STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v- **No. 160968**

KELLIE NICHOLE STOCK,
Defendant-Appellant.

Court of Appeals No. 340541

PLAINTIFF-APPELLEE'S ANSWER OPPOSING THE DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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-v- **No. 160968**

KELLIE NICHOLE STOCK,
Defendant-Appellant.

Court of Appeals No. 340541
Circuit Court No. 17-003509-01-FC

PLAINTIFF-APPELLEE'S ANSWER OPPOSING THE DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

The People of the State of Michigan – through Kym L. Worthy, Prosecuting Attorney, County of Wayne, Jason W. Williams, Chief of Research, Training, and Appeals, Deborah K. Blair, Assistant Prosecuting Attorney – hereby ask this Honorable Court to deny the Defendant-Appellant's application for leave to appeal.

1. The Defendant's application for leave to appeal relies on the same arguments she made in the Michigan Court of Appeals.
2. The People's brief to the Michigan Court of Appeals adequately addresses these issues, and is hereby incorporated in this answer.[1]
3. The Michigan Court of Appeals did not clearly err in rejecting the Defendant's arguments and affirming her convictions.[2]

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1. See Appendix 1.
2. MCR 7.302(B)(5).

4. The Defendant's application for leave to appeal does not demonstrate any of the other grounds for granting leave to appeal.[3]
5. The Defendant also raises several issues not presented to the Court of Appeals, but review of those issues should be foreclosed in this Court. When a defendant does not afford the Court of Appeals the opportunity to consider an issue, the Court of Appeals cannot have rendered a "decision" on it, and thus this Court has no jurisdiction to review it. Michigan Court Rule 7.301(A) sets out this Court's jurisdiction. The only relevant subsection—(2)—provides for jurisdiction of a case "after *decision* by the Court of Appeals." Subsection (2) also references MCR 7.302, which clarifies the meaning of "decision" and unquestionably requires that the Court of Appeals actually consider an issue—otherwise the "clearly erroneous" language is rendered superfluous. This Court specifically stated in *People v Holloway,* [4] that "an appellant may not raise in this Court an issue not presented to the Court of Appeals."[5]
6. In sum, the Defendant's application for leave to appeal raises no issues worthy of this Honorable Court's review, and it should be denied.

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3. MCR 7.302(B)(1)-(3).
4. *People v Holloway,* 387 Mich 772 (1972).
5. *People v Holloway*, 387 Mich 772 (1972). See also *Booth Newspapers, Inc. v University of Michigan Bd. of Regents*, 444 Mich 211, 234 (1993).

RELIEF REQUESTED

THEREFORE, the People respectfully request that this Honorable Court affirm defendant's convictions and sentences.

Respectfully submitted,

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Prosecuting Attorney
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/s/ *Deborah K. Blair*

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Dated: March 4, 2020

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs- **No. 160823**

KELLIE NICHOLE STOCK,
Defendant-Appellant.

Court of Appeals No. 340541

Third Circuit Court No. 17-003509-01-FC

Appendix 1
The People's Brief to the Michigan Court of Appeals

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

Court of Appeals
No. 340541

KELLIE NICHOLE STOCK,

Defendant-Appellant.

Third Circuit Court No. 17-003509-01-FC

BRIEF ON APPEAL
ORAL ARGUMENT NOT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People accept and adopt the Defendant's statement of jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

In order to prove ineffective assistance of counsel, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness and prejudice. Here, the Defendant claims that trial counsel was ineffective on several grounds, none of which have any merit. Therefore, has the Defendant shown that trial counsel performed below an objective standard of reasonableness or that any alleged failure caused prejudice to the Defendant?

The Trial Court answered: "No."

The People answer: "No."

The Defendant would answer: "Yes."

II.

Jury instructions are reviewed as a whole to determine whether there was error requiring reversal. Here, the jury was properly instructed as to all the elements of the various offenses including fleeing and eluding first degree where the jury was instructed that a driver of a motor vehicle must bring their vehicle to a stop after being given a visual or audible signal by a police officer. Therefore, where the jury instructions were correct, did error requiring reversal occur?

The trial court did not answer this question.

The People answer: "No."

The Defendant would answer: "Yes."

COUNTERSTATEMENT OF QUESTIONS PRESENTED

III.

Claims of prosecutorial error are reviewed on a case-by-case basis, examining the remarks in context to determine whether the defendant received a fair trial. In this case, the prosecutor commented that the Defendant had cocaine in her system because, according to the toxicology report, her urine contained cocaine metabolites. When viewed in the overall context of the evidence in the case, did the prosecutor's comment deprive the Defendant of a fair trial?

The People answer: "No."

The Defendant would answer: "Yes."

The trial court did not answer this question.

IV.

Evidence is sufficient if a rational juror could find that all the essential elements of the crime were proven beyond a reasonable doubt. In this case, the People presented evidence that the Defendant attempted to flee from the police when they tried to pull the Defendant over for a traffic violation; the Defendant ran a red light and crashed her vehicle into the side of the decedent's vehicle, killing the driver of the other vehicle and seriously injuring her passenger. Was this sufficient evidence for the crimes of fleeing and eluding first and second degree?

The People answer: "Yes."

The Defendant answers: "No."

The trial court did not answer this question.

COUNTERSTATEMENT OF QUESTIONS PRESENTED (CONT.)

V.

A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion and an abuse of discretion will only be found where the court chooses an outcome falling outside the range of principled outcomes. Here, the trial court allowed the admission of the Defendant's medical records at trial over defense counsel's objection because the records were provided to the defense prior to trial and they were certified. Therefore, was the trial court's ruling admitting the Defendant's medical records an abuse of discretion?

The People answer: "No."

The Defendant would answer: "Yes."

The trial court would answer this question: "No."

VI.

Although a defendant has a right to present a defense, that right is not unfettered and the defendant must still follow the rules of evidence. Here, the Defendant sought to introduce the disciplinary history of two police officers, both of whom had informed the court that they would exercise their rights under the Fifth Amendment to not answer questions about the case and based on that circumstance the trial court did not allow the defense to call the two officers. Was this ruling an abuse of discretion?

The People answer: "No."

The Defendant answers: "Yes."

The trial court would answer this question: "No."

COUNTERSTATEMENT OF QUESTIONS PRESENTED (CONT.)

VII.

In order to warrant a new trial based on newly discovered evidence, the evidence must be reliable and clearly exculpate the defendant. Here, the Defendant's alleged newly discovered evidence is based on hearsay contained in an internal affairs report, the findings of which were overruled by the commanding officer; therefore, even if the report was admissible, which it is not, there is no reasonable possibility that it would have made a difference in the Defendant's trial. Therefore, is the Defendant entitled to a new trial?

The People answer: "No."

The Defendant answers: "Yes."

The trial court did not answer this question.

COUNTERSTATEMENT OF FACTS

The People do not dispute the Defendant's statement of facts. The Defendant was convicted following a jury trial of reckless driving causing death,[1] operating under the influence causing death,[2] operating with license suspended causing death,[3] fleeing and eluding first degree,[4] fleeing and eluding second degree,[5] reckless driving causing serious impairment of bodily function,[6] operating under the influence causing serious injury,[7] and operating with license suspended, revoked, or denied, causing serious injury,[8] following a jury trial held on July 19-24, 2017. The Defendant was found not guilty of the most serious charge, count 1, second degree murder. On August 8, 2017, the Defendant was sentenced to eight concurrent terms of 19-50 years of incarceration.[9] The Defendant filed a motion for new trial in the trial court and following a hearing, that motion was denied on August 24, 2018.[10]

The Defendant fled from the police and crashed into the side of a red pickup truck, killing the occupant of the truck, Benny Simms, and severely injuring her front seat passenger, Classie Butler.[11] The Defendant did not have a valid driver's license (it was expired) and the car she was driving was reported stolen.[12] Moreover, the Defendant had cocaine in her system and was

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1 MCL 257.626(4).
2 MCL 257.625(4).
3 MCL 257.904(4).
4 MCL 257.602a(5).
5 MCL 257.602a(4)(a).
6 MCL 257.626.
7 MCL 257.625(5)(a).
8 MCL 257.904(5).
9 8/07/2017, 21.
10 8/24/2018, 118.
11 7/19/2017, 151; 7/20/2017, 54-55; 129.
12 8/07/2017, 20.

driving at a high rate of speed when she ran a red light and crashed into the decedent's pickup truck.[13]

Other facts will be added as necessary in the course of argument.

[13] 7/20/2017, 28; 71; 161.

ARGUMENT

I. In order to prove ineffective assistance of counsel, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness and prejudice. Here, the Defendant claims that trial counsel was ineffective on several grounds, none of which have any merit. Therefore, the Defendant has not shown that trial counsel performed below an objective standard of reasonableness or that any alleged failure caused prejudice to the Defendant.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. Following a *Ginther*[14] hearing, an appellate court reviews the trial court's findings of fact for clear error, and reviews the trial court's conclusions of law are reviewed *de novo*.[15] Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record (the Defendant's last claim of ineffective assistance of counsel was not raised below).[16] The standard of review for ineffective assistance of counsel claims is whether defense counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.[17] In *People v Pickens*,[18] the Michigan Supreme Court adopted the standard set forth in *Strickland v Washington*.[19] The following must be established in order to mandate reversal under a Sixth Amendment claim of ineffectiveness of counsel:

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14 *People v Ginther*, 390 Mich 436 (1973).
15 *People v Russell*, 297 Mich App 707, 715 (2012).
16 *People v Unger*, 278 Mich App 210, 234-235 (2008).
17 *People v Pickens*, 446 Mich 298 (1994).
18 *Id.*
19 *Strickland v Washington*, 466 US 668 (1984).

- First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed defendant by the Sixth Amendment.

- Second, defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.[4]

Discussion

None of the grounds alleged by the Defendant constitute ineffective assistance of counsel and the Defendant was provided a fair trial because trial counsel performed above an objective standard of reasonableness. The Defendant's ineffective assistance of counsel claims on appeal were mostly already addressed by the lower court in the *Ginther* hearing.[20] Only one of the claims was not included in the Defendant's motion for new trial (failure to make a motion for directed verdict). Review of the findings of fact on the claims already raised below is for clear error. There was no clear error in this case.

The Defendant's first claim is that trial counsel failed to conduct a reasonable and adequate investigation as to the charges.[21] The Defendant theorizes that because trial counsel focused primarily on the most serious charge of second degree murder, he ignored the other charges. This is unfounded and not supported by the *Ginther* hearing testimony. The trial court heard this argument and rightly rejected it.[22] Moreover, focusing on the acquittal on the most serious

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[20] *People v Ginther*, 390 Mich 436 (1973).
[21] Defendant-Appellant's brief on appeal, p. 18-20.
[22] 8/24/2018, 106-113.

charge, second degree murder (a potential life offense), would be a reasonable trial strategy in this case since the evidence against the Defendant was very strong including videotape evidence of her car crashing into the decedent's pickup truck at a high rate of speed. Nothing that the Defendant has presented would refute that basic fact. The trial transcript demonstrates that trial counsel vigorously defended his client on all the charges and was victorious in earning an acquittal on the most serious charge of second degree murder.[23] This was not ineffective assistance of counsel. In addition, the Defendant does not explain what further investigation trial counsel could have endeavored to engage in that would have had a reasonable probability of a different result.

The Defendant's next claim of ineffective assistance of counsel is that the trial attorney did not file a motion to suppress the search warrant for the toxicology report from the hospital.[24] This was a subject of the *Ginther* hearing in the trial court. The trial court found that there was no merit to this issue because the toxicology results would have been discoverable under the doctrine of implied consent and inevitable discovery.[25] The search warrant used to obtain the results details that the Defendant was driving a car that was reported as stolen at a high rate of speed when she ran a red light and caused an injury accident.[26] This was sufficient probable cause to justify the execution of the search warrant for the Defendant's medical records but the results of the toxicology screen would have been admissible without the need for a search warrant under the implied consent statute, MCL 257.625a(6)(e).

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[23] 7/24/2017, 4.
[24] Defendant-Appellant's brief on appeal, p. 20-22.
[25] 8/24/2018, 109.
[26] Exhibit C attached to Defendant-Appellant's brief on appeal.

The Defendant cites to *People v Jagotka* for the proposition that where there is a search warrant issued the implied consent statute can never apply to the admissibility of toxicology results at trial.[27] But the Defendant has misconstrued the holding of *People v Jagotka*, and further has cited to a version of the case that was later overturned on appeal.[28] Rather than holding that the implied consent statute would have no applicability to the instant situation, the case held that where a blood sample is taken in the course of the execution of a search warrant but is not preserved, the evidence need not be suppressed at trial.[29] Moreover, *People v Jagotka* did not even involve an injury accident on a public highway resulting in a hospital taking a blood or urine sample such that the implied consent doctrine involved here would have any applicability.

Even if probable cause was lacking in the search warrant, the implied consent doctrine would have allowed the prosecution to obtain the test results from the hospital anyway. The implied consent doctrine is part of a statute that provides in relevant part as follows:

> (e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or other intoxicating substance in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or

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[27] *People v Jagotka*, 461 Mich 274, 281 (1999).

[28] The version of the case cited by the Defendant, *People v Jagotka*, 232 Mich App 346 (1998), Defendant-Appellant's brief on appeal, p. 21-22, was overruled a year later by *People v Jagotka*, 461 Mich 274 (1999).

[29] *People v Jagotka*, 461 Mich 274 (1999).

criminally liable for making the disclosure.[30]

The Defendant argues that the toxicology test results would not be admissible under this law because the results came from urine and not blood.[31] But the implied consent statute addresses this argument by providing that:

> (6) The following provisions apply to chemical tests and analysis of a person's blood, urine, or breath, other than a preliminary chemical breath analysis:
>
> (a) The amount of alcohol or presence of a controlled substance or other intoxicating substance in a driver's blood or urine or the amount of alcohol in a person's breath at that time alleged as shown by the chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle….[32]

The cases cited by the Defendant do not support her position that the implied consent doctrine was inapplicable to her case. For example, *People v Callon,* cited by the Defendant on page 22 of her brief on appeal, involved the ability of the court to enhance the sentence of someone convicted of multiple drunk driving offenses.[33] The defendant in *Callon* was convicted of impaired driving, MCL 257.625(3), in 1993. On October 9, 1999, he was arrested for "operating a vehicle under the influence of intoxicating liquor or while having a blood alcohol content of 0.10 grams or more per 100 milliliters of blood (OUIL/UBAL), MCL 257.625(1)."[34] During the period between the two offenses, the Legislature amended MCL 257.625(23)(a) so that a previous

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30 MCL 257.625a(6)(e).
31 Defendant-Appellant's brief on appeal, p. 22.
32 MCL 257.625a(6)(a).
33 *People v Callon*, 256 Mich App 312, 315 (2003).
34 *Callon*, 256 Mich App at 314.

impaired-driving conviction could be used to enhance a subsequent OUIL/UBAL conviction.[35] This Court in *People v Callon* rejected the defendant's ex post facto challenge to this enhancement, holding that the amendment to the statute had not altered the legal consequences of his 1993 conviction, but rather, it altered the legal consequences of his 1999 conviction.[36] The Court explained, "[T]he conduct for which defendant is being punished is driving while intoxicated or with an unlawful blood alcohol level after having fair notice that the statute had been amended to permit enhancement of an OUIL/UBAL conviction with a prior impaired-driving conviction."[37] This Court concluded, "Simply put, there is no retroactive application of the law where a prior conviction is used to enhance the penalty for a new offense committed after the effective date of the statute."[38]

Further, in the *Callon* case, the defendant, who was not involved in an injury accident as was the Defendant in the instant case, challenged the search warrant used to take his blood, arguing that the implied consent statute required a licensed physician or an individual operating under the delegation of a licensed physician to withdraw the blood sample, therefore, this required the suppression of his blood test results because a medical technician, not a physician, withdrew his blood.[39] The court found that the section of the statute did not apply because regular principles of probable cause did not involve the ability of medical personnel to take blood; therefore, that particular section had no applicability to be a basis to suppress the evidence:

> Because defendant does not argue that the search warrant was

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35 *Id*. at 315–316.
36 *Id*. at 318.
37 *Id*. at 319.
38 *Id*. at 321.
39 *People v Callon*, 256 Mich App 312, 321 (2003).

> unsupported by probable cause or otherwise suffered from a constitutional deficiency, and because the alleged deviations from MCL 257.625a(6)(c) do not implicate the relevancy or reliability of blood test results, exclusion of the evidence was not required. Second, even if MCL 257.625a(6)(c) applied to this case because of its incorporation in the search warrant, the trial court did not err by concluding that it had not been violated.[40]

Similarly, *People v Borchard-Ruhland*, also cited by the Defendant, is inapplicable to the instant case. In that case, the defendant was charged with two counts of operating a vehicle under the influence of liquor while having an unlawful blood alcohol level.[41] The district court suppressed the evidence of the defendant's blood test because she had not been advised of her chemical test rights prior to the test.[42] The Michigan Supreme Court ruled that where the defendant is not under arrest, the implied consent statute did not control the admissibility of the blood alcohol evidence, but the simple rule of express consent to search applied.[43] The *Borchard-Ruhland* Court was construing the provision of the statute that sets forth the presumption of consent to testing and the provision that establishes the notice rights of the suspect, both of which expressly concern only persons who have been arrested.[44]

In contrast, the section involved here, MCL 257.625a(6)(e), does not mention the need for the subject to be under arrest, and it provides for the admissibility of blood test results in any civil or criminal proceeding where the test was run for medical treatment from a driver involved in an accident. By its plain terms, therefore, MCL 257.625a(6)(e) is not limited to those under arrest.[45]

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[40] *People v Callon*, 256 Mich App 312, 323 (2003).
[41] *People v Borchard-Ruhland*, 460 Mich 278 (1999).
[42] *Id* at 282.
[43] *Id* at 285.
[44] MCL 257.625c(1)(a) and (b).
[45] See also *People v Aldrich*, 246 Mich App 101, 118 (2001).

But in any event, there is evidence that the Defendant was under arrest while at the hospital, having just crashed a stolen car and killed someone while driving it. The document the Defendant attached as Exhibit G contains the following: "It should be noted that the Dodge Intrepid was confirmed stolen from Royal Oak on February 7, 2017. Therefore, both Ms. Stock and Ms. Butler were placed under arrest during their hospital confinement for Possession of a Stolen Vehicle."[46] There is no evidence that the Defendant would have been free to leave the hospital following this crash that killed the other driver. Also, the Defendant was on parole at the time of the crash and would have been subject to a parole hold. Therefore, the Defendant's argument that her urine test results should have been suppressed or would have been suppressed had her trial attorney made the appropriate motion is without merit.

The Defendant then makes the argument that trial counsel was ineffective because he did not object to the admission of the toxicology results based on a chain of custody issue.[47] The Defendant at first arrived at the hospital apparently unable to communicate so the hospital used the name "Mississippi" on her medical chart. After the Defendant's true name was determined, her medical records were reprinted using her correct name. Trial counsel was first provided the medical records with the name "Mississippi" and later given the records with the name Kellie Stock. They are the same medical records with the same MRN identifying number.[48] There is no evidence in the record that the medical records with the name Kellie Stock that were admitted at

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[46] DPD Force Investigation Memorandum attached as Defendant's exhibit G.
[47] Defendant-Appellant's brief on appeal, p.22.
[48] 7/19/2017, 84.

trial did not belong to the Defendant. The defense attorney had the medical records, which included the test results, far in advance of trial.[49] There is no true issue as to the chain of custody.

Any presence of cocaine in the system, and therefore, cocaine metabolite, would be sufficient to prove that the Defendant had a controlled substance in her system at the time of the crash. The Defendant claims that it was ineffective assistance of counsel for the trial attorney not to argue that she had cocaine metabolites in her system. Here, the medical records show that the Defendant had the presence of cocaine metabolite in her urine. Cocaine is processed through the body and extracted in urine as cocaine metabolite. Pure cocaine does not appear in someone's urine. Therefore, there is no merit to the Defendant's argument that testimony related to cocaine metabolites was in any way objectionable or that trial counsel was ineffective for failing to argue a theory that the Defendant had cocaine metabolites, and opposed to pure cocaine, in her system.

The Defendant further argues that her argument regarding cocaine metabolites is valid because of the holding in *People v Feezel*, which involved only marijuana. *Feezel* pointed out that the legislature specifically made a definition of marijuana in the OWI statute. This definition did not include 11-carboxy-THC, which was the substance found in defendant Feezel's system in that case. 11-carboxy-THC, although related to marijuana, has no known pharmacological effect on the body and relates poorly, if at all, to an individual's level of THC-related impairment.[50] The holding of *Feezel* is specific to 11-carboxy-THC in marijuana, and does not relate to all metabolites of cocaine. No case has ever held that the presence of cocaine metabolite would not be evidence of cocaine ingestion for purposes of the OWI statute. Therefore, it could not be

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[49] 7/19/2017, 82.
[50] *People v Feezel*, 486 Mich 184, 208 (2010).

ineffective assistance of counsel for counsel not to argue something that has never been held to be the law.

Moreover, the definition of cocaine as a schedule two drug in the Public Health Code includes: "coca leaves and any salt, compound, *derivative*, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances does not include decocainized coca leaves or extraction of coca leaves which extractions do not containe cocaine or ecgonine."[51] Therefore, the definition of cocaine contained in the Public Health Code would include cocaine metabolites, which are a naturally produced derivative of cocaine when it is ingested by the body.

The presence of cocaine metabolites in the Defendant's urine meant that the jury could consider whether or not she was under the influence of cocaine when she operated the motor vehicle and caused the death of the Mr. Sims. The Defendant's argument regarding trial counsel's failure to focus on cocaine metabolites is meritless since cocaine expresses itself in the urine as a metabolite – humans do not urinate pure cocaine.

Trial counsels' Failure to Make a Directed Verdict Motion had no Effect on the Verdict and therefore, is not a ground for ineffective assistance of counsel.

The Defendant argues that trial counsel was ineffective for failing to make a motion for directed verdict at the conclusion of the prosecution's proofs. The Defendant did not raise this claim in her motion for remand, therefore, any errors must be apparent from the existing record.[52]

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51 MCL 333.7214(a)(iv), emphasis supplied.
52 *People v Lopez*, 305 Mich App 686, 693 (2014).

There is no evidence that had a motion for directed verdict been made, that it would have been granted in this case, therefore, the Defendant's claim fails.

Finally, the Defendant argues that the cumulative errors of trial counsel denied the Defendant of effective assistance of counsel. Whereas it is true that cumulative trial errors can sometimes lead to reversal, they must be true errors. Here, the Defendant has not shown that there were multiple errors committed such that a new trial should be ordered.

II. Jury instructions are reviewed as a whole to determine whether there was error requiring reversal. Here, the jury was properly instructed as to all the elements of the various offenses including fleeing and eluding first degree. Therefore, instructing the jury that a driver of a motor vehicle must bring the vehicle to a stop after being given a visual or audible sign by a police officer was a correct jury instruction.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. Claims of instructional error involving a question of law are reviewed *de novo*.[53] The Defendant bears the burden of establishing that the error undermined the reliability of the verdict.[54] "Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant's rights."[55]

Discussion

The trial court correctly instructed the jury as to the elements of fleeing and eluding. The jury sent out a note during deliberations that asked if turning on the police lights constituted ordering the Defendant to stop her vehicle under the law.[56] The trial court, in accordance with *People v Green*,[57] gave the following jury instruction: "The driver of a motor vehicle, when given a visual or an audible signal by a police officer must bring the motor vehicle to a stop. This

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53 *People v Mitchell*, 301 Mich App 282, 286 (2013).
54 *People v Hawthorne*, 474 Mich 174, 184 (2006).
55 *People v Chapo*, 283 Mich App 360, 373 (2009).
56 7/21/2017, 86.
57 *People v Green*, 260 Mich App 710 (2004), held that where a police officer verbally commanded the defendant to stop his car and the defendant's flight from the scene caused him to pass the officer's official police vehicle, this was sufficient to satisfy the elements of the fleeing and eluding statute.

visual or audible signal may be given by hand, voice, emergency light or siren."[58] There was no objection to the answer given by the court. The Defendant claims this answer was incorrect because it did not include that the audible or visual signal must come from a officially identified police car. But the jury was instructed as such earlier and that was not the jury's question. The jury's question already assumes that the vehicle is a police vehicle since it says "police lights."

The jury was previously instructed in regards to the adequately marked police vehicle in the court's instructions of the elements of fleeing and eluding in the first degree:

> THE COURT: The defendant is charged with the crime of fleeing and eluding in the first degree. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that a police officer was in uniform and was performing his or her lawful duty. And that any vehicle driven by the officer was adequately marked as a law enforcement vehicle. Second, that the Defendant was driving a motor vehicle. Third, that the officer ordered the defendant to stop her vehicle. Fourth, that the defendant knew of the order. Fifth, that the defendant refused to obey the order by trying to flee or avoiding being caught. Sixth, that the violation resulted in the death of another individual.[59]

The jury was also instructed that the police vehicle had to be adequately marked as a law enforcement vehicle as part of the fleeing and eluding second degree instruction.[60] Therefore, the jury was properly instructed as to the elements of fleeing and eluding and the Defendant's claim is without merit.

The fact that the jury was not instructed exactly as the Defendant would have preferred does not mean that the jury was instructed incorrectly. The jury was properly instructed on all the

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[58] 7/21/2017, 93.
[59] 7/21/2017, 68-69.
[60] 7/21/2017, 69-70.

elements of the offense of fleeing and eluding, including that the order to stop must come from a law enforcement vehicle. Both the original jury instruction on fleeing and eluding and the answer to the jury's question were correct, therefore, the Defendant's claim is without merit.

III. Claims of prosecutorial error are reviewed on a case-by-case basis, examining the remarks in context to determine whether the defendant received a fair trial. In this case, the prosecutor commented that the Defendant had cocaine in her system because, according to the toxicology report, her urine contained cocaine metabolites. When viewed in the overall context of the evidence in the case, the prosecutor's comment did not deprive the Defendant of a fair trial.

Standard of Review

The People agree with the Defendant's statement of the standard of review. Where no objection is raised at trial, review is limited to the plain error standard of review. To avoid forfeiture under the plain error standard of review, the Defendant bears the burden of establishing that: (1) the error occurred, (2) the error was plain, that is, clear or obvious, and (3) that the plain error affected substantial rights.[61] Once the Defendant establishes these three elements, the appellate court must still exercise its discretion in deciding whether to reverse or not. Reversal is only warranted where the plain, unpreserved error resulted in the conviction of an actually innocent defendant, or when the error affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence.[62]

Discussion

There was no prosecutorial error in the prosecution's closing argument. What the Defendant describes as "prosecutorial misconduct" is actually better described (even if true) as prosecutorial error.[63] Therefore, the People will address the argument as "prosecutorial error"

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61 *Id.*

62 *People v Carines*, 460 Mich 750, 763 (1999).

63 As the Court of Appeals held in *People v Cooper*:

rather than "prosecutorial misconduct."

The test of prosecutorial error is whether the defendant was denied a fair and impartial trial.[64] Because of the fact and context-specific nature of the issue, this Court reviews questions of prosecutorial error case by case and in the context of the particular facts of the case.[65] When trial counsel fails to object to and request an instruction to cure alleged prosecutorial error, the conviction will not be reversed unless a curative instruction could not have eliminated the prejudice arising from the remarks.[66]

> …it is a misnomer to label claims such as this one as 'prosecutorial misconduct.' This concern for the proper phrase is not a case of mere political correctness, for the term misconduct has a specific legal meaning and connotation when it comes to attorney conduct, and is in general limited to instances of illegal conduct, fraud, misrepresentation, or violation of the rules of professional misconduct. See MRPC 8.4 and *Grievance Administrator v Deutch*, 455 Mich 149, 164; 565 NW2d 369 (1997). Although we recognize that the phrase prosecutorial misconduct has become a term of art in criminal appeals we agree that the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. See, e.g., MRPC 8.4. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.'

People v Cooper, 309 Mich App 74, 87 (2015).

64 *People v Saunders*, 189 Mich App 494, 496 (1991).

65 *Id.*

66 *People v Stout*, 116 Mich App 726, 730 (1982).

A. A prosecutor is allowed to argue facts that are in evidence at trial.

For the first allegation of prosecutorial error raised by the Defendant – that the prosecutor argued that the Defendant had cocaine in her system, the Defendant does not cite to the transcript where this alleged error occurred.[67] Failure to brief an issue is akin to abandoning it on appeal. If this issue is not deemed to be abandoned on appeal, the closing argument of the People contained the following reference to cocaine:

> [BY ASSISTANT PROSECUTOR] Well here's what [sic what's] different. Third, that while operating the vehicle the defendant had any amount of cocaine in her body. And we have the laboratory results for that. And I'll get to that.
>
> Fourth, that the defendant voluntarily decided knowing that she had any cocaine in her body. And fifth, that the defendant's operation of the vehicle caused a serious impairment of bodily function. Again, we talked about that.
>
> So let's talk about the third element. Did the defendant have any cocaine in her body? Well for that we have the lab results. And it's difficult to see. But you can see easier when you actually look at the physical copy.
>
> But that her blood was taken approximately four hours after the crash occurred. And what was the result of the analysis of the analysis of that blood? She testified [sic tested] positive for the presence of opiates, cocaine, and methadone.
>
> Now you go back and think, well, did she knowingly drive with this cocaine in her body? And I would submit to you that she was taken directly to the hospital after the car crash. She didn't have an opportunity to go buy some drugs and go do some drugs before she got to the hospital.
>
> And it really is beyond any doubt. There's no question that the hospital didn't put the cocaine in her system. There's no mystery

[67] Defendant-Appellant's brief on appeal, p. 33.

> person that somehow magically made these drugs go in her body. She clearly used these drugs before she was driving. And that's how they ended up in her blood stream at that time she was at the hospital.[68]

There was a proper evidentiary basis upon which the assistant prosecutor based his argument that the Defendant had cocaine in her system. The toxicology report from Henry Ford Hospital plainly shows that the Defendant tested positive for "cocaine, metabolite, urine, 300 ng per ml cutoff, on March 20, 2017 at 6:45 p.m.."[69] The crash occurred at around 2:17 p.m. on March 20, 2017.[70] Therefore, it was not improper for the prosecution to argue that the Defendant had cocaine in her system at the time of the crash that occurred four hours before her urine was tested.

B. The assistant prosecutor did not shift the burden of proof or denigrate defense counsel.

Next, the Defendant claims that the prosecutor improperly shifted the burden of proof and denigrated defense counsel. The prosecutor made the following statement in rebuttal closing argument:

> [By the assistant prosecutor] This isn't a case of well, here's my explanation or here's my excuse. She has no excuse. She has no explanation. She can try and – Mr. Longstreet can work hard. And he's a great attorney. But he's trying to do some smoke and mirrors. He's trying to say well, you know, if you look at the evidence this one kind of way and you have a conspiracy theory, maybe she's not guilty. Maybe.[71]

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68 7/21/2017, 30-31.
69 7/20/2017, 167.
70 7/20/2017, 99.
71 7/21/2017, 53.

There was no objection to this argument. Where there is no objection at trial, review is limited to the plain error standard of review.[72] To avoid forfeiture under the plain error standard of review, the Defendant bears the burden of establishing that: (1) the error occurred, (2) the error was plain, that is, clear or obvious, and (3) that the plain error affected substantial rights.[73] Once the Defendant establishes these three elements, the appellate court must still exercise its discretion in deciding whether to reverse or not.[74] Reversal is only warranted where the plain, unpreserved error resulted in the conviction of an actually innocent defendant, or when the error affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence.[75] This did not occur in this case. The prosecutor's rebuttal argument did not affect the fairness, integrity, or public reputation of the judicial proceedings and the Defendant is not actually innocent.

Moreover, the argument was made in direct response to defense counsel's argument where he argued the following:

> [by Mr. Longstreet]: It wasn't the police if they disengaged. So at the end of the day you have to see, you just can't look at the prosecution's pretty videos and pretty power [sic power point] presentations. You got to really look and break down the elements of the crime.
>
> It's a strict liability on the prosecution that they have to put that puzzle together completely. Each and every element of the crime. They can't put have [sic half] of it together and say, well, it looks like what I said it is. It's mostly what I say it is. They have to show you all the elements. And I don't believe that they have.[76]

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72 *People v Carines*, 460 Mich 750 (1999).
73 *Id.*
74 *Id.*
75 *People v Carines*, 460 Mich 750, 763 (1999).
76 7/21/2017, 47.

From this passage it becomes clear that the prosecutor was responding to defense counsel's argument that the prosecution was trying to mislead the jury through the use of a PowerPoint presentation, and to the fact that second degree murder requires that the defendant act without justification or excuse.[77] The prosecutor's comments must be considered in light of defense counsel's comments.[78] "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument."[79]

Also, any challenge that the prosecutor's argument improperly shifted the burden of proof is negated by the trial court's final jury instructions that the Defendant was presumed innocent and that the prosecution had the burden of proving the Defendant's guilty beyond a reasonable doubt.[80] The Defendant's jury was also instructed that the comments and arguments of the lawyers are not evidence and that they were the sole finders of fact.[81]

The Defendant argues that the holding of *People v Spagnola*[82] should apply in the instant case, but that is an unpublished decision with no precedential value on the court.[83] Also, that case is factually distinguishable from the instant case in several respects. In *Spagnola*, the prosecutor

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77 *People v Goecke*, 457 Mich 442 (1998).
78 *People v Messenger*, 221 Mich App 171, 181 (1997).
79 *People v Kennebrew*, 220 Mich App 601, 608 (1996); *People v Watson*, 245 Mich App 572, 592–93 (2001).
80 7/21/2017, 55-56.
81 7/21/2017, 57.
82 *People v Spagnola*, unpublished COA opinion no. 330382, issued March 8, 2018.
83 "An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears." MCR 7.215(C)(1).

argued that the prosecution's radiology expert would have testified favorably for the prosecution but for his vacation in Paris. There was an objection to this comment, but the trial court failed to give a curative instruction. The assistant prosecutor also argued as follows:

> Over and over and over again, always the same dog and pony show. The same old magic show. The same old red herring. The same old smoke and mirrors. The same old, 'he didn't do it.' He didn't prove his case. I picked, I left each one of you on this jury because you are not stupid. Don't be stupid. Don't believe what you just heard.[84]

These statements are far more egregious than the argument made in the instant case (that the Defendant had no excuse for her actions). The statements in *Spagnola* violated both legal rules and professional norms in that the assistant prosecutor, in addition to implying that that jury would be stupid to believe the defense, argued facts that were not in evidence, i.e., there was no evidence that the prosecution's expert was in Paris or that was why the expert did not appear to testify. In fact, there were several experts that authored the radiology report and there was no evidence that any of the doctors were unavailable to testify at trial. Therefore, the *Spagnola* case is not analogous to the instant case in any way.

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[84] *People v Spagnola*, unpublished COA decision no. 330382, March 8, 2018 (attached to Defendant-Appellant's brief on appeal as Appendix E).

IV. Evidence is sufficient if a rational juror could find that all the essential elements of the crime were proven beyond a reasonable doubt. In this case, the People presented evidence that the Defendant attempted to flee from the police when they tried to pull her over for a traffic violation; the Defendant ran a red light and crashed her vehicle into the side of the decedent's vehicle, killing the driver of the other vehicle and seriously injuring her passenger. This was sufficient evidence for the crimes of fleeing and eluding first and second degree.

Standard of Review

The People do not dispute the Defendant's statement of the standard of review. In reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[85] The reviewing court must make all reasonable inferences and credibility choices which will support the trier of fact's verdict, and the scope of review is the same whether the case involves direct or circumstantial evidence.[86] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.[87]

Discussion

1. There was sufficient evidence of fleeing and eluding first and second degree.

There was sufficient evidence presented to support the conviction for fleeing and eluding first and second degree. The fleeing and eluding statute provides, in relevant part, the following:

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85 *People v Nowack*, 462 Mich 392, 399 (2000); *People* v *Petrell*a, 424 Mich 221 (1985).
86 *United States v Clark*, 741 F2d 1699 (5th Cir, 1984).
87 *People v Nowack*, 462 Mich at 399 (2000), citing *People v Carines*, 460 Mich 750, 757 (1999).

> (1) An operator of a motor vehicle or vessel who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the operator to bring his or her motor vehicle or vessel to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle or vessel, extinguishing the lights of the vehicle or vessel, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle or vessel is identified as an official police or department of natural resources vehicle or vessel.[88]

Contrary to the Defendant's argument, there was evidence presented that the police vehicle was adequately marked as a police vehicle. Several witnesses identified that car as a police vehicle and there were two videos shown to the jury that showed the police vehicle behind the Defendant's vehicle. The Defendant's front seat passenger, Classie Butler, testified at trial that the Defendant told her that there was an undercover cop car behind them and then the Defendant took off speeding.[89] Witness Squire Richardson testified that he saw a police car with its lights flashing behind the Defendant's car.[90] Officer Donegan testified that the car that pursued the Defendant's vehicle was a semi-marked police car, a solid black Ford Crown Victoria, with blue and red lights in the grill, and red and blue lights in the rear mirror, sirens, and a push bumper in the front.[91] Only police vehicles are allowed to have oscillating blue or red lights[92] and only emergency vehicles may be equipped with a siren.[93] The jury was also shown four videos showing the police

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88 MCL 750.479a.
89 7/20/2017, 49.
90 7/20/2017, 34.
91 7/20/2017, 65-66.
92 MCL 257.698(5)(a).
93 MCL 257.706(b) and (d).

car behind the Defendant's car.[94] Thus, the jury was able to determine that the markings on the vehicle were "adequate" to notify the Defendant that a police car was attempting to pull her over. A police car does not have to be fully marked to be considered adequately marked for purposes of the fleeing and eluding statute – a semi-marked car, as was used in this case, is sufficient.[95] The police car was equipped with police lights and a siren and a push bumper in the front, all of which would adequately identify it as a police vehicle. Therefore, the Defendant's claim of insufficient evidence is without merit.

2. The People concede that there was insufficient evidence of operating while license suspended, revoked or denied causing death and license suspended, revoked, or denied causing serious impairment of a body function.

The People agree that MCL 257.904(4), driving with license suspended, revoked, or denied causing death, and MCL 257.904(5), driving with license suspended, revoked, or denied causing serious impairment of a body function, cannot be based on the fact that the Defendant's driver's license was merely expired. *People v Acosta-Baustista*[96] held that the crime of driving with license suspended, revoked, or denied causing death does not apply where the driver's license has merely expired, as opposed to being denied, revoked, or suspended. The Defendant's license in the instant case was expired, not revoked, denied, or suspended.[97] Therefore, under the applicable law, the People concede that the Defendant could not be properly found guilty of Driving With License Suspended, Revoked, or Denied Causing Death, or Driving With License

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94 7/20/2017, 91 (People's Exhibit 3).

95 See, for example *People v Johnson*, unpublished COA case no. 325120, March 17, 2016, (attached as People's Appendix A), holding that a defendant could be found guilty of fleeing and eluding a semi-marked police car.

96 296 Mich App 404 (2012).

97 7/20/2017, 158-159; People's Exhibit 12.

suspended, revoked, or denied causing serious impairment where there was no evidence that the Defendant's driver's license was suspended, revoked, or denied, but merely was expired, a circumstance which is not covered by the statute. Under the applicable case law (and the plain reading of the statute) there was no basis for the convictions for driving with license suspended, revoked, or denied causing death and driving with license suspended, revoked, or denied causing serious impairment, so those two counts, Counts 4 and 9, should be vacated.

3. There was sufficient evidence of operating while intoxicated causing death.

Since it was established at trial that the Defendant had cocaine metabolites in her urine when she hit the decedents vehicle with her vehicle, there was sufficient evidence of operating while intoxicated causing death. The operating while intoxicated death statute, MCL 257.625(4)(a), requires the following elements: (1) That the defendant was operating his or her motor vehicle while he or she was intoxicated, (2) that he or she voluntarily decided to drive knowing that he or she had consumed an intoxicating agent and might be intoxicated, and (3) that the defendant's operation of the motor vehicle caused the victim's death.[98] The Defendant's only claim in this regard is that cocaine metabolites are not listed as a schedule 1 or schedule 2 controlled substance. But, as argued previously, the public health code defines cocaine as a schedule 2 drug and includes in its definition any cocaine derivative.[99] A cocaine metabolite is a derivative of cocaine because that is how cocaine expresses itself in urine, i.e., the body breaks down cocaine and it is excreted through the kidneys or metabolized as cocaine metabolites. A human simply does not urinate out pure cocaine. The Defendant's argument is without merit.

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[98] *People v Schaefer*, 473 Mich 418, 430 (2005).
[99] MCL 333.7214(a)(iv).

4. There was sufficient evidence of Reckless Driving Causing Death and Reckless Driving Causing serious Injury.

There was sufficient evidence presented of reckless driving causing death and reckless driving causing serious impairment of a body function. MCL 257.626 provides that a person who drives recklessly and causes death or serious injury is guilty of a felony:

> (1) A person who violates this section is guilty of reckless driving punishable as provided in this section.
>
> (2) Except as otherwise provided in this section, a person who operates a vehicle upon a highway or a frozen public lake, stream, or pond or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, in willful or wanton disregard for the safety of persons or property is guilty of a misdemeanor....
>
> (3) Beginning October 31, 2010, a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes serious impairment of a body function to another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both....
>
> (4) Beginning October 31, 2010, a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both....[100]

The Defendant argues that there was insufficient evidence presented that the Defendant drove her vehicle with wanton or willful disregard for the safety of persons.[101] Under the circumstances, viewing the evidence in the light most favorable to the People, there was more than enough evidence for the jury to come to the conclusion that the Defendant's operation of the

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[100] MCL 257.626.

[101] Defendant-Appellant's brief on appeal, p. 39-40.

vehicle was with wanton or willful disregard for the safety of person or property based on the fact that the Defendant's speed was estimated to be 70 mph in a 45 mph zone on Woodward Avenue, a busy street in Detroit.[102] Classie Butler, the front seat passenger, testified that the Defendant was going at a high rate of speed with the knowledge that the police were behind her trying to pull her over and that they did not stop at the stop light.[103] Also, the video admitted at trial showed that the car was driving at a high rate of speed when it ran a red light and smashed into the side of Mr. Simms' pickup truck and the car and the truck both flipped over.[104] Contrary to the Defendant's argument, one does not need to be clocked with a speedometer for an estimation of the speed to be made, and a finding of driving with wanton or willful disregard for the safety of persons, especially when running a red light at a busy intersection.[105] Based on the evidence, a rational trier of fact could conclude that the Defendant was guilty of reckless driving causing death and reckless driving causing serious impairment of a body function beyond a reasonable doubt.

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[102] 7/20/2017, 27.
[103] 7/20/2017, 51-53; 57.
[104] 7/20/2017, 35.
[105] See, *e.g.*, *People v Carll*, 322 Mich App 690 (2018), holding that where the passenger of the vehicle estimated the speed of the defendant's vehicle to be between 30 to 50 mph on a gravel road, and the vehicle ran a stop sign and struck a vehicle, this was sufficient evidence of wanton and willful disregard for the safety of persons or property for purposes of the reckless driving causing death statute.

V. A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion and an abuse of discretion will only be found where the court chooses an outcome falling outside the range of principled outcomes. Here, the trial court allowed the admission of the Defendant's medical records at trial over defense counsel's objection because the records were provided to the defense prior to trial and they were certified. Therefore, the trial court's ruling was not an abuse of discretion.

Standard of Review

The court reviews the trial court's admission of evidence under the abuse of discretion standard.[106] "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes."[107]

Discussion

The Defendant's medical records were properly admitted against her at trial. The Defendant, upon being admitted to the hospital, was unconscious from her injuries so the medical records have a pseudonym instead of a real name - Mississippi. Later, the police obtained the certified medical records with the Defendant's correct name at the top instead of a pseudonym. Both versions have the same information and the same medical record identifying number. There can be no real argument that they are one and the same except for the addition of the true name at the top. Therefore, there should have been no surprise to the defense upon the prosecution's request to admit the records. The records were relevant and since they were certified by the hospital, they were presumed to be self-authenticating exception to hearsay. Therefore, the trial court's admission of the medical records was not an abuse of discretion.

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106 *People v Taylor*, 195 Mich App 57, 60 (1992).
107 *People v McBurrows*, 322 Mich App 404, 411 (2017) (citation and quotation marks omitted).

VI. Although a defendant has a right to present a defense, that right is not unfettered and the defendant must still follow the rules of evidence. Here, the Defendant sought to introduce the disciplinary history of two police officers, both of whom had informed the court that they would exercise their rights under the Fifth Amendment and not answer questions about the case; based on that circumstance the trial court did not allow the defense to call the two officers. This ruling was not an abuse of discretion.

Standard of Review

This Court generally reviews a trial court's evidentiary decisions for abuse of discretion.[108] A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion.[109] A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes.[110]

Discussion

The Defendant cannot establish that the trial court abused its discretion when it disallowed evidence that Detroit Police Officers Howell and Jenkins (who pursued the Defendant's car) were disciplined for violation of internal police policies related to their pursuit in this case. The Defendant alleges that trial counsel should have been able to introduce at trial that the officers were either terminated or suspended (they were in fact suspended from duty due to their failing to announce a chase over police department radio and violation of the vehicle pursuit policy) due to their failure to follow protocol for police pursuits in this case.[111] Neither police officer testified at

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[108] *People v Yost*, 278 Mich App 341, 353 (2008).
[109] *People v Sabin*, 463 Mich 43, 67 (2000).
[110] *People v Watkins*, 491 Mich 450, 467 (2012).
[111] See Defendant-Appellant's Exhibit 2, Professional Standards Memorandum, p.39.

trial, nor were they subpoenaed for trial, so other than conjecture, it's unclear how the defense would have introduced this evidence at the Defendant's trial.

Moreover, in the motion for new trial, the ground raised in the trial court was that Officers Jenkins and Howell should have been called as witnesses for the defense at trial and it was ineffective assistance of counsel not to do so. This claim was rightly rejected by the trial court. On appeal the claim is slightly different: That the evidence of the officers' suspension should have just come in (but there is no explanation as to under what mechanism this would have been accomplished).

The evidentiary hearing in this case revealed that prior to trial the trial court had considered the idea of the introduction of the officers' police discipline and rendered it more prejudicial than probative in this case and, therefore, ruled that it could not be introduced.[112] It is well established that the trial court can exclude evidence if its probative value is substantially outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. This is certainly present in the instant case where the introduction of the discipline would likely confuse the jury since the protocols that the officers were accused of violating did not in any way exculpate the Defendant. Also, the attorneys knew that the officers would not be called because they would assert their Fifth Amendment right not to testify.[113] The Defendant was made aware of this ruling prior to trial, but told her attorney that she was going to bring it up by "accident."[114]

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[112] 8/24/2018, 97.
[113] 8/24/2018, 17.
[114] 8/24/2018, 69.

The Defendant further theorizes that the fact that these officers were disciplined would have meant that they were not performing their lawful duty when they attempted to effectuate a traffic stop of the Defendant's vehicle. This is a false premise. A police officer attempting to effectuate a traffic stop for a vehicle traveling the wrong way down a one-way street is performing his or her lawful duty.[115] Any argument to contrary is unfounded and was rightly rejected.

The right of cross-examination is not boundless. "[N]either the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject."[116] "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[117] Therefore, the Defendant has not shown that the trial court abused its discretion in limiting cross-examination on the subject of the officers' suspension.

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[115] Officer Donnegan testified that the Defendant's vehicle was travelling down a one-way street, Hollywood Street, in the wrong direction and as a result, Officers Jenkins and Howell tried to effectuate a traffic stop. 7/20/2017, 60-61.

[116] *People v Adamski*, 198 Mich App 133, 138 (1993).

[117] *Adamski*, 198 Mich App at 138, quoting *Delaware v Van Arsdall*, 475 US 673, 679 (1986); see MRE 403.

VII. In order to merit a new trial based on newly discovered evidence, the evidence must be reliable and clearly exculpate the defendant. Here, the Defendant's alleged newly discovered evidence is based on hearsay contained in an internal affairs report, the findings of which were overruled by the commanding officer; therefore, even if the report was admissible, which it is not, there is no reasonable possibility that it would have made a difference in the Defendant's trial. Therefore, the Defendant is not entitled to a new trial.

Standard of Review

The People dispute the Defendant's statement of the standard of review. The Defendant did not raise in the trial court the claim that she is entitled to a new trial based on newly discovered evidence, and thus appellate review of the issue is limited to plain error affecting the Defendant's substantial rights.[118]

Discussion

Initially, the Defendant alleges that the Defendant's conviction was based on perjured testimony.[119] This is a blatantly false allegation. There is no evidence of perjured testimony. The Defendant focuses on an internal affairs report which erroneously states that the police car driven by Officer Jenkins was unmarked. The surveillance videotapes submitted into evidence plainly show that the police car was semi-marked, as was testified by numerous eyewitnesses to the crash.[120] The Defendant has blown an errant comment based on hearsay in an internal affairs

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[118] *People v Carines*, 460 Mich 750, 769-764 (1999).

[119] Defendant-Appellant's brief on appeal, p. 45.

[120] Squire Richardson testified that he saw a police car with lights flashing behind the Defendant's vehicle. 7/20/2017, 34. Officer Donnegan described the car as a semi-marked solid black Crown Vic with sirens, and red and blue lights in the front grill and mounted on the rear mirror. 7/20/2017, 65-66, 68. Classie Butler testified that the Defendant told her that an undercover police car was behind them. 7/20/2017,49.

memo into something it is not (the proverbial making a mountain out of a molehill). The jury was presented with video evidence showing the police car that pursued the Defendant, and testimony from several eyewitnesses that the car had lights and sirens and was a semi-marked police car. Even the Defendant's front seat passenger, Classie Butler, testified that the Defendant knew that the police was behind them, and that she was screaming to get the Defendant to pull over.[121] This is further evidence that the police car was at least semi-marked or else the Defendant would not have known that they were police driving behind her car. Therefore, the car was properly identified as an official police vehicle and the Defendant's conviction for first degree fleeing and eluding must be affirmed.[122]

There is no competent evidence that the officers were in an unmarked car because the initial finding of the sergeant contained in the internal affairs report was incorrect, and was subsequently corrected by the commanding officer, Lt. Hahn. Lt. Hahn justified his position as follows:

> However, I disagree with the finding of a violation for pursuing in an unmarked vehicle. Detroit Police Manual, Directive 303.1 Department Vehicles, Section 2 definitions, Sub-Section 2.3 Semi-Marked Vehicle defines semi-marked vehicle as, "A four (4) wheel vehicle that is equipped with permanent flasher type lights to the front, rear, or flashing, oscillating or rotating lights mounted in the front and rear window area instead of a permanent top mounted light bar or beacons. The vehicle is also equipped with a siren. A semi-marked vehicle can have partial police identification markings." Therefore, the vehicle in question is technically a

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[121] Classie Butler testified that the Defendant told her that an undercover cop car was behind them. 7/20/2017, 49.

[122] A conviction for the crime of fleeing and eluding a police officer will be contingent on the facts and circumstances of each case, and there must be sufficient indicia through the police uniform and vehicle that the person making the stop is in fact a police officer. *People v Gree*n, 260 Mich App 710, 719, footnote 3 (2004).

> semi-marked vehicle, and as such, is not specifically prohibited by the current policy.[123]

The Defendant also alleges that the officers were not acting within their lawful duties when they attempted to effectuate a traffic stop of the Defendant's vehicle because they violated internal police policy. But the officers were acting within their lawful duties by pursuing the Defendant's vehicle for going the wrong way down a one-way street and then failing to stop at a stop sign. These traffic violations justified a traffic stop. The internal affairs report confirms this by stating the following:

> Evaluation of Probable Cause
>
> Officers Howell and Jenkins were attempting to conduct a traffic stop to identify the occupants of the vehicle who were possibly involved in human trafficking. Further, the vehicle was observed driving the wrong way down a one way street. Based on these factors, the officers had probable cause to conduct a traffic stop of the vehicle.[124]

In addition, the fact that an internal policy was not followed does not mean that the police officers were not acting in performance of their lawful duties for purposes of the first degree fleeing and eluding conviction. These policies are generally aimed at limiting civil liability – not to describe police powers. One of the main policies that was found to be violated was the failure to inform the zone dispatcher of the fact that they were involved in a vehicle pursuit. This minor mistake is not such a violation that renders their actions outside the duties of a police officer when they attempted a traffic stop of the Defendant's vehicle.

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[123] Internal Affairs Report, attached to the Defendant-Appellant's brief as Appendix Exhibit 2, p.43.

[124] Defendant's Appendix 2, p. 8.

RELIEF REQUESTED

WHEREFORE, the People respectfully request that this Court affirm the Defendant's convictions and sentence except as it relates to counts four and nine – operating with license suspended, revoked, or denied causing death and operating with license suspended, revoked, or denied causing serious injury. The People also respectfully request publication of the Court's decision pursuant to MCR 7.215(B).

Respectfully submitted,

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Dated: March 21, 2019

Appendix A

People v Johnson, unpublished COA case no. 325120, dated March 17, 2016.