STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
RIORDAN, P.J., AND RONAYNE KRAUSE, AND SWARTZLE, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant/
Cross-Appellee,

v

Supreme Court
No. 156161

WILBERT JOSEPH MCKEEVER,
Defendant-Appellee/
Cross-Appellant

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

TONI ODETTE
Assistant Prosecuting Attorney

MADONNA BLANCHARD
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5764

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Federal Cases

State Cases

Statutes and Rules

STATEMENT OF JURISDICTION, JUDGMENT APPEALED FROM, AND RELIEF SOUGHT

The People seek leave to appeal the unpublished decision of the Michigan Court of Appeals in *People v McKeever*, dated May 25, 2017.[1] This Court has jurisdiction over this application pursuant to MCL 770.12(2)(c) and MCR 7.303(B)(1).

The Court of Appeals reversed defendant's conviction of unarmed robbery because, upon remand from this Court, the trial court—despite holding a *Ginther* hearing and denying defendant's motion for a new trial—ultimately could not determine why defendant's witness (who never appeared for the *Ginther* hearing despite multiple opportunities) was not called at trial. Instead of addressing the substantive issues raised, the Court of Appeals merely stated that they could not review the issue and, therefore, a new trial had to be granted.

The People respectfully request that this Court either (1) reverse the Court of Appeals' opinion ordering a new trial, or (2) remand this case with an order instructing the Court of Appeals to review and decide whether the alleged error was outcome-determinative.

---

[1] *People v McKeever*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 25, 2017 (Docket No. 331594). Plaintiff-Appellant's appendix page 394a. The appendix will be referred to solely by its page number followed by the letter "a."

STATEMENT OF QUESTIONS PRESENTED

I.

When a defendant claims on appeal that he was deprived of a defense because a specific witness was not called to testify at his trial, defendant must produce that witness at an evidentiary hearing for the trial court to consider that witness's testimony in light of all of the other evidence presented at trial. Here, defendant did not present the witness—who was both alive and available—at the post-conviction hearing despite multiple opportunities to do so because that witness chose not to attend any of the hearings. Has defendant established the facts necessary to support any of his claims and entitle him to a new trial?

The Court of Appeals did not specifically address this question.
The People answer: "No."
Defendant answers: "Yes."

II.

In a post-conviction evidentiary hearing where defendant is attempting to establish that defendant was either prejudiced or denied a fair trial by the absence of a specific witness's testimony at this trial, it is defendant's burden—not the People's—to produce that witness to establish the factual basis for his claim. Here, despite multiple opportunities to produce the witness at the evidentiary hearing, defendant failed to do so. Should the failure to produce the defense witness be attributable to the defense?

The Court of Appeals did not specifically address this question.
The People answer: "Yes."
Defendant answers: "No."

STATEMENT OF FACTS AND PROCEEDINGS

At a final conference on November 2, 2012, defendant rejected the People's plea offer and decided to proceed to trial. After that, his defense attorney, Marvin Barnett, made the following record as it relates to the issue presented in this appeal (that is, if Mr. Barnett was ineffective for not calling co-defendant Jennifer Craven to testify on defendant's behalf):

> MR. BARNETT: Your Honor, there is a person that was the codefendant in this particular case. May I have her name for the record?
>
> APA CAMARGO: Her last name is Craven.
>
> MR. BARNETT: Ms. Craven. Ms. Craven has pled guilty before another Judge. The defendant wishes Ms. Craven to be a witness in this case.
>
> JUDGE JONES: Why don't you subpoena her?
>
> MR. BARNETT: That's good. I don't think I can because she has an attorney.
>
> JUDGE JONES: I don't know why you can't subpoena her. She can bring her attorney to court, and he'd say, "I told her not to say anything." So, I'm trying to figure out, what's the problem here?
>
> MR. BARNETT: Well, your Honor, first of all, well, if the People are willing to give me her address and all that information, then, fine. I mean, yes, literally, I know how to subpoena her. Well, then, I will subpoena her to court.

> JUDGE JONES: Okay.
>
> MR. BARNETT: I have the information.
>
> APA CAMARGO: And when she comes in here, the first thing that we'll do is make sure her lawyer is notified, and she's got to do what—because I don't know whether she has an attorney, so I can't issue a subpoena. I don't think that's what you were trying to communicate to me.
>
> MR. BARNETT: Actually, Judge, I was. I didn't think that they would give me her address. I assumed wrongfully.
>
> JUDGE JONES: Okay.
>
> MR. BARNETT: So, they've given me her address. I've got her address. We will subpoena Ms. Jennifer Marie Craven.
>
> APA CAMARGO: Your Honor, I'm also more than happy to subpoena her on Mr. Barnett's behalf if he'd like.
>
> MR. BARNETT: I'd appreciate it if they would do it. Then we'll make sure she's here.[2]

During a break from voir dire on March 11, 2013, Craven's name again came up when Barnett asked the court:

> MR. BARNETT: At some point, would you please allow Mr. McKeever to know that [sic] the decision on whether Ms. Craven, who I have placed on the witness list, whether she can testify.
>
> I don't know what this man's problem is. He seems upset with me for some reason, and I'm not going to tolerate it.

[2] 42a-43a.

> At some point, please explain to this man I don't have anything to do with Ms. Craven testifying. I couldn't explain it to him because he ain't trying to hear it.[3]

Judge Jones then went on to other topics and did not address why Craven would not be testifying. The prosecutor, who at this point was APA RuShondra Jones, did not comment.[4] The trial then progressed.

During trial, the People called two witnesses: the victim and the officer in charge. The victim, Kenith Fawaz, testified that he was at his apartment complex in Dearborn on July 17, 2012, when he saw Jennifer Craven, a woman he had known for a long time and considered like a daughter.[5] Fawaz testified that she appeared drunk and beaten up. When he went to help her, Craven asked him for money. When he said no, Craven held him back by his shirt until defendant (Craven's then-boyfriend) appeared in the hallway. When the victim attempted to escape, defendant followed him down the stairs. Defendant then began hitting the victim repeatedly in the head and body. After the beating, Craven joined defendant. Fawaz testified that Craven took the wallet out of his pocket, gave it to defendant, and then defendant—after

---

[3] 123a-124a. The parties have assumed he was referring to Jennifer Craven, but it appears "Julie Craven" was on his witness list. The term "Ms. Craven" is unclear here.

[4] 124a-125a.

[5] 177a-178a, 188a.

taking $100 from the wallet—threw the wallet back on the ground. Defendant and Craven then left together.[6]

When the police arrived, they took several photos of the victim's injuries. Those photos were published to the jury.[7] The officer in charge, Detective Marek Noworyta, testified to retrieving the surveillance video from the apartment complex. The entire beating and theft was captured on camera. The video was likewise published to the jury.[8] After the People rested, defendant waived his right to testify and stated that he did not wish to call any witnesses.[9] During closing arguments, the People urged the jury to watch the video closely and argued that defendant beat the victim up, Craven fished out his wallet, and then the two took the money and left together.[10] Defense counsel argued that—while it was unquestionable that defendant beat the victim—he did not assist in taking the money and that the victim accused him

---

[6]179a-184a.

[7]185a.

[8]235a. The video of this beating and robbery—admitted during trial as People's Exhibit No. 13, 234a— will be submitted separately to this Court via US mail.

[9]246a-249a.

[10]254a-258a, 271a-275a. Jennifer Craven pled guilty to unarmed robbery on August 10, 2012, and was originally sentenced to probation. After repeatedly violating her probation, she was eventually sentenced on January 21, 2014 to six months in the Wayne County Jail. At the plea hearing, she stated that she did not know why defendant beat up the victim because they did not talk about it.

of taking the money just to protect Craven.[11] During closing argument, Mr. Barnett mentioned Craven, stating "Ms. Craven is—Mr. Fawaz is trying to protect Ms. Craven is what he's doing. He's trying to protect her." The prosecutor objected, and Judge Jones stated, "She cannot testify. It's stricken. The jury is told to disregard it."[12] Mr. Barnett then moved on with his closing argument.

Following jury instructions, defendant was convicted of unarmed robbery and aggravated assault.[13] He was sentenced within the guidelines as a habitual third offender on March 29, 2013, to 85 months to thirty years. He then appealed to the Court of Appeals with three issues. The Court of Appeals affirmed his convictions.[14] He then applied for leave to appeal to this Court. This Court remanded the case back to the trial court. Specifically, this Court stated in an order dated June 3, 2015: "The court shall determine whether trial counsel was ineffective for failing to call Jennifer Craven as a witness at trial, *People v Ginther*, 390 Mich 436 (1973), or whether the court ruled off the record that she could not testify and, if so, what was the basis for

[11] 258a-271a.

[12] 269a-270a.

[13] MCL 750.530; MCL 750.81a.

[14] *People v McKeever*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 16, 2014 (Docket No. 315771). 302a.

such a decision." The Court denied defendant's leave to appeal in all other respects and did not retain jurisdiction.

The first of many adjourned post-conviction hearings was set for September 9, 2015. But, because subpoenaed defense witness Jennifer Craven had apparently gone to Northern Michigan for whatever reason, the court allowed an adjournment. Another hearing was then set for October 6, 2015. Again, Craven was still out of town and chose not to attend the hearing. Yet another hearing was set for November 18, 2015. Again, the witness did not appear for the hearing. Another adjournment was allowed and the hearing was set for January 15, 2016. This time, Craven was in Texas and, once again, would not be attending the hearing.[15]

The defense asked if she could testify by telephone because she did not have the ability to appear for a video conference, but the People objected and the court did not allow testimony via telephone.[16] The court then decided, in light of the many adjournments already granted, to go ahead with the hearing without Craven, as it was clear she was never going to appear before the Court despite being subpoenaed to do so for several months. The *Ginther* hearing was then conducted with two witnesses: Barnett and defendant.

---

[15] 314a-315a.

[16] 315a.

Before the hearing started, the parties stipulated that neither Judge Jones nor the trial prosecutors involved (APA Camargo or APA Jones) had any memory of why Craven did not testify at the trial.[17] Over the People's objection, the Court allowed defense counsel to submit Craven's plea transcript and affidavit into the record as an offer of proof for what she would have testified to had she ever appeared at any of the court proceedings she was required to attend.[18] In order to get them admitted, counsel qualified the offer of proof by stating, "I don't expect it to take the place of her testimony."[19]

Barnett then testified that he had no independent memory of why Craven was not called during trial. Instead, he simply stood by whatever the transcript said happened regarding the witness.[20] He did add, however, that he recalled she was represented by counsel so he would not, as a general matter, have attempted to speak directly with a co-defendant represented by counsel.[21] He also added that he recalled seeing the video in this case, thinking it was a "terrible case," and that—while he tried to explain to defendant both the plea offer and the concept of aiding and

[17] 313a.

[18] 313a-316a.

[19] 315a.

[20] 324a, 326a-327a, 345a.

[21] 332a.

abetting—defendant was adamant he wanted to go to trial despite the video.[22] Defendant then briefly testified that he wanted co-defendant Craven to testify on his behalf.[23]

Following the testimony and arguments from counsel, the Court denied the motion for a new trial. She reiterated the standard for ineffective assistance of counsel and then noted that, while nobody could recall the specific reason for why Craven was not called, the transcript indicates that it was the Court (not Barnett) who indicated that Craven would not be testifying. She went on to hold that Barnett was not ineffective, but that she was unable to determine whether the Court ruled off the record about Craven testifying or what the basis was for that decision.[24] Defendant appealed.

In an unpublished opinion dated May 25, 2017, the Court of Appeals granted defendant a new trial on the sole ground that this Court ordered a hearing and the trial court was unable to comply with that order.[25] While the opinion laid out the standard for ineffective assistance of counsel, it then went on to state that "there is simply no

---

[22]355a-358a.

[23]368a.

[24]377a-379a.

[25]*People v McKeever*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 25, 2017 (Docket No. 331594). 394a.

way to review the issue because the basis of the ruling [on why Craven was not called] is unknown." It goes on to "assume that an error occurred." Then—despite reiterating that the evidence of defendant's involvement in the assault and robbery was "overwhelming" and that "it would appear that the jury already rejected essentially the same version of events that Craven would have provided"—the Court nevertheless granted a new trial simply because the trial court could not determine why Craven was not called.

The People then filed a timely application for leave to appeal, asserting that there were clear legal errors in the Court of Appeals' opinion that will cause a manifest injustice and that the Court of Appeals erred by reversing defendant's conviction for unarmed robbery. On June 1, 2018, this Court issued an order directing the Clerk to schedule oral argument on the application. The order directed the parties to file supplemental briefs addressing: "(1) whether the defendant is entitled to a new trial based on either trial court error or ineffective assistance of counsel, where the defendant witness that was not produced at trial also did not appear at the post-conviction evidentiary hearing; and (2) whether the witness's failure to appear at the hearing is attributable to the defense under the circumstances of this case." This supplemental brief follows.

ARGUMENT

I.

When a defendant claims on appeal that he was deprived of a defense because a specific witness was not called to testify at his trial, defendant must produce that witness at an evidentiary hearing for the trial court to consider that witness's testimony in light of all of the other evidence presented at trial. Here, defendant did not present the witness—who was both alive and available—at the post-conviction hearing despite multiple opportunities to do so because that witness chose not to attend any of the hearings. Defendant has not established the facts necessary to support any of his claims and, therefore, has not shown anything that would entitle him to a new trial.

Standard of Review

Whether a defendant was denied the constitutional right to present a defense is reviewed de novo.[26] In dealing with claims of ineffective assistance of defense counsel, whether a person has been denied effective assistance of counsel is a "mixed question of fact and constitutional law."[27] This Court reviews a trial court's factual findings for clear error and reviews questions of constitutional law de novo.[28]

---

[26] *People v Kurr*, 253 Mich App 317, 327 (2002).

[27] *People v Dendel,* 481 Mich 114, 124 (2008), quoting *People v LeBlanc,* 465 Mich 575, 579 (2002).

[28] *Id.*

To the extent defendant claims that the trial court erred in preventing a defense witness from testifying, defendant's claim is unpreserved. At no point did trial counsel make a record objecting to the trial court's ruling to exclude the witness, or make any sort of record establishing why the witness was not presented. This Court reviews unpreserved claims of error for plain error.[29] The defendant has the burden of establishing plain error that affected his substantial rights. A defendant's conviction should only be reversed when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[30]

Discussion

This Court asked the parties to address whether defendant is entitled to a new trial "based on either trial court error or ineffective assistance of counsel, where the defense witness that was not produced at trial also did not appear at the post-conviction evidentiary hearing." The answer is no because defendant has not established that any error occurred or, even assuming error, that it affected the outcome of his trial.

---

[29] *People v Carines,* 460 Mich 750 (1999). It is arguable whether defendant's claim is one of constitutional magnitude, because—based on the affidavit of the defense witness—the majority of the witness's testimony was likely inadmissible and, to the extent any of it would have been admitted, would not have assisted in defendant's defense.

[30] *Id.*

In order for defendant to be entitled to a new trial on grounds of ineffective assistance of counsel, he must establish that, but for trial counsel's error in not calling the available witness at trial, there is a reasonable probability that the outcome of the proceedings would have been different. But defendant has not established, as a matter of record, that the witness was available and willing to testify at the trial or that there is a reasonable probability that the outcome of the proceedings would have been different had she testified. Similarly, in order for defendant to be entitled to a new trial on grounds of trial court error, defendant must establish that the trial court erroneously prevented the witness from testifying, and that the alleged error was outcome determinative. Here, defendant did not establish that—assuming the trial court excluded the witness—the trial court's decision was erroneous or, even assuming it was erroneous, that the alleged error was outcome-determinative.

Defendant had multiple opportunities to substantiate his claim and to make a proper record before the trial court regarding why the witness was not called and what her testimony would have been. He never did. But despite the fact that defendant did not present the witness—who was both alive and available—to testify at the post-conviction hearing, thereby failing to establish a valid, testimonial record for any of his appellate claims, defendant nevertheless argues that he should get a new trial simply because the court could not determine with absolute certainty why the witness

was not called at his trial. Rather than making an actual record in this case as is required, he instead simply rests on the witness's plea transcript and affidavit—neither of which were subject to cross-examination or credibility determinations—to argue that he has somehow established outcome-determinative prejudice. Defendant, who made no real effort to produce the witness at the evidentiary hearing, is essentially asking this Court to substitute a plea transcript and an affidavit for the live, in-person testimony of a witness. Because this is not a substitution this Court should make, and because defendant has not established outcome-determinative prejudice, defendant's claims should fail.

Accordingly, the Court of Appeals erred when it granted defendant a new trial without ever really reaching the substantive legal issues presented and without ever determining whether the defendant could establish any outcome-determinative error. Instead, after acknowledging that the evidence of defendant's guilt was overwhelming and that the jury had already heard and rejected the version of events described by Craven, the Court of Appeals essentially assumed to know the thoughts and reasoning behind this Court's remand order and used that to excuse itself from the requisite plain-error analysis.[31] The Court of Appeals' opinion should be reversed.

---

[31]This Court should make clear that, just because a case is remanded to the trial court for an evidentiary hearing, that does not mean this Court has already made an ultimate decision on the case before it. The Court of Appeals seems to have read far more into this Court's remand order than is

A. Defendant cannot establish either prong of ineffective assistance of counsel for failure to call a witness when there is no proper, testimonial record at the post-conviction hearing of how that witness would have testified or whether her testimony would have been beneficial to defendant.

In the context of ineffective assistance of counsel, defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial.[32] *People v Pickens* articulates the standard Michigan courts use to determine whether there has been ineffective assistance of counsel.[33] There, the defendant claimed his counsel was ineffective for failing to file an alibi notice. At the *Ginther* hearing, the subpoenaed alibi witness did not appear. This Court found that, while defense counsel acted unreasonably by failing to properly file an alibi notice, the defendant nevertheless was required to show prejudice. Because the defendant failed to establish that the alibi witness' testimony would have altered the proceeding, he was likewise unable to show that there was a "reasonable probability that the evidence would undermine confidence in the outcome of the trial."[34]

---

stated in the order itself.

[32] *People v Grant*, 470 Mich 477, 485-486 (2004).

[33] *People v Pickens*, 446 Mich 298, 302-303 (1994).

[34] *Id.* at 327.

Here, regardless of the specific allegation of ineffective assistance of counsel—whether counsel simply failed to call her or Judge Jones ruled that she could not be called and defense counsel then failed to object or make a record regarding that decision—defendant cannot establish outcome-determinative error because (1) Craven never appeared to testify at the *Ginther* hearing so defendant has failed to establish how her testimony would have affected the outcome of the proceedings, and (2) even if she had testified consistently with her plea transcript or affidavit, there is no indication her testimony would have changed the outcome of the proceedings given the overwhelming evidence of defendant's guilt.

i. Defendant cannot establish prejudice where he has failed to make a proper, testimonial record to substantiate any of his claims.

First, despite the fact that appellate counsel subpoenaed her for the *Ginther* hearing and the parties repeatedly adjourned the hearing to give her an opportunity to testify, Craven never appeared at the *Ginther* hearing.[35] Accordingly, the only

[35]See Argument II, *infra*, regarding how the witness's failure to appear at the post-conviction hearing is attributable to defendant. Defendant's appellate counsel and potentially defendant himself—not the People—were in communication with Craven. Appellate counsel asked for several adjournments to accommodate Craven's travel schedule, none of which the People had any problem with. After multiple adjournments and the realization that the witness had moved to Texas, the hearing finally proceeded without her. While the People objected to taking Craven's testimony by telephone, we had no objection to testimony via video conference. Appellate counsel did not arrange for a video conference with the witness, nor did counsel ever ask Judge Walker to issue a bench warrant while the witness was still in Michigan to compel the witness to testify.

"evidence" of what Craven would have testified to is her plea transcript and affidavit: neither of which were subject to cross-examination, neither of which allowed the court to assess her credibility, and neither of which would have been admissible at trial under the rules of evidence.[36] While appellate counsel now attempts to substitute Craven's brief affidavit for her actual, live courtroom testimony, that is simply not a substitution our criminal justice system permits.[37]

Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.[38] In *People v Ginther*, this Court held that it is incumbent on the defendant when his claim depends on facts not of record "to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately."[39] A defendant's burden includes establishing that the witness who did not testify would have provided

---

[36]In order to determine whether the evidence would change the outcome of the proceedings, it necessarily requires that the evidence in question would have actually been admissible during the proceedings.

[37]Conversely, at the post-conviction hearing appellate counsel made clear that Craven's affidavit and plea transcript does not take the place of her testimony. 315a.

[38]*Strickland v Washington*, 466 US 668, 694 (1984); *People v Hoag*, 460 Mich 1, 6 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.").

[39]*People v Ginther*, 390 Mich 426, 442-443 (1973).

evidence favorable to the defendant to the extent that the result of the trial must be considered unreliable.[40]

Here, defendant failed to establish the factual predicate for his claim because he did not rebut the presumption of deficient performance and did not establish that, even if trial counsel was deficient, the result of the proceedings would have been different but for counsel's alleged error. Defendant did not make a proper, testimonial record at the trial court level in connection with his motion for new trial. While an affidavit or offer of proof regarding the facts to be established at a hearing may be sufficient for this Court to grant a remand under MCR 7.211(C)(1), such documents do not take the place of live testimony at the hearing. Indeed, an affidavit *cannot* be evaluated for credibility or cross-examined by the opposing party. Therefore, it is impossible for the trial court to determine whether, based on Craven's affidavit, there was a reasonable probability that the outcome of the proceedings would have been different. Because Craven did not appear to testify, despite multiple opportunities to

[40] *People v Pickens*, *supra*, 446 Mich at 327 (holding that the defendant could not establish his claim of ineffective assistance on the basis of failing to call an alibi witness at trial because he failed to present the witness at a hearing on his motion for new trial). See *People v Carbin*, 463 Mich. 590, 600 (2001), citing *Hoag*, 460 Mich at 6 ("Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.").

do so, defendant cannot show that her testimony would have altered the result of the proceeding.[41]

For comparison, when a trial court determines whether newly discovered evidence makes a different result probable on retrial, the trial court must first determine whether the evidence is credible. Recently, in *People v Johnson,* this Court reviewed the standard for reviewing a defendant's claim of newly discovered evidence presented in a motion for relief from judgment.[42] This Court held that, like magistrates at preliminary examinations, judges reviewing motions for relief from judgment based on newly discovered evidence are contemplating a future trial and the role of a future fact-finder. The *Johnson* Court emphasized that a trial court, when considering new evidence, must first determine whether the evidence is credible. In the context of ineffective assistance of counsel, the trial court should likewise consider the credibility

[41]Likewise, there is no showing that Craven would testify even if defendant is re-tried in this matter. She obviously felt comfortable ignoring a subpoena to appear despite being given multiple opportunities so there is no reason to believe she would appear for defendant's new trial either. For whatever reason—her affidavit was not truthful, she did not want to subject herself to cross-examination, or (as defendant's answer to the People's application states) she just moved on with her life)—the witness chose not to testify in this matter. Why would she testify if defendant is re-tried?

[42]*People v Johnson*, _Mich_ (2018) (Docket No. 154128). Newly discovered evidence requires that a defendant show that "a different result is *probable* on retrial," while the prejudice prong of a defendant's ineffective assistance of counsel claims requires that a defendant show that there is "a *reasonable probability* that the outcome of the proceedings would have been different."

of defendant's proposed evidence to assess whether there is a reasonable probability that the outcome of the proceedings would have been different.[43]

Here, there was no credibility determination of the defense witness because the witness chose never to take the stand on behalf of defendant.[44] The defense witness did not testify because she simply refused to comply with the subpoena at the post-conviction hearing and defendant never asked the court to enforce it.[45] As a result, there is no valid evidence to consider in light of the evidence presented at the previous trial in order to determine whether Craven's testimony would have made a different result reasonably probable. Defendant cannot be said to have met his burden of establishing the factual predicate for his claim, when he has not presented the "available"[46] witness upon which his claim depends.

---

[43] *Strickland*, *supra.*

[44] A determination of credibility requires the trial court to judge the witnesses who appeared before it. MCR 2.613(c).

[45] Interestingly, at the post-conviction hearing, appellate counsel argues that had Craven been subpoenaed at trial she would have appeared and testified, because she would have complied with the subpoena. 374a. The record does not support this assertion as she was subpoenaed to testify in the post-conviction hearing and *refused* to attend any of the scheduled hearings, even when she still resided in Michigan. If Craven would not attend any of the hearings now—after her probation had ended and she was no longer within the criminal justice system—how can this Court conclude she would have testified at defendant's trial (which most certainly would not have been adjourned *ad infinitum* while the trial court tried to accommodate her travel schedule)?

[46] See MRE 804 a witness is "unavailable" when the witness:
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite

ii. Even if the witness had testified consistently with her plea transcript or affidavit, there is no indication her testimony would have changed the outcome of the proceedings given the overwhelming evidence of defendant's guilt.

Second, even if the co-defendant *had* shown up to the *Ginther* hearing and testified consistently with her affidavit, defendant would still be unable to establish prejudice in light of the fact that most of what she says would have inadmissible under the court rules, that the video evidence presented was overwhelming, and that defendant was nevertheless provided with a substantial defense. Here, unlike in most cases, the entire transaction from the beating to the robbery was recorded on video and played for the jury. There was never any question that defendant brutally beat the victim and then, *while defendant continued beating and holding down the victim*, Craven reached into the victim's pockets, fished out his wallet, looked through the

---

an order of the court to do so; or
(3) has a lack of memory of the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

wallet, and then took money from the victim. The two then fled from the scene together.[47]

Craven's affidavit submitted as an offer of proof stated the following: "DEFENDANT WILBERT JOSEPH MCKEEVER did not know I was going to take money from Mr. Fawaz and he did not take anything from Mr. Fawaz's pocket or wallet. He did not help me take anything from Mr. Fawaz. I was available and willing to testify to this at Mr. McKeever's trial and I am willing to testify to this at an evidentiary hearing."[48]

There are multiple problems with this affidavit being used as a basis for granting defendant a new trial. First, despite stating that she was willing to testify to the above statement at an evidentiary hearing, she obviously was not. Second, Craven could not testify as to defendant's state of mind during the assault, or why defendant took certain actions during the assault because she had no personal knowledge of what defendant was thinking.[49] And third, whether defendant took anything from the victim is immaterial because he was tried on an aiding and abetting theory. Even if Craven testified that defendant did not take anything from the victim, that would have no

[47]See The security video of the beating and robbery, admitted during trial as People's Exhibit No. 13.

[48]393a.

[49]See MRE 602 Lack of Personal Knowledge.

affect on the outcome of the proceedings because a taking is not required to find defendant guilty.[50] Most importantly, Craven's affidavit does not resolve or refute evidence related to the singular issue presented at trial: whether defendant assisted in the taking of property from the victim. After several opportunities to review the video the jury determined that defendant made some sort of contribution to the taking of the victim's personal property. Indeed, the jury clearly found that defendant either took something from the victim himself or knew Craven was taking something as he held the victim down so Craven could fish out his wallet and take his money.

Even assuming that defendant had no idea during the beginning of the assault that Craven wanted to take money from the victim, that changed at some point when Craven's intent to rob the victim became clear. The evidence establishes that at 20 seconds into the assault, Craven begins to go through the victim's pockets, and defendant continues to assault the victim. Then at 38 seconds, both Craven and defendant turn the victim over so that she can go through his pockets. Defendant is then seen pushing the victim down and hitting him while Craven retrieves something

[50] "To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Carines*, *supra,* at 757-758 (citation omitted). Here, the jury was properly instructed on the law of aiding and abetting and shown the video of the robbery.

from the victim's pocket. The assault does not stop until Craven completes the robbery.

In light of the video and the victim's testimony, Craven's supposed testimony that defendant did not "help" her would not have made a difference in the outcome of the trial because the video shows them acting together to corner the victim, beat him up, take his money, and then leave with it.[51] Aiding and abetting, of course, "describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime."[52] There is no question based on the video evidence that defendant aided and abetted his co-defendant when he continued to beat the victim and hold him down while seeing that Craven was obviously robbing him. As the Court of Appeals said in its original opinion and reiterated in its subsequent opinion, "the evidence of McKeever's involvement in the assault and robbery was overwhelming."

And finally, despite the video evidence, counsel nevertheless provided defendant with a substantial defense. Indeed, defense counsel did not have to call Craven—a co-defendant who had just violated her probation—as a witness to argue

---

[51]The People's theory at trial was, of course, that defendant and Craven worked together to rob the victim. Even if defendant's motive for beating him up was unclear, he still aided and abetted Craven in taking the money from the victim.

[52]*Carines*, *supra* ,460 Mich at 757.

that defendant was only responsible for the beating and not the robbery. While there was little counsel could do in light of the video, he nevertheless argued that defendant was not part of the robbery and that the victim only pointed the finger at defendant because he had a close relationship with Craven. Again, as the Court of Appeals pointed out, "the jury already rejected essentially the same version of events that Craven would have provided."

To the extent defendant argues that trial counsel was also ineffective for not admitting Craven's plea transcript at defendant's trial, that claim is groundless.[53] Defendant argues that—assuming Craven was "unavailable" at trial—counsel was ineffective for not admitting Craven's entire plea transcript at defendant's trial as a statement against interest. Even assuming for the sake of argument that Craven was unavailable at trial, Craven's plea transcript would not have been admissible as a statement against her interest under MRE 804(b)(3) because defendant has not provided any corroborating circumstances that would clearly indicate the trustworthiness of statement.[54]

---

[53] At the evidentiary hearing, appellate counsel argued that—regardless of whether it was trial court error to exclude the testimony—the issue can and should still be evaluated in the context of ineffective assistance of counsel because counsel failed to have the plea transcript read into the record at trial.

[54] MRE 804(b)(3): "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."

Further, even if considered admissible under MRE 804(b)(3), only portions of the plea transcript could be admitted and those portions would not have made it reasonably probable that there would have been a different outcome. The portions relevant and related to defendant are not statements against *Craven's* interest.[55] A statement against interest must actually assert the *declarant's* own culpability to some degree—it cannot be a statement merely exculpating the accused.[56] Also, if the declarant faces no reasonable threat of punishment, the justification underlying the exception would not be met.[57]

Here, the statements that defendant claims would have assisted in his defense would not have been admissible at trial. Craven's statement at her plea hearing that defendant beat up the victim because "someone had went outside and told him that I was in there crying," is not a statement against Craven's interest.[58] Nor is her statement that she did not "know why he beat the guy up?"[59] The portion of her plea

---

[55]*People v Barrera,* 451 Mich 261, 271 (1996) (it is insufficient if the statement would be important evidence against the declarant to subject the declarant to criminal liability).

[56]*Barrera,* 451 Mich at 271 (citation omitted).

[57]*Barrera*, 451 Mich at 271.

[58]This statement also contains another level of hearsay. What someone told defendant outside is inadmissible hearsay.

[59]Craven could not testify to defendant's state of mind. MRE 602.

that *would* be considered a statement against interest is the following, which would have no relevancy to defendant's defense or instant claim:

> PROSECUTOR: While—I mean we have a video, judge. The video reveals that the co-defendant was punching—while the co-defendant was punching my victim in the face, then this defendant was reaching in his pants pocket.
>
> COURT: Is that true?
>
> DEFENDANT CRAVEN: Yes.
>
> COURT: So you took the money?
>
> DEFENDANT CRAVEN: Yes.[60]

Because the portions relevant to defendant's defense were not statements against Craven's interest, even if trial counsel *did* move for Craven's entire plea transcript to be admitted at trial, his motion would have been denied. Counsel is not ineffective for failing to make futile motions or objections.[61]

Ultimately, defendant cannot establish either prong of ineffective assistance of counsel because he has failed to show the requisite outcome-determinative error in light of the fact that his supposed star witness failed to appear at the evidentiary hearing, thereby making it impossible for defendant to establish the proper, testimonial

---

[60] 390a-391a.

[61] *People v Milstead,* 250 Mich 391, 401 (2002).

record to support his claims. Further, even if the witness did not completely ignore the subpoena to appear and had testified consistently with her affidavit, it would not have made a difference in the outcome given the video, which clearly shows defendant holding the victim down while Craven fishes out his wallet.

B. Even if Judge Jones did make the decision to preclude the witness from testifying, there is no record to establish that her decision was erroneous or, even if it was erroneous, that it affected defendant's substantial rights.

While this case has always been one of alleged ineffective assistance of counsel—either for failing to call the witness, failing to attempt to have her plea transcript read into the record, or failing to make a record as to why the witness was not called—this Court's order asks the parties to address whether defendant is entitled to a new trial based on trial court error where the defendant witness was not produced at the evidentiary hearing. Again, the answer is no.

i. *Assuming Judge Jones made the decision to exclude the witness, there is nothing on this record to establish that her decision was erroneous.*

This Court's Order assumes error, as it asks the parties to address whether defendant is entitled to a new trial based "on either trial court error or ineffective assistance of counsel." But—even assuming Judge Jones *did* make the decision that Craven would not be called—there is no record as to *why* that decision was made and,

therefore, no way to conclude the decision was even erroneous.[62] Of course Craven was not merely a witness to this crime; she was a co-defendant. Obviously this was clear to the parties, including the court, when, at defendant's final conference on November 12, 2012, defense counsel expressed concern about contacting a co-defendant who was represented by counsel. Judge Jones then showed her understanding of the law, stating:

> JUDGE JONES: I don't know why you can't subpoena her. She can bring her attorney to court, and he'd say, "I told her not to say anything." So, I'm trying to figure out, what's the problem here?
>
> MR. BARNETT: Well, your Honor, first of all, well, if the People are willing to give me her address and all that information, then, fine. I mean, yes, literally, I know how to subpoena her. Well, then, I will subpoena her to court.
>
> JUDGE JONES: Okay.[63]

Given this exchange, there is no reason to conclude Judge Jones precluded the witness from testifying for any reason other than Craven's assertion of her Fifth Amendment rights.

---

[62]When the record is silent, a reviewing court may presume the trial court understood the law. *People v Garfield*, 166 Mich App. 66, 79 (1988) ("a trial judge is presumed to know the law"); *People v Knapp*, 244 Mich App 361, 389 (2001) ("the presumption that a trial court knows the law must prevail"). See also *People v Capentier*, 446 Mich 19 n. 17 (1994), citing *People v Auerbach*, 176 Mich 23, 43 (1913) ("finding that appointment of a special prosecutor was valid despite a silent record showing the need for such a prosecutor because of the presumption of regularity.").

[63]42a-43a.

By the time defendant's trial occurred on March 11, 2013, Craven had already violated her probation for the first of three times before she was ultimately sent to jail. Had the attorneys or the court spoken with Craven's attorney and determined that she would invoke her Fifth Amendment rights, there would have been no error in the court's determination that she could not be called to the stand.[64] Had defendant wished to make a record regarding this claim at the evidentiary hearing, he could have called the attorney who represented Craven during her probation to determine whether he advised his client not to testify. But no such record was made. *Perhaps* Craven would have testified at the evidentiary hearing that she would not have evoked her Fifth Amendment rights at trial, but she never appeared at the hearing to testify as to why she was not called at defendant's trial so there is nothing to support that assertion. Accordingly, there is nothing on the existing record to establish that, assuming the

[64]In cases involving "a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken." *People v Poma*, 96 Mich App 726, 732 (1980). In these circumstances, the Court should hold a hearing outside the presence of the jury to determine if the witness's Fifth Amendment privilege is valid after explaining the privilege to the witness. *People v Paasche*, 207 Mich App 698, 709 (1994). Here, it does not appear that this happened in this case or, if it did, it happened informally off the record. If that was the case, defense counsel should have made a record regarding what occurred off the record. So, once again, this circles back to what is ultimately a question of whether defendant can establish both prongs of ineffective assistance of counsel.

Court did not allow Craven to testify, such a decision was at all even erroneous in the first place.[65]

ii. *Even assuming Judge Jones did erroneously exclude the witness, which is unclear from the record, any such error was unpreserved and, therefore, subject to plain-error review.*

Even assuming the trial court erroneously excluded the testimony, the decision happened off the record and defense counsel did not make a formal objection on the record. While counsel asked the court to tell defendant of her decision, he did not object to whatever the reason was that the witness was not called. Because there is no objection or reasoning for the court's supposedly erroneous ruling that Craven could not testify, the error is unpreserved.[66] When an error, constitutional or not, is

---

[65] *People v Abdella,* 200 Mich App 473, 475; 505 NW2d 18 (1993), citing *Chessman v Teets*, 354 US 156, 164; 77 S Ct 1127; 1 L Ed 2d 1253 (1957). See *Bransford v Brown,* 806 F.2d 83, 86 (CA 6, 1986) (The defendant bears the burden of demonstrating prejudice resulting from missing transcripts. While demonstrating prejudice is difficult in the absence of transcripts, nevertheless, a defendant must present more that gross speculation that the transcripts were necessary to a fair appeal.).

[66] The People fail to see how this could be considered preserved, constitutional error given that defense counsel, at most, asked Judge Jones to give defendant her decision. He never objected to that decision, and never made any sort of a record as to what the decision was or whether he agreed with it. But even if this Court does consider this alleged error to be preserved, constitutional error, it was nevertheless harmless in light of the overwhelming evidence against defendant. "If the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." Once again, there is no proper record of how the witness would have testified, thereby making it difficult to even evaluate this claim. But, even assuming the witness testified in line with her affidavit, the error—for all of the reasons mentioned repeatedly throughout this brief—was harmless beyond a reasonable doubt.

unpreserved, the defendant must show a plain error that affected substantial rights. "The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[67]

Here, defendant cannot show plain error. As argued *supra*, the witness chose not to appear at the evidentiary hearing so there is no proper record—that is, testimony by Jennifer Craven that was subject to cross-examination and a credibility determination—for the trial court to even consider if or how her testimony would have made a difference in light of the other evidence presented at trial. And *even if* Craven had testified credibly and in line with her affidavit, that testimony—only some of which would have even been admissible in the first place—would not have made any difference in the outcome of the trial. Indeed, her statement that defendant "did not take anything from Mr. Fawaz's pocket or wallet" means little in light of the video, which shows defendant holding the victim down while Craven fishes through his pockets, pulls out his wallet, and takes the money. As mentioned above, a defendant does not have to personally take money from a victim in order to aid and abet another individual in doing so. Defendant cannot establish plain error in light of the fact that he held the victim down so Craven could complete the robbery. Thus, even if the trial

[67] *Carines*, *supra*, 460 Mich at 774.

court did erroneously exclude the video, it was not plain error affecting defendant's substantial rights for her to do so in light of the video evidence.

II.

In a post-conviction evidentiary hearing where defendant is attempting to establish that defendant was either prejudiced or denied a fair trial by the absence of a specific witness's testimony at this trial, it is defendant's burden—not the People's—to produce that witness to establish the factual basis for his claim. Here, despite multiple opportunities to produce the witness at the evidentiary hearing, defendant failed to do so. The failure to produce the defense witness should be attributable to the defense.

Standard of Review

Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.[68] As *People v Ginther* states, "[a] convicted person who attacks the adequacy of the representation he received at his trial must prove his claim."[69] This burden includes establishing that the witness who did not testify would have provided evidence favorable to defendant to the extent that the result of the trial must be considered unreliable.[70]

---

[68] *Strickland, supra*, 466 US at 694; *Hoag*, *supra*, 460 Mich at 6 ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.").

[69] *Ginther*, *supra,* 390 Mich at 442-443.

[70] *Pickens*, *supra*, 446 Mich at 327 (holding that the defendant could not establish his claim of ineffective assistance on the basis of failing to call an alibi witness at trial because he failed to present the witness at a hearing on his motion for new trial).

Discussion

This Court has asked the parties to address "whether the witness's failure to appear at the hearing is attributable to the defense under the circumstances of this case." The answer is yes because this was defendant's motion for a new trial, and the witness he needed to substantiate *his* claims on appeal was *his* witness. There was no bad faith on behalf of the courts or the prosecutors and, therefore, there is no reason why the witness's failure to appear could be attributable to anyone *other than* defendant himself. The fact that the witness ultimately chose to ignore the subpoena does not change the analysis or somehow shift whose burden it is to establish the required record.

There is no question that, under Michigan law, it is a defendant's burden on appeal to make a proper, testimonial record in the trial court in order to raise a claim of ineffective assistance of counsel. There is no law or statute that would permit defendant to evade the requirements of his burden of proof under these circumstances. But the Court of Appeals failed to hold defendant to this burden, essentially treating this case as though it contained a structural error and—without any substantive analysis—granted defendant a new trial. In other words, the Court of Appeals erroneously did not place *any* burden on defendant; instead, it simply held that the *possibility* of a defense witness's testimony is enough to grant defendant a new trial,

even when the proposed witness does not appear at the hearing to testify and there is no evaluation of whether the proposed testimony might have made a difference in the outcome of trial.[71] This simply cannot be the case in Michigan. Defendant must make a testimonial record, and must establish prejudice.[72]

Indeed, Michigan's jurisprudence has long held that a defendant has the burden to establish the factual predicate in support of his appellate claims.[73] Only in unique and specific circumstances, such as when a defendant can establish a structural error, is a defendant not required to establish prejudice.[74] Because none of those circumstances exist in this case, it was up to the defendant to substantiate his claims

---

[71]The Court of Appeals reiterates that the evidence of defendant's guilt regarding the unarmed robbery was "overwhelming" and that "the jury already rejected the same version of events that Craven would have provided." Despite this, the Court then simply says in a simple, unsupported sentence that they must reverse on the sole ground that "there is simply no way to way to determine why Craven was not allowed to testify . . ." Accordingly, had they properly analyzed the issue to assess whether defendant was prejudiced, a new trial would *not* have been granted.

[72]*Hoag, supra*, 460 Mich at 6 (The Court found that the defendant did not meet his burden of establishing his claim because "there is no testimony or evidence in the *Ginther* hearing record" that would support his claim of error.).

[73]See *Strickland,* 466 US at 692 (the Court *rejected* the defendant's argument that his burden of proof need only establish that the error "impaired the presentation of the defense.").

[74]The Court of Appeals plainly rejected any notion that the claim of error before it was a structural error. The United States Supreme Court has found structural error only in a very limited class of cases, such as the complete deprivation of counsel or racial discrimination in selection of the jury. These sort of errors "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Neder v United States*, 527 US 1, 8 (1999).

with a proper record, and the failure to do so should most certainly be attributable to him under the circumstances of this case.

Here, there was no purposeful wrongdoing by the prosecutor or trial court that would have somehow shifted the burden or made the fact that the defense witness chose not to appear attributable to anyone other than defendant.[75] Once the hearing was ordered by this Court on June 3, 2015,[76] a *Ginther* hearing date was set for September 9, 2015, and the People were ready to proceed.[77] Two weeks before the hearing, the People were informed that Craven had to go to Northern Michigan and would not be able to attend. Both the People and the court agreed to adjourn the hearing, and a new date was set for October 6, 2015. A couple weeks before that date, the People were again asked for an adjournment, this time because Craven had a sick baby. Everyone agreed to an adjournment to accommodate the witness, and another date was set for November 18, 2015. But *again* the witness did not appear, and the

---

[75]Cf. MRE 804(a) "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

[76]309a. Before and during trial, the prosecutor never objected to Craven being called as a witness. On appeal, the People opposed the motion to remand because, as was argued then and now, the witness's testimony, even if credible and consistent, would not have made a difference in the outcome of the trial. Once this case was remanded back to the trial court, the People were ready at any time to hear and cross-examine Craven's testimony.

[77]3a.

hearing was adjourned until January 15, 2016. At that point, the People were informed that the witness had apparently gone to Texas and was not going to appear yet again.[78]

Prior to the hearing on January 15, 2016, appellate counsel asked the Court to take Craven's testimony via telephone. The People objected to telephone testimony, but, citing MCR 6.006 (C), stated that Craven could testify via video conference from Texas.[79] Appellate counsel said that could not be arranged because the witness did not have access to that technology, and Judge Walker declined counsel's invitation for phone testimony because there was no court rule allowing it. Finally, on January 15, 2016, when it was abundantly clear that the witness was *never* going to appear, the hearing was held without her.[80]

Defendant made no effort to enforce Craven's subpoena. Defendant has made no showing that Craven was absent from the hearing because defendant was unable to procure her "attendance by process or other reasonable means, and in a criminal

---

[78]3a; 315a.

[79]The Court of Appeals correctly rejected defendant's claim that the witness should have been permitted to testify via telephone. MCR 6.006 allows for testimony via "two-way interactive video technology," *not* for testimony by telephone. Craven was apparently only willing to testify via telephone, not video—though whether she would have actually testified by telephone is questionable given her unwillingness to appear in court despite being subpoenaed to do so. In any event, the People continue to contend that taking her testimony via telephone would have been inappropriate, against the court rules, and a bad precedent to set for future cases. The People had no objection to testimony by video conference, but it apparently could not be arranged, and was never requested.

[80]314a-316a.

case, due diligence is shown."[81] The record suggests that defendant subpoenaed the defense witness to appear at the post-conviction hearing, but defendant took no steps to establish that it would be impossible for the witness to be present in court, MCR 2.506(C), nor did defendant request for assistance in enforcing the subpoena, MCR 2.506(E). Instead, defendant unilaterally determined that he made sufficient efforts in procuring this witness, i.e., making her available for a phone conference, and because that was denied, the witness need not appear.[82] Defendant has not made a showing that the witness was "unavailable" to testify at the post-conviction hearing. At no point in any of the proceedings did appellate counsel ever ask Judge Walker to issue a bench warrant to compel the witness to appear. And now, on appeal, appellate counsel admits that the witness had simply moved on with her life.

The circumstances of this case are only unusual because defendant was unable to produce his own witness. Given these circumstances, the fact that the witness ultimately chose not to appear despite being given multiple opportunities to do so can not and should not be attributable to the People or the trial court, both of whom let the hearing be adjourned over and over again to accommodate the witness's busy travel

[81]MRE 804(a)(5).

[82]There is nothing to suggest that, while Craven was unable to testify at the post-conviction hearing, she will nevertheless somehow be able to testify on retrial. To the contrary, it appears Craven has a complete disregard for the Court proceedings in this case and defendant cannot show otherwise. Therefore, it is wholly unclear if Craven would even testify upon retrial.

schedule. Of course it was defendant, not the People, who had Craven's contact information and was in communication with her about the various excuses she had for ignoring this case.[83] Had defendant actually wanted her testimony to be a part of the record, he was free to ask for a bench warrant or to arrange video conferencing. He did neither, perhaps because the offer of proof—untested and unable to be evaluated for its credibility—was superior to what the witness's actual testimony might have been.[84] In any event, the People fail to see what else could have been done by the trial court or the prosecutor to secure the witness's testimony.[85] Accordingly, the lack of post-conviction record to review defendant's claim can only be attributed to defendant.

Likewise, the timing of defendant's *Ginther* hearing is not unreasonable. Certainly, defendants are often delayed in presenting their witnesses because of various reasons, usually due to the delays inherent in the appellate process. But most witnesses still appear, sometimes decades after the initial trial. Here, there were no

---

[83]314a-315a.

[84]See MRE 804(a) "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

[85]Defendant's trial occurred on March 11, 2013, and this Court ordered an evidentiary hearing on June 3, 2015. It took appellate counsel until January 15, 2016, to proceed with the evidentiary hearing without the witness who was the subject of the remand order–Jennifer Craven.

unusual circumstances in the instant appellate process.[86] Defendant cannot actually claim that just over two years is too lengthy of a delay in his appellate proceedings so as to remove his burden of proof for his ineffective assistance of counsel claims, especially where defendant remained in communication with his witness throughout the appellate proceedings.

Ultimately, when a defendant claims that a defense witness should have been called at his trial, and is subsequently granted an evidentiary hearing to establish a record to support his claim, a defendant has the burden to produce his witness to support his claim. If the witness has decided that she no longer wants to testify for defendant, despite a subpoena, defendant cannot be permitted to proceed with his claim as if he met his burden of establishing prejudice.[87] There is no basis in Michigan jurisprudence that would suggest that a defendant is no longer responsible for

---

[86]The State Appellate Defender's Office was appointed almost immediately after defendant was sentenced, and defendant was free to make a motion for a new trial before the trial court in 2013 when the original parties might have still been available to hear the motion. Instead, he chose to go through the appellate courts.

[87]If this Court decides that defendant should not be hurt because his witness "has moved on with her life" and therefore no longer wants to testify, and accordingly he should get a new trial, the practical effect of that would be catastrophic towards the meaning of the finality of judgments. What incentive would any defendant have to produce their witnesses at their post-conviction hearings (especially like in this case where nothing was placed on the record outlining the efforts made to procure the witness) and all that would result is the defendant getting another trial *again without that witness*? This would require victims to again be subjected to the court process simply so that a defendant may "try again" with nothing different to present than he did the first time around.

producing its own witnesses at a post-conviction hearing to support his appellate claims under the circumstances of this case.

RELIEF

THEREFORE, the People respectfully request that this Court either grant leave to appeal or peremptorily reverse the Court of Appeals. In the alternative, the People request that this Court remand this matter back to the Court of Appeals with an order instructing the Court to address the substantive issues presented.

Respectfully Submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

TONI ODETTE
Assistant Prosecuting Attorney

/s/ Madonna Blanchard

MADONNA BLANCHARD
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5764

Dated: August 9, 2018