

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DUANE BROWN,

Defendant-Appellant.

UNPUBLISHED

September 15, 2026

9:24 AM

No. 369529

Eaton Circuit Court

LC No. 2022-020161-FH

Before: RIORDAN, P.J., and REDFORD and PATEL, JJ.

PER CURIAM.

Defendant, David Duane Brown, was convicted following a jury trial of one count of driving while license suspended causing death, MCL 257.9044, and one count of failing to stop at the scene of an accident resulting in death, MCL 257.617. The trial court sentenced defendant to serve 5 years, 11 months to 15 years’ imprisonment for the first count, and 44 days for the second count, with 44 days credit for time served. Defendant appeals his convictions and sentence. While several statements made by the trial judge during sentencing were inappropriate and reflected her opinion rather than the record, we do not find this error so substantial as to warrant the relief sought. The record as a whole does not demonstrate that she penalized defendant for exercising his Fifth Amendment right not to testify on his own behalf by imposing a heightened sentence or that any error rose to the level necessary to vacate the within-guidelines sentence. We affirm.

I. FACTS AND PROCEDURAL HISTORY

At approximately 8:30 p.m.¹ on November 13, 2021, defendant hit and killed a thirteen-year-old boy, DH, while driving east on Jolly Road in Lansing, Michigan. At his mother’s request,

¹ Appellant’s brief references 10:30 p.m. as the time of the accident, while the appellee’s brief references 8:30 p.m. The latter is consistent with testimony and evidence presented at trial. The victim’s mother testified at trial that DH left their home in the Kensington Meadows mobile home park around 8:30 p.m., and his body was found close to the entrance of this mobile home park.

DH was walking to a convenience store from his home in the Kensington Meadows mobile home park. She learned of his death from police officers investigating the scene.

After defendant struck the child, defendant did not stay at the scene. DH's body was found at 1:26 a.m. by a passerby, Eric Williams, who saw what he believed to be a body on the side of the road, and he called 911. Officer Daniel Salinaz of the Lansing Police Department (LPD) arrived at the scene and found DH's body between the two entrances to Kensington Meadows in a ditch on the side of the road. Officer Salinaz attempted to resuscitate DH, but his body was cold to the touch with blood coming out of his nose and mouth. DH was pronounced dead at 1:55 a.m. at McLaren Hospital. Officer Salinaz observed parts of a headlight at the scene, as well as "tire tracks that went into the ditch and pretty much ended roughly where the body lie."

The police investigation following the accident included analysis by a crash reconstructionist, Detective Timothy Mapley, who testified that he observed DH's body "approximately five-ish feet off the roadway," that he observed debris located on the shoulder that included plastic fragments eventually identified as pieces of a headlight from a 2000-2004 Chevrolet S-10 or Blazer, and it was located on a stretch of road not lit by streetlights. The sky that evening was overcast, and the road was damp. He also observed two sets of skid marks consistent with heavy braking. Based on his field observations and calculations, he testified that DH was likely walking along the side of the road, partially in the grass.

The day after the accident, Detective Mapley reviewed surveillance camera footage from the entrances to Kensington Meadows, which showed DH leaving his home at approximately 8:24 p.m., walking out of the mobile home park, and walking eastbound on Jolly Road. Shortly after DH turned onto the road, Detective Mapley witnessed a "dark colored vehicle traveling eastbound." The vehicle had something "like a light decal swoop on it and some block lettering towards the back." As the vehicle passed into the view of the eastern surveillance camera, "the headlights [were] no longer uniform." Crime Analyst Madison Lewis of the LPD viewed the surveillance video a day or two later, on November 15, and testified that about five minutes elapsed between the suspect vehicle's passing the western and then eastern cameras.

Also on November 15, less than 48 hours after the accident occurred, the LPD received an anonymous tip identifying defendant with the hit-and-run. The tipster provided defendant's name, age, and that he lived in Eaton Rapids. The tipster explained that he knew defendant's daughter and had been told that defendant hit someone with his truck. Based on this tip, LPD Sergeant Marcus Johnson traveled to the address at which defendant resided and "observed a vehicle matching the description of the accused vehicle in the driveway (dark colored S-10 with a topper, gray pinstriping on the side, front passenger side damage)." By stipulation of the parties, the jury did not hear the tip.

Later in the evening of November 15, officers from the LPD and the Eaton County Police Department made contact with defendant at his residence. Captain Robert Backus testified at trial that he saw a Chevy S-10 parked next to defendant's residence and confirmed that it matched the vehicle that he saw in the surveillance footage. Captain Backus observed damage to the hood of the car on the passenger-side, but observed that the front passenger-side headlight was intact. Defendant's adult son, Derek, answered the door at the officers' knock and let them into the house. Captain Backus testified that once he was inside the house, he had contact with defendant directly

and told defendant that he was interested in discussing the Chevy S-10, to which defendant replied that the vehicle belonged to his father and that “I was driving.” Defendant signed a consent form authorizing a search of his vehicle at the officers’ request, but stated that he did not want to talk to anyone until he hired an attorney. When Captain Backus told defendant that they were arresting him on failure-to-appear warrants, defendant asked to change his clothes, and two officers accompanied him to his bedroom to allow him to do this. A cell phone was sitting on the dresser. Defendant picked it up, stating that he was going to leave it with his son and, instead, Captain Backus seized it as evidence because defendant was being investigated as part of a hit-and-run. The LPD seized the Chevy S-10 that night and had it towed to their operations center.

After it was impounded, Detective Mapley testified that he observed defendant’s vehicle and believed it to be the vehicle he saw in the surveillance video from Kensington Meadows. He saw damage consistent with hitting a pedestrian of DH’s height—approximately 6 feet—and inconsistent with hitting a deer. Danial Munford, from the Michigan State University’s Department of Police and Public Safety, testified on behalf of the prosecution that an event data recorder (EDR) in defendant’s vehicle indicated that there had been a “non-deployment event,” which could be caused by a pedestrian-vehicle collision. Munford testified that the EDR showed that the car was traveling at 47 miles per hour for each of the five seconds leading up to the nondeployment event, and that there was no evidence of braking in those five seconds.

The police obtained a search warrant to search the cell phone seized from defendant’s bedroom. Detective Monika Ford submitted a sworn affidavit in support of the warrant that included details from Detective Mapley’s investigation of the scene, the surveillance video, and the anonymous tip the LPD received that identified defendant with the hit-and-run. The affidavit limited the search to “[e]vidence related to the death of [DH] including but not limited to” files on the phone, data related to messages and phone calls, software used to access the Internet, passwords, memory, and “electronic communications stored within the phone and storage devices as e-mail.” Detective Ford described her knowledge “through training and experience” that voice and message files and data “may provide evidence of identification, identification of witness[es], and/or suspects” and “may contain evidence of intent or motive.” The search warrant was signed on December 1, 2021, and the Michigan State Police subsequently performed a digital extraction and examination.

Madison Lewis, a crime analyst for the LPD, used the Cellbright Physical Analyzer software to extract data from the cell phone related to the incident. The analysis revealed that a phone call was made to defendant’s adult daughter, Heather Brown, at 8:35 p.m. on November 13, the night of the incident. There were other calls and messages with Heather, including a text to her on November 15 stating that “Derek thinks I hit a deer.” Lewis testified as to discovering evidence of web browsing searches that included WILX Channel 10 News and hunting licenses. Lewis testified that the phone had accessed an article on the WILX website about the hit-and-run.

Defendant’s adult son, Derek, lived with his father. At a pretrial hearing, he testified that he never had a conversation with defendant about hitting a deer; however, during trial, he testified regarding a short phone call using Facebook Messenger. In response to counsel’s questioning, Derek explained this discrepancy by stating that he “did not recall” this conversation at pretrial because it did not seem like a “big deal.” Derek testified that he wanted the trial to come out in his and his father’s favor, but that he did not change his testimony nor risk providing inconsistent

testimony to help his father. During cross-examination, he testified that “[i]t’s very hard to remember exactly what happened two years ago. A lot happened very fast and I was never prepared for it.” Derek testified that he did not recall having a conversation with defendant about him hitting a person, and he told Captain Backus on the night defendant was arrested that he had no knowledge of the crash.

Defendant’s adult daughter, Heather, also testified. She recalled several telephone calls with her father from 8:35 p.m. to 11:21 p.m. on November 13 and there was a “vague conversation of interaction of a crash.” She did not recall talking to her father about being in a crash.

The defense called James Campbell, a retired state police officer, as an expert witness in traffic crash reconstruction. Campbell created a diagram to show where the vehicle was at the time of impact, based on the position of the skid marks officers photographed at the scene, the size of the vehicle, and a Google Map of the accident. Defense counsel attempted to offer the diagram as a demonstrative, and upon the prosecutor’s objection, the court prevented this stating that it was, in reality, an undisclosed exhibit.

Campbell testified that the cause of the crash was “simply the pedestrian in the roadway.” Based on his review of the evidence, including the position of the skid marks and damage to the vehicle, he testified that DH was “about four feet into the roadway.” He visited the collision site at night on April 17, describing the area as “extremely dark” and far from potential sources of ambient lighting. Campbell also noted that DH was walking with traffic, contrary to Michigan law that requires pedestrians to walk toward traffic, and that his dark sweatshirt hood likely muffled sound. He further testified that defendant was driving 47 miles per hour, two miles per hour over the speed limit, and that he was driving “in his lane of travel” and not on the shoulder or across the centerline. Campbell testified that he did not find “anything that the driver, specifically, did wrong to cause the impact with the pedestrian.”

A trial date was initially set for January 30, 2023; however, this was adjourned to resolve defense motions to release the impounded vehicle and, then, to exclude evidence obtained from the search of the vehicle and cell phone. The latter motion was filed on the date of the pretrial motion hearing, which was after the late date for such motions according to the trial court’s orders. The trial court adjourned trial to ensure fairness to both sides, while stating that “[t]he proper sanction” would be denying defense’s ability to call an expert.

The three-day jury trial began on May 1, 2023. The jury found defendant guilty of two offenses: (1) Count I: Operating–License Suspended, Revoked, Denied–Causing Death and (2) Count II: Failure to Stop at the Scene of Accident Resulting in Serious Impairment or Death. Defendant had eight prior misdemeanor convictions, of which “a majority involve a driving offense.” The sentencing guideline was scored at 36 to 71 months for Count I utilizing the following information as included in the presentence investigation report:

PRV7 is scored at **10 points** for the defendant having one concurrent felony conviction, **OV3** is scored at **25 points** for life threatening or permanent incapacitating injury occurring to the victim, **OV5** is scored at **15 points** for serious psychological injury requiring professional treatment occurring to the victim’s family, **OV17** is scored at **5 points** for the defendants failing to show the degree of

care that a person of ordinary prudence in a similar situation would have shown, and **OV19** is scored at **10 points** for the defendant interfered with administration of justice by leaving the scene of the incident.

The sentence rendered by the trial court was within the guidelines, i.e., 5 years and 11 months to 15 years' incarceration, with credit for 44 days served. During the sentencing hearing, DH's mother testified that "every day has been a struggle" for her and her daughters since DH was killed. The prosecutor moved to strike defendant's sentencing memorandum, which included a photograph of DH not entered into evidence which indicated he had been engaged in gang activity, and requested a sentence of 10 to 15 years. Defense counsel emphasized that DH's death was a tragic accident for which defendant was "very remorseful" and that defendant had lived a largely respectable and simple life. Defense counsel asked for a probationary sentence or for a sentence at the low end of the guidelines. Defendant stated that he was "very upset" with himself and that he was "truly sorry that this happened."

The trial judge expressed disgust at the sentencing memorandum, stating she would remove the photograph and strike the offending language. She identified the four factors derived from *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), to be taken into account: rehabilitation, public safety, punishment, and deterrence. The trial court stated that rehabilitation was "impossible" because defendant's driving record evidenced that "You've clearly decided you're not going to follow the law." She further stated that he was a "menace to public safety" for not stopping at the site of the crash, that "[DH] clearly wasn't in the middle of the road," and that defendant obstructed the investigation by leaving the scene and repairing his headlight despite news reports that a young person had lost their life at the date, time, and location of the crash.

With respect to punishment, the trial court criticized defendant for allowing his adult children to lie in their testimony by "refusing to take responsibility for what [defendant] did," and for putting DH's mother through arduous legal proceedings. On the subject of deterrence, the trial court said, "I think that it's important that we say as a society, if you hurt somebody and you run, and you lie about it, and a jury finds you guilty, you will go to prison, period." The court acknowledged the prosecution's request for a longer sentence, but stated that she would remain within the guidelines in order to avoid issuing a sentence that would "be a basis to send this back." On appeal, defendant claims error in several decisions made by the trial court both prior to and upon sentencing. As explained below, none of them warrant reversal of the jury verdict or the within-guidelines sentence.

II. ANALYSIS

A. TRIAL COURT APPROPRIATELY DENIED MOTION TO SUPPRESS EVIDENCE OBTAINED FROM CELL PHONE

Defendant first claims the trial court committed reversible error in denying defense counsel's motion in limine to suppress evidence obtained from the cell phone because the seizure of the cell phone was allegedly unlawful. This Court reviews de novo a trial court's decision on a motion to suppress based on a constitutional violation. *People v Mahdi*, 317 Mich App 446, 457; 894 NW2d 732 (2016). We find the seizure of the cell phone was authorized under the plain-view

exception to the Fourth Amendment's warrant requirement and, therefore, affirm the trial court's decision to deny defendant's motion to suppress.

The right to be free from unreasonable searches and seizures is embedded in both our federal and state constitutions. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution expressly extends this to electronic data and communications. Const 1963, art 1, § 11. The plain-view doctrine "allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they can view the item, and the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101-102; 549 NW2d 90 (1996). The plain-view exception authorizes a seizure, but not the search of the item being seized, and "it is not predicated on exigent circumstances" but "permitted in the interest of police convenience." *Id.* An object's incriminating character is considered "immediately apparent" if, without further search, officers have probable cause to believe the items are seizable. *Id.* Probable cause does not require total certainty, but rather is present "when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place." *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). These facts and circumstances include law enforcement officers' relevant experience and knowledge, which might allow them to recognize criminality where a layperson might not. *Champion*, 452 Mich at 112. The plain-view doctrine may not be extended to a "general exploratory search from one object to another until something incriminating at last emerges." *Horton v California*, 496 US 128, 136; 110 S Ct 2301; 110 L Ed 112 (1990) (citation and quotation marks omitted).

There is no dispute that the police were at defendant's residence lawfully, and that the phone was in plain view of the police officers. The police went to the residence because an anonymous tipster gave his name and, upon arrival, observed the vehicle matching that seen in the surveillance footage. Defendant stated that his father owned it, but that he "was driving" it. The police also saw the cell phone in plain view in defendant's bedroom, and defendant stated that he used it to make phone calls. The tipster referred to communication with defendant's daughter, who did not live with defendant. These circumstances would lead a reasonably prudent person to believe that the cell phone would contain evidence related to the hit-and-run, thereby providing the probable cause necessary for the third plain-view element—the phone's incriminating nature being immediately apparent.

Defendant's reliance on *Mahdi*, 317 Mich App at 452, is misplaced. In *Mahdi*, the police seized a phone from a residence where the defendant did not live and where no evidence of the crime was found. *Id.* at 452-453. This case presents a very different factual scenario. In this case, the police officers had reason to believe from an anonymous tip that defendant had called his daughter on the evening of the accident, they seized the cell phone from the residence in which he resided, and defendant identified the cell phone as being one that he uses. Seizure of the phone was permissible under the plain-view doctrine. The trial court's decision to deny defendant's motion in limine is affirmed.

B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT SUPPORTED BY THE
APPLICABLE LAW

Defendant also claims his trial counsel rendered ineffective assistance of counsel for not moving to suppress the evidence seized from the cell phone. Ineffective assistance of counsel claims present mixed questions of fact and constitutional law. This Court reviews questions of fact for clear error and reviews questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that the outcome would have been different but for trial counsel's deficient performance. *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023).

Defendant's trial counsel's performance neither fell below an objective standard of reasonableness, nor is there a reasonable probability that the outcome would have been different if counsel had moved to suppress the information gleaned from the cell phone. The Court must evaluate the trial counsel's performance in the context of the facts, circumstances, and caselaw at the time of the trial. *People v Carson*, ___ Mich ___, ___ NW3d ___ (2025) (Docket No. 166923); see *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (holding that "[a] reviewing court must not evaluate counsel's decisions with the benefit of hindsight."); see also *Maryland v Kulbicki*, 577 US 1, 4; 136 S Ct 2; 193 L Ed 2d 1 (2015); see also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The prevailing standard regarding searches and seizures of electronic devices in January 2023,² when defendant's trial counsel failed to move to suppress the information, was *People v Hughes*, 506 Mich 512, 542-543; 958 NW2d 98 (2020). In *Hughes*, law enforcement agents obtained a warrant to search the defendant's cell phone for evidence of drug trafficking, then, without getting a second warrant, searched the phone for evidence of an unrelated crime. *Id.* at 552-553. Our Supreme Court held that the privacy implications of cell phone searches "requires that officers reasonably limit the scope of their searches to evidence related to the criminal activity alleged in the warrant and not employ that authorization as a basis for seizing and searching digital data in the manner of a *general warrant* in search of evidence of any and all criminal activity." *Id.* at 553. However, our Supreme Court expressly declined to rule on whether the warrant to search the cell phone for evidence of drug trafficking lacked probable cause. *Id.* at 527 n 6.

Utilizing the *Hughes* standard, this Court has repeatedly held that similar warrants in factual situations comparable to this case were supported by probable cause and sufficiently particular. See *People v Carr*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2023 (Docket No. 358663) (holding that the search warrant affidavit describing the defendant's alleged criminal activity and movements was sufficient to support the inference that evidence of the crime would be located in the GPS data from the defendant's phone); *In re Ilemobade*, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2023

² The Michigan Supreme Court's decision in *Carson*, ___ Mich at ___, slip op at 6, has heightened the standard of what is considered a valid warrant. As discussed herein, the warrant in the present case meets that standard.

(Docket No. 360868) (holding that a warrant authorizing the search of a broad array of data was sufficiently particular).

In the present case, the search warrant affidavit described the crime and the investigation up to that point in detail, including the anonymous tip in which the tipster “had been told” that defendant hit someone with his vehicle, which indicated that defendant had communicated with others about the incident—likely through the use of his cell phone. The affidavit explicitly limited the search to “[e]vidence related to the death of [DH],” and explicitly named the types of data to be searched. Given the contemporary caselaw, defendant’s trial counsel reasonably believed that the search warrant affidavit adequately established probable cause and was sufficiently particular to be permissible. Therefore, defendant’s trial counsel did not render ineffective assistance.

Defendant also fails to show that, if his trial counsel had challenged the validity of the search warrant, there was a reasonable probability that the outcome would have been different. Defendant relies primarily on this Court’s decision in *Carson*, which was issued more than eight months after sentencing and has since been partially affirmed by our Supreme Court, to argue that the search warrant was impermissibly broad. Though the particularity standard laid out in *Carson* does not apply to the present case retroactively, it is instructive to compare the warrants at issue. In *Carson*, the warrant authorized the search of “any and all records or documents” pertaining to the crime and, in order to search those items, “any” physical keys or similar items, “any” passwords needed to access or convert any data, and “any and all data.” Our Supreme Court deemed this warrant to be insufficiently particular. *Carson*, ___ Mich at ___; slip op at 6. Specifically, our Supreme Court took issue with the repeated use of “any” and “any and all,” holding that “[t]he lack of instruction on the scope, breadth, or focus of the search” leaves too much to the officers’ discretion. *Id.* at ___; slip op at 18. Though it declined to create a per se rule of specificity, our Supreme Court held that “a search warrant should be as particular as the circumstances presented permit and consistent with the nature of the item to be searched.” *Id.* at ___; slip op at 20. The warrant in the present case is more tailored than the warrant in *Carson*, describing the types of searchable data in greater detail and making frequent references to “the above types of data files” to narrow supplemental searches. Even if *Carson* were the prevailing standard, this warrant was sufficiently particular; under *Hughes*, 506 Mich at 542-543, which required the search to be “reasonably directed at finding evidence of the criminal activity identified within the warrant,” this warrant was permissible.

We conclude the warrant and affidavit in support thereof in this case satisfy *Carson*.

Moreover, even if the warrant was impermissibly broad, defendant has failed to demonstrate a reasonable probability that the outcome would have been different, i.e., that the evidence gathered from the cell phone would have been suppressed. The exclusionary rule, which dictates that evidence seized in violation of the Fourth Amendment cannot be used against a defendant, is not a personal remedy for Fourth Amendment violations, but rather a tool to deter law enforcement misconduct. *Davis v United States*, 564 US 229, 236-237; 131 S Ct 2419; 180 L Ed 2d 285 (2011). The exclusionary rule’s deterrent value—which depends on the degree of misconduct—must outweigh the significant social costs of suppressing evidence. *Id.* at 237-238. In this case, that standard is not met. Officers obtained a warrant before searching defendant’s phone and searched it in reasonable reliance on that warrant. The warrant was not facially invalid, as defendant claims, but similar to warrants issued under the *Hughes* standard that were deemed

sufficiently valid and supported by probable cause. Thus, the exclusionary rule is inappropriate in this circumstance even if the warrant was overly general.

Finally, even if defense counsel had moved to suppress on the basis of the warrant and the trial court had granted the motion, defendant has not shown that there is a reasonable probability that the outcome of the trial would be different. There was significant other evidence tying defendant to the crime: defendant admitted to driving a vehicle in his driveway that matched the suspect vehicle from the surveillance video, the vehicle showed damage consistent with hitting a person of DH's height, and the vehicle's make and model matched the headlight fragments found at the scene. Defendant's claim of ineffective assistance of counsel is without merit.

C. TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PREVENTED EXPERT'S DIAGRAM FROM BEING ADMITTED INTO EVIDENCE

Defendant also claims reversible error occurred when the trial court precluded use of the defense expert's diagram. A trial court's decision to exclude evidence as a discovery violation is reviewed for an abuse of discretion. MCR 6.201(J); *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012). Where the trial court deprives a defendant of his constitutional right to present a defense, the court's decision to suppress evidence is reviewed de novo. *Sitz v Dep't of State Police*, 443 Mich 744; 506 NW2d 209 (1993).

The trial court did not err in excluding defendant's undisclosed exhibit at trial. MCR 6.201(A)(6) requires that, upon request, parties must provide "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper." If a party fails to comply with this rule, MCR 6.201(K) states that a court, at its discretion, "may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, *prohibit the party from introducing in evidence the material not disclosed*, or enter such other order as it deems just under the circumstances." (Emphasis added.) Additionally, MCR 6.201(K) provides that "[w]illful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court."

This Court has held that only egregious discovery violations, such as those resulting from willful misconduct, justify excluding material evidence, but courts have broad discretion over determining the appropriate remedy for a violation given "the interests of the court, the public, and the parties." *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). Our Supreme Court has held that where "circumstances beyond the control of defendant and his or her counsel" have caused a discovery violation, the state's interest in full discovery and a fair trial might outweigh the violation's negative effects. *People v Merritt*, 396 Mich 67, 83; 238 NW2d 31 (1976).

In the present case, defendant attempted to introduce a diagram created by his expert witness in support of his testimony as a demonstrative exhibit. The prosecution claimed that the diagram was a fact exhibit, rather than demonstrative, that it was not disclosed prior to trial, and that therefore, introducing it was a violation of the trial court's orders that "[f]inal witness and exhibit lists shall be exchanged at the Final Pretrial." There is nothing in the record to contradict the prosecutor's claim that the diagram was not earlier disclosed or to suggest that circumstances

beyond defendant and his counsel's control caused the violation. *Merritt*, 396 Mich at 83. Rather, the defense was able to provide an expert witness and a summary of his testimony in a timely manner, and gave no reason why it could not provide the diagram at issue in a timely fashion. Thus, the trial court did not abuse its discretion by excluding the untimely exhibit; its decision did not fall outside "the range of reasonable and principled outcomes." *Webster v Osguthorpe*, ___ Mich ___; ___ NW3d ___ (2025) (Docket No. 166627). Rather, the trial court's decision was in line with MCR 6.201(A)(6), which requires the provision of a description and opportunity to inspect "any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper."

Moreover, even if the exclusion had been an abuse of discretion, it does not merit the requested remedy of a new trial. The improper admission or rejection of evidence does not automatically undermine the reliability of a verdict but, rather, the verdict may only be set aside if, "after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26. Our Supreme Court held in *Lukity* that MCL 769.26 creates a presumption that nonconstitutional error is harmless, which a defendant must rebut by demonstrating that the error resulted, more probably than not, in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). In other words, defendant must show that the evidence was excluded in error, and that, assessed "in light of the weight and strength of the untainted evidence," the error more probably than not led to a different outcome. *Id.* at 495-496 (citation and quotation marks omitted).

Here, the record does not support a finding of such prejudice from the exclusion of defense's diagram. Defendant's expert witness was able to testify as to the substance of the diagram, reference the prosecution's exhibits, and point to the position of the skid marks, the body, and the debris to make the intended assertion: that DH was farther into the road than the prosecution had said, and that his being in the road was the cause of the accident given the road conditions and low visibility. The trial court instructed the jury to consider witnesses' sworn testimony alongside exhibits admitted into evidence in making their decision. Given the content of the expert's testimony and the full context of the case, it is not "more probable than not" that the excluded exhibit would have altered the jurors' assessment of the evidence to the extent of undermining the reliability of the verdict. *Id.*

D. RESENTENCING IS NOT WARRANTED

Defendant claims he is entitled to be resentenced. This issue was preserved by defendant's motion to correct an invalid sentence, which the trial court denied. MCL 769.34(10); MCR 6.429; *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006). For the reasons explained below, the scoring of Offense Variable (OV) 5 was appropriate. Moreover, while some of the comments made during sentencing by the trial judge should not have been made and were inappropriate, the sentence ultimately rendered was within the guidelines and was fair and reasonable given all of the facts and circumstances of the case, and, therefore, resentencing is not warranted.

A trial court's sentencing decisions are reviewed for an abuse of discretion. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). Whether a trial court has inappropriately considered a person's exercise of their constitutional rights as a factor in sentencing is a question of constitutional law reviewed de novo. *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006).

A trial court's factual findings under the sentencing guidelines are reviewed for clear error, and whether the facts satisfy the statutory scoring conditions is a question of statutory interpretation reviewed de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). A trial court's response to a claim of inaccuracy in a presentence investigation report is reviewed for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009).

Defendant is not entitled to resentencing because the trial court considered appropriate factors in its sentencing decision, and OV 5 was correctly scored at 15 points. Sentences, whether within or outside of the applicable sentencing guidelines, must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017) (citation and quotation marks omitted). Within-guidelines sentences are presumptively reasonable, and the defendant has the burden of overcoming this presumption. *People v Posey*, 512 Mich 317, 326; 1 NW3d 101 (2023). In *Snow*, 386 Mich at 592, our Supreme Court held that courts should consider four factors to determine an appropriate sentence: (1) the reformation of the offender, (2) protection of society, (3) disciplining the wrongdoer, and (4) deterring others from committing similar offenses. These are not the only relevant sentencing criteria, however, and they are not mandatory considerations. *People v Boykin*, 510 Mich 171, 183-184; 987 NW2d 58 (2022).

Our Supreme Court has held that though a trial court cannot consider a defendant's refusal to admit guilt when making sentencing decisions, it is permissible to consider a defendant's lack of remorse in determining his or her potential for rehabilitation. *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). Citing prior decisions of this Court, our Supreme Court held in *Wesley* that if the trial court had considered the defendant's maintenance of innocence after conviction, if the trial judge had tried to get the defendant to admit guilt, and if it appeared that the defendant's sentence would have been less severe if he had admitted guilt, then the trial court was likely to have been improperly influenced by the defendant's claim of innocence. *Id.* at 713.

In this case, defendant has not overcome the presumption that the trial court's within-guidelines sentence was reasonable. The trial judge addressed all four *Snow* factors on the record during sentencing, particularly focusing on defendant's repeated driving-related offenses as they bore on his potential for rehabilitation and whether he presented a danger to the public. On the discipline and deterrence factors, the trial judge indicated that the jury's guilty verdict mandated an appropriate consequence.

We agree that the trial judge's commentary suggesting that defendant allowed his adult children to lie on his behalf was not supported by the record. Indeed, defendant's children were adults, and his son explained the potential discrepancies between his pretrial and trial statements. Moreover, the trial court's statement that defendant failed to take responsibility for his actions and suggesting that he unnecessarily caused DH's mother pain because the proceedings continued to trial were inappropriate. However, the record does not support a finding that the trial court improperly sentenced defendant based on his refusal to admit guilt.

To the contrary, the trial court referenced the jury's guilty verdict, defendant's prior offenses, the gravity and tragedy of the young victim's death, and made clear that the sentencing guidelines were instrumental as to her sentencing decision. See *Posey*, 512 Mich at 352 (holding that sentencing guidelines "remain important as an advisory resource for sentencing courts and

continue to be a ‘highly relevant consideration’ on appeal.”). Further, as is apparent from the record and from the trial judge’s clarifying statements at the post-sentencing motion hearing, the trial judge did not attempt to make defendant admit guilt, did not consider his maintenance of innocence after conviction, and did not increase his sentence for not admitting guilt. *Wesley*, 428 Mich at 713. The sentence ultimately imposed was a within-guidelines sentence and not improperly based on defendant’s refusal to admit guilt.

Moreover, defendant is not entitled to resentencing because OV 5 was correctly scored at 15 points. Under MCL 777.35(2), OV 5 should be scored at 15 points “if the serious psychological injury to the victim’s family *may* require professional treatment.” (Emphasis added.) Whether the family member has sought treatment at that point is not conclusive. *Id.* Our Supreme Court has held that a “serious” psychological injury is one that has “important or dangerous possible consequences,” and that trial courts should “consider the severity of the injury and the consequences that flow from it.” *People v Calloway*, 500 Mich 180, 186; 895 NW2d 165 (2017). In *Calloway*, the Court held that a murder victim’s stepfather’s statements that the victim’s mother “is having a very hard time dealing with this situation” and that he has thought about the murder “every single day,” among other statements, were sufficient for a 15-point OV 5 score. *Id.* at 189; see *People v Wellman*, 320 Mich App 603, 611; 910 NW2d 304 (2017) (holding that an assault victim’s testimony that “everyday life was harder now” helped support a 10-point score for OV 4). At the sentencing hearing in the present case, the victim’s mother recounted, under oath, that “every day has been a struggle” for her and her daughters since DH was killed, which is sufficient to establish the psychological injury required for OV 5 at 15. Defendant did not object to the OV 5 scoring at sentencing, but objected to it in a motion to correct an invalid sentence. At the post-sentencing motion hearing, the trial court correctly relied on the testimony of the victim’s mother as a key part of the scoring decision. The trial court did not clearly err in making such a determination.

Finally, given our conclusion that resentencing is not warranted, it is unnecessary to address whether such resentencing should be before a new judge, as defendant requests. However, for purposes of completeness, we determine that even if resentencing were required, we do not find that reassignment is necessary to preserve the appearance of justice and, in fact, the reassignment would likely entail duplication of resources disproportionate to any gain in the appearance of fairness. Cf *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1987). To the contrary, the trial court expressed a willingness to follow the guidelines regardless of her personal opinion, exhibited no explicit bias toward defendant during trial, and while some of her statements during sentencing were critical of defendant in ways not directly supported by the record, the ultimate sentence imposed was reasonable and proportionate, within the guidelines, and in accordance with the jury verdict and did not upwardly depart. *People v Abbatoy*, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2024 (Docket No. 364852), p 8. Resentencing before a different judge is not necessary to preserve the appearance of justice and, moreover, the sentence was rendered following a three-day jury trial in which numerous witnesses testified and exhibits were presented. It would be a significant expense of time and resources to require a judge unfamiliar with this case to step in for purposes of resentencing at this juncture. Defendant’s request for resentencing is denied, as is the request for resentencing before a different judge.

We affirm defendant's conviction following the jury verdict and the sentence subsequently imposed.

/s/ Michael J. Riordan

/s/ James Robert Redford

/s/ Sima G. Patel