Court of Appeals, State of Michigan

ORDER

People of Mi v Edward Pinkney

Docket No. 282144; 286992

LC No. 2005-401979-FH

Kathleen Jansen
Presiding Judge

Joel P. Hoekstra

Jane E. Markey
Judges

The Court orders that the July 14, 2009 opinion is hereby AMENDED. The opinion contained the following clerical error: page 35, footnote 36, the word "not" was inadvertently omitted between the words "wilt" and "hearken."

In all other respects, the July 14, 2009 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 16 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2009
v EDWARD PINKNEY, Defendant-Appellant.	No. 282144 Berrien Circuit Court LC No. 2005-401979-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v EDWARD PINKNEY, Defendant-Appellee.	No. 286992 Berrien Circuit Court LC No. 2005-401979-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of giving valuable consideration to influence the manner of voting by a person, MCL 168.931(1)(a), influencing a person voting an absent voter ballot, MCL 168.932(h), and three counts of possessing, returning, or soliciting to return an absent voter ballot, MCL 168.932(f). The trial court sentenced defendant to five years' probation with a delayed jail sentence of 365 days. Subsequently, after finding that defendant violated the terms of his probation, the trial court revoked defendant's probation and sentenced him to 3 to 10 years' imprisonment. In Docket No. 282144, defendant appeals as of right his convictions. In Docket No. 286992, defendant appeals the trial court's order revoking his probation. We affirm defendant's convictions, but reverse the order revoking his probation.

I. Introduction

On February 22, 2005, the voters of Benton Harbor recalled Glen Yarbrough from his position as a city commissioner. After Yarbrough made a complaint that defendant, a community activist, had paid people $5 to vote in the recall election, the Benton County Sheriff's

Department conducted an investigation into the election. The investigation led to defendant's arrest for giving valuable consideration to influence the manner of voting by a person (Count I), influencing a person voting an absent voter (AV) ballot (Count II), and possessing AV ballots (Counts III-V).

Defendant first went to trial in March 2006. After the jury was unable to reach a verdict, the trial court declared a mistrial.

After the prosecutor announced his intention to retry defendant, defendant obtained new counsel. Counsel filed numerous pretrial motions, none of which resulted in the dismissal of any charges against defendant. The pretrial motions included a motion to dismiss Counts III-V, a motion to permit defendant to question Brenda Fox, a key prosecution witness, about an alleged arrest for prostitution, a motion to exclude the utterances of two unknown persons which indicated that the persons were being paid $5 to vote, and a motion requesting an adjournment of his trial until Berrien County's jury selection procedures were reformed and he was assured of a jury venire that was drawn from a fair cross-section of the community.

Defendant went to trial for a second time in March 2007. Fox testified that defendant asked her to recruit people from the local soup kitchen to vote AV ballots in the recall election and he told her that he would pay $5 to each person that she recruited. On February 21, 2005, the day before the recall election, Fox recruited 15 people from the soup kitchen to vote an AV ballot. After defendant arrived at the soup kitchen at approximately 12:45 p.m., Fox and those she had recruited followed him to the federal building, which housed the city clerk's office. Fox took those she had recruited into the city clerk's office in groups of five. Following defendant's instruction, Fox instructed each person to mark "yes" on his or her AV ballot. When a group of five finished voting, Fox led the group back outside, where each person received $5 from defendant.

There was evidence presented that the AV ballots voted by Danelle Williams, Latoyia Williams, Rosie Miles, Schelena Miles, Mary Foster, Rev. Robert Foster, Teresa Foster, Earlene Wiley, Taneka Dumas, and David Jackson had been possessed by defendant.[1] Several of the AV envelopes that accompanied the AV ballots bore Marian Anderson commemorative stamps and the stamps had not been cancelled. In addition, the AV envelopes had the address of the city clerk's office as the return address.

Defendant testified that, while he asked Fox to recruit people to pass out flyers and he paid $5 to those who had passed out flyers, he never asked Fox to recruit people to vote in the recall election and he had not paid anyone to vote. Defendant admitted that he provided postage stamps and address labels for people to place on AV envelopes, but he did this only to make sure that the AV ballots were returned in the mail. He testified that he never possessed an AV ballot that belonged to another person.

[1] Testimony was also presented that Teresa Foster, Taneka Dumas, and Schelena Miles had not voted the AV ballots that were cast in their names.

The jury convicted defendant on the five charges. With regard to counts III-V, the jury unanimously found that defendant had possessed the AV ballots of Danelle Williams, Latoyia Williams, and Rosie Miles.

Defendant moved for a new trial. He claimed that he was entitled to a new trial because he had been denied his constitutional rights to a public trial and to an impartial jury, he was never arraigned on the information, and because the information failed to specify which AV ballots he possessed. The trial court denied defendant's request for a new trial.

II. Right to Public Trial

On appeal, defendant argues that he was denied his sixth amendment right to a public trial when the public was required to watch jury selection in an alternate courtroom by way of a live video transmission. Specifically, defendant claims that his right to a public trial was violated because all members of the public, including his wife Dorothy Pinkney, were excluded from the courtroom, the transmission did not operate properly for a significant period of time, the transmission did not allow for adequate viewing of any prospective jurors, and the prospective jurors were referred to by number, rather than name.

A

On the morning of jury selection, before the prospective jurors were brought into the courtroom, the court officer announced that, because the courtroom would be "filled full" with prospective jurors, any member of the public who wanted to watch jury selection must proceed to an alternate courtroom, where jury selection would be shown over a live video transmission. Defendant did not object to the closure of the courtroom to the public.[2]

Defendant first objected to the closure of the courtroom in a post-conviction motion for a new trial, where he argued that the closure of the courtroom to the public violated his sixth amendment right to a public trial. Defendant claimed that the trial court's error in closing the courtroom to the public was compounded by the court's requirement that the prospective jurors be referred to by number rather than name and the fact that the live video transmission did not operate properly for a significant period of jury selection.

The trial court held an evidentiary hearing, where it heard the testimony of Dorothy Pinkney and two of defendant's supporters, Mary Gault and Belinda Brown. The three women had watched jury selection from the alternate courtroom. Following the hearing, the trial court made findings of fact, including: (1) the live video transmission was faulty; the transmission was off for one to two hours, out of the five and one-half hours of jury selection;[3] (2) the members of

[2] No member of the public objected either. The courtroom was only closed to the public during jury selection.

[3] The transmission was not off for a continuous period of one to two hours. According to the testimony of the three female observers, the transmission went off for several periods, each lasting between 10 and 30 minutes.

the public watching jury selection from the alternate courtroom had a limited view of the prospective jurors; they could not see any prospective jurors sitting in the jury box; and (3) Dorothy Pinkney informed defendant of the problems with the live video transmission during the morning recess and the lunch break, but defendant did not notify the trial court of the technological problems. The trial court concluded that defendant had waived the issue whether he had been denied his right to a public trial. It reasoned that defendant never objected to its decision to require the public to watch jury selection from an alternate courtroom, never requested that any particular member of the public be allowed to remain in the courtroom, and did not inform the trial court of the technological problems with the transmission after he had learned of the problems.[4] The trial court also concluded that, because defendant had not objected to the trial court's practice of referring to prospective jurors by number, rather than name, defendant had waived any issue concerning the propriety of the practice.[5]

B

The Sixth Amendment, applicable to the states through the 14th Amendment, *Duncan v Louisiana*, 391 US 145, 148; 88 S Ct 1444; 20 L Ed 2d 491 (1968), provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." US Const, Am VI. The Michigan Constitution also guarantees an accused the right to a public trial. Const 1963, art 1, § 20; *People v Bails*, 163 Mich App 209, 210; 413 NW2d 709 (1987). The right to a public trial extends to jury selection. See, e.g., *Gibbons v Savage*, 555 F3d 112, 115 (CA 2, 2009); *Owens v United States*, 483 F3d 48, 61-63 (CA 1, 2007). The guarantee of a public trial is for the benefit of the defendant; "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (quotation omitted).

A defendant can waive his right to a public trial. *Singer v United States*, 380 US 24, 35; 85 S Ct 783; 13 L Ed 2d 630 (1965); *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981). "The right to complain about an order of exclusion may be waived either expressly or by an accused's failure to object." *Gratton*, *supra* at 481 (the defendant waived his right to complain about the trial court's decision to close the courtroom during the victim's testimony when the defendant failed to object to the decision). See also *People v Hitt*, 473 F3d 146, 155 (CA 5, 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."); *State v Butterfield*, 784 P2d 153, 157

[4] In the alternative, the trial court concluded that defendant had forfeited the issue. Defendant, by not informing the trial court of the technological problems after he had learned of them, failed to provide the trial court with an opportunity to correct the problems. The trial court further concluded that defendant's substantial rights were not affected by the faulty video transmission.

[5] The trial court noted the practice of referring to prospective jurors by name was standard practice in Berrien County trial courts and that the practice had been used in defendant's first trial without objection.

(Utah, 1989) ("[T]he failure of a defendant and his or her counsel to object to a closure order constitutes waiver of the defendant's right to public trial.").[6]

Here, defendant did not object when the trial court closed the courtroom during jury selection to the public and required any member of the public who wanted to observe jury selection to watch it over the live video transmission in the alternate courtroom. At that time, defendant's failure to object to the trial court's order was a waiver of any complaint that the trial court's decision to close the courtroom to the public violated his right to a public trial. *Gratton*, *supra*. However, as found by the trial court, the live video transmission was faulty. The transmission was off for one to two hours. But, as also found by the trial court, defendant learned of the problems with the transmission from his wife during the first morning break, and failed to inform the trial court of the problems. We conclude that defendant's failure to inform the trial court of the faulty transmission was a continuing waiver of any complaint that the trial court's decision to close the courtroom to the public violated his right to a public trial. *Id.* In coming to this conclusion, we note that defendant was not a stranger to the legal system or to the rights afforded a criminal defendant. At trial, defendant testified that he visited the courthouse "every day." He did so "to monitor the system" and to help those at the courthouse understand their rights. Defendant, by not informing the trial court or even his attorneys of the transmission problems at a time when the problems could have been timely addressed,[7] deemed the problems to be of no concern. Consequently, defendant should not now be able to argue on appeal that he was denied his right to a public trial based on the problems with the live video transmission. See *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.") (quotation omitted); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998) (a defendant may not harbor error as appellate parachute).

C

We recognize that, because defendant did not affirmatively approve the trial court's decision to require the public to watch jury selection over the live video transmission in the alternate courtroom, defendant's failure to object might be viewed more appropriately as forfeiture, rather than waiver. "Waiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation omitted). Forfeited error, or unpreserved error, is reviewed for plain error, which is error that is clear or obvious. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because defendant knew of the trial court's decision to close the courtroom to the public

[6] But see *Walton v Briley*, 361 F3d 431, 434 (CA 7, 2004), in which the Seventh Circuit held that the right to a public trial "may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right."

[7] According to the voir dire transcript, there was only one hour of jury selection before the morning break. Jury selection began at 9:04 a.m., the prospective jurors were excused for a break at 10:07 a.m., and the trial court, the attorneys, and defendant took a break at 10:16 a.m. Jury selection resumed at 10:32 a.m.

during jury selection and because defendant learned of the problems with the live video transmission during the morning break, we reject defendant's argument that the contemporaneous objection rule, see *People v Hernandez*, 443 Mich 1, 11-12; 503 NW2d 629 (1993), should not apply to his sixth amendment challenge. Defendant knew of the basis for his challenge at a time that, had he made an objection, the trial court could have timely addressed the problems with the live video transmission and potentially cured any possible violation of defendant's right to a public trial.[8]

An appellate court must apply a two-step inquiry to determine whether a defendant's right to a public trial has been violated: first, the court must determine whether the closure implicates the right to a public trial; and second, if the right is implicated, the court must determine whether the closure was justified. *State v Ndina*, 2009 WI 21, ¶ 46; 761 NW2d 612 (2009).[9] Not every closure of a courtroom constitutes a violation of the defendant's right to a public trial; a closure is trivial and does not implicate the constitutional right if the closure does not implicate the values served by the Sixth Amendment. *United States v Perry*, 479 F3d 885, 889-890 (CA DC, 2007); *Peterson v Williams*, 85 F3d 39, 42 (CA 2, 1996); *Ndina*, *supra* at ¶ 49.

> A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.' It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment. [*Peterson*, *supra* at 42.]

The right to a public trial advances four values: "1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury." *Id.* at 43. Because the public was only required to watch jury selection in the alternate courtroom, the third and fourth values are not implicated by the trial court's decision to close the courtroom to the public. See *Gibbons*, *supra* at 121 ("The third and the fourth values . . . are not implicated by voir dire because no witnesses testified."). Thus, we look to the first two values to determine whether the

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[8] For example, the trial court could have suspended jury selection until the problems were fixed, obtained an express waiver of any possible violation that occurred during the one hour of jury selection, and, when jury selection began again, allowed some members of the public to remain in the courtroom should there be additional problems with the live video transmission. See *Gibbons*, *supra* at 116 ("[S]o long as the public at-large is admitted to the proceedings, the Sixth Amendment does not guarantee access to unlimited numbers.").

[9] To determine whether a closure is justified, a court applies the "*Waller* test":

> "(1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure." [*Ndina*, *supra* at ¶ 56 (quotation omitted).]

trial court's decision to close the courtroom to the public during jury selection was trivial, such that it did not implicate defendant's right to a public trial.

Defendant's claim that he was denied his right to a public trial is essentially comprised of four points: (1) his wife Dorothy Pinkney was excluded from the courtroom; (2) the public's view of the prospective jurors was restricted; (3) the prospective jurors were referred to by number, rather than name; and (4) the public was completely unable to view jury selection when the live video transmission malfunctioned. Neither the second point nor the third point supports defendant's claim that he was denied a public trial. First, this Court has approved the practice of referring to jurors by number. *People v Hanks*, 276 Mich App 91, 93-95; 740 NW2d 530 (2007); *People v Williams*, 241 Mich App 519, 522-525; 616 NW2d 710 (2000). Second, there is no guarantee that, even when viewing court proceedings in the actual courtroom, any given member of the public will have an unobstructed view of all happenings in the courtroom. This is especially true where, as it was in the present case, the seating area outside the bar is filled to capacity and people are sitting on portable chairs inside the bar. Consequently, we find the fact that the public had a restricted view of the prospective jurors to be of no significant import. Regarding his first point, defendant cites *In re Oliver*, 333 US 257, 271-272; 68 S Ct 499; 92 L Ed 682 (1948), where the United States Supreme Court stated that "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present." However, we do not read this statement in *Oliver* as broadly as defendant does; we do not read it as a requirement that a defendant's family members must be allowed to remain in the courtroom. In *Oliver*, the Supreme Court was concerned with whether a defendant could be tried and convicted in grand jury secrecy, and the Court made the above statement in discussing this country's distrust of secret trials. The Court did not hold that an accused is always, and under all circumstances, entitled to have his family members in the courtroom.

The most problematic of defendant's four points is that the public was completely unable to view jury selection during the times when the live video transmission malfunctioned. When the transmission malfunctioned, jury selection was completely closed to the public. However, the trial court did not intend for any portion of jury selection to be conducted away from the oversight of the public. It is true that the trial court excluded the public from the courtroom during jury selection. But, by setting up the live video transmission, the trial court gave the public the opportunity to watch jury selection. In addition, as acknowledged by defendant, the malfunctions in the transmission were inadvertent. The malfunctions were due to technological problems. And, on the record before us, there is no indication that either the trial court or the prosecutor knew of the malfunctions. Thus, the trial court and the prosecutor were not aware that portions of jury selection were, in all actuality, conducted in secret. Because the trial court did not intend for jury selection to be conducted away from the oversight of the public, and because neither the trial court nor the prosecutor knew that portions of jury selection were conducted in secret, we do not believe that the first and second values advanced by the right to a public trial were implicated to an extent that defendant's right to a public trial was infringed. The public was only excluded from the courtroom for jury selection, the technological problems were inadvertent and did not preclude the public from observing the majority of jury selection, and because the trial court and the prosecutor believed that their actions were being observed by the public, they were kept "keenly alive to a sense of their responsibility and to the importance of their functions." *Waller, supra*. Accordingly, defendant has not established that the trial court's

decision to close the courtroom to the public during jury selection violated his right to a public trial.

D

Defendant claims that, if we determine that his sixth amendment claim is unpreserved, he was denied the ineffective assistance of counsel based on counsel's failure to preserve the issue. He asserts that, because counsel "was not able to observe and object to any problems with the public's view of the jury selection, counsel was prevented from assisting him during a critical stage in the proceedings." Defendant further asserts that, pursuant to *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), prejudice must be presumed.

A defendant is guaranteed the right to counsel at all critical stages of the criminal process. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005). The right to counsel includes the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). When a defendant is "denied" the right to counsel at a critical stage of the proceedings, counsel's performance is deemed so deficient that prejudice is presumed. *Cronic*, *supra* at 659; *People v Murphy*, 481 Mich 919, 921; 750 NW2d 582 (2008) (Markman, J., concurring). A defendant has been "denied" his right to counsel if "counsel was totally absent, or prevented from assisting" the defendant. *Cronic*, *supra* at 659 n 25. Defendant's claim that he was denied the effective assistance of counsel because counsel was unable to assist him during jury selection is without any merit. Counsel was present for and conducted jury selection.

III. Right of Confrontation and Right to Present a Defense

Defendant contends that he was denied his right of confrontation when the trial court limited his cross-examination of Brenda Fox regarding an alleged prior arrest for prostitution. Defendant also claims that he was denied his right to present a defense when the trial court prohibited him from questioning Doug Bragg, a defense witness, who claims that he saw Fox arrested for prostitution, about the alleged arrest. Defendant acknowledges that the trial court permitted him to question Fox and Bragg about Fox's alleged statement to Bragg that, as long as she testified against defendant, she did not have to worry about being arrested by the police, but claims that the trial court violated his constitutional rights by not allowing him to present the circumstances surrounding the alleged statement. According to defendant, Fox made the alleged statement after she was released from her arrest for prostitution.

A

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). However, we review de novo whether a defendant was denied his constitutional rights to confrontation and to present a defense. *Id.* at 247; *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

B

In a pretrial motion in limine, defendant, alleging that Fox had been arrested for prostitution while the police were investigating defendant's actions in the recall election, moved for an order permitting discovery into the arrest and allowing him to cross-examine Fox about

the arrest. In response, the prosecutor stated that he had checked the Berrien County Criminal Justice System and the Law Enforcement Information Network and had not found any information relating to an arrest of Fox for prostitution. At the hearing on the motion, the trial court asked defendant if he had any evidence to support his claim that Fox had been arrested. Defendant stated that he did not, and the trial court denied the motion. Thereafter, defendant filed a motion for rehearing. Attached to the motion was an affidavit from Bragg. Bragg averred that, on April 22, 2005, he saw Fox working the streets as a prostitute when she was arrested and placed inside a police car. Bragg further averred that the police car drove off and 20 minutes later, Fox returned and told him that she no longer had to worry about being arrested for prostitution. The trial court did not rule on the motion for rehearing before trial.[10]

During cross-examination of Fox, defendant asked her if she had ever told Bragg that she was free to do what she wanted on the streets because the police would not arrest her. The prosecutor objected, and a lengthy bench conference ensued. Defense counsel informed the trial court that, in addition to the question already asked, he intended to ask Fox if she had been arrested for prostitution in front of Bragg. The trial court acknowledged that the questions defendant sought to ask Fox had to do with Bragg's affidavit. Unfortunately, portions of the bench conference are listed as "inaudible," and much of what was stated by the trial court and the parties cannot be understood. In particular, any specific ruling by the trial court on the prosecutor's objection is unknown. However, near the end of the bench conference, the trial court stated to defense counsel, "I thought it was clear you were not gonna get in this issue about prostitution." Defense counsel responded, "Well, I'm gonna stay away from it, Your Honor." Thus, it appears that defendant agreed or was instructed by the trial court to limit his inquiry to whether Fox told Bragg that, as long as she testified against defendant, she could do anything she wanted on the streets.

After the bench conference, defendant asked Fox if she had told Bragg that she could do anything she wanted on the streets of Benton Harbor and she would not be arrested as long as she testified against defendant. Fox denied making such a statement to Bragg. Defendant did not ask Fox whether she had been arrested for prostitution. During examination of Bragg, defendant asked if Fox had ever told him that, as long as she testified against defendant, she would not have any problems with the police. Bragg replied that Fox had made such a statement to him. The trial court then called the parties up to the bench, and inquired whether defendant intended to ask Bragg about Fox's prostitution, to which defense counsel replied, "No, no, no, no." And, indeed, defendant did not ask Bragg whether, shortly before he heard Fox's statement, he observed Fox being arrested for prostitution.

C

[10] During opening arguments, defense counsel told the jury that Fox had been arrested for prostitution. The trial court sustained the prosecutor's objection to the statement, but noted that it had not yet ruled on the motion for rehearing and stated that it intended to allow defendant to be heard on the motion.

Defendant was allowed to question Fox and Bragg regarding whether Fox told Bragg that, as long as she testified against defendant, she could do whatever she wanted on the streets without fear of being arrested. Thus, as acknowledged by defendant, the question is whether defendant was denied his constitutional rights to confrontation and to present a defense when, as he claims, the trial court prohibited him from questioning Fox and Bragg about the context of the alleged statement.

"Bias is a common-law evidentiary term used 'to describe the relationship between a party and a witness . . . in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.'" *People v Layher*, 464 Mich 756, 762; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). Bias is almost always relevant, because the jury is entitled to assess all evidence that bears on the accuracy and truthfulness of a witness's testimony. *Id.* at 763-764. If Fox made the alleged statement, the statement evidences a bias by Fox in favor of the prosecution. Because Fox did not need to fear any arrest by the police for her activities on the streets if she testified against defendant, the jury could infer that Fox's testimony was slanted in the prosecution's favor. And, it cannot be denied that the context of the alleged statement—that Fox had been arrested for prostitution and made the statement soon after she had been released—would have provided the jury with additional facts from which to assess the bias of Fox. The context of the statement may have provided additional weight to any inference that Fox slanted her testimony in favor of the prosecution.

A criminal defendant has the right to be confronted with the witnesses against him. *People v Yost*, 278 Mich App 341, 369; 749 NW2d 753 (2008); US Const, Am VI; Const 1963, art 1, § 20. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v Alaska*, 415 US 308, 315-316; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (quotation omitted and emphasis deleted). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v Van Arsdall*, 475 US 673, 678-679; 106 S Ct 1431; 89 L Ed 2d 674 (1986) (quotation omitted). See also *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998) ("A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation.").

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20, 88 L Ed 2d 15, 106 S Ct 292 (1985) (per curiam) (emphasis in original). [*Van Arsdall*, *supra* at 679.]

Because the record is unclear whether defendant agreed to limit his inquiry into Fox's alleged arrest for prostitution or whether the trial court imposed the limitation on him and, if so, its reasoning for imposing the limitation, it is impossible for us to reach a conclusion on whether defendant's right of confrontation was violated.[11] However, we need not address plaintiff's argument that, because defendant failed to provide a complete record on appeal, pursuant to MCR 7.210(B), defendant has waived the issue. If the trial court violated defendant's right of confrontation, the error was harmless.

D

A violation of a defendant's right of confrontation is subject to a harmless error analysis. *Van Arsdall*, *supra* at 684. We need not reverse a conviction based on a denial of the defendant's right of confrontation if the error was harmless beyond a reasonable doubt. *People v Bell (On Second Remand)*, 264 Mich App 58, 63; 689 NW2d 732 (2004). Whether an error is harmless beyond a reasonable doubt depends on a variety of factors, "including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Kelly*, *supra* at 644-645.

Fox was the prosecutor's main witness on the Counts I and II.[12] Defendant presented several witnesses, including himself, to discredit Fox's testimony. Mattie Smith testified that she was at the soup kitchen on February 21, 2005, and heard Fox announce that defendant would pay five to ten people $5 to pass out flyers. She did not hear Fox say anything about people getting paid to vote. Harold Farmer acknowledged that he had voted an AV ballot on February 21, 2005, but testified that he had not been paid to vote.[13] He also testified that he did not hear any talk about being paid to vote. Bragg testified that he saw Fox at the soup kitchen on February 21, 2005, and he did not hear any talk about paying people to vote. Defendant testified that he

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[11] If the trial court did prevent defendant from cross-examining Fox about whether she was arrested for prostitution on the basis that no evidence corroborated Bragg's affidavit that Fox had been arrested for prostitution, we do not believe that the trial court's ruling would have violated defendant's right of confrontation. Because the prosecution disputed whether Fox had been arrested for prostitution, the trial court's limitation on the scope of cross-examination would have been reasonable. *Van Arsdell*, *supra*. Had the trial court allowed defendant to ask Fox if she had been arrested for prostitution and, thereby, also allowed defendant to ask Bragg if he had observed Fox being arrested for prostitution, the prosecution would have called employees from either the police department or the prosecutor's office to inform the jury that no records existed that showed that Fox had been arrested for prostitution. Requiring the jury to determine whether Fox had been arrested for prostitution would have led to a confusion of the issues.

[12] Any violation of defendant's right of confrontation was harmless as to defendant's convictions on Counts III-V because Fox's testimony was not relevant to those charges.

[13] Farmer's AV ballot was "receipted in" on February 21, 2005, at 2:04 p.m., which was during the time frame that Kimberly Thompson, a Benton Harbor city clerk, testified that many voters came to vote AV ballots. Fox testified that Farmer was one of the persons that she recruited to vote from the soup kitchen.

had never asked Fox to recruit people to vote; rather, he had asked her to recruit ten to 15 people to pass out flyers, and that he had never paid anyone to vote. In addition, Fox's testimony that defendant asked her to recruit people to vote and that he would pay each person $5 to vote was impeached by an affidavit that Fox had signed in March 2005. In the affidavit, Fox claimed that she "was told by [defendant] to recruit 10 to 15 people to pass out flyers and they would be paid five dollars for their service." Fox further claimed in the affidavit that defendant repeatedly told the people who were passing out flyers that he was not paying them to vote.[14] Further, the jury was presented with evidence from which it could infer that Fox was biased in favor of the prosecution. During defendant's cross-examination of Fox, the trial court instructed the jury on MCL 168.942, which granted immunity to Fox for any election law crimes to which her testimony related.[15] And, Fox testified that MCL 168.942 meant that she was to tell the truth and that she would not go to prison. Finally, it must not be forgotten that Fox's testimony that she never told Bragg that, as long as she testified against defendant, she could do whatever she wanted in the streets and not be arrested was impeached by Bragg's testimony that Fox had made such a statement to him. Accordingly, the evidence from which the jury could find that Fox's testimony was not truthful was plentiful. Yet, the jury, as evidenced by its verdict, found Fox to be credible. Because the jury found Fox credible, in spite of the evidence suggesting that she was biased in favor of the prosecution or that her testimony was not truthful, we are firmly convinced that any error by the trial court in excluding the context of Fox's alleged statement to Bragg was harmless beyond a reasonable doubt. *Bell*, *supra*. The only portion of any testimony regarding the context of Fox's alleged statement to Bragg that would not be cumulative of the fact that Fox received immunity under MCL 168.942 would be that Fox received immunity for acts of prostitution. We believe that it is clear beyond a reasonable doubt that knowledge by the jury that Fox may have received immunity for acts of prostitution would not have altered the jury's credibility determinations, given that the jury chose to believe Fox in light of the plentiful evidence suggesting that Fox's testimony was not truthful.

E

A criminal defendant has a constitutional right to present a defense. US Const, Am VI; Const 1963, art 1, § 20; *Yost*, *supra* at 379. Assuming that the trial court erred when it prevented

[14] In the affidavit, Fox also claimed that, after defendant arrived at the soup kitchen, he told her and those she recruited to meet him at the city clerk's office because he needed to take a man there to vote. Several of the recruited people then asked defendant if they could vote an AV ballot. Defendant replied that they could if they would be out of town the following day, and he again instructed them to meet him at the city clerk's office. When they arrived at the clerk's office, they met defendant and received flyers and instructions on where to pass out the flyers.

[15] MCL 168.942 provides, in pertinent part:

> The complaining witness or any other person who is called to testify in behalf of the people in a proceeding under this section shall not be liable to criminal prosecution under this act for an offense in respect to which he or she is examined or to which his or her testimony relates, except to prosecution for perjury committed in the testimony.

defendant from introducing Bragg's testimony that he observed Fox being arrested for prostitution and that Fox made her alleged statement approximately soon after she was released, the trial court's error did not rise to a violation of defendant's constitutional right to present a defense, because defendant was not totally precluded from challenging Fox's bias and credibility. See *People v Steele*, __ Mich App __; __ NW2d __ (2009).[16] The jury was instructed that, pursuant to MCL 168.942, Fox received immunity for election law crimes to which her testimony related. Defendant also presented witnesses who provided testimony that impeached and contradicted the testimony of Fox. Accordingly, defendant was free to argue to the jury that Fox's testimony was not truthful. Defendant was not denied his constitutional right to present a defense.

IV. MCL 168.932

Defendant argues that the trial court erred in denying his motion to dismiss and motion for a directed verdict on Counts III-V. Specifically, defendant claims that the trial court, because it held that MCL 168.932(f) only requires proof that an accused knowingly possesses an AV ballot of another person, erred in concluding that a violation of MCL 168.932(f) is a general intent crime, rather than a strict liability crime. According to defendant, a general intent crime requires proof that the accused knew that his actions were illegal. Defendant also claims that counsel was ineffective for failing to request a proper *mens rea* jury instruction. In addition, defendant argues that, because MCL 168.932(f) imposes strict liability, the statute violates due process and impermissibly infringes on first amendment activity. Defendant further claims that MCL 168.932(f) is unconstitutional pursuant to the overbreadth doctrine.

A

"[W]hether a statute imposes strict liability or requires proof of a *mens rea*, that is, a guilty mind," involves an issue of statutory interpretation. *People v Lardie*, 452 Mich 231, 239; 551 NW2d 656 (1996), overruled in part on other grounds *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005). We review de novo issues of statutory interpretation. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005). We also review de novo issues concerning a statute's constitutionality. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007).

B

The Supreme Court, in *Lardie*, *supra* at 240-241, explained the difference between specific intent and general intent, as well as the difference between a strict liability crime and a general intent crime:

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[16] Consequently, if error occurred in limiting defendant's examination of Bragg, the error was nonconstitutional evidentiary error. *Steele*, *supra* at __. A nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Tierney*, 266 Mich App 687, 712; 703 NW2d 204 (2005). Because the jury found Fox credible in light of the evidence suggesting otherwise, it is not more probable than not that the exclusion of Bragg's testimony concerning the context of Fox's alleged statement was outcome determinative.

> Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself. For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know. On this basis, the distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of whether he intended to perform it. [Citations omitted.]

To determine whether MCL 168.932(f) imposes strict liability or requires proof of a *mens rea*, we must begin with the language of the statute. *Tombs*, *supra* at 451. MCL 168.932 provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> * * *
>
> (f) A person other than an absent voter; a person whose job it is to handle mail before, during, or after being transported by a public postal service, express mail service, parcel post service, or common carrier, but only during the normal course of his or her employment; a clerk or assistant of the clerk; a member of the immediate family of the absent voter including father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild; or a person residing in the absent voter's householder shall not do any of the following:
>
> (i) Possess an absent voter ballot mailed or delivered to another person, regardless of whether the ballot has been voted.
>
> (ii) Return, solicit to return, or agree to return an absent voter ballot to the clerk of a city, township, village, or school district.

A person who violates MCL 168.932(f) shall be punished by a fine not exceeding $1,000, a term of imprisonment not exceeding five years, or both. MCL 168.935.

The Legislature did not expressly include language in MCL 168.932(f) indicating that *mens rea*, or criminal intent, is an element of the crime. However, "[i]n interpreting a statute in which the Legislature has not expressly included language indicating that fault is a necessary element of a crime, this Court must focus on whether the Legislature nevertheless intended to require some fault as a predicate to finding guilt." *Lardie*, *supra* at 239. Because criminal intent is normally an element of a crime and because statutes that create strict liability for all their elements are disfavored, this Court presumes that, absent a clear indication that the Legislature intended to dispense with the *mens rea* requirement, the Legislature's silence suggests that it did not intend to eliminate the requirement. *Tombs*, *supra* at 451, 456-457. Factors this Court looks at to determine whether the Legislature intended to require a *mens rea* element include the specific terms and phrases used in the statute, the Legislature's goal in enacting the statute, the

severity of the punishment, and the difficulty encountered by prosecutors in proving a criminal intent. See *Tombs, supra* at 457-458; *People v Schumacher*, 276 Mich App 165; 171; 740 NW2d 534 (2007); *People v Nasir*, 255 Mich App 38, 43-45; 662 NW2d 29 (2003).[17]

Consideration of these factors establishes that the Legislature intended that MCL 168.932(f) contain a *mens rea* element. The active verbs used in MCL 168.932(f), "[p]ossess," "[r]eturn," "solicit to return," and "agree to return," contemplate knowing, intentional conduct on the part of the defendant. In addition, the Legislature enacted MCL 168.932(f) to ensure the integrity of the absentee voting process. Before the enactment of MCL 168.932(f), any registered voter could return the AV ballot of an absentee voter if a family member or person residing with the absentee voter was not available, and this led to abuse by campaign workers who were eager to "assist" absentee voters. See House Legislative Analysis, HB 4242, October 17, 1995. The intent of the Legislature to stop abuse in the absentee voting process would not be furthered by reading MCL 168.932(f) as a strict liability crime. For example, if MCL 168.932(f) was read as a strict liability crime, then a person who carried his neighbor's AV ballot from his mailbox into his home because a postal worker placed the AV ballot in the wrong mailbox would be subject to prosecution. Prosecution of this person, or any person who unknowingly possesses an AV ballot belonging to another person, is not necessary to further the Legislature's intent. Further, the punishment for a violation of MCL 168.932(f) is severe: a person who violates the statute is guilty of a felony[18] and subject to a prison term of five years. Finally, although a person's intent may be difficult to prove, only minimal circumstantial evidence is needed to prove a defendant's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Prosecutors should face no undue hardships in proving, through minimal circumstantial evidence, that a defendant intended to possess an AV ballot belonging to another person. For the above reasons, we conclude that the Legislature intended that MCL 168.932(f) contain a *mens rea* element. Accordingly, the trial court did not err in holding that MCL 168.932(f) is a general intent crime.

In addition, contrary to defendant's argument, the trial court did not err in holding that the prosecution was not required to prove that defendant knew that possession of an AV ballot belonging to another person was a crime. Our Supreme Court, in its most recent explanation of the *mens rea* element of a general intent crime, explained that "general intent is merely the intent to perform the physical act itself" and that "for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act." *Lardie*, *supra* at 240-241. In addition, this Court has repeatedly stated the same. See *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997) ("The instant offense is a general intent, not a specific intent, crime. The requisite intent is the intent to do the prohibited physical act."); *People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987) ("Carrying a concealed weapon is a general intent crime. The only intent necessary is an intent to do the act

[17] Neither party suggests that MCL 168.932(f) is a public welfare offense, such that the Legislature intended to dispense with the *mens rea* requirement. See, e.g., *Staples v United States*, 511 US 600, 605-607; 114 S Ct 1793; 128 L Ed 2d 608 (1994); *Nasir*, *supra* at 42.

[18] A "felony is . . . as bad a word as you can give to man or thing." *Staples*, *supra* at 618 (quotation omitted).

prohibited, to knowingly carry the weapon on one's person or in an automobile."). As explained by Justice Ginsburg, "The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.'" *Staples v United States*, 511 US 600, 622 n 3; 114 S Ct 1793; 128 L Ed 2d 608 (1994) (Ginsburg, J., concurring), quoting *Cheek v United States*, 498 US 192, 199; 111 S Ct 604; 112 L Ed 2d 617 (1991). Accordingly, defendant's argument that, if the prosecutor is not required to show that he knew that possession of an AV ballot belong to another person was a crime, MCL 168.932(f) is a strict liability crime, rather than a general intent crime, is without merit.[19]

C

Because MCL 168.932(f) is a general intent crime and does not require proof that a defendant knew possession of an AV ballot belonging to another person was a criminal act, counsel was not ineffective for failing to request a jury instruction that before convicting defendant of Counts III-V, the jury must find that defendant knew possession of AV ballots was criminal. Counsel is not required to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

D

Based on his argument that MCL 168.932(f) imposes strict liability, defendant argues that the statute is unconstitutional because it violates due process and impinges on first amendment activity. Defendant claims that MCL 168.932(f) violates due process because "it: (a) involves a *malum prohibitum* act; (b) does not contain a requirement that the offender have any type of scienter or criminal intent as required by the general common law rule that there may be no criminal activity with a 'vicious will' or 'guilty mind;' [sic] and (c) imposes liability for a 5-year felony."[20] Defendant claims that MCL 168.932 impinges on first amendment activity because, "imposing strict liability for possession of absentee voter ballots, without any requirement that the possessor know [sic] that the law forbids the possession, will chill the associational rights related to voting and election campaigning." Because defendant's constitutional arguments are based on the incorrect assertion that a violation of MCL 168.932(f) is a strict liability crime, the arguments are unavailing.

Defendant also claims that MCL 168.932(f) is unconstitutional pursuant to the overbreadth doctrine because (1) it prohibits the consensual possession of AV ballots and (2) it criminalizes conduct that is protected by federal law, 42 USC 1973aa-6. Defendant has not properly presented this issue for appellate review. In claming that MCL 168.932(f) criminalizes

[19] We note that is it not surprising that courts refer to a crime requiring proof of *mens rea* as requiring proof of a "guilty mind." The phrase "*mens rea*" means "guilty mind." Black's Law Dictionary (7th ed).

[20] The case relied on by defendant, *United States v Wulff*, 758 F2d 1121 (CA 6, 1985), involved a criminal statute in which the Sixth Circuit refused to read a *mens rea* element.

conduct protected by federal law, defendant merely quotes 42 USC 1973aa-6. And, in claiming that MCL 168.932(f) is unconstitutional because it prohibits the consensual possession of AV ballots, defendant relies solely on a federal district court case from Texas, *Ray v Texas*, unpublished findings of fact and conclusions of law, issued October 31, 2006 (ED Tex, No. 2:06-CV-385). This case is of no value to defendant. The case is unpublished and the Fifth Circuit stayed the preliminary injunction granted by the court.[21] See *Ray v Abbott*, 2008 WL 104262 (CA 5, 2008). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly*, *supra* at 640-641. The failure to properly address the merits of an alleged error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Accordingly, defendant has abandoned the issue, and we decline to address it.

V. Hearsay

Defendant claims that the trial court erred in admitting the utterances of unknown persons who appeared at the city clerk' office on February 21, 2005. The utterances of the unknown persons, which were heard by Kimberly Thompson and Lesia Rolling, employees of the city clerk's office, indicated that the persons were expecting to be paid $5 to vote. Specifically, defendant claims that the utterances were hearsay because they involved assertions and were not admissible under MRE 804(b)(3), the hearsay exception for statements against penal interests.[22]

A

We review preserved claims of nonconstitutional evidentiary error for an abuse of discretion. *Carines*, *supra* at 774; *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when it fails to select a reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review an unpreserved claim of error for plain error affecting the defendant's substantial rights. *Carines*, *supra* at 763.

B

[21] We note that the district court did not definitively decide that the Texas statute, which was similar to MCL 168.932, was unconstitutional. Because the plaintiffs had requested a preliminary injunction, the district court only determined that plaintiffs had "demonstrated a substantial likelihood of success on the merits."

[22] In his brief on appeal, defendant references the testimony of Ronald Smith. Smith, the soup kitchen's maintenance man, testified that he was working at the soup kitchen on February 21, 2005, and everybody was talking about getting paid $5 to vote. Defendant, however, has abandoned any argument that the trial court improperly admitted Smith's testimony. Defendant's question presented, when read in totality, refers only to the utterances that were heard by Thompson and Rolling, and, in defendant's argument, Smith's testimony is only referenced in three sentences, which merely summarize the testimony. See *Unger*, *supra* at 262 (an issue is not preserved for appellate review if it is not raised in the statement of questions presented); *Harris*, *supra* at 50 (failure to properly address the merits of an alleged error constitutes abandonment of the issue).

Before trial, defendant moved in limine to exclude the utterances of the unknown persons. The trial court did not rule on the motion; rather, it outlined the legal framework that it would use during trial to analyze the admissibility of the utterances. The trial court opined that the utterance, if they were questions, would not be assertions under MRE 801(a) and, thus, not subject to the rules of hearsay. The trial court also opined that the utterances, if they were assertions, might be admissible under MRE 804(b)(3) if the declarants were unavailable. The trial court further speculated that the utterances might be admissible either under the rule of completeness because the utterances were part of the res gestae or under MRE 404(b) because the utterances were part of a common plan by defendant. The trial court withheld a decision on the admissibility of the utterances pending resolution of the issues whether the utterances were questions and whether the declarants were unavailable.

At trial, the prosecutor asked Thompson if any of the individuals who came into the city clerk's office on February 21, 2005, asked unusual questions. Defendant objected, arguing that Thompson's answers would include hearsay. The trial court excused the jury, and asked the prosecutor to inform it of Thompson's testimony. The prosecutor replied that Thompson would testify that two people asked, "Where do I get my $5 dollars?" or "Is this where I get paid?" The trial court ruled that if that was Thompson's testimony, then the utterances of the unknown persons were questions and not subject to the hearsay rules.

After the bench conference, the prosecutor elicited, without any further objection by defendant, the following testimony from Thompson:

> *Q.* My question before we took the break was on February 21st, 2005, when all those individuals were coming in at one time in the afternoon and you indicated you had a large group . . .
>
> *A.* Yes.
>
> *Q.* . . . and I asked if there were any questions that were posed to you?
>
> *A.* Yes.
>
> *Q.* And what were the--what was the question?
>
> *A.* Someone is supposed to be paying me $5 dollars [sic] to vote.
>
> * * *
>
> *Mr. Davis*. What did you say again? I--I didn't understand.
>
> *The Witness*. Someone is supposed to be paying me $5 dollars [sic] to vote.
>
> *Mr. Davis*. They said that?
>
> *The Witness*. Yes.
>
> *Mr. Davis*. As a statement?

The Witness. They said it directly to me.

* * *

Q. Did anybody else have an unusual question for you or anybody else in your office?

A. Yes.

* * *

Q. What was the question?

A. They needed to know where to go get their $5 dollars [sic] to vote.

Q. You heard that question twice that afternoon?

A. Yes.

On cross-examination, Thompson clarified that the second unusual question she heard was "Where do I get my $5 dollars?" Thompson did not know the persons who made the utterances.

The prosecutor also asked Rolling if she heard any unusual conversations on February 21, 2005. The trial court, over defendant's hearsay objection and after inquiring from the prosecutor if he expected "the same kind of answer," allowed Rolling to answer the question. Rolling testified that she heard "[s]omeone asking about $5 dollars [sic]." On cross-examination, Rolling testified that the person had voted an AV ballot and then said that "she was told she would receive $5 dollars [sic] for voting her ballot." Rolling, like Thompson, did not know who inquired of the $5.

C

Hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 802. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). An assertion is capable of being true or false. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998), modified 458 Mich 862 (1998) (the command "Bitch, come out" was not capable of being true or false and, therefore, it was not a "statement"). In addition, this Court has rejected the "implied assertion" theory of hearsay. *Id.* at 207, 225-226.[23]

[23] The "implied assertion" theory of hearsay is often implicated

> where out-of-court conduct of a person, sometimes verbal and sometimes nonverbal, is offered in evidence to demonstrate that person's belief, from which

(continued…)

After receiving the prosecutor's offer of proof of the testimony of Thompson and Rolling regarding the utterances, the trial court did not abuse its discretion in allowing Thompson and Rolling to testify to the utterances. The prosecutor informed the trial court that Thompson and Rolling would testify that the unknown persons asked, "Where do I get my $5 dollars?" and "Is this where I get paid?" The offer of proof established that the utterances of the unknown persons were questions. As questions, which are incapable of being true or false, the utterances were not assertions. *Jones*, *supra* at 204-205. Because the utterances were not assertions, the utterances were not statements and, therefore, not subject to the rules of hearsay. MRE 801(a), (c); MRE 802. In addition, any assertion implied from the questions that the unknown speakers were being paid to vote cannot be considered hearsay, as the "implied assertion" theory of hearsay has been rejected by the Court. *Jones*, *supra* at 207, 225-226.

However, the testimony of Thompson and Rolling did not correspond to the offer of proof. Although one utterance as testified by Thompson was a question—"Where do I get my $5 dollars?"[24]—the other utterance as testified by Thompson and the utterance as testified by Rolling were not questions. The issue whether the trial court erred in failing to strike the testimony of Thompson and Rolling regarding the utterances that were not questions is unpreserved, because defendant did not object during the testimony of Thompson and Rolling See MRE 103(a) (a defendant must make a timely objection); *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006) ("In order to properly preserve an issue for appeal, a defendant must raise objections at a time when the trial court has an opportunity to correct the error.") (quotation omitted).

The utterances of the unknown persons that were not questions were assertions. The utterances, "Someone is supposed to be paying me $5 to vote" and "[I] was told that [I] would receive $5 dollars for voting," were capable of being true or false. *Jones*, *supra* at 204-205. In addition, the utterances were offered for the truth of the matter asserted, i.e., that the unknown persons would be paid $5 for voting an AV ballot. Because these utterances were not questions and were offered for the truth of the matter asserted, the trial court plainly erred in failing to strike the testimony of Thompson and Rolling regarding the utterances. *Carines*, *supra*.

In addition, to the extent that the trial court would have admitted the assertive utterances under MRE 804(b)(3), the trial court would have erred. MRE 804(b)(3) provides that, if the declarant is unavailable, the following is not excluded by the hearsay rule:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. . . .

(…continued)

> the inference is offered that the belief is true, when it was not the actor's intent to communicate the matter to be proved in court. [*Jones*, *supra* at 207.]

[24] Contrary to defendant's claim, this question does not contain a second level of hearsay.

A declarant is unavailable if he or she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). For a witness to be deemed unavailable under MRE 804(a)(5), the prosecution must have made a diligent good-faith effort in its attempt to locate the witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case." *Id.*

Here, the record contains no indication that the prosecutor made any attempts to learn the identity of the persons who made the utterances, despite knowing the persons who voted AV ballots at the city clerk's office on February 21, 2005. At trial, the prosecutor admitted into evidence 19 AV applications and AV envelopes that were "initialed in" by Thompson between 1:03 p.m. and 2:12 p.m. Nothing in the record suggests that the prosecutor made any attempts to ascertain whether any of these 19 people had made the utterances.[25] Accordingly, because the prosecutor made no attempts to learn the identity of the speakers of the utterances, any conclusion that the prosecutor used due diligence in procuring the attendance of the speakers would have been an abuse of discretion. *Id.* (a trial court's determination whether a prosecutor made good faith effort in attempting to locate a witness is reviewed for an abuse of discretion). We simply do not believe that, because the identity of a declarant is unknown, the declarant is necessarily unavailable under MRE 804(a)(5). Where means are available for the prosecutor to attempt to learn the identity of an unknown declarant, the prosecutor must make a diligent good-faith effort at learning the identity of the declarant.

The trial court's error in admitting the assertive utterances of the unknown declarants does not require reversal of defendant's convictions on Counts I and II.[26] We reach this conclusion whether utilizing the standard for unpreserved error, *Carines*, *supra* at 763, or the standard for preserved nonconstitutional error, *Lukity*, *supra* at 495-496.[27] In determining whether an error is prejudicial, we must focus on the nature of the error and assess its effect in light of the weight and strength of the untainted evidence. *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997). As previously stated, Fox was the prosecutor's main witness for Counts I and II, and Fox's credibility was suspect. The utterances that were erroneously admitted, because they corroborated Fox's testimony that she had been asked by defendant to recruit people to vote and that he would give $5 to each person she recruited, had the ability to influence the jury's credibility determinations. However, other evidence also corroborated Fox's testimony. The utterance that was heard by Thompson that was a question, "Where do I get my

[25] Laura Rittmon voted her AV ballot between 1:03 p.m. and 2:12 p.m. Detective Michael Danneffel admitted that he never interviewed Rittmon while investigating the case. Rittmon testified that she did not have any contact with the police about the case until a few days before defendant's second trial when she received a subpoena.

[26] It is clear that, because the assertive utterances were not related to Counts III-V, the trial court's error did not affect defendant's convictions on those counts.

[27] Under both of these standards, defendant has the burden to show prejudice. *Carines*, *supra* at 763; *People v Blackmon*, 280 Mich App 253, 270; 761 NW2d 172 (2008). In his brief on appeal, defendant makes no argument that the trial court's error affected the outcome of his trial.

$5?" corroborated Fox's testimony. In addition, Laura Rittmon testified that, after having a conversation with Fox at the soup kitchen, she went to the city clerk's office, signed her named on a piece of paper, and after she went outside, received $5 from defendant. Further, Thompson testified that she saw Fox in the city clerk's office on February 21, 2005, during the same time that a lot of people came in to vote an AV ballot. Because Fox's testimony was corroborated by evidence other than the erroneously admitted utterances, we do not believe that the trial court's error affected the outcome of the proceedings, *Carines*, *supra* at 763, or that, more probable than not, it was outcome determinative. *Lukity*, *supra* at 495-496.

VI. The Information

Defendant claims that he was denied due process because the information, as to Counts III-V, failed to specify which AV ballots defendant possessed. Defendant asserts that, because 242 AV ballots were cast in the recall election and because he was not given notice of which AV ballots he was alleged to have possessed, he was unable to prepare a defense. Defendant also asserts that the information is insufficient to allow him to claim any double jeopardy protections in future prosecutions.

A

Defendant first objected to the information in a post-conviction motion for a new trial. Consequently, because the laws governing indictments apply to informations, MCL 767.2, our review of defendant's claim is governed by MCL 767.76. The first sentence of MCL 767.76 provides:

> No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, *nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit*. [Emphasis added.]

Pursuant to MCL 767.76, because defendant did not object to the information before commencement of trial, we may not reverse defendant's convictions based on any defect in the information.

B

Nonetheless, because defendant did not object to the information before trial, any review of his claim that the information was constitutionally deficient because it failed to specify which AV ballots he possessed is for plain error affecting his substantial rights. *Carines*, *supra* at 763. Error affects a defendant's substantial rights if the error was prejudicial. *Id.* Under this standard, defendant is not entitled to a reversal of his convictions on counts III-V.

"[A]n [information] is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

Hamling v United States, 418 US 87, 117; 94 S Ct 2887; 41 L Ed 2d 590 (1974). In the information, Counts III-V read:

> [T]he defendant:
>
> * * *
>
> did possess an absent voter ballot that was mailed or delivered to another person and/or return, solicit to return, or agree to return another person's absent voter ballot to the clerk of a city, township, village, or school district; contrary to MCL 168.932(f)[.]

The information used the words of MCL 168.932(f) to set forth the charges. It did not set forth any of the specifics of the charged offenses; as pointed out by defendant, it did not set forth whose AV ballots defendant possessed. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence coming under the general description, with which he is charged." *Hamling*, *supra* at 117-118 (quotation omitted).

Even if we accept defendant's argument that the information was deficient because it failed to specify which AV ballots he possessed, defendant cannot establish that the information was or will be prejudicial. First, defendant had actual notice of the AV ballots that he was charged with possessing. After the preliminary examination, the trial court provided a written opinion and order, in which it stated that it was granting the prosecution's motion to bind defendant over on Counts III-V on theories that he possessed the AV ballots of Taneka Dumas, Mary Foster, Rev. Robert Foster, Teresa Foster, Schelena Miles, and Rosie Miles. For reasons not apparent on the record, at defendant's first trial, the prosecution claimed that defendant possessed the AV ballots of ten people. The prosecution argued that, in addition to possessing the AV ballots of the six people already listed, defendant possessed the AV ballots of David Jackson, Latoyia Williams, Danelle Williams, and Earlene Wiley. At defendant's second trial, the prosecution claimed that defendant possessed the AV ballots of the same ten people. Thus, contrary to defendant's claim, he was not required to prepare a defense regarding all 242 AV ballots that were cast in the recall election. Based on the trial court's opinion and order following the preliminary examination and on the evidence presented at his first trial, defendant had actual knowledge of the ten AV ballots that he was alleged to have possessed. Second, defendant can look to the jury verdict to determine whether a subsequent prosecution is barred by double jeopardy. See *Russell v United States*, 369 US 749, 764; 82 S Ct 1038; 8 L Ed 2d 240 (1962) (a defendant may look beyond the information and rely on other parts of the record to determine whether double jeopardy bars a subsequent prosecution). In rendering its verdict, the jury stated that it found beyond a reasonable doubt that defendant possessed the AV ballots of Danelle Williams, Rosie Miles, and Latoyia Williams.[28] Accordingly, any deficiency in the

[28] The trial court instructed the jury that it must "be unanimous as to the identity of the person" for Counts III-V. During deliberations, the jury was further instructed that it was necessary to write on the verdict form the identities of the persons whose AV ballots it found defendant possessed.

information did not affect defendant's substantial rights at trial, nor will it affect his ability to seek double jeopardy protection in a future prosecution.

VII. Sufficiency of the Evidence

Defendant argues that his convictions for possessing the AV ballots of Danelle Williams and her sister, Latoyia Williams, are not supported by sufficient evidence. Specifically, defendant claims that because the sisters were unsure about the paperwork that they gave defendant, there was insufficient evidence from which the jury could find that defendant possessed the sisters' AV ballots, as opposed to AV ballot applications. We review a challenge to the sufficiency of the evidence de novo. *Cline*, *supra* at 642. We must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Although Danelle testified that she could not specifically remember what papers she gave defendant, her testimony indicated that she handed her AV ballot to defendant. Danelle testified that, after she filled out an AV application, she received an AV ballot in the mail. She filled out the papers that were inside the envelope, and put the papers back in the envelope. She then called defendant to pick up the AV ballot, because defendant had instructed her to call as soon as she voted "yes." When defendant arrived, Danelle handed him the envelope. In addition, Danelle testified that she did not affix to the AV envelope either the stamp or the two labels that were on the envelope. The stamp, a Marian Anderson stamp, was the same stamp that was on several of the other AV envelopes that defendant was alleged to have possessed. Similarly, the return address label, which had the address of the city clerk's office, was the same label that was on other AV envelopes that defendant was alleged to have possessed. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that Danelle gave defendant her AV ballot.

Although Latoyia testified that she believed she received an AV application and an AV ballot in the mail on the same day, which would have been inconsistent with the manner in which AV ballots were mailed, her testimony still indicated that she handed her AV ballot to defendant. Latoyia testified that defendant, on his second visit to her apartment, checked her mailbox and brought a "yellow envelope" to her. Defendant opened the envelope, and gave her the paper that was inside and told her to sign it. She marked "yes" on the paper, as defendant instructed her, and signed the paper. Latoyia then gave the paper and the envelope back to defendant. In addition, Latoyia testified that she did not affix the James Baldwin stamp and the address labels to the AV envelope. The return address label listed the address of the city clerk's office. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that Latoyia gave defendant her AV ballot.

VIII. Failure to Arraign

Defendant claims that his convictions must be reversed because he was never arraigned on the information.

A

Defendant first complained of the trial court's failure to arraign him on the information in a post-conviction motion. Accordingly, the issue is not preserved, and we review defendant's claim for plain error affecting his substantial rights. *Carines, supra* at 763.

B

A defendant has a constitutional right to adequate notice of the charges against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). A defendant must be arraigned on the information. MCR 6.113. At the arraignment, "the court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant." MCR 6.113(B). A defendant, thereafter, must enter a plea to the charge. *Id.* Plaintiff does not dispute that defendant was never arraigned on the information.

Our Supreme Court has held that, if a defendant is not arraigned on the information, his convictions must be set aside. *Grigg v People*, 31 Mich 471, 472-473 (1875). However, failure to arraign does not require automatic reversal where the parties, including the defendant, go to trial "as if all formalities had been complied with." *People v Weeks*, 165 Mich 362, 365; 130 NW 697 (1911). In other words, we will not reverse a conviction based on a trial court's failure to arraign the defendant on the information if the defendant was present, prepared for trial, and went to trial on the merits without objection. *Id.* at 364-366.[29] In the present case, defendant was present and prepared for trial, and he went to trial on the merits without objection. There is no doubt that defendant was aware of the charges against him. He was acquitted of the charges in his first trial, and at the hearing on his post-conviction motions, defendant admitted that he had been fully informed of the charges. Moreover, defendant had no intention to plead guilty to the charges, as he twice went to trial without objecting to not being arraigned on the information. Under these circumstances, the trial court's failure to arraign defendant on the information did not affect his substantial rights. *Carines, supra*. Defendant is not entitled to a reversal of his convictions based on the trial court's error.

IX. Impartial Jury and the Right to Be Present

Defendant asserts that he was denied his constitutional right to an impartial jury when juror #5 was allowed to remain on the jury after she reported seeing one of defendant's attorneys, Hugh Davis, engage in a drug deal with Harold Farmer in the courthouse parking lot. Defendant also claims that he was denied the effective assistance of counsel when his attorneys failed to challenge the continued presence of juror #5 on the jury. In addition, defendant claims that he

[29] We reject defendant's contention that *Weeks, supra*, does not apply to the present case because he, unlike the defendant in *Weeks*, did not submit an affidavit, in which he averred that he was innocent of the charges, after the information had been filed. In *Weeks*, the Supreme Court stated that the defendant's affidavit, along with defense counsel's statement to the jury that the defendant had pleaded not guilty, justified the entry of a plea *nunc pro tunc*. *Weeks, supra* at 364. However, the Supreme Court also stated that it believed "the presence of defendant in court through a trial of the cause upon the merits represented by counsel, who failed to call attention to the omission of arraignment and plea, was a waiver of right thereto." *Id.* It cited numerous cases from other states for this proposition, and it is this proposition that we rely on in the present case.

was denied his constitutional right to be present when he was not allowed to be present during the questioning of juror #5 regarding what she saw in the parking lot.

A

On the fourth day of testimony, Farmer was the first witness to testify after the lunch recess. During Farmer's testimony, the court officer informed the trial court that juror #5 had observed an incident between Farmer and one of defendant's attorneys. The trial court stopped the proceedings, and the trial judge, along with the prosecutor and defendant's two attorneys, Davis and Elliott Hall, retired to a vacant room behind the courtroom to question juror #5. Juror #5 explained that, during the lunch recess, she saw Davis give Farmer "something, look like money." It appeared to juror #5 that Davis and Farmer were engaged in a drug deal. Davis clarified that Farmer had approached him, saying that he had been standing around all day and that he did not have any cigarettes. Davis handed him two cigarettes. Juror #5 stated that, after hearing Davis's explanation, she could "[a]bsolutely" set aside the impression that Davis and Farmer engaged in a drug deal. She further stated that she could remain a fair and impartial juror. After juror #5 left the room, both Davis and Hall agreed that juror #5 could remain on the jury.

B

A defendant may not assign error on appeal to action deemed proper by trial counsel. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). To do so would allow the defendant to harbor error as an appellate parachute. *Id.* Accordingly, because defense counsel deemed it proper for juror #5 to remain on the jury, defendant cannot now argue that juror #5's continued presence on the jury denied him an impartial jury.

C

Nonetheless, defendant argues that he was denied the effective assistance of counsel when his attorneys agreed that juror #5 could remain on the jury. We disagree. A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *Unger*, *supra* at 242. We review the trial court's factual findings for clear error and its conclusions of law de novo. *Id.*

To establish a claim for ineffective assistance of counsel, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *Yost*, *supra* at 387. There is a strong presumption that trial counsel provided effective assistance. *Unger*, *supra* at 242.

This Court is disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. *Id.* at 258; see also *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (O'Connell, J.) ("[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy."). This is because nonverbal cues, such as a juror's facial expressions, body language, and the manner of answering questions, all of which

this Court cannot see, are important criteria in deciding whether to challenge a juror. *Unger*, *supra* at 258.

In its order denying defendant's post-conviction motions, the trial court found that, based on juror #5's demeanor, juror #5 "genuinely believed" Davis's explanation that he handed cigarettes to Farmer and that she "genuinely committed" to set aside the incident and to decide defendant's guilt based solely on the merits. The trial court further found that juror #5 "was not biased" and that the parking lot incident "did not cause her to have a state of mind or opinions which would improperly influence her." Defendant has not established that any of these factual findings were clearly erroneous. Based on its findings, the trial court concluded that the professional judgment of Davis and Hall not to challenge juror #5 was objectively reasonable. Defendant has presented us with no reason to disagree. In fact, at the evidentiary hearing, both Davis and Hall testified that, when in the room behind the courtroom, it was their professional judgment that juror #5 should remain on the jury. We will not second-guess counsel on matters of trial strategy, nor assess their actions with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Accordingly, defendant has not established that the actions of Davis and Hall in failing to challenge the continued presence of juror #5 on the jury fell below an objective standard of reasonableness.[30]

D

A defendant has the "right to be present during the voir dire, selection of and subsequent challenges to the jury." *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). However, the test for whether a defendant's absence from part of the trial requires reversal is whether there is any reasonable possibility of prejudice. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977); *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). Defendant makes no argument that he was prejudiced by not being present during the questioning of juror #5. Accordingly, defendant has not demonstrated that his absence requires reversal of his convictions.

X. Religious Questioning

Defendant next claims that the prosecutor cross-examined him and his wife in such a manner to suggest that his religious beliefs and practices were not valid and, thereby, he was not credible. Defendant contends that the prosecutor's questioning violated MCL 600.1436 and

[30] Any admissions by Hall and Davis at the evidentiary hearing suggesting that they were ineffective for failing to challenge juror #5 are not controlling. These admissions were made with the benefit of hindsight, and neither Hall nor Davis questioned their decision regarding juror #5 until after defendant expressed his opinion that the juror should be dismissed.

In addition, defendant has not established that, even if counsel had challenged juror #5, the trial court would have excused her from the jury. A juror is presumed to be impartial, until the contrary is shown. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). "The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Id.* Given the trial court's findings, defendant has not proven that the impartiality of juror #5 was in reasonable doubt.

MRE 610 and that, regardless of whether the religious questioning affected the outcome of his trial, reversal is required. Defendant also claims that he was denied the effective assistance of counsel when counsel failed to object to the religious questioning.

A

At trial, defendant did not object to the alleged improper questioning. However, absent "swift and commendable action" by the trial court to stop improper religious questioning, such questioning demands a new trial. *People v Burton*, 401 Mich 415, 417-418; 258 NW2d 58 (1977); *People v Hall*, 391 Mich 175, 182-183; 215 NW2d 166 (1974).

B

Dorothy Pinkney testified that defendant became an ordained minister after they married. On cross-examination, the prosecutor asked Dorothy if defendant had any formal training as a minister. Dorothy replied that defendant had received training, but that he could explain it much better than she could. Defendant testified that he was ordained as a minister in 2002. He explained that he was tutored under several church leaders, attended classes at Moody Bible Institute and Liberty University, from where he received a certificate in "Ministry--Theology." On cross-examination, the prosecutor inquired into defendant's formal training. The prosecutor asked defendant if he had obtained a degree in divinity or whether he was licensed by the state of Michigan as a minister. The prosecutor also asked defendant, who held himself out as a Christian psychologist, if he had taken any psychology courses, obtained a psychology degree, or was licensed by the state of Michigan as a psychologist.

A prosecutor may not inquire into a witness's religious beliefs. MCL 600.1436; *People v Bouchee*, 400 Mich 253, 262; 253 NW2d 626 (1977); *People v Leshaj*, 249 Mich App 417, 420; 641 NW2d 872 (2002); see also MRE 610 ("Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."). However, not all questioning that touches on religious matters is improper religious questioning. For example, in *People v Jones*, 82 Mich App 510, 515; 267 NW2d 433 (1978), this Court held that the prosecutor's cross-examination of the defendant, an ordained lay minister, regarding his qualifications for that position "did not extend into any prejudicial area concerning his beliefs on the specific practices of the religion."

In this case, the prosecutor did not inquire of either defendant or his wife about the substance of defendant's religious opinions. The prosecutor did not ask either witness about the tenants of defendant's religious beliefs. Compare *Hall*, *supra* at 180-183 (the prosecutor's question of the defendant if he believed in a Supreme Being violated MCL 600.1436). Nor did the prosecutor ask if the criminal conduct with which defendant was charged was inconsistent with defendant's religious beliefs. Compare *Bouchee*, *supra* at 261-262 (the trial court's question of the defendant if his religious beliefs permitted or forbade the charged conduct violated MCL 600.1436). The jury heard no testimony about the content, nature, or substance of defendant's religious beliefs. Rather, the prosecutor inquired into defendant's qualifications as a minister and as a Christian psychologist. Pursuant to *Jones*, *supra*, the prosecutor's inquiry was proper.

C

Because the prosecutor's inquiry into defendant's qualifications as a minister and as a Christian psychologist was proper, counsel was not ineffective for failing to object to the questioning. Counsel is not required to make a futile objection. *Fike*, *supra*.

XI. Jury Drawn From a Fair Cross Section

Defendant argues that he was denied his sixth amendment right to a jury drawn from a representative cross-section of the community. Defendant argued below that African-Americans were underrepresented in Berrien County jury venires and that this underrepresentation was the result of systematic exclusion. Defendant also claims that he was denied the opportunity to develop the issue through adequate hearings and discovery and that remand is required to allow him to review the necessary records and to develop the factual basis for his claim.

A

"Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court." *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). A trial court's decision on a motion to adjourn is reviewed for an abuse of discretion, *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003), as is a trial court's decision on a motion for reconsideration, *People v Perkins*, 280 Mich App 244; 248; 760 NW2d 669 (2008), aff'd 482 Mich 1118 (2008).

B

A defendant is entitled to an impartial jury that was drawn from a fair cross-section of the community. *Hubbard*, *supra* at 472.

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

In denying defendant's sixth amendment challenge, the trial court concluded that defendant had not established either the second or third prongs of the *Duren* test. On appeal, defendant presents no argument supported by legal authority that the trial court erred in reaching its conclusion. Accordingly, defendant has abandoned the issue whether the trial court erred in denying his claim that he was denied his constitutional right to a jury drawn from a fair cross-section of the community. *Harris*, *supra*.

C

Our analysis, therefore, is limited to defendant's claim that he was denied the opportunity to adequately develop the record through hearings and discovery. It appears that defendant's

main contention is that he was given "an extremely short period of time" in which to develop the record and that the trial court erred in failing to adjourn his trial.

After defendant's first trial ended in a mistrial, the trial court scheduled defendant's retrial to begin on September 19, 2006. The trial court adjourned defendant's trial to January 9, 2007, in order to allow the court reporter time to prepare the transcripts and to give new defense counsel, Davis and Hall,[31] time to prepare for trial. Upon request by Hall, who stated that additional time was needed to prepare for trial and to file pretrial motions, the trial court further adjourned defendant's trial to March 13, 2007.

On January 16, 2007, defendant filed a motion challenging the manner in which petit jury venires were selected in Berrien County. Defendant requested that the trial court (1) allow him access to records relating to the selection procedure of juries, (2) grant an evidentiary hearing, (3) enter an order declaring the selection procedures were discriminatory and exclusionary with regard to African-Americans, and (4) hold his trial in abeyance until the selection procedures were reformed. Defendant did not request that his trial be adjourned to allow him more time to explore the claim. A hearing was held on January 25, 2007. The trial court stated that it would grant defendant an opportunity to have an evidentiary hearing, and it requested that defendant attempt to obtain, without a court order, the necessary information from the clerk's office. The trial court urged defendant to "act promptly" because the last date for hearing motions was February 16, 2007. Defendant did not, however, request that his trial be adjourned.

On February 6, 2007, the chief judge of Berrien County entered an order granting defendant access to the jury questionnaires of the past three years, but defendant was not given permission to remove the questionnaires from the clerk's office. On February 9, 2007, defendant moved the trial court for permission to remove the questionnaires from the clerk's office. Defendant claimed that it was "onerous, burdensome, needlessly expensive and practically impossible" for him to examine and analyze the questionnaires within the physical confines of the clerk's office. Defendant further claimed that "[t]he delay in the determination of these issues has already made it unlikely that the requisite analysis and resulting evidentiary hearing can be completed before the March 13, 2007 trial date" and that "[t]he lack of the ability to remove the records" from the clerk's office will lengthen the process. Despite this last claim, there was no request by defendant to adjourn his trial.

A hearing was held on February 16, 2007. The trial court stated that it learned that the information on the jury questionnaires that was needed by Wayne Bentley, defendant's proposed expert, was in electronic form, and stated that it would enter an order requiring that the necessary information be turned over to Bentley. Bentley stated that, if the information on the compact disc contained the "codes," he would have what he needed. The trial court also stated that it had set aside time on March 6, 2007, for an evidentiary hearing and that it was "not going to be interested in having a hearing after that date." Bentley informed the trial court that it was "almost impossible" for him to review and analyze the information by March 6, 2007, but then said that if he had a March 6 deadline, he would meet it. Davis informed the trial court that,

[31] Davis and Hall were substituted as defendant's counsel on September 22, 2006.

although he and Hall "want time, as late as possible," he would assume that the evidentiary hearing would be held on March 6, 2007. Again, defendant made no request that his trial be adjourned.

On March 5, 2007, defendant submitted a three-page motion to the trial court, in which he specifically moved for an evidentiary hearing. In the motion, defendant summarized "areas of concern," which were discovered "[i]n the time allowed for analysis," that he believed led to the underrepresentation of African-Americans in jury venires. Defendant, in the motion, did not request that his trial be adjourned. Defendant also did not complain that Bentley, either because of time restrictions or because he was not given the actual jury questionnaires, was unable to adequately analyze the information regarding Berrien County's jury selection procedures or was unable to reach any conclusions with certainty.

The evidentiary hearing was held on March 6, 2007. Bentley testified at the hearing, and a report he had completed on Berrien County's jury selection procedures was admitted into evidence. Although Bentley stated that he had been under a "tremendous time restraint," he made no claim that his analysis on the jury selection procedures was, in any manner or for any reason, incomplete. The following day, March 7, 2007, defendant submitted a post-hearing brief, in which he set forth his arguments as to how he had established the three prongs of the *Duren* test. Although defendant stated that Bentley analyzed Berrien County's jury selection procedures "as much as possible under the [c]ourt[-]imposed time restraints," defendant made no claim that Bentley's analysis was incomplete because of the time restraints or for any other reason. No request was made by defendant for an adjournment of his trial at either the evidentiary hearing or in the post-hearing brief.

The above summary of the relevant proceedings establishes that, contrary to the claim in defendant's brief on appeal, the trial court never refused a request to adjourn defendant's trial. Defendant simply never requested that his trial be adjourned. In addition, defendant has not established that the trial court erred in failing to *sua sponte* adjourn his trial. The trial court granted defendant's motion for an evidentiary hearing, and scheduled the hearing for March 6, 2007. Although Bentley claimed at the February 16, 2007 hearing, that it was "almost impossible" for him to meet a March 6, 2007 deadline, he stated that, if March 6 was the deadline, he would meet it. At no time when defendant presented Bentley's findings and conclusions to the trial court, either at the evidentiary hearing, in the March 5, 2007 motion for an evidentiary hearing, or in the March 7, 2007 post-hearing brief, did defendant claim that, given the short time period in which Bentley had to analyze the information on the compact disc, that Bentley's findings and conclusions were incomplete. Defendant also never claimed that, if his trial was adjourned and, thereby, he was given more time to analyze the Berrien County jury selection procedures, he would have undertaken any additional efforts to gather evidence to support his claim.[32] Defendant, as it appears from the record, was content to rest on the evidence

[32] For example, in its order denying defendant's sixth amendment challenge, the trial court faulted defendant for not presenting any statistical information regarding the percentage of African-Americans on "the Berrien County 1st jury list, those selected and assigned to a jury panel, those whose questionnaires were undelivered, those who did not respond after the second mailing of the questionnaire, or any other category." In his brief on appeal, defendant claims
(continued…)

that had been produced at the evidentiary hearing. Under these circumstances, defendant has not established that the trial court erred in failing to *sua sponte* adjourn his trial.

In addition, defendant has not shown that the trial court abused its discretion in denying his motion for reconsideration. In a motion for reconsideration, a party must show "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). The gravamen of defendant's motion for reconsideration was that the trial court, by its determination to adhere to the March 13, 2007 trial date and its specific refusal to adjourn defendant's trial, truncated and eviscerated defendant's opportunity to fully analyze Berrien County's jury selection procedures. However, because defendant never requested an adjournment of his trial and never suggested before the trial court rendered its opinion that the time limits prevented him from fully analyzing the jury selection procedures, we cannot say the trial court abused its discretion in denying defendant's motion for reconsideration. Defendant did not demonstrate that the trial court was misled by a palpable error.

XII. Trial Court Bias

Defendant asserts that he was denied due process and his state law right to an impartial decision maker when the trial judge, Judge Alfred Butzbaugh, had a financial interest in the Harbor Shores Project.[33] Defendant requests that, because he did not learn of Judge Butzbaugh's financial interest in the Harbor Shores Project until well after trial, we remand for an evidentiary hearing so that a factual record can be developed. This Court has previously denied defendant's request for a remand, *People v Pinkney*, unpublished order of the Court of Appeals, entered July 3, 2008 (Docket No. 282144), and we decline to readdress the issue.

A trial judge is presumed to be fair and impartial, and the party who asserts partiality has a heavy burden of overcoming the presumption. *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). Because there are no facts in the record to support defendant's claim that Judge Butzbaugh had a financial interest in the Harbor Shores Project, defendant has failed to overcome the presumption that Judge Butzbaugh was fair and impartial.

XIII. Cumulative Error

In his last issue in his appeal of his convictions, defendant asks us to reverse his convictions based on the cumulative effect of any errors. "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error

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(…continued)

that he did not have time to produce a statistician's report, "for which [he] was criticized by the court," and that, because the jury questionnaires do not contain any information on a juror's race, racial information of prospective jurors could not be obtained without an independent investigation. However, at no time before the trial court rendered its opinion, did defendant suggest that, absent the time restrictions, he would have obtained a statistician's report or conducted an independent investigation into the racial composition of jury venires.

[33] According to defendant, his efforts to recall Yarbrough were directly motivated by his opposition to the Harbor Shores Project.

would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). The test is whether the cumulative effect of the errors undermines confidence in the reliability of the verdict. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). "In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). After reviewing the evidence presented at trial, we conclude that, if the two evidentiary errors[34] had not occurred, no reasonable juror would have voted to acquit defendant. *Id.* The cumulative effect of the errors did not deny defendant a fair trial.

XIV. Probation Revocation

Defendant argues that the trial court erred in revoking his probation based on a newspaper editorial written by him that was critical of Judge Butzbaugh because the editorial was protected by the First Amendment. Defendant asserts that the editorial was not a "true threat" because the paraphrased biblical passage merely predicted that God would punish Judge Butzbaugh. Defendant also asserts that the editorial was not "defamatory" because the statements in the editorial were his opinion and rhetorical hyperbole. Defendant further claims that the probation condition prohibiting "demeaning . . . behavior" is unconstitutional because it is not narrowly tailored to the goals of probation and because it is vague.

A

Although defendant did not object to the probation condition prohibiting defamatory and demeaning behavior until after he was arrested for the probation violation, we may address whether the probation condition was proper, because it relates to whether defendant's probation was lawfully revoked. *People v McNeil*, 104 Mich App 24, 26; 303 NW2d 920 (1981). We review a trial court's decision to revoke a defendant's probation for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991). We review constitutional issues de novo. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

B

Soon after the trial court denied defendant's request for a new trial, defendant wrote the following editorial, which appeared in the *People's Tribune*, a monthly newspaper published in Chicago:

> **Corrupt Judge Denies New Jury Trial in Pinkney Case**
>
> By Rev. Edward Pinkney

[34] We only consider the trial court's error in admitting the assertive utterances of the unknown persons at the city clerk's office and the trial court's possible error in failing to allow defendant to cross-examine Fox and to question Bragg about Fox's alleged arrest for prostitution. We do not consider any errors relating to the information, because those errors did not affect the presentation of the case to the jury.

It is our constitutional duty as American citizens to hold our elected officials accountable for their words, actions and inaction of wrongdoing. We must draw the line and decide what to do if that line is crossed, and we must use our Constitution. Most judges, prosecutors and law enforcement officials have crossed the line in the sand many times. It's time for the people: poor whites, Blacks and Hispanics to stand together and fight for what is right.

We must fight for justice for all anytime you have a Judge like Alfred Butzbaugh, who is a racist. It took over 53 days to render a fifth-grade decision denying me a new trial. I am a man of God, and an innocent man, convicted by an all-white jury that violated the sanctity of their oath and were motivated by something other than the pursuit of truth and justice.

The corruption and the deceitfulness continues in Berrien County Courthouse. In my motion for a new trial, I argued that I was charged but never arraigned, nor did I receive due process by the dumb Judge and prosecutor. I was denied a public trial when the Judge locked the courtroom doors. One of the jurors reported to the Court that during the recess, she saw one of Rev. Pinkney's attorneys make a drug deal in the parking lot. She lied, saying several Black people came up to her and her husband and asked for money. She was not removed from the jury. The Berrien County Courthouse is so blatantly corrupt that even the legal establishment has been forced to recognize it. It does not provide a just legal system. The corruption starts at the top. They customarily and regularly deprive Blacks and Hispanics of due process. The corruption and the deceitfulness continues in Berrien County Courthouse. Judge Butzbaugh has violated his oath. I support the constitution of the United States and the State of Michigan; we are still waiting on this racist judge to do the same. Judge Butzbaugh has failed the people, the community, his duties and his office.

Judge Butzbaugh, it shall come to pass; if thou continue not to hearken unto the voice of the Lord thy God to observe to do all that is right; which I command thee this day, that all these Curses shall come upon you and your family, curses shalt be in the City of St. Joseph and Cursed shalt thou be in the field, cursed [sic] shall come upon you and your family and over take thee; cursed shall be the fruit of thy body. The Lord shall smite thee with consumption and with a fever and with an inflammation and with extreme burning. They the demons shall Pursue thee until thou persist.

The Herald Palladium is known as the "Herald Pollution" because of all the racist garbage the newspaper writes. . . .

When does it all stop! When are the people going to take a stand? The challenge is clear. The case of Rev. Edward Pinkney is a concentration of the criminalization of a generation of people. This is not a Black issue, nor is it just a person of color issue. It is a whole country issue.

Defendant's probation officer, James Pjesky, believed that defendant, by writing the editorial, and specifically by declaring that Judge Butzbaugh was "racist," "dumb," and

"corrupt," violated the 15th condition of his probation. Pursuant to the 15th condition, defendant was not to "engage in any assaultive, abusive, defamatory, demeaning, harassing, violent, threatening, or intimidating behavior, including the use, through any electronic or print media under [his] care, custody or control, of the mail, e-mail or internet." Defendant was arrested and arraigned on a probation violation charge.

At the probation revocation hearing,[35] Rev. William Wylie Kellerman, a minister in the United Methodist Church, testified that he recognized the "threatening" paragraph in the editorial as a paraphrase of several verses from the 28th chapter of Deuteronomy, the fifth book of the Bible.[36] He explained that Deuteronomy described a covenant between God and men and that the curses referred to in the paraphrased verses were visited upon men by God. Defendant testified that he did not threaten Judge Butzbaugh; he only exhorted the judge to repent. Defendant further testified that the editorial only contained his opinion.

The trial court concluded that defendant by writing the editorial violated the 15th condition of his probation. The trial court found that defendant had threatened Judge Butzbaugh. Although the paraphrase of Deuteronomy 28 was not a threat of what defendant himself would do, defendant, who was a minister, called upon the divine powers of God to curse Judge Butzbaugh, and this, according to the trial court, was a threat or, at the very least, an attempt to intimidate. The trial court also found that defendant's comments that Judge Butzbaugh was "racist" and "corrupt" and had "violated his oath" were defamatory and demeaning. According to the trial court, there was no "scintilla of evidence" to support defendant's comments, and this lack of evidence indicated that defendant's statements were false and were made with a reckless disregard for the truth. The trial court revoked defendant's probation and sentenced defendant to 3 to 10 years' imprisonment.

C

Defendant first claims that his paraphrase of the verses from Deuteronomy 28 was not a "true threat," as defined by *Virginia v Black*, 538 US 343; 123 S Ct 1536; 155 L Ed 2d 535 (2003), and *Watts v United States*, 394 US 705; 89 S Ct 1399; 22 L Ed 2d 664 (1969), and, therefore, the trial court could not revoke his probation on the basis that he made a threat against

[35] Judge Dennis Wiley presided over the hearing. Judge Butzbaugh had recused himself upon concluding that the editorial contained a threat against him.

[36] Deuteronomy 28:15-22 (King James Version) reads:

> But it shall come to pass, if thou wilt hearken unto the voice of the Lord thy God, to observe to do all his commandments and his statutes which I command thee this day; that all these curses shall come upon thee, and overtake thee: Cursed shalt thou be in the city, and cursed shalt thou be in the field. . . . Cursed shall be the fruit of thy body . . . . The Lord shall smite thee with a consumption, and with a fever, and with an inflammation, and with an extreme burning, and with the sword, and with blasting, and with mildew; and they shall pursue thee until thou perish.

Judge Butzbaugh. Plaintiff agrees that the paraphrase of Deuteronomy 28 "is not defensible as anything other that [sic] hyperbole" and that the paraphrase could not serve as a lawful basis for revoking defendant's probation. Accordingly, we need not address or decide the issue.

D

Defendant next claims that his characterizations of Judge Butzbaugh as "racist" and "corrupt" and his accusation that Judge Butzbaugh violated his oath were constitutionally protected because the comments were expressions of opinion, nothing more than "rhetorical hyperbole." Plaintiff agrees that defendant's claim that Judge Butzbaugh was "racist" was hyperbole and could not serve as a lawful basis for revoking defendant's probation. Consequently, our analysis is limited to whether the trial court was within its discretion to revoke defendant's probation based on defendant's claim that Judge Butzbaugh was "corrupt" and had violated his oath.

A trial court has wide discretion in setting the conditions of probation. *People v Winquest*, 115 Mich App 215, 220; 320 NW2d 346 (1982). It may impose conditions that it deems are proper or are warranted by the circumstances, MCL 771.3(3), but it must be guided by principles of what is lawfully and logically related to the defendant's rehabilitation, *People v Houston*, 237 Mich App 707, 719; 604 NW2d 706 (1999); *People v Branson*, 138 Mich App 455, 458; 360 NW2d 614 (1984). As a condition of his probation, defendant was to refrain from engaging in any defamatory or demeaning behavior. A communication is defamatory if it "tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual." *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). Because a demeaning communication is one that "lower[s] in dignity or standing; debase[s]," *Random House Webster's College Dictionary* (1992), it appears that any communication that is demeaning would also be defamatory, and vice versa.

A probation condition that prohibits a probationer from engaging in defamatory or demeaning communications clearly impinges on the probationer's first amendment right of free speech. See, e.g., *Garrison v Louisiana*, 379 US 64, 75; 85 S Ct 209; 13 L Ed 2d 125 (1964) ("The First . . . Amendment[] embod[ies] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (quotation omitted). A probation condition may impinge on a probationer's First Amendment rights. *Branson*, *supra* at 458-461; *United States v Holloway*, 740 F2d 1373, 1383 (CA 6, 1984). However, such a condition is subject to careful review. *United States v Peete*, 919 F2d 1168, 1181 (CA 6, 1990); *People v Terrigno*, 838 F2d 371, 374 (CA 9, 1987); see also *Thomas v State*, 710 P2d 1017, 1019 (Alas App, 1985) (probation conditions which restrict constitutional rights are subject to "strict scrutiny"). The condition must be narrowly tailored, *United States v Crandon*, 173 F3d 122, 128 (CA 3, 1999); *People v Pointer*, 151 Cal App 3d 1128, 1139 (1984), and be primarily designed or directly related to the rehabilitation of the defendant and to the protection of the public. *Crandon*, *supra* at 128; *Peete*, *supra* at 1181. The condition must be "narrowly drawn to protect the public from a situation that might lead to a repetition of the same crime." *Terrigno*, *supra* at 374.

In the present case, defendant was convicted for paying $5 to persons to vote in favor of the recall of Yarbrough and for possessing AV ballots. The 15th condition of defendant's probation prohibited defendant from engaging in defamatory and demeaning communications. The condition was a blanket prohibition on such behavior; defendant was prohibited from making defamatory or demeaning communications about *any* person, including coworkers, neighbors, and congregants. Such a blanket prohibition is not directly related to defendant's rehabilitation of the election law crimes he committed, which impugned the integrity of the electoral process, or to the public's protection from a repetition of the crimes. *Crandon, supra* at 128.[37] Prohibiting defendant from engaging in *any* defamatory or demeaning communications is not primarily directed at preventing defendant from engaging in subsequent crimes that impugn the electoral process. Moreover, a prohibition on defamatory and demeaning communications could be narrowly tailored so that it relates directly to the election law crimes committed by defendant. For example, defendant could be prohibited from engaging in any defamatory or demeaning communications regarding Yarbrough and the other city commissioners.

To the extent that the prohibition of defamatory and demeaning behavior impinges on defendant's first amendment rights, the prohibition was not proper, as it was not directly related to defendant's rehabilitation or to the protection of the public. *Id*. Because the prohibition was not proper, the trial court abused its discretion in revoking defendant's probation based on a violation of the prohibition. We reverse the trial court's order revoking defendant's probation.

Defendant's convictions are affirmed, but the order revoking defendant's probation is reversed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[37] We reject plaintiff's contention that the trial court merely directed defendant to follow the ninth commandment, "Thou shall not bear false witness against thy neighbor." A defamatory or demeaning communication is not necessarily a false communication. Cf. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420; (2005) ("The elements of a defamation claim are: (1) a false *and* defamatory statement concerning the plaintiff . . . .") (emphasis added).