argument are not evidence; (7) a sustained objection and instruction to disregard to the prosecutor arguing that the car wash video meant that Ms. Griffin was going to kill someone Lattner loved; (8) another appeal to sympathy. 6/6/19 T 26-29, 31

Mr. Rider's conviction must be reversed.

III. Over objection, the court allowed the prosecutor to introduce a text message sent shortly after the murder speculating that Ms. Griffin had "gotten her dog." This admission of a witness's opinion on the defendant's guilt violated Mr. Rider's constitutional right to due process

Issue Preservation/Standard of Review

Trial counsel objected repeatedly to the admission of this text message. 5/24/19 T 172-173, 195.

Evidentiary rulings are generally reviewed pursuant to an abuse of discretion. *People v Wilson,* 265 Mich App 386, 393 (2005).

Argument

The trial court allowed the prosecutor to introduce a text from Ms. Griffin's niece Barbara Bellamy shortly after she learned of the murder, "I think Marcie got her dog." 6/4/19 T 24. This text was offered purely as an opinion on the guilt or innocence of the defendant. As the prosecutor argued in his closing, "you guys decide for yourself what that means. I think Marcie got her dog, like a puppy. Or I think Marcie got her, and then the slang term, dog." 6/5/19 T 127

The Due Process Clause of US Const, Am XIV prohibits introduction of opinion testimony as to a defendant's guilt. *Cooper v Sowders,* 837 F2d 284 (CA 6, 1988). It is a "settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant." *People v Parks*, 57 Mich App 738, 750 (1975). This determination must be left to the jury. *People v Bragdon*, 142 Mich App 197 (1985).

Under this well-settled law, the trial court should have excluded this text. Its failure to do so was either an abuse of discretion, or if counsel's objections did not properly preserve the objection, the court committed plain error. As outlined above, an trial court commits plain error when the error is obvious – such as being contrary to well-settled law – and prejudiced the defendant. *See Randolph, supra*. Although this statement addresses purely Ms. Griffin's guilt, under the prosecution's theory of the case it also reflects on Mr. Rider's guilt. While this text is just one small piece of evidence in a lengthy trial, this was a purely circumstantial case against Mr. Rider (and Ms.

Griffin). Their motive was allegedly Ms. Griffin's rage, but her rage was not the only possible motive for this murder. Johnson's boyfriend was the "fentanyl king" and drug dealing is a dangerous business. 5/24/19 T 37; 5/31/19 T 123. Johnson was killed, after all, outside of Lattner's house. In addition, an associate, Mr. Bailey, was angry at Ms. Johnson. 6/4/19 T 169-174. Bellamy's opinion, as a relative of Ms. Griffin, may have tilted the balance in this circumstantial case. As this error would have impacted the fairness of the trial, if the error is unpreserved, this Court should exercise it discretion and reverse Mr. Rider's conviction.

IV. The trial court denied Mr. Rider a fair trial when it admitted numerous text messages between Ms. Griffin and Mr. Lattner, neither of whom testified. These messages were all inadmissible hearsay.

Standard of Review and Issue Preservation

Trial counsel objected on hearsay, relevance and confrontation clause grounds to the admission of the texts between Griffin and Lattner. 5/31/19 T 128. Counsel also filed a written motion pretrial.

Evidentiary rulings are generally reviewed pursuant to an abuse of discretion. *People v Wilson,* 265 Mich App 386, 393 (2005).

Argument

At trial, the prosecution entered scores of angry text exchanges between Lattner's phone and Griffin's phone, neither of who testified. 5/31/19 T 79, 97-123; Exhs 53-192. As the trial court summarized them Ms. Griffin "repeatedly" referred to Ms. Johnson as "ho, young dumb ho, young dummy bitch, slut bitch, stupid bitch, dumb bitch, ugly bitch, ugly funny-ass looking bitch, rat ass, rat hos with zero potential, flat no-shaped slut, flat no-shaped dumb as fuck nothing-ass bitch." 6/6/19 T 22. A theme at trial was Griffin's hostility towards Johnson. *E.g.* 5/31/19 Tr 165,

The court improperly admitted these text messages. In *People v Taylor,* the Michigan Supreme Court held that the admissibility of a co-defendant's nontestimonial hearsay statement is solely governed by MRE 804(b)(3), overruling *People v Poole,* 444 Mich 151 (1993) to the extent that it held that such a statement was governed by the Confrontation Clause as well. 482 Mich 368, 379 (2008). However, the Court noted that the Court's analysis in *Poole* of such a statement under MRE 804(b)(3) remains valid. That rule states:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to

> expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

None of the statements when made by Griffin could be said to fall within the requirement of 804(b)(3) that as a whole is clearly against the declarant's penal interest and as such is reliable. Ms. Griffin just mainly complains about Mr. Lattner and says she is over him. There was no text where Ms. Griffin wished Ms. Johnson dead, however, and none where she offered to pay anyone to kill her. 6/4/19 T 79.

Nor could the statement meet the requirement of MRE 801(d)(2)(E) for the admission of a co-conspirator's statement. To be admissible under this rule, the statement must be made "by a coconspirator . . . during the course and in furtherance of the conspiracy." *People v Bushard*, 444 Mich 384, 394 (1993); *People v Vega*, 413 Mich 773, 780-782. Ms. Griffin's texts to Mr. Lattner calling him and Ms. Johnson names, or berating him for his failings as a father and person, hardly qualify as statements in furtherance of the conspiracy. The texts themselves also span from May of 2016 to December 2016, and so most could not even be said to be during the course of the (uncharged) conspiracy.

It also could not be said that the statements were not being offered for the truth of the matter asserted in each of the texts, or that they were all expressions of their then existing mental emotional or physical condition. For instance "you bring our son to sleep in that bed where that hoe sleep. Really" is obviously being offered for the truth of the statement. 5/31/19 T 77. Texts from May of 2016, such as ones calling Lattner a woman beater that she does not want anything from are, if not hearsay, then irrelevant.

While these texts do not involve Mr. Rider, their erroneous admission of these statements was not harmless. This was a case of guilt by association. The prosecution used these statements to show Ms. Griffin in a bad light, as an angry woman, to prove her guilt, which transferred to Mr. Rider (since he allegedly participated at Ms. Griffin's request.) Where Ms. Griffin was not a witness in this case, her texts should never have been put before the jury as evidence of his guilt. Since there was only a single jury, and that jury was not

instructed to not consider the texts against Mr. Rider, the admission of the texts even though he was involved in them, was prejudicial.

Mr. Rider's conviction should be vacated and a new trial granted.

Conclusion and Relief Requested

WHEREFORE, for the foregoing reasons, George Rider asks that this Honorable Court reverse his conviction.

Respectfully submitted,

/s/ Christine a. Pagac

Christine A. Pagac
State Appellate Defender Office
3031 W. Grand Blvd, Suite 450
Detroit, MI 48223
313-256-9833
cpagac@sado.org
Counsel for George Rider

Date: April 19, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 11,807 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Christine A. Pagac
State Appellate Defender Office
3031 W. Grand Blvd, Suite 450
Detroit, MI 48223
313-256-9833
cpagac@sado.org
Counsel for George Rider

Date: April 19, 2021