

## Frederick Baker - Preserving issues for appeal

**From:** Frederick Baker  
**To:** Frederick Baker  
**Date:** 2/5/2010 5:43 PM  
**Subject:** Preserving issues for appeal

The Court of Appeals exists to correct error.

The Supreme Court does not. It exists only to address matters having jurisprudential significance for the reasons outlined in the grounds specified by MCR 7.302(B).

The result is that, between the rules designed to relieve the CoA of any duty to consider and correct an error and the Supreme Court's general predisposition not to involve itself in the correction of "mere error," your client will be seriously prejudiced if you don't keep a few salient rules in mind.

### PLAIN ERROR

Because defendant failed to preserve this issue, relief is only to be granted where the trial court committed **plain error** that affected defendant's substantial rights. *People v. Carines*, 460 Mich. 750, 764-765; 597 NW2d 130 (1999).

Defendant cannot show that any error in regard to the other-acts evidence amounted to **plain error** affecting his substantial rights, because the error did not affect the outcome of the proceedings. *People v. Carines*, 460 Mich. 750, 764; 597 NW2d 130 (1999) Affirmed.....

### HARMLESS ERROR

Even assuming, arguendo, that the trial court erred in failing to give the self-defense instruction, a review of the jury instructions "in their entirety" does not require reversal in this case. See *Canales, supra* at 574, 624 N.W.2d 439. Applying the **harmless error** standard articulated in *People v. Lukity*, 460 Mich. 484, 495, 596 N.W.2d 607 (1999), the Court must determine "whether it is more probable than not that a different outcome would have resulted without the error." See, also, MCL 769.26. This is the case because even without the self-defense jury instruction, the jury was free to assess the credibility of the testimony and assign weight to the evidence that defendant emphasized in support of her self-defense claim. The jury, as the trier of fact, was free to determine which testimony was most credible. *People v. Passage*, 277 Mich.App. 175, 177, 743 N.W.2d 746 (2007). The Court must not usurp the role of the jury in making such determinations. *Id.*

### INSTRUCTIONAL ERROR

Defendant next contends that he was denied a fair trial because the manner in which the court instructed the jury on the charge of second-degree CSC was tantamount to a directed verdict for the prosecution. We find that defendant has **waived** any claim of error because, after the court instructed the jury, defense counsel pronounced himself "[s]atisfied" with the **instructions**. *People v. Carter*, 462 Mich. 206, 215-219, 612 N.W.2d 144 (2000); *People v. Chapo*, 283 Mich.App. 360, 372-373, 770 N.W.2d 68 (2009).

### INEFFECTIVE ASSISTANCE

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v. McGhee*, 268 Mich.App. 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption,

defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* Because no *Ginther*<sup>FN1</sup> hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v. Cox*, 268 Mich.App 440, 453; 709 NW2d 152 (2005).FN1. *People v. Ginther*, 390 Mich. 436, 443; 212 NW2d 922 (1973).

Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v. Ginther*, 390 Mich. 436, 443, 212 N.W.2d 922 (1973); *People v. Sabin (On Second Remand)*, 242 Mich.App. 656, 658-659, 620 N.W.2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v. Pickens*, 446 Mich. 298, 302-303, 521 N.W.2d 797 (1994); *People v. Effinger*, 212 Mich.App. 67, 69, 536 N.W.2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v. Frazier*, 478 Mich. 231, 243, 733 N.W.2d 713 (2007).

### WHAT A GUILTY PLEA WAIVES (UNLESS YOU NEGOTIATE TO RESERVE THE ISSUE)

By pleading guilty or nolo contendere, a defendant waives the following issues: search and seizure claims, defective complaint and warrant claims, claims of error as to the preliminary examination (including sufficiency of the proofs to bind over), Fifth Amendment claims, nonjurisdictional evidentiary issues, challenges to operating a vehicle while under influence of alcohol predicate offenses, claims (including constitutional claims) relating to the defendant's factual guilt and the prosecution's ability to prove the case, claims of error in juvenile waiver proceedings, speedy trial claims (if the plea is unconditional), claims of violation of the statutory 180-day rule, claims of speedy trial under M.C.L. § 768.1; MSA 28.1024, claims of failure to timely file the habitual information, statute of limitations claims, unpreserved entrapment claims, double jeopardy claims that are unpreserved so that the necessary facts to support the claim are missing, and ineffective assistance of counsel claims in which the underlying issues are waived by a guilty plea. Gillespie, Michigan Criminal Law & Procedure, Practice Deskbook (2d ed.), § 10:50, pp. 10-15 to 10-17.

*People v. Bulger*, 462 Mich. 495, 517 n7 ( 2000) Cert Den, *Bulger v. Michigan*, 531 U.S. 994, 121 S.Ct. 486, 148 L.Ed.2d 459, 69 USLW 3333 ( 2000).

AND Habeas Corpus Conditionally Granted by

4 *Bulger v. Curtis*, 328 F.Supp.2d 692 (E.D.Mich. Jul 16, 2004) (NO. 00-10476-BC)

Related References (U.S.A.)

5 *People v. Bulger*, 589 N.W.2d 773 (Mich. Dec 02, 1998) (TABLE, NO. 112694)

6 *People v. Bulger*, 598 N.W.2d 336 (Mich. Jun 11, 1999) (TABLE, NO. 112694)

7 *People v. Bulger*, 461 Mich. 1204, 599 N.W.2d 102 (Mich. Aug 17, 1999) (NO. 112694)

Court Documents  
Appellate Court Documents (U.S.A.)

### SENTENCE AGREEMENT THAT EXCEEDS GUIDELINES

In a memorandum opinion, the court held a sentence exceeding the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional "substantial and compelling" reasons by the sentencing court. Furthermore, a defendant waives appellate review of a sentence exceeding the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence. In this respect, the case was similar to *Cobbs*, in which the Court stated a defendant who pleads guilty with knowledge of the sentence will not be entitled to appellate relief on the basis the sentence is disproportionate. The judgment of the trial court was affirmed. In all other respects, defendant's

application for leave to appeal was denied.

**People v. Wiley**

472 Mich. 153, 693 N.W.2d 800  
 Mich., 2005.  
 March 29, 2005 (Approx. 1 page)

**CRAWFORD**

In his appellate brief, Defendant's discussion of his Confrontation Clause claim is perfunctory at best. In essence, he argues that "[b]y allowing the medical examiner to testify concerning reports which he had no part in testing or producing, the defendant was denied his right of confrontation." Defendant's Br. at 13. Other than citing *Crawford* for the general proposition that the introduction of testimonial hearsay runs afoul of the Confrontation Clause, Defendant cites no cases to support his argument. We reject Defendant's argument, in part because his claim is "unaccompanied by some effort at developed argumentation." *Casas*, 425 F.3d at 30 n. 2.

\*5 In addition, we reject Defendant's argument on the merits. An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*. See *Crawford*, 541 U.S. at 56, 124 S.Ct. 1354 (noting that business records are not testimonial by nature); see also *id.* at 76, 124 S.Ct. 1354 (Rehnquist, C.J., concurring) (praising the Court's exclusion of business records from the definition of testimonial evidence falling within the ambit of the Confrontation Clause); *United States v. Feliz*, 467 F.3d 227, 236-37 (2d Cir.2006) (noting that autopsy reports are kept in the course of a regularly conducted business activity and are nontestimonial under *Crawford*); *Manocchio v. Moran*, 919 F.2d 770, 778 (1st Cir.1990) (recognizing that autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications").

**A HEARSAY OBJECTION WILL NOT PRESERVE A CRAWFORD/CONFRONTATION OBJECTION!**

In *Crawford v. Washington*, 541 U.S. 36, 53-56; 124 S.Ct. 1354; 158 L. Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause, a testimonial statement of a witness absent from trial is not admissible for its truth unless the declarant is unavailable and there has been a prior opportunity for adequate cross-examination. As such, *Crawford* is applicable only to substantive use of testimonial hearsay. *Id.* at 59 n. 9. The Confrontation Clause does not prohibit the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *McPherson*, *supra* at 133, citing *Crawford*, *supra* at 59 n. 9. In this instance, the challenged medical records were offered not to prove a propensity by defendant for abuse or to establish the allegations regarding his abuse of Madison. Rather, the records were introduced to show that defendant understood or had reason to know the consequences of his improper handling of a young child and the risk of injury. As such, the records did not violate defendant's right of confrontation pursuant to *Crawford*. Based on our determination regarding the admissibility of the challenged evidence, we need not address defendant's contention regarding the adequacy of the cautionary instruction provided by the trial court to the jury.

\*5 A defendant is entitled to a new trial if his or her right to confrontation is violated unless the error is deemed harmless beyond a reasonable doubt. *People v. Bauder*, 269 Mich.App 174, 179; 712 NW2d 506 (2005). Although we have determined that defendant's right to confrontation was not violated, even if admission of the child's medical records comprised error, the evidence of defendant's guilt was sufficiently established that any error would have been harmless and a new trial would not be warranted. *Id.* at 179-180.

\*134 We granted leave to appeal to consider whether the victim's statements to the police in this case

constituted inadmissible testimonial hearsay \*135 within the meaning of the United States Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The Court of Appeals held that the statements were non-testimonial under the test set forth in *Davis*, 547 U.S. at 822, 126 S.Ct. 2266, because they were made "in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency." *People v. Bryant (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007, 2007 WL 675471 (Docket No. 247039), at 3. Because we conclude on the basis of *Crawford* and \*\*67 *Davis* that the "primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 U.S. at 822, 126 S.Ct. 2266, we respectfully disagree and hold that the statements constituted inadmissible testimonial hearsay. Moreover, we conclude that the admission of these statements constituted plain error requiring reversal. Therefore, we reverse the Court of Appeals and remand for a new trial.

**People v. Bryant**

483 Mich. 132, 768 N.W.2d 65  
 Mich., 2009.  
 June 10, 2009 (Approx. 20 pages)

**ABANDONMENT  
 (FAILURE TO BRIEF)**

"It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v. City of Detroit*, 355 Mich. 182, 203; 94 NW2d 388 (1959). Without explaining his argument, this Court concludes that the general unanimity instruction was sufficient. *Martin, supra* at 338. Similarly, defendant has provided no basis for his ineffective assistance of counsel claim based on this issue. Defendant has not shown error.