NO._____

IN THE SUPREME COURT OF THE UNITED STATES

AVERN LEE BURNSIDE,

Petitioner,

v.

RANDEE REWERTS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME I

Avern Lee Burnside # 394665
In Propria Persona
Carson City Correctional Facility
10274 Boyer Road
Carson City, Michigan 48811

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APPENDIX A

No. 19-2074

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AVERN LEE BURNSIDE,

Petitioner-Appellant,

v.

RANDEE REWERTS, Warden,

Respondent-Appellee.

ORDER

Before: COOK, Circuit Judge.

Avern Lee Burnside, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Burnside has moved for a certificate of appealability, for leave to proceed in forma pauperis, and for release pending appeal.

A jury found Burnside guilty of assault with intent to murder, carrying a concealed weapon, being a felon in possession of a firearm, discharging a weapon from a vehicle, and possessing a firearm during the commission of a felony. The trial court sentenced Burnside as a fourth habitual offender to 20 to 40 years in prison for the assault with intent to murder conviction, two years for possessing a firearm during the commission of a felony, and 30 months to 15 years for each of the remaining convictions. The Michigan Court of Appeals affirmed the trial court's judgment, *People v. Burnside*, No. 309807, 2014 WL 1515265 (Mich. Ct. App. Apr. 17, 2014) (per curiam), and the Michigan Supreme Court denied leave to appeal, *People v. Burnside*, 854 N.W.2d 740 (Mich. 2014) (mem.). Burnside unsuccessfully sought state post-conviction relief.

In 2016, Burnside filed a § 2254 petition, raising eleven grounds for relief. The district court denied the petition on the merits and declined to issue a certificate of appealability.

Burnside now moves for a certificate of appealability only as to his claims that the prosecutor knowingly presented perjured testimony and that the cumulative effect of the trial errors denied him a fair trial. To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court has rejected a constitutional claim on the merits, the petitioner must show that jurists of reason would find it debatable whether the district court correctly resolved the claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Miller-El*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Burnside first argues that the prosecution violated his rights by knowingly presenting the perjured testimony of his girlfriend, Leah Watson. In support of his claim, Burnside presents an affidavit from Watson in which she recants her trial testimony against Burnside and alleges that she testified against Burnside only because the police and prosecutors threatened her. To prevail on a claim that the prosecution knowingly presented false testimony, a petitioner must show that the prosecution presented false testimony, that the prosecution knew the testimony was false, and that the testimony was material. *Akrawi v. Booker*, 572 F.3d 252, 265 (6th Cir. 2009). The testimony must be indisputably false rather than merely misleading. *Id.*

Reasonable jurists would not debate the district court's determination that the state courts reasonably rejected this claim. Recanting affidavits are always viewed with extreme suspicion, *Williams v. Coyle*, 260 F.3d 684, 708 (6th Cir. 2001), and Watson's affidavit is even less credible, given her repeated sworn testimony that Burnside is guilty and her acknowledgement at trial that it was fear of Burnside that caused her to temporarily recant her statements to police and her preliminary examination testimony. Given the lack of credibility of Watson's affidavit and the other evidence of Burnside's guilt, Burnside has not shown that Watson's trial testimony was false or that the prosecution knew it was false.

Burnside also argues that the cumulative effect of various trial errors denied him a fair trial. Reasonable jurists would not debate the district court's rejection of this claim because, post-

AEDPA, such a claim is not cognizable in a federal habeas petition. *See Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011); *Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010).

Accordingly, Burnside's motion for a certificate of appealability is **DENIED**, and his motions for leave to proceed in forma pauperis and for release pending appeal are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AVERN LEE BURNSIDE,

Petitioner,

Case Number: 2:16-CV-13358
HONORABLE VICTORIA A. ROBERTS

v.

SHERMAN CAMPBELL,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY

Petitioner Avern Burnside filed a *pro se* habeas corpus petition under 28 U.S.C. § 2254. He challenges his Genesee County Circuit Court convictions for assault with intent to murder, Mich. Comp. Laws § 750.83; carrying a concealed weapon, Mich. Comp. Laws § 750.227(2); felon in possession of a firearm, Mich. Comp. Laws § 750.224f; discharging a weapon from a vehicle, Mich. Comp. Laws § 750.234a; and possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b. Respondent argues several of Petitioner's claims are procedurally defaulted and that all of his claims are meritless. The Court denies the petition.

I. Background

Petitioner's convictions arise from a shooting in Flint, Michigan. The Michigan Court of Appeals provided this summary of the testimony presented at trial:

The prosecution presented evidence at trial to establish that at

> approximately 12:30 p.m. on July 30, 2009, defendant was driving a black SUV on Court Street in Flint, Michigan while physically assaulting his girlfriend, Leah Watson, who was sitting in the front passenger seat. Antwyne Ledesma was driving on the same road and witnessed defendant's conduct. When the two cars pulled up to a red light, Ledesma, whose windows were down, yelled "leave her alone; you're not f***in' right." Meanwhile, Watson was screaming, hollering, and asking for help. When the light turned green, instead of turning left, as he was in the left turn lane to do, defendant continued on Court Street and followed Ledesma. Defendant pulled alongside Ledesma's car and fired two shots at her. Ledesma's car was struck by one bullet, but she escaped uninjured.

People v. Burnside, No. 309807, 2014 WL 1515265, *1 (Mich. Ct. App. Apr. 17, 2014).

A jury in Genesee County Circuit Court found Petitioner guilty and he was sentenced as a fourth habitual offender to 20 to 40 years for the assault with intent to murder conviction, 2 years for the felony-firearm conviction, and 2-1/2 to 15 years each for the carrying a concealed weapon, discharging a firearm from a vehicle, and being a felon in possession of a firearm convictions.

The Michigan Court of Appeals affirmed Petitioner's convictions. *People v. Burnside*, No. 309807, 2014 WL 1515265, *1 (Mich. Ct. App. Apr. 17, 2014), *lv. denied* 497 Mich. 889 (Mich. Oct. 28, 2014). Petitioner filed a motion for relief from judgment, which the trial court denied. *See* 7/14/15 Op. & Ord., ECF No. 11-38. The Michigan Court of Appeals denied leave to appeal, *People v. Burnside*, No. 328495 (Mich. Ct. App. Sept. 15, 2015), as did the Michigan Supreme Court, *People v. Burnside*, 499 Mich. 967 (Mich. June 28, 2016).

Now before the Court is Petitioner's habeas corpus petition, raising the following grounds for relief:

I. Petitioner's due process rights were violated and he is entitled to a new trial based on newly discovered evidence, where the prosecutor knowingly used perjured testimony from Leah Watson, whose testimony was based on threats and intimidation.

II. The trial court denied Petitioner a fair trial by admitting some irrelevant and unfairly prejudicial transcripts of some alleged phone conversations purported to be between Leah Watson and Petitioner that were not sufficiently authenticated and were not trustworthy.

III. Petitioner is entitled to a new trial where the verdict is against the great weight of the evidence, and it would be a denial of due process and a miscarriage of justice to allow Petitioner's convictions to stand.

IV. Petitioner was denied both his state and federal constitutional rights to effective assistance of trial counsel, where counsel failed to compel the prosecution to hand over the exculpatory phone calls from the Genesee County jail, and counsel failed to let Petitioner hear the phone recordings.

V. Petitioner was denied his right to effective assistance of appellate counsel on his only appeal of right when counsel failed to raise trial counsel issues of error, and failed to raise the preserved issues.

VI. The trial court abused its discretion when it permitted police Sergeant Brown to testify over defense objection, that Leah Watson presented "the classic case of somebody that was a victim of domestic violence." The admission of this improper syndrome testimony invaded the province of the jury and deprived Petitioner of his due process right to a fair trial.

VII. The cumulative effect of the prosecutor's misconduct denied Petitioner a fair trial.

VIII. Trial counsel's ineffectiveness in failing to object to the prosecutor's repeated instances of misconduct denied Petitioner a fair trial.

IX. The trial court reversibly erred in overruling the defense objection to the admission of evidence alleging that Petitioner assaulted Leah Watson in 2005, as that evidence had minimal if any relevance to the question of Petitioner's alleged intent in the case at bar; the defense

had not put into issue the intent question at the point the prosecution introduced the evidence, contrary to the court's pretrial ruling, and even if relevant the evidence was more prejudicial than probative under MRE 403.

X. Petitioner was denied his Sixth Amendment right to a speedy trial, alternatively, defense counsel was ineffective by his failure to file a motion to dismiss on those grounds.

XI. Cumulative effect of alleged errors denied Petitioner a fair trial.

II. Standard of Review

Review of this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a state prisoner is entitled to a writ of habeas corpus only if he can show that the state court's adjudication of his claims –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 408. "[A] federal habeas court may not issue the writ simply because that court concludes in its

independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

"AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "[A] habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of th[e Supreme] Court." *Id.*

A state court's factual determinations are entitled to a presumption of correctness on federal habeas review. See 28 U.S.C. § 2254(e)(1). The presumption may be rebutted with clear and convincing evidence. *See Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). Habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III. Discussion

A. Prosecutorial Misconduct (Claims I & VII)

Petitioner alleges several instances of prosecutorial misconduct: (i) the prosecutor

knowingly presented perjured testimony; (ii) the prosecutor's opening statement was argumentative; (iii) the prosecutor vouched for the victim's credibility; and (iv) the prosecutor elicited irrelevant testimony from Sergeant Brown. He also argues that the cumulative effect of these errors denied him a fair trial. Respondent argues that these claims are procedurally defaulted. Procedural default is not a jurisdictional bar to review of a habeas petition on the merits. *Trest v. Cain*, 522 U.S. 87, 89 (1997). "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). The Court finds it is more efficient to proceed to the merits of these claims.[1]

The controlling Supreme Court decision governing prosecutorial misconduct claims is *Darden v. Wainwright*, 477 U.S. 168 (1986). Under *Darden*, a prosecutor's improper comments violate a criminal defendant's constitutional rights if they "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.*, at 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). To constitute a due process violation, the prosecutor's conduct must have been "so egregious so as to render the entire trial fundamentally unfair." *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000) (citations omitted).

1. Leah Watson's Testimony

[1] Respondent alleges several other claims are procedurally defaulted as well. The Court finds it is also more efficient to proceed to the merits of these claims.

First, Petitioner argues that the prosecutor committed misconduct when she knowingly presented perjured testimony from the victim, Leah Watson. Petitioner presents an affidavit executed by Leah Watson on May 13, 2014 to support his claim. 5/13/2014 Affidavit, ECF No. 14, Pg. ID 66-67.

At trial, Watson identified Petitioner as the person who shot in the direction of Ledesma's car. In contrast, in her affidavit, Watson claims that another man, known to her as "Ty", shot at the victim's vehicle. She states that police pressured her into implicating Petitioner and that she did so only to stop police harassment. *Id.*

The Genesee County Circuit Court, the last court to address the merits of this claim, found Watson's affidavit unpersuasive. *See* 7/14/2015 Ord. at 2, ECF No. 11-38 at Pg. ID 1118. The state court noted Watson's testimony vacillated from the outset and that her inconsistencies were well-known. Defense counsel cross-examined Watson about these inconsistencies and asked Watson which of her multiple "versions" of the truth she would testify to at trial. The state court held that the prosecutor simply asked Watson to tell the truth and denied this claim. *Id.*

The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (citations and internal quotations omitted). This rule applies to both the solicitation of false testimony and the knowing acquiescence in false testimony. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In order to prove this claim, a defendant must show that (1) the evidence the prosecution presented was false; (2) the prosecution

knew it was false; and (3) the false evidence was material. *United States v. Hawkins*, 969 F.2d 169, 175 (6th Cir.1992). Petitioner fails to satisfy any of these requirements.

Watson's testimony was inconsistent and she was a reluctant witness. But "mere inconsistencies" in testimony do not establish a prosecutor's knowing use of perjured testimony. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). At trial, Watson identified her fear of Petitioner as the reason for her inconsistent testimony. Defense counsel adequately probed Watson's credibility on cross-examination. The jury was properly left to evaluate Watson's credibility. Petitioner fails to show that Watson's trial testimony was false or that the prosecutor was aware it was false. The trial court's decision denying Petitioner's claim was not contrary to or an unreasonable application of *Darden*.

2. Opening Statement

Petitioner argues that the prosecutor committed misconduct by presenting an argumentative opening statement. The prosecutor, focusing on the intent element of assault with intent to murder, stated "Think about shooting into a car with somebody driving right next to you. Why would you do that if you didn't mean to kill 'em?" 2/23/12 Tr. at 13, ECF No. 11-34, Pg. ID 767. The prosecutor also stated: "Just because the Defendant was a bad shot and didn't hit her doesn't mean he didn't mean to kill her." *Id.* at 12, Pg. ID 766.

The Michigan Court of Appeals held the opening statement was not improper because the prosecutor's statements were supported by evidence produced at trial, were not excessively inflammatory, and the trial court specifically instructed the jury that the

opening statements were not evidence. *Burnside,* 2014 WL 1515265 at *4.

The state court's holding is a reasonable application of *Darden.* The prosecutor devoted much of her opening statement to outlining the evidence she expected the jury to hear. She did not inflame the passions of the jury nor did she misstate or overstate the evidence ultimately presented. The comments did not render Petitioner's trial fundamentally unfair. Habeas relief is denied on this claim.

3. Vouching for Prosecution Witness

Next, Petitioner argues that the prosecutor improperly vouched for Leah Watson's credibility in her opening statement. The prosecutor stated the following about Watson's appearance at the preliminary examination:

> So, she appeared. She told the truth; it was Avern Burnside in that vehicle. It was Avern Burnside who was hitting me. Avern Burnside who shot at the woman.

Burnside, 2014 WL 1515265 at *5.

Prosecutors may not vouch for a witness's credibility. Prosecutorial vouching and an expression of personal opinion regarding the accused's guilt "pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

The Michigan Court of Appeals held that the prosecutor's argument was not improper. The state court recognized the applicable law, including that a prosecutor may not vouch for a witness's credibility or imply that she has some special knowledge about a witness's truthfulness. The state court held that because the prosecutor did not imply some special knowledge, the comment was isolated and, considered in context, meant to chronicle Watson's inconsistent behavior and statements it was not improper. *Burnside*, 2014 WL 1515265 at *5.

The Michigan Court of Appeals reasonably disposed of Petitioner's claim. Even assuming that the Michigan Court of Appeals erred in finding the statement was not improper, the statement did not render the trial fundamentally unfair. The statement was brief, not inflammatory, and jurors were advised that they alone were charged with determining the witnesses' credibility. The court of appeals' decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

4. Testimony from Sergeant Brown

Petitioner argues that the prosecutor committed misconduct by eliciting testimony from Sergeant Brown regarding an incident when he fired his service revolver in the direction of a suspect's fleeing car. Petitioner objects to the following exchange:

Q. Have you ever shot at a moving vehicle before?

A. One time.

Q. Why were you shooting at a moving vehicle[?]

A. It was an incident when I was working here in April of 1995, an armed robbery.... I exited my vehicle and shot at the person trying to stop them.

Q. Did you hit him?

A. No, I didn't.

Q. Did you mean to?

A. I was trying to stop him. Yes, I was trying to shoot him.

Q. Did you mean to kill him?

A. If he was killed as a result of it, yes, I was trying to stop him.

Burnside, 2014 WL 1515265 at *5.

The Michigan Court of Appeals held that Sergeant Brown's testimony was irrelevant and it was improper for the prosecutor to solicit this testimony. *Burnside*, 2014 WL 1515265 at *5. The court, nevertheless did not reverse the convictions because "evidence of [Petitioner's] guilt was compelling." *Id.*

The Court agrees with the Michigan Court of Appeals' determination that this testimony was irrelevant. There are no Supreme Court cases holding that a prosecutor's questions that call for irrelevant evidence constitute prosecutorial misconduct rising to the level of a federal due process violation. *See Wade v. White*, 120 Fed. App'x 591, 594 (6th Cir. 2005). Therefore, the fact that the prosecutor elicited irrelevant testimony from Sergeant Brown does not warrant habeas relief.

5. Cumulative Effect

Finally, Petitioner argues that the cumulative effect of the multiple instances of

alleged misconduct violated his right to a fair trial. The only error was the prosecutor's questioning of Sergeant Brown and that error was harmless. Accordingly, the state court's rejection of Petitioner's cumulative error argument was not unreasonable.

B. Admission of Tape-Recorded Telephone Conversations (Claim II)

Petitioner's second claim concerns the admission of transcribed tape-recorded telephone conversations between Petitioner and Watson. The conversations were tape-recorded during Petitioner's pre-trial incarceration. A short segment of the audiotape was played at trial to allow Watson to identify the voices on the recording as hers and Petitioners. The prosecutor then read transcripts of the telephone conversations. During the conversations, Petitioner advised Watson she should avoid being subpoenaed because Ledesma would recognize her in court. Petitioner argues that the phone conversations were irrelevant, unfairly prejudicial and not authenticated.

The trial court, the last state court to issue a reasoned opinion on this claim, held that the phone conversations were properly admitted. *See* 7/14/2015 Ord. at 2, ECF No. 11-38 at Pg. ID 1118. "Errors by a state court in the admission of evidence are not cognizable in habeas corpus proceedings unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994). The conversations were authenticated by one of the participants, Leah Watson, and the state court's conclusion that they were probative of Petitioner's consciousness of guilt is reasonable. Petitioner has failed to show that admission of the transcribed telephone calls violated any right

under the Constitution or denied him his right to a fair trial. Habeas relief is denied on this claim.

C. Great Weight of the Evidence (Claim III)

Petitioner argues in his third claim that the verdict was against the great weight of the evidence. This claim is meritless. In Michigan, a trial court may order a new trial "where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v. Lemmon*, 456 Mich. 625, 642 (1998) (internal quotation omitted). The grant of a new trial under these circumstances is distinct from the due process issues raised by insufficient evidence, and "does not implicate issues of a constitutional magnitude." *Id.* at 634 n. 8. Thus, a claim that a verdict is against the great weight of the evidence alleges an error of state law, which is not cognizable on habeas review. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (holding that "federal habeas corpus relief does not lie for errors of state law").

D. Ineffective Assistance of Trial Counsel (Claim IV & VIII)

Petitioner raises two ineffective assistance of counsel claims. He argues counsel was ineffective in: (i) failing to object to the prosecutor's misconduct; and (ii) failing to compel the production of exculpatory phone calls from the Genesee County Jail or allow Petitioner hear the taped telephone conversations.

An ineffective assistance of counsel claim has two components. A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient

representation, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, a petitioner must show that, but for the constitutionally deficient representation, there is a "reasonable probability" that the outcome of the proceeding would have been different. *Id.* at 694.

Petitioner argues that counsel was ineffective for failing to object to the prosecutor's misconduct. The Michigan Court of Appeals' denial of this claim was neither an unreasonable application of, nor contrary to *Strickland.* First, Petitioner failed to show that the prosecutor presented perjured testimony or that her opening statement was improperly argumentative. Counsel, therefore, was not ineffective in failing to raise a meritless objection to this conduct.

Second, the prosecutor's statement that Leah Watson told the truth was injudicious, but the evidence against Petitioner was substantial and the comment was isolated. The state court held that, even assuming the comment was improper, Petitioner was not prejudiced by counsel's failure to object. The state court's decision is neither contrary to *Strickland* nor an unreasonable application of federal law. Third, the state court did not err in denying Petitioner's claim that counsel was ineffective in failing to object to Sergeant Brown's unrelated testimony about shooting at a fleeing vehicle. The testimony, though irrelevant, was a very small portion of Sergeant Brown's testimony and of the trial as a whole. Petitioner fails to show a reasonable probability that the outcome of the proceeding would have been different had this testimony been excluded. Habeas relief is denied.

Next, Petitioner challenges counsel's handling of the tape-recorded phone calls from the Genesee County Jail. The tape-recorded phone calls were preserved on ten disks. The prosecution produced Disk 4 about two weeks after producing the other nine disks. Petitioner argues that defense counsel should have obtained Disk 4 sooner and that counsel never allowed him to listen to Disk 4. The state court's rejection of this claim as "groundless" was not unreasonable nor was the court's conclusion that Petitioner failed to satisfy *Strickland*'s prejudice prong.

The trial court allowed Petitioner and defense counsel to use his vacant courtroom to privately listen to the disks containing the taped telephone calls on February 1, 2012. *See* 2/1/2012 Tr. at 13-23, ECF No. 11-31, Pg. ID 554-564. At that time, Disk 4 was unavailable. Two weeks later, the prosecution produced Disk 4. *See* 2/15/2012 Tr. at 34, ECF No. 11-32, Pg. ID 601. Defense counsel stated he would arrange for Petitioner to hear the recording. *Id.* Petitioner fails to show defense counsel caused or could have prevented or shortened the delay in Disk 4's production. He also fails to allege how this prejudiced the defense. Defense counsel received the disk approximately one week before trial. Nothing in the record suggests a reasonable probability that earlier production of Disk 4 would have resulted in a different outcome.

Petitioner also asserts that counsel did not allow him to hear the tape before trial. Defense counsel's on-the-record statements to the trial court show his intention and plan to play the tapes for Petitioner. Even assuming this intention did not lead to action, Petitioner fails to show prejudice. He claims that Disk 4 contained exculpatory evidence.

Even if Petitioner did not have access to the recordings, he was aware of their general content because he was a party to the calls. Petitioner fails to allege or identify any exculpatory material. He, therefore, fails to call into doubt the state court's decision denying this claim. Habeas relief is denied on this claim.

E. Ineffective Assistance of Appellate Counsel (Claim V)

Petitioner claims that his appellate attorney was ineffective in failing to raise on direct appeal the claims raised in this habeas petition. A petitioner does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990).

The claims raised in this petition and on collateral review in state court are meritless. Appellate counsel need not raise non-meritorious claims on appeal. *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (citing *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)). Accordingly, the Court will deny habeas corpus relief on this claim.

F. Admission of Opinion Testimony (Claim VI)

Petitioner next alleges that the improper admission of Sergeant Mitch Brown's opinion testimony violated his right to a fair trial. Sergeant Brown gave his opinion about the behavior of domestic violence victims in general and testified that Leah Watson was a "classic case" of a domestic violence victim. *Burnside,* 2014 WL 1515265 at *1. The Michigan Court of Appeals, relying on Mich. R. Evid. 701 & 702, and state court precedent, held that the trial court abused its discretion in admitting this testimony. *Id.* The state court found the error harmless. *Id.*

State-court evidentiary rulings cannot rise to the level of due process violations

unless they offend "'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Seymour v. Walker*, 224 F.3d 542, 552 (quoting Montana v. Egelhoff, 518 U.S. 37, 43 (1996)) (other internal quotations omitted). Petitioner cites no Supreme Court decision holding that the admission of lay opinion testimony violates due process and the Court is aware of none. *See Armstrong v. Lizarraga,* No. 18-1999, 2019 WL 3253790, *9 (E.D. Cal. July 19, 2019) (finding no clearly established Supreme Court precedent establishing that lay opinion testimony violates due process). Consequently, the admissibility of this evidence is a question of state law, not cognizable on habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

Finally, even if introduction of the lay opinion testimony violated Petitioner's constitutional rights, the error was harmless. On habeas review, an error is considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Petitioner fails to meet the *Brecht* standard because Sergeant Brown's testimony on domestic abuse was cumulative to Watson's own testimony that Petitioner verbally, physically, and emotionally abused her and Ledesma's testimony about the violence she observed. Watson explained that she did not initially tell Sergeant Brown the truth about Petitioner's actions because she feared Petitioner. Further, the evidence against Petitioner was substantial. In addition to Watson's and Ledesma's testimony implicating Petitioner,

Petitioner's jailhouse phone calls with Watson were also incriminating. Petitioner told Watson not to get subpoenaed because if she went to court, the victim would likely recognize her. Petitioner also told Watson that if he hadn't argued with her, he would not be in the position he was in. In light of this evidence, the Michigan Court of Appeals reasonably determined that admission of Sergeant Brown's opinion testimony was harmless error. Habeas relief is denied.

G. Other Act Evidence (Claim IX)

Petitioner's ninth claim concerns the admission of other-acts evidence. The trial court allowed testimony that, in 2005, Petitioner allegedly shot at Leah Watson when she was driving away from him after an argument. The Michigan Court of Appeals held that the trial court erred in admitting this evidence because it was improper character evidence, but that the error was harmless. *Burnside*, 2014 WL 1515265 at *7. The state court reasoned that the jury heard ample evidence throughout the trial about Petitioner's bad character including his physical, verbal, and mental abuse against Watson, his attempts to convince Watson to avoid being subpoenaed, and his attempts to get Watson to lie for him. Petitioner's phone calls with Watson evidenced a consciousness of guilt. Considering these factors and the substantial evidence of Petitioner's guilt, the state found the error harmless. *Id.*

"There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). The Supreme Court has

discussed when other acts testimony is permissible under the Federal Rules of Evidence, see *Huddleston v. United States*, 485 U.S. 681 (1988), but has not addressed the issue in constitutional terms, finding such are more appropriately addressed in codes of evidence and procedure than under the Due Process Clause. *Dowling v. United States*, 493 U.S. 342, 352 (1990). Consequently, there is no "clearly established federal law" to which the state court's decision could be "contrary" within the meaning of section 2254(d)(1). *Bugh*, 329 F.3d at 513.

"Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling*, 493 U.S. at 353. The rule regarding the admissibility of evidence and due process is "exceedingly general." *Desai v. Booker*, 732 F.3d 628, 631 (6th Cir. 2013). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations ... and, it follows, the less likely a state court's application of the rule will be unreasonable." *Id.*

As the state court held, there was substantial evidence of Petitioner's guilt. Given this evidence, Petitioner fails to show that admission of other act evidence denied him a fair trial.

H. Right to Speedy Trial (Claim X)

In his tenth claim, Petitioner argues that his right to a speedy trial was violated by the lengthy delay between his arraignment and trial. He also argues that defense counsel was ineffective for failing to move to dismiss on speedy trial grounds.

The Sixth Amendment guarantees a criminal defendant the right to a speedy trial. U.S. Const. amend. VI. Courts must balance the following four factors in determining whether a defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 528 (1972). The Sixth Amendment's Speedy Trial Clause does not extend to the period prior to arrest. *United States v. Marion*, 404 U.S. 307, 321 (1971); *United States v. MacDonald,* 456 U.S. 1, 7 (1982). Accordingly, the relevant inquiry for a speedy trial analysis is the time between arrest and trial. "[U]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other facts that go into the balance." *Barker*, 407 U.S. at 530. Generally, depending on the nature of the charges, a delay that approaches one year is presumptively prejudicial. *Doggett v. United States,* 505 U.S. 647, 652 n. 1 (1992).

The Michigan Court of Appeals, although not specifically citing *Barker*, applied the factors set forth in *Barker*, and denied Petitioner's speedy trial claim. The state court held that Barker's first factor – the length of the delay, in this case, 27 months – weighed in Petitioner's favor. Because the delay was over 18 months, the Michigan Court of

Appeals found the delay presumptively prejudicial and considered the remaining *Barker* factors.

The Michigan Court of Appeals held that the second factor – the reason for the delay – weighed against the Petitioner because his own actions contributed to nearly all the delays. *Burnside*, 2014 WL 1515265 at *9. The primary reason for the lengthy delay was the time needed to transcribe the jailhouse telephone recordings and defense counsel did not want to proceed without the transcripts. The defense further contributed to the delays by requesting a competency evaluation and requesting that the trial be postponed until the Michigan Court of Appeals addressed Petitioner's *pro se* complaint for superintending control. *Id.*

Petitioner did not assert his right to a speedy trial and the court of appeals weighed this factor against him. Finally, the state court held Petitioner was not prejudiced by the delay and, therefore, weighed the last factor against him. *Id.*

The state court's application of *Barker* was neither contrary to nor an unreasonable application of Supreme Court precedent. 28 U.S.C. § 2254(d)(1). The delay, while long, was not the result of bad faith or an attempt to gain a tactical advantage. Petitioner argues that he was prejudiced by the delay because a letter allegedly written by Leah Watson was excluded when Watson could not recall if she wrote the letter or when. In the letter, Watson apologized for her role in Petitioner's arrest. The Michigan Court of Appeals reasonably concluded that the substance of this alleged letter (Watson blaming herself for Petitioner's arrest) was conveyed to the jury in the tape-recorded jailhouse phone

conversations. It is unclear how this letter would have bolstered the defense. Petitioner fails to allege any other specific prejudice from this delay. Habeas relief is denied on this claim.

Relatedly, Petitioner argues that counsel was ineffective for failing to assert Petitioner's right to a speedy trial. Because petitioner was not denied his right to a speedy trial, trial counsel was not ineffective for failing to move for dismissal of the charges on speedy trial grounds. Defense counsel cannot be said to be ineffective for failing to bring a speedy trial motion that is meritless. *See Shanks v. Wolfenbarger*, 387 Fed. Supp. 2d 740, 750 (E.D. Mich. 2005). Petitioner is not entitled to habeas relief on this ineffective assistance of counsel claim.

I. Cumulative Effect of Alleged Errors (Claim XI)

Finally, Petitioner asserts that he is entitled to habeas relief based upon cumulative error. The Court rejects Petitioner's claim because the Supreme Court has never held that cumulative errors may form the basis for issuance of a writ of habeas corpus. *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). *See also Daniels v. Jackson*, 2018 WL 4621942, *6 (6th Cir. July 17, 2018) (("'[T]he law of [the Sixth Circuit] is that cumulative error claims are not cognizable on habeas [review] because the Supreme Court has not spoken on this issue.'") (quoting *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006)). This cumulative-error claim, therefore, is not cognizable on habeas corpus review. *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) (citing *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)).

IV. Certificate of Appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

The Court concludes that reasonable jurists would not debate the Court's disposition of Petitioner's claims. Thus, the Court denies a COA.

V. Conclusion

The Court DENIES the petition for a writ of habeas corpus. The Court further DENIES a certificate of appealability.

SO ORDERED.

s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

DATED: 8/28/19

APPENDIX C

Order

Michigan Supreme Court
Lansing, Michigan

June 28, 2016

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

152410 & (17)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 152410
COA: 328495
Genesee CC: 09-025749-FC

AVERN LEE BURNSIDE,
Defendant-Appellant.

_____/

On order of the Court, the motion to amend the application for leave to appeal is GRANTED. The application for leave to appeal the September 15, 2015 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 28, 2016

Clerk

a0620

APPENDIX D

Court of Appeals, State of Michigan

ORDER

People of MI v Avern Lee Burnside

Docket No. 328495

LC No. 09-025749-FC

Henry William Saad
Presiding Judge

Kathleen Jansen

Deborah A. Servitto
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this appeal only.

The Court orders that the application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The defendant alleges grounds for relief that could have been raised previously and he has failed to establish both good cause for failing to previously raise the issues and actual prejudice from the irregularities alleged, and has not established that good cause should be waived. MCR 6.508(D)(3)(a) and (b).

The Court further orders that the motion to amend the application to add an additional exhibit is GRANTED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 15 2015
Date

Chief Clerk

APPENDIX E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

AVERN BURNSIDE,

Defendant.

CASE NO. 09-25749-FC

JUDGE JOSEPH J. FARAH

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court held in the City of Flint, County of Genesee, State of Michigan, on the _____ day of July, 2015.

PRESENT: HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE

Still vexed by his failure to prevail at trial and the confirmation of that failure by two appellate courts and, no doubt, additionally motivated by the discomfort of the lengthy prison sentence imposed, Defendant Burnside now seeks relief from judgment of his conviction and sentence under MCR 6.501 et seq. For the reasons stated below, the Court rejects each of his contentions as groundless.

The basic facts, apparently accepted as true by the jury, concern Burnside beating up one woman, his girlfriend Leah Watson, in a car as he drove in Flint. Another woman driving along, Antwyne Ledesma,[1] yelled at Burnside to stop hitting Watson, as she was alongside the Burnside/Watson vehicle. Apparently Burnside's misogynistic tendencies knew no boundaries so he switched lanes and followed Ledesma and OPENED FIRE ON HER VEHICLE! Watson's testimony was a mixed bag of inconsistencies but, at trial, she testified against Burnside. She indicated Burnside was yelling and screaming at her and grabbing her hair and shoving her head down. She said Burnside shot into Ledesma's car. She explained her inconsistencies were prompted by her fear of Burnside. Burnside was convicted and sentenced to lengthy prison sentences for the assault on Ledesma as well as gun charges.

Burnside now challenges Watson's testimony and the People's use of it. Burnside's arguments center around Watson's May 13, 2014 affidavit (attached to his motion) largely recanting her testimony as untrue (apparently she mistook her own boyfriend, Burnside, for someone else) and remonstrating about police and prosecutor

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[1] Ledesma did not know Burnside or Watson and apparently interceded as a Good Samaritan of sorts.

misbehavior in prevailing on her to identify Burnside as the man who was beating her up and who had previously shot at her after a spat.

Burnside's argument is unavailing in either regard. There was no prosecutorial or police misconduct. Watson's vacillation in her testimony was well-known. Her "claim" of misconduct was reflected in an April 8, 2010 affidavit. Apparently attempting to shield her abusive boyfriend from being held responsible for shooting at another woman, who had the misfortune of coming across Watson and Burnside as Burnside was pulling Watson's hair and slamming her head into the dashboard of his car, Watson desired non-involvement in the case. This of course changed and changed again. In any event, there was nothing about which the People were aware that suggests they presented perjured testimony. Witnesses often vacillate in this type of matter, maybe more so than in others. Simply because the prosecutor insisted that Watson simply tell the truth (an apparently moving target for Watson) does not cast a negative light on the People.

Moreover, Watson's affidavit of May 13, 2014, a full two years after her trial testimony, was not known to the defendant but its substance was. The particulars of Watson's testimony were well-known (her previously filed affidavit, her vacillations, her inconsistencies) and were the proper subject of cross examination. Furthermore, a recanting witness's affidavit is held in low regard, People v Canter, 197 Mich App 550, 559-562 (1992), and the test for a new trial award based on new evidence (even if this could be so classified) is demanding. Compare People v Cress, 468 Mich 678 (2003) and contrast People v Mechura, 205 Mich App 481, 483-484 (1994).

In sum, no relief is warranted on Burnside's claim.[2] [3]

Burnside next claims reversal is warranted because of the erroneous admission of certain phone conversations that were not "authenticated and trustworthy." The various issues surrounding these tape recordings, which pertained to Burnside's attempt to cajole witnesses into non-cooperation, were the subject of repeated motions, hearings and orders. In particular, the Court entered an order specifically addressing a panoply of issues (including relevance and authentication, the subject of Burnside's request now) about the admissibility of the taped conversations. No issue remains concerning the admissibility of the taped conversations, and the dead issues concerning the taped conversations are not revived at this juncture by Burnside's groundless assertions. A review of the Court of Appeals' opinion in Burnside's direct appeal reveals that the tape issues were not raised by either of Burnside's counsel or even Burnside himself in his Standard 4 brief. Review is foreclosed and, even if it were not, no merit exists in Burnside's belated argument.

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[2] The Court has considered Burnside's claim on its "merits."

[3] It is interesting to note that Burnside himself calls Watson "a liar." (See page 17 of his brief.) A liar at exam? In police statements? In her first affidavit? At trial? In her second affidavit? Simply pathetic. Given Watson's second affidavit was signed two years after her trial testimony, it is not immediately apparent when precisely she became "a liar."

Burnside next argues that he is entitled to a new trial because the verdict was against the great weight of the evidence. Burnside's argument here sets a new standard for absurdity. More than ample evidence existed for convicting Burnside. Indeed in the Court of Appeals' affirmance of conviction – in spite of that Court's finding of evidentiary error – the evidence against Burnside was called "compelling" and "significant." Moreover, raising for the first time, at this juncture, evidentiary insufficiency bespeaks the utter absurdity in Burnside's contention, now apparently for the first time, of evidentiary insufficiency, by whatever nomenclature.

Burnside next argues he was denied the effective assistance of counsel because counsel failed to compel the People to furnish "exculpatory" phone calls from the county jail from where Burnside was cajoling witnesses and because counsel failed to let Burnside hear some of the tapes. This groundless claim requires little discussion. The tape recording issues were fully litigated, not pressed on appeal, and are of no merit at this juncture, even as characterized. All these shortcomings aside, Burnside fails to indicate to any level of persuasion how the outcome of his trial would have been different.

Finally, Burnside assails appellate counsel. (Adding counsel to the list of wrongdoers that includes the heavy-handed investigating officer; the complicit assistant prosecutor, who also engaged in unfair trial tactics; his lying,[4] girlfriend witness; and his trial counsel.) Appellate counsel's transgression is the failure to raise Burnside's meritless claim that trial counsel was ineffective. No deficiency occurred as appellate counsel was not required to raise meritless issues: two times zero is still zero.

In the final analysis, Burnside's motion and brief for relief from judgment, while long in length, high in gloss, and marked by the pressed breath of pseudo-merit, must now succumb to the asphyxiative grip of legal reality. While vexing, at least Burnside may take comfort, cold-as-it-might be, that his efforts as fully undertaken were seriously considered and in that undertaking and consideration, he may find solace as the decades of his imprisonment unfold.

For the foregoing reasons, Burnside's motion for relief from judgment is denied.

IT IS SO ORDERED.

JOSEPH J. FARAH, Circuit Judge

Dated 2/14/15

[4] His words.

APPENDIX F

Order

Michigan Supreme Court
Lansing, Michigan

October 28, 2014

149464

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 149464
COA: 309807
Genesee CC: 09-025749-FC

AVERN LEE BURNSIDE,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the April 17, 2014 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., would grant leave to appeal.

t1020

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 28, 2014

Clerk

APPENDIX G

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AVERN LEE BURNSIDE,

Defendant-Appellant.

UNPUBLISHED
April 17, 2014

No. 309807
Genesee Circuit Court
LC No. 09-025749-FC

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendant, Avern Lee Burnside, appeals as of right from his jury trial convictions of assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227(2), felon in possession of a firearm, MCL 750.224f, discharging a weapon from a vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for the assault with intent to murder conviction, two years' imprisonment for the felony-firearm conviction, and 2-1/2 to 15 years' imprisonment for each of the remaining three convictions. We affirm.

The prosecution presented evidence at trial to establish that at approximately 12:30 p.m. on July 30, 2009, defendant was driving a black SUV on Court Street in Flint, Michigan while physically assaulting his girlfriend, Leah Watson, who was sitting in the front passenger seat. Antwyne Ledesma was driving on the same road and witnessed defendant's conduct. When the two cars pulled up to a red light, Ledesma, whose windows were down, yelled "leave her alone; you're not f***in' right." Meanwhile, Watson was screaming, hollering, and asking for help. When the light turned green, instead of turning left, as he was in the left turn lane to do, defendant continued on Court Street and followed Ledesma. Defendant pulled alongside Ledesma's car and fired two shots at her. Ledesma's car was struck by one bullet, but she escaped uninjured.

I. SERGEANT BROWN'S TESTIMONY

In his first brief on appeal,[1] defendant argues that the trial court abused its discretion in allowing Sergeant Mitch Brown to give his opinion on the behavior of domestic violence victims and to testify that Leah Watson was a "classic case" of a domestic violence victim. We agree that the trial court abused its discretion, but conclude that the error was harmless.

We review the trial court's decision on a preserved evidentiary issue for an abuse of discretion. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). This Court also reviews a trial court's decision to admit or exclude expert witness testimony, and a trial court's decision on an expert's qualifications, for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Mahone*, 294 Mich App at 212.

Under MRE 701, a lay witness can provide opinion testimony that is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 702 addresses expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"[W]hether expert testimony is beyond the ken of common knowledge is a commonsense inquiry that focuses on whether the proposed expert testimony is on a matter that would be commonly understood by the average person." *People v Kowalski*, 492 Mich 106, 123; 821 NW2d 14 (2012). Expert testimony may allow the jury to "intelligently evaluate" a foreign experience in cases where "certain groups of people are known to exhibit types of behavior that are contrary to common sense and are not within the average person's understanding of human behavior." *Id.* at 124. For example, expert testimony can be used to help the jury understand the behavior of a child who has been the victim of sexual abuse, or the actions of a domestic violence victim. *Id.*; *People v Peterson*, 450 Mich 349, 375-377; 537 NW2d 857 (1995); *People v Christel*, 449 Mich 578, 591-596; 537 NW2d 194 (1995).

In *Christel*, 449 Mich at 592, our Supreme Court stated that expert testimony may be needed to explain why "a complainant endures prolonged toleration of physical abuse and then attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or

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[1] After defendant's first appellate counsel withdrew, this Court granted new counsel leave to file a supplemental brief. See *People v Burnside*, unpublished order of the Court of Appeals, entered September 25, 2013 (Docket No. 309807). In addition, defendant filed a Standard 4 brief.

friends, or denies or recants the claim of abuse." The Supreme Court held that such expert testimony is only admissible when "it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified." *Id.* at 580. Even then, an expert "may not opine whether the complainant is a battered woman, may not testify that defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness." *Id.* at 580.

In the case at bar, Sergeant Brown testified:

> In my experience . . . this would be a classic case of somebody that was involved in domestic violence. Initially, make the report, is scared to death. And then try to stick up or change the complaint or go back, so that – almost feeling like they were the perpetrator by getting this person in trouble because this person had assaulted them or had done something. I would, you know, again say this would be a classic case of somebody that was a victim of domestic violence.

The trial court abused its discretion in allowing Sergeant Brown to testify as a lay witness about the behavior of domestic violence victims. Sergeant Brown was not qualified as an expert in the area of battered woman syndrome or domestic violence, and only a properly qualified expert may testify on these subjects. See *Christel*, 449 Mich at 579-580. Other than briefly saying that he had prior experience with domestic violence victims, Sergeant Brown did not demonstrate "knowledge, skill, experience, training, or education" from which he could form an opinion on the behavior of domestic violence victims. See MRE 702. Yet, despite not being qualified as an expert, Sergeant Brown provided testimony that would ordinarily be within the realm of expert testimony. Indeed, his testimony was meant to explain Watson's behavior because it was "contrary to common sense" and "not within the average person's understanding of human behavior." See *Kowalski*, 492 Mich at 124. This behavior included avoiding a subpoena to testify, inculpating defendant in her preliminary examination testimony, and then writing a letter to recant that testimony. Sergeant Brown testified that domestic violence victims often make a report and then try to recant it because they feel like the perpetrator. However, only a properly qualified expert can testify on matters "beyond the ken of common knowledge." *Id.* at 123. See also *Peterson*, 450 Mich at 375-377.

Furthermore, even qualified experts "may not opine whether the complainant is a battered woman, may not testify that defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness." *Christel*, 449 Mich at 580. Sergeant Brown opined that Watson was a domestic violence victim, or battered woman, when he testified that this was "a classic case of somebody that was a victim of domestic violence." Thus, his testimony was inadmissible. *Id.*

Nonetheless, reversal is not required because the error did not result in a miscarriage of justice. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an

examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In determining if the error resulted in a miscarriage of justice, this Court asks whether "it is more probable than not that a different outcome would have resulted" absent the error. *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010) (internal quotation marks omitted). Defendant has the burden of proving that the error was outcome determinative, or resulted in a miscarriage of justice. *Id.*

Sergeant Brown's testimony regarding the behavior of domestic violence victims was intended to explain why Watson's actions and statements were so inconsistent. This evidence was cumulative to properly admitted evidence because Watson herself explained why she changed her story. Watson testified that defendant verbally, emotionally, and physically abused her. She said that she did not tell Sergeant Brown the truth at first because she was scared of defendant and she did not want to get him in trouble. After Watson testified at defendant's preliminary examination, he told her she was ruining his life and everything was her fault. Watson then wrote a letter recanting her testimony. Watson testified that at that time, she would have done anything necessary to keep defendant from going to jail.

Moreover, the error was not outcome determinative because the evidence of defendant's guilt was compelling. Telephone calls between Watson and defendant while defendant was incarcerated corroborated Watson's explanation for her inconsistent actions and further implicated defendant. During one conversation, defendant told Watson to avoid getting subpoenaed because if she went to court, Ledesma would probably recognize her. When Watson did get subpoenaed, defendant was not happy with her. This evidence supports Watson's testimony that she lied because defendant told her to and she was afraid of him. It is also evidence of defendant's guilt and his plans to cover up his crime and avoid conviction. During another conversation, defendant told Watson, "last time I checked, if it weren't for arguing with your mother-f*****' a**, s*** wouldn't even be like this." This is also evidence of an abusive relationship, which corroborates Watson's testimony, and an implied admission of guilt by defendant. Given the evidence that explains Watson's inconsistent behavior and incriminates defendant, the erroneous admission of Sergeant Brown's opinion testimony was not outcome determinative. See MCL 769.26; *Gursky*, 486 Mich at 619.

II. PROSECUTORIAL MISCONDUCT

Defendant also contends in his first brief that the prosecutor's misconduct denied him a fair trial. We disagree.

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to any of the alleged prosecutorial misconduct below. Therefore, this issue is unpreserved.

Generally, this Court reviews claims of prosecutorial misconduct de novo "to determine whether the defendant was denied a fair trial." *People v Dunigan*, 299 Mich App 579, 588; 831

NW2d 243 (2013). When a claim of prosecutorial misconduct was not preserved, this Court reviews for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011) (quotation omitted).

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Meissner*, 294 Mich App at 456, citing *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Under a plain error analysis, reversal for prosecutorial misconduct is not required "where a curative instruction could have alleviated any prejudicial effect." *Unger*, 278 Mich App at 235. "[P]roper jury instructions cure most errors because jurors are presumed to follow the trial judge's instructions." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

Defendant argues that the prosecutor's opening statement was argumentative. He points to these sections of the prosecutor's opening statement, among others:

> Intent. Think about intent. Had a gun. Pulled the gun out. Wasn't supposed to have a gun. Takes the gun and shoots at somebody he doesn't even know, in the car right next to her.
>
> * * *
>
> Just because the Defendant was a bad shot and didn't hit her doesn't mean he didn't mean to kill her.
>
> * * *
>
> Think about shooting into a car with somebody driving right next to you. Why would you do that if you didn't mean to kill 'em?

In her opening statement, a prosecutor is allowed to state facts that she intends to prove at trial. *Meissner*, 294 Mich App at 456; *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). In this case, the statements cited above were all supported by the evidence produced at trial. Ledesma testified that defendant was driving in the lane next to her. She saw him raise his arm and then she heard a gunshot. Watson testified that defendant reached across her and fired at Ledesma's car, which was right next to them. Thus, defendant's claim is meritless. In addition, the prosecutor's opening remarks were not excessively inflammatory, and the prejudice, if any, that resulted from them could have been cured by an instruction. See *Mesik (On Reconsideration)*, 285 Mich App at 542; *Unger*, 278 Mich App at 235. In fact, the trial court specifically instructed the jury that the attorneys' opening statements were not evidence. The court also told the jurors that they must only consider the evidence admitted at trial when deciding the case.

Defendant also argues that the prosecutor improperly vouched for Watson's credibility. During her opening statement, the prosecutor said the following about Watson's appearance at the preliminary examination:

> So, she appeared. She told the truth; it was Avern Burnside in that vehicle. It was Avern Burnside who was hitting me. Avern Burnside who shot at the woman.

It is improper for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Meissner*, 294 Mich App at 456 (quotation omitted). The prosecutor's statement in this case did not indicate that she had special knowledge concerning Watson's truthfulness. In addition, the comment was isolated and made in the context of explaining Watson's inconsistent behavior and statements. During this explanation, the prosecutor made it clear that she was summarizing what she expected Watson to say during her testimony:

> She'll tell you that she didn't want to go to court. . . . She'll tell you that she tried [to] avoid getting served so she wouldn't have to go to court. . . . Ms. Watson will also tell you that after the preliminary exam she wrote a letter, and she'll read it to you. She wrote a letter saying everything I said wasn't true at that exam. The police and prosecutor made me do it. She'll tell you why she did that.

Consequently, we find that the prosecutor's comments were not improper. In addition, an instruction could have cured the prejudice, if any, caused by her statements. See *Mesik (On Reconsideration)*, 285 Mich App at 542; *Unger*, 278 Mich App at 235.

Finally, defendant argues that the prosecutor elicited improper opinion testimony from Sergeant Brown. During the prosecutor's direct examination, Sergeant Brown testified:

> *Q.* Have you ever shot at a moving vehicle before?
>
> *A.* One time.
>
> *Q.* Why were you shooting at a moving vehicle[?]
>
> *A.* It was an incident when I was working here in April of 1995, an armed robbery. . . . I exited my vehicle and shot at the person trying to stop them.
>
> *Q.* Did you hit him?
>
> *A.* No, I didn't.
>
> *Q.* Did you mean to?
>
> *A.* I was trying to stop him. Yes, I was trying to shoot him.
>
> *Q.* Did you mean to kill him?
>
> *A.* If he was killed as a result of it, yes, I was trying to stop him.

Sergeant Brown's testimony was not relevant to a fact at issue. Sergeant Brown's intent when he shot at a vehicle had no bearing on defendant's intent when he shot at Ledesma's vehicle. It was improper for the prosecutor to solicit such testimony. Nonetheless, reversal is

not required because if defense counsel had objected, an instruction would have cured the error. See *Unger*, 278 Mich App at 235. Moreover, reversal is not required because, as discussed *supra*, evidence of defendant's guilt was compelling.

Defendant contends that the cumulative effect of all of the alleged instances of prosecutorial misconduct deprived him of a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Reversal is only warranted, however, if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* Here, the only improper conduct by the prosecutor was to solicit intent testimony from Sergeant Brown, which we conclude could have been cured by way of a jury instruction.

III. OTHER ACTS EVIDENCE

In his second brief and Standard 4 brief, defendant claims that the trial court abused its discretion in allowing the prosecutor to present prior bad acts evidence under MRE 404(b). The prior incident occurred in 2005 when defendant allegedly fired a shot at Watson while she was driving away from him after the two had argued. We agree that the trial court abused its discretion in admitting this evidence, but conclude that reversal is not required because the error did not result in a miscarriage of justice.

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009), citing *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The trial court abuses its discretion when "it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id.* at 670. When an evidentiary question involves the interpretation of law, like whether evidence is precluded by a statute or court rule, appellate review is de novo. *People v Buie*, 298 Mich App 50, 71; 825 NW2d 361 (2012).

MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible for other reasons, like to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b)(1).

When the prosecution seeks to admit evidence under MRE 404(b), it must first "offer the 'prior bad acts' evidence under something other than a character or propensity theory." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the prosecution must demonstrate that the evidence is relevant to a material fact, as required by MRE 401 and MRE 402, for a purpose other than showing the defendant's character or criminal propensity. *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). "Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403." *Waclawski*, 286 Mich App at 671, quoting *Knox*, 469 Mich at 509. If the prosecution satisfies these requirements, the defendant can request a limiting instruction pursuant to MRE 105 that directs the jury to consider the evidence only for noncharacter purposes. *Mardlin*, 487 Mich at 616. MRE 404(b) is an inclusionary rule of evidence. *Id.* at 616. "Evidence is *inadmissible* under this rule *only* if it is

relevant *solely* to the defendant's character or criminal propensity." *Id.* at 615-616 (emphasis in original).

Although the prosecution recited a proper purpose, i.e., establishing defendant's intent, the trial court abused its discretion in admitting the evidence because the prior acts evidence was not probative of defendant's intent when he shot at Ledesma's car. *Crawford*, 458 Mich at 387. ("Mechanical recitation of knowledge, intent, absence of mistake, etc., without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)."). To be probative, evidence must "make the existence of any fact that is of consequence to the determination of the act more probable or less probable than it would be without the evidence." MRE 401. See also *Crawford*, 458 Mich at 389-390. With respect to 404(b) evidence, the proffered evidence must be probative of something other than the defendant's character or propensity to commit the crime. *Id.* at 390.

Prior bad acts evidence can be relevant to prove a defendant's intent when the defendant is claiming innocent intent, inadvertence, or mistake. See, e.g., *Mardlin*, 487 Mich at 629; *People v VanderVliet*, 444 Mich 52, 75-81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In the instant case, however, defendant did not claim that he accidently shot at Ledesma's car. Rather, he claimed that even if he was the shooter (which he also denies), he did not have the intent to kill that is necessary to support a conviction of assault with intent to kill. Evidence of the 2005 shooting is not probative of this issue in part because there was no indication, based on the facts provided, that defendant intended to kill Watson when he shot at her car in 2005. Even if provided, such evidence would not support the inference that defendant had the specific intent to murder. Rather, this evidence is only relevant to show defendant's character, or his propensity to lose his temper, carry a gun, or shoot at someone's vehicle when he is angry. Evidence is not admissible when it is only relevant to show "defendant's inclination to wrongdoing in general." *VanderVliet*, 444 Mich at 63. Such character evidence encourages the jury to focus on the type of person defendant is, and to conclude that he is the type to commit the crime with which he is charged. *Id.* This leads to "a substantial danger that the jury will overestimate the probative value of the evidence." *Id.* at 63-64.

Although the trial court abused its discretion in allowing evidence of the 2005 shooting, this error was harmless. If bad acts evidence is erroneously admitted, the "defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). In other words, reversal is not required unless it is more probable than not that the error was outcome determinative. *Id.*

Here, although evidence of the 2005 shooting was improper character evidence, the jury properly heard evidence of defendant's character throughout the trial. For example, Watson testified that defendant verbally, emotionally, and physically abused her. She said that on July 30, 2009, she and defendant were having an argument and defendant grabbed her hair and tried to slam her head against the dashboard. Ledesma corroborated Watson's testimony and said that she saw a black man assaulting a white woman in an SUV, which police subsequently learned was registered to Watson. The jury also heard evidence of defendant's character from the telephone conversations Watson and defendant had while he was in jail. For example, defendant attempted to protect himself by telling Watson to avoid getting subpoenaed, and by asking

Watson to lie for him. Furthermore, the evidence of defendant's guilt was significant, and it is unlikely that the jury found defendant guilty because he committed a somewhat similar act in 2005. Ledesma testified that she saw the driver of the SUV raise his hand and then she heard a gunshot. Watson testified that defendant reached across her and fired two shots. The similarities between Watson's and Ledesma's accounts bolstered the credibility of both these witnesses. In addition to these corroborated accounts, the phone calls between Watson and defendant while he was in jail were further proof of defendant's guilt. The phone calls demonstrate that defendant was trying to cover up his involvement in the shooting. He encouraged Watson to avoid being subpoenaed, to lie about what happened, and to refuse to speak to the police. In another phone call, defendant told Watson that he would not be in trouble if he had not argued with her. Consequently, we find that defendant is not entitled to relief.

IV. SPEEDY TRIAL

In his Standard 4 brief, defendant argues that he was denied his right to a speedy trial. We disagree.

"A defendant must make a formal demand on the record to preserve a speedy trial issue for appeal." *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999) (quotation omitted). During several pretrial hearings, defense counsel noted that the case was substantially delayed and told the court that defendant wanted to go to trial soon. However, defendant never made a formal demand for a speedy trial or requested dismissal on this basis, and the trial court never ruled on this issue. Therefore, this issue is unpreserved. *Id.*

"The determination whether a defendant was denied a speedy trial is a mixed question of fact and law." *Waclawski*, 286 Mich App at 664. We review the trial court's factual findings for clear error and questions of law de novo. *Id.* However, "[u]npreserved, constitutional errors are reviewed for plain error affecting substantial rights." *People v Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006).

A defendant has the right to a speedy trial under both the United States Constitution and the Michigan Constitution. US Const, Am VI; Const 1963, art 1, § 20; *Waclawski*, 286 Mich App at 665. To determine if a defendant has been denied his right to a speedy trial, we consider four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013) (quotation omitted); see also *Vermont v Brillon*, 556 US 81, 90; 129 S Ct 1283; 173 L Ed 2d 231 (2009). When the delay is more than 18 months, prejudice is presumed and the prosecution has the burden of showing that the defendant was not prejudiced. *People v Williams*, 475 Mich 245, 262; 716 NW2d 208 (2006).

Defendant was arraigned on November 2, 2009. His trial began on February 22, 2012, about 27 months later. Thus, the first factor – the length of delay – weighs in defendant's favor. Because a delay of more than 18 months is presumptively prejudicial, this Court must consider the remaining factors. See *id.*; *Waclawski*, 286 Mich App at 666.

The second factor – the reason for delay – weighs against defendant. When considering this factor, the court must determine if "each period of delay is attributable to the defendant or

the prosecution." *Waclawski*, 286 Mich App at 666. When delays are unexplained, they are attributed to the prosecution. *Id.* "Although delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id.*, quoting *Williams*, 475 Mich at 263.

As defendant argues, the primary reason for the delay before his trial began can be attributed to the time needed to transcribe the jail phone call recordings between defendant and Watson. The transcripts were not completed and delivered to the parties until sometime around May 31, 2011. However, the time it took to transcribe the phone recordings should be given "a neutral tint" and "assigned only minimal weight." See *Waclawski*, 286 Mich App at 666.

In addition, the record shows that it was defense counsel who requested that the recordings be transcribed. Delays caused by defendant or defense counsel are generally attributable to defendant. *Brillon*, 556 US at 90-91. At a pretrial hearing on May 17, 2010, defense counsel said:

> One of the problems, Judge, I've got – basically I was handed two CDs with these telephone conversations. The only way my client can hear these is if I'm there with a computer, at the jail with a computer, because my client is in the jail obviously.
>
> So, my client would like a transcript of what's contained in the tapes so we can go through them and adequately prepare for trial.

When the transcripts were still not completed by April 18, 2011, the court asked whether defense counsel still considered the transcripts necessary to his defense. Defense counsel answered affirmatively, stating that he and defendant had to know what was said in the recordings before they could go to trial. However, the record shows that defense counsel had CDs of the recordings for almost a year at this point. He and defendant could have listened to the recordings.

Other delays were also attributable to defendant. On August 3, 2011, defense counsel asked the court to order a competency evaluation for defendant. The court granted the request. The results of the competency evaluation were not received until sometime around November 14, 2011.[2]

On November 1, 2011, defendant, acting in propria persona, filed a complaint for superintending control in this Court. Defendant called the document a complaint for "mandamus." This Court denied defendant's complaint for superintending control. *Burnside v Genesee Circuit Judge*, unpublished order of the Court of Appeals, entered January 27, 2012 (Docket No. 306913). While defendant's action was pending in this Court, he asked the trial

[2] Defendant was found competent to stand trial.

court to delay trial until this Court reached a decision. The trial court agreed to do so and set the trial for January of 2012.

On December 19, 2011, defense counseled relayed defendant's request to have the swearing out of the warrant transcribed. The court agreed to order the proceeding transcribed. The transcript was filed on January 9, 2012. Thus, defendant's request for this transcript caused further delay. Overall, defendant's own actions caused nearly all of the delays in this case, and we find that the second factor weighs against defendant. *Brillon*, 556 US at 90-91.

The third factor – defendant's assertion of his right to a fair trial – also weighs against him. Defendant did not make a formal demand for a speedy trial or file a motion to dismiss on this ground.

Finally, the fourth factor also weighs against defendant because he was not prejudiced by the delay. In his Standard 4 brief, defendant claims that he was prejudiced because the delays caused witness memories to dim. "[S]uch general allegations of prejudice are insufficient to establish that [a defendant] was denied his right to a speedy trial." *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). To support his claim that he was prejudiced by the delay, defendant claims that Watson was unable to remember when she wrote a letter to him in which she allegedly apologized to defendant for her role in defendant's arrest. As a result of Watson's inability to remember the letter, the letter was not admitted at trial. Defendant's claim is meritless. Initially, defendant failed to make an offer of proof at trial concerning the contents of the letter. Thus, he fails to verify his claim as to the contents of the letter, and we need not speculate as to its contents. Moreover, even if defendant's representations of the contents of the letter were true, he ignores the fact that the recorded jail conversations contained similar statements by Watson. Therefore, defendant was not prejudiced.

In conclusion, despite the lengthy delay in this case, the factors weigh against finding that defendant's right to a speedy trial was violated. Defendant has not established plain error affecting his substantial rights.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in both his first appellate brief and his Standard 4 brief that his trial counsel was ineffective. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or a *Ginther*[3] hearing with the trial court. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant did not move for a new trial or a *Ginther* hearing in the trial court. Therefore, our review is limited to mistakes apparent on the record. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *Rodriguez*, 251 Mich App at 38. The circuit court's factual findings are reviewed under a clearly erroneous standard. MCR 2.613(C).

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to establish ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010) (internal citation and quotation marks omitted). See also *Jordan*, 275 Mich App at 667. Generally, a defense attorney has discretion over his method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In his first appellate brief, defendant argues that his trial counsel was ineffective for failing to object to the prosecutor's misconduct. For the reasons discussed above, there was no prosecutorial misconduct with respect to the prosecutor's opening statement or vouching for Watson's credibility. However, it was improper for the prosecutor to elicit opinion testimony from Sergeant Brown about domestic violence victims. Defendant's trial counsel should have objected to this error. Nonetheless, this failure was not outcome determinative. See *Jordan*, 275 Mich App at 667. Additionally, defendant's trial counsel should have objected to Sergeant Brown's testimony about his own experience shooting at a vehicle because such testimony was not relevant to defendant's intent when he shot at Ledesma's vehicle. However, defense counsel's failure to object does not entitle defendant to relief because, as discussed *supra*, defendant was not prejudiced by this testimony. See *id.*

Lastly, defendant claims in his Standard 4 brief that his trial counsel was ineffective for failing to file a motion to dismiss based on the denial of his right to a speedy trial. As discussed above, most of the trial delays were attributable to defendant and he was not prejudiced by the delay. He was not denied his right to a speedy trial. Counsel is not ineffective for failing to make a meritless argument. *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AVERN LEE BURNSIDE,

Petitioner,

Case Number: 2:16-CV-13358
HONORABLE VICTORIA A. ROBERTS

v.

SHERMAN CAMPBELL,

Respondent.
_____/

JUDGMENT

Pursuant to this Court's Order dated August 28, 2019 , this cause of action is DISMISSED.

IT IS ORDERED.

Dated at Detroit, Michigan this 28th day of Ausgust, 2019.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/ Victoria A. Roberts

APPROVED:

s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AVERN LEE BURNSIDE,

Petitioner,

Case Number: 2:16-CV-13358
HONORABLE VICTORIA A. ROBERTS

v.

SHERMAN CAMPBELL,

Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT (ECF # 37) AND MOTION FOR CERTIFICATE OF APPEALABILITY (ECF # 38)

On August 28, 2019, the Court denied Petitioner Avern Burnside's habeas corpus petition filed under 28 U.S.C. § 2254 and declined to issue a certificate of appealability. (ECF No. 35.) Now before the Court are Petitioner's Motion for Relief from Judgment and Motion for Certificate of Appealability. The Court denies the motions.

Petitioner seeks relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(1). Relief from judgment may be granted under Rule 60(b)(1) where the Court's judgment was the result of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). A motion for relief under Rule 60(b)(1) is intended to provide relief to a party in two instances: "(1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *Cacevic v. City*

of Hazel Park, 226 F.3d 483, 490 (6th Cir. 2000).

Petitioner argues that the Court failed to adjudicate his claim that the factfinding of the trial court and the Michigan Court of Appeals are not entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). In fact, the Court set forth the presumption of correctness accorded state court factual determination and that this presumption may only be rebutted with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). Petitioner contended in his petition and supplemental pleadings that the trial court and court of appeals improperly assessed and weighed the credibility of witnesses, particularly the victim's credibility. In considering and denying all of Petitioner's claims, this Court found no showing that either the trial court or the Michigan Court of Appeals made an unreasonable determination of the facts. Petitioner fails to show that the Court made an error of law or fact and the motion will be denied.

Petitioner also moves for a certificate of appealability. Because the Court denied a certificate of appealability at the time the Court denied the habeas petition, the Court construes Petitioner's motion as a motion for reconsideration.

Pursuant to Local Rule 7.1(h), a party seeking reconsideration must demonstrate (i) a "palpable defect" by which the court and the parties have been "misled," and (ii) that "correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(h)(3). A "palpable defect" is an error that is "obvious, clear, unmistakable, manifest or plain." *United States v. Cican*, 156 F. Supp. 2d 661, 668 (E.D. Mich. 2001).

Petitioner asks the Court to issue a certificate of appealability on two claims: (i) the cumulative effect of trial errors violated his right to due process and a fair trial; and (ii) the Michigan Court of Appeals' factual findings are not entitled to a presumption of correctness. The Court denied Petitioner's cumulative error claim because it is not cognizable on federal habeas review. The Sixth Circuit Court of Appeals has repeatedly and frequently held that constitutional claims may not be cumulated to grant habeas relief. *Lorraine v. Coyle,* 291 F.3d 416, 447 (6th Cir. 2002). Contrary to Petitioner's argument, that remains the law of the Sixth Circuit. *See Hill v. Mitchell,* 842 F.3d 910, 948 (6th Cir. 2016). The Court finds no basis for granting reconsideration.

Similarly, the Court declines to grant reconsideration for Petitioner's claim that the state courts' factual findings are not entitled to a presumption of correctness. Petitioner's argument merely presents issues already ruled upon by this Court, either expressly or by reasonable implication, when the Court denied his habeas petition and declined to issue a certificate of appealability.

Petitioner fails to convince the Court that it made an obvious, clear, unmistakable, manifest, or plain error by denying a certificate of appealability and reconsideration will be denied.

The Court DENIES Petitioner's Motion for Relief from Judgment (ECF No. 37) and Motion for Certificate of Appealability (ECF No. 38).

SO ORDERED.

s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

DATED: 3/4/2020

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

AVERN LEE BURNSIDE,

Petitioner,

v.

RANDEE REWERTS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME II

Avern Lee Burnside # 394665
In Propria Persona
Carson City Correctional Facility
10274 Boyer Road
Carson City, Michigan 48811

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APPENDIX J

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 09-25749-FC

AVERN L. BURNSIDE,

Defendant.
_____/

DEFENDANT'S MOTION TO EXCLUDE JAIL TAPED CONVERSATIONS

BEFORE THE HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE

FLINT, MICHIGAN - MONDAY, MAY 17, 2010

APPEARANCES:

For the People: RICHMOND M. RIGGS P33863
ASST. PROSECUTING ATTORNEY
100 Courthouse
Flint, Michigan 48502

For the Defendant: JOHN A. TOSTO P56579
Attorney at Law
503 S. Saginaw Street, Suite 1410
Flint, Michigan 48502
(810) 244-5862

Recorded by: Via Video Recorder

Transcribed by: Shelie Robinson CER 6913
Certified Electronic Recorder
(810) 424-4454

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EXHIBITS:

None

WITNESSES:

None

about Leah Watson and I don't blame you.

MR. TOSTO: But again, Your Honor, these tapes, these calls are voluminous. I don't have --

THE COURT: Let's go first things first. I see no reason to exclude the tapes.

Now, the question is are you entitled to a transcript? Potentially, you are entitled to a transcript.

You're entitled -- however, if the People introduce five minutes of nine hours, you are entitled to introduce whatever rest and remainder you would like which ought in fairness be considered contemporaneous with what they want admitted so that you don't even have to wait until your cross-examination. You could have it admitted right then under rule 106.

So, get me, through Ms. Menear, an estimate, if you would, of how much you think it's going to cost and whether she would be willing to approve it.

Whatever you do, we would want this to be an estimate of cost up front, right, Ms. Morrow?

THE CLERK: Yes.

MR. TOSTO: Up front. So --

THE COURT: Because here's the problem. The typists charge one rate reasonable for courtroom

APPENDIX K

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 09-25749-FC

AVERN L. BURNSIDE,

Defendant.
_____/

PRETRIAL HEARING

BEFORE THE HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE

FLINT, MICHIGAN - TUESDAY, JULY 12, 2011

APPEARANCES:

For the People: KAREN HANSON P53588
ASST. PROSECUTING ATTORNEY
100 Courthouse
Flint, Michigan 48502

For the Defendant: JOHN A. TOSTO P56579
Attorney at Law
503 S. Saginaw Street, Suite 1410
Flint, Michigan 48502
(810) 244-5862

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None

WITNESSES:

None

but.

THE DEFENDANT: Your Honor, I want to inform the Court the transcripts, they are not accurate. Identified by dates alone, (inaudible) specifically refer to origin for I can know when the call was actually happened. They're not accurate. Nor can I utilize the alleged incorrectly information related to who is actually speaking.

The transcriber, Ms. Sandra Quill, identified Leah Watson, a friend of mine, for Heather. On the transcript disks, track three, one through 15, they are not in chronological order. They are saying words I did not say. Words are left out but only when it's beneficial to me. There are a lot of words that say indistinct on the transcripts, but only when it's beneficial to me.

They're void of exculpatory calls where Leah Watson stated she was sorry for lying at my preliminary examination.

Me and Leah Watson had a conversation that I was out of town when the crime happened. Leah Watson stated I'm not the person that did the crime. Leah Watson stated she was cheating on me with somebody else, that he the one that did the crime.

Leah Watson --

APPENDIX U

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 09-25749-FC

AVERN L. BURNSIDE,

Defendant.
_____/

PRETRIAL HEARING

BEFORE THE HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE

FLINT, MICHIGAN - WEDNESDAY, FEBRUARY 15, 2012

APPEARANCES:

For the People: KAREN HANSON P53588
ASST. PROSECUTING ATTORNEY
100 Courthouse
Flint, Michigan 48502

For the Defendant: JOHN A. TOSTO P56579
Attorney at Law
503 S. Saginaw Street, Suite 1410
Flint, Michigan 48502
(810) 244-5862

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EXHIBITS:

None

WITNESSES:

None

Flint, Michigan

Wednesday, February 15, 2012 - 11:10 a.m.

(All parties present)

THE COURT: People versus Burnside. We're handling pretrial motions here on this case for the trial that's starting next Wednesday before Judge Latchana.

Ms. Hanson or her office some time ago requested the use of 404(b) evidence and that's been outlined in a submission to the Court. Then we have to deal with whatever lingering issues there are on the tapes and transcripts concerning the jail conversations.

Ms. Hanson, would you like to present your argument on the 404(b) request?

MS. HANSON: Your Honor, I believe the Court and counsel have read the brief. I will indicate under *VanderVliet*, 444 Mich 52, and MRE 404(b), we are seeking to enter evidence of other acts to show -- and I think my predecessor here listed everything included in there, but I think we would be entering it to show intent, system of doing an act or identity.

I think we already went through this. I think counsel already indicated that his defense was going to be he wasn't there. It wasn't him. So, I

think identity is an issue in this case.

In the case before the Court, we have this defendant shooting into a car of a victim who tried to get the defendant from -- to keep from hitting his girlfriend that was in the car with him.

In the case that we are seeking to also use occurred in June of 2005 where this defendant actually was -- it's the same victim (sic) and she saw the defendant driving his vehicle in a parking lot at Welch and N. Chevy in the City of Flint. As they passed by each other, she stopped. The defendant jumped out of his vehicle and said, bitch, I wish you would pull off. She started to pull off. As she drove away, she heard a shot.

The same thing. He's angry. He's mad. He's shooting into a car. So, the same thing he's doing in this case. So, we would seek to enter that evidence through Leah Watson to prove motive, system of doing an act or identify.

THE COURT: Is Leah Watson the person who was in the --

MR. TOSTO: No.

THE COURT: -- car for the charged offense?

MS. HANSON: No.

MR. TOSTO: That was a misstatement, Judge.

THE COURT: Okay. Who was the person that's in the car on the charged offense?

MS. HANSON: I don't think that I said it was.

MR. TOSTO: You said the same victim in this case as the --

MS. HANSON: I'm sorry. Well, the victim of the domestic violence I guess I should say.

THE COURT: Okay.

MS. HANSON: No. The person in the car was Antwyne Ledesma. So, no. If I said that, I didn't mean to. I meant it's a domestic violence thing and both of his --

THE COURT: Is there any charge involving Ms. Ledesma as complainant?

MS. HANSON: In that case, no.

THE COURT: No. In the case before the --

MS. HANSON: In this case? Yes.

MR. TOSTO: She's the victim.

MS. HANSON: She's the victim in this case. He was shooting into her car.

THE COURT: Okay. All right.

MS. HANSON: So, maybe I didn't make myself clear.

THE COURT: I'm just making sure that I have

it clear in my mind. He is -- the allegation is in the 2009 situation which is before me is that he's having some rift with the girlfriend in his own car?

MS. HANSON: In his own car.

THE COURT: Okay. And that somebody says, hey, knock it off, what are you doing?

MS. HANSON: Correct.

THE COURT: Okay. Now, does he eventually -- the allegation, does he eventually shoot at the person who tried to intercede?

MS. HANSON: Yes.

THE COURT: Okay. And that's the victim in this case?

MS. HANSON: That's the victim in this case.

THE COURT: Okay. How about the person he was into it with in the car? Is there any charge on that?

MS. HANSON: We did not charge domestic violence.

THE COURT: Okay. All right.

MS. HANSON: Because at the exam, she kind of recanted and then can back and said, yes, it was true, and we didn't charge domestic violence.

THE COURT: Okay. Is she going to testify in this case?

away.

THE COURT: All right. So, the 2009 situation, he's in a car by absolute coincidence with Leah Watson, if the facts are believed, and Ledesma is in a car also, correct?

MS. HANSON: Right.

THE COURT: All right. Ledesma has words, leaves and I think the explanation was that he then follows Ledesma and the allegation is he shoots at her car.

MS. HANSON: Right.

THE COURT: Did he shoot at the glass? Did glass break in this situation, window glass?

MS. HANSON: It wasn't glass I don't believe. I think it was behind the driver's door.

THE COURT: Behind the driver's door.

MS. HANSON: In this case, it was behind the driver's door. Both cases.

THE COURT: Okay. All right. So, we have some degree of similarity. Now, of course, although these words are thrown around somewhat cavalierly from 404(b), if in fact the intention of the People to prove under 404(b) the intent of the defendant, all right -- going through our checklist from *VanderVliet* -- one, that's not a character purpose. That's not a

propensity situation. So, it's a proper purpose.

Two, is intent relevant in this case? Well, number one, it is an element of the offense. Number two, it appears that the argument might be along the lines of if somebody wanted to kill somebody in a car, they could have shot the window, not shot behind the window. Therefore, intent, the level of it, to scare, to do bodily harm or to murder becomes an issue.

If it becomes an issue, then the 2005 incident becomes relevant. If the question is about identification, hey, I wasn't even there, all right, then I need greater similarity and we may have that greater similarity here.

So, it may be admissible either way.

Now, the question is, although admissible under *VanderVliet*'s analysis, is it more prejudicial than probative? Okay. The prejudicial nature has to substantially outweigh the probative value under 403.

Let's go ahead and get it so that we're dealing with it precisely. We have it right here. Let's look at the language. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of

time, or needless presentation of cumulative evidence.

Well, Ms. Watson is going to testify in the charged offense. She's a listed witness in the charged offense. So, the amount of time that will be needed for her to describe this other incident seems to be minimal.

So, I don't believe that considerations of undue delay, waste of time or needless presentation of cumulative evidence is involved. Indeed, it's not cumulative evidence. It's about something totally different, albeit related.

Now, here's where we're concerned. Mr. Tosto is legitimately concerned. It's probative value substantially is outweighed by the danger of unfair prejudice. Okay.

Now, this is a balancing test that has to be performed. On the one side, how weighty is the evidence to demonstrate intent? Well, I would say for the reasons that are mentioned fairly weighty. On top of that, when the issue is intent, all we need for it to be relevant is an act of the same general category of the charged act. We don't need a high degree of similarity. In fact it is on the lowest rung of similarity. Intent is on the lowest rung, as opposed to identification which is on the highest rung.

So, it does appear to have pretty good probative value.

What's the prejudicial nature? Prejudice isn't defined as is this bad for the case. All evidence against you is bad for the case. All evidence for you is bad for the other side.

Is it that the jury will be swept away by considerations ancillary to and separate and apart from the real issues in the case? That's what's meant by prejudice.

Also, prejudice can entail an inability to meet the evidence. Well, this request is now two years old. So, it certainly doesn't come as any surprise that this was going to be attempted to be introduced. Mr. Tosto has even had a chance to interview Ms. Watson who he says told her (sic) I'm a liar, I just lied. Good. That can be explored. A jury may agree and say she's a complete liar.

Now, whether that has anything to do with whether or not they believe Ms. Ledesma might be a different question. Because in the end, they're going to have to believe Ms. Ledesma for the People to prove their case. Not just Ms. Watson. If they don't believe Ms. Watson, but they do believe Ms. Ledesma, it's not going to be very good for the defendant.

Okay.

So, that's the way that could go. So, you do have an element of prejudice here. At the same time, I don't know that I can say it substantially outweighs the probative value because we have the same Ms. Watson in both situations.

Now, some might say doesn't that mean you get more prejudicial? I would say no because we don't have a stranger to the situation. We have the same. Frankly, I don't even recall a case where the 404(b) witness happens to be the witness involved in the principal charge.

Now, what I'm concerned about though is will the jury figure he's a bad man acting consistently with his bad nature because Ms. Watson is involved in both situations? This is always the case and the possibility involved in 404(b) analysis.

Remember what *Martin* (phonetic) teaches which just came out two summers ago is the evidence becomes irrelevant and maybe even overly prejudicial if the only reason it's being introduced is to show bad character, that there will always be some spill over of bad character evidence, but so long as there's a proper purpose, that's mitigated.

A second mitigating aspect under *VanderVliet*

is the ability to request a limiting instruction, and that is up to the defense.

It seems to me that we do have sufficient safeguards here because we do have it connected to the case about intent. We do have the same witness that was on the scene who is going to testify anyway and was the 404(b). And we do have the ability to have a limiting instruction so that the jury doesn't take from the evidence that he's a bad guy that does this to women. I won't allow that. I won't allow that.

But to the extent that intent is raised as a defense and I believe it is, I will allow the 404(b) witness to testify. Some say she may not show up. If she doesn't show up, I guess we don't have anything to deal with. Because you can't just come in here and quote her. She's got to be on the witness stand.

MS. HANSON: The People understand.

THE COURT: So, if she appears for trial, then she will testify both as a listed witness and as a 404(b) witness.

Mr. Tosto, you don't have to decide now, but you can tell Judge Latchana if you want the limiting instruction under 105.

MR. TOSTO: Judge, just to correct Ms. Hanson, the police report indicates the incident. Ms.

worried about is 2009. Because they could believe 2005 and not believe 2009 and then he's acquitted. Okay.

So, Ms. Hanson, you may submit a consistent order.

Now, are you all set on the tapes? Did you get the tape you were looking for?

MR. TOSTO: Judge, I just received tape number four. That's the one we didn't have.

THE COURT: Okay.

MR. TOSTO: So, I'll have to let my client hear the ones we're interested in. That's fine.

THE COURT: All right. We're going to let the People use the tape that they want to establish voice identification and then the transcript they want and then Mr. Tosto may introduce those things that rule 106 would allow. But it doesn't seem like it would be much. It looks like a lot of tapes. But I can't imagine. Is this more than like two hours of tapes? I'm talking about playing tapes.

MS. HANSON: I'm not playing the tapes.

THE COURT: How much is --

MS. HANSON: I'm just playing the one.

THE COURT: How long is the tape that's being played?

authenticating voice where transcripts are available. Okay. I have not yet heard one thing about a discrepancy between tapes and transcripts.

So, the Court's ruling is the transcripts will be read. But the only tape that will be played is to authenticate voice which is a requirement. All right. Because you can't just say this piece of paper says this is Avern Burnside's voice. No.

You need a tape and somebody saying I know Burnside's voice. That's his voice. That's fine.

But as far as just playing tapes to play tapes, not when we have transcript. They're certified transcripts and we're using transcripts unless it's brought to my attention, and it has not been, that there's any discrepancy between the tapes and the transcripts.

MR. TOSTO: Whether there's a discrepancy or not, Judge, my client would like to have the right to play the tape. Because I think voice inflection is significant, is relevant, context is relevant and just dialect, everything.

THE COURT: The tapes will be introduced in evidence. They won't be played. If you want to draw the jury's attention to particular incidents where voice inflection, sarcasm, lack of seriousness,

APPENDIX M

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

vs

Case No. 09-25749-FC

AVERN LEE BURNSIDE,

Defendant.
_____/

JURY TRIAL - Volume I of III
BEFORE THE HONORABLE MARK LATCHANA, DISTRICT JUDGE, SITTING
FOR JOSEPH J. FARAH, CIRCUIT JUDGE
FLINT, MICHIGAN - WEDNESDAY, FEBRUARY 22, 2012

APPEARANCES:

For the People:	KAREN R. HANSON P-53588 Genesee County Prosecutor's Office 900 South Saginaw Street Flint, Michigan 48502 (810) 424-4417
For the Defendant:	JOHN A. TOSTO P-56579 503 S. Saginaw Street, Suite 1410 Flint, Michigan 48502 (810) 244-5862
Recorded by:	Via Video Recorder
Transcribed by:	Teresa A. Trosko, CER 5595 Certified Electronic Recorder (810) 424-4454

APPENDIX N

Notice: Mr. Burnside lost the original transcript cover sheet so he replaced it with a generic cover sheet. But the table of contents and the transcripts are original.

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

VS Case No. 09-25749-FC

AVERN LEE BURNSIDE,

Defendant.

JURY TRIAL - VOL. II OF III
BEFORE THE HONORABLE MARK LATCHANA, DISTRICT JUDGE, SITING
FOR JOSEPH J. FARAH, CIRCUIT JUDGE
FLINT, MICHIGAN - THURSDAY, FEBRUARY 23, 2012

APPEARANCES:

For the People: KAREN R. HANSON P-53588
Genesee County Prosecutor's Office
900 South Saginaw Street
Flint, Michigan 48502
(810) 424-4417

For the Defendants: JOHN A. TOSTO P-56579
503 S. Saginaw Street, Suite 1410
Flint, Michigan 48502
(810) 244-5862

Recorded by: Via Video Recorder

Transcribed by: Teresa A. Trosko, CER 5595
Certified Electronic Recorder
(810) 424-4454

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headphones start to make noise, just raise your hand.

THE COURT: Ms. Ledesma, if you'll raise your right hand, ma'am.

MS. LEDESMA: Yes.

THE COURT: Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth?

MS. LEDESMA: Yes.

ANTWYNE LEDESMA,

having been called by the People at 9:37 a.m. and sworn by the Court, testified:

THE COURT: Okay. If you'll come up here and have a seat for us in the witness stand. Right around here to the corner and then around the end.

(At 9:37 a.m., Ms. Ledesma approaches the witness stand.)

THE COURT: And when you are seated there and comfortable, will you state your first name and your last name, and spell those for us, please.

MS. LEDESMA: Okay. Antwyne Ledesma.

THE COURT: Ms. Hanson, go right ahead.

MS. HANSON: Thank you.

DIRECT EXAMINATION

BY MS. HANSON:

Q Taking you back to July 30th, of the year 2009, during the day, were you on Court Street, here in the city of

Flint, Genesee County?

A Yes.

Q Do you recall about what time it was that you were on Court Street?

A Around 12:30 in the afternoon.

Q What were you doing?

A Traveling west on Court Street, coming from Consumer Powers.

Q Coming from Consumers Powers? Okay. As you're traveling, did anything draw your attention to a vehicle that was in the same location you were in?

A Yes. I was going west on Court Street, approaching Ann Arbor, close to the White Tavern. And I noticed a vehicle swerving.

Q Can you describe that vehicle for us?

A A black SUV.

Q And could you tell why it was swearing?

A It appeared to be a male assaulting a female.

Q What did you do?

A At that time, I was talking on my cell phone to my dad. He instructed me to possibly try to get close enough to get the license plate number.

Q Were you able to do that?

A Yes. I was proceeding on Court Street. There's a dip on a bridge. And I was able to get the license plate

number.

Q Did you give it to your dad?

A Yes.

Q And did you continue to follow the vehicle?

A Well, not necessarily follow the vehicle, but yet I was going west, going back to work.

Q And were they actually going in the same direction you were going in, I guess is what I'm asking you?

A Yes.

Q Okay. And as you're following them, do you continue to see this -- this abuse going on?

A Yes.

Q At some point in time, did you get to Miller Road?

A Yes, at a red light.

Q So, you're at a right light and you're on Miller Road. And where's -- where's the SUV?

A Well, we're on Court Street. The SUV --

Q I'm sorry; Court Street.

A Okay. The SUV is in the turning lane, going onto Miller Road. Now it's a little clearer, but at that time it was under construction -- but in the left lane going onto Miller Road. And I was in the lane, you know, at the light on Court Street.

Q Okay. Were your windows down or up?

A Down. It was a beautiful, sunny day.

Q Do you know if their windows were down or up?
A Down.
Q All right. So, when you get to this light, what do you hear or see?
A At that time, then I noticed a black male assaulting a white female.
Q And what did you -- what did you do?
A I yelled "leave her alone; you're not fuckin' right."
Q And was the female just sitting there? Was she screaming? What was going on?
A Screaming, hollering; yes.
Q Asking for help?
A Yes.
Q When you said leave her alone, what happened next?
A The light turned green. I proceeded to go through the light, still on the phone with my dad. Noticed in my rear-view mirror that the SUV had got out of the turning lane and got behind me.
Q And what did you think?
A He's probably going to come curse me out.
Q Were you scared?
A Yes.
Q Okay. So, you proceeded on and he's behind you. And what happened next?
A You know, I know, I kind of picked up my pace a little

bit, too fast. We were going down Court Street. It goes into -- either you can veer off to your left to go up to Corunna or you can keep straight on Court Street. So, I opted that way; that was my way back to work. A car pulled out of Lastepa's (phonetically) Restaurant, so I had to slow down a bit. That's when the SUV approached on my side.

Q So, you're driving. You've got a car in front of you. You're on like the right lane.

A Yes.

Q The SUV pulls out and comes up beside you.

A Yes.

Q Tracks you; goes the same speed you're going?

A Yes.

Q What happened next?

A Again, I did not stop. I see a hand go up, thinking again that he was going to curse me out; mind your own business. But that's when I heard the first shot. When I heard the first shot, I ducked and hit the accelerator, and then heard another shot.

Q Did you see that hand coming pointing at you?

A I just seen a hand going up, extended.

Q In your direction?

A Yes.

Q When you heard the shots, what did you do?

A Told my dad what was going on. Hung up.

Q You're still on the phone at that time?

A Right, with dad. Yes.

Q Were you afraid for your life?

A Yes.

Q Did you believe he was trying to kill you?

A Yes.

Q Any doubt in your mind it was the driver of that SUV that was shooting at you?

A No. It was him.

Q Did you actually see the gun?

A No.

Q What happened after that? Is the car still in front of you?

A A car was still in front of me.

Q You had nowhere to go?

A No.

Q What happened?

A The SUV vehicle went up Durand Street.

Q And is that like a side street or --

A Yes. It's in between Court Street and Corunna.

Q And does that go off to the left or the right?

A It's the left.

Q Okay. So, you're still on the phone with your dad at this point when the shots happened, right?

Q And do you recall who you talked to? If you don't, that's okay.
A No.
Q But a police officer?
A Right.
Q Okay. And did you tell 'em what the license plate number was of that car?
A Yes.
Q That SUV, I mean. Do you know that license plate number?
A Yes.
Q What is it?
A BXJ8088.
Q That's a long time ago --
A Yes.
Q -- for you to remember that license plate number. At the time that you're driving and his hand's coming out to you, can you see his face?
A No.
Q You couldn't see well enough?
A No.
Q Okay. Was the SUV -- did it have tinted windows or --
A Tinted windows, a tinted plate on the license plate.
Q Okay. You could tell it was a black male?
A Yes.

Q Could you see the white female that was sitting in the passenger's side?
A I could see her; could not identify her. Just remembered her having her pair pinned up, and she had a scrub shirt on --
Q Scrub --
A -- like a medial scrub.
Q Medical scrub shirt? Okay. Why did you -- why did you decide to anything? Why did you decide to, when you're stopped at that light, get involved?
A Just thinking maybe he would just leave her alone, not hit her again, not thinking what the after-effects of it.
Q Would you help anybody again?
A Not a stranger.

MS. HANSON: Can I have one minute, your Honor?

THE COURT: Certainly.

(At 9:46 a.m., Ms. Hanson confers with deputy.)

MS. HANSON: I have some pictures and, your Honor, defense counsel has already looked at them.

THE COURT: Mr. Tosto, you've seen these pictures; is that right?

MR. TOSTO: Sure, Judge.

correct?

A Yes.

Q At what point do you see an arm extend out?

A Like at that point, once it was -- the car -- you know, the black SUV was next to me.

Q Okay. Okay. And you saw the arm extend out. You do not see a gun?

A No.

Q Okay. And you see the arm extend out. What do you do at that point?

A I just figured he was going to curse at me.

Q Okay.

A You know --

Q Okay.

A -- mind your business.

Q Is that the point at which you hear a gun shot?

A Yes.

Q Okay. Do you see a muzzle flash? Any flash of flame or anything like that?

A No. Once I heard it, it was like I seen the hand extend --

Q Okay.

A -- I heard it. I just scooted down in my seat and hit the accelerator.

Q Hit the accelerator and got out of there, right?

A Right.
Q Okay.
A And right after that, there was another shot.
Q Okay. You didn't feel anything in your car, correct? You just -- you just hear these noises, correct?
A Right.
Q All right. Did the gunfire accompany any statements? Did anybody yell anything at you; I'm going to kill you, or anything like that?
A No.
Q So, you don't hear any voices at that point?
A No.
Q Okay. Did the SUV follow you?
A No.
Q Did the SUV turn off?
A Yes.
Q Okay. Do you know what street it turned on?
A Durand Street.
Q Okay. Were there any stop -- anything preventing the SUV from following you?
A No.
Q Okay. And you indicated you cannot identify the black male that was in the SUV, correct?
A No, I could not.
Q Okay. And you can't -- at that point you couldn't

identify the white female either, correct?

A No.

Q Okay.

THE COURT: No, that's not correct? Or, no, you couldn't identify her?

THE WITNESS: No, I couldn't identify her at that time.

THE COURT: Okay.

BY MR. TOSTO:

Q Now, you're on the phone at this point, correct --

A Yes.

Q -- when this is all going on. It's a cell phone. Are you -- do you know if you're holding it with your right hand or your left hand?

A Left hand.

Q Okay. So, you're holding the steering wheel with your right hand, cell phone with your left hand; is that true?

A Yes.

Q Okay. All right. And, again, at the moment you hear a shot, you're actually looking at the SUV and you see an arm; correct?

A Right.

Q All right. After that, you proceed to work. Correct?

A Yes.

Q Okay. How far is work from that location?
A I'd be like three minutes.
Q Okay. All right. And isn't it true, you get to work, correct; you get out of your car? Is that true?
A Yes.
Q Okay. And you look at your car, correct?
A Yes.
Q Isn't that true?
A (No audible response.)
Q And at that point you don't see a bullet hole, correct?
A No.
Q Okay. And it's not until later when you get home from work you actually discover the bullet hole. Is that true?
A Right. It wasn't -- and my fiancé noticed it. I did not.
Q You didn't notice it? Okay. Okay. Is that the same bullet hole we're talking about (showing photo on the overhead projector.)
A Yes.
Q Would you agree with me, that's a fairly large bullet hole?
A Yes.
Q Okay. And would you also agree with me that that door -- that's not the driver's side door, is it?

A No.
Q That is the rear of the passenger door. In fact, the bullet hole is pretty close to the rear quarter panel, correct?
A Right.
Q Okay. I mean, whoever shot at you, you really don't know what their intent was? I mean, the bullet hole is clearly not the driver side door, correct?
A It's not the driver's side. But had I not accelerated, it very well could have been.
Q Okay. Is there just one bullet hole in the vehicle?
A Yes.
Q Okay. Are you sure that there was two gun shots?
A Yes.
Q You understand that another witness has testified that there was only one. Do you understand that?

MS. HANSON: I'm going to object to that. Speculation.

MR. TOSTO: Okay.

BY MR. TOSTO:

Q Did you hear that? Have you heard that?
A No.
Q Okay.

THE COURT: I'll overrule the objection.

MR. TOSTO: One moment, Judge.

Do you want me to spell it?

THE COURT: Will you spell those, please?

THE WITNESS: Leah is L-E-A-H. Watson is W-A-T-S-O-N.

THE COURT: And, Ms. Watson, if you'll have a seat in the other chair for us. There's a reason we have two chairs there. It's going to become clear to you in just a minute. But if you could move over there for us a little bit.

Ms. Hanson, you may go right ahead.

MS. HANSON: Thank you.

DIRECT EXAMINATION

BY MS. HANSON:

Q Ms. Watson, do you know someone named Avern Burnside?

A Yes.

Q How do you know that person?

A He was my boyfriend for six years.

Q Do you see him in the courtroom today?

A Yes.

Q Can you tell the Court where he's seated?

A Over there (indicating).

MS. HANSON: Your Honor, may the record reflect the witness has identified the Defendant, Avern Burnside.

THE COURT: Mr. Tosto?

MR. TOSTO: No objection, Judge.

THE COURT: All right. The record is then going to reflect the identification of Mr. Burnside by this witness.

Go right ahead, Ms. Hanson.

BY MS. HANSON:

Q Ms. Watson, was it a -- I guess I'll call it a rocky relationship?

A Yes.

Q Had problems throughout the whole period. Is that correct?

A Yes.

Q Taking you back to July 30th, of the year 2009, sometime around noon, do you recall being with the Defendant on Court Street, here in the City of Flint?

A Yes.

Q Do you recall where you were at that day?

A We went and ate at a restaurant called Tom Z's.

Q And is that on Court Street?

A Yes.

Q Do you recall what happened when you left Tommy Z's.

A Yes.

Q Can you tell us what happened?

A We got into an argument. He grabbed me -- grabbed my hair and was like shoving my head down. And somebody

A Technically, it was his vehicle but it was in my name.
Q So, it was in your name. What type of vehicle was it?
A A truck, a Tahoe truck.
Q If I show you People's 17 -- 16 and 17, I'll ask you if you recognize these photos.

(At 10:54 a.m., People's Exhibits 16 and 17 are handed to the Witness.)

THE WITNESS: Yes.

BY MS. HANSON:
Q What are they?
A Pictures of his truck.
Q And where is that truck parked?
A In my driveway.
Q And do you recall where you were living at that time?
A At that time, yes.
Q Where were you living?
A Do you want the address?
Q Yeah. You don't live there anymore, do you?
A No.
Q Okay. Do you recall even the street? Do you remember the street?
A Gail Street.
Q Okay. Now, when -- when you're in the SUV, who's driving?
A He is.

Q And you are where?
A In the passenger seat.
Q Front passenger seat?
A Yes.
Q And at some point in time, did you come to Miller Road?
A Yes.
Q Or -- if you recall.
A Yes.
Q And do you recall being stopped at a stop sign -- at a stop light?
A Yes.
Q And did that vehicle with the woman in it pull up next to you --
A Yes.
Q -- on your side?
A Yes.
Q And do you remember if you -- and if you don't remember this, just tell me. But were you in the turn lane to go onto Miller Road?
A Yes.
Q Okay. And is at that point that she said something?
A Yes.
Q Okay. And then after that happened, what happened next?
A I guess the light turned green for her. She went. He

got behind her. And then whenever they met up -- I'm not sure of the side street -- he put his arm over me like this (indicating) and the gun was right in front of my face and shot at her.

Q Did you see the gun?

A Yes.

Q Where did he get the gun from?

A That, I'm not sure.

Q Do you recall testifying at the preliminary exam that he pulled it out of his waistband?

A No. I just know he -- it happened so fast. I know he leaned, but I don't know where -- I said I assumed he got it from his waistband.

Q Okay. It was in the car?

A Yes.

Q And was it your gun?

A No.

Q Did you know he had the gun that day?

A No.

Q Did he normally carry a gun?

A I wouldn't say normally.

Q Had you seen him with a gun before?

A Before? Yes.

Q Same gun, or do you know?

A I don't know.

Q What color was it?
A Black.
Q So, after -- do you recall how many times he shot at the victim?
A No.
Q What happened after he shot at her?
A Turned up a side street and went home.
Q Did he say anything to her when he shot at her? Was he yelling at her, or you, or --
A No, not that I remember; no.
Q Do you remember what really happened that day?
A (No audible response.)
Q Do you remember -- I mean, is it clear to you or do you not remember?
A I mean, some parts are clear but some parts -- you know -- like what was exactly was said and stuff like that aren't clear.
Q Okay. So, after he shot her and he pulled off, what happened next? Where did you guys go?
A To my house.
Q And when you got to your house, what happened?
A Got out and he left walking.
Q Did he take the gun with him?
A I assume so.
Q Did you find it in the truck?

Q And did somebody come and talk to you?
A I went to them.
Q You went to them.
A Um-hum.
Q And do you remember who you talked to?
A Sergeant Brown.
Q Sergeant Brown, sitting here?
A Um-hum.
Q And when you went and talked to him, did you tell him the truth about what happened that day, right away?
A No.
Q Why?
A Because I was scared.
Q Scared of what?
A Of my boyfriend at the time.
Q Who is -- was Avern Burnside?
A Yes.
Q Did you try to avoid telling Sergeant Brown the truth?
A Yes.
Q At some point in time, did you in fact tell Sergeant Brown basically what happened that day?
A Yes.
Q And did he take notes while you were telling him that?
A Yes.
Q And at the end of that time, did you sign the statement

A Yes, it is.

MS. HANSON: Your Honor, at this time the People would move to have People's Proposed Exhibit 22 entered into evidence.

MR. TOSTO: No objection, Judge.

THE COURT: All right. People's 22 will be admitted by stipulation.

BY MS. HANSON:

Q Now, Ms. Watson, I want to read this to the jury, but you've indicated that you -- you can't read out loud. Is that right?

A Yes.

MS. HANSON: Your Honor, at this time the People would ask that our legal assistant, Katie Snyder, be sworn and allow her to read for Ms. Watson.

THE COURT: Mr. Tosto, any objection?

MR. TOSTO: None.

THE COURT: All right. Ms. Snyder, if you'll stand and raise your right hand.

Do you swear or affirm to accurately relate the exhibit -- People's Proposed Number 22, as well as any other transcript or written evidence accurately to the best of your ability?

MS. SNYDER: I do, your Honor.

THE COURT: Okay. If you'll have a seat right there.

This is why we have two chairs, Ms. Watson.

Ms. Hanson, if you'll show Ms. -- Ms. Snyder has Exhibit 22 there?

MS. HANSON: Yes, your Honor.

Ms. Snyder, if you can just read that letter as it is written, please.

MS. SNYDER: The letter was wrote October 19, 2009. "Judge Kathy Doud. My name is Leah Watson and I'm writing this letter on my own free will. This is regarding an assault with intent to murder case involving Avern Burnside in which I testified on October 15th, 2009. I am writing this letter to inform you that I was not honest on the witness stand, nor was I honest in the statement given to the detectives. I have never had to endure a thing like this and I was extremely scared at what to do. I felt like I was being pulled in two different directions; one of the directions being the truth and the other direction being the possibility of going to prison, for not saying what was told of me to be what they already knew. Avern Burnside had no involvement in this matter. When I originally went down to the Flint Police Station and was interviewed

by Sergeant Brown and Sergeant Collins, I told them at first I didn't know what they were talking about and then I told them that it was a man named Tye. Avern was out of town at the time and I had met this man when me and a couple friends went out for a friend's birthday at a bar called The Luge, on Saginaw Street. He told me he was from Detroit and came up to Flint most weekends. I proceeded to give him my number to call me when he was in Flint. When he called me, he always called my number private. I asked him why he called me private, and he said that his phone does automatically, but I just wrote off that he had a girlfriend and left it at that. We met a couple times, and the last time was on July 30th. Tye and I went to Tom Z's. While we were at Tom Z's paying the bill, we began to argue. We argued about the fact that I had decided not to leave my boyfriend and that I wanted to stop seeing him and I wanted him to stop calling me. After getting in my vehicle, the argument changed to harsh name-calling. At the light on Court and Miller Road, Tye grabbed my hair and my neck and pushed me down. I was never out of the window screaming for help. He was not beating me. I have pictures taken on that night of the 30th at the bar called Jolly O's, to prove that I was not

beaten. After the lady pulled off and said something to the effect of stop doing that or that is wrong, he began to get really angry. He pulled a gun out of his waist and pulled off behind her. We caught up with her. He pulled onto the side of her car, shot one time. After this, we drove to my house and he left walking down Miller Road. I have not heard or seen him again to this date. I lied to the police because they continued to bring up a murder case in which they had stated to me multiple times that Avern was the reason the man was found guilty -- not guilty; that he got on the witness stand and lied his ass off. I was also told that if I didn't tell them what they already know that he did it, I would be charged. I was scared and I didn't want to go to prison, so I told them what they wanted to hear. That way, I figured that I could go home and go to work. I was also told that they would ruin my life. I was lose my job and I would never be able to be a nurse. I didn't want to lose everything I had worked so hard for simply because I made a poor choice on who to have an affair with. After leaving the police station, I guess it never really hit me that what I had really done. When Avern returned home on the following Sunday, I didn't tell him anything that had went on until Monday, when I

got home from work and he told me the detective left a card in my door saying please call him a.s.a.p. So I called the detective and he requested that I come down to the police station. At this point, Avern still didn't know what was going on. He figured that it was still something about the truck, because earlier that year a detective called me to verify that I had receipts for buying the truck; because the guy that had bought it from was in some kind of trouble. So I went down there. After leaving the station, I called Avern and told him that the police were saying happened and I told him that it must all be a mix-up. On September 30th, when Avern was picked up at my house, I started to get worried. Then it kind of hit me that I was going to be the cause of him going to jail. During the time Avern was in jail, we kept in contact and I continued to tell him that I didn't tell the cops that he had done anything, that this was all just a mix-up. I don't know how to fix the situation and undo what I had done. During the time Sergeant Brown and Sergeant Collins showed up at my house in which I had full intentions of telling them that I had lied and Avern was not the person committed this crime, until Sergeant Brown told me that I was in a lot of trouble and the prosecutor was

going to charge with an accessory if I didn't testify and help them out. I began to break down and cry and I didn't tell them that I had lied and I am deathly afraid to go to jail or prison. So, I didn't tell them anything. I have only had tickets in my life and I have never been involved in anything like this, so I thought if I just told them what they wanted to hear, then everything would be okay and that this would all go away. I didn't want them to put handcuffs on me right then and there and take me to jail. The second time the detectives showed up at my door, they gave me subpoena to testify. Words cannot explain how much I finally realized at this point at this point that there was not going to go away; that I had done something that was in jail sitting there, wondering what is going on, and here I am helping people put him away for something he didn't do. At this time I didn't tell the detectives that I had lied. On October 15th, 2009, I arrived at the courthouse. I told the prosecutor when I was called in there to talk to him that Avern was not the one that did this. He got extremely mad and told me that if I changed my story now and got on the stand and said everything other than my statement made previously that I would no doubt go to prison for perjury. I began -- I

begged him to please not make me do this, and then he told me if I refused to testify then I would be immediately taken to Genesee County Jail and held until I agreed to testify against him. I felt like I had no other choice but to do it. I was scared out of my mind and I felt trapped. I felt like I had to testify and I didn't know what else to do. During my testimony I was crying uncontrollably because of the fact that the person I was going to testify on was completely innocent in this and I was going to send him off to prison for a long time for something that he didn't do. I guess I was trying to make myself in the situation. I was telling the detectives what they wanted to hear so they wouldn't take me to jail, and I was telling Avern what he wanted to hear so that he didn't know that I was cheating on him. I didn't understand the magnitude of this. Like I had said before, I've never been involved in something like this and I was just scared and confused. I have prayed a lot in the last couple months and I know that I need to make everything right. I cannot think of only myself in this situation. This is not all about me; it's about the person that does not deserve to go to prison for the rest of his life for a crime that he did not commit. I sincerely

apologize for the time and money wasted due to my ignorance. I have to do the right thing and letting someone go to prison for my ignorance is not the right thing to do. I am telling the truth now because I fully realize what I have done and I need to make it right. I felt I did not have much to tell the detectives about the real person that is responsible for this, but they were going to put me in jail. But now I understand the truth needs to be told and that is what I am doing. Once again, I apologize for my ignorance. Sincerely, Leah D. Watson.

MS. HANSON: And what's the date on that letter?

MS. SNYDER: October 19th, 2009.

MS. HANSON: Okay.

BY MS. HANSON:

Q Ms. Watson, was there a Tye? Somebody named Tye?

A No.

Q Who was Tye when you're describing what happened that day?

A (No audible response.)

Q When you're going through, you said Tye -- you went to Tommy Z's with Tye, and you got in an argument with Tye, and Tye's the one who shot at the victim.

A Oh. Tye was really Avern, but I was just replacing the

THE COURT: Mr. Tosto, any objection to that?

MR. TOSTO: To what?

MS. HANSON: I wasn't going to --

THE COURT: Having a snippet.

MS. HANSON: I was only going to enter -- or, take apart -- if we can get it apart -- just the first one that we were going to use for authentication.

MR. TOSTO: Are you just going to play a portion of the first disk, just a few lines?

MS. HANSON: But to mark it as an exhibit, it's got all of it on there. So, I was going to --

MR. TOSTO: That's fine.

MS. HANSON: That's fine?

MR. TOSTO: Yep.

MS. HANSON: Okay. We'll mark it as an exhibit.

THE COURT: Okay. It will be People's --

MS. HANSON: People's 23, I believe. Well, we marked 23 as the transcript, so that will be 24.

THE COURT: Okay. Mr. Tosto, any objection to the admission of 24, which is the CD for purposes of authenticating the voice?

MR. TOSTO: No -- no objection, Judge.

THE COURT: All right. Number 24 will be admitted then.

And Ms. Hanson, you may proceed.

MS. HANSON: Thank you, your Honor.

Ms. Snyder, if you could just play a portion of it, and then we'll --

(At 11:26 a.m., a CD is played.)

". . . collect call from . . . at the Genesee County Jail. This call may be monitored or recorded. For English, press one. If you accept the charges for this call, press one. To refuse this call --

Hello?

What up, girl?

(Not discernable)

They had to make a lock down and all this sort of thing.

Okay. Well, okay. Let me tell you --

What?

-- what's going on. Probably about 11:30, 12:00 the doorbell rings.

Uh-huh.

And I already knew who it was because nobody just comes over to the house -- you know what I'm saying -- without calling first.

Yeah.

It's the detectives. They're like, can we come in? I'm like, no, I'll step out. So, I step out.

And they're like, you know your name's on the warrant, too, right? I just want to let you know that. I'm like, what? They're like, yeah, you know your name's on the warrant, too. I'm like --

What warrant?

-- okay, no, I didn't know that. And so instantly, I'm thinking -- "

BY MS. HANSON:

Q Ms. Watson, do you recognize those voices?

A Yes.

Q Who's the male voice?

A Avern.

Q And who's the female voice?

A Mine.

Q And at the beginning of this, you hear a recording that says, "This call may be recorded and monitored;" correct?

A Yes.

Q And that's every time you hear that recording before you get to talk to anybody from the jail. Correct?

A Yes.

Q Okay. And over the course of time, there were a number of phone calls between you and the Defendant, right?

A Yes.

Q Okay.

MS. HANSON: We're going to just read a few of them into the record, instead of listening to the calls which takes quite a bit longer if -- I think we've all agreed to that.

MR. TOSTO: To reading?

MS. HANSON: To reading.

MR. TOSTO: The Judge ordered it.

MS. HANSON: Okay.

THE COURT: Yes. The Court has ordered that we're only going to be reading the transcripts versus listening to the tapes.

MR. TOSTO: And I'd like my previous objections --

THE COURT: Your objections are noted for the record.

MR. TOSTO: All right.

MS. HANSON: So, your Honor, at this time, if Ms. Snyder could return to the stand.

THE COURT: And Mr. Tosto, Mr. Snyder is going to return to the stand in terms of reading, due to Ms. Watson's indication earlier that she would have trouble reading them out loud.

Is that -- any objection to that procedure, Mr. Tosto?

MR. TOSTO: No, your Honor. And it's my understanding Ms. Hanson will be reading Mr. Burnside's statements. Is that true?

THE COURT: Correct.

MS. HANSON: That is correct, your Honor.

THE COURT: All right. Ms. Snyder, you're still under oath. And if you'll have a seat up here next to Ms. Watson, we'll proceed in that fashion.

(At 11:28 a.m., Ms. Snyder approaches the witness stand.)

MS. HANSON: And, your Honor, I would just like to apologize to the Court and to the Jury for the language which they will hear, because we will be reading this exactly how --

THE COURT: We understand that you are reading it verbatim --

MS. HANSON: Right.

THE COURT: -- and the record is what the record is.

MS. HANSON: Okay. Very good.

MS. SNYDER: Want me to start where we left off on the tape?

MS. HANSON: I think we'll just start at the beginning. And at the beginning, it just says, "You have a collect call from Avern Burnside at the Genesee

County Jail. This call may be monitored or recorded." And then that will be at the beginning of each one. And if we could skip that portion and just go right to --

MR. TOSTO: (Not discernable).

MS. HANSON: Okay.

THE COURT: We'll just recognize -- and for members of the Jury, each one of these phone calls, there's an indication at the beginning that the call may be monitored. And, so, we're not going to read that portion of it because it is verbatim the same every time.

And we'll proceed in that fashion.

Go ahead, Ms. Hanson.

MS. HANSON: Okay.

And we will be reading the complete phone call, so it will take a minute. But just for completeness, we're going to read the whole thing, Ms. Snyder. Okay?

MS. SNYDER: Okay.

MS. HANSON: Okay.

MS. WATSON: Hello?

THE DEFENDANT: What up, girl.

MS. WATSON: (not discernable)

THE DEFENDANT: Man, they had a nigger locked

down in this bitch all day, man.

MS. WATSON: Okay. Well, let me tell you what's going on.

THE DEFENDANT: What?

MS. WATSON: Probably around 11:30 -- 12:00, the doorbell rings.

THE DEFENDANT: Uh-huh.

MS. WATSON: I already knew who it was because nobody comes over to the house -- you know what I'm sayin' -- without calling first.

THE DEFENDANT: Yeah.

MS. WATSON: It's the detective. They're like, we can come in? I'm like, no, I'll step out. So, I step out and they are like, you know your name's on the warrant too, right? I just want to let you know that. I'm like, what? They are like, yeah; you know, your name's on the warrant, too. I'm like, okay; no, I didn't know that. And I instantly -- I'm thinking they're sitting there talking about having warrant for my arrest, too. Well, anyway, I'll finish up the story. When they tell me, you know, we're really trying hard to keep you out of it, but it's -- getting the prosecutor -- the prosecutor wants to prosecute you for an accessory unless we tell them that you are cooperating. So, to keep you out of trouble, instead

of us trying to ruin your life, I think you just need to turn on that scumbag. I'm like, turn on him for what? Nothing's happened. You are -- oh, you are just going to stick to that story, aren't you? That bullshit story? I'm like, I can't tell you guys nothin' but the truth. Then they get ready to leave. They tell me, oh, you think he's got it bad; we're going to fry you; we're going to fry you; and left.

THE DEFENDANT: The M (phonetically), so they're going to threaten you like that?

MS. WATSON: Uh-huh.

THE DEFENDANT: Did my lawyer get back in contact with you?

MS. WATSON: I called him and asked him. I'm like -- I'm like, the detectives just came over here and they are talkin' about that my name is on the warrant, too. What does that mean? He was like, well, that can mean one of three things. It can either mean, one, that you have a warrant for your arrest. But if they already did, they would have already came and got you. So, that's not it. He said, two, it could mean that just something about you was involved. Or, three, it could mean that you said something. I'm like, well, whatever it is, regardless of what it is, I didn't say anything. I can't tell them something that I don't

know nothing about. He's like, well, this we'll figure all out tomorrow. Oh, yeah. They told me, you know, you are going to have to testify, right?

THE DEFENDANT: Testify against me?

MS. WATSON: I don't know. They didn't say anything -- or, they didn't say against you, nothing. They just said you know you're gonna have to testify, right?

THE DEFENDANT: See -- see what it is. They need to fry me but it ain't -- it ain't happening like that; you know what I'm saying -- 'cuz we ain't did shit; you know what I'm sayin'?

MS. WATSON: Oh. And they told me that I should stop being scared and I really do. I want a lady from the YWCA to call me because she can really help. I need to get help because I need to work out my self-esteem because obviously, to be with a scumbag, I have no self-esteem. And I shouldn't be letting them do this to me. And they are going to ruin my life. I'm going to be charged with a felony and I can never work as a nurse again. And I don't understand why I'm protecting you. He's made his own bed and a whole bunch of stuff, and I just keep telling no, I don't want to talk to anybody. I'm going to work and live my life as I would every single day; you know what I mean?

THE DEFENDANT: Um-hum.

MS. WATSON: I'm waiting for this to be over. And because there's no reason that he should be in there -- oh, you just don't know what you're getting yourself int.

THE DEFENDANT: Yeah, they just tryin' to scare you, dog. Fuck them mother-fuckers.

MS. WATSON: I know they are, Avern. I'm not like I told Little Lewis, because I tried to call him first to see what that meant. You know what I'm sayin'? Before I called the attorney, what does that mean, they have my name on a warrant, and didn't answer. So, I tried to call Barry. Barry didn't answer. So then I called a lawyer. But then when I talked to Little Lewis to give him my number -- new number, in case he ended up getting up some money, 'cuz he's acting like he's got to get the money, and this and that. And if I do, too, I will have to get a cash advance for five hundred dollars, I will. So, I mean, I don't know. Little Lewis -- I don't know if he's bullshittin' or what. But, whatever. Anyways, he told me he was like, yeah, they doin' exactly like Avon said they'd do it. Just tryin' to turn you against him. I'm like, well, I don't know what.

THE DEFENDANT: Who said that?

MS. WATSON: That's what Little Lewis said.

THE DEFENDANT: Oh.

MS. WATSON: So, I don't know what -- oh, and they asked me, they are like -- they are like, this phone number right here, the one that the detective called you -- you're talking about your phone number -- they're like, do you know if anybody about what happened that day on this phone? I'm like no, because nothin' happened to him to call somebody and tell somebody. He's like -- he's like, well, this phone number right here -- he's talking about my phone number -- don't know how they got that. I guess maybe they just got your phone number and seen that there was two different numbers on the line or whatever.

THE DEFENDANT: How'd they -- how'd they get our numbers?

MS. WATSON: They had your -- your number is the lady called me to verify your background information.

THE DEFENDANT: Oh. So, that's how. That's how they got my number, from her?

MS. WATSON: I guess. Apparently because they said the lady that you talked to -- what number did she call you on? This number right here?

THE DEFENDANT: Oh, okay. Yeah. 'Cuz I ain't

-- remember, I ain't know your number so I gave 'em my number.

MS. WATSON: Right. Well, oh, my God, I lost my train of thought. Oh, yeah. So, I said that to -- about your phone. And they asked me, well, have you talked to anybody about it; friends, family, anybody? I'm like, no. They are like, well, does anybody know what's going on? I'm like, people know what's going on right now and that's bullshit that he's in jail for something he didn't even do. No. We are talking about when it happened. I said no, because I was not aware of anything happening. They are like, oh, you're going to ruin my life over this scumbag piece of shit?

THE DEFENDANT: That's how they feel about me?

MS. WATSON: Apparently. Talkin' about I need to go -- I need to come back downtown and make another statement. I said why, nothing's going to change about the first statement I made, so --

THE DEFENDANT: See -- see, what it is, baby girl said all that about you, so they need you because that's the motive.

MS. WATSON: I don't know. I don't know, man, Avon. Just to -- you know, I put it on everything that I love, whatever they tell you, show you, whatever. It don't anything they do. I put on

everything that I love. You know what I'm sayin'? I -- I said what happened. Nothing. Nothing happened. So, I just got a feeling, man, that just acting so, oh, man, so shady, you know what I'm sayin'? Like, I don't know.

THE DEFENDANT: So, what did the lawyer say?

MS. WATSON: The lawyer said we'll figure that all out tomorrow.

THE DEFENDANT: So, he's coming to court tomorrow?

MS. WATSON: Yeah, because I told him, I'm like, I don't know if I'll have the money by the end of today. Because like I told Little Lewis, if he wants the money today, then -- you know what I'm sayin' -- I don't have all that money today. So, you would have to give me more money. I would have to give it back to you tomorrow. He's like, all right, all right, I'll see what I can do; I'll see what I can do and give you a call.

THE DEFENDANT: So, he's saying he'll call?

MS. WATSON: So, you know, that's funny though; is after I called him the first time from my phone number, he won't answer on the phone and didn't call me back. But as soon as I called from this number, he called back. So, I don't know. I might

have to get a cash advance of five hundred dollars and I'm selling my car to Stephanie.

THE DEFENDANT: For how much?

MS. WATSON: Thirteen hundred.

THE DEFENDANT: I mean, you're selling it to her?

MS. WATSON: She's gonna give it to me as soon as she gets her loan. She said she can write something out. She said it don't matter. And I just told her it don't matter. The sounds of it. Everything she can just have for thirteen hundred. And she said, that's fine, because she knows you know the car ain't gonna break down, you know, a day after she gets it. And she knows everything what's wrong with it already. So, it's not going to be a surprise. So --

THE DEFENDANT: Um-hum.

MS. WATSON: You know, I mean, I figured, you know, right now, this is when we need to -- because I could get that twelve hundred or thirteen hundred dollars. And if I have to get a cash advance, pay that off, pay some bills off, you know. So, it's less money a month on me. You know what I'm sayin'? So, I can pay more on phone bills or, you know, pay more on lawyer, stuff like that. Because it's gonna be hard.

THE DEFENDANT: Yeah, I see, man, because this

is some bullshit. So, that's what this about, huh?

MS. WATSON: Yep.

THE DEFENDANT: Ummm -- so, basically, they need you, so they gonna threaten you in all type of ways and all types of shit. They can't -- they can't charge you with nothin'.

MS. WATSON: Yeah. And they're -- like this is your phone number right here. I'm like, yeah, that's my phone number right now. They are like, right now? I'm like, yeah. My phone's gonna be cut off on the 8th. They are like, why? I'm like, because I don't have the money to pay the bills because I have to pay the bills by myself. And they're like -- they are like, oh, is this your mortgage getting too steep for you? I'm like, no, my mortgage is not getting too steep for me. Even if it was, that's none of your business; talkin' about I need to go to the Safe House at YMCA, man. Kiss my ass, man.

THE DEFENDANT: Man, fuck those mother fuckers, dog.

MS. WATSON: Obviously, they tell everybody about the Safe House. So, obviously, it ain't too safe.

THE DEFENDANT: You know -- you know what? They ain't -- they ain't sending my money up. I can't

even get my deodorant and shit.

MS. WATSON: What do you mean, they didn't send it up?

THE DEFENDANT: I guess -- I guess it was too late or something, 'cuz they ain't never -- you know what I'm sayin'.

MS. WATSON: I dropped it off at eight o'clock.

THE DEFENDANT: I know. But the only thing I got was my shoes. But they ain't -- they ain't sending me my money.

MS. WATSON: So, you got to wait a whole nother (sic) week for deodorant?

THE DEFENDANT: Hell, yeah.

MS. WATSON: Oh, my God, man. If it -- if it wasn't so hectic, I would -- I didn't even think about it Thursday or Friday. I didn't even think about it at all or else I would have brought it up there then.

THE DEFENDANT: I know, man. Shit.

MS. WATSON: Okay. So, now you have to tell me how this works tomorrow with visiting, because I don't know how it works. This guy that I was talking to up there who everybody was asking him questions, I thought he worked there but I guess he doesn't. 'Cuz after I asked him, he said, ma'am, I need a paycheck.

'Cuz I guess he don't work there.

THE DEFENDANT: Um-hum.

MS. WATSON: He was like -- he told me that to visit between 12, there's a visit like 12 to 2, or something like that. And then there's one from 5:15 to 7:15. But he said if I want to get in at the one at 12, then I should be there at like 11. I can't go earlier and say I want to visit at this time.

THE DEFENDANT: We gonna be in court early.

MS. WATSON: I know. So, you think I should just go to the 3:15 or the 5:15 to 7:15 one?

THE DEFENDANT: Probably -- probably the 3:15 one or something, 'cuz --

MS. WATSON: There is no 3:15 one; 5:15.

THE DEFENDANT: So, it's -- what all that -- what all time it is?

MS. WATSON: I don't have my purse right now in front of me. The lady gave me the paper. I think it's like 12 to like 2 or 3, or something like that. But I know there's one from 5:15 to 7:15.

THE DEFENDANT: Well -- well, if we out of court, you know what I'm sayin', best to come up here around at 2 or something; you know what I'm sayin'?

MS. WATSON: Well, didn't you say you had to go to court tomorrow?

THE DEFENDANT: Yeah. But that's at 8:30 in the morning.

MS. WATSON: I know. But -- so, why are you going to court twice?

THE DEFENDANT: 'Cuz I got to go for traffic tickets.

MS. WATSON: Oh, kiss my fucking ass, man. They are still worried about traffic tickets."

MS. HANSON: And then the jail talks about disconnecting the call. And then Defendant says:

"So, basically, Lew don't even want to give you the cash.

MS. WATSON: I mean, I don't know if he does or not, but he's acting like he's bullshittin', oh, got to see what I can do. And then last time I talked to him I'm like, yeah, this shit is getting serious. So, you know, you're going to be able to do it or not. He says, I'm the type of person, if you're gonna do it, tell me; if you ain't, tell me so I can make other arrangements.

THE DEFENDANT: That's what -- is that what you told him?

MS. WATSON: No. That's what I told him. But that's how I am. He's like -- he's like, well, I'm tryin' to get a hold of Barry and said a couple other

people, to see if they got their money.

THE DEFENDANT: Well, call that nigger, man. Tell him, man, be for real, dog. 'Cuz this shit for real. And don't -- don't let them mother-fuckers scare you. Remember --

MS. WATSON: I'm not.

THE DEFENDANT: -- when we was goin' to court with Little Barry and how they was doin' me.

MS. WATSON: Yeah.

THE DEFENDANT: That's how they gonna try to do you. So --

MS. WATSON: I already know that they can't charge me with nothin', Avon.

THE DEFENDANT: Look, they can't charge you with no felony.

MS. WATSON: They can't charge me with nothin' because they can't -- they have nothin' to charge you.

THE DEFENDANT: What they can do is try to charge you with perjury, and that -- and that ever gonna happen. See, apparently, baby girl said all that shit about you and this and that. And that shit ain't true. Or about me.

MS. WATSON: Right.

THE DEFENDANT: So -- so, we're going to work

with this lawyer that come and seen me today.

MS. WATSON: Oh, hold on. Listen. That's what else they told me.

THE DEFENDANT: What?

MS. WATSON: When they leavin', they gonna say if you want to talk to the girl, then just give me a call and I'll let you talk to her. What the hell I want to talk to her for?

THE DEFENDANT: I'm your nigger, man. Fuck that bitch and fuck the police, man. I mean --

MS. WATSON: I mean --

THE DEFENDANT: I'll hit you up a little bit later though. This shit crazy as hell.

MS. WATSON: What time do you guys get locked down, man? You better call me before you guys get locked down.

THE DEFENDANT: I get locked down like at 10 -- 10 o'clock and shit. I'll hit you up and shit. I'm just fittin' to think about this shit. This shit crazy. But I'm happy that they need you; you know what I'm sayin'? They all on your ass and you my girl, though."

MS. HANSON: And then again it talks about disconnecting. And then Burnside says --

"Cuz' look, if they ain't need you, they

wouldn't be at your door today. And they know I got to go to court tomorrow.

MS. WATSON: Right.

THE DEFENDANT: See, they need you. And, oh, girl, to get me locked up pretty much. Because you basically -- you basically key to the mother-fuckin' puzzle.

MS. WATSON: Right.

THE DEFENDANT: And oh girl just basically just lying. So --

MS. WATSON: Yep.

THE DEFENDANT: -- we gonna -- you -- you call Lewis and tell him come off that bread, man, 'cuz the nigger do need it. He's gonna get it back.

MS. WATSON: Oh, don't worry, Boo. Regardless, we gonna have it. So --

THE DEFENDANT: And we gonna -- we gonna work with this lawyer; you know what I'm saying? The paid lawyer. Because they might get a little set-up lawyer for me. So, fuck that. We gonna work with ol' boy and --

MS. WATSON: Right

THE DEFENDANT: -- and call him and tell him you tryin' to get this money for him. All right?

MS. WATSON: All right.

THE DEFENDANT: All right.

MS. WATSON: I love you.

THE DEFENDANT: All right.

MS. HANSON: Judge, we read one of the transcripts completely.

Now, with the Court and counsel's permission, I would just like to go to the pertinent parts within the transcript. We've entered it. If the jury wants to read the whole thing, they can.

THE COURT: Mr. Tosto?

MR. TOSTO: You mean you're going to question about what was just read?

MS. HANSON: No. I'm just going to read the pertinent parts, instead of reading the whole thing.

MR. TOSTO: Oh.

MS. HANSON: If you want me to continue reading the whole thing, I will.

MR. TOSTO: Oh. Okay. You mean in the remainder of the calls --

MS. HANSON: Right.

MR. TOSTO: -- just speaking stuff?

MS. HANSON: Right.

MR. TOSTO: Oh, okay.

MS. HANSON: If you're okay with that. But, if not, we'll continue reading the whole thing.

MR. TOSTO: Ah --

MS. HANSON: We'll continue reading.

MR. TOSTO: Well, no. Can I -- can we talk about it at the Bench?

MS. HANSON: Yeah.

THE COURT: Come on up. We'll have a --

(At 11:46-11:48 a.m., Bench Conference.)

THE COURT: As I understand it, you've read the first call here in its entirety in terms of its context. Now, there are several more calls that we're going to move along to the more pertinent parts in terms of what you want to publish to the jury in the courtroom.

But, as I understand it and as has been previously ruled, the entirety of the calls are admitted in transcript form --

MS. HANSON: Correct.

THE COURT: -- and will be available for the jury to review as an exhibit, should they desire to do so.

Mr. Tosto, we're going to proceed in that fashion. Do you have any objection to that?

MR. TOSTO: No. I'd just adopt my previous objections to the whole issue, Judge.

THE COURT: As I understand it, you've read the first call here in its entirety in terms of its context. Now, there are several more calls that we are going to move along to the more pertinent parts in terms of what you want to publish to the jury in the courtroom. But, as I understand it and as has been previously ruled, the entirety of the calls are admitted in transcript form --

MS. HANSON: Correct.

THE COURT: -- and will be available for the jury to review as an exhibit, should they desire to do so.

Mr. Tosto, we're going to proceed in that fashion. Do you have any objection to that?

MR. TOSTO: No, just adopt my previous objections to the whole issue, Judge.

THE COURT: Correct. And those are on the record.

So, we'll proceed as I've indicated, Ms. Hanson.

MS. HANSON: Thank you, your Honor.

Ms. Snyder, turning to disk 1, track 15, going to page 13 to start. I'm sorry, I'm just trying to get to it.

Okay. Starting on page 13, line 3, with the

Defendant.

"THE DEFENDANT: You two, again, I don't think it's a good idea for you to be in court.

MS. WATSON: You don't think I should come to court?

THE DEFENDANT: No. Like the lawyers say, you already said.

MS. WATSON: He didn't tell me I couldn't come to court.

THE DEFENDANT: Yeah, he did. That what he told me, 'cuz he don't want ol' girl to see you in court, 'cuz he said that --

MS. WATSON: Oh, and be like -- "

MS. HANSON: And then we have a disconnect notice. And then Defendant says:

"THE DEFENDANT: He said that she'll recognize you before she'll recognize me. You know what I'm saying?

MS. WATSON: Right.

THE DEFENDANT: And he said -- he said he don't want that to go on in court like that. So, you -- you know --

MS. WATSON: Well, maybe I'll have Stephanie or somebody go in there.

THE DEFENDANT: You ain't got to have

Stephanie or nobody in there.

MS. WATSON: Well, I don't know what the hell's going on.

THE DEFENDANT: I'm going to call you and let you know what's going on. You got the lawyer's number?

MS. WATSON: Oh, my God. It is going to fuckin' kill me."

MS. HANSON: And then -- well, I'll just keep reading.

"THE DEFENDANT: No, I know. I'm steady trying to explain to you, dog. You steady trying to be stubborn and shit, man.

MS. WATSON: I'm not being stubborn, okay. I won't come.

THE DEFENDANT: I told you, man, the mother-fuckin' lawyer already said he like -- man, I don't think it's a good thing 'cuz you all in my mother-fuckin' paperwork.

MS. WATSON: I am? I asked you and you said they didn't say nothin' about me.

THE DEFENDANT: I'm telling you right now, he said it's not a good idea for you to be in court 'cuz ol' girl see you in courtroom, then she gonna automatically know, then point me out; you know what I'm sayin'?

MS. WATSON: Okay. Well, then, I won't come.

THE DEFENDANT: You know, I just -- I just call you and let you know what's going on; you know what I'm sayin'? But don't --

MS. WATSON: I mean, you have to understand, though, I'm not trying to be stubborn. I just want to be there for you; you know what I'm sayin'.

THE DEFENDANT: You can't be there.

MS. WATSON: I know. Okay. I understand that now. But I'm just saying, I don't know. I understand that though. I won't be there.

THE DEFENDANT: All right.

MS. WATSON: I won't be there. I just want you to call me.

THE DEFENDANT: 'Cuz I'm telling you, he told me like if mother-fuckin' ol' girl see you in the courtroom, whatever -- you know what I'm sayin'? It ain't gonna be right. He said the best thing for you to say away. I thought he told you that and you said you were gonna stay at your daddy's house or something.

MS. WATSON: No. He told me that I should stay away from my house so they can't subpoena me. I guess I just didn't put two and two together; I mean --

THE DEFENDANT: Court, too.

MS. WATSON: What?

THE DEFENDANT: Court, too. 'Cuz if they see you in court, they gonna already know who the fuck you is.

MS. WATSON: Yeah, that's true."

MS. HANSON: And then going to page 16, Burnside -- actually, if you can start on line 1.

"MS. WATSON: Probably like Tuesday night or Wednesday night. I'll probably stay there. You know what I'm sayin'? So, they can't just come to my house early in the morning. You know what I'm sayin'?

THE DEFENDANT: Yeah.

MS. WATSON: And try to do some bullshit. So --

THE DEFENDANT: Yeah. He said -- he said -- he said they really want you; you know what I'm sayin'? So, you know, really, just stay out of they way. You don't want to be all in their face."

MS. HANSON: And then we go to disk 1, track 17, page -- starting on page 14.

MR. TOSTO: Disk 1, track 17?

MS. HANSON: Disk 1, track 17. Actually -- I'm sorry -- back up to page 6.

Starting on line 17 with Defendant:

"THE DEFENDANT: Yeah, Boo, I'm going to go ahead and accept that plea. I ain't trying to

jeopardize your mother-fuckin' career and all that shit, 'cuz they might try to charge you with some perjury; you know what I'm saying? So, when you get on the stand and be like no, no, he ain't did nothin', and then you know how they tried to do me with Barry.

MS. WATSON: Yeah.

THE DEFENDANT: They tried to then try to charge you with perjury and then, you know.

MS. WATSON: I mean, I mean, you know, Avon, I don't want to say anything because I don't want to make it all about myself; you know what I'm sayin' -- because it's not. But, you know, I feel like my job is our livelihood, you know. And I don't want you -- even if I do do that and get up there and they still send you forever. You know, what I'm saying? I don't know, man. I just -- I just want whatever's shorter. I just want to be with you."

MS. HANSON: And then going to page 14, line 20:

"THE DEFENDANT: Don't worry about getting on the stand, Boo. I really, really truly don't think they can do nothing to you, though, even if you did have to. They just tryin' to scare you.

MS. WATSON: I know. But, I mean, if I get any felony charges, you realize I can never be an aide

or a nurse.

THE DEFENDANT: Perjury -- perjury ain't a felony.

MS. WATSON: It was for Little Kim.

THE DEFENDANT: Oh, yeah. You ain't bullshittin. Oh, yeah, you're right. I'm going to go ahead and accept this plea on the strength of you remember that. Because if it weren't for you and jeopardizing your career, I wouldn't be accepting this plea when we go to court."

MS. HANSON: And then going to track -- disk 1, track 19, page 4, line 14, starting with Leah Watson.

MS. WATSON: I am on your side 100 percent.

THE DEFENDANT: Listen, listen. Fuck what the lawyer's sayin'. Fuck what everybody is sayin'. Fuck what the bitch sayin'. Fuck everybody. You on my side. Fuck what everybody sayin'. Oh, you gonna jeopardize your career over this mother-fucker? Whatever the fuck they want to call me. You know what I'm saying? Fuck them. If I want to take this shit to trial, I'll take it to trial. And, another thing is --

MS. WATSON: I know.

THE DEFENDANT: -- they ain't got shit on me, you know. I know it. Of course they gonna try to talk

all this shit; you know what I'm sayin'? Of course they gonna put you on the stand, 'cuz they show your truck. Your truck was mentioned. So, don't act like this was a big ol' surprise because you got subpoenaed to court.

MS. WATSON: It's not a big surprise.

THE DEFENDANT: All right then.

MS. WATSON: Its not. The attorney already told me that it was gonna happen."

MS. HANSON: Okay. And then moving down to line 19 on page 5:

"THE DEFENDANT: All right then. So, we need to try to come up with a plan; you know what I'm saying? Where you get on the stand and you tell 'em the same ol' shit. If you got on the stand like, shit, we ain't did nothin', he ain't did nothin', and that's that. Ol' girl need you to say the same shit that she said for them to convict me.

MS. WATSON: I know.

THE DEFENDANT: Okay, then. Now, at least we both got the understanding. So, if they didn't need you -- let's believe they will subpoena you, just like they were subpoenaed me to Barry court. You see, they ain't charge me with perjury. I told 'em I didn't know shit. I didn't know shit. When you don't know shit,

you don't know shit. You don't get all scared and when you get on the stand and get all shook up when they go to question you. If they ask you like if I ever did something like that to you, hell, no. It's just a big misunderstanding. Somebody lied. You know what I'm saying? Because 9 times out of 10, that's gonna come up. You hear what I'm sayin'?

MS. WATSON: Yeah."

MS. HANSON: And then we go over to page 7, starting at line 8. I'm sorry, starting at like 6, with Ms. Watson.

"MS. WATSON: Exactly what I told 'em before, that it was not him. It was somebody else.

THE DEFENDANT: Yeah, exactly, you know what I'm sayin'. So, fuck that. They tryin' to use you 'cuz they think you all scared of me and this and that and this, 'cuz that what they gonna try to put in everybody's face. Now, if push comes to shove, like I told you, they got mother-fuckin' Barry mother-fuckin' prosecutor on my case. Now, they might don't try to come with me with a good plea like the lawyer said. So, I might end up taking this shit to trial. So, long as you get on the stand and say what the fuck you got to say and I didn't do shit -- I ain't did shit, we should be straight. Now, remember, ol' girl needs your

word to match up with hers. So, if you -- if her words ain't matchin' up with yours, that shit a mother-fuckin' lie."

MS. HANSON: And then going to page 8, line 14, with the Defendant.

"THE DEFENDANT: Just like Little Barry. If he would have went ahead and caught hisself taking the cheap way out, he still would a did some time.

MS. WATSON: Well, I didn't even know that they gave Barry a plea deal."

MS. HANSON: And then going to page 9, at the top, line 1 with Ms. Watson.

"MS. WATSON: I don't know, Avon. Like I told you before, I don't want to see like a bad person. I'm not trying to.

THE DEFENDANT: I mean, to be honest with you, you make me think mother-fuckin' twice about you. You supposed to be down with me 100 percent. You got me feeling like if I do get out of mother-fuckin' jail I might as well leave you the fuck alone, too, then, since -- since this shit gettin' too mother-fuckin' hot for you. Now you acting like I don't know what's wrong with you.

MS. WATSON: You don't know what's wrong with me?"

MS. HANSON: And then going to -- going to page 13, line 16, with Ms. Watson.

"MS. WATSON: You letting this shit turn you against me.

THE DEFENDANT: Okay, all right, whatever you say. But last time I checked, if it weren't for arguing with your mother-fuckin' ass, shit wouldn't even be like this.

MS. WATSON: Did you get my letter?

THE DEFENDANT: No.

MS. WATSON: You haven't got my letter yet?

THE DEFENDANT: Hell, no.

MS. WATSON: Avon, I'm trying everything I can. Okay?

THE DEFENDANT: We'll see.

MS. WATSON: What?

THE DEFENDANT: I said we'll see. So, what -- what you want me to call you, work now? What made you want me to call your work?

MS. WATSON: Because I just wanted to talk to you, bad.

THE DEFENDANT: We just -- you make sure you call the lawyer tomorrow and you explain to him what the fuck I told you about the murder case and tell him to check -- check out that and make sure that shit

don't affect me with --

MS. WATSON: So, it was a girl?

THE DEFENDANT: Just tell him to look up Barry Milton Blassing, a murder case and I was on it. And I was there to fuckin' testify against Barry, but I --" and then there's a thing to disconnect -- "and you tell him that I was there to testify against Barry and I didn't. You tell him them prosecutors is mad at me and you explain to him when they fuckin' came and put the letter up in your mother-fuckin' door that the homicide detective Collins and them were showing me and Barry pictures."

MS. HANSON: And then that's all on that.

Going to disk 2, track 2, page 7, starting with line 6, with the Defendant.

"THE DEFENDANT: So, basically, he said I ain't have a chance winning if I go to trial.

MS. WATSON: No, he said you have no chance. He said that won't even -- he won't take it to trial, he said, because he can't win.

THE DEFENDANT: Far as what, 'cuz I was pulled over in the truck?

MS. WATSON: He said far as they have too many -- too much circumstan -- I cannot say that word -- you know what I mean, evidence.

THE DEFENDANT: What, 'cuz you work in a nursing home and it's your truck and I was pulled over?

MS. WATSON: Yeah. And you've been pulled over and they picked you up at my house; you know what I mean.

THE DEFENDANT: Yeah.

MS. WATSON: She sayin' it was these two people, you know what I mean. There's no reason why they are thinking that she would lie. You know, everything. The license plate she said on 9-1-1 call and the license plate was given before this happened. I told you, she was on the phone, so that's that. That what he's saying is the crucial part of this 9-1-1 call."

MS. HANSON: Okay. And then going to tape 2, track 4, pages 8 through 13, just starting at the page, the top of page 1, line 1, with Ms. Watson.

MS. WATSON: Oh, what,the domestic violence?

THE DEFENDANT: You and the girl claim that she was trying to help you.

MS. WATSON: Oh, my God. Well, she ain't helped me too God damn much. Shit, I can't tell she's tryin' to help.

THE DEFENDANT: Yeah, but that's what it is.

MS. WATSON: People need to learn to mind

their mother-fuckin' business. That's what the fuck it is.

THE DEFENDANT: That's how it lookin', man. So I guess whatever they tell you in the courtroom, I don't know, man. Nine times out of 10, they're gonna try to get you, the lawyer, the prosecutor and her together. Ya'll just going to be tryin' to talk.

MS. WATSON: Well, if they do, I'm just going to let her know, you know, this is not going to help me or him. You're ruining my life, basically. I mean, I don't know if I want to say it like that 'cuz, you know, if they gonna play it like that, I want her on my side. You know what I'm sayin'. I don't want to piss her off.

THE DEFENDANT: I'm telling you what they -- they want you and her to talk.

MS. WATSON: Well, I'll just have to start figuring it out. 'Cuz what I'm saying, if it comes down to that, 'cuz the bottom line is me and you. Whatever the fuck I got to tell her, you know what I'm sayin', I'll do it.

THE DEFENDANT: The only thing I'd advise you to tell her like you takin' my man away from me, you know. That's what it is.

MS. WATSON: Yeah.

THE DEFENDANT: So, she might be trying to tell you, like I think it's best you leave him alone and all this and that. The prosecutor might say the same thing. Maybe even the lawyer.

MS. WATSON: I don't know. I mean, you don't think I should be like -- like -- I don't know. You don't think I should kind of play like, you know, I know that he needs help and that's what he needs, is help. And if he goes to prison, it's just gonna make it worse. He needs help. He needs somebody to talk to, to resolve the issues in his life, you know. Tell he's hard a hard life. I don't know.

THE DEFENDANT: I don't know.

MS. WATSON: Huh.

THE DEFENDANT: I don't know. They subpoenaed you to court.

MS. WATSON: They what?

THE DEFENDANT: I said I don't know. They subpoenaed you to court.

MS. WATSON: I know. Tell me about it.

THE DEFENDANT: So, whatever you all talk about and whatever you know, I ain't -- I'm gonna be locked up, you know. Ya'll, I don't know.

MS. WATSON: But they will bring you to court, right?

THE DEFENDANT: Yeah, I'll be in court. But you all gonna be in there talking and everything before I even come out.

MS. WATSON: Well, maybe I'll just think of something to say on the spot. I'll just respond to whatever she's got to say, if that's how they're gonna play it.

THE DEFENDANT: I don't know. But whatever you do, do it right. That's all I can tell you.

MS. WATSON: Well, trust me, I'm going to. I'm not gonna say something that's gonna hurt you.

THE DEFENDANT: Okay.

MS. WATSON: I'm waiting on the ring on my finger. So --

THE DEFENDANT: But they fuckin' that up.

MS. WATSON: I know. So, I got to fix it. And that's what I'm gonna do as best to my ability. Trust me. Trust me.

THE DEFENDANT: Yeah, man, they gonna -- they gonna want to talk to you and see what you say. 'Cuz if they sayin' both you all victims and shit, they gonna want to talk to you and see what you say, and then see what she say, and see what you all come up with. And then they gonna go off with what you all say. And then sentence me.

MS. WATSON: 'Cuz I feel like, you know, if I'm steady bringing up the fact that you need help, that might includes her; you know what I mean."

MS. HANSON: And then we go to disk 2, track 14, pages 4 through 6, starting at line 5, with the Defendant.

"THE DEFENDANT: Oh, damn, so this phone in your name?

MS. WATSON: Yep.

THE DEFENDANT: Oh, man.

MS. WATSON: So?

THE DEFENDANT: That ain't good.

MS. WATSON: Why? They have to know the number.

THE DEFENDANT: They know the number, don't they?

MS. WATSON: No. I don't -- I don't know how they could unless they check every single service for something with my name.

THE DEFENDANT: Yeah. When you get a contract, they basically know all about it.

MS. WATSON: Well, they -- what?

THE DEFENDANT: I say, when you got a contract phone, they basically know, like if you answer the phone at the house or whatever, they'll know exactly

where you at. Like as soon as you pick up, they'll know from your phone number, from the signal.

MS. WATSON: (Indistinct)

THE DEFENDANT: You say what?

MS. WATSON: Where --

THE DEFENDANT: You said what?

MS. WATSON: Asking me where is the calls coming from and what number and this and that. And I'm like, I don't know the number. So, I think that's the only way that they can -- you know, maybe they do record. I mean, they probably do record all the conversations. But they -- you know how many phone calls come from out of there a day.

THE DEFENDANT: Yeah. But somehow they like -- my man just got caught up on a M case 'cuz he was talkin' on the phone to his people, explaining what happened. And they brought the phone recording up in court. And now he cut out from talking on the phone. But the only thing I can say is, you know, we just gotta watch what we say on this phone. I don't think they could tap it if we phone tag it, 'cuz it ain't being recorded at that time. So, if we got to say something, we got to phone tag.

MS. WATSON: Yeah. But, I mean, I still want to talk to you.

THE DEFENDANT: Right. Yeah. But we can -- we can talk on the phone as long as we use the name that we use and don't say nothin' about it.

MS. WATSON: Right.

THE DEFENDANT: About the case.

MS. WATSON: Right.

THE DEFENDANT: So, pretty much, we just got to watch what we say on the phone. 'Cuz I really know when a nigger go to court, they gonna already be like, we already know you been mother-fuckin' tampering and all this bullshit.

MS. WATSON: Right. And I don't want that.

THE DEFENDANT: Yeah. That's what they gonna try to say and shit.

MS. WATSON: I really don't want that. So, I don't know, man."

MS. HANSON: And then going to disk 3, track 6, page 11, starting on line 16.

"MS. WATSON: And what's your lawyer say?

THE DEFENDANT: Mother-fuckin' man, he ain't been talking to me, man. I guess -- I guess I got to wait until Thursday to figure out what's going on. He gonna -- he gonna tell me one thing, that he ain't gonna go into trial with it because they got too many circumstantial evidence, some shit like that, he said.

And I'm like, here we go.

MS. WATSON: And what evidence?

THE DEFENDANT: I guess the mother-fucker called the police. That's the only evidence they got. But let them tell it. That's too many circumstantial evidence. But, I guess, you know, I guess that's a lot of evidence, you know.

MS. WATSON: Is that the only evidence, Avon?

THE DEFENDANT: Yeah, unless he just don't want to take the shit to trial. I don't know what -- I don't want to go to trial neither. I just want to, you know, take a plea. Hopefully, I get a little probation or something, 'cause they ain't -- they ain't finding me with no gun or nothin' like that. They just got a license plate off a truck, and that's pretty much all they got.

MS. WATSON: Anybody can get that, though.

THE DEFENDANT: I know. But let him tell that the police, mother-fucker, had called the police and shit. Man, be man -- I don't know, I feel like sometimes he's against me and shit, mother-fucker.

MS. WATSON: Why?"

MS. HANSON: And I think -- going to disk 4, track 8, page 10 through 13, one line 13.

MR. TOSTO: What page?

MS. HANSON: Ten.

"MS. WATSON: Right. But they don't have nothing. That's why I'm telling you, that's why I'm saying right now is, I mean, I don't know, just -- it's just messed up. 'Cuz the way I look at it it's okay. So, where is people getting the information from? So, okay; so what? How do you -- how do you know if it's Avern Burnside? What you saw, a license plate?

THE DEFENDANT: Yeah, yeah, yeah, exactly.

MS. WATSON: Is it illegal to ride down a street? No.

THE DEFENDANT: Yeah, that's what I'm saying. See, mother-fucker said he goin' off the license plate -- off the plate number and shit. So that's why when you get on the stand like, shit, he wasn't driving my car; you know what I'm saying? Or, you know, what I'm sayin', we wasn't together. You know what I'm sayin'? It wasn't nothing like that going on while we were together. You feel me?

MS. WATSON: Yeah. But I'm saying it as though as Avon, you need to stick with me because I'm telling you right now what Barry lawyer told me. He said gonna say I said some bullshit. I'm telling you, that's exactly what he said. He said he is dirty. I'm telling you."

MS. HANSON: Okay. And we will leave the rest for the jury to read, if they so desire.

THE COURT: Okay. And that binder --

MS. HANSON: And that concludes --

THE COURT: -- with the transcript has been marked. Is that right?

MS. HANSON: Absolutely. I think Ms. Snyder has the marked exhibit.

THE COURT: Okay.

Mr. Tosto, any objection to the admission of the binder with the transcripts in their entirety, which is Proposed Exhibit 23?

MR. TOSTO: Just I'd preserve my previous objections, Judge.

THE COURT: Other than your previous objections. All right.

Exhibit 23 will then be admitted based upon the Court's prior rulings, noting Mr. Tosto's objections to those rulings.

And, Ms. Hanson, you may proceed.

MS. HANSON: Thank you.

BY MS. HANSON:

Q Ms. Watson, we read just a few of the phone conversations, just part of them. And is it true that at that time you would have done whatever you needed to

A Yes.
Q Same thing you told us here today, correct?
A Yes.
Q Okay. Now, let's talk a little bit about the past. In the past, was there a time when the Defendant shot at you?
A Yes.
Q Tell us about that.
A It was a argument over money. I had money for him. I pulled up to where we were meeting. A friend I was with said he's got a gun, so I took off and he shot.
Q Where did he shoot? At you?
A Yes.
Q Did it hit you?
A No.
Q What did it hit?
A My car.
Q Okay.

MS. HANSON: One minute, your Honor.

(At 12:14 p.m., Ms. Hanson confers with detective.)

BY MS. HANSON:

Q At one point in time during all these phone conversations, Ms. Watson, did you actually try to change your name so you could -- you could be Kathy, I

APPENDIX D

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

vs

Case No. 09-25749-FC

AVERN LEE BURNSIDE,

Defendant.
_____/

JURY TRIAL - VOL. III of III
BEFORE THE HONORABLE MARK LATCHANA, DISTRICT JUDGE, SITTING
FOR JOSEPH J. FARAH, CIRCUIT JUDGE
FLINT, MICHIGAN - FRIDAY, FEBRUARY 24, 2012

APPEARANCES:

For the People:	KAREN R. HANSON P-53588 Genesee County Prosecutor's Office 900 South Saginaw Street Flint, Michigan 48502 (810) 424-4417
For the Defendant:	JOHN A. TOSTO P-56579 503 S. Saginaw Street, Suite 1410 Flint, Michigan 48502 (810) 244-5862
Recorded by:	Via Video Recorder
Transcribed by:	Teresa A. Trosko, CER 5595 Certified Electronic Recorder (810) 424-4454

TABLE OF CONTENTS

JUROR: Debra Williams Sharrow (phonetically).

CLERK: What is your verdict as to Count One?

JUROR: Guilty as charged, Assault with Intent to Murder.

CLERK: What is your verdict as to Count Two?

JUROR: Guilty as charged of Carrying a Concealed Weapon.

CLERK: What is your verdict as to Count Three?

JUROR: Guilty as charged of Felon in Possession.

CLERK: What is your verdict as to Count Four?

JUROR: Guilty as charged of Discharge of a Firearm from a Vehicle.

CLERK: And what is your verdict as to Count Five?

JUROR: Felony Firearm, Possession of a Firearm in the Commission of a Felony.

CLERK: Members of the jury who agree with the verdict, please raise your right hand and listen to your verdicts as recorded.

You, and each of you, do say upon your oath that you find the Defendant, Avern Burnside, guilty as charged of Assault with Intent to Murder as to Count One, guilty as charged of CCW -- Carrying a Concealed

APPENDIX P

STATE OF MICHIGAN

IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

PEOPLE OF THE STATE OF MICHIGAN,

vs Case No. 09-25749-FC

AVERN L. BURNSIDE,

Defendant.
_____/

SENTENCE

BEFORE THE HONORABLE MARK LATCHANA, DISTRICT JUDGE
FOR HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE

FLINT, MICHIGAN - WEDNESDAY, MARCH 28, 2012

APPEARANCES:

For the People: MICHELLE L. RICHARDSON P57485
ASST. PROSECUTING ATTORNEY
100 Courthouse
Flint, Michigan 48502

For the Defendant: JOHN A. TOSTO P56579
Attorney at Law
503 S. Saginaw Street, Suite 1410
Flint, Michigan 48502
(810) 244-5862

Recorded by: Via Video Recorder

Transcribed by: Shelie Robinson CER 6913
Certified Electronic Recorder
(810) 424-4454

TABLE OF CONTENTS

EXHIBITS:

None

WITNESSES:

None

called on it and being told to stop, you get firearms out.

You're the reason that this town has the reputation that it does. You shoot at innocent bystanders, people who are just trying to get back to work. It's despicable, quite frankly.

Mr. Tosto mentioned the 404(b) and I'm not taking that into account. It was never charged. It was testified to at the trial. It makes no difference. It has no factor in the sentence that I have fashioned with regard to this case.

I'm not departing from the guidelines. I'm not going to the top of the guidelines. But I believe that a significant sentence is necessary. The reason I'm not going to the top of the guidelines is, as Mr. Tosto pointed out, you don't really have any prior assaultive convictions. You have prior felony convictions. There's no question about that. But you don't have a multitude of misdemeanor assault and battery convictions. If you did, I would be sentencing you at the top of the sentencing guidelines.

As it stands, the sentence for count five, the felony firearm count is 24 months in prison, credit for 730 days. It's consecutive to counts one,

three and four, concurrent to count two. I guess I should, for the record, note that that change needs to be made to the sentencing information or the presentence investigation report that count two is concurrent to count five.

With regard to count one, it's the sentence of the Court that you be sentenced to the Michigan Department of Corrections for a minimum term of 240 months to a maximum term of life, with credit for 178 days. That's concurrent to counts two, three and four, consecutive to count five.

With regard to count two, carrying a concealed weapon, it's the sentence of the Court that you be sentenced to the Michigan Department of Corrections for 30 months to 180 months, credit for 730 days. It's concurrent to count five which is the felony firearm count.

With regard to count three, the sentence of the Court is 30 months to 180 months in prison, credit for 178 days. Concurrent to counts one, two and four, consecutive to count five.

With regard to count four, the sentence of the Court is 30 months at the Michigan Department of Corrections to 180 months, credit for 178 days. Concurrent to counts one, two and three, consecutive

to count five.

Ms. Richardson?

MS. RICHARDSON: May Mr. Tosto and I approach?

THE COURT: Yes.

(At 2:42 p.m., bench conference)

(At 2:43 p.m., bench conference concluded)

THE COURT: Ms. Richardson and Mr. Tosto have informed me that the term with regard to count one needs to be specified on the top end of the sentence. So, the sentence of the Court is going to be 240 months to a maximum of 480 months, with once again credit for 178. All the other terms remain the same.

Mr. Burnside, you have the right to appeal your conviction and sentence. For that purpose, I'm going to hand to you through Mr. Tosto your notice of right to appellate review and request for appointed attorney. I ask that you sign the receipt. Return that back to the Court. You will have your copy for your purposes.

MR. TOSTO: Judge, I didn't catch it. Did you give him jail credit for 178 days for counts one through four?

THE COURT: I gave him 178 days credit on

APPENDIX Q

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff,

vs

No. 09-025749-FC

Avern L. Bunside Defendant(s). Hon. Joseph J. Farah

/.

AFFIDAVIT OF CASE WITNESS

Now comes the affiant Leah Watson to state as follow:
Name

That I, Leah Watson may be called in the above matter as a witness, to provide testimony.

Affiant, at this time invokes the right to not participate in these proceedings, or any future trials, to provide testimony, against any of the above mention defendant(s).

Affiant, fear that any testimony, provided by affiant at any judicial hearing in the above matter and/or any prior statements provided to the Flint City investigator's, during their criminal investigation in this matter, was and will not be given in the interest of law or pursuant to the rights of the defendent(s).

Due to the contradictory nature of affiant prior statements and the influential techniques of investigators in obtaining these statements, from your affiant, I base my decision.

Additionally, your affiant, after the issuance of affiant's affidavit. Respectfully, request that if any futute communication and contact, by state officials are pertain to the above matter. Pursuant to rights and law, affiant inserts the right to be accompanied by counsel, to address any conerns.

Further affiant sayeth naught.

Date: 4/8/10

Leah Watson
Affiant

FILED
2010 APR -8 PM 1:14
GENESEE COUNTY CLERK
BY DEPUTY CLERK

-Notary Use Only-

Sworn to an subscribed before me this 8th day of April 2010.

Notary Public Cecilia LaPorte

CECILIA LAPORTE
Notary Public, State of Michigan
County of Genesee
My Commission Expires Nov. 24, 2014
Acting in the County of Genesee

Commission Expires Nov. 24, 2014

APPENDIX R

FILED
2011 JAN 20 A 10:30
GENESEE COUNTY CLERK
BY DEPUTY CLERK

STATE OF MICHIGAN
7TH JUDICAL CIRCUIT
FOR THE COUNTY OF GENESEE

HONORABLE JUDGE FARAH
CIRCUIT COURT JUDGE

Case No.: 09-25749-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs.

AVERN B. BURNSIDE,
Defendant

EX PARTE ORDER DECLARING LEAH D. WATSON A MATERIAL WITNESS

DAVID S. LEYTON
Prosecuting Attorney

Karen H. Hanson (P-53588)
Assistant Prosecuting Attorney
100 Courthouse
Flint, Michigan 48502
(810)424-4417

At a session of 7th Circuit Court
held on January 20, 2011

In this cause, on reading and filing the petition of David S. Leyton, Prosecuting Attorney for Genesee County, praying that **LEAH D. WATSON**, be declared a material witness in, who is alleged to be a necessary and material in the above-entitled cause now pending in this Court, whose testimony may be lost unless he/she is required to furnish bail for his/her appearance at preliminary examination.

On motion of the People of the State of Michigan, it is ordered that an attachment be issued, returnable before this Court IMMEDIATELY, and that **LEAH D. WATSON** be required to enter into a recognizance to appear as a witness in the above-entitled cause, and to await the further order, after a hearing on the petition.

1/20/11
DATE

Judge Joseph Farah
7th Circuit Court
Genesee County

ORDER FOR ATTACHMENT

FILED

STATE OF MICHIGAN
7TH JUDICIAL CIRCUIT
FOR THE COUNTY OF GENESEE

2011 JAN 20 A 8:30
COUNTY CLERK
BY DEPUTY CLERK

HONORABLE JUDGE FARAH
CIRCUIT COURT JUDGE

Case No.: 09-25749-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs.

AVERN BURNSIDE,
Defendant

EX PARTE PETITION TO HOLD WITNESS TO BAIL

DAVID S. LEYTON (P-35086)
Prosecuting Attorney

Karen H. Hanson (P-53588)
Assistant Prosecuting Attorney
100 Courthouse
Flint, Michigan 48502
(810)424-4417

Now comes David S. Leyton, Prosecuting Attorney for Genesee County, by Karen R. Hanson, Assistant Prosecuting Attorney, and states unto this Court that **LEAH D. WATSON** is a necessary and material witness in the above entitled case, and there is danger of the loss of his/her testimony unless he/she is required to furnish bail or be committed in default thereof.

LEAH D. WATSON is a necessary and material witness in this cause for the reason that he/she is a witness necessary for the resolution of the issue of criminal responsibility of an Assault with Intent to Murder, Felon in Possession, Discharge into Motor Vehicle and Felony Firearm case where defendant is currently charged.

There is danger of the loss of his/her testimony unless he/she is required to furnish bail or be committed in default thereof because a review of the affidavit attached hereto and made a part thereof by **SGT MITCH BROWN of the City of Flint Police Dept.,** indicating that **LEAH D. WATSON was personally served** with a subpoena on January 19, 2011, and that he/she did not appear at a Circuit Court Trial January 20, 2011. That Watson assured Sgt. Brown she would appear at trial on January 20, 2011.

That previous dealings with Leah Watson indicates that when she become aware that she is being subpoenaed for trial she is less than cooperative.

Pursuant to MCL 765.35, your petitioner therefore prays that an attachment may be issued requiring **LEAH D. WATSON** to be brought before this Court to show cause why he/she should not be required to enter into a

recognizance to appear on the exam date set by the 7th Court, Genesee County, to give testimony in this cause before the **Honorable Joseph Farah.**

And if it shall appear to the Court that **LEAH D. WATSON** is a material witness, and there is a danger of the loss of his/her testimony, that he/she be required to furnish bail or in default thereof be committed to jail pending the trial in this case.

January 20, 2011

Karen R. Hanson, Assistant Prosecuting Attorney
Genesee County Prosecutor's Office

STATE OF MICHIGAN
7TH JUDICAL CIRCUIT
FOR THE COUNTY OF GENESEE

HONORABLE FARAH
DISTRICT COURT JUDGE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs.

AVON BURNSIDE,
Defendant

Case No.:

AFFIDAVIT

DAVID S. LEYTON (P 35086)
Prosecuting Attorney

Karen H. Hanson (P-53588)
Assistant Prosecuting Attorney
100 Courthouse
Flint, Michigan 48502
(810)424-4417

STATE OF MICHIGAN
SS
COUNTY OF GENESEE

SGT. MITCH BROWN, being first duly sworn states unto this Court that:

1) That Sgt Mitch Brown is the officer in charge of case number 09-25749-FC an Assault with intent to Murder where the defendant, Avon Burnside is accused of shooting at Antwyne Ledesma, on July 30, 2009 in the City of Flint;
2) That Leah Dene Watson was a Res Gestea witness to the AWITM, as the crime was committed in her presence while she was being assaulted by the defendant in her vehicle;
3) That Leah Dene Watson testified at the preliminary examination against defendant, then wrote a letter recanting her statement;
4) Further, Leah Dene Watson was served on January 19, 2011 by your affiant and Sgt. Jeff Collins at which time Watson told your affiant and Sgt. Collins that she would be here but she is afraid of defendant and his family;
5) Watson also told your affiant and Sgt. Jeff Collins that she wrote the letter to Judge Dowd recanting her testimony and that it was a stupid thing to do and that she only did it because 'Avern' was pressing her to do it;
6) That Watson told your affiant she would be in Court January 20, 2011 between 8:30 and 9:00 AM. She has not appeared and is not answering her phone;
~~7) That trial is set for January 20, 2011 before the Honorable Joseph Farah;~~

APPENDIX S

Affidavit

State of Michigan, County of Genesee

My current legal name is Leah Dene' Watson, and my current occupation is CENA. I am presently 27 years old, and my current address of residence is 1127 South Dye Rd., Flint, Michigan 48532.

1. I have attempted multiple times to tell both the detectives and the prosecutor the truth, not only in private but through other means as well. All throughout this time the original statement I made to Detective Brown and Detective Collins was the truth. I originally stated to them that the man that committed this crime was a man I was engaged in a sexual relationship with, despite being involved in a relationship with Avern Burnside at that time. I did not and do not currently know many details about this man, I could only tell them what I knew. The name I know him by is Ty, I understood this to be his nickname. He told me he was from Detroit, MI but the only locations I always pick him up at were either the store on Lapeer rd. Flint, MI or walking around that area. Due to the fact that, to my knowledge, he was at that time in a relationship as well as I, he had my telephone number but only called me as a private caller. After informing the detectives of this, they continued to tell me I was lying. Detective Collins then continued by showing me a photo of a man who I knew to be one of Avern Burnside's friends. This friend was involved in a criminal trial previously where he was charged with murder and was found not guilty through a jury trial. In which, the detectives informed me that "Avern lied during his friends trial to help him beat the case". I attempted to hire the attorney that worked on that case and he informed me that he told Avern and his friend to leave flint after the trial because "the detectives would be gunning for them". So after detectives Collins showed me the photo I knew the only way they would let me go and not send me to prison for this crime, as they threatened, was to tell them that Avern was the one that had committed it. That is a false statement. After I told the detectives it was Avern the badgering ceased. They informed me that he would receive probation or get the help that he needed. Knowing Avern for an extended amount of time and knowing many of the traumatizing thing he had been through during his childhood I figured it would not hurt him to get some counseling. At that point, I still did not understand the consequences of what I had done. At his preliminary exam I was forced to testify, after informing them again that it was not Avern. I was told by detective Brown at this point that I "needed to do what I was told, to get on the stand and testify that it was Avern that committed the crime, or he would personally make sure my life was hell and I'd definitely be in prison before it was over". I felt like I had no other choice at this point but to falsely testify against Avern Burnside. After testifying I knew I had to let the truth be known. I decided to write a notarized letter and send it directly to the judges instead of the detectives. I decided to do this after previously trying multiple times to go through the detective in which I was never successful. I sent the notarized letter to both Judge McDowd and Judge Farrah. After I did this then the harassment really began. The detectives began showing up at my house and job repeatedly. My employer was told of the situation by the detectives and informed me that if my personal life continued to affect my job then I would be let go due to it disturbing the work place. I also tried to move away but nothing stopped it. I tried to not show up when Avern's trial began because I just wanted it to go away. I was not able to tell the truth without being harassed, threatened for my life to be ruin, and thrown in prison. When I was taken in front of Judge Farrah on a $50,000 bond hearing, I knew then that there was nothing I could do. I had to get on the stand and just say what they wanted me to, I had no choice but to say that it was Avern. Every question I was asked I just agreed with it to hurry up and get it over with. For example, the incident in 2005 where I indicated Avern had shot at me. It is true that I did call Avern's probation officer at the time and tell him that he shot at me, but when I found out that it was not him I called his probation officer back and informed him that I was mistaken and it was not Avern. That was the truth, Avern did not shot at me in 2005.

2. Regarding the telephone transcripts I was never given the opportunity to hear the audio recordings of the phone call conversations. After asking to hear them twice, then I was given typed transcripts from the prosecutor. Upon reading these typed transcripts, I saw a lot of errors. Some of the conversations that the prosecutor claimed were between Avern and I were not, I knew this due to the nature of the conversations, it

was obvious. For example, there were conversations where Avern asked for pictures of this person, and the response was to the nature of the only pictures I have are of me and my kids. Also inquiring about how my children were doing, since up to this point in my life I still do not have any children he was not speaking to me as the prosecutor portrayed. Along with many more problems that I called to the prosecutors attention. Including conversations I never recalled having with him and things that were put in the typed transcripts that I never remember saying or hearing. After reading through all of the typed transcripts, I once again requested to hear to actual audio recordings. Once again my request was denied. I was told that there was no need for me to hear them, that the typed transcripts were all the evidence I needed. Thus by being denied to hear the actual recordings I was unable to determine if the type transcripts were accurate, I was not given the opportunity to confirm if the conversations presented to me where indeed Avern and myself, and also I was not given the opportunity to listen to the audio recordings to determine the nature of the conversations or hear the context in which things were stated, if indeed the conversations were Avern and I.

3. I was recently diagnosed with ADHD and Anxiety. I have struggled with symptoms of this chronic illness my whole life, but now with the help of therapy and medications I am able to realize how much my life was affected. There are a couple known symptoms of this illness that I believe affected me in this situation. Some of the known symptoms are inattention, inability to understand consequences (acting recklessly or spontaneously without regard for consequences), poor impulse control (inability to make proper decisions), frequent poor judgment, anxiety, and chronic stress and tension. I believe all of these symptoms played a vital role in my decisions to do what the detectives and prosecutor stated they wanted me to do, instead of insisting the truth be heard. Currently I am receiving the help I need to help minimize these symptoms and now know the importance of making sure I can correct the horrible mistakes I have made.

4. I could no longer live my life ignoring this mistake I have made. Avern Burnside is innocent of this crime for which he was found guilty of during his jury trial. I regret letting the detectives and the prosecutors threatening and scaring me into sending an innocent man to prison. I am praying that after repeatedly attempting to tell the truth it will finally be heard..

I hereby state that the information above is true, to the best of my knowledge. I also confirm that the information here is both accurate and complete, and relevant information has not been omitted.

Signature of Individual

Date
5/13/14

Notary Public
Rhonda Henderson

Title And Rank
Notary

Date Of Commission Expiry

RHONDA HENDERSON
Notary Public, State of Michigan
County of Genesee
My Commission Expires Jan. 08, 2018
Acting in the County of Genesee