STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

JOHN HENRY GRANDERSON,
Defendant-Appellee.
_____/

SC: 154552
COA: 325313
Saginaw CC: 14-039760-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

TERRANCE DEMON-JORDAN THOMAS, JR.,
Defendant-Appellee.
_____/

SC: 154656
COA: 325530
Saginaw CC: 14-039757-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

KAREEM AMID SWILLEY, JR.,
Defendant-Appellee.
_____/

SC: 154684
COA: 325806
Saginaw CC: 14-039758-FC

PLAINTIFF-APPELLANT'S [CORRECTED] RESPONSE TO DEFENDANT-APPELLEES' APPLICATIONS FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS INVOLVED

I. Were Witness Youngblood's statements to Detective Kahn and Detective Oberle properly admitted under MRE 801 (d)(1)(B) as prior consistent statements where: (1) Youngblood testified at trial and was subject to cross-examination; (2) there was express and implied claims of fabrication, improper influence and motive of his testimony; (3) the People offered prior consistent statements that was consistent with the challenged in-court testimony; and (4) the statements were made prior to the time that the supposed motive to falsify arose? Therefore, did the trial court abuse its discretion when it admitted Youngblood's statements to Detectives Kahn and Oberle?

The trial court answered: Yes
The Michigan Court of Appeals answered: Yes
The People answer: Yes
The defendant-appellant answers: No

II. Did the trial court's questioning of witnesses affirmatively satisfy the five factor test espoused in *People v Stevens*, 498 Mich 162; 869 NW2d 233, 239 (2015), cert den sub nom. *Michigan v Stevens*, 136 S Ct 811; 193 L Ed 2d 715 (2016), establishing that the trial court did not create the appearance of advocacy or partiality against a party where the trial court's questioning of witnesses did not demonstrate judicial bias, did not improperly influence the jury, and did not deprive the defendant-appellants of their constitutional right to a fair trial?

The trial court answered: Yes
The Michigan Court of Appeals answered: Yes
The People answer: Yes
The defendant-appellant answers: No

KEY TO ABBREVIATIONS

When citing to the lower court record, the People use the following abbreviations in this brief:

1. "RST" refers to the Kareem Amid Swilley, Jr. Resentencing Transcript dated January 21, 2015.
2. "ST 1" refers to the John Henry Granderson Sentencing Transcript dated December 15, 2014.
3. "ST 2" refers to the Terrance Demon-Jordan Thomas, Jr. Sentencing Transcript dated December 18, 2014.
4. "ST 3" refers to the Kareem Amid Swilley, Jr. Sentencing Transcript dated December 17, 2014.
5. "TT 4" refers to Trial Transcript Volume IV of XVIII dated September 16, 2014.
6. "TT 5" refers to Trial Transcript Volume V of XVIII dated September 17, 2014.
7. "TT 6" refers to Trial Transcript Volume VI of XVIII dated September 18, 2014.
8. "TT 7" refers to Trial Transcript Volume VII of XVIII dated September 19, 2014.
9. "TT 8" refers to Trial Transcript Volume VIII of XVIII dated September 23, 2014.
10. "TT 9" refers to Trial Transcript Volume IX of XVIII dated September 24, 2014.
11. "TT 10" refers to Trial Transcript Volume X of XVIII dated September 25, 2014.
12. "TT 11" refers to Trial Transcript Volume XI of XVIII dated September 30, 2014.
13. "TT 12" refers to Trial Transcript Volume XII of XVIII dated October 1, 2014.
14. "TT 13" refers to Trial Transcript Volume XIII of XVIII dated October 2, 2014.
15. "TT 14" refers to Trial Transcript Volume XIV of XVIII dated October 3, 2014.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

At about noon on November 21, 2012, Teresa Jurdem loaned her dark gray Saturn Aura to James Jones. TT 6, pp. 8, 9-10. She eventually learned James' real name was Ricky Holmes. TT 6, p. 31. Ricky was only supposed to have her car for a few hours. TT 6, pp. 13-14. Between 12 and 12:30 p.m., Verquisha Montgomery saw defendant-appellant Swilley, defendant-appellant Granderson, and defendant-appellant Thomas in a black car. TT 11, pp. 30-31, 33, 34.

At about 2:30 p.m., Willie Youngblood, Marcus Lively, Joshua Colley, and DaVarion Galvin were walking on the sidewalk of York Drive. TT 5, pp. 62-63; TT 10, pp. 77, 78. A car pulled up to them. Youngblood approached the car and then saw guns. He ran and heard shots. He saw Galvin on the ground. TT 5, p. 72. Youngblood eventually went to the hospital because he was shot in the stomach. TT 5, pp. 73, 87.

At about 2:32 p.m., Officer Holp arrived at the scene to find Galvin laying in the front yard of 3274 York and Lively standing next to Galvin. TT 4, pp. 90, 91, 95, 98. Galvin suffered a number of gunshot wounds. TT 4, p. 92. Lively said a blue or black Saturn occupied by four males shot at him. TT 4, p. 94. Holp noticed that the street was littered with shell casings, that the home at 3729 York had bullet damage, and that a truck in front of 3724 York had been riddled with bullets. TT 4, pp. 92, 105, 108, 109. Another officer told Lively to stand by, but Lively disappeared. TT 4, pp. 118-119. From the scene, Detective Rabideau collected 20 9-mm cartridge casings and 10 .40-caliber casings from the street. TT 5, pp. 19, 20, 25-26.

Youngblood and Colley were charged with carjacking, AWIM, and armed robbery for a separate incident. TT 5, pp. 92, 164; TT 10, p. 84. At that time, Youngblood told detectives that the defendant-appellants had killed Galvin. TT 5, pp. 93-94, 175-176. At defendant-appellant Swilley's preliminary examination, Youngblood testified that defendant-appellant Thomas was

in the front passenger seat, defendant-appellant Swilley was sitting behind defendant-appellant Thomas, defendant-appellant Granderson was driving, and Derell Martin was also in the car. TT 5, pp. 78-79, 80, 81-82, 177. He testified that all four defendant-appellants shot at him, Galvin, Lively, and Colley. TT 5, pp. 82. Colley told police he saw a black Saturn with a gun sticking out of its window. TT 10, pp. 85-86.

Ricky returned Teresa's car with bullet holes hours after he was to return it. TT 6, p. 14. Teresa called 911 while Ricky was present. TT 6, pp. 14-15. Ricky was frantic and did not want her to call the police. TT 6, p. 30. A car stopped occupied by some males. TT 6, pp. 19, 35-36. One of them resembled defendant-appellant Swilley. TT 6, pp. 37-38, 40. Ricky got into this car and quickly left. TT 6, p. 22. Police arrived and impounded her car. TT 6, pp. 22, 23. Rabideau inspected the interior of the Saturn but did not find any shell casings. TT 5, p. 34. He did lift a fingerprint from the outside of the passenger front door's molding and gave it to the crime lab. TT 5, pp. 16, 30, 52. The print was later determined to belong to defendant-appellant Granderson's left ring finger. TT 10, p. 16.

Dr. Virani performed the autopsy on Galvin's body. TT 4, p. 122. Virani observed five gunshot wounds. TT 4, p. 125. One bullet had entered the left side of the thigh, had gone through the pelvis, abdomen, stomach, and liver, and stopped behind the front of the rib. TT 4, p. 124. This caused internal bleeding and was the most significant injury. TT 5, p. 125. Virani recovered three bullets and turned them over to police. TT 4, p. 127.

On March 19, 2013, Teresa's boyfriend Michael Hoffman bought Teresa's Saturn. TT 6, p. 56. While cleaning the car's interior, he found a shell casing under the front passenger seat. TT 6, pp. 57-58, 63-64. The 9-mm casing was also collected by police. TT 5, p. 20; TT 6, p. 71.

On Christmas Day of 2012, at about 10:34 p.m., someone shot at defendant-appellant Swilley's house while he was present inside. TT 7, pp. 22, 23, 38, 86, 87. As a result, defendant-appellant Swilley was upset. TT 7, p. 89. At about 11:30 p.m., Connie Stark called 911 because she saw three boys with a long gun outside her home, which was on the north side of Saginaw. TT 7, pp. 132, 133. Officers Hildebrant and Beyerlein responded. TT 8, pp. 10-11. The officers saw four subjects running. TT 8, pp. 20-21; TT 9, p. 10. Three of them stopped while the fourth continued fleeing. TT 8, p. 21; TT 9, p. 10. The three subjects were defendant-appellant Swilley, defendant-appellant Thomas, and Jamar Swilley. TT 8, p. 12; TT 9, pp. 11-12, 27. The fourth subject ran while holding his waist area. As he got to the rear of a house, he made a throwing motion. TT 8, pp. 21-22. Near that area in a parking lot, Hildebrant found the thrown item: a Glock handgun with an extended magazine. TT 8, pp. 14, 25. Beyerlein followed defendant-appellant Swilley, defendant-appellant Thomas, and Jamar Swilley's path and found two assault rifles under a porch. TT 9, pp. 10-11.

Also within that area, Hildebrant found a car registered to defendant-appellant Swilley's sister Shontrell Harris. TT 8, p, 14; TT 9, p. 80. He performed an inventory search and found three cell phones in the glove box. TT 8, p. 37. Shontrell initially told police that her aunt had borrowed her car and had abandoned it after it had run out of gas. TT 9, pp. 97, 177. Nevertheless, she finally admitted defendant-appellant Swilley had her car after she left it and the car's keys at his house. TT 9, pp. 93-94, 111, 177.

The 21 9-mm casings taken from York Street and from with the Saturn were determined to have been fired from the firearm seized by Hildebrant on Christmas Day, and all of the .40-caliber casings were fired from one firearm. TT 8, pp. 80, 81, 82-83, 96-98. Two .40-caliber bullets taken from Galvin's body were fired from one firearm, but they could not be matched to

any of the .40-caliber casings. TT 8, pp. 84-85, 89. The bullet taken from Galvin's shoulder was a 9-mm. TT 8, pp. 86, 87. The firearm collected by Hildebrant was tested for DNA. TT 9, pp. 187-188. Along with known DNA samples from defendant-appellant Swilley and from defendant-appellant Thomas, TT 9, p. 173, a DNA analysis was able to exclude defendant-appellant Swilley as one of the donors of the DNA found on the firearm. TT 9, p. 200. However, defendant-appellant Thomas was most likely a primary donor. TT 9, p. 199, 204.

Detective Khan testified as an expert in cell phone data analysis. TT 12, p. 23. He analyzed the phones taken from Shontrell Harris' car. TT 12, pp. 17, 23-24, 25. One phone belonged to defendant-appellant Thomas. TT 12, pp. 31, 33-34, 38. Another phone belonged to defendant-appellant Swilley. TT 12, pp. 32-33. In defendant-appellant Swilley's contacts list were defendant-appellant Thomas', defendant-appellant Granderson's, and Martin's phone numbers. TT 12, pp. 55, 56, 57. On August 24, 2012, defendant-appellant Thomas texted defendant-appellant Swilley about a 9-mm gun. TT 12, pp. 103-104. On August 25, 2012, defendant-appellant Swilley texted defendant-appellant Thomas about a .40-caliber gun. TT 12, pp. 104-105. Defendant-appellant Thomas responded that he had a .380-caliber. TT 12, p. 105. On November 21, 2012, at 2:49 p.m., defendant-appellant Swilley texted defendant-appellant Thomas and asked, "how many down?" TT 12, p. 115. Defendant-appellant Thomas responded, "[A]bout three." Defendant-appellant Swilley texted, "[W]oo whoo." TT 12, p. 116. A video taken on defendant-appellant Swilley's phone on October 6, 2012, showed a 9-mm Glock pistol with an extended magazine. TT 13, pp. 23-24, 25-26. The pistol appeared to be the same firearm seized by Officer Hildebrant. TT 13, p. 26.

Defendant-appellant Swilley asserted an alibi defense. On the afternoon of the shooting, defendant-appellant Swilley and his grandparents left their home at about 2 p.m. and went to the

water department and to City Hall to transfer some property to defendant-appellant Swilley and to defendant-appellant Swilley's sister. TT 7, pp. 97, 112; TT 14, pp. 90, 91, 92, 95. They eventually went to the courthouse. There, defendant-appellant Swilley received a phone call on his cell phone. Defendant-appellant Swilley told his grandfather, "I'm glad I'm with you all, because something just went down, and they probably would try to blame it on me." TT 14, p. 93.

Lori Brown and Mary Malocha worked at the City of Saginaw Assessor's Office. TT 13, p. 76, 96. They were working on November 21, 2012, but she could not recall seeing defendant-appellant Swilley on that day. TT 13, pp. 79, 96, 101. While the grantor was required to sign a quitclaim deed, the grantee was not. Further, the grantee was not required to appear in person. TT 13, p. 77, 101. However, the grantee was required to sign an affidavit. TT 13, pp. 85-86. In this case, the grantees were defendant-appellant Swilley and Marcel Swilley, but the only signature on the affidavit was Marcel's. TT 13, pp. 88, 102.

In Docket No. 154552, Court of Appeals Docket No. 325313, defendant-appellant Granderson appeals his convictions and sentences of one count of first-degree premeditated murder, contrary to MCL 750.316; one count of conspiracy to commit first-degree premeditated murder, contrary to MCL 750.157a; three counts of assault with intent to murder (AWIM), contrary to MCL 750.83; one count of carrying a dangerous weapon with unlawful intent, contrary to MCL 750.226; and six counts of possession of a firearm during the commission of a felony (felony-firearm), contrary to MCL 750.227b. The trial court sentenced Granderson, as a second-habitual offender, MCL 769.10, to concurrent terms of life without parole for murder; life with parole for conspiracy to commit murder; 46 to 69 years' imprisonment for each AWIM count; and 36 to 90 months' imprisonment for carrying a dangerous weapon. The trial court

ordered that all of the sentences be served consecutively to six concurrent terms of two years' imprisonment for felony-firearm. See ST 1, pp. 5-6.

In Docket No. 154656, Court of Appeals Docket No. 325530, defendant-appellant Thomas appealed his convictions and sentences of first-degree premeditated murder; conspiracy to commit first-degree premeditated murder; three counts of AWIM; one count of carrying a dangerous weapon with unlawful intent; one count of possession of a firearm by a felon, contrary to MCL 750.224f; and seven counts of felony-firearm. The trial court sentenced Thomas to concurrent terms of life without parole for conspiracy to commit murder and first-degree murder; 29 to 45 years' imprisonment for each AWIM count; and 60 to 90 months' imprisonment for carrying a dangerous weapon with unlawful intent and possession of a firearm by a felon. The trial court ordered that all of the sentences be served consecutively to seven concurrent terms of two years' imprisonment for each count of felony-firearm. See ST 2, pp. 12-13.

In Docket No. 154684, Court of Appeals No. 325806, defendant-appellant Swilley appealed his convictions and sentences of first-degree premeditated murder; conspiracy to commit murder; three counts of AWIM; one count of carrying a dangerous weapon with unlawful intent; and six counts of felony-firearm. The trial court sentenced Swilley to concurrent terms of life without parole for conspiracy to commit murder; 37 to 75 years' imprisonment for first-degree murder; 18 to 36 years' imprisonment for each AWIM count; and 38 to 60 months' imprisonment for carrying a dangerous weapon with unlawful intent. The trial court ordered that all of the sentences be served consecutively to six concurrent terms of two years' imprisonment for felony-firearm. See RST, pp. 7-8; ST 3, pp. 6-9.

A fourth defendant, Derell Martin, was acquitted of all charges and is not a party to this appeal. Defendant-appellants Granderson, Thomas, and Swilley were also found not guilty of receiving or concealing a stolen firearm, MCL 750.535b.

The defendant-appellants' appeals were consolidated by the Michigan Court of Appeals, see *People v Granderson*, unpublished order of the Court of Appeals, entered January 27, 2016 (Docket No. 325313), and their convictions were ultimately affirmed, see *People v Granderson*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2016 (Docket No. 325313). The defendant-appellants' sought leave from this Court to appeal the Court of Appeals decision. This Court ordered a response to the defendant-appellants' applications, directing the Saginaw County Prosecuting Attorney to:

> specifically address whether Willie Youngblood's statements to the police were properly admitted under MRE 801(d)(1)(B) as prior consistent statements. As to defendants Thomas and Swilley, the prosecutor shall also address whether the trial court's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against a party. [*People v Granderson*, __ Mich __; __ NW2d __ (2017) (No. 154552), citing *People v Stevens*, 498 Mich 162; 869 NW2d 233, 239 (2015), cert den sub nom. *Michigan v Stevens*, 136 S Ct 811; 193 L Ed 2d 715 (2016).]
>
> This response follows.[1]

[1] Respectfully, it is the People's position that the Court of Appeals issued a comprehensive opinion when affirming the defendant-appellant's convictions. Therefore, considering the thorough nature of the *Granderson* panel's resolution of the issues to which this Honorable Court has directed a response, the People's brief relies substantially on that panel's analysis.

ARGUMENT I

Witness Youngblood's statements to Detective Kahn and Detective Oberle were properly admitted under MRE 801 (d)(1)(B) as prior consistent statements because: (1) Youngblood testified at trial and was subject to cross-examination; (2) there was express and implied claims of fabrication, improper influence and motive of his testimony; (3) the People offered prior consistent statements that was consistent with the challenged in-court testimony; and (4) the statements were made prior to the time that the supposed motive to falsify arose. Therefore, the trial court did not abuse its discretion when it admitted Youngblood's statements to Detectives Kahn and Oberle.

A. STANDARD OF REVIEW

"A trial court's discretionary decisions concerning whether to admit or exclude evidence 'will not be disturbed absent an abuse of that discretion.'" , quoting). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." citing "When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission, we review the question de novo." ***Error! Bookmark not defined.***, citing . Whether a defendant was denied his constitutional right to confrontation is reviewed *de novo*, *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

"When construing court rules, including evidentiary rules, this Court applies the same principles applicable to the construction of statutes." *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013), citing *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). "Accordingly, we begin with the rule's plain language." *Duncan*, 494 Mich at 723, citing *Danse Corp v City of Madison Heights*, 466 Mich 175, 181–182; 644 NW2d 721 (2002). "When the language of the rule is unambiguous, we enforce the plain meaning without further judicial construction." *Duncan*, 494 Mich at 723, citing *Danse Corp*, 466 Mich at 18. "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be

treated as surplusage or rendered nugatory. *Whitman v City of Burton*, 493 Mich 303, 311-12; 831 NW2d 223 (2013), citing Baker v Gen. Motors Corp, 409 Mich 639, 665; 297 NW2d 387 (1980). "The Court may refer to dictionaries to aid in discerning the plain meaning of a rule." *Duncan*, 494 Mich at 723, citing *Fremont Ins Co v Izenbaard*, 493 Mich 859, 859; 820 NW2d 902 (2012).

B. LEGAL STANDARDS

"Hearsay is 'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Duncan*, 494 Mich at 724, quoting MRE 801(c). "'Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule.'" *Duncan*, 494 Mich at 724, quoting *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). Accordingly, "[t]he admission of a prior consistent statement through a third party is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied."

People v Jones, 240 Mich App 704, 706; 613 NW2d 411 (2000). MRE 801(d)(1) provides, in pertinent part, that "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ." MRE 801(d)(1)(B). Stated another way, the following four elements must be established to admit a prior consistent statement:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court

> testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*Jones*, 240 Mich App at 707.]

C. DISCUSSION

The primary argument made by the defendant-appellants regarding the inadmissibility of Youngblood's statements to Detective Kahn is whether, at the time of his statement, he had a motive to falsify. It is their position that, at the time Youngblood spoke with Kahn, Youngblood was offering any information he could in order to escape or mitigate his potential criminal liability for the Cass River Market incident. They argue that because this motive existed, Youngblood's statement was not admissible as a prior consistent statement. Unfortunately, this argument suffers from several fatal flaws.

As this Court is aware, a prior consistent statement does not become inadmissible because any motive to falsify existed at the time it was made. Rather, the pertinent question is whether the prior statement was made before or after the specific motive alleged to have influenced the testimony arose. See *Jones*, 240 Mich App at 711 (holding that simply having any motive is inadequate; instead, "the motive in the second element must be the same motive in the fourth element of the four-pronged test to admit a prior consistent statement under MRE 801(d)(1)(b)"). In the case at bar, trial counsel for the defendants implied several motives to falsify. In opening statements and in questions posed to Youngblood, trial counsel further implied that Youngblood named the individuals because he had been charged with crimes stemming from the Cass River Market incident. They also suggested that Youngblood's attorney directed Youngblood as to how he should testify when Youngblood gave the proffer statement. Trial counsel also implied that his testimony was improperly influenced by a deal he received

from the prosecutor, in that if he did not testify as the prosecutor wished, he would lose the deal because Youngblood had not been sentenced at the time he testified in this matter.

The lower court record indicates that all of these motives arose only after Youngblood spoke to Kahn. Significant is that when Youngblood spoke to Kahn, he had not been charged. The proffer statement also occurred after Youngblood spoke with Kahn. Further, Youngblood did not reach any deal with the prosecutor until after the proffer statement. While it is certainly possible that he motive the defendant-appellants point to on appeal may have existed prior to the statement to Kahn, it is simply not sufficient that there be *any* possible motive to falsify prior to or at the time of the statement. See *Jones*, 240 Mich App at 711. When this Court considers that there were several claims of improper influences and motives to falsify, many of which manifested only after Youngblood spoke with Kahn, the trial court did not abuse its discretion in allowing the prosecutor to present the video recording of the interview as a prior consistent statement.

Regarding Youngblood's first statement to Oberle, the defendant-appellants claim that it was also made when there was a motive to fabricate. Therefore, they assert that the trial court abused its discretion when it admitted portions of that statement. Again, the record reflects that this statement was made prior to the proffer statement. Trial counsel for defendant-appellants suggested that, while giving this statement, Youngblood's attorney coached him to identify the men at trial. The lower court record also indicates that Youngblood gave the statement before he was offered and accepted a sentence agreement with regard to his own criminal charges. Trial counsel also argued that the sentence agreement was also argued to have improperly influenced Youngblood's testimony. As with Youngblood's statements to Detective Kahn, the trial court properly admitted Youngblood's statements to Detective Oberle.

D. CONCLUSION

Based on the above discussion, one that closely reflects The Michigan Court of Appeals resolution of this matter in *People v Granderson*, unpublished order of the Court of Appeals, entered January 27, 2016 (Docket No. 325313), the trial court did not err when it admitted the prior consistent statements of Witness Youngblood. Therefore, the People respectfully request that this court affirm the Court of Appeals decision and find no error relative to this issue.

ARGUMENT II

Did the trial court's questioning of witnesses affirmatively satisfy the five factor test espoused in *People v Stevens*, 498 Mich 162; 869 NW2d 233, 239 (2015), cert den sub nom. *Michigan v Stevens*, 136 S Ct 811; 193 L Ed 2d 715 (2016), establishing that the trial court did not create the appearance of advocacy or partiality against a party where the trial court's questioning of witnesses did not demonstrate judicial bias, did not improperly influence the jury, and did not deprive the defendant-appellants of their constitutional right to a fair trial?

A. STANDARD OF REVIEW

With regard to the trial court's questioning of witnesses, "[t]he question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich. 162, 168; 869 NW2d 233 (2015). "When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial." *Id.* at 164. Further, this Court should not evaluate the defendant-appellants' claims of error in isolation, "but rather consider the cumulative effect of the errors." However, where the defendants' have failed to preserve their challenges relative to the trial court's questioning of witnesses, the issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-64, 774; 597 NW2d 130 (1999).

B. LEGAL STANDARDS

In *People v Stevens*, this Court clarified the scope of an appellate court's inquiry when deciding whether alleged judicial bias warrants a new trial. Ultimately, the issue is determined by considering "the totality of the circumstances, to determine whether the judge demonstrated the

appearance of advocacy or partiality on the whole." *Stevens*, 498 Mich at 172. A variety of factors must be considered, including:

> the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions." [*Id*.]

A reviewing court is not limited to these factors, and may also "consider additional factors if they are relevant to the determination of partiality in a particular case." *Id*.

When the claim of bias relates to the trial judge's questioning of witnesses, this Court's analysis must first begin with the recognition that as a general matter, a trial court is permitted to question witnesses. *Stevens*, 498 Mich at 173. See also MRE 614(b). "[T]he central object of judicial questioning should be to clarify." *Stevens*, 498 Mich. at 173. Therefore, "it is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information." *Id*. However, the trial court's ability to question witnesses is not unlimited. The court must be careful not to exhibit disbelief of a particular witness, even if unintentional. *Id*. at 173. The court must also abstain from conveying its personal views on disputed factual issues to the jury. *Id*.

Second, the reviewing Court must consider the tone of the questioning. *Id*. at 174-176. This can be problematic because the reviewing Court does "not have the benefit of viewing a trial judge's tone and demeanor first hand." *Id*. The Court should examine the "nature of the words used by the judge" to see if the record indicates the existence of "hostility, bias, or incredulity." *Id*. at 176. Further, "[j]udicial questioning might be more necessary when a judge is confronted with a difficult witness who refuses to answer questions posed by attorneys or repeatedly responds to those questions with unclear answers . . . ." *Id*. at 175–176.

Third, the reviewing Court must "consider the scope of judicial intervention within the context of the length and complexity of the trial, or any given issue therein." *Id*. at 176. Judicial intervention is more appropriate in a long or complex trial. *Id*.

"Fourth, and in conjunction with the third factor, a reviewing court should consider the extent to which a judge's comments or questions were directed at one side more than the other." *Id*. at 176-177.

Finally, "the presence or absence of a curative instruction is a factor . . . ." *Id*. at 177. Jurors are presumed to follow their instructions, and "a curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct. Depending on the circumstances, an immediate curative instruction may further alleviate any appearance of advocacy or partiality by the judge." *Id*. See also *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). However, the People recognize that there are cases where judicial conduct is so egregious that a curative instruction cannot "erase the appearance of partiality." *Id*. at 177-78.

C. DISCUSSION

As with any multi-factor inquiry that hinges on considering the totality of the circumstances, this Court must develop its analysis through a step-by-step review and application of the lower court record. Applying this process to witness Colley, the record reflects that the witness was much more willing to answer questions posed by defense attorneys than by the prosecutor. The record further reflects that, the trial court's was merely trying to to clarify certain parts of Colley's testimony, specifically areas where he avoided the prosecutor's questions by claiming lack of knowledge. The record also reflects that trial court did not intend to express an opinion on Colley's truthfulness. Regarding Witness Beyerlein, the record reflects that the trial

court intended to clarify the timeline of the events that occurred on December 25, 2012. Nothing in the trial court's questioning gave even the impression of bias or partiality.

As predicted by *Stevens*, the second factor, the tone and demeanor of the judge, is difficult to discern from the record in this case. As will inevitably occur, a reviewing court cannot evaluate the tone of voice used by the judge below based on the printed record alone. The record does reflect, however, that no objection was raised to the trial court's tone. See *Stevens*, 498 Mich. at 176 ("[A]n objection by trial counsel may specifically note the inappropriateness of the judge's demeanor in the courtroom, further aiding the appellate court in understanding the tenor of judicial involvement.").

The Court will note that the record does reflect that the trial court questioned Colley on whether he had explained to officers that he had no personal knowledge of the information he was providing. However, this was because Colley gave evasive answers to the trial court's questions before finally admitting that he had told the officers this. As this Court stated in Stevens, a trial court "should avoid questions that are intimidating, argumentative, or skeptical." *Stevens*, 498 Mich at 175. However, this Court has also provided that, "[j]udicial questioning might be more necessary when a judge is confronted with a difficult witness who refuses to answer questions posed by attorneys or repeatedly responds to those questions with unclear answers . . . ." *Id*. at 175–176. The record reflects that Colley this type of witness. Therefore, the way that the trial court questioned him was proper. Concerning witness Beyerlein, the record fails to substantiate any claim that the trial court's tone was improper. The trial court asked direct questions, which Beyerlein answered accordingly. Again, and most indicative of the trial court's tone, no objections were raised to the trial court's tone.

Regarding factors three and four, this trial involved four defendants and solicited a large amount of evidence and testimony over the course of 18 days. The record reflects that this included eyewitness testimony, expert witnesses, DNA evidence, scientific analysis of bullet casings and weapons, and evidence of other events that bore relevance to this matter. Therefore, it was the type of long and complex trial where judicial questioning is more appropriate. *Id*. at 176. Additionally, the defendant-appellants should not have been surprised that the trial court questioned Colley or Beyerlein, because it had similarly questioned the majority of the witnesses who testified earlier in the trial. The Court will note that Colley, Beyerlein, and all of the previous witnesses were called by the prosecution. The trial court's questioning of Colley and Beyerlein merely followed in the pattern that the trial court had established of the course of the People's case in chief. Accordingly, no reasonable juror would have found it unusual that the trial court questioned Colley or Beyerlein.

Especially notable here is the fact that the lower court record reflects that the trial court repeatedly instructed the jury not to consider its questions as providing any sort of opinion regarding the evidence. In the jury's preliminary instructions, the trial court stated that, "I may ask some questions of the witnesses myself. These questions are not meant to reflect my opinion about the evidence. If I ask a question, my only reason would be to ask about things that may not have been fully explored." This occurred even before any testimony had been elicited. When it was suggested that the trial court's questioning of Colley was improper, the trial court responded by reaffirming those preliminary instructions. Specifically, the trial court told the jury that it had no stake in the matter and was not interested in the outcome. Similarly, it so instructed the jury before asking Beyerlein any questions. This instruction was given *sua sponte*, and unsolicited by an objection. Finally, in the trial court's final instructions to the jury, the trial court explained

that it did not intend to display any opinion, and that if the jurors believed the court had expressed such an opinion, it must be disregarded.

While it is possible that the trial court could have unintentionally exhibited some disbelief of Colley's testimony, none of the remaining factors supports the conclusion that the defendant-appellants were deprived of a fair trial. This argument equally applies to the questioning of Beyerlein. Further, jurors are presumed to follow their instructions. *Stevens*, 498 Mich at 177. Therefore, given the trial court's multiple curative instructions, and considering the totality of the circumstances, the defendant-appellants were not denied a fair trial.

Similarly misplaced are any argument that the trial court displayed judicial bias when questioning Colley, Alesha Lee, and Phillip Taylor. The lower court record reveals that Swilley presented an alibi defense at trial. Lee, Swilley's guardian and grandmother, and Taylor, who is Lee's fiancé, testified that he was with them at the time of the shooting. According to these witnesses, Lee, Taylor, Swilley, and Swilley's sister went to City Hall to execute and record a quitclaim deed for a parcel of real property at about 2:00 p.m. on November 21, 2012.

As previously stated by this Court, it is proper for a court to question a witness in an effort to "produce fuller and more exact testimony or elicit additional relevant information." *Stevens*, 498 Mich at 173. A review of the lower court record suggests that this was the trial court's intent with its questions to Lee. The subject of the real property transfer was discussed during Lee's testimony, but no the testimony did not establish the details of the transaction. It is the People's position that the trial court was merely eliciting those details. Further, nothing in the record of the trial court's questioning of Lee reflects disbelief or a tone or demeanor that exhibited any bias to the jury. *Id*. at 174-176.

Conversely, the trial court's questioning of Taylor was more extensive. Like the trial court's questioning of Colley, the record reflects that that the trial court's motivation for questioning Taylor was valid. The record reflects that Taylor's testimony was confusing and, at times, unclear. Therefore, it is understandable that trial court endeavored to clear up these issues. Further, nothing in the record indicates that the trial court's tone with Taylor was argumentative or incredulous.

Ultimately, when this Court considers the totality of the circumstances, neither Swilley nor any of the defendant-appellants were deprived of a fair trial. As discussed above, the trial court questioned many witnesses. The record reflects that nearly all of them were called by the prosecutor. No reasonable juror would have been surprised that the court questioned Lee, Taylor, or Colley. Further, the trial court instructed the jury on multiple occasions that its questions were not posed to convey any opinions or to sway the jury. In fact, the trial court gave those instructions while it questioned both Colley and Taylor in response to objections that the trial court might be exhibiting bias. The lower court record indicates that that the trial court's conduct was not so extreme that "no instruction [could] erase the appearance of partiality." *Id*. at 177-178. Accordingly, neither Swilley nor any of the defendant-appellants are entitled to a new trial.

D. CONCLUSION

Based on the above discussion, one that closely reflects The Michigan Court of Appeals resolution of this matter in *People v Granderson*, unpublished order of the Court of Appeals, entered January 27, 2016 (Docket No. 325313), the trial court did not exhibit judicial bias when it questioned any of the witnesses. Accordingly, it did not deny the defendant-appellants of a fair trial. Therefore, the People respectfully request that this court affirm the Court of Appeals decision and find no error relative to this issue.

SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People respectfully request that this Honorable Court affirm the Court of Appeals' decision in its entirety

Respectfully submitted,

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/s/ Nathan J. Collison

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