STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE STEPHENS,

Defendant-Appellant.

UNPUBLISHED
December 30, 2024
9:59 AM

No. 366451
Kalamazoo Circuit Court
LC No. 2022-001681-FH

Before: CAMERON, P.J., and K. F. KELLY and GARRETT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of domestic violence, MCL 750.81, and reckless driving, MCL 257.626. He was sentenced to incarceration terms of 24 months to 10 years for the domestic violence conviction, and 51 days for the reckless driving conviction. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim were previously in a dating relationship. This case arises out of defendant's assault of the victim after she returned home to her apartment with her roommate, and defendant's niece, Natonya Smith. After the assault, defendant followed the victim in her vehicle, trying to "tap [her] bumper." The victim reported the assault to a police officer, who interviewed Smith about her observations of the assault and eventually arrested defendant.

The prosecutor endorsed Smith as a witness, but she failed to appear for trial. The prosecutor stated, during his opening statement, that he did not believe one of the three witnesses on his witness list—Smith—would appear, because she was defendant's niece. The prosecutor also explained to the jury that Smith was an eyewitness to the assault, and that she gave a statement to the arresting officer.

The victim and the arresting officer testified at trial. The officer testified that he had interviewed Smith and that Smith's account was consistent with the victim's. The prosecutor

referenced Smith during closing arguments, while defense counsel lamented about her absence. The jury found defendant guilty and he was sentenced as noted.[1] Defendant now appeals.

II. CONFRONTATION CLAUSE

Defendant first argues the arresting officer's testimony about Smith's account violated his Sixth Amendment rights under the Confrontation Clause. We disagree.[2]

A. PRESERVATION AND STANDARD OF REVIEW

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1). Defendant objected to the officer's testimony about Smith's account as hearsay, but made no mention of the Confrontation Clause. Because "an objection based on one ground at trial is insufficient to preserve an attack based on a different ground[,]" *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003), this issue is unpreserved.

"When a party raises a separate argument on appeal than the party raised before the trial court, the party must satisfy the standard for plain-error review." *People v Brown*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 359376); slip op at 2 (citation omitted). "Generally, whether a defendant's right of confrontation has been violated presents a question of constitutional law that the appellate court reviews de novo." *Id*. at ___; slip op at 3. "However, this Court reviews unpreserved issues of constitutional error for plain error affecting a party's substantial rights." *Id*. "An error is plain if it is clear or obvious, and it affects substantial rights if it affected the outcome of the lower court proceedings." *Id*. "Additionally, reversal is only warranted if a defendant has shown actual innocence or that the error seriously affected the fairness, integrity, or public reputation of the proceedings." *Id*.

B. ANALYSIS

"The United States and Michigan Constitutions protect a defendant's right to confront the witnesses against him." *Brown*, ___ Mich at ___; slip op at 3, citing US Const, Am VI; Const 1963, art 1, § 20. "A primary interest secured by the Confrontation Clause is the right of cross-examination." *Id*. (quotation marks and citation omitted). "Indeed, the right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *Id*. (quotation marks, citation, and alteration

---

[1] He was acquitted of assault by strangulation.

[2] We decline to consider defendant's argument concerning whether the challenged testimony constituted hearsay, because he abandoned it on appeal by failing to include it in his statement of questions presented. *People v Haynes*, 338 Mich App 392, 435 n 5; 980 NW2d 66 (2021). We also decline to consider defendant's truncated, conclusory, single-paragraph ineffective-assistance-of-counsel claim under this issue, because he failed to adequately argue the merits of his challenge and similarly failed to include it in his statement of questions presented. *Id*.; *People v Lopez*, 305 Mich App 686, 694; 854 NW2d 205 (2014).

omitted). "Cross-examination is a valuable right of the accused to expose falsehoods and bring out the truth." *Id.*

We need not consider whether the challenged statements violated the Confrontation Clause because any alleged error was not outcome determinative. *Brown*, ___ Mich App at ___; slip op at 3. The victim testified at length about defendant's assault. While certain inconsistencies were noted for the jury, the victim was consistent that defendant had assaulted her. Thus, the jury was well within reason to find the victim's testimony credible and convict defendant of domestic violence. See *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002) ("[T]he issue of credibility is for the jury to decide and we will not resolve credibility issues anew on appeal.").

III. PROSECUTORIAL ERROR AND IMPROPER ARGUMENT

Defendant argues the prosecutor erred by: (1) implying that Smith did not testify because of her relation to defendant, (2) stating that Smith's account convinced the arresting officer that the victim's allegations were true, and (3) generally using Smith's account "as substantive evidence to corroborate and bolster the credibility of his complaining witness." Defendant also argues the trial court erred by refusing to provide a curative instruction or declare a mistrial as a result of the prosecutor's errors. We disagree.[3]

A. PRESERVATION AND STANDARD OF REVIEW

"In order to preserve an issue of prosecutorial [error], a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Here, defense counsel's objection to the prosecutor's closing argument occurred after closing arguments had completed. Therefore, the objection was untimely. *Id.* Nor did defense counsel request a curative instruction. *Id.* This issue is therefore unpreserved. *Id.* Additionally, we note that defense counsel's specific objection at trial to the prosecutor's closing argument was made on hearsay grounds, not the issues defendant now raises on appeal. Defendant now argues that the prosecutor, in opening statement and closing argument: (1) violated his Confrontation Clause rights by discussing Smith's account and implying she "had also inculpated defendant[;]" (2) improperly implied that Smith failed to appear for trial because of her relation to defendant; (3) "connected an improper call for community outrage to the res gestae witness he failed to produce[;]" (4) claimed that Smith's statement convinced the arresting officer that the victim was telling the truth; (5) allowed the arresting officer to testify that "he had no reason to believe [the victim] was lying and that Ms. Smith's statement was consistent with [the victim's']," but failed to ask "whether he believed either res gestae witness was telling the truth[;]" and (6) used Smith's statement "as substantive evidence to corroborate and bolster the credibility of [the victim]." None of these arguments relate to defense counsel's hearsay objection.

Defendant's claim that the trial court erred by refusing to provide a curative instruction or declare a mistrial is also unpreserved, because defense counsel never sought a curative instruction

[3] We again decline to consider defendant's brief, abandoned ineffective-assistance-of-counsel claim as to this issue because it was not included in the statement of questions presented. *Haynes*, 338 Mich App at 435 n 5.

or moved for a mistrial. *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012) ("A defendant must raise an issue in the trial court to preserve it for our review.").

"Unpreserved issues are reviewed for plain error affecting substantial rights." *Bennett*, 290 Mich App at 475. "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." *Id*. at 475-476 (quotation marks and citation omitted).

B. ANALYSIS

Beginning with defendant's prosecutorial error argument, we note that "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Prosecutors are "not required to state inferences and conclusions in the blandest possible terms." *Id*. at 239. Issues of prosecutorial error "are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id*. "Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel." *Id*.

Defendant first challenges a remark by the prosecutor during opening statement alerting the jury that Smith was not going to appear, implying her absence was because she was defendant's niece. According to defendant, this comment improperly suggested "something untoward going on related to [defendant.]" But, other than the reference to their familial relation, the prosecutor did not suggest that defendant was responsible for Smith's nonappearance. Therefore, there is no plain error warranting reversal.

Defendant's next argument centers on the following exchange between the prosecutor and the arresting officer:

> *Q*. So you met with a woman who was obviously distraught who described being assaulted by him, is that right?
>
> *A*. That's correct, sir.
>
> *Q*. And then did you meet with an eyewitness that was present during all of this?
>
> *A*. I did, sir.
>
> *Q*. Did you speak with her about what happened?
>
> *A*. I did.
>
> *Q*. Did she say anything that was in difference to what [the victim] said?
>
> *A*. Not at all.

[*Defense Counsel*]: Objection, I think it calls for hearsay. It's certainly implied hearsay and I would object to it.

The Court: Overruled.

Q. Go ahead. What is your answer?

A. Not at all. They were both consistent with one another.

* * *

Q. The two statements that the two women gave you, they were consistent, is that right?

A. Yes.

Q. And those statements involved this man assaulting [the victim]?

A. That's correct, sir.

Q. Both statements involved this man strangling [the victim]?

A. That's correct.

Q. And then this man was driving recklessly and you saw that as well?

A. I did.

Q. And then you arrested him for those offenses?

A. That's correct.

Defendant also challenges the prosecutor's statement during closing argument that Smith's account "convinced [the arresting officer] that what [the victim] was saying was entirely true." As noted, a prosecutor "need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66. Additionally, "[a] prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id*. at 64. Given that the primary defense theory was that the victim's story was incredible, the prosecutor's description of the officer's interpretation of Smith's account was, in context, not unreasonable. Furthermore, the trial court noted it "instructed the jury to rely only on the evidence, [and] that the arguments of the parties are not evidence[.]" Because "jurors are presumed to follow the trial court's instructions," *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004), any potential error did not rise to the level of plain error affecting defendant's substantial rights, *Bennett*, 290 Mich App at 475.

Defendant's third argument, that the prosecutor was generally using Smith's account "as substantive evidence to corroborate and bolster the credibility of his complaining witness[,]" not only fails given the above reasoning, it is also abandoned for failing to adequately argue the merits of the issue. *People v Lopez*, 305 Mich App 686, 694; 854 NW2d 205 (2014).

Lastly, as to defendant's claim that the trial court erred by refusing to provide a curative instruction or declare a mistrial, the record reflects this argument is patently incorrect. Given that defendant never actually requested such relief, his complaint that the trial court erred by "refusing" to do so is without merit.

IV. MISSING WITNESS INSTRUCTION

Defendant next argues he was denied the right to a properly instructed jury as well as effective assistance of counsel because defense counsel did not request that the trial court provide the jury with a missing witness instruction. We disagree.

A. PRESERVATION AND STANDARDS OF REVIEW

After the witnesses finished their testimonies, the trial court questioned the attorneys about the proposed final jury instructions and verdict form. Defense counsel confirmed she reviewed the proposed jury instructions and verdict form, and had "no issues other than what [they] talked about yesterday." The trial court then stated: "We did put some things on the record yesterday and those were preserved[,]" before deciding to print and circulate the final jury instructions. Because there is no evidence in the record indicating defendant specifically objected to the proposed jury instructions, this issue is unpreserved for appellate review. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Defendant's ineffective-assistance-of-counsel claim is also unpreserved, because he did not move for a new trial or an evidentiary hearing before the trial court or on appeal. *People v Abcumby-Blair*, 335 Mich App 210, 227; 966 NW2d 437 (2020); *Heft*, 299 Mich App at 80.

We review unpreserved jury-instruction challenges for plain error affecting substantial rights. *People v Everett*, 318 Mich App 511, 526-527; 899 NW2d 94 (2017). Review of unpreserved claims of ineffective assistance of counsel "is limited to errors apparent on the record." *Unger*, 278 Mich App at 253.

B. ANALYSIS

1. JURY INSTRUCTIONS

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *Everett*, 318 Mich App at 527 (quotation marks and citation omitted). "[T]he missing witness instruction, M Crim JI 5.12, . . . allow[s] the jury to infer that [the missing witness's] testimony would have been unfavorable to the prosecution's case." *Everett*, 318 Mich App at 527. "A prosecutor who endorses a witness . . . is obliged to exercise due diligence to produce that witness at trial." *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). "A missing witness instruction should be given if the trial court finds a lack of due diligence on the part of the prosecution in seeking to produce an endorsed witness." *Everett*, 318 Mich App at 527.

Defendant argues that the prosecutor failed to exercise due diligence in procuring Smith for trial. While this challenge is abandoned for not being included in defendant's statement of questions presented, *Haynes*, 338 Mich App at 435 n 5, it is necessary to determine whether the trial court should have provided a missing witness instruction. The record has only one reference to the prosecutor's attempts to procure Smith as a witness at an adjourned hearing. At this hearing,

the prosecutor informed the trial court: "I have a material eyewitness that I have not been able to reach. I have been informed that she is unavailable. We have tried to reach out to her today via telephone and her phone does not accept messages and is full." Defendant never challenged the prosecutor's efforts in the trial court, nor did he request a due diligence hearing—which would have examined the prosecutor's efforts to secure Smith as a witness. The record is insufficient to facilitate appellate review on this issue. *People v Giovannini*, 271 Mich App 409, 414-415; 722 NW2d 237 (2006). Therefore, there is insufficient evidence for this Court to determine whether a missing witness instruction should have been given. *Id.*; *Everett*, 318 Mich App at 527 ("A missing witness instruction should be given if the trial court finds a lack of due diligence on the part of the prosecution in seeking to produce an endorsed witness."). Accordingly, there is no plain error warranting reversal. *Everett*, 318 Mich App at 526-527.

2. INEFFECTIVE ASSISTANCE OF COUNSEL

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012), citing Const 1963, art 1, § 20; US Const, Am VI. "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id.*

As explained, the record is insufficient for this Court to determine whether the missing witness instruction should have been given. There are therefore no errors apparent from the record to support a conclusion that defense counsel was deficient or that the outcome of the trial would have been different but for any alleged deficient performance. *Trakhtenberg*, 493 Mich at 51. Therefore, defendant's ineffective-assistance-of counsel argument is meritless.

V. CUMULATIVE ERROR

Defendant lastly argues the cumulative effect of the errors he alleges on appeal denied him a fair trial. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Generally, "[a] defendant must raise an issue in the trial court to preserve it for our review." *Heft*, 299 Mich App at 78. Because defendant did not raise a cumulative-error objection in the trial court, this issue is unpreserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

B. ANALYSIS

"The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. "In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). "In other words, the effect of the errors must have been seriously prejudicial in order

to warrant a finding that defendant was denied a fair trial." *Id*. "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Dobek*, 274 Mich App at 106.

All of defendant's alleged errors pale in comparison to the victim's own testimony, in which she consistently testified that defendant assaulted and choked her. While lacking, the evidence available on appeal demonstrates that a reasonable jury, even with a missing witness instruction or the omission of Smith's account altogether, could find defendant guilty of domestic violence on the basis of the victim's testimony.

Affirmed.

/s/ Thomas C. Cameron
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE STEPHENS,

Defendant-Appellant.

UNPUBLISHED
December 30, 2024
9:59 AM

No. 366451
Kalamazoo Circuit Court
LC No. 2022-001681-FH

Before: CAMERON, P.J., and K. F. KELLY and GARRETT, JJ.

GARRETT, J. (*dissenting*).

I respectfully dissent and would hold that the trial court erred by admitting the hearsay testimony of Officer Kadin Baar about statements made by eyewitness, Natonya Smith. I would further hold that this amounted to plain error that affected the outcome of the proceedings and seriously affected the fairness, integrity, or public reputations of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). For that reason, I would vacate defendant's conviction of domestic violence and remand for a new trial on that charge.

We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Duenaz*, 306 Mich App 85, 90; 854 NW2d 531 (2014). However, "[w]hen an issue is not properly preserved for appellate review, this Court reviews the unpreserved issue for plain error affecting a defendant's substantial rights." *People v Francis*, ___ Mich App ___; ___ NW3d ___ (Docket No. 364998); slip opn at 3. A defendant is entitled to relief under the plain error rule only if the error was clear or obvious and it affected the defendant's substantial rights. *Carines*, 460 Mich at 763.

Relevant to this issue, the prosecutor charged defendant with one count of assault with intent to do great bodily harm less than murder or by strangulation, MCL 750.84, and one count of domestic violence, MCL 750.81. At trial, the victim testified that defendant was waiting for her inside her apartment building and jumped in the back seat of her car as she tried to get into her vehicle and drive away. The victim further testified that defendant punched her, ordered her to drive him to his apartment, and, as she drove, defendant repeatedly threatened her, pulled her hair, and strangled her. Smith was with the victim during these incidents and, afterward, Smith spoke

to Officer Baar about what she observed. Smith did not appear for defendant's trial but, following the victim's testimony, the prosecutor called Officer Baar to testify about what Smith told him about the crime. During the prosecutor's direct examination of Officer Baar, the following exchange occurred:

> *Q.* So you met with a woman who was obviously distraught who described being assaulted by him, is that right?
>
> *A.* That's correct, sir.
>
> *Q.* And then did you meet with an eyewitness that was present during all of this?
>
> *A.* I did, sir.
>
> *Q.* Did you speak with her about what happened?
>
> *A.* I did.
>
> *Q.* Did she say anything that was in difference to what [the victim] said?
>
> *A.* Not at all.
>
> [*Defense Counsel*]: Objection, I think it calls for hearsay. It's certainly implied hearsay and I would object to it.
>
> *The Court*: Overruled.
>
> *Q.* Go ahead. What is your answer?
>
> *A.* Not at all. They were both consistent with one another.
>
> * * *
>
> *Q.* The two statements that the two women gave you, they were consistent, is that right?
>
> *A.* Yes.
>
> *Q.* And those statements involved this man assaulting [the victim]?
>
> *A.* That's correct, sir.
>
> *Q.* Both statements involved this man strangling [the victim]?
>
> *A.* That's correct.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

Hearsay is not admissible unless an exception applies under the Michigan Rules of Evidence. See MRE 802. The trial court gave no reason for overruling defense counsel's objection to Officer Baar's testimony on hearsay grounds, but Officer Baar's testimony was plainly hearsay.

In essence, by testifying that Smith's description of the crime was identical to that of the victim, Officer Baar stated that an unavailable eyewitness confirmed every detail of the victim's version of events. This not only bolstered the victim's testimony, which differed in significant respects from her statements at the scene, but the prosecutor also offered Smith's statements through Officer Baar as substantive evidence of defendant's conduct to prove both assault with intent to do great bodily harm by strangulation and domestic violence. Thus, Officer Baar gave Smith's out-of-court statements for the truth of the matter asserted—that defendant committed the charged crimes exactly as described by the victim. The evidence of Smith's statements was hearsay and the trial court's decision to admit it was an abuse of discretion. MRE 804(b)(3); *People v Zitka*, 325 Mich App 38, 43-44; 922 NW2d 696 (2018).

The Confrontation Clause of the United States provides, in relevant part, that "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. The Confrontation Clause of the Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Tennessee v Lane*, 541 US 509, 523; 124 S Ct 1978; 158 L. Ed. 2d 820 (2004). Further, the Michigan Constitution similarly provides that, "[i]n every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her[.]" Const 1963, art 1, § 20. Thus, "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *People v Henry (After Remand)*, 305 Mich App 127, 156; 854 NW2d 114 (2014); See also *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A statement is "testimonial" if it has the primary purpose of establishing "past events potentially relevant to later criminal prosecution." *Henry*, 305 Mich App at 153 (quotation marks and citation omitted). "The constitutional concern is out-of-court statements of witnesses, that is, persons who bear testimony against a defendant." *Id*. (quotation marks and citation omitted). As our Supreme Court further explained in *People v Washington*, ___ Mich ___; ___ NW3d ___ (2024) (Docket No. 165296):

> A statement is "testimonial" if it was "made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]' " [*People v Fackelman*, 489 Mich 515, 556, 802 NW2d 552 (2011)], quoting *Crawford*, 541 US at 51-52 (brackets in *Fackelman*). But, even if the statement is testimonial, "the Confrontation Clause applies only to statements used as substantive evidence." *Fackelman*, 489 Mich at 528. [*Washington*, ___ Mich App at ___; slip op at 6 (footnote omitted.)]

Thus, statements are not testimonial if made to police officers when the primary purpose of the interrogation is to enable the officers to address an ongoing emergency. *Walker*, 273 Mich App at 60-61. But statements *are* testimonial when made to police officers under circumstances unrelated

to an ongoing emergency, but to prove or establish events relevant to later prosecution. *Ohio v Clark*, 576 US 237, 244; 135 S Ct 2173; 192 L Ed 2d 306 (2015).

As discussed, Smith described to Officer Baar the details of the crimes of assault by strangulation and domestic violence that she observed once she and the victim were no longer with defendant. No ongoing emergency rendered Smith's statements to Officer Baar nontestimonial and, therefore, Smith's assertions to Officer Baar were made to establish events relevant to defendant's arrest and prosecution. In other words, Smith made the statements in a context that would lead a reasonable person to believe that the statement would be available for use at a later criminal proceeding. *Washington*, ___ Mich App at ___; slip op pp 9-10. The prosecutor thereafter used Smith's statements through Officer Baar's testimony at defendant's criminal trial to establish that he committed the crimes. But because defendant had no opportunity to cross-examine Smith about her statements, their admission through Officer Baar violated defendant's rights under the Confrontation Clause. *Henry*, 305 Mich App at 156. Further, even to the extent Officer Baar *implied* that the substance of Smith's testimony included the same description of events offered by the victim, our Supreme Court has ruled that such testimony amounts to a violation of the Confrontation Clause. *Washington*, ___ Mich App at ___; slip op pp 14-16.

Although the majority is correct that defendant objected on hearsay grounds and did not assert a constitutional violation in the trial court, I would hold that this violation of the Confrontation Clause amounted to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. As discussed, the victim's testimony about defendant's conduct was not unequivocal and differed from her statements immediately following the crime. Defense counsel cross-examined the victim about inconsistencies in her testimony, then Officer Baar testified that Smith's statements about the crime were entirely consistent with the victim's version of events. Further, in his closing argument, the prosecutor argued that Officer Baar's testimony about what Smith told him proved that the victim was telling the truth that defendant assaulted and strangled her.

At no time did defendant have the opportunity to cross-examine Smith, compare her statements to the victim's statements and testimony, or have the jury view her to assess her credibility. Fundamentally, "[t]he right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001) (citation omitted). A witness's demeanor includes "the words the witnesses said, the manner in which the words were said, the witnesses' body language, any pauses in the testimony, the mannerisms, and any other intangible factors." *People v Brown*, ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 359376); slip op at 6 (opinion of the Court). Moreover, the right to confrontation has procedural components simply not present in Officer Baar's assertions about what Smith said, including that confrontation ensures statements are made under oath, in the presence of the accused and the finder of fact, and subject to cross-examination. *Id.*, ___ Mich App at ___; slip op at 10 (HOOD, J. (concurring in part). For these reasons, I would hold that the admission of the hearsay statements through Officer Baar amounted to a clear and obvious constitutional error.

I also disagree with the majority's assertion that, given the evidence presented, the admission of Smith's out-of-court statements to prove defendant's guilt had no bearing on the outcome of defendant's trial. As discussed, the plain-error standard requires a showing that the

error affected defendant's substantial rights, which means that it affected the outcome of the proceedings. *Carines*, 460 Mich at 763. The prosecutor called only two witness at defendant's trial, the victim and Officer Baar, and the prosecutor admitted to the jury that he had no evidence to present other than testimony. The majority emphasizes the strength of the victim's testimony in finding that the admission of Smith's hearsay statements was harmless, but the record does not support this view.

During her direct examination, the victim testified that she dated defendant between 2013 and 2015 and, for some unknown reason, defendant waited inside her apartment building on September 11, 2022, and ran after her when she walked through the door of her building. The victim further testified that she ran back to her car and tried to close the door, but that defendant caught up to her and tried to punch her, but missed. According to the victim, defendant got into the car and sat in the back seat, punched her, called her offensive names, repeatedly threatened to kill her, and ordered her to drive him to his apartment. The victim further stated that, while she was driving, defendant pulled her hair and pulled back the hood of her jacket, which caused her to choke. The victim testified that she had a hard time breathing while defendant was strangling her because he was pulling her jacket so hard. The victim also testified that, after she dropped defendant off, defendant returned to her apartment complex in another vehicle, chased her vehicle, and tried to tap her bumper as she was driving down the road.

During her cross-examination, the victim testified that she believed defendant's goal was to simply get a ride from her and defendant suddenly became angry with her for no discernable reason. She also testified during cross that no argument happened as she was driving and she further agreed that the car ride was quiet. She then corrected herself and said that defendant "was the one who was doing the talking." She also testified that defendant left no marks on her neck and said twice that she could breathe while she was driving the car as defendant pulled on the hood of her jacket. The victim admitted that she failed to tell Officer Baar that defendant tried to punch her as she was trying to get into her car, and she denied telling Officer Baar that defendant choked her with his hands.

Officer Baar then testified that, shortly after the incident, the victim told him that defendant strangled her by wrapping both of his hands around her neck, which is what he wrote in his police report. As noted, Officer Baar testified that the statements of the victim and Smith were consistent with each other and that he arrested defendant because of their assertions. During his cross-examination, Officer Baar testified that the victim never said defendant was waiting for her inside her apartment building, but that he approached her as she was getting out of her vehicle at the apartment complex. Officer Baar denied that the victim ever said defendant swung at her or punched her while she was inside the vehicle. He also reiterated that the victim stated that defendant strangled her by placing his hands and fingers around her throat. Further, Officer Baar denied that the victim ever reported that defendant chased her in another vehicle and tried tap her bumper.

Thus, although only two witnesses testified at trial, the victim contradicted herself on the stand and her trial testimony also contradicted statements she gave on the night of the incident. During its deliberations, the jury asked to re-watch the testimonies of both witnesses and also asked for a copy of the police report. Pertinent to these issues, after further deliberations, the jury acquitted defendant of the assault by strangulation charge, but convicted him of domestic violence.

I am persuaded that, in light of the jury's need to view all of the trial evidence twice to reach a guilty verdict on one charge involving the victim, the prosecutor's use of Smith's hearsay statements through Officer Baar affected the outcome of defendant's trial. *Carines*, 460 Mich at 763-764.

It is clear that, by acquitting defendant of the charge, the jury found that insufficient evidence showed defendant assaulted the victim with intent to do great bodily harm through strangulation. Given the many inconsistencies between the victim's testimony and the police report, it is logical to conclude that it was outcome determinative to admit Officer Baar's unconstitutional hearsay testimony, which corroborated all of the statements about the crime from the only other eyewitness, and for the prosecutor to emphasize the substantive value of Smith's statements. In my view, plain error affected defendant's substantial rights because the prosecutor introduced unconstitutional hearsay as substantive evidence of defendant's commission of a crime from a second eyewitness that echoed and bolstered the victim's otherwise tenuous and inconsistent testimony.

Once a defendant shows that plain error affected his substantial rights, we may only reverse "the plain, forfeited error resulted in the conviction of an actually innocent defendant or . . . seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *People v Allen*, 507 Mich 597, 614; 968 NW2d 532 (2021). In my view, the admission of what amounted to quintessential hearsay testimony in clear violation of defendant's rights under the Confrontation Clause when evidence was otherwise contradictory affected the fairness of defendant's trial. Smith's testimony was presented through a police officer who assured the jury that Smith's eyewitness statements matched those of the only testifying witness. This deprived defendant of the right to face or cross-examine the only eyewitness other than the complainant and prevented the jury from fully assessing the facts and the witnesses' credibility. Because this amounted to a clear constitutional violation that weighed heavily in favor of the prosecution, I would hold that it seriously affected the fairness of defendant's trial. *Carines*, 460 Mich at 763-764. Accordingly, I would vacate and remand for a new trial on this ground.

/s/ Kristina Robinson Garrett