

COVER LETTER

Nov 5, 2018

(Date of mailing to the Supreme Court)

Clerk's Office
Michigan Supreme Court
Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: PEOPLE OF THE STATE OF MICHIGAN v Kristopher Allen Hughes
(Print your name)

Supreme Court No. 158652 (Leave blank - the Clerk will assign a number for you.)
Court of Appeals No. 338030 (Get this number from the Court of Appeals decision.)
Trial Court No. 2016-260154-FC (Get this number from Court of Appeals brief or the PSI Report.)

Dear Clerk:

Enclosed please find the originals of the documents checked below. (Put a check mark in the boxes of the documents you are sending.) I am indigent and cannot provide four copies.

- Application for Leave to Appeal
- Copy of Trial Court decision
- Copy of Court of Appeals decision
- PSI Report (required **only** if you raise an issue related to the sentence imposed on your conviction)
- Transcript of jury instructions (required **only** if you are challenging an instruction on appeal)
- Motion to Waive Fees / Affidavit of Indigency
- Proof of Service
- Other _____

You do not have to provide any briefs filed in the trial court or Court of Appeals

Kristopher Hughes

(Sign your name)

Kristopher A. Hughes #280717

(Print your name and MDOC number)

St. Louis Correctional Facility

(Print name of correctional facility if still incarcerated)

8585 N. Croswell St.

(Print your address or address of correctional facility)

St. Louis, MI 48880

Copy sent to:

Oakland County Prosecutor

INSTRUCTIONS

1. You will need 2 copies and the originals of this letter and the pleadings listed above.
2. Mail the originals of this letter and the pleadings listed above to the Supreme Court Clerk.
3. Mail 1 copy of this letter and the pleadings to the prosecutor.
4. Keep 1 copy of this letter and the pleadings for your file.

TITLE PAGE

INSTRUCTIONS: This application is for use in *criminal* appeals only. If you are appealing a Court of Appeals decision involving a civil action, use the form designed for that appeal type. Answer each question completely and add more pages if necessary.

**IN THE MICHIGAN SUPREME COURT
PRO PER CRIMINAL APPLICATION FOR LEAVE TO APPEAL**

I am appealing a Court of Appeals decision that affirmed my conviction(s) and sentence(s) in whole or in part, affirmed the trial court's denial of my motion for relief from judgment, or denied my application for leave to appeal in that court.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 158652
(Leave blank)

v

Court of Appeals No. 338030
(See Court of Appeals decision)

Kristopher Allen Hughes
(Print your name)

Trial Court No. 2016-260154-FC
(See Court of Appeals decision or PSIR report)

Defendant-Appellant.

I am currently incarcerated in a Michigan, federal, or other state correctional facility. Yes No

If Yes, provide the name and address of the correctional facility:

St. Louis Correctional Facility
(Print name of correctional facility)

8585 N. Croswell St.
(Print street address of correctional facility)

St. Louis, MI 48880
(Print city, state and zip code of correctional facility)

FILING DEADLINE: For incarcerated persons, the application will be accepted as timely filed by the Supreme Court if received on or before the 56-day filing deadline or if it bears a date stamp from the correctional facility's mailroom on or before the filing deadline and (1) the case involves a criminal appeal, (2) you are incarcerated, (3) you are acting without an attorney, and (4) you include a sworn statement identifying the date the papers were given to the correctional facility for mailing to the Court and indicating that first-class postage was prepaid. MCR 7.305(C)(4).

For persons who are not incarcerated, the application must be received by the Supreme Court on or before the 56-day deadline or it will be rejected as untimely. No extensions can be given to the filing deadline.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

Kristopher Allen Hughes, Appellant Court of Appeals No. 338030
(Print your name)

INSTRUCTIONS: In the sections below, write out those issues you want to raise in the Supreme Court that were raised in the Court of Appeals in either a brief prepared by your attorney or a supplemental brief that you prepared. To raise new issues, go to page 8.

ISSUES RAISED IN COURT OF APPEALS

ISSUE I:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

(See Attachment A for issue raised in the Court of Appeals)

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

(See Attachment A)

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

Kristopher Allen Hughes, Appellant Court of Appeals No. 338030
(Print your name)

ISSUE II:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

(See Attachment A for issue raised in the Court of Appeals)

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

(See Attachment A)

RELIEF REQUESTED

9. For the above reasons I request that the Supreme Court grant my application for leave to appeal or order any other relief that it decides I am entitled to receive.

Nov 5, 2018

(Date)

Kristopher Hughes

(Sign your name)

Kristopher Allen Hughes #280717

(Print your name and MDOC number)

St. Louis Correctional Facility

(Print the name of the correctional facility if still incarcerated)

8585 N. Croswell St.

(Print your address or address of the correctional facility)

St. Louis, MI 48880

After this page, you should attach copies of the trial court and Court of Appeals decisions, the PSI Report (if you are raising an issue related to the sentence imposed on your conviction), the jury instructions (if you are raising an issue regarding the instructions), and other documents you want the Supreme Court to consider.

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v
Kristopher Allen Hughes
(Print your name)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank)

Court of Appeals No. 338030
(See Court of Appeals decision)

Trial Court No. 2016-260154-FC
(See Court of Appeals brief or PSI Report.)

MOTION TO WAIVE FEES

For the reasons stated in the affidavit of indigency below, I request that this Court GRANT a waiver pursuant to MCR 7.319(C) of all fees required for filing the attached pleading because I am indigent and the provisions of MCL 600.2963 requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction.

Nov 5, 2018
(Date)

Kristopher Hughes
(Sign your name)
Kristopher Allen Hughes #280717
(Print your name and MDOC number)

AFFIDAVIT OF INDIGENCY

My name and MDOC number are Kristopher Allen Hughes #280717.

I am incarcerated at St. Louis Correctional Facility in St. Louis, MI 48880.
(Name of correctional facility) (City, state and zip code)

I attest that I cannot pay the filing fee. (Check the boxes that apply to you.)

- My only source of income is from my prison job and I make \$ _____ per day.
- I have no income.
- I have no assets that can be converted to cash.
- The Court of Appeals waived my fees in that court.

I declare that the statements above are true to the best of my knowledge, information and belief.

Nov 5, 2018
(Date)

Kristopher Hughes
(Sign your name)
Kristopher Allen Hughes #280717
(Print your name and MDOC number)
St. Louis Correctional Facility
(Print name of correctional facility if incarcerated)
8585 N. Croswell St.
(Print your address or address of correctional facility)
St. Louis, MI 48880

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

Kristopher Allen Hughes
(Print your name)

Defendant-Appellant.

Supreme Court No. _____
(Leave blank)

Court of Appeals No. 338030
(See Court of Appeals decision)

Trial Court No. 2016-260154-FC
(See Court of Appeals brief or PSI Report)

PROOF OF SERVICE

On Nov 5, 2018, I mailed by U.S. mail 1 copy of the documents checked below:

- Application for Leave to Appeal
- Copy of Trial Court decision
- Copy of Court of Appeals decision
- PSI Report (if you are raising an issue related to the sentence imposed on your conviction)
- Transcript of jury instructions (if you are raising an issue related to a jury instruction at trial)
- Motion to Waive Fees / Affidavit of Indigency
- Proof of Service
- Other: _____

You do not have to provide any briefs filed in the trial court or Court of Appeals

TO: Oakland County Prosecutor
(Name of county)

1200 N. Telegraph Rd.
(Street address)

Pontiac, MI, MI 48341
(City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

Nov 5, 2018
(Date)

Kristopher Hughes
(Sign your name)

Kristopher Allen Hughes #280717
(Print your name and MDOC number)

St. Louis Correctional Facility
(Print name of correctional facility if still incarcerated)

8585 N. Croswell St.
(Print your address or address of correctional facility)

St. Louis, MI 48880

**NOTICE OF FILING APPLICATION
IN THE MICHIGAN SUPREME COURT**

(Mail 1 copy to the Court of Appeals and 1 copy to the trial court)

Nov 5 2018

(Today's Date)

Michigan Court of Appeals
Clerk's Office
Hall of Justice
P.O. Box 30022
Lansing, MI 48909

Oakland County Circuit (Name of Trial Court)
6th Judicial Circuit (Address)
1200 N. Telegraph Rd
Pontiac, MI 48341

PEOPLE OF THE STATE OF MICHIGAN v Kristopher Allen Hughes
(Print your name)

Court of Appeals No. 338030
(Get this number from the Court of Appeals decision)

Trial Court No. 2016-260154-FC
(Get this number from Court of Appeals brief or the PSI Report)

Dear Clerk:

On this date I have filed an application for leave to appeal with the Michigan Supreme Court in the above-captioned matter.

Kristopher Hughes
(Sign your name)

Kristopher Allen Hughes #2801717
(Print your name and your MDOC number, if applicable)

St. Louis Correctional Facility
(Print name of correctional facility, if applicable)

8585 N. Croswell St.
(Print your address or address of correctional facility)

St. Louis, MI 48080

Attachment A

Issue I 2

Issue II 9

ISSUE I

I. The seizure and forensic examination of Mr. Hughes phone were accomplished without a warrant supported by an affidavit. Were the phone records the result of an illegal search and seizure in violation of the United States and Michigan Constitutions requiring a new trial? In the alternative, was Mr. Hughes's trial counsel ineffective for failing to raise constitutional issue?

Standard of Review

Michigan courts review de novo a trial court's ultimate decision on a motion to suppress on the basis of an alleged Constitutional violation. People v Gingrich, 307 Mich App 656, 661 (2014).

Unpreserved claims of nonstructural constitutional error are reviewed for plain error. People v Boie, 285 Mich App 401, 407 (2009)

Argument

In this case, it is undisputed Mr. Hughes phone was seized subsequent to his arrest during the execution of a search warrant on an unrelated drug charge. The warrant was very broad in scope and states that it was "sworn to by the affiant, Detective Matthew Gorman

... based upon facts stated therein, probable cause having been found in the name of the People of the State of Michigan." The warrant further provides in relevant part that the police can search:

Any and all rooms, spaces, compartments, safes, persons, vehicles, out-buildings and curtilage located in or at the residential dwelling located at 45 W. Beverly Ave., City of Pontiac, County of Oakland, State of Michigan - single story dwelling, located on the south side of W. Beverly AVE and west of Baldwin Ave., the front door faces east. The residence consist of tan siding with tan trim, the numbers "45" are located on the siding to the east of the front door.
* * *

It is further ordered that any cell phones or computers or other devices capable of digital or electronic storage seized by authority of this search warrant shall be permitted to be forensically searched and or manually searched, and any data that is able to be retrieved there shall be preserved and recorded. (Attachment B)

Mr. Hughes plead guilty to the charge in that case. (Case No. 2016-260213-FH) An application for leave to

appeal was filed and rejected by the Michigan Court of Appeals. (Docket No. 339858) None of the data extracted from the phone was used, It was merely retained in the evidence vault of government officials.

The prosecution in this case proceeded and Mr. Hughes was tried twice. The first two trials resulted in a hung jury. Subsequent to the second hung jury, the prosecutor decided to examine the cell phone data retained after Mr. Hughes drug charges had been resolved. This resulted in the cell data at issue being introduced, over objection in Mr. Hughes third trial. (TR 2, pp 212-213)

Due to the guilty plea in the case related to the cell phone's seizure, no challenge had previously been made to the validity of the seizure of the cell phone data at issue, and Mr. Hughes failed to challenge the fact that there was no warrant recent in time or in any way applicable to the instant case which would have allowed the data to be introduced.

In other words, after two trials, the prosecutor had

failed to get a conviction, and was looking for success in the third trial. Aware that Mr. Hughes' cell phone had been seized and searched in another case, and that the data was still available in an evidence archive, he retrieved the data without obtaining a warrant relating to his current needs. This warrantless info. was introduced at Mr. Hughes' 3rd trial, and was relied on heavily in finally obtaining a conviction. (To avoid redundancy Mr. Hughes is only addressing the aspects of this issue that are necessary to illustrate the Court of Appeals mistakes and will incorporate by reference the arguments made in the lower court.)

In Riley v California, 537 US ____; 134 S. Ct. 2473 (2014), the United States Supreme Court held that the police generally, may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. *Id.*, at 134 S. Ct. 2482-2495.

(Note: Officer Janczarek testified that Mr. Hughes was "exiting a vehicle on the property where a warrant

was being executed." (TR 2 at 192). During that arrest that cell phone was removed from Mr. Hughes person.

Subsequently, a forensic analysis of the phone was conducted.)

In the Court of Appeals Mr. Hughes argued that this circumstance violated the rule set in Riley, *supra*, and that trial counsel was ineffective for not moving to suppress the data. (See Court of Appeals Brief)

The Court of Appeals, in reviewing this issue asserts that because the cell phone was seized subsequent to an arrest in an unrelated case, and there was a search warrant for the residence where Mr. Hughes was arrested, that the data was properly seized and searched, ergo, the search did not violate Riley, *supra*. In support of this conclusion the Court of Appeals relies on United States v Jacobsen, 466 US 109 (1984). The Court of Appeals asserted that Jacobsen holds that once a defendant's right to privacy has been violated, the evidence obtained may be used for other matters. (COA Opinion, p 3, see Attachment C)

The Court of Appeals reliance on Jacobsen is mistaken and allowing their decision to stand will cause material injustice to me. MCR 7.305 (B)(5)(a)

In Jacobsen, *supra*, employees of a private freight carrier examined and opened a damaged package and found a white powdery substance. The employees summoned a federal agent who eventually determined the powder was cocaine. Jacobsen, *supra*, at 111. The question addressed by the court was did the government need to get a warrant before examining the already opened package. *Id.*

The Jacobsen Court explained that the United States Supreme Court has consistently construed 4th Am. protection as proscribing only governmental action stating: "it is wholly inapplicable 'to a seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with participation or knowledge of any governmental official. *Id.* at 115. (quoting *Walter v United States*, 447 US 649, 662 (1988)).

The Jacobsen Court concluded that as long as the

the government's search does not "significantly expand on the search that had previously been conducted by the private party it does not run afoul of the 4th Am." Jacobsen, supra, at 116. (Internal quotations omitted)

The facts of Jacobsen sharply contrast with the facts of this case. Here we only have government agents conducting the search. To extrapolate the doctrine that private searches are not subject to 4th Am. challenges onto the facts of this case is manifest injustice.

Mr. Hughes request that this Honorable Court reverse the decision of the Court of Appeals and order the illegally obtained cell data suppressed.

ISSUE II Jury Instruction

1 some point tomorrow.

2 Does anyone believe that the length of the

3 trial, which is very short, will be a real hardship for

4 anyone?

5 Okay. Some of you may have health problems that

6 would prevent you from serving on a jury. For example,

7 does anyone have a medical problem that makes you unable

8 to sit for two or three hours at a time or have a sight or

9 hearing problem?

10 And, I did -- do give appropriate breaks and I

11 tell jurors all the time that since I do a lot of sitting

12 in this job you may see me sometimes stand up and just in

13 place -- just to be standing as opposed to sitting. And,

14 so you can obviously do that if you need to stretch at any

15 point, but if any point anyone needs a break just let us

16 know, okay.

17 This is a criminal case. The paper used to

18 charge the defendant with a crime is called an

19 information. The information in this case charges the

20 defendant, Kristopher Allen Hughes, with the crime of

21 armed robbery.

22 And, I'll have Ms. Collins read the information.

23 MS. COLLINS: In the State of Michigan in the

24 Circuit Court for the County of Oakland, the People of the

25 State of Michigan versus Kristopher Allen Hughes. In the

21

1 name and by authority of the People of the State of

2 Michigan, Jessica R. Cooper, Prosecuting Attorney for the

3 County of Oakland who prosecutes for and on behalf of the

4 People of the State of Michigan, appears before the Court

5 and informs the Court that in Oakland County, Michigan,

6 defendant, Kristopher Allen Hughes, on or about August

7 sixth, 2016, did in the course of committing a larceny of

8 a safe use force or violence against a person present

9 and/or assaulted or put in fear a person present, and in

10 the course of that conduct possessed a gun, a dangerous

11 weapon, and/or possessed an article used or fashioned in a

12 manner to lead a person present to reasonably believe the

13 article was a dangerous weapon contrary to the law of the

14 State of Michigan.

15 THE COURT: The defendant has pled not guilty to

16 this charge. You should clearly understand that the

17 information that was just read is not evidence. An

18 information is read in every criminal trial so that the

19 defendant and jury can hear the charges. You must not

20 think that it is evidence of his guilt or that he must be

21 guilty because he has been charged.

22 The person accused of a crime is presumed to be

23 innocent. This means that you must start with the

24 presumption that the defendant is innocent. This

25 presumption continues throughout the trial and entitles

22

1 the defendant to a verdict of not guilty unless you are

2 satisfied beyond a reasonable doubt that he is guilty.

3 Every crime is made up of parts called elements.

4 The prosecutor must prove each element of the crime beyond

5 a reasonable doubt. The defendant is not required to

6 prove his innocence or to do anything. If you find that

7 the prosecutor has not proven every element beyond a

8 reasonable doubt then you must find the defendant not

9 guilty.

10 A reasonable doubt is a fair honest doubt

11 growing out of the evidence or lack of evidence. It is

12 not merely an imaginary or possible doubt but a doubt

13 based on reason and common sense. A reasonable doubt is

14 just that, a doubt that is reasonable after and careful

15 and considered examination of the facts and circumstances

16 of this case.

17 Now, just as a preliminary matter, if you

18 haven't noticed we don't have a court reporter in this

19 court or actually in this whole courthouse. All the

20 courtrooms in this courthouse are video courtrooms. So,

21 you can see that there are cameras all around and

22 microphones and so everything is recording. Now, I say

23 that to indicate to you that it used to be that we used to

24 get notes from jurors saying can we have transcripts of

25 such and such witness. And, even then when we did have a

23

1 court reporter, who used to take things down shorthand, it

2 would be difficult obviously to get a transcript to the

3 jury. So, that was usually -- we weren't able to do that.

4 So, obviously with a video courtroom we don't have a court

5 report that can transcribe things. Things -- videos will

6 be sent out and then we get transcriptions later.

7 So, I say that just to say please pay attention

8 and in the end you'll have to rely on your collective

9 memory as to certain things that have occurred or certain

10 witnesses that have testified to things. So, just as a

11 reminder.

12 Let's pick the first batch.

13 We're going to call you by your juror number,

14 okay.

15 THE CLERK: Now filling seat number one, juror

16 number 114. Juror number 114.

17 Filling seat number two, juror number 190.

18 THE COURT: Grant, make sure the numbers match

19 up.

20 THE CLERK: Filling seat number three, juror

21 number 261.

22 Filling seat number four, juror number 49.

23 Filling seat number five, juror number 41.

24 Filling seat number six, juror number 154.

25 Filling seat number seven, juror number 128.

24

ISSUE II

II. Michigan Law requires trial judges to provide juries the opportunity to review transcripts when necessary for deliberations. It is plain error for the trial judge to absolutely foreclose the review of transcripts prior to the beginning of deliberations. In this case, was it reversible error to prohibit any possible review of the transcripts prior to the beginning of deliberations?

Standard of Review

Unpreserved errors are generally reviewed under the plain error standard. The plain error test precludes appellate review of unpreserved error "unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic. People v Grant, 445 Mich 535, 553 (1994)

Argument

There are three important reasons this application should be granted. First, the issue presented here is one that involves a legal principle of major significance to our state's jurisprudence. MCR 7.305(B)(3). Secondly, the decision of the Court of Appeals is clearly

erroneous and will cause material injustice if allowed to stand. MCR 7.305(B)(5)(a). Third, the decision of the Court of Appeals conflicts with the decisions of this Honorable. MCR 7.305(B)(5)(b).

In this case, prior to deliberations beginning, the trial court communicated to the jury that review of any testimony would not be possible.

Trial Court: "... Now, just as a preliminary matter, if you haven't noticed we don't have a court reporter in this court or actually in this whole courthouse. All the courtrooms in this courthouse are video courtrooms. So, you can see that there are cameras all around and microphones and so everything is recording. Now, I say that to indicate to you that it used to be that we used to get notes from jurors saying can we have transcripts of such and such witness. And, even then, when we did not have a court reporter, who used to take things down shorthand, it would be difficult obviously to get a transcript to the jury. So, obviously -- we weren't able to do that. So, with a video courtroom we don't have a court report (sic) that can transcribe things -- videos will be sent out and then we get transcripts later. (TR 3 at 23-24)

Traditionally, communicating to a jury that any review of the testimony would be impossible required automatic reversal. See People v Smith, 396 Mich 109 (1976)

Eventually, this Honorable Court overruled automatic reversal rules and articulated a plain error standard which required a reviewing court to analyze all unpreserved errors for prejudice caused. See People v Carines, 460 Mich 750 (1994)

This Court agreed that it was appropriate to apply the plain error standard to a judge denying requests to review transcripts or testimony. See People v Tucker, 469 Mich 403 (2003).

The Court of Appeals, in its decision in People v Tucker, unpublished opinion, March 4, 2003 (COA #232094), applied the plain error standard to a situation where the jury sent two notes requesting review of the transcripts. One request concerned a review of a portion of transcripts concerning a charge that the defendant was acquitted of. The second note requested review

of the ambiguous testimony of the victim. The Court of Appeals concluded that in that circumstance there was neither plain error or prejudice.

The error in that case is differentiated from the type of error that occurred in this case, where the trial court foreclosed any review of the transcripts prior to the beginning of deliberations.

Where the jury request review a portion of the testimony, the discretion whether to grant request rest with the trial court. People v Carter, 462 Mich 206, 218 (2000). When the trial instructs a jury in a way which precludes any possibility of later review of testimony it is plain error. *Id* at 208.

It is Mr. Hughes' position that these two types of errors are substantially different and that this Honorable Court should give direction and explain the difference.

Mr. Hughes agrees that completely appropriate to review the denial of a request to rehear testimony for for an abuse of discretion. This is differentiated from

the instant scenario where the judge forecloses the possibility of hearing any portion of testimony prior to the beginning of deliberation. In this situation there is no discretion, plain error has occurred. The only question is whether there was sufficient prejudice to require reversal.

Mr. Hughes asserts that, while the automatic reversal rule has been overruled, the court's position concerning prejudice in People v Smith, supra, should still be instructive. In examining the potential prejudice of a trial judge completely prohibiting the possibility of reviewing a portion of the testimony the Smith court explained that it was impossible to speculate as to the impact of this type of error on the jury. The Smith Court reasoned that "it [the jury not being able to request the transcript] could also mean that those jurors who did not remember specific testimony, after being advised that they could not get additional help, allowed themselves to be persuaded by those who did remember. Conjecture about

what actually went on in the room should not be the basis for determining whether the error was harmless. The fact is we do not know what occurred in the jury room." *Id.*, at 110-111.

Mr. Hughes understands that this Honorable Court has abandoned automatic reversal rules. This does not mean that a presumption of prejudice cannot be applied to this type of plain error. Mr. Hughes understands that in cases where there is overwhelming evidence of guilt even this error would be harmless. However, it is Mr. Hughes position that this Honorable Court needs to direct how this type of error is evaluated, differentiating it from denials of notes from jurors and incorporating some of the logical analysis that this Court articulated in People v Smith, *supra*. (Note: In this case the first two trials resulted in a hung jury. This implies that the evidence was not overwhelming)

The second aspect is the Court of Appeals refusal to acknowledge and evaluate this error as a total

denial of the possibility of the rehearing of testimony. In support of this position the Court of Appeals implies that the instruction from the court does not say specifically that testimony cannot be reheard but instead it would take a long time, and that the jury never actually requested review of any of the testimony. (Attachment C, p 5)

The trial court, in the preliminary instruction explains that it used to take a long time when there was a court reporter and then explains that in a video courtroom it would not be possible during their deliberations to review testimony.

In this circumstance, we have to assume that the jury did not send any request to the judge because they understood the judge's instruction that review of testimony would not be possible in a "video courtroom."

Finally, the Court of Appeals fails to apply the plain error standard articulated by this Court in People v Carines, 460 Mich 750 (1999). In Carines, this

Honorable Court stated that in order to succeed on an unpreserved claim of error a defendant must show plain error which affected his substantial rights, and the error must have been prejudicial enough to have rendered the result of the proceeding unreliable.

In this case, the judge did foreclose the rereading of the transcripts. This is err. See People v Carter, at 218. The only question here is, was this error sufficiently prejudicial as to require reversal. The Court of Appeals incorrectly characterized Mr. Hughes argument as "him asserting that this type of error requires automatic reversal. (Attachment C, p 5) This is not Mr. Hughes position. Instead, Mr. Hughes is arguing that this type of error comes with a strong presumption of prejudice. In this case, there were three trials, and guilt rested solely on the testimony of a prostitute who two juries failed to believe. (T 2, at 92-139) To preclude the possibility of review of that testimony, in this case, has to be presumed to be prejudicial. The Court of

Appeals failed to properly apply People v Carines, supra, and for this reason their decision should be overturned.

In conclusion, our judiciary is in need of this Court's direction concerning the different standards applicable to a denial of a request from the jury as apposed to a total prohibition on rehearing testimony. Secondly, the Court of Appeals mischaracterization of the trial court's instruction as not forclosing review of testimony needs to be corrected. Finally, the error in instruction in this case was prejudicial.

Attachment B
Search Warrant

E

Affidavit

STATE OF MICHIGAN }

S.S. SEARCH WARRANT

COUNTY OF OAKLAND }

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

THE ATTACHED AFFIDAVIT, having been sworn to by the affiant, Detective Matthew Gorman, before me this day, based upon facts stated therein, probable cause having been found in the name of the people of the State of Michigan, I command that you enter the following described places and vehicles:

All rooms, compartments, spaces and any attic or basement, attached garages, detached garages and all areas within the curtilage of the home; including vehicles, shrubs, trees, gardens, greenery, wood piles, and dog pens accessible there from;

Any and all rooms, spaces, compartments, safes, persons, vehicles, out-buildings and curtilage located in or at the residential dwelling located at 45 W. Beverly Ave, City of Pontiac, County of Oakland, State of Michigan – single story family dwelling, located on the south side of W Beverly AVE and the west of Baldwin Ave, the front door faces east. The residence consists of tan siding with tan trim, the numbers “45” are located on the siding to the east of the front door.

Any and all rooms, spaces, compartments, safes, persons, vehicles, out-buildings and curtilage located in or at the residential dwelling located at 433 Franklin, City of Pontiac, County of Oakland, State of Michigan –single story family dwelling, located on the east side of Franklin St, south of Nevada Ave and the north of Nebraska St, the front door faces west. The residence consists of tan siding with brown trim, the numbers “433” are located on a white mailbox attached to the south side of the front door.

Any and all rooms, spaces, compartments, safes, persons, vehicles, out-buildings and curtilage located in or at the residential dwelling located at 106 N. Tasmania, City of Pontiac, County of Oakland, State of Michigan –single story family dwelling, located on the north /west corner of N. Tasmania and Michigan Ave, the front door faces west onto N. Tasmania. The residence consists of tan/brown brick with white trim, the numbers “106” are located on a white pillar attached to the south side of the front porch.

It is further ordered that a vehicle, 2001 GMC, black in color, bearing MI license plate of DNG9190 be searched.

It is further ordered that any cell phones or computers or other devices capable of digital or electronic storage seized by authority of this search warrant shall be permitted to be forensically searched and or manually searched, and any data that is able to be retrieved there from shall be preserved and recorded.

Therein to search for, seize, secure, tabulate and make return according to law, the following property and things:

Crack Cocaine, and any other illegally possessed controlled substances; any raw material, product, equipment or drug paraphernalia for the compounding, cutting, exporting, importing, manufacturing, packaging, processing, storage, use or weighing of any controlled substance; proofs of residence, such as but not limited to, utility bills, correspondence, rent receipts, and keys to the premises; proofs as to the identity of unknown suspects such as but not limited to, photographs, certificates, and/or diplomas; prerecorded, illegal drug proceeds and any records pertaining to the receipt, possession and sale or distribution of controlled substances including but not limited to documents, video tapes, computer disks, computer hard drives, and computer peripherals; other mail receipts, containers or wrappers; currency, property obtained through illegal activity, financial instruments, safety deposit box keys, money order receipts, bank statements and related records; firearms, ammunition, and all occupants found inside.

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ISSUED UNDER MY HAND THIS 11th DAY OF August 2016

Time: 2:30^{PM}

CT Walker

Judge in and for the 50th District Court,

County of Oakland, State of Michigan.

police monitoring equipment, and other items which are proceeds or items which were purchased with the proceeds of the sale of controlled substances. Also to be seized are business, tax, travel and/or financial records.

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

DETECTIVE BACKGROUND

a. Affiant is a police officer for the city of Rochester, Rochester City Police Department. Affiant has been assigned to the Oakland County Sheriff's Office Narcotics Enforcement Team for the past nine months and has been employed as a law enforcement officer for the past eight years seven months. Affiant has successfully completed a basic drug investigations course, an advanced roadside interview for drug interdiction, DEA Undercover narcotics school, and advanced undercover narcotics workshop. Affiant has completed the MCOLES basic police academy in Kalamazoo and received an associates degree in Law Enforcement from Kalamazoo Valley Community College. I have been involved in numerous executions of search warrants which resulted in the seizure of controlled substances, cutting material, narcotics growing material, packaging equipment and materials, drug paraphernalia, weighing instruments, narcotic tabulations, electronic communication and telephone codes, maps, and documentary evidence relating to drug trafficking activities. I have also utilized confidential informants, and have been involved in undercover purchases of controlled substances from drug traffickers. I have also been involved in field testing, weighing, and the identification of controlled substances. I know the following to be true, from personal investigation and from information provided to me from fellow investigators/police reports.

b. Based upon my training and experience involving the concealment of funds and assets from the detection of governmental agencies, I know that drug traffickers maintain books, records, receipts, notes, ledgers and other papers relating to the procurement, distribution, storage, and transportation of controlled substances. These documents include, but are not limited to, records

showing the phone numbers of customers, the e-mail addresses, text messages, or PIN numbers associated with numbers of customers, the amount of controlled substances "fronted" to various customers along with running totals of debts to customers. Drug traffickers frequently maintain receipts such as credit card billings, parking stubs, hotel reservations/records, airline tickets, gas receipts and various notes. Items used to package controlled substances are also frequently maintained by drug traffickers. It is also common for these traffickers to maintain electronic devices that are used to facilitate their criminal activities, to include, but not limited to, mobile telephones, personal digital assistants, paging devices, answering machines, police scanners and money counters. It is common for drug traffickers to conceal narcotics records, narcotics proceeds and other related items described above within their residences, garages, safety deposit boxes, businesses, automobiles, and on their persons, in order that they may have ready access to these items. Drug traffickers commonly maintain address books and/or telephone numbers in books, papers, and wireless electronic devices that reflect the names, addresses, e-mail addresses, telephone numbers, pager numbers, and/or PINs for electronic communications with their criminal associates in the drug trafficking organization, even if said items are in code.

- c. During the course of my employment with the NET, I have participated in numerous narcotics investigations using various law enforcement techniques, including the use of confidential sources, undercover operations, physical surveillance, electronic surveillance, investigative interviews, and the execution of state and federal search warrants to search locations for controlled substances, related paraphernalia, cultivation and/or manufacturing equipment, indicia, and other evidence relating to violations of the Controlled Substances Act, including violations of State of Michigan controlled substance laws, Michigan Public Health Code. In my capacity as a Detective for the NET, I have personally observed and identified crack cocaine, and have been involved in numerous investigations involving the distribution and processing of crack cocaine.

- d. I have participated in numerous investigations involving narcotics and controlled substances, including crack cocaine. I have also participated in countless hours of surveillance, observing and recording movements of persons trafficking in drugs and those suspected of trafficking in drugs. I have participated in and/or executed numerous search warrants authorizing the search of locations such as residences, storage facilities, and vehicles related to drug traffickers and their co-conspirators. These investigations have resulted in arrests of numerous individuals, the seizure of illicit drugs and drug-related evidence, and the forfeiture of drug-related assets.
- e. As a result of my experience, I have encountered and have become familiar with the day-to-day operations and the various practices, tools, trends, paraphernalia and related articles utilized by various traffickers in their efforts to cultivate, possess, import, conceal, and distribute controlled substances, including crack cocaine. I have also consulted with and discussed these investigations with numerous officers and agents who are very experienced in these types of investigations.
- f. Based on my training and experience, I am aware that individuals involved in the sale and distributions of controlled substances generate large amounts of United States currency. Proceeds generated from the sale of controlled substances are commonly cash, but in some cases traffickers will accept other property in trade or as payment for controlled substances.
- g. Based on my training and experience, I am aware that, because of the difficulties presented by trying to move large sums of illegal profits into the legitimate financial market, large-scale drug traffickers often collect cash drug proceeds faster than they are able to safely move the drug proceeds into the legitimate financial market because attempting to do so may attract the unwanted attention of law enforcement. Therefore drug traffickers commonly engage in a process of "cash hoarding". Cash hoarding is a process by which the drug trafficker will hide money caches until the funds can be properly funneled into the mainstream legitimate financial

market with little chance of detection. Based on experience and training, Affiant knows that cash hoarding may involve secreting drug proceeds into a safe or safe deposit box, hidden places within any building or automobile, cavities of furniture or fixtures or structures, burying in the ground, and so on. Affiant also knows that drug traffickers commonly practice cash hoarding to protect their cash drug proceeds from being stolen by other criminals or confiscation and subsequent forfeiture by the government.

- h. Based on my training and experience, I am aware that it becomes common practice for a drug trafficker to disguise the manner in which drug proceeds are obtained, managed and spent by the trafficker. In doing so it is common for a drug trafficker to utilize an alias or multiple aliases, false identities, fictitious information, or witting persons called "nominees" or "straw buyers", or employ the assistance of co-conspirators who act as imposters posing as real people with good reputations and/or credit history. The drug trafficker will commonly place his/her assets, bank accounts, and other things of value in the name of a nominee, straw buyer, imposter, alias or fictitious person or identity to isolate the trafficker from discovery and/or identification by law enforcement, or to otherwise further their criminal acts. Any and/or all of these measures can be used to prevent detection by and prosecution by law enforcement and to prevent forfeiture of those assets by hiding assets belonging to the drug trafficker.
- i. Based on my training and experience, I am aware that the shell corporations is a common method used by a trafficker or drug trafficking organization to disguise, conceal, or to otherwise assert that illegal gains are legitimate income. In many cases drug proceeds are often alleged to be the proceeds of the shell corporation. It is common practice of a drug trafficker to open bank account(s) in the names of shell corporation(s). This practice is done so illegal proceeds can be moved from the illegal financial market into the legitimate financial market.

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4. Based upon your affiants training and experience involving narcotic traffickers and their concealment of funds and assets from the detection of governmental agencies, your affiant knows the following:
 - a. That drug traffickers very often place utilities, registrations, and other assets in names of others than their own to avoid detection by law enforcement and other government agencies.
 - b. That drug traffickers often place residences in other persons' names, although, the traffickers continue to exercise dominion and control over them.
 - c. That it is common for drug traffickers to maintain multiple premises from which their illegal business is conducted. Drug traffickers also store narcotics, narcotics proceeds and records relating to the trafficking of narcotics at their residences and/or businesses and the residences and/or businesses of their relatives and co-conspirators.
 - d. That large scale, narcotics traffickers must maintain on hand, large amounts of US Currency in order to maintain and finance their ongoing narcotics business.
 - e. That drug traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders, passports, and other papers relating to the procurement, distribution, storage, and transportation of controlled substances. These records include the telephone numbers of customers, the amount of controlled substances distributed to various customers, along with running totals of debts owed by those customers. They also maintain paraphernalia utilized to cut and package controlled substances. These aforementioned items are commonly maintained in locations to which narcotic traffickers have frequent and ready access, i.e. homes, business, and automobiles.
 - f. That the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them.

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- g. That it is common for large scale drug traffickers to secrete contraband proceeds of drug sales, and records of drug transactions in secure locations within their residences and/or businesses for ready access and to conceal them from law enforcement authorities.
- h. That persons involved in large scale drug trafficking conceal within their residence and/or business, caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry, automobile titles and other items of value and/or proceeds of drug sales and evidence of financial transactions, or spending of large sums of money acquired from engaging in drug trafficking activities and that these items are also secured in safety deposit boxes.
- i. That when drug traffickers amass large amounts of proceeds from the sales of drugs, the traffickers attempt to legitimize these profits. That to accomplish these goals, drug traffickers utilize domestic and foreign banks and/or financial institutions and their attended services, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, "shell" corporations, and business "fronts." Records of these activities are commonly kept in the drug traffickers' residences and/or businesses.
- j. That drug traffickers commonly maintain addresses, or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers of their criminal associates in drug trafficking.
- k. That during drug transactions, traffickers take or cause to be taken photographs of themselves, their associates, their property and their product. That these traffickers usually maintain these photographs at their residences and/or other properties that they control.
- l. That drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities. This equipment includes, but is not limited to, digital display pagers, mobile

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telephones, electronic telephone books, electronic date books, computers, computer memory disks, money counters, electronic surveillance equipment, eavesdropping equipment, police radio scanners, and portable communication devices.

- m. That drug traffickers commonly possess firearms to protect their assets and narcotics. These firearms are commonly located on subjects person, residence and/or vehicle.
5. During the past 60 days, your Affiant received information from a credible and reliable Confidential Informant [hereafter referred to as CS-1], relative to the narcotic trafficking activities of Kristopher Hughes and Patrick Pankey, CS-1 provided the following information relative to the crack cocaine trafficking activities of Pankey and Hughes. CS-1 advised that PANKEY and HUGHES are members of an organization, arranging the processing and distribution of large scale quantities crack cocaine and other narcotics from local sources to Oakland County for distribution to the local Pontiac area. CS-1 advised that PANKEY and HUGHES are responsible for the local trafficking of the crack cocaine in the Oakland County area.
6. CS-1 informed your affiant that he/she knows from observations of PANKEY and HUGHES, conversations with PANKEY and HUGHES that PANKEY and HUGHES, are distributing/trafficking multi ounce quantities of crack cocaine per week throughout the Oakland County area and that their drug trafficking activities are on-going to presents date. CS-1 explained to your affiant that he/she has observed PANKEY and HUGHES during the past 60 days and as ^{or} recent as within the past 48 hours conduct narcotics trafficking activities in Oakland County, Michigan. CS-1 advised the he has observed and has had conversations with PANKEY and HUGHES that HUGHES is PANKEY's main supplier of narcotics.
7. CS-1 advised that he/she has observed PANKEY and HUGHES at 45 W Beverly Ave, Pontiac, Michigan and has observed over 3 occasions during the past 60 days and as resent as within the

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past 48 hours, where PANKEY and HUGHES were in possession of packaged crack cocaine for sale at this location. CS-1 advised that PANKEY resides at 45 W Beverly Ave, Pontiac, Michigan and has observed crack cocaine in PANKEY and HUGHES possession packaged for sale at this location. CS-1 advised that he/she has observed PANKEY and HUGHES with large amounts of US Currency in their possession and knows from observations and conversations with PANKEY and HUGHES the US Currency in PANKEY and HUGHES possession to be drug proceeds from the sale of crack cocaine. CS-1 advised that he/she has observed during the past 48 hours PANKEY and HUGHES in possession of handguns at the 45 W. Beverly address. CS-1 identified photographs of PANKEY and HUGHES.

8. NET detectives were advised that HUGHES is currently on parole through MDOC and identified 433 Franklin, Pontiac, Michigan as HUGHES current registered address from MDOC/parole. NET detectives have conducted surveillance at 433 Franklin, Pontiac, MI within the last 48 hours and have observed the same 2001 GMC Yukon (bearing MI plate of DNG9190) at this residence. CS-1 advised that this vehicle is being driven by HUGHES for the purposes of distributing narcotics to 45 Beverly Ave, Pontiac MI. During controlled purchases of narcotics at 45 Beverly Ave, Pontiac MI this vehicle has been observed by NET Detectives at 45 Beverly Ave, Pontiac MI. During the past 48 hours; HUGHES has been observed by NET Detectives driving the 2001 GMC Yukon (bearing MI plate of DNG9190).
9. Your affiant has conducted multiple controlled purchases of narcotics from PANKEY and with the cooperation of CS-1 over the past 30days and as recent as the past 48 hours at 45 W Beverly Ave, Pontiac MI. Note: HUGHES was present during the last controlled purchase of narcotics (within the past 48 hours) at the 45 W. Beverly, address, and during this narcotic transaction, the CS-1 was made aware that HUGHES was the source of supply of the cocaine from the observations and conversations that the CS-1 had with PANKEY and HUGHES.

(A) The confidential informant was searched before and after the controlled purchases. The confidential informant immediately returned to the affiant after making the purchase and turned over the substance that had been purchased with pre-recorded investigative funds.

(B) The substance alleged by the informant to be crack cocaine was field tested with a positive result for cocaine utilizing NARK 2 Scott Reagent Modified field testing kit.

(C) The informant was searched immediately before and after making the purchase with negative results.

10. The information provided by CS-1 relative to this investigation (i.e. descriptions of locations, vehicles and persons of interest) has been shown by public databases, law enforcement databases and surveillance to be accurate, in addition to the successful controlled purchases of crack cocaine, and proves CS-1 to be credible. In addition the information that CS-1 has provided to Law Enforcement in the past in reference to other unrelated narcotic investigations have led to over ten State Search Warrants and the seizure of narcotics, firearms and over \$10,000 US Currency, as well as the arrest and conviction of subjects on narcotic and weapon offenses.

PUBLIC DATA BASES/SECRETARY OF STATE RECORDS/MDOC RECORDS

11. Your affiant conducted an inquiry with the Michigan Secretary of State that revealed that PANKEY current Michigan Driver's Licenses issued to him (PANKEY) is registered, at 45 W Beverly Ave, Pontiac, Michigan.
12. During the past 48 hours, your affiant conducted an inquiry with the Michigan Secretary of State that revealed that HUGHES current Michigan Driver's License issued to him (HUGHES) is

registered at 106 N Tasmania, Pontiac, Michigan. During the past 48 hours your affiant conducted an public data records check (Lexus/Nexus) that revealed that HUGHES is currently associated with 106 N. Tasmania, Pontiac, Michigan. Your affiant also knows from training and experience, that narcotic traffickers commonly utilize several addresses to thwart law enforcement from discovering their true residence, drug stash and distribution locations, as well as traffickers commonly store their assets gained from drug proceeds other residence, such as family members, girlfriends and associates residence in an attempt to hinder law enforcement in locating and seizing such assets.

13. During the past 48 hours, your affiant has contacted an inquiry with MDOC reference HUGHES that revealed the registered MDOC parole address for HUGHES is 433 Franklin, Pontiac MI. Your affiant also knows from training and experience, that narcotic traffickers commonly utilize several addresses to thwart law enforcement from discovering their true residence, drug stash and distribution locations, as well as traffickers commonly store their assets gained from drug proceeds other residence, such as family members, girlfriends and associates residence in an attempt to hinder law enforcement in locating and seizing such assets.

LAW ENFORCEMENT DATABASE RECORDS (Criminal History)

14. Your affiant conducted a criminal history that revealed the following;

Reference to; **Patrick Pankey:**

2004- Conviction of possession of marijuana, Southgate Police Department

Reference to **Kristopher Hughes:**

1997- Felony Conviction of possession of controlled substance, Pontiac Police Department

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2008-Felony conviction possession of controlled substance, Pontiac Police Department

2009-Misdemeanor conviction possession controlled substance, OCSO

2013- Felony conviction possession controlled substance, OCSO

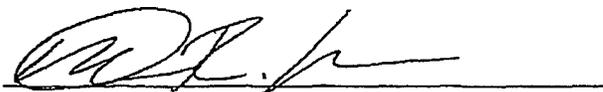
Note: HUGHES is currently on Parole with MDOC.

15. Your affiant believes that a search of 45 W Beverly Ave, Pontiac, Michigan, 106 N. Tasmania, Pontiac, Michigan and 433 Franklin, Pontiac, Michigan will result in the seizure of narcotics as well as documentary evidence tending to establish a large scale drug conspiracy. Your affiant contends that a search warrant of the listed locations will result in the seizure of evidence that will greatly assist the NET in the identification of additional co-conspirators, crack cocaine sources of supply, and also to identify crack cocaine customers. Your affiant also believes that a search of the residences will result in the seizure of drug proceeds (cash and assets) obtained through narcotic transactions with PANKEY and HUGHES and others currently unknown. Your affiant knows from his training and experience that drug traffickers sometimes maintain one or more residence for the distribution of narcotics and additional residences for the storage of drug proceeds. Your affiant is aware that drug traffickers often maintain weapons at these locations to protect their drugs and proceeds. Your affiant knows that traffickers sometimes maintain drug paraphernalia and money/drug ledgers at both of these locations in order to facilitate their ongoing drug distribution operation. Your affiant contends that the above listed confidential source information and NET surveillance observations tend to show that PANKEY's residence located at 45 W Beverly Ave, Pontiac, Michigan, and that HUGHES is associated with 45 W. Beverly as well as; 106 N. Tasmania, Pontiac, Michigan and 433 Franklin, Pontiac, Michigan will contain evidence of narcotic trafficking activities such as drug records, drug proceeds and drug paraphernalia.
16. Based on the foregoing, your affiant contends that probable cause exists 45 W Beverly Ave, Pontiac, Michigan, 106 N. Tasmania, Pontiac, Michigan and 433 Franklin, Pontiac, Michigan will

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contain evidence of violations of State of Michigan controlled substance laws and Michigan Public Health Code.



Detective Matthew Gorman, Affiant Subscribed and sworn to before me this ²⁷10th day of August, 2016.



Judge/Magistrate in and for the 50th District Court

County of Oakland, State of Michigan

TIME: 2:30^{PM}

Attachment C

Court of

Appeals

Opinion

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISTOPHER ALLEN HUGHES,

Defendant-Appellant.

UNPUBLISHED

September 25, 2018

No. 338030

Oakland Circuit Court

LC No. 2016-260154-FC

Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant, Kristopher Allen Hughes, appeals as of right his conviction of armed robbery, MCL 750.529. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 60 years' imprisonment. We affirm.

Defendant's conviction arises from an armed robbery in the early morning hours of August 6, 2016. A prostitute who was seeking to purchase drugs initially called defendant to the victim's residence. At one point, while the victim and the prostitute were engaged in a sexual act, defendant re-entered the residence and pointed a gun at them. Defendant instructed the prostitute to tie up the victim while he searched for the key to the victim's safe. The victim testified that he had about \$4,200 to \$4,300 in the safe at that time. Eventually, he heard the door close twice and realized the defendant and the prostitute had left. The safe also was gone. The victim believed that defendant and the prostitute were acting together to commit the robbery, although she was not charged. At trial, the prostitute claimed that she was not in on the robbery. She acknowledged that she tied the victim up but claimed it was at defendant's direction. She also acknowledged receiving money from defendant afterwards, but claimed that she thought it was "hush" money. The prostitute identified defendant as the robber and said he went by the name of "Killer."

At trial, the prosecution presented several exhibits containing summaries of cellular phone data which was extracted from the phone defendant had in his possession when he was arrested. There was strong proof that the phone was defendant's. In addition to defendant's possession of the phone at the time of his arrest, the prosecution introduced evidence that the phone contained several pictures of defendant, including three "selfies," and numerous messages that contained references to "Kill," "Killa," "Kris," and "Kristopher." The phone data established that there were 19 phone calls on August 6, 2016, the date of the robbery, between

the prostitute and defendant. Further, the records established that they exchanged several text messages between August 5 and August 10, 2016.

I. CELL PHONE CONTENTS/DATA

On appeal, defendant argues that the phone records were obtained unlawfully and in violation of his Fourth Amendment rights, and that they should have been excluded from evidence. We disagree.

We note that defendant challenged the admission of the cellular phone records on grounds that it was stale, irrelevant, and potentially prejudicial. He did not argue below that the search and seizure was illegal. “[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Therefore, this constitutional claim is unpreserved.

The standard of review for an unpreserved constitutional issue is plain error affecting the defendant’s substantial rights. *People v Bosca*, 310 Mich App 1, 47; 871 NW2d 307 (2015). To demonstrate plain error, a defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) “the plain error affected [the defendant’s] substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* Even if a defendant establishes a plain error that affected his substantial rights, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* at 763-764 (quotation marks, citation, and brackets omitted).

The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). “[A] search for purposes of the Fourth Amendment occurs when the government intrudes on an individual’s reasonable, or justifiable, expectation of privacy.” *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011) (citation and quotation marks omitted). “A seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). Whether a search and seizure is lawful depends on whether it is reasonable. *People v Nguyen*, 305 Mich App 740, 751; 854 NW2d 223 (2014). “Whether a search is reasonable is a fact-intensive determination and must be measured by examining the totality of the circumstances.” *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008) (quotation marks and citation omitted). Generally, searches conducted without a warrant are unreasonable per se. *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014). An unlawful search involving police misconduct generally requires suppression of the evidence. *People v Hyde*, 285 Mich App 428, 439; 775 NW2d 833 (2009). Thus, absent misconduct, exclusion is inappropriate. *People v Hill*, 299 Mich App 402, 411-415; 829 NW2d 908 (2013).

With regard to cell phones, a warrant generally is required before searching the information contained in a cell phone. *Riley v California*, 537 US ___, ___;134 S Ct 2473, 2484-2489; 189 L Ed 2d 430 (2014). Here, a search warrant for defendant's phones in an unrelated case involving drug-trafficking was issued and subsequently executed on August 12, 2016. It authorized seizure of any cell phones found and permitted a forensic or manual search, with any data retrieved to be preserved and recorded. Defendant's argument is that the evidence should have been excluded because the warrant was issued with regard to a separate criminal case, and the subsequent analysis of the data in regard to the present armed robbery case constituted a separate search for which no probable cause or warrant existed.

Defendant fails to cite any authority for the proposition that cell phone data lawfully seized for one case cannot be analyzed for another case without a separate warrant supported by probable cause. He also presents no support for the proposition that further analysis of data that already is lawfully in police possession for an unrelated case constitutes police misconduct. We reject defendant's position. The Supreme Court has stated that "[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." *Jacobsen*, 466 US at 117. Rather, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.*

Assuming that the initial seizure of the cell phone and data was lawful pursuant to the August 12 search warrant,¹ the question becomes whether the subsequent search of the cell phone requires a separate search warrant. This Court recognizes that "obtaining and examining evidence may be considered a search, provided that doing so infringes an expectation of privacy that society is prepared to recognize as reasonable." *People v Woodard*, 321 Mich App 377, 387; 909 NW2d 299 (2017) (quotation marks and citations omitted). Here, the phone data already had been lawfully extracted from defendant's phone pursuant to the August 12 search warrant. Hence, defendant no longer had a reasonable expectation of privacy related to that data after the execution of the search warrant. See *Jacobsen*, 466 US at 117. The fact that the search warrant was for an unrelated case is not relevant. What is relevant is that defendant's privacy rights were protected and any invasion into his privacy was authorized by a valid search warrant. See *Woodard* at 390 ("[W]e note that the defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property . . .") (quotation marks and citation omitted). Accordingly, because defendant had no reasonable expectation of privacy related to his cell phone data after it had been seized and searched pursuant to a valid search warrant, he cannot show how that data's use in this case constituted a violation of his Fourth Amendment rights.²

¹ Defendant does not challenge the validity of that initial search warrant.

² We also reject defendant's argument that defense counsel provided ineffective assistance by failing to object to the introduction of the cell phone data on these Fourth Amendment grounds. As already discussed, defendant's rights were not violated by the use of that data, which had already been obtained pursuant to a valid search warrant. Consequently, any objection would

Defendant's reliance on *Riley v California* is misplaced. The United States Supreme Court in *Riley* held that officers could not search the contents of a cell phone after seizing the phone in a warrantless search incident to arrest. *Riley*, 134 S Ct at 2485. *Riley* is wholly inapplicable for the simple reason that defendant's phone here had been seized and searched pursuant to a valid search warrant. In other words, an arrestee who is subject to a search incident to arrest still has privacy rights that must be protected, and those rights are protected by requiring a search warrant. See *id.* at 2485, 2488-2491. Here, defendant's privacy rights were protected because defendant's phone was specifically seized pursuant to a warrant authorizing the retrieval, preservation, and recording of the data content. Because defendant's reasonable expectation of privacy had been extinguished through the issuance of a valid search warrant, he was not entitled to demand that any subsequent use of the same evidence be supported by a second search warrant. See *Jacobsen*, 466 US at 117 ("The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.").

II. OPPORTUNITY FOR JURY TO REVIEW TRANSCRIPTS

In his Standard 4 brief, defendant argues that he is entitled to automatic reversal of his conviction because the trial court violated Michigan law by effectively foreclosing the jury's opportunity to review transcripts of witness testimony. We disagree.

MCR 2.513(P) provides as follows:³

If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

"A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court." *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). However, when a jury requests to rehear testimony and the trial court instructs the jury in a manner which precludes any possibility of later reviewing that testimony, it errs. *Id.* at 208.

have been futile, and counsel is not ineffective for failing to raise a futile or meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

³ We note that defendant's argument on appeal relies on MCR 6.414(H), which was repealed in 2011 and replaced by MCR 2.513(P), which substantively has the same language.

In this case, prior to jury selection, the trial court judge stated the following to the potential jurors:

Now, just as a preliminary matter, if you haven't noticed we don't have a court reporter in this court or actually in this whole courthouse. All the courtrooms in this courthouse are video courtrooms. So, you can see that there are cameras all around and microphones and so everything is recording. Now, I say that to indicate to you that it used to be that we used to get notes from jurors saying can we have transcripts of such and such witness. And, even then when we did have a court reporter, who used to take things down shorthand, it would be difficult obviously to get a transcript to the jury. So, that was usually—we weren't able to do that. So, obviously with a video courtroom we don't have a court report [sic] that can transcribe things. Things—videos will be sent out and then we get transcriptions later.

Defendant argues that these statements “effectively” foreclosed the option of obtaining the transcript and thus constituted error requiring reversal.

As a threshold matter, although the jury sent a number of notes to the trial judge, it never requested to rehear trial testimony. Thus, MCR 2.513(P) was never at issue because it applies only to a “jury request” made “after beginning deliberation.” Moreover, the preliminary instruction given by the trial judge about the length of time it would take to get transcripts, if the jury requested them during deliberations, was simply to reinforce for the jury that it should not rely on the availability of transcripts, and that “I'll allow you to take notes, and if need be -- but otherwise you'll have to rely on your collective memory[.]” In other words, the trial judge was illustrating for the jury the importance of paying close attention to the testimony during the trial, which was entirely appropriate. Furthermore, by making this statement prior to the beginning of testimony, the trial court provided the jury with a warning that the transcripts would not be immediately available, but the court did not foreclose the possibility that transcripts would be available in the future. The trial court committed no error in this instruction.

Even assuming that the trial court's instruction was erroneous, we still would decline to reverse for a new trial. Defendant relies on *People v Smith*, 396 Mich 109; 240 NW2d 202 (1976) (concluding that the harmless error doctrine was inapplicable to preemptive instruction foreclosing rereading of testimony because it resulted in lack of factual basis for review), and *People v Howe*, 392 Mich 670; 221 NW2d 350 (1974) (concluding that the trial court's abuse of discretion in rejecting a reasonable request from the jury required reversal of the defendant's conviction because there was no way to determine from the record the extent of the jury's confusion regarding the requested testimony), in support of his theory that this Court is bound to automatically reverse his conviction. Furthermore, defendant argues that automatic reversal is appropriate under *People v Grant*, 445 Mich 535, 555; 520 NW2d 123 (1994), on the basis that this case falls within “the category of cases . . . where prejudice is presumed or reversal is automatic.” However, these arguments are unavailing because since *Smith*, *Howe*, and *Grant*, the Michigan Supreme Court has recognized that the “automatic reversal rule” relied on in cases involving the jury's ability to review transcripts was superseded by the plain error rule set forth in *Carines*, 460 Mich 750. *People v Tucker*, 469 Mich 903 (2003). Thus, to succeed on this claim of error, which was unpreserved, defendant must affirmatively demonstrate a plain error

affecting his substantial rights. See *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

A review of the record does not give any indication that the trial court's instruction prior to jury selection had any effect on the outcome of the lower court proceedings. The trial court did not repeat the instruction during the final jury instructions or otherwise refer to the jury's ability or inability to review testimony. There is nothing in the record to suggest that the challenged instruction may have caused the jury to refrain from asking to review trial testimony. Indeed, with each of the 17 jury notes (most of which involved non-substantive issues, such as scheduling) it received during the jury's deliberation, the trial court read the note on the record and informed counsel of the actions taken by the court in response to each request. This included requests for review of the evidence, including a request to replay a recording of the victim's 911 call. A review of the record reflects that the jury did not request to rehear any specific testimony nor was the jury denied any request to review any evidence. Accordingly, defendant has failed to establish any plain error affecting his substantial rights.

Affirmed.

/s/ Jonathan Tukel
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro

ISSUED UNDER MY HAND THIS 11th DAY OF August 2016

Time: 2:30^{pm}

C. W. Walker

Judge in and for the 50th District Court,
County of Oakland, State of Michigan.