STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY BERNARD PYNE,

Defendant-Appellant.
_____/

Court of Appeals
No. 308706

Circuit Court
No. 2011-238692-FC

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Jurisdiction was conferred through Const 1963, art. 1, §20; MCL 600.308(1); MCL 770.3; MCR 7.203(A); MCR 7.204(A)(2)(a); and MCR 6.425(F)(3). The final judgment was January 29, 2013, petition for counsel was made on February 6, 2013, and pursuant to MCR 6.425(F)(3) the Claim of Appeal issued February 8, 2013.

QUESTIONS PRESENTED

I. WAS THE TRIAL COURT'S FAILURE TO PREVENT, OR TO REASONABLY RESTRICT, THE PROSECUTION'S USAGE OF IMPROPER CHARACTER, OPINION AND NON-RELEVANT OTHER-ACTS EVIDENCE -- IN A CASE WHERE DIRECT EVIDENCE OF GUILT WAS LACKING AND THE PROOFS WERE COMPRISED OF INFERENTIAL CIRCUMSTANTIAL EVIDENCE AND OPINIONS OF WITNESSES -- AN ABUSE OF DISCRETION WHICH DENIED MR. PYNE HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS, AND CONST. 1963, ART. 1, §§17 AND 20, AND FURTHER VIOLATIVE OF MRE 403 AND 404(A) AND 404(B)?

Defendant-Appellant answers "yes" to all aspects

Plaintiff-Appellee would answer "no"

II. WAS MR. PYNE DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO PRESENT A SUBSTANTIAL DEFENSE, FAILED TO OBJECT TO INADMISSIBLE HEARSAY, FAILED TO OBJECT TO IMPROPER PROSECUTION ARGUMENT, AND OPENED THE DOOR TO HIGHLY-PREJUDICIAL OPINION "EVIDENCE?"

Defendant-Appellant answers "yes"

Plaintiff-Appellee would answer "no"

STATEMENT OF FACTS

Background.

This is an appeal of right by Jeffrey Pyne from a jury-tried conviction of one count of second-degree murder, MCL 750.317 [requested by the prosecution, objected to by the defense], as a lesser-offense of the charged count of first-degree premeditated murder, MCL 750.316(1)(a) (Trial transcript ("TT"), 12/18/2012, verdict, 6; TT, 12/13/2012, prosecution's request for instruction, 3-9).

Mr. Pyne was sentenced by Oakland County Circuit Judge Leo Bowman to a prison terms of twenty to sixty years, with sentence credit of 476 days (Sentence transcript, 1/29/2013, 22).

Trial.

The criminal charges arose from the May 27, 2011, murder of Ruth Pyne, Mr. Pyne's mother.

Ms. Pyne died from multiple blunt force injuries (nine or more) to her head and multiple (sixteen) stab wounds to the neck (TT, 12/11/2012, 50-51, 55, 75, 78, 78, testimony of Dr. Ruben Ortiz-Reyes, Deputy Medical Examiner). The blunt instrument, or instruments, Dr. Ortiz-Reyes said, was something with an edge, possibly a 2 X 4, or possibly one flat instrument and one with an edge (*Id*. at, 27, 28-30, 48, 70-71). The instrument could have been either metal or wood (*Id*. at 71).

Chief Medical Examiner Ljubisa Dragovic also testified, and noted that he found some omission and /or misrepresentations in Dr. Ortiz-Reyes' report (TT, 12/12/2012, 21). Dr. Dragovic testified the blunt-instrument was likely a rectangular object, not a baseball bat, and could have been a 2 X 4, a 1 X 4 or 2 X 2 piece of wood, or the object could have been a metal rectangular object (*Id.* at 24, 27, 26). The weapon causing the stab wounds was indicative of a

knife; the body would have been completely immobilized, and Ms. Pyne likely unconscious, when the stab wounds were sustained (*Id.* at 31).

The trial was long and many witnesses were called by the prosecution; the defense called no witnesses.

Nicholas Bretti testified that he was twenty years old and knew Mr. Pyne, having met in September, 2009. Both men worked at Spicer's Orchards, with Mr. Pyne having worked there about eight or nine years, and Mr. Bretti about three years (TT, 11/16/2012, 32).

Mr. Bretti was shown several photographs of injuries on Mr. Pyne's hands, and said he had never seen similar injuries like that occurring as a result of picking up pallets at work, something which Bretti had done on a daily basis (*Id.* at 44). Mr. Bretti further said that he could not see how a person could get such injuries from pallets, and that he tried to simulate those injuries and could not do it (*Id.* at 45-46).

Mr. Bretti described he and Mr. Pyne as "pretty close friends." Bretti said he knew Pyne had a girlfriend, Holly, whom Pyne loved. Bretti said the couple broke up in March, 2011, after Mr. Pyne "told Holly one thing and did something else," relating to Mr. Pyne having gone up north to see an old girlfriend; Mr. Pyne was heartbroken after the break-up (*Id.* at 50, 52).

Mr. Bretti said he and Mr. Pyne would go out for drinks a couple of times a week; Bretti, who did not drink, thought Pyne was self-medicating over the break-up (*Id.* at 53-55, 83). Pyne had mentioned to Bretti that his mother was bi-polar, had said that some days were better than other days, and said sometimes she would not take her medications (*Id.* at 56). On one occasion, when off her medications, she tried to kill Pyne's little sister, Bretti said (*Id.*).

In the evening of May 26, 2011, Mr. Bretti and Mr. Pyne were at O'Malley's for dinner. Mr. Pyne was "getting over " the break up with Holly (*Id.* at 61). Mr. Pyne became "a little tipsy," but was not drunk (*Id*. at 58-59). They left at about midnight, or possibly 11:00 p.m., when the bar closed (*Id*. at 76, 84).

In the afternoon of May, 2011, Bretti clocked-in at Spicer's between 2: 30 p.m. and 3:00 p.m. About ten minutes later, he saw Mr. Pyne arrive. Mr. Pyne, who seemed a "little stressed" or "distraught" walked into the store (*Id.* at 64-65). Mr. Bretti followed, they had a brief conversation, and Mr. Pyne told him he was going to clean the bathrooms. Mr. Bretti did not think it was unusual, but he said Mr. Pyne seemed tense, and not "laid back" (*Id.* at 66-68).

Bretti later learned that Pyne left work early because something had happened to his mother (*Id*. at 69-70).

At a later time, sometime after Ms. Pyne's death, Mr. Bretti said he contacted Mr. Pyne to see if he wanted to go to the bar; Mr. Pyne told him he wanted to stay sober for his family, and had quit drinking (*Id.* at 79).

William Cartwright testified that he was a farmer and the manager at Spicer's, and he knew both Pyne and Bretti. Mr. Pyne was a "great" employee, but kind of a quiet guy, and he was someone on whom Mr. Cartwright relied. They got along like "peas and carrots" (*Id*. at 96-87). On May 27, 2011, Mr. Cartwright said Mr. Pyne was quieter than normal and he was not jovial (*Id*. at 97).

Mr. Cartwright said Mr. Pyne's time-card for that day showed he punched-in at 2:53 p.m. Both Bretti and Pyne were scheduled to work that day from 3:00 p.m. - 6:00 p.m. (*Id*. at 89-91).

Mr. Cartwright said he went into the break-room between 3:00 p.m. and 3:15 p.m. and saw Mr. Pyne bandaging his hands. Mr. Pyne told him he got injured when he threw a pallet (*Id.* at 91-92, 126). Cartwright said he had thrown a lot of pallets in his 25 years there, and he could not recall seeing injuries like that; he said he thought it odd, and he thought the injuries looked more like a rope-burn, or blisters, or that he had gone to a batting-cage and taken about fifty swings without gloves; the explanation for the injuries, he thought, did not make sense (*Id.* at 94-96; 107-108).

He did not questions Mr. Pyne further about it, however (*Id.* at 114-115). He said the photographs later shown him of Mr. Pyne's injuries were accurate (*Id.* at 92-93).

Mr. Cartwright said he had seen Mr. Pyne quieter than normal on previous occasions, usually when there was something involving Pyne's mother. He said during the summer before, Mr. Pyne became quiet once, and he was visibly upset and crying. Cartwright helped him calm down, and Cartwright learned of Ms. Pyne's illness and that she sometimes would not take her medication (*Id.* at 97, 100-101).

Mr. Pyne would not speak in detail of the problems, and he would only say that things got "rough" around the house when she was not medicated (*Id.* at 102-103).

Sometime in march, 2011, Cartwright said, he got a call from Mr. Pyne's girlfriend, Holly, at about 2:30 a.m., and she asked if Mr. Pyne were with Cartwright, and if they had gone to judge a hard-cider contest. Mr. Cartwright explained he had asked Mr. Pyne to go with him, but it was a different weekend. Mr. Pyne later explained to Mr. Cartwright that he had gone out with some buddies, and he apologized for getting Cartwright involved in it (*Id.* at 109-110).

Maureen Boucher testified that she worked for the Sheriff's Department answering 911 calls. She answered a call at 2:36 p.m. on May 27, 2011, and dispatched officers at 2:40 p.m. The officers arrived at the scene at 2:45 p.m., and later left at 8:56 p.m. (*Id*. at 133, 137, 138).

David Gilbert testified that he lived on Burwood Court next-door to the Pynes. He had known them for about fifteen or sixteen years. He returned home from work that day at about 1:30 p.m., plus or minus fifteen minutes; he saw no pedestrians in the area (*Id*. at 141-143).

At about 2:30 - 2:35 p.m., he heard screaming and he then saw Bernard Pyne [Mr. Pyne's father] running to another neighbor's house (*Id*. at 143). Mr. Gilbert went out and met up with Bernard Pyne, who was "very distraught" and almost unintelligible in his speech (*Id*. at 143-144).

He wanted Mr. Gilbert to verify that Ms. Pyne was in the garage, and that there was blood. Mr. Gilbert peeked around the door into the garage and saw Ms. Pyne's body and a pool of blood. Bernard Pyne was still trying to call 911, and Mr. Gilbert assisted with the call. He mentioned to the 911-dispatcher that Ms. Pyne was bi-polar and there sometimes were problems if she were off her medications (*Id*. at 143-145; 154-155). He initially thought it had been a suicide (*Id*. at 164).

Mr. Gilbert testified that his wife notified police that she had seen someone wearing a hoodie -- with the hood up -- walking through the backyards towards the Pyne's garage in the week before Ms. Pyne's death; the person was seen in the late afternoon (*Id*. at 161, 162). Mr. Gilbert said that was the only time in fifteen or sixteen years that he lived there that they ever called the police because of someone strange in the neighborhood (*Id*. at 162). No one ever saw that

stranger again, he said (*Id*. at 165, 169).

Oakland County Sheriff's Deputy Michael Saile testified that he responded to the Pyne home at about 2:45 p.m. on May 27, 2011 (*Id*. at 171-172). He went to the back garage door, which was partially open; Ms. Pyne's hand was protruding from beneath the door. He said he peeked in and saw the obviously-deceased victim (*Id*. at 172, 192). EMS personnel arrived and the death was confirmed (*Id*. at 173).

Deputy Saile said he preserved the scene. He noticed that the front door to the house was dead-bolted, and there was no sign of any disturbance inside the house, which, he said, was "immaculate." There was no blood seen inside the house. No areas in the garage were disturbed, except the corner by the door where Ms. Pyne's body was found. There was no sign of forced entry into the house. There was no evidence that anyone had tracked through the blood (*Id.* at 1798-183; 195).

Amy McIntosh testified that she worked as a paramedic, and she arrived at the scene at about 2:47 p.m. She observed the body and wounds, and called for confirmation of death; death was pronounced at 2:58 p.m. (*Id*. at 229-234, 250).

Ms. McIntosh said that Bernard Pyne and his daughter were seated in the ambulance. Bernard Pyne had tears in his eyes and appeared distraught and was asking what happened; Ms. McIntosh thought that was normal, in her experience (*Id.* at 237-238).

She said Jeffrey Pyne soon arrived and sat with his family in the ambulance. She said that after a few minutes Mr. Pyne came out of the ambulance, knelt on the ground and was making sobbing sounds, but McIntosh saw no tears and it did not appear to her that he had been crying,

she said (*Id.* at 241).

She testified she was shocked there were no tears, and that there was no physical display on his face, and she said she did not think his actions were real; she thought it was a "put on" (*Id*. at 242, 256). Mr. Pyne did not ask her what had happened (*Id*. at 243).

She said Mr. Pyne had some band aids on his hands that were falling off, and he asked her if she had something; he explained that he had grabbed a falling pallet. She testified she thought that was unusual, but she "guessed" it could happen that way (*Id*. 243-245).

Gary Bonham testified he was a paramedic and arrived at the scene with Ms. McIntosh. Ms. McIntosh went inside the garage, while Mr. Bonham stepped in only partway. He could see the massive injuries, and brain-matter (TT, 11/19/2012, 6-8).

Mr. Bonham said Bernard Pyne was very upset and crying and kept repeating that if he had only 'stayed home this would not have happened'. When told by a deputy that Ms. Pyne was deceased, Bernard Pyne began to sob (*Id.* at 10, 12).

Mr. Pyne arrived and sat in the ambulance with his sister and Bernard Pyne (*Id*. at 14, 38). When he arrived, Bonham said, he had a "what the heck's going on' look on his face (*Id*. at 14, 16). About five minutes after getting into the ambulance, Mr. Pyne jumped out and went down on all fours; he sounded like he was crying, Bonham said, and he was dry-heaving. He never did vomit and Bonham never really did see him crying. It "kind of looked like a show to me, like it didn't look sincere... It didn't look genuine," Bonham said (*Id*. at 16-17; 40). The "usual" reaction of families at death scenes is crying (*Id*. at 17; 47).

Mr. Bonham testified that when Mr. Pyne got up from the ground there was no emotion on his

face, "just kind of like he got up and it looked like he got up and he said, well, now I got to get back in the ambulance, you know, because I'm done, you know, putting on a show" (*Id*. at 18). Mr. Bonham said Mr. Pyne never asked him what happened, but did ask some deputies, he thought (*Id*. at 21).

Mr. Pyne stated that a pallet had fallen at work and he had grabbed it. It did not look like that to Bonham; Bonham said it looked like a friction injury, like blisters (*Id*. at 23-24, 25).

Deputy Ronald Chatterson testified that he responded to the scene and stood by the ambulance (*Id*. at 97, 100-101). He saw Mr. Pyne walk up and Mr. Pyne asked, "What's going on?" "What's going on?" What's happening?" and Mr. Pyne started to "tear up" and get emotional (*Id*. at 103, 131, 151).

Mr. Pyne reached the ambulance and Bernard Pyne came out and told his son that his mother was dead. Mr. Pyne soon came out of the ambulance and fell to his knees (*Id*. at 103-104). He heard Mr. Pyne say, "I was just here at 1:30 and she was fine" (*Id*. at 105, 107). The deputy did not notice anything that seemed like Mr. Pyne was putting on a show (*Id.* at 137, 148).

Deputy Chatterson noticed a knife clipped to Mr. Pyne's pocket, asked for it, and have it to another deputy (*Id*. at 109-110). He said he did not know in his experience of anyone ever returning to the scene of a crime with a knife (*Id*. at 136).

The deputy transported the Pynes to the station. Bernard Pyne, he said, "couldn't get a handle on what was going on" and asked numerous times if there was news from the scene. Mr. Pyne showed no emotion, Chatterson said (*Id*. at 114-116).

Chatterson said that at one point, while Mr. Pyne was seated alone in an interview room

waiting for a detective. Chatterson could see him, and heard him say aloud, "why is this happening?" It sounded "bland" to Chatterson; it did not sound "believable" (*Id*. at 118-119).

Deputy Chatterson testified that previously, in March, 2009, he had responded to the Pyne home to assist in effecting a court order that Bernard Pyne had for Ms. Pyne's committal. The deputy escorted ambulance personnel who took Ms. Pyne from the home on a stretcher (*Id*. at 120-123).

Detective Steven Zdravkovski testified that he was dispatched to the scene at 2:50 p.m. May 27, 2011, on a "unknown medical" call (*Id*. at 153). He did not enter the garage back door, but had Deputy Saile let him into the house through the front door, and the two searched the house (*Id*. at 155, 159-160). The inside of the house was "pristine" and "clean," and he saw no evidence of any forced entry, and no evidence of any struggle inside the house (*Id*. at 161-162, 165, 191). Ms .Pyne's purse was on the kitchen table, apparently undisturbed (*Id*. at 166).

The detective spoke with Bernard Pyne, who was "beside himself," was "out of control" and was hyperventilating (*Id.* at 212-213). Mr. Pyne arrived and walked to the ambulance. he saw Mr. Pyne enter the ambulance, emerge and fall to his knees, dry-heave, and cry (*Id*. at 214, 223-224). The detective thought it was "odd" and it "seemed fake" (*Id*. at 224). He said that people usually, if they get to that emotional level, will stay at that level for awhile (*Id*.).

Detective Zdravkovski said that none of the Pynes were told that Ms. Pyne had been murdered until during interviews that evening. The detective said that investigators like to see the reaction of people to the news (*Id*. at 234). Bernard Pyne was told, and his reaction was he did not believe it; he was in complete denial (*Id.* at 237-238). Mr. Pyne did not have much of a

reaction, Zdravkovski said he just "sat back" and wiped away tears "that weren't there" (*Id.* at 239). The difference between the two Pynes was like "day and night," Zdravkovski said (*Id.*).

No murder weapon was ever found, Zdravkovski said, although there had been neighborhood and aerial searches for any disturbed ground (*Id.* at 243-244, 253). Zdravkovski sent a number of items to the State Police for testing, including two handles from a laundry room faucet,, the sink drain, samples from Ms. Pyne, Mr. Pyne's jeans and pocketknife, and several hairs that were found in Ms. Pyne's hand (*Id*. at 252-258; TT, 11/20/2012, 57-63).

He later spoke with Bernard Pyne about several items possibly missing from the garage, including a screwdriver, a box-cutter, two wooden boards, one of which Bernard Pyne used to support his motorcycle; some tools had also been moved, Bernard Pyne told him. Detective Zdravkovski said he later learned that some deputies had used Pyne's screwdriver and a pipe-wrench at the scene (TT, 11/19/2012, 259-260, 263-265, 266; TT, 11/20/2012, 33-34).

In cross-examination, the detective said he did not think that Mr. Pyne had acted "correctly," he had "showed no emotion" and did not appear to be in shock (TT, 11/20/2012, 46-47). The detective said that while not everyone has the same reaction, everyone has some reaction, he said (*Id*. at 47-48).

During cross-examination, defense counsel asked the detective if he knew who killed Ms. Pyne (*Id*. at 65). The detective responded, "Yes. Your client, Jeffrey Pyne, killed his mother, Ruth Pyne" (*Id*). The prosecutor followed-up during re-direct, and Detective Zdravkovski elaborated on that opinion, stating that it was based on the evidence, the time-line, Mr. Pyne's lack of cooperation, his injuries, his lack of emotion, and "none of it made sense" (*Id*. at 66).

Also, he said Mr. Pyne would have had time to clean the house, and he had "lied about where he was at, he lied about what he was doing" (*Id.*).

Detective Kenneth Hiller responded to the scene that afternoon, then went to Spicer's and interviewed people there (*Id.* at 83, 90-91). A pallet was later taken from Spicer's (*Id.* at 99-100).

Several days later he went to the Pyne home with Detective Zdravkovski and spoke with Bernard Pyne about possible missing tools and pieces of wood (*Id.* at 106-107, 108, 109). Detective Hiller said that Bernard Pyne did not later tell him that no wood was actually missing (TT, 11/26/2012, 22-23).

William Foreman, a forensic specialist with the Sheriff's Department, testified that arrived at the scene at about 3:15 p.m. (*Id.* at 45-46). He took photos; he found no weapon (*Id.* at 49, 52). he said viewing the body he determined that Ms. Pyne had probably been knocked down and then beaten and stabbed while on the ground (*Id.* at 54). He said there would not necessarily be any blood spatter from the first strike. He thought there were probably multiple strikes. He explained about how the blood appeared on Ms. Pyne's jacket, and what that meant; he gave an opinion that the entry-way garage door had to have been closed during the assault. He found no blood n the doorknob (*Id.* at 62-65).

There were no bloody footprints anywhere (*Id.* at 82, 98). The carpeting in the house, entered from the garage, showed "no reaction" to his tests for the presence of blood (*Id.* at 82-85). There were no obvious signs of any blood in the laundry room (*Id.* at 85). presumptive tests on the right handle of the laundry tub and the drain were positive for the presence of blood, he said (*Id.*

at 88-89). He tried loosening the sink-trap with a pipe-wrench he found in the garage, but had no luck; fire department personnel later removed it. He used a screwdriver from the garage to remove the garage door (*Id*. at 91, 97). He collected some towels from the second-floor bathroom, but did not test the faucet-handles or tub there (*Id.* at 92-93, 108, 117).

Mr. Pyne's car was tested for the possible presence of blood, with negative results inside and out (*Id*. at 129).

There was no evidence anyone had cleaned up in the house, Foreman said (*Id*. at 140).

Foreman said false positives can result in the presumptive tests for blood from things such as the presence of bleach, copper and some solvents (*Id*. at 110-111, 128, 133, 135, 139).

He had not been qualified as an expert, and he indicated that he did not have a college degree (*Id.* at 107). He did not think he could contaminate the scene by using tools found in the garage in his attempts to remove the laundry-tub sink-trap and the garage door (*Id*. at 108-109).

Sheriff's forensic specialist Robert Koteles also sprayed areas of the carpeting from the garage into the family room and the laundry room, and Mr. Pyne's car, for the possible presence of blood. There was no reaction (*Id*. at 156-158, 159).

Detective John Jacob was qualified as an expert in blood stain analysis (*Id*. at 176). he said he was called to the scene and determined that the main stains in the garage were low to the ground at the exit door, on a near cabinet, and on the wall behind where the victim's body lay (*Id*. at 176-180). Some linear stain on the cabinet suggested that the victim had to have higher than that at some point. The staining at the scene was not high-impact, as would be found in a case with gunshots. The impacts here were medium, as could be caused by, for example, a board

(*Id*. at 186-189, 191). He said there was not a lot of cast-off, so he thought the swinging of the instrument may have been more of a chopping-type motions, rather than full-swing motions (*Id*. at 197). The area of the beating was a small area; there was no thrashing around (*Id.* at 205-206).

Detective Jacob said the perpetrator likely would have had some cast-off blood on clothing, head, hands, shoulders, etc., but would not necessarily be covered; it would depend on how close the perpetrator was to the victim. Presented with a hypothetical of a 3' length of 2 X 4 being used, he said there should be some blood, but not a lot, on the perpetrator; blood would not be dripping from the perpetrator (*Id*. at 208-210). He did not know what kind of instrument had been used, but knew it was linear and long (TT, 11/27/2012, 12).

Detective Jacob described the nature of the wounds on Ms. Pyne's body as "overkill," which can result when a perpetrator goes into a rage. The suspect need not be known to each other, but there are time s when the perpetrator "can't stop" because of an emotional connection to the victim (*Id*. at 4-6, 7-8).

Lieutenant David Pement testified that responded to the scene, arriving before the ambulance (*Id*. at 32). He spoke with Bernard Pyne, who told him he had last spoken with his wife at about 10:38 a.m., while she was shopping. Pement saw a Meijer store receipt on the counter near Ms. Pyne's purse. The receipt showed a time of 11:28 a.m., May 27, 2011 Video of the transaction was obtained from Meijer (*Id*. at 48-49). Because the garage side-door had been taken in the investigation, and for the family's benefit, he contacted a cleaning service to secure the door area and clean the bio-hazard scene; that is something usually left for the family to do, he said (*Id*. at 51, 69, 74).

Kip Conley testified that he lived two doors down from the Pynes (*Id*. at 84-85). That day, he said, he was working outside, starting at about 10:30 a.m. - 11:00 a.m. He saw no foot-traffic; it was quiet. He could see Mr. Pyne's car in the Pyne driveway until about 1: 40 p.m., when he went inside to take a break. When he went back outside, at about 2:10 p.m., Mr. Pyne's car was not in the driveway (*Id*. at 89). At about 2:35 p.m. he saw Bernard Pyne with his daughter walking towards Conley's house; Pyne was in "a panic." Police arrived soon after that (*Id.* at 90, 92).

Mr. Conley said his 22 year-old grandson, who had a record for smoking marijuana, and used to live at the Conley house until he quit school when 17 years-old. The grandson would still visit. He did not see his grandson that day, he said (*Id.* at 98, 109-110, 112).

Detective Sergeant David Hendrick testified that he went to the scene between 3:30 - 4:00 p.m. on May 27, 2011 (TT, 11/28/2012, 9-10). He said he entered the house through the front door and went to the garage.ere he saw the victim. The wounds, he said, indicate that, "Generally there is some -- some rage, there's some emotion involved" (*Id.* at 13).

No weapon was ever found (*Id*. at 16, 17, 40). There were no signs of a struggle or any ransacking in the house, no broken windows, and it appeared to Hendrick that the perpetrator was someone who had access to the house (*Id*. at 18). he was aware that Mr. Pyne reportedly left the house at 1:30 p.m. and Bernard Pyne arrived home with his daughter at about 2:30 p.m. (*Id*. at 19).

Detective Hendrick concluded that the only way out of the house was through the front door, which was dead-bolted, because he said there was no indication that anyone left through the door

next to Ms. Pyne's body (*Id*. at 22-23).

He interviewed later Mr. Pyne later that evening and showed him photos of some pallets at Spicer's; Mr. Pyne indicated which pallet caused his injuries (*Id*. at 22, 28). He later interviewed Diane Needham, at whose home Mr. Pyne said he did some yard work before going to Spicer's that day, and got a copy of a voice-mail message Mr. Pyne left for her that day (*Id*. at 39). He said he confirmed Bernard Pyne's alibi and ruled out other suspects (*Id.* at 47, 43-45). Later, in August, he met with the Medical Examiner and showed him Mr. Pyne's knife; Dr. Dragovic indicated he could not rule the knife in or out as the weapon (*Id*. at 49),

The detective checked the mileage between the Pyne house and Ms Needham's house (4 miles); from the Pyne's to Spicer's (6 miles), and from Needham's to Spicer's (6 1/2 miles)(*Id*. at 50).

During the interview with Mr. Pyne Mr. Pyne demonstrated how he had sustained the injuries on his hands. Hendrick said he tried to duplicate that by picking up pallets about twenty times, but could not duplicate the result (*Id*. at 51). During the interview, Hendrick said, Pyne never asked any questions about how his mother had died. When told she was murdered, Mr. Pyne looked at the detectives then put his hand to his face for a moment (*Id*. at 53, 55).

At one point in the interview, Hendrick said, Mr. Pyne was making sounds like crying, but there were no tears and no redness in his eyes (TT, 11/29/2012, 4). "It did not appear to be real, it appeared to be an act or for show," Hendrick said (*Id.*).

Mr. Pyne told the detectives that the back garage door was left unlocked (*Id*. at 13). He said his mother had returned from shopping at about 11:30 a.m. - 12:00 p.m. (*Id.* at 3).

Four hairs -- ranging in size from 3 centimeters to 17.5 centimeters in length, were tested for mitochondrial DNA. All four matched Ms. Pyne's profile (*Id*. at 113-114, testimony of forensic technician Bonnie Higgins; 154-155, testimony of Dr. Terry Melton).

State Police forensic scientist Erica Anderson tested a number of items for the presence of blood. No blood was found on one of the laundry-tub handles; the laundry sink-drain; several towels; a wash cloth; swimming trunks; the pallet; Mr. Pyne's jeans; Mr. Pyne's knife; or on Mr. Pyne's cell-phone (TT, 11/30/2012, 49, 51-53, 65). The entire knife was swabbed; there was no blood found (*Id*. at 76-77).

Ms. Anderson did find two small (1 mm x 1/2 mm) blood stains on the second laundry-tub handle, and found blood in the clippings of Ms. Pyne's fingernails (*Id*. at 50). The sample from the laundry-tub faucet handle matched Ms. Pyne's sample; the blood in the fingernail clippings contained no foreign DNA (*Id*. at 60-62).

Diane Needham testified that she knew the Pynes and had been Mr. Pyne's 10th grade teacher (*Id.* at 88-89). He started doing maintenance work for her in 2006; she was always satisfied with his work (*Id*. at 89-90). Ms. Needham said that Ms. Pyne was very religious, would dominate conversations, and was strongly-opinionated about premarital sex (*Id*. at 91-93). She had been to the Pyne's for dinner in the past, she said, and the family did not seem to enjoy being with each other (*Id.* at 91-94).

She said that in the Summer of 2010, Mr. Pyne mentioned to her that his mother had come after him with a knife; the police came and took her away. Mr. Pyne explained that his mother had problems with her medications (*Id*. at 95-96).

Ms. Needham said it seemed like something was bothering Mr. Pyne in March, 2011; he seemed unhappy (*Id*. at 97). In May, 2011, she had an out-of-town trip planned, so she left a list of jobs for Mr. Pyne to do while she was gone (*Id*. at 99). She returned home on May 19, 2011 (*Id*. at 101).

She said there were five lilac bushes she wanted transplanted; she was sure Mr. Pyne transplanted them on Monday, May 23, 2011, and that she mulched around them on Tuesday, May 24, 2011 (*Id*. at 108-109, 114-115, 122, 185).

On Friday, May 27, 2011, she was at her daughter's house babysitting from about 8:30 a.m. until 5:00 p.m. - 5:30 p.m. (*Id*. at 123). She received a voice-mail message from Mr. Pyne that day at 2:41 p.m. She thought the message was unusual in the amount of detail it contained. In the message, he mentioned that he transplanted the bushes that day. She later, at the funeral, asked him about the lilacs. He insisted he planted them on that Friday; Ms. Needham said she knew better (*Id*. at 124-125, 132, 147).

Donald MacKinnon testified that he was a neighbor of Ms. Needham. He had met Mr. Pyne before and had seen him and car at Ms. Needham's home many times (*Id*. at 217).

On May 27, 2011, Mr. MacKinnon, said, he was outside helping another neighbor set up a pool; he was outside from about 10:00 a.m. to 3:00 p.m., and he said he did not see Mr. Pyne or Mr. Pyne's car at Ms. Needham's house that day. He said he did see Mr. Pyne there earlier in the week, on Monday, he thought, cutting the grass (*Id*. at 220-222, 224, 231-232). He thought he noticed that Ms. Needham had lilac bushes along her driveway on Tuesday of that week (*Id*. at 222).

Andrew Lesnew testified that he was a neighbor of Ms. Needham, who lived three doors down, and, on May 27, 2011, he was outside putting up a pool. MacKinnon was there helping him (TT, 12/10/2012, 10-12). He said they were outside from about 11:45 a.m. until 7: 30 to 8:00 p.m., and he did not see Mr. Pyne or his car that day (*Id*. at 15-17, 19, 26). He last saw Mr. Pyne at Ms. Needham's house that week on either Monday or Tuesday, doing yard-work (*Id.* at 17). he said he noticed Ms. Needham's lilac bushes on Tuesday (*Id*. at 19).

Holly Freeman testified that Mr. Pyne was her ex-boyfriend. They started dating in the Fall of 2008. She said the relationship was exclusive and serious; there had been talk of marriage (*Id*. at 60-61). Mr. Pyne had mentioned that neither of his parent supported their relationship. because Ms. Freeman was not a Christian (*Id*. at 64). Ms. freeman said Ms. Pyne became upset when Mr. Pyne told her in 2009 that he and Ms. Freeman were in a sexual relationship (*Id*. at 65). Ms. Freeman became upset at Mr. Pyne, because she thought it was none of his parents' business (*Id*. at 67-68).

Ms. Freeman said in the early days of their relationship Mr. Pyne became emotional often, and it was almost always about his mother, or when he talked about his sister, whom he was worried about (*Id*. at 69, 74-75). Usually, Mr. Pyne was "always very reserved" and quiet (*Id*. at 69-70). Sometimes, she said, things would accumulate and it would result in an "emotional breakdown" (*Id.* at 70). She said it was unusual to her to have a guy that would break down so much and cry and "always be so emotional." She finally told him to "man up," and it diminished after that (*Id*. at 70-71).

She said Mr. Pyne wanted to move out of the house, but he did not have enough money, and

he was worried about his little sister (*Id.* at 77-78). She said Mr. Pyne's father started talking about getting a divorce in 2010; Mr. Pyne was in agreement with that (*Id.* at 85-86, 87). He also told her that if his father did not go through with the divorce by the summer, he would move out (*Id*. at 89). She said he was becoming frustrated, and he couldn't take it, the fighting between his mother and his father, anymore (*Id*. at 89-91).

Ms. Freeman said that at the end of March, 2011, he told her he was going to Grand Rapids with his boss, but he cheated on her (*Id.* at 92, 94). She said he had been the "perfect boyfriend" and was the "perfect guy" and she had never had a reason to doubt him (*Id*. at 94). She said he "lied so effortlessly" to her and her family and friends, and he had a "whole elaborate story to cover his tracks" (*Id.* at 95).

Ms. Freeman said about his cheating, "if you knew Jeff and you knew his character and what a good person he was, you couldn't even fathom the fact that he could do something like that." She said she did not speak to him for a month, but they reconciled in April, 2011, and starting to date again (*Id*. at 95-97).

She said that on May 27, 2011, she received a text message from him at 11:40 - 11: 50 a.m. saying that he loved her (*Id*. at 98). The next contact was at about 2:30 a.m. May 28, 2011, when he called her and told her that he was okay, Julia was okay, his father was okay ... his mom was dead (*Id.* at 99). She said he was calm and not crying (*Id*. at 99).

he came to her house later that day and, as soon as he was inside the garage, he fell to his knees and started crying (*Id*. at 101). She noticed the bandages on his hands and asked about it; he told her they got caught in a pallet. She told him it did not look like a pallet would do that and

she made him take off the bandages (*Id.* at 101-102, 105-106). He told her on that Friday his mother had gone grocery shopping. He helped her put the groceries away, got bored and left at about 1:30 p.m. and went to Ms. Needham's house; from there he went to work at Spicer's (*Id*. at 106).

Ms. Freeman said she had never seen Mr. Pyne hit anybody, and never saw him react violently to anybody. She said she had hit him a couple of times, and he never hit her back (*Id*. at 139, 118-119, 146). She knew his mother choked him in July, 2010, and he did not retaliate (*Id*. at 118).

Tonia Moore testified that she met Mr. Pyne in September, 2010; they had several classes together and carpooled. He mentioned that his mother was bi-polar (*Id.* at 156-158). He told her if it got too bad he could move out, but he did not want to leave his little sister (*Id*. at 158).

Ms. Moore said the carpooling ended in October, 2010, because it became uncomfortable," in that she and Mr. Pyne had different ideas about where the relationship should go. She wanted to be friends, but he wanted a little bit more (*Id*. at 160). He had told her he was not dating anyone, she said (*Id.*).

Dr. Dragovic testified that he reviewed Dr. Ortiz-Reyes' findings; there were some things Dr. Dragovic disagreed with and that Dr. Ortiz-Reyes changed. He found some omissions and/or misrepresentations in Dr. Ortiz-Reyes' report (TT, 12/12/2012, 21).

Dr. Dragovic said the blunt-force instrument was likely a rectangular object, possibly a 2 X 4, a 1 X 4, or a 2 X 2, but he could not say whether it was a board or a rectangular metal object (*Id*. at 24-26, 67). The victim had been completely immobilized, and likely completely unconscious,

at the time the sharp-force injuries were sustained (*Id*. at 31). The cause of death was from two competing mechanisms: brain injury, superimposed by the sharp-force injuries (*Id*. at 33). Both types of injuries were fatal injuries (*Id*. at 46-47). Ms. Pyne could have died within five minutes (*Id*. at 48).

It was a "highly emotionally charged" killing, one of "extreme passion," Dr. Dragovic said, due to the injury pattern and overkill, and likely involved some "unresolved conflict" (*Id*. at 63-64; 70; 71).

Dr. Dragovic viewed photos of the injuries on Mr. Pyne's hands and said they were "picked out blisters." A single movement, in theory, could cause them, as could a single contact with a hot object (*Id.* at 37-38). He thought that blisters occurring on both hands likely would not occur from a single contact, unless a hot object was grabbed (*Id*. at 38). Dr. Dragovic said that such symmetrical blister are "suggestive of some simultaneous effect on the skin of both hands and that means that both hands have been used to grasp an object that would have created them" (*Id.* at 38-39). A round object would yield a different distribution of blisters, he said (*Id*. at 39). A rectangular object could be an explanation for the blisters, because the area of the skin would be exposed to the edge of the rectangular object (*Id*. at 40). He could not say how long it would take to get such blisters (*Id*. at 52).

He said it was possible that the same object that caused the seven to nine -- possibly more -- blows to the victim's head, and at least six blows to the victim's arms and hand, caused the blisters, due to the pattern of injury (*Id*. at 40, 42-43). He said it was possible that a person could sustain the blisters by getting hands caught in a pallet, but he thought it highly unlikely (*Id*.

at 43, 44). If a person already had blisters and got their hands caught in the pallet, the blister caps would peel off (*Id*. at 45).

Following the prosecution's proofs, a motion for directed verdict of acquittal was heard and denied (*Id*. at 80-92).

No defense witnesses were called (*Id*. at 94-96, Mr. Pyne's waiver of right to testify).

Over defense objection the jury was instructed on second-degree murder as a lesser offense (TT, 12/13/2012, 3-9, prosecutor's request and the ruling).

Mr. Pyne was convicted of the lesser offense, and sentenced as described above (TT, 12/18/2012, verdict, 6).

He appeals by right.

ARGUMENT I

THE TRIAL COURT'S FAILURE TO PREVENT, OR TO REASONABLY RESTRICT, THE PROSECUTION'S USAGE OF IMPROPER CHARACTER, OPINION AND NON-RELEVANT OTHER-ACTS EVIDENCE -- IN A CASE WHERE DIRECT EVIDENCE OF GUILT WAS LACKING AND THE PROOFS WERE COMPRISED OF INFERENTIAL CIRCUMSTANTIAL EVIDENCE AND OPINIONS OF WITNESSES -- WAS AN ABUSE OF DISCRETION WHICH DENIED MR. PYNE HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS, AND CONST. 1963, ART. 1, §§17 AND 20, AND FURTHER VIOLATIVE OF MRE 403 AND 404(A) AND 404(B).

Standard of Review and Preservation of Issue

A trial court's ruling on the admissibility of evidence is reviewed for an **abuse of discretion**. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when the court's decision is outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010); *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

Constitutional questions are reviewed **de novo**. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004); *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

Factual determinations, including those of other acts, made by the trial court are reviewed for **clear error**, and a determination that evidence fits within a rule or is offered for a proper purpose

under the rules of evidence is a legal determination reviewed **de novo**. *United States v Merriweather*, 78 F 3d 1070, 1074 (CA 6, 1996); *Jenkins, supra*, 472 Mich at 31.

Where an evidentiary nonconstitutional error is preserved, there is a presumption it is not grounds for reversal, unless it "affirmatively appears that, more probably than not, it was outcome determinative." *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002).

Where claims are unpreserved, the forfeited errors -- constitutional or nonconstitutional -- are subject to the "plain-error" analysis. *United States v Olano*, 507 U S 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Allen*, 466 Mich 86, at 89-90; 643 NW 2d 227 (2002); *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003)("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").

Defense counsel raised multiple objections, preserving for review many of the instances; others were forfeited. (TT, 11/16/2012, 45 [opinion objection overruled]; 49-50 [character objection overruled]; 53 [character objection overruled]; 59-60 [character objection overruled]; 107-108 [no objection to opinion testimony]; 242 [no objection to opinion testimony]; TT, 11/19/2012, 16-17, 18 [no objection to opinion testimony]; TT, 11/19/2012, 116, 118-119 [no objection to opinion testimony]; 224 [no objection to opinion testimony]; 11/26/2012, 55 ["late" objection overruled]; 57, 59, 63 [objections not renewed], 64, 74, 76 [no objections to opinion testimony]; TT, 11/27/2012, 7 [foundation (opinion) objection overruled]; TT, 11/28/2012, 18 [no objection to foundation (opinion)]; TT, 11/29/2012, 4 [no objection to opinion testimony];

TT, 12/10/2012, 93 [character and relevance objection sustained]; 94 [character objection overruled]; 94-95 [no objection to character testimony]; 171-202 [additionally, it is hard to see the relevance of Renee Ginell's testimony, which, at its core, was that she and Bernard Pyne had an extramarital affair; counsel should have objected on relevancy grounds].

Analysis

The trial court allowed evidence of Mr. Pyne having lied about dating Ms. Freeman, drinking and drinking, and opinions about whether Mr. Pyne was truthful. Some were objected, most were not. Ultimately, the court, defense counsel and the prosecutor all have the responsibility to ensure that Mr. Pyne's trial was fair. The trial court had the additional obligation to maintain the orderly progression of the evidence, and to make the determinations relative to the admissibility of the evidence. If evidence is not legally admissible, then it is an abuse of discretion, as a matter of law, to admit it. An error of law is necessarily an abuse of discretion. *Craig v Oakwood Hosp.*, 471 Mich 67, 76; 684 NW2d 296 (2004). The trial court failed in its ultimate obligations.

The presumption of innocence is so fundamental and crucial to our system of jurisprudence, that it is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v United States*, 156 US 432, 453, 15 S Ct 394, 403, 39 L Ed 481 (1895).

Once a defendant introduces character testimony, the prosecution *then* may, and *not before*, rebut that testimony. "For example, a defendant charged with theft may introduce character evidence tending to prove his or her honesty. A defendant accused of a violent crime may

introduce character evidence of his or her peaceable nature. A defendant who defends on a claim of self-defense may be permitted, under certain circumstances, to introduce character witnesses for truth and honesty. Robinson & Longhofer, *Courtroom Handbook on Michigan Evidence, Michigan Court Rules Practice***,** Section 404.2, page 181 (West Pub., 2000)." Under MRE 405(a), for example, the accused can only present favorable character evidence in the form of reputation testimony. MRE 405(a) then permits the prosecution's rebuttal to be done either by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the bad reputation of the defendant. *People v Champion*, 411 Mich 468; 307 NW2d 681 (1981).

The relevancy required of any proffered evidence is that which shows a relationship between the evidence and a material fact which demonstrates by reasonable inferences that the material fact at issue is more probable or less probable than it would be without the evidence. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

Evidence of other crimes or wrongs may be admissible when offered for a proper, i.e., non-propensity purpose, provided, however, that the probative value of the proposed evidence is not substantially outweighed by the danger of unfair prejudice. See, for example, *People v Sabin (After Remand)*, 463 Mich 43, 62; 614 NW2d 888 (2000); *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993); *People v Matthews*, 17 Mich App 48, 52; 169 NW2d 138 (1969)("This rule of law guards against convicting an accused person because he is a bad man."). Barring such evidence prevents the trier of fact from inferring that the accused person is guilty of the charged offense because he has committed other similar crimes"); MRE 404(b);

MRE 403 [the texts of MRE 404(b) and MRE 403 are attached as Appendix A]. Propensity evidence has been historically excluded as being improper, as it can lead to a conviction not upon the defendant's actual behavior concerning the charged offense, but upon his character. See, for example, *Michelson v United States*, 335 US 469; 69 S Ct 213; 93 L Ed 168 (1948); and *People v Seaman*, 107 Mich 348; 65 NW2d 203 (1895).

Unfair prejudice exists when there is a tendency that the evidence will be given undue weight by the jury, or it would be otherwise inequitable to use the evidence. See, for example, *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The acts must be relevant not to a propensity purpose, but to a legitimate purpose before evidence of the acts may be admitted. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Unfair prejudice is perhaps especially likely where improper character evidence is utilized; see, for example, *Crawford, supra*, wherein the Supreme Court stated that, "the problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can "'weigh too much with the jury and … so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" 458 Mich at 384, quoting *Old Chief v United States*, 519 US 172, 181; 117 S Ct 644; 136 L Ed 2d 574 (1997), in turn quoting *Michelson v United States*, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948).

The *Crawford* Court concluded:

> To the extent that the 1988 conviction is logically relevant to show that the defendant was also a drug dealer in 1992, we believe it does so *solely by way of the forbidden intermediate inference of bad character that is specifically*

> *prohibited by MRE 404(b). Thus, the defendant's prior conviction was mere character evidence masquerading as evidence of "knowledge" and "intent."* Because MRE 404(b) expressly prohibits the use of prior bad acts to demonstrate a defendant's propensity to form a certain mens rea, we hold that the trial court abused its discretion in admitting evidence of the defendant's prior conviction and reverse and remand the case for a new trial. 458 Mich at 394-395 (internal citations omitted)(emphasis supplied).

The *Sabin* case, *supra*, held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are *sufficiently similar* to support an inference that they are manifestations of a common plan, scheme, or system," and that "[g]eneral similarity between the charged and uncharged acts *does not, however, by itself, establish a plan, scheme, or system used to commit the acts*." 463 Mich at 63, 64 (emphasis supplied).

In the instant case, the prosecution had no similar acts of violence, or any acts of violence to legitimately proffer under MRE 404(b). Instead, the prosecution sought to use evidence of character, including that due to circumstances Mr. Pyne was breaking down emotionally was drinking, and drinking and driving, and cheating on his girlfriend, and lying, etc. The trial court erroneously allowed the presentation.

As noted, a prosecutor may ask a witness about specific instances reflecting on the defendant's character, but only *where the defendant has placed his or her character at issue*. MRE 404(a)(1). Questioning about Mr. Pyne's various problems with his girlfriend, his attempt to date someone new, his drinking at a bar with a friend several nights a week, etc., were not relevant, and were improper questions concerning character traits. The prosecution should not

have done it; having done it, however, defense counsel should have -- in all instances -- objected; in any event, the trial court should have controlled the proceedings to prevent contamination of the jury with inadmissible evidence. Not doing so was an abuse of discretion. See, for example, *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009)((and, at 91: "a prosecutor may not normally call witnesses to testify about a defendant's character or present evidence of other acts performed by the defendant in order to show that the defendant has a particular character and that the defendant acted in conformity with his or her character with regard to the events at issue"); see, also, *People v Morikawa*, unpublished opinion per curiam of the Court of Appeals, issued August 27, 2013 (Docket No. 308016)(a copy is attached as Appendix B),

The case of *People v Goddard*, 429 Mich 505, 516; 418 NW2d 881(1988), provides, by analogy, a helpful example. In that felony murder case, the Supreme Court ruled that admission of the primary prosecution witness' testimony that, during one night six months before the victim's death, the witness and defendant committed five breakings and enterings, and, during one of the break-ins, the defendant shot several times at a television set and said that if they "were ever approached that he'd fire once into the air and then fire at the people," was reversible error. *Id.* at 508. The Court also noted that:

> "There were no similarities between the February 15, 1980, series of breakings and enterings and the shooting at the television set testified to by Koski and the death of Wissmiller sufficient to warrant admitting Koski's testimony. The prior breakings and enterings and the shooting at the television are not significantly probative of an intent to kill. At none of these prior burglaries did Ken kill or shoot at another human being. *The shooting of a television set is not sufficiently similar to shooting a human being to warrant admitting it into*

> *evidence. Directing force at an inanimate object does not translate into a willingness to kill a human being.*" *Id.* at 516 (emphasis supplied).

The case also involved 'finger-pointing' between the defendant and defendant's father, each of whom accused the other of firing the fatal shot. The *Goddard* Court concluded that:

> "The jury was presented with two contrasting versions of Wissmiller's death. Neither was inherently credible. Which version the jury chose to believe depended largely on which witness the jury found most believable. Koski's testimony was the only evidence indicating that Ken had engaged in prior bad acts. Absent this testimony, the jury may well have found Ken the more credible witness and chosen to believe his version of events rather than his father's. We therefore hold that admission of Koski's testimony concerning the breakings and enterings and the shooting of the television set constitutes error requiring reversal." *Id*. at 519 (footnotes omitted).

The testimony at trial established (however, through prosecution witnesses alone, for defense counsel failed to present any witnesses on Mr. Pyne's behalf; see Argument II, *infra*) that Mr. Pyne had no violent history, *whatsoever*. That is, unlike the facts in *Goddard*, where there was a compare-and-contrast analysis of that defendant's prior violent act -- with the Supreme Court ultimately holding that the prior acts were inadmissible -- there was no prior act of Mr. Pyne which the prosecutor could tie to a motive to kill.

Mr. Pyne had been struck by Ms. Freeman, yet never hit her back; he never was violent to anybody that she knew of (TT, 12/10/2012, 119, 139, 146). Mr. Pyne's mother had, on an earlier occasion, grabbed his throat; he did not respond physically (*Id*. at 119).

Despite -- or, perhaps, because of -- the complete lack of any prior violent act by Mr. Pyne,

on anybody, the prosecution found it necessary to argue non-relevant acts, e.g., that Mr. Pyne might have driven while impaired by alcohol the night before; that Mr. Pyne had some drinks with friends after work two or three evenings a week for several weeks; that Mr. Pyne may have flirted with a co-ed one half-year before the murder, and that he possibly dated another female earlier in the year; that Mr. Pyne may have lied to his then-girlfriend about dating that other female, etc., somehow cumulatively supported an inference that he held and acted upon an intent to kill his mother in a brutal fashion.

In effect, the prosecution chose to attack Mr. Pyne's character, both generally and through specific other acts, contrary to MRE 404(a) and (b), where the defense had not put character into issue. In essence, the prosecution sought to create the false impression that Mr. Pyne had a violent character and was subject to violent emotional outburst, and then attack that false construct through an improper attack on Mr. Pyne's character. (See, for example, the prosecutor's response to a defense objection that a question called for character evidence: the testimony was instead to "demonstrate a continuing build-up of state of mind in the part of the defendant that culminated" in the events of May 27, 2011, and "it goes [not to character, but] to the facts that happened and the state of mind that he was in on May 27th" [TT, 11/16/2012, 50]). In short, it appears the 'relevance' was that Mr. Pyne acted in conformity with

That was their case. That was the trial. Counsel occasionally objected, but the trial court repeatedly allowed such evidence. That was error which denied Mr. Pyne of a fair trial and improperly affected his presumption of innocence. The resulting verdict cannot therefore be trusted as reliable.

The trial court erred not only in allowing the specific character evidence and attacks on Mr. Pyne, but, also, by allowing the opinion testimony of the officers at all. Experts may certainly provide opinions, and lay witnesses may provide opinion testimony in a more limited manner. The Rules of Evidence provide the framework for the admission of opinion testimony, both that of lay witnesses and that of experts. The Rules provide as follows:

> **Rule 701 Opinion Testimony by Lay Witnesses**
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
>
> **Rule 702 Testimony by Experts**
>
> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

If the witness is to provide opinion testimony beyond the limitations in MRE 701, then the trial court has, under MRE 702, the threshold duty of determining that each aspect of an expert's proposed testimony, and the data underlying the expert's opinions, are reliable. See, for example, *Gilbert v DaimlerChrysler Corp*., 470 Mich 749, 779; 685 NW2d 391 (2004), reh den 472 Mich 1201; 691 NW2d 436, cert den 546 US 821; 126 S Ct 354; 163 L Ed 2d 63 (2005)("MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony--including the data underlying the expert's theories and the methodology by which the expert

draws conclusions from that data--is reliable."); *Gay v Select Specialty Hospital*, 295 Mich App 284, 290-291; 813 NW2d 354 (2012)("the court must weigh the witness's "knowledge, skill, experience, training , [and] education" and determine whether— on the basis of those factors— the witness is sufficiently qualified to offer expert testimony on the area at issue"); *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Kumho Tire Co, v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

Further, "MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data" (*Gilbert, supra*, 470 Mich at 782). A trial judge "may neither "abandon" this obligation nor "perform the function inadequately." *Id*. at 780 (internal citations and notes omitted). If the expert's proposed testimony is not reliable, the evidence is not admissible. *Id.* at Also, "[a]n expert who lacks "knowledge" in the field at issue cannot "assist the trier of fact" under MRE 702, *Gilbert, supra*, 470 Mich at 789, and the testimony must be excluded.

In this case, the police detectives were allowed to cross the line and render opinions in several areas and on multiple crucial topics, although they were not qualified as experts in those areas; for example, blood-spatter, emotional states, “fake” behavior, etc. (e.g., Detective Zdravkovski, TT , 11/19/2012, 224, and testimony of “fake” behavior).

The detectives were allowed to render opinions, essentially testifying as experts, or, perhaps, “quasi-experts.” How, exactly, should such quasi-expert opinion testimony be measured in light of the requirements of MRE 702 and *Gilbert*? The short answer is that there is no room in the

existing legal framework for such quasi-, and foundation-less "expert" testimony. Under the rules for lay witnesses, the detectives were allowed to venture too far into prohibited realms of testimony. See, for example, *U.S. v Freeman*, U.S. Sixth Circuit Court of Appeals for the Sixth Circuit, decided September 13, 2013 (Docket No. 11-1798)(a copy is attached as Appendix C).

In *Freeman*, the Sixth Circuit held that an FBI agent's testimony ranged out of his area of expertise. The agent had listened to and ascribed meaning to phrases in many thousands of recorded phone-calls. The Freeman Court noted that, "Throughout the recordings, Agent Lucas interpreted conversations between Freeman and his co-defendants to broadly illustrate the prosecution's theory of the case for the jury."

The *Freeman* Court, construed FRE 701. "MRE 701 is virtually identical to FRE 701," *People v Fomby*, 300 Mich App 46 ; 831 NW2d 887, 889 (2013).

One very real harm possible from such testimony, the *Freeman* Court noted, is that "an agent's "testimony may effectively smuggle in inadmissible evidence, " that he may be "drawing inferences that counsel could do but with . . . the imprimatur of testifying as a law enforcement officer, " that he may "usurp the jury's function, " and that he may be "doing nothing more than speculating," citing *United States v Albertelli*, 687 F 3d 439 (1st Cir. 2012). The Court further noted that:

> "While the jury, left in the dark regarding the source of Agent Lucas's information, likely gave him the benefit of the doubt in this situation, "the fair inference is that he was expressing an opinion informed by all the evidence gleaned by various agents in the course of the investigation and not limiting himself to his own personal perceptions." ... In short, Agent Lucas was called by the government to testify to the meaning of numerous phone conversations

irrespective of whether his testimony, at points, was mere speculation or relied on hearsay evidence." (internal citation omitted).

Significantly, the Court further explained that "[a] witness, lay or expert, may not form conclusions for a jury that they are competent to reach on their own," i*d*. (citing *McGowan v. Cooper Indus., Inc.*, 863 F 2d 1266, 1272 (6th Cir. 1988)("[The witness's] proffered testimony . . . consisted of opinions which were not helpful to the jury because they addressed matters that were equally within the competence of the jurors to understand and decide, and thus were inadmissible under Fed.R.Evid. 701 and 702.").

The burden of establishing admissibility is on the proponent, i.e., in this case, the prosecution, which must "show that any opinion based on those data expresses conclusions reached through reliable principles and methodology" (*Gilbert, supra*, 470 Mich at 781, 782, 789). There was no "searching inquiry" in the instant case. The prosecution failed to meet its burden, and the trial court failed to meet its obligation under the law. Further, defense counsel, too, failed in his duty to protect the interests of Mr. Pyne through timely objection(s).

The trial court failed in its threshold duty to act as the gatekeeper prior to the admission of that evidence. Defense counsel failed to timely object and, in that failure, deprived Mr. Pyne of constitutionally effective assistance of counsel under the Sixth Amendment.

ARGUMENT II

MR. PYNE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO PRESENT A SUBSTANTIAL DEFENSE, FAILED TO OBJECT TO INADMISSIBLE HEARSAY, FAILED TO OBJECT TO IMPROPER PROSECUTION ARGUMENT, AND OPENED THE DOOR TO HIGHLY-PREJUDICIAL OPINION "EVIDENCE."

Standard of Review and Preservation of Issue

Sixth Amendment effective assistance of counsel claims are reviewed **de novo**, to determine whether the counsel's performance fell below an objective standard of reasonableness, prejudiced the defendant and as a result denied him a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1980) (setting forth a two-prong standard that a claimant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceeding would have been different).

Multiple errors of counsel are evident in the existing record, and would be reviewable for the first time on appeal where the errors are evident in the existing record. *People v Henry,* 239 Mich App 140, 146; 607 NW2d 767 (1999). In any event, remand is also concurrently sought with this filing to expand on the issues, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The record shows many failures to object, and instances where counsel opened the door to

damaging testimony. For example, TT, 11/19/2012, 259-260, 262, 263-264, 265, 266-267; TT, 11/20/2012, 106-107, 108, 109; TT, 11/26/2012, 37, failures to object to hearsay [relating to what Mr. Pyne said about a missing board(s)]); TT, 11/20/2012, 65-66 [opening door to witness' elaboration on opinion about who killed Ms. Pyne], 67 (witness opinion, no objection); 79-80 (belated, although successful objection to opinion about emotions); 81 (counsel re-asking about opinion of Pyne's guilt); TT, 11/29/2012, 38-39, questions to Hendrick about what witnesses said about lilac bushes; TT, 11/29/2012, 72-75, opened door to prosecutor's re-direct with Hendrick about his opinions of guilt; TT, 11/16/2012, 242, failure to object to McIntosh's opinions; TT, 11/19/2012, 15-17, 18, failed to object to Bonham's opinions; 116, 118-119, failed to object to Deputy Chatterson's opinions about the believability of Mr. Pyne's actions and comments; TT, 11/19/2012, 224, Detective Zdravkovski's testimony about "fake" behavior; 259-260, another failure to object to hearsay relating to what Bernard Pyne said about missing items; TT, 11/20/2012, 106-109, still another failure to object to hearsay about missing tools and wood; TT, 11/26/2012, 55, belated objection -- overruled as "late;" 57, failure to object to blood-spatter witness opinions; 59, failure to object to further opinion about number of impact-strikes; 61-63, failure to object to description of wounds as "defensive;" 64, failure to object to testimony about the door having to have been closed; [note: many of these relating to Foreman's testimony are likely within common knowledge and experience of the officer, or any officer, and were not really at issue in case, that is, the things discussed did not touch on the ultimate questions nor address the material disputes; e.g. piece of a handle "had to have been laying there during

attack," and 76, "She was laying here the entire time"]; 11/28/2012, 18, failure to object to Hendrick's opinion about access to house; failure to object to Hendrick's opinion that defendant's reaction to news during interview "appeared to be an act for show;" 11/29/2012, 74-75, failure to object to Hendrick's opinion about 'squeegee-effect;' TT, 11/30/2012, 137, belated objection about Ms. Needham's being scared that Jeffrey fought with Ms. Pyne and she died as a result; 93, failure to object throughout Ms. Freeman's descriptions of emotional character, behaviors, and then a belated objection; 95, no follow-up objection [there had been one concerning character at 94], where Ms. Freeman spoke of Mr. Pyne's "character and what a good person he was," and she could not believe he would cheat on her.

Additionally, trial counsel failed to object to improper argument of the prosecutor (as noted above)(TT, 12/13/2012, 37, 41, 44, 45, 45, 45, 61-62, 66).

The record is clear that no defense witnesses were called. The reasons are not clear, and remand is sought for that clarification.

Analysis

The right to assistance of counsel is a fundamental right guaranteed to one accused of a crime by both the state and federal constitutions. US Const., AM VI; AM XIV; Const 1963, art. 1, §§17, 20; *Powell v Alabama*, 287 US 45, 71 (1932); *People v Sierb*, 456 Mich 519, 526; 581 NW2d 219 (1998).

A defendant raising a claim of the ineffective assistance of counsel claims must establish that

counsel's performance fell below an objective standard of reasonableness, prejudiced the defendant and, as a result, denied him a fair trial. *Pickens*, supra, 446 Mich at 338; *Strickland, supra*, 466 US at 687 (setting forth the two-prong standard that a claimant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceeding would have been different); see, also, *People v Yost*, 278 Mich App 341, 378; 749 NW2d 753 (2008). As a general matter, trial counsel is afforded deference in matters of legitimate trial strategy. *Strickland, supra*; *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), lv den 439 Mich 837.

However, where a lawyer fails to object to unfairly prejudicial evidence, and thereby fails to protect the client, the lawyer essentially adds to the case against the client. Such a failure to object, or acquiescence, may readily be seen as deficient representation, whether or not the failure was deliberate or inadvertent. See, for example, *Strickland*, *supra*, 104 S Ct at 2066 (deliberate trial tactics may constitute ineffective assistance of counsel where they fall "outside the wide range of professionally competent assistance"); *People v Fenner*, 136 Mich App 45; 356 NW2d 1 (1984), where counsel's failure to object to inadmissible hearsay corroborating the complainant's testimony was held to be ineffective assistance of counsel; *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996)(counsel's failure to object to other-acts evidence required reversal); and see *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988) (where counsel was ineffective for calling a witness for the defense who actually provided the only substantive evidence of defendant's guilt); and, also, *Morikawa, supra*, slip op. p. 3

(counsel failed to object to improper character evidence, as well as to an instruction; the Court, in reversing for a new trial, held: "Given that this case was obviously a "close call," counsel's failure to object in this instance and in the jury instruction instance constituted ineffective assistance of counsel").

The federal courts provide additional guidance, including that found in *Washington v Hofbauer*, 228 F 3d 689 (CA 6, 2000)(counsel's failure to object to obvious prosecutorial misconduct was due to incompetence and ignorance of the law, rather than a reasonable trial strategy); *Combs v Coyle*, 205 F3d 269 (CA6, 2000)(where counsel's failure to assert objections and challenge to a Fifth Amendment violation, among other errors, was ineffective); *Davis v Booker*, 594 F Supp 2d 802 (E.D. Mich. 2009), where trial counsel was found ineffective on several grounds, including failure to make use of an investigator, and, although defense counsel had a trial strategy, he failed to investigate and develop any facts which would have supported the theory; and *Martin v Rose*, 744 F 2d 1245, 1249 (CA 6, 1984), where trial counsel's trial strategy, formulated after two years of pre-trial motions and investigation, was to do nothing and instead rely upon a favorable appeal; the lawyer's refusal to cross-examine witnesses, make objections or present evidence, although deliberate strategy, denied the defendant the effective assistance of counsel.

Also helpful, by analogy, is the case of *English v Romanowski*, 589 F Supp 2d 893 (E.D. Mich. 2008), aff'd in part, rev'd in part, *English v Romanowski*, 602 F 3d 714 (6th Cir. 2010). Defense counsel was found to have been ineffective for failing to adequately investigate and to call the defendant's girlfriend as a witness to corroborate the claim of self-defense in an assault

with intent to murder prosecution. The lawyer told the jury in opening statement that the witness would be called; however, the witness was not called. The federal court found that the Michigan court's determination that the girlfriend's testimony would have been merely cumulative of the defendant's, was error, because the girlfriend "was the only witness who would have corroborated Petitioner's version of events. In an assault case where the disputed issue concerns who was the aggressor, corroborating testimony is critical to a self-defense claim." By failing to present her testimony, the lawyer allowed the state's case "to go unchallenged save for Petitioner's own testimony." Also, as the U.S. Sixth Circuit Court of Appeals noted in the *English* case, "Undoubtedly, the testimony of a second person to corroborate the Defendant's version of the events would not have been cumulative, but rather could have critically added to the strength of the defense's case." 602 F. 3d at 727.

Mr. Pyne's case is more compelling. Counsel presented no witnesses, even after the jury had been advised during selection that experts might be called (TT, 11/14/2012, 7). Essentially, the prosecution's case went unchallenged. There was no strength to the defendant's case. There was 'no there, there.' The jury saw the picture painted only by the prosecution.

Mr. Pyne does not here assert that his trial counsel failed to investigate the case; instead, the specific problem -- leading to the unfair prejudice and denial of a fair trial -- was that counsel, after his investigation, failed to follow through on that investigation, failed to utilize the fruits of that investigation, failed to protect Mr. Pyne against inadmissible hearsay and other damaging testimony, and failed to present any substantial defense. In short, counsel failed to effectively challenge the prosecution's case, particularly as the case was so largely dependent upon

innuendo, speculation and opinion. The jury, without something specific or viable to challenge the prosecution's case, had nothing with which to counter the theories, opinions and inferences. Legitimate trial strategy? No. The jury was left with no foundation to formulate an articulable -- and reasonable -- doubt.

Deputy Foreman was allowed, without objection, to give opinion testimony -- although not qualified as an expert -- about blood-spatter, how many blows were struck, the physics of the assault, whether or not the garage side-door was open, defensive wounds, etc. (TT, 11/26/2012, 54-55, 57, 59, 61-63, 64). (Ironically, the prosecutor objected to a defense question posed to Deputy Foreman about blood-spatter; the objection was sustained. *Id* at 114).

Frankly, some of the testimony, although erroneously admitted and counsel failed to object, is not legally significant, as no real dispute exists about it. For example, whether or not a piece of a cabinet handle was on the ground during the assault (e.g., "That piece had to have been lying there during the attack," *id*. at 74), would not affect the outcome of the case and is not in dispute. It does reflect, however, another example of counsel letting the prosecution and its witnesses to venture where they may, without effective resistance or challenge.

Even the issue about "overkill" from those witnesses not qualified to give such testimony, for example, Hendrick, although likely improper and without adequate foundation for the opinion rendered (see, for example, Detective Hendrick's observation that the massive injuries were indicative of a "personal relationship with the victim" [an objection to that was sustained, however] TT, 11/29/2012,75), was not really an issue. The extent and number of the injuries suffered by Ms Pyne was not contested; the issue at trial was the identity of the perpetrator.

However, counsel's failure to challenge such testimony at the outset, and not only when it reaches the extreme stage, as in Hendrick's case, for example, is reflective of a pattern of counsel's failure to be at the forefront in the protection of Mr. Pyne's constitutional rights.

Counsel failed to effectively challenge the heart of the prosecutions' case, i.e., the opinions, assumptions, conclusions, and character evidence of the prosecution's witnesses, and, adding insult to injury, he opened to door on multiple occasions to the detailed explanations of witness opinions about Mr. Pyne's guilt (TT, 11/20/2012, 65-66 [Zdravkovski, "Yes. Your client, Jeffrey Pyne, killed his mother, Ruth Pyne"]; TT, 11/27/2012, 75-76 [Pement, stating he knew that Mr. Pyne killed his mother "based on all the information I have, yes ... Jeffrey's alibi, that didn't hold up. His lack of cooperation with the police. The injuries to his hands the evening of the incident ... Those are all circumstantial evidence"]; TT, 11/29/2012, 69-70 [Hendrick]; and TT, 11/30/2012, 137 [belated objection to Ms. Needham's fears that Mr. Pyne had done something to his mother causing her death).

There were no objections to the hearsay of what Bernard Pyne said about one or two boards possibly missing from his garage (for example, TT, 11/19/2012, 259-260; TT, 11/20/2012, 106-109; TT, 11/26/2012, 37). Without that hearsay, the prosecution's theory that a 2 X 4 or other wooden board was taken from inside the garage and used as the weapon is weakened. Without that evidence, the inference that something from inside the garage was grabbed and used is diminished, making it instead more likely that the implement was something brought to the scene by the perpetrator. In that case, the likelihood would be that a stranger brought the instrument -- perhaps some type of pry-bar or other implement -- in and used it to kill Ms. Pyne.

Trial counsel utilized a tactic, or theatric, perhaps, throughout the trial, asking almost all of the witnesses if they knew who killed Ms. Pyne. Of course, in the cases of Zdravkovski, Pement and Hendrick, they all said they did [TT, 11/16/2012, 84, Bretti did not; TT, 11/19/2012, 147, Deputy Chatterson did not; TT, 11/20/2012, 65-66, Detective Zdravkovski *did* 'know' who killed Ms. Pyne; TT, 11/26/2012, 32, Detective Hiller did not; 133, Foreman did not; 168, Koteles did not; TT, 11/27/2012, 24, Jacob did not; 75, Pement 'did;' 107, Conley did not; 11/29/2012, 72, Hendrick 'did; ' TT, 11/30/2012, 28, Deputy Cooper did not; 194, Ms. Needham did not [although she worried that Jeffrey had, *id*. at 137]; 12/10/2012, 25, Mr. Lesnew did not; 59, forensic scientist Vitta did not; TT, 12/10/2012, 146, Ms. Freeman did not; 167-168, Ms. Moore did not; 201, Ms. Ginell did not; TT, 12/11/2012, 74, Dr. Ortiz-Reyes did not].

The tactic was not reasonable and, it might be suggested, it blew up in counsel's face. More problematically, certainly, is the impact on the jury of law enforcement personnel -- with the prestige of the State behind them -- stepping into the jury's role as factfinder and presenting the otherwise inadmissible opinions of guilt. Counsel's questioning may have been strategy, but it was not reasonable strategy. *Strickland*, *supra*, 104 S Ct at 2066 (deliberate trial tactics may constitute ineffective assistance of counsel where they fall "outside the wide range of professionally competent assistance").

The harm wrought by the attorney's continuing to press detectives for opinions of guilt, for example, continuing to question Detective Pement about the basis for his opinion of guilt, is exactly the type of harm the *Freeman* Court ruled necessitated a new trial; that is, the police witness is testifying about the "opinions of others and the information that was given to" the

witness, as well as what he actually observed at the scene (TT, 11/27/2012, 76). See *Freeman, supra*, p. 5 of Appendix B)("... there is a risk ... that he [is] testifying based upon information not before the jury, including hearsay, or at the least, that the jury [c]ould think he ha[s] knowledge beyond what [is] before them ..."). Detective Pement stated that, "based on all the information [he had]" he knew who committed the crime (TT, 11/27/2012, 75-76).

Additionally, the harm is again found in the prosecution's re-direct examination of Detective Zdravkovski, after counsel had opened the door, where Zdravkovski testified that "Jeffrey Pyne, killed his mother," and his opinion was based on the evidence, the time-line, Mr. Pyne's lack of cooperation, his injuries, his lack of emotion, and "none of it made sense," and he had "lied about where he was at, he lied about what he was doing" (TT, 11/20/2012, 66, 67). Further, he said Mr. Pyne showed no emotion when told that his mother had been murdered "because he already knew that. He knew that" (*Id*. at 73).

Mr. Pyne should have, Zdravkovski said, had "elevated" emotions on the news of his mother's murder (*Id*. at 79-80). Defense counsel at that point finally, belatedly, objected; the objection was sustained (*Id*. at 80).

Counsel's follow-up was curious. He asked Zdravkovski if he thought Mr. Pyne was a liar and a murderer, to which the detective re-asserted his opinion that Mr. Pyne had killed his mother (*Id*. at 81). What is to be gained on Mr. Pyne's behalf from such questioning? Such determinations must be left with the jury. See, for example, It is "[t]he Anglo-Saxon tradition of criminal justice . . . [that] makes jurors the judges of the credibility of testimony offered by witnesses." *United States v Bailey* , 444 US 394, 414; 100 S Ct 624; 62 L Ed 2d 575 (1980).

Because it is the province of the jury to determine whether "a particular witness spoke the truth or fabricated a cock-and-bull story, " *id*. at 414-415, it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). *See also, People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). *People v Musser*, __ Mich __ ; __ NW2d __ (2013), decided July 12, 2013 (Docket No. 145237).

Defense counsel asked Detective Hendrick for his opinion. Hendrick thought "there's several facts that indicate Jeffrey Pyne killed his mother" (TT, 11/29/2012, 72). The prosecutor followed-up through the door opened by defense counsel and got a more lengthy description of Hendrick's opinions concerning Mr. Pyne's guilt (*Id*. at 73-74). Further, when discussing "overkill," Hendrick said the "excessive amount" of injury makes it likely not a random act (*Id*. at 76-77).

Trial counsel's errors, where multiple, must be reviewed for their *cumulative effect* upon the defendant's right to a fair trial. See, for example, *Goodman v Bertrand*, 467 F 3d 1022, 1030 (6th Cir. 2006)(trial court erred by weighing each error individually, instead of for their cumulative effect: "counsel's deficiencies must be considered in their totality"); and *Davis v Booker, supra* (the state court "failed to consider this impeachment testimony in the larger context of counsel's other errors and the relative weakness of the prosecutor's case"). However, constitutionally deficient performance may stem from even a "single, serious error." *Kimmelman v Morrison*, 477 US 365, 383; 106 S Ct 2574; 91 L Ed 2d 305 (1986).

There are multiple errors in the instant which, individually or cumulatively, demonstrate

deficient performance of trial counsel and prejudice to Mr. Pyne. The *Strickland* standard has been met, and a new trial is warranted.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant Jeffrey Pyne requests this Honorable Court reverse the conviction and remand the case for a new trial;

Respectfully submitted,

/S/ NEIL J. LEITHAUSER

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Dated: September 20, 2013