STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN WAYNE SHAW,

Defendant-Appellant.

UNPUBLISHED
December 3, 2020

No. 347537
St. Clair Circuit Court
LC No. 18-001730-FH

Before: RONAYNE KRAUSE, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a vehicle while intoxicated, third offense, MCL 257.625(1)(a), reckless driving, MCL 257.626, and operating a vehicle with a suspended, revoked, or denied license, second offense, MCL 257.904. Defendant was sentenced, as a second-offense habitual offender, MCL 769.10, to 2 to 7½ years for operating a motor vehicle while intoxicated, third offense, five days, time served, for reckless driving, and five days, time served, for operating a vehicle with a suspended, revoked, or denied license, second offense. Defendant argues on appeal that he is entitled to a new trial because his right to confrontation was violated when the prosecutor questioned him and Jonathan Smith about the statements made to the police by defendant's wife, Mercedes Shaw. Defendant argues, in the alternative, that he was denied the effective assistance of counsel because his trial counsel failed to object to the prosecutor's questions about Shaw's statements to the police. We affirm.

I. FACTUAL BACKGROUND

On July 2, 2017, defendant and his family attended the Pickerel Festival in Algonac, Michigan. Defendant testified that throughout the day, he drank eight or nine 16-ounce beers and snorted cocaine. Before the fireworks show started, defendant laid down in his black truck because he drank too much and wanted to "sleep it off." Defendant's truck was parked at the corner of Robbins Street and State Street in Algonac. Corey Engel, Scott Pearson, and Jeannie Hilton were attending a barbeque at Engel's house located on State Street.

After the fireworks ended, Engle, Pearson, and Hilton, heard a truck "brake torqueing" and squealing tires. Engel, Pearson, and Hilton ran to the front of Engel's house and saw a bearded

man in a black truck parked at the corner of Robbins Street and State Street brake torqueing, revving his engine, and spinning his back tires. Engel and Pearson approached the driver's side window of the truck and Engel asked the driver what he was doing. The driver did not respond. Engel and Pearson put their arms into the truck to take the keys out of the ignition and the driver drove off with Engel and Pearson hanging off the side of the truck. Engel and Pearson let go of the truck after being dragged for two blocks. St. Clair County Sheriff's Deputy Dennis Tuzinowski pulled the truck over and defendant exited from the driver's door. Deputy Tuzinowski arrested defendant and defendant admitted that he did not have a valid driver's license, had a blood alcohol level of .078, and tested positive for cocaine and benzoylecgonine.

II. RIGHT TO CONFRONTATION

Defendant argues that his constitutional right to confrontation was violated when the prosecutor questioned defendant and Smith about Shaw's statements to the police. We disagree.

To preserve a claim that a defendant's right to confrontation was violated, the defendant must object to the admission of the testimony in the trial court. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Defendant failed to object to the admission of the testimony regarding Shaw's statements to the police at trial. Therefore, the issue is unpreserved. *Id*. This Court reviews unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture, the defendant must demonstrate that "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. Even if all three requirements are met, reversal is only warranted when the plain error resulted in an innocent defendant's conviction, or it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *People v Moorer*, 262 Mich App 64, 66-67; 683 NW2d 736 (2004).

A criminal defendant's right to confront the witnesses against him or her is guaranteed by both the United States Constitution and the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 20; *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009). "To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant." *Garland*, 286 Mich App at 10, citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "However, if the hearsay is nontestimonial, the Confrontation Clause does not restrict state law from determining admissibility." *Id*.

"Hearsay" is defined as "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); See *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013). "Statements are testimonial if the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.' " *Garland*, 286 Mich App at 10, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Statements to the police are nontestimonial " 'when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.' " *People v Walker*,

273 Mich App 56, 61; 728 NW2d 902 (2006), quoting *Davis*, 547 US at 822. Statements to the police are testimonial when " 'the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' " *Id*., quoting *Davis*, 547 US at 822.

Defendant challenges the prosecutor's line of questioning about the statements which Shaw made to the police when defendant was arrested. The prosecutor first questioned Smith about Shaw's statements, as follows:

> *Q*. . . . So later that night were you aware that [Shaw] gave a statement to the police?
>
> *A*. Um, not that I recall. A statement to the police at all. I mean, I know that the cops talked to both of us.
>
> * * *
>
> *Q*. Are you aware that [Shaw] said she was driving around with you because she was mad at [defendant] for drinking and wanting to drive the car?
>
> *A*. She was with me, yes.
>
> *Q*. Okay. So she was driving around with you when you said you were kind of driving around –
>
> *A*. The block.
>
> *Q*. -- the block.
>
> *A*. Yep.
>
> *Q*. She was with you?
>
> *A*. We was trying to leave, yeah.
>
> *Q*. And it's true she was mad at [defendant]?
>
> *A*. Yes.
>
> *Q*. Because he was drinking?
>
> *A*. Um, yes.
>
> *Q*. And because he insisted on driving the truck, correct?
>
> *A*. Yeah, they were fighting, yeah.
>
> *Q*. She'd actually thrown the keys at him, correct?

A. Um, I don't know, I wasn't [watching] them fight. I just kind of learned to block them two out.

Q. It's true that she wasn't driving the truck. The truck got driven so she didn't have the keys, correct?

A. Um, she wasn't driving, no.

Q. Are you aware that [Shaw] told the police she saw [defendant] leave driving the truck northbound on State [Street]?

A. No, I'm not aware of that.

Q. She was in the car with you when she saw that, correct?

A. I didn't see him leave at all. I'm not aware if she seen him leave. I don't see how that's even possible because we left before that car had left. I, we were gone.

Q. Gone where?

A. Around the block. Maybe it was more like three or four blocks, but we were gone before that car or truck or moved. Before the truck moved we were gone. So maybe she's over thinking, you know, just like sometimes women do. I'm not meaning like that, but you, when you, you're mad, you know what I mean, you're fighting, you're upset, you're angry. She was over thinking maybe I don't know, but that – the truck did not move before we left.

Q. But it moved after?

A. Apparently, yes.

The prosecutor next questioned defendant on cross-examination about Shaw's statements, as follows:

Q. Do you know that [Shaw] gave a statement to police?

A. I don't know.

Q: You don't know?

A. No.

Q. You were made aware—we watched the footage and the officer told you that your wife had made a statement to [the] police saying she saw you driving.

A. Well my wife told me she did not make a statement.

* * *

Q. And if Deputy Carrie Duva[1] of the St. Clair County Sherriff's Department indicates that your wife did give a statement saying that she did see you driving and she was mad at you because you were drinking and insisted on driving the car you would say that's, you're saying that's a lie?

A. I don't know if she gave a statement or not. It's – I'm just going by what I was told.

* * *

Q. Mere, [sic] if [Shaw] told Deputy Carrie Duva that she threw the keys at you when she was mad at you because you were insisting on driving would that be a lie?

A. I don't remember her throwing the keys at me, no.

The record demonstrates that Shaw spoke to the police after defendant's truck was stopped and defendant was arrested. The record is void of any continuing danger. Thus, Shaw was not speaking to the police to meet an ongoing emergency. Rather, Shaw's statements recounted the events which led to defendant's arrest. Thus, the primary purpose of Shaw's statements to the police was to establish or prove the events that led to defendant's arrest. Therefore, Shaw's statements were testimonial under the standard set forth in *Davis*.

The Confrontation Clause bars the admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross examine the witness. *Walker*, 273 Mich App at 60-61. Shaw did not appear at trial, defendant did not have a prior opportunity to cross-examine her, and there was no evidence presented that Shaw was unavailable to testify. The prosecution did not assert that Shaw invoked spousal immunity or that her statements were admissible under any hearsay exception.

On appeal, the prosecution argues that the questions regarding Shaw's statements to the police did not violate defendant's right to confrontation because the statements were not offered as substantive evidence, but rather, to attack defendant's credibility. The Confrontation Clause only applies to testimonial statements used as substantive evidence in a criminal prosecution. *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012) (quotation marks and citations omitted). The use of testimonial statements for the purpose of impeachment or to otherwise attack the credibility of a witness does not violate the Confrontation Clause. *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011); See also *Tennessee v Street*, 471 US 409, 413-414; 105 S Ct 2078; 85 L Ed 2d 425 (1985) (holding that evidence admitted for impeachment purposes does not violate the Confrontation Clause). Thus, the Confrontation Clause does not "bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *People v Putman*, 309 Mich App 240, 246; 870 NW2d 593 (2015).

[1] Deputy Carrie Duva did not testify during the lower court proceeding.

We need not decide, however, whether the prosecutor properly used Shaw's statements to the police to impeach the credibility of defendant and Smith, rather than as substantive evidence, because defendant has failed to demonstrate that the alleged error affected his substantial rights. Defendant argues that the error affected the outcome of the proceeding because it undermined his defense that he was not driving the truck and made him look like a liar. We disagree.

While defendant denied that he was driving when his truck was pulled over, the evidence demonstrated that he was the driver of the truck. Hilton, Engel, Pearson, Deputy Tuzinowski, and St. Clair County Sheriff's Deputy Susan Westrick each testified that there was only one person in the truck. Deputy Tuzinowski and Deputy Westrick both testified that defendant exited the truck from the driver's seat when he was pulled over. Additionally, defendant informed St. Clair County Sheriff's Deputy Stoyan that he "had to get out of there" because "four or five guys" started "beating him up." When defendant was arrested, he had a blood alcohol level of .078, and tested positive for cocaine and benzoylecgonine. At trial, defendant admitted that he was intoxicated prior to his arrest and that, throughout the day, he snorted cocaine and consumed eight to nine, 16-ounce beers. Defendant, Smith, and Justin Breger each testified that defendant was sleeping in his truck prior to being arrested because he "had too much to drink." Furthermore, defendant admitted that he drove to the festival with a suspended license. Deputy Stoyan confirmed that defendant did not have a valid license in a database run by the Secretary of State. Additionally, the jury was instructed that the attorney's questions and arguments are not substantive evidence. Therefore, defendant is not entitled to a new trial because the testimony regarding Shaw's statements to the police did not affect the outcome of the proceeding and did not result in the conviction of an actually innocent defendant.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues, in the alternative, that he is entitled to a new trial because his trial counsel was ineffective for failing to object to the prosecutor's questions about Shaw's statements to the police. We disagree.

To preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move in the trial court for a new trial or for a *Ginther* hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014); see *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Failure to move for a new trial or for a *Ginther* hearing limits this Court's review to mistakes that are apparent in the appellate record. *People v Foster*, 319 Mich App 365, 390; 901 NW2d 127 (2017) (citations omitted). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Id*. Defendant did not move in the trial court for a new trial or a *Ginther* hearing. Therefore, review is limited to the existing record. *Foster*, 319 Mich App at 390.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). This Court reviews questions of law de novo and a trial court's findings of fact for clear error. *Id*. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Thompson*, 314 Mich App 703, 720; 887 NW2d 650 (2016).

The effective assistance of counsel is presumed, and a defendant bears the burden to overcome the strong presumption that the assistance of his counsel was sound trial strategy. *People v Rosa*, 322 Mich App 726, 741; 913 NW2d 392 (2018); see also *People v Jackson*, 313 Mich App 409, 431; 884 NW2d 297 (2015) (citation omitted). To establish the ineffective assistance of counsel, a defendant must establish that " '(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different.' " *Rosa*, 322 Mich App at 74, quoting *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). However, counsel is not ineffective for failing to raise a meritless or futile objection. *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010).

While defendant's trial counsel failed to object to the prosecutor's questions about Shaw's statements to the police, counsel's performance was not below an objective standard of reasonableness. The decision not to object to the prosecutor's questioning regarding Shaw's statements was likely a strategic decision to avoid drawing undue attention to the testimony. Alternatively, defendant's trial counsel may have opted not to object to the statements because neither Smith nor defendant provided any detailed answer to the prosecutor's questions or indicated that they had any significant knowledge of Shaw's statements. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Additionally, as previously discussed, there is not a reasonable probability that the outcome of the proceeding would have been different had defendant's trial counsel objected to the line of questioning. Therefore, defendant failed to demonstrate that his trial counsel's performance was objectively unreasonable or that he was prejudiced by his counsel's failure to object to the prosecutor's questioning regarding Shaw's statements to the police.

Affirmed.

/s/ David H. Sawyer
/s/ Mark T. Boonstra

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Before: RONAYNE KRAUSE, P.J., and SAWYER and BOONSTRA, JJ.

RONAYNE KRAUSE, P.J. *(concurring)*

I concur with the majority's reasoning and conclusion that the prosecutor's use of alleged statements from defendant's wife, Mercedes Shaw, to the police did not affect the outcome of the proceedings. I write separately to provide additional reasons for that conclusion; and because I respectfully disagree with the majority that the prosecutor's violation of defendant's right to confrontation should be left unaddressed, even if that violation does not, under the specific circumstances of this case, warrant reversal.

I. IMPEACHMENT OR SUBSTANTIVE EVIDENCE

I agree with, and will not repeat, the majority's analysis concluding that Mercedes Shaw's statements to the police were testimonial. Thus, they were inadmissible under the Confrontation Clause unless Mercedes was unavailable to testify and defendant had a prior opportunity to cross-examine her. *People v Walker*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006); *Crawford v Washington*, 541 US 36, 52-55; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Additionally, under Michigan's spousal privilege statute, MCL 600.2162(2), Mercedes Shaw would have had to waive her spousal privilege in order to testify against defendant,[1] and there is no evidence in the record that she made any such waiver. See *People v Szabo*, 303 Mich App 737, 741-742; 846 NW2d 412 (2014). The record indicates that Mercedes Shaw was in the courtroom and thus the prosecutor

[1] Subject to exceptions not present here, such as where one spouse is a victim of some manner of wrong committed by the other spouse. See MCL 600.2162(3).

could have at least attempted to call her as a witness, subject to her right to exercise her spousal privilege. In any event, the record also establishes that defendant was unaware that she had given a statement.

As the majority observes, the Confrontation Clause does not preclude the admission of otherwise-testimonial statements for the purposes of impeachment or to attack credibility. Or, more specifically, "the Confrontation Clause applies only to statements used as substantive evidence." *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). "Substantive evidence" means evidence used to prove or disprove the truth of a fact. See *Perry v F Byrd, Inc*, 280 Mich 580, 582; 274 NW 335 (1937). Thus, an inconsistent statement might be admissible to impeach a witness, but not to prove the truth of the prior statement—and admission would be improper even where there was a meaningful risk that the jury would be unable to distinguish between substantive evidence and impeachment evidence. See *People v Jenkins*, 450 Mich 249, 259-263; 537 NW2d 828 (1995).

II. PROSECUTOR QUESTIONING

The prosecutor asked witness Jonathan Smith if he was aware that Mercedes Shaw had "said she was driving around with [Smith] because she was mad at [defendant] for drinking and wanting to drive the car." The prosecutor further asked Smith whether she had been angry at defendant for drinking and driving the truck, and attempted to elicit a confirmation "that Mercedes told the police she saw [defendant] leave driving the truck northbound on State [Street]." Although there was nothing improper about confirming that Mercedes rode with Smith that evening, the prosecutor's questions were unambiguously an attempt to introduce into evidence a statement from Mercedes to prove the substantive facts that defendant had keys to the truck and was actually driving the truck while drunk. This is improper. No possible impeachment purposes present themselves: Smith had not previously testified one way or the other about Mercedes Shaw riding with him, and he testified that he did not see defendant operating the truck while drunk. The prosecutor did not, for example, attempt to impeach Smith with a contradictory statement Smith had made to the police.

On direct examination, defendant and Breger both testified that defendant's truck could not be locked because the lock was broken, so keys were unnecessary to get into the vehicle. Defendant denied knowing where the keys were. On cross examination, the following exchange occurred:

> *Q*. Who's Mercedes Smith [sic] to you?
>
> *A*. My wife.
>
> *Q*. Is she here today?
>
> *A*. Yes.
>
> *Q*. Do you know that she gave a statement to police?
>
> *A*. I don't know.

Q. You don't know?

A. No.

Q. You were made aware – we watched the footage and the officer told you that your wife had made a statement to police saying she saw you driving.

A. Well my wife told me she did not make a statement.

Q. Okay. So, not only are the people who were hit by the car and the – those people are lying. The people who saw you they're, they're lying, now the officers are lying about who they talked to?

A. I don't understand.

Q. It just seems like – would you agree that a lot of people are lying in this situation to get you in trouble?

A. No.

Q. Well, okay. So, you're telling me that Mercedes told you she didn't make a statement?

A. Correct.

Q. And if Deputy Carrie Duva of the St. Clair County Sheriff's Department indicates that your wife did give a statement saying that she did see you driving and she was mad at you because you were drinking and insisted on driving the car you would say that's, you're saying that's a lie?

A. I don't know if she gave a statement or not. It's – I'm just going by what I was told.

* * *

Q. So where did you park initially?

A. I couldn't, I couldn't tell. I'm not from that area.

Q. Was it in Algonac?

A. Yes.

Q. And that's in St. Clair County, correct?

A. I believe so, yes.

Q. All right. So now you're saying the car was originally parked in a different spot and then it was moved to the position that you've heard testimony where it was parked on Robbins Street, correct?

A. Correct.

Q. But you don't know how it got there?

A. I don't remember, no.

Q. You don't remember.

A. I don't remember how the car – who moved – I don't know who moved it from the original park to the Robbins Street.

Q. Okay. Could have been you, but you don't remember?

A. No, it couldn't have been me. I didn't have the keys.

Q. Mere, if Mercedes told Deputy Carrie Duva that she threw the keys at you when she was mad at you because you were insisting on driving would that be a lie?

A. I don't remember her throwing the keys at me, no.

Q. You don't remember her throwing the keys at you. Is that what you're saying?

A. Correct.

Q. So she could have thrown the keys at you and you don't remember?

A. I don't know.

Q. You either don't know or you don't remember?

A. I don't remember if she threw the keys at me.

* * *

Q. Okay. So, somehow without your knowledge the car was moved from that original parking space to Robbins Street?

A. Correct.

Q. And so you, but you don't remember getting into an argument with Mercedes?

A. We – it – to me and her it's, it wasn't an argument. It's – that's just me and my wife we talk about things and we move on. Some people call that an argument. I call it just talking.

Q. So you do remember a conversation?

A. Yes.

Q. Was she mad?

A. She could have been, yes.

Q. Okay. So while you may not see it as argument you would acknowledge that she was mad at you?

A. I can't, I can't read her mind. No, I don't know.

Q. You've been married to her since 2011; isn't that correct?

A. Right, right.

Q. You can't read her mind, but you certainly know when your wife is angry at you?

A. Well like I said, I was intoxicated as well. And I didn't want nothing to do with her.

Q. Which way is it? Was she mad? You don't remember. Or you were – or what because you keep going for these different, you know, versions. You saw her, was she mad at you?

A. I honestly can't tell you. I don't know. It's just being my wife. We have our different type of relationship than most. And I don't – I just – I'm confused why that's a problem when we're not here for me and her. It's something, something totally different.

Q. If Mercedes told Deputy Carrie Duva that you two got in an argument because she was mad at you because you were drunk and you were insisting on driving--

A. I don't believe that to be true.

Q. Why, because you two don't argue?

A. Because I don't believe she thought I was going to drive. I don't think she would have thought I was going to drive. Why would I drive, I was drinking.

III. CONFRONTATION CLAUSE VIOLATION

Significantly undermining the prosecution's argument that it was merely trying to impeach defendant, it is noteworthy that the prosecutor asked defendant multiple times whether other witnesses were lying. Doing so is blatantly improper. See *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). I agree with the majority that such an inquiry might not be technically impermissible as to Mercedes Shaw or Deputy Carrie Duva, simply because they did not actually testify as witnesses. However, given the obviously testimonial nature of the statements at issue, even as to them, such a line of inquiry at least skirts the bounds of impropriety. In addition, it is clear that the prosecutor was affirmatively trying to introduce evidence to directly prove that defendant possessed the keys to the truck and had been directly observed by his wife driving the truck while drunk. If the prosecutor had simply asked defendant whether his wife threw the keys at him at some point that evening, such a question might have been proper impeachment. As posed, however, the prosecutor's questions were, again, clearly an effort to introduce Mercedes Shaw's testimony into substantive evidence.

I conclude that plain error occurred and defendant's confrontation rights were flagrantly violated.

IV. OBJECTIVE VIDEO EVIDENCE

Notwithstanding the above analysis, I agree with the majority that defendant is not entitled to reversal because he cannot show that the error affected the outcome of the proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the circumstances, I cannot conclude that the prosecutor's improper questioning likely swayed the jury in any way. I do not disagree with the majority's observations about what the evidence showed. However, I rely primarily on comparing defendant's version of events to what is objectively depicted in the dashboard camera footage from Deputy Dennis Tuzinowski's police vehicle, which was played for the jury. Deputy Tuzinowski was the officer who initiated contact with defendant.

Ordinarily, only the trier of fact may resolve conflicts in evidence. *Nichol v Billot*, 406 Mich 284, 301-302; 279 NW2d 761 (1979). However, the courts may remove such a conflict from the jury's consideration if it is based on testimony that is physically or effectively impossible. See *People v Lemmon*, 456 Mich 625, 643-646; 576 NW2d 129 (1998). Objective and clear record evidence, such as a video recording, in the absence of allegations of tampering, that "blatantly" contradicts a party's differing version of events may discredit that version of events so utterly that no reasonable jury could believe it, thereby precluding a court from finding a genuine question of material fact. See *Scott v Harris*, 550 US 372, 378-381; 127 S Ct 1769; 167 L Ed 2d 686 (2007). I would not go so far as to say that the dash-camera footage from Deputy Tuzinowski's police vehicle renders defendant's version of events absolutely impossible, but it does render defendant's version of events extremely implausible.

On the video, defendant's truck appears at approximately 23:07:51, driving in the opposite direction from the police vehicle, with its headlights turned off, and driving partially on the curb. The truck disappears from the camera's view at 23:07:55, and the police vehicle almost immediately begins to make a three-point turn to follow the truck. The truck becomes visible again at 23:08:04, by which time it has turned right at a nearby intersection and apparently parked.

Although the driver's side was facing away from the police vehicle's perspective, the truck's brake lights are unambiguously turned on at that point, and they can be seen to turn off. The police vehicle takes a few seconds to reach the intersection, whereupon it turns behind the truck. Although the truck is not visible at that point, the camera's perspective sweeps most of the street, and no one is visible other than a few individuals who appear to be calmly walking away from the fireworks in the distance. Defendant himself becomes visible at 23:08:12, at which time he is already out of the truck, standing in the street, and smoking a cigarette. Defendant then turns and approaches the police vehicle with his hands up, whereupon he was ordered back by Deputy Tuzinowski.

According to defendant's version of events, he was asleep in the back of the truck and woke up to "screaming and yelling." According to defendant and his friend, Justin Breger, it was Breger who was driving the truck at that time. Defendant remained lying down in the back seat when the truck came to an "abrupt" stop, whereupon defendant hit his head on the back of the front seat. Breger said he was "getting out of here," and when defendant sat up, Breger was already out of the vehicle and running away up the street. Breger testified that when he drove past Deputy Tuzinowski's police vehicle, Breger could tell that the officer was "interested" in the truck, so he immediately pulled off to the side of the road, saw the police vehicle in the process of turning around, and fled. Defendant testified that he immediately got out, but he was still disoriented, so he then stood there and lit a cigarette. He explained that the truck had two rows of seats, and egress from the back seats through rear "suicide doors" required the front doors to be open first.

Importantly, the fact that the rest of the truck's lights were off to begin with, and that the video therefore clearly records the truck's *brake* lights in the process of turning off, raises a mandatory inference: whoever was driving the truck must have still been in the driver's seat at 23:08:04. Thus, there was a span of—at the most—eight seconds for: (1) Breger to exit the vehicle and run away far enough to no longer be within view; (2) defendant to sit up in the backseat and see Breger running away; (3) defendant to extricate himself from the back seat of the truck; and (4) defendant to light a cigarette. Although that might just barely be possible, the available time seems highly improbable. Critically, during its deliberations, the jury asked to review the video footage, and the testimonies of Shaw, Breger, and defendant. The video footage and Breger's testimonies were replayed for the jury, but the jury opted to rely on its memories regarding Shaw's and defendant's testimonies upon being told that, unlike what was depicted on television, transcripts were not automatically generated. Thus, not only does the video recording make defendant's version of events highly implausible, but it was also of great interest to the jury.

Under the circumstances, I simply cannot conclude that the prosecutor's blatantly improper references to Mercedes Shaw's alleged statements had any likely effect on the outcome of the proceedings. The jury was obviously interested in the video, and as noted, objective video evidence is one of the very few exceptions to the courts' deference to the jury's role in weighing credibility and resolving factual disputes. I do not believe the video needs to render defendant's version of events impossible; nevertheless, it renders defendant's version of events objectively implausible to a degree that precludes interference with the jury's findings.

V. CONCLUSION

Because I share the majority's ultimate conclusion that the improper questioning was harmless, I concur with the majority that defendant is not entitled to reversal on the basis of the confrontation clause violation, and he cannot satisfy the prejudice prerequisite for ineffective assistance of counsel. I concur in affirming.

/s/ Amy Ronayne Krause