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Michigan Supreme Court
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01/3/2020

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Murray, C.J., and Murphy and Camerson, JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-v-

KEITH ERIC WOOD,

Defendant/Appellant.

SUPREME COURT
NO. 159063
COURT OF APPEALS
NO. 342424
CIRCUIT COURT
NO. 17-24073-AR
DISTRICT COURT
NO. 15-45978-FY

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BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHERE THE TRIAL COURT PROPERLY DEFINED THE TERM "JUROR" AS USED IN MCL 750.120a, WERE THE PROCEEDINGS BELOW PROPER?

Trial Court, Circuit Court and Court of Appeals answered:	Yes
Plaintiff/Appellee answers:	Yes
Defendant/Appellant answers:	No

II. WHERE THE PROOFS REQUIRED THAT THE JURY FIND DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF WILLFULLY ATTEMPTING TO INFLUENCE SPECIFIC JURORS IN A SPECIFIC CASE, DID THE TRIAL COURT PROPERLY PROTECT ANY FIRST AMENDMENT RIGHTS APPELLANT MAY HAVE HAD?

Trial Court, Circuit Court and Court of Appeals answered:	Yes
Plaintiff/Appellee answers:	Yes
Defendant/Appellant answers:	No

III. WHERE THE TRIAL COURT FOLLOWED ALL APPLICABLE LAWS AND PROCEDURES, DID THE TRIAL COURT PROPERLY PROTECT APPELLANT'S DUE PROCESS RIGHTS?

Trial Court, Circuit Court and Court of Appeals answered:	Yes
Plaintiff/Appellee answers:	Yes
Defendant/Appellant answers:	No

RESPONSE TO APPELLANT'S "INTRODUCTION"

Appellant's opening salvo misses the mark. It poses the wrong question and relies on cases that neither support the wrong question nor shed any light on the correct question.

Appellant's "Introduction" engages in substitution. That is, it substitutes a more favorable question for Appellant than the question at issue. Appellant substitutes an examination of what constitutes a *jury* for the real question of who may be properly included within the term *juror* under the Juror Tampering statute, MCL 750.120a.

Despite Appellant's labeling of the statute as "Michigan's Jury Tampering Statute" (Appellant's brief at 1), the word *jury* only appears once in the statute, MCL 750.120a(3) in an interesting subsection where the term *juror* is qualified *–deliberating juror*—indicating the breadth of the unqualified use of the term *juror* throughout the remainder of the statute.

The distinction between the term *juror* and the term *jury* is a matter of substantial difference. In the *Yoder* case which underlies the present case, a jury was never selected because Appellant's criminal conduct so polluted the pool of jurors that District Court sent the jurors home. But that mere fact that the jurors summoned for the *Yoder* trial never became members of a *jury* has no relevance here. Just as many players show up for a chance to make a baseball team in the spring, the mere fact that they ultimately do not make the team does not mean they were never players. Appellant appears to stumble over the similarity of the spelling of *jury* and *juror*, where, for present purposes, those words are no more related than *player* and *team*.

Even if there was some greater connection between *jury* and *juror* or some cogent argument to connect the cases cited by Appellant regarding a *jury* to *juror*, the cases do not stand for the propositions posited by Appellant.

Appellant makes the bold assertion that "In Michigan, a person must be sworn as a juror in order to be a juror." Appellant's Brief at 1. Appellant cites two cases that do not discuss the issue at all. The claim in *People v Cain,* 498 Mich 108; 869 NW2d 829 (2015) was that the defendant was denied a jury trial because the jury was never sworn. That contention was rejected by the majority otherwise the conviction could not have been affirmed as it was uncontested that the jury was never properly sworn. Even still, had this Court said in *Cain* that

there is no jury unless it is sworn, that would not tell us anything about who falls within the term *juror* in MCL 750.120a.

Appellant's reliance on *Jochen v County of Saginaw,* 363 Mich 648; 110 NW2d 780 (1961) is equally off target. This time the substitution is *employee* for *juror*. The issue in *Jochen* was not whether the person injured on their way into the courthouse was or was not a *juror* it was whether or not the person was an *employee* for purposes of the Workmen's Compensation Act of 1956. The ruling was essentially that the individual was not an *employee* under the act. Neither on its face, nor through cogent argument has Appellant shown any reason this Court should place any reliance on *Jochen.*

Appellee has never alleged that the jurors Appellant sought to improperly influence were either employees of Mecosta County or members of a petit jury. They were jurors as contemplated by MCL 750.120a.

Appellant also asserts in his introduction that the government acted because the government disagreed with the content of his message. That is simply untrue. The government acted because the jury clerk alerted other authorities to Appellant's efforts to improperly influence the jury in the *Yoder* case. The government would have acted in equal measure had Appellant been an environmental advocate improperly advocating that jurors convict persons charged with environmental crimes as their civic duty to save the planet.

In final response to Appellant's introduction, there is no possible chilling effect from the holding in this case. The facts are unique. Appellant's actions were extreme. His intent was unequivocal. No one in Appellant's position would have any doubt they the conduct pursued was a clear violation of MCL 750.120a.

COUNTER-STATEMENT OF FACTS

A. Factual Background:

Andy Yoder, an Amish citizen of Mecosta County, was charged with three misdemeanors based on the illegal conversion of protected wetland on his property to farmland (TTR v I, p.134,

266). A pretrial was scheduled for the *Yoder* matter on November 4, 2015 (TTR V I, p. 197). The pretrial took place in the Mecosta County district court courtroom (TTR v I, p. 197). Defendant, though not a party to the action, appeared for that pretrial (TTR v I, p. 197; Ex. 2).

Defendant had become aware of the *Yoder* case and the pretrial conference through an "email blast" he received which discussed the criminal charge (TTR v II(b), p. 29). He testified that he did not know Mr. Yoder or his attorney personally (TTR v II(b), p. 29-30). After having received the "email blast" but before the November 4th pretrial, Defendant contacted Emily Grove, a reporter with the Big Rapids Pioneer, regarding the *Yoder* case, and wanted her to report on it (TTR v I, pp. 253-260; v II(b), p.33). Witness Grove testified that her conversation with Defendant was "probably ten to 15 minutes, which is typical when someone calls, I guess, and really wants us to pay attention to something" (TTR V I, p. 259, ln. 20-24). Defendant testified that the conversation with Ms. Grove only lasted 3 to 4 minutes and that he called the Pioneer because the *Yoder* case "piqued" his interest (TTR v II(b), p. 32, 62, ln. 16). Specifically, "it just interested me that the government would have jurisdiction on somebody's private property" (TTR v II(b), p. 63, lns. 2-3).

The *Yoder* trial was scheduled for the 24th of November 2015 in the Mecosta County Courthouse (TTR v I, p. 125). It was scheduled to begin at 9:15am (TTR vI, p. 125, 128). No other trials were scheduled for that date within the courthouse (TTR v I, p. 125). Defendant knew the *Yoder* trial was scheduled for that date (TTR vII(b), p. 33). At some point between 8:30am and 8:45am Defendant appeared outside the courthouse and began handing out what has been referred to as jury nullification pamphlets (TTR v I, pp. 127-128[1], Ex. 1).

[1] Witness Lyons testified that he began seeing jurors with the pamphlets in their hands at around 8:40am.

Defendant testified that he did not choose the date and time of the *Yoder* trial because he had any feelings about the case one way or another, but he only chose that date and time because he thought there would be a lot of people, and that he did not believe the trial would occur (TTR v II(b) pp. 35, 44).

The Pamphlet Defendant handed out is addressed to jurors, and titled "Your Jury Rights: True or False?" with the below caption, "What rights do you have as a juror that the judge won't tell you?" The pamphlet (see Attachment #1) alludes to, and sometimes flat out says, that judges and prosecutors will work together to keep juries in the dark regarding their 'rights.' The pamphlet goes into great detail advocating for jury nullification, and sums up the intent of the drafters by stating how "juries can protect the rest of our rights, simply by acquitting defendants charged with breaking bad law" (Attachment #1).

Witness Jennifer Johnson testified that she was summoned to appear for jury duty on that date and appeared for court approximately ten minutes early (TTR v I, p. 152). She parked in the parking lot past Elm Street and she saw "a gentleman standing in the public sidewalk, but right at the start of the sidewalk up to the door to the courthouse" (TTR v I, p. 153, ln. 14-16). She believed he was there for official purposes, either to direct traffic or for check in (*id* ln. 17-19). Ms. Johnson stopped in front of the person and "[w]e confirmed that I was here for jury duty. He handed me a pamphlet and pointed to the door (TTR v I, p. 154, ln 2-3).[2]

Witness Johnson could not remember the exact wording of the pamphlet, but remembered that "well, the first thing it said was that I had permission to disobey the judge's orders. At that point, I realized that whoever handed it to me probably was not there in any official capacity" (TTR v I, p. 155, ln. 9-12).

[2] Witness Johnson could not remember whether she told him she was appearing for jury duty or if he specifically asked whether she was a juror. Either way, he was made aware that she was was a juror (TTR V I, pp. 153-154).

Witness Theresa Devries testified that she too appeared for jury duty on November 24, 2015 (TTR v I, p. 161). She came in the same entrance as witness Johnson and met the same man. She testified that "I was coming up to the room and a gentleman approached me and said 'Are you here for jury selection?' I says, 'yes.' And he said—he handed me a pamphlet – and he says 'Do you know what your rights are for being a jury [sic]" (TTR v I, p. 163, ln. 6-9).

Witness James VanderWoude testified that he was also a juror summoned for duty that date, and that he too was handed a pamphlet by defendant. However, he could not remember exactly what was said (TTR v I, pp 170-172). Witness Vanderwoude testified that at least a third of his fellow jurors were also holding pamphlets when he later entered the courtroom (TTR v I, p. 176).

Witness Lisa Lenahan appeared on the same date for jury duty. She testified to seeing the Defendant[3] "at the top of the steps [to the courthouse]" (TTR v II(a), p. 14 lns. 3-5). Defendant came down to assist Ms. Lenahan as she was using a walker. Like Witness Johnson, witness Lenahan could not specifically remember whether Defendant asked her if she was reporting for duty, or if she simply told him. Somehow, though, he was made aware that she was there for jury duty (TTR v II(a), pp. 14-15). She further testified that the conversation regarding her reporting for jury duty came up at the same time Defendant handed her the pamphlet (TTR v II(a), p. 15).

Randy Erridge was another juror who testified that he reported for duty on the date of the *Yoder* trial (TTR vII(a), p. 20). He remembered the Defendant standing at the sidewalk. When approached, Mr. Erridge specifically remembered the Defendant asking him whether he was a

[3] Most of the jurors summoned to appear, including Ms. Lenahan, could not directly identify the Defendant in court as the person handing out pamphlets. However, all testified that there was only one person handing out pamphlets, Magistrate Lyons identified the person handing pamphlets as the defendant, and Defendant himself admitted that he was the only person handing out pamphlets that day.

juror. When Mr. Erridge responded in the affirmative, the Defendant handed him a pamphlet (TTR vII(a), p. 21, lns. 1-6).

Darren Nichols testified on behalf of the defendant. He was another juror who appeared for jury duty. His recollection was that Defendant approached him on the sidewalk and handed Nichols the pamphlet saying, "this has information in it, letting jurors know their rights and jurors; what they can and can't do, and say, and things like that" (TTR vII(b), p.7, lns. 16-23). Randall Vetter also testified for Defendant. He too was a juror who received a flyer from Defendant. His testimony was that defendant indicated to him, "Here is a flyer that describes your rights" (TTR vII(b), p. 19, lns. 15-16).

Therese Bechler was the deputy clerk for Mecosta County circuit court at the time of the incident. She came to work on November 24, 2015 and was confronted by the defendant who asked her if she would like a pamphlet and told her the pamphlets concerned juror rights (TTR v I, p. 178-179; ln. 19-21). Witness Bechler testified that she had concerns that the jury would be influenced or misdirected regarding their duties (TTR v I, p. 182). She took a copy of the pamphlet to Judge Peter Jaklevic (PPR v I, p. 182-183).

Witness William Allers testified that he too appeared for jury duty on the date of the incident. He saw Defendant on the sidewalk handing out pamphlets and specifically cut onto the grass in order to avoid having to have contact with him (TTR v II(b), p. 315).

Though several people had been handed the flyer, not a single Amish member of the community was found to be in possession of the pamphlet, despite the lobby of the courthouse being full with Amish citizens (TTR v 1, p. 134).

Defendant testified that the November 24, 2015 incident was the first and only time he passed those pamphlets out in public (TTR v II(b), p 44). When asked why he decided to choose the date and time of the *Yoder* trial to hand out the pamphlets defendant stated the following:

> ...I learned a really interesting fact that 95 percent of all criminal cases in the United States, they are pled out before they get to trial. And so there was a – there was a very high likelihood that the *Yoder* case was not going to go to trial, but then I also believed that there were going to be a lot of people around the courthouse...

For his part, Defendant testified that he had no interest in influencing any jurors, and that when he handed out the pamphlets that day he said "Here's jury rights information you should know about" (TTR vII(b), p. 39, ln. 8). He testified that his goal was to "educate as many people in the public as possible about juror rights" (TTR vII(b), p. 43, lns. 6-7). Defendant testified that he had not even heard about these Jury Rights pamphlets until after the *Yoder* November 4th pretrial (20 days before trial) (TTR vII(b), p. 34, lns. 22-24). Later, he testified that though he had never given the pamphlets out in public before, "I had given them to people like clerks if the issue would arise, my pest control guy; I work from home, and he would come at least once a-month and we-- -- we discussed that" (TTR vII(b), p. 43, lns. 15-19). Defendant testified, during cross examination, that he did not print out the pamphlets, that he ordered several of them online and they were delivered to his home (TTR vII(b), p. 67).

B. Procedural Background:

On November 24, 2015, Appellant was charged with one count of Obstructing Justice and one count of Jurors- Attempting to Influence. Appellant moved to dismiss the charges against him. Relevant to this appeal, Appellant argued that the misdemeanor Attempting to

Influence Jurors charge was invalid, as the persons summoned to appear for court in the *Yoder* trial were not yet jurors because they had not sworn an oath or been empaneled. In addition, Appellant argued that dismissal was appropriate under First Amendment grounds similar to those argued in his current appeal. A hearing was held on March 24, 2016. The trial court granted Appellant's motion in regard to the Obstruction of Justice charge (Motion Hearing, March 23, 2016, p. 39). And denied Appellant's motion to dismiss the misdemeanor charge of Attempting to Influence a Juror[4] (Motion Hearing, March 23, 2016, p. 37). In regard to the first amendment issues, the trial court took the arguments under advisement until sufficient facts and testimony were placed on the record to make a decision (p. 39).

Appellant requested—and was granted—a stay of the proceedings to appeal the trial court's decision in regard to the misdemeanor charge. Appellant filed an interlocutory appeal with the Mecosta County Circuit Court, arguing that the trial court erroneously defined the word "juror." That request for leave to appeal was denied. Appellant requested leave to appeal to the Michigan Court of Appeals, briefing the same issue. That request for leave to appeal was denied. Appellant requested leave to appeal to this Court, briefing the same issue. That request for leave to appeal was denied. The case was remanded back to the district court, and a trial was held on May 31- June 1, 2017.

After the People rested their case in chief, Appellant orally renewed his prior motion to dismiss based on his First Amendment claims. The court, in its reasoning, pointed to witness testimony that Appellant asked if the witnesses were jurors, and made the following finding of fact in her decision "it appears to me that he was targeting jurors that were coming that day based on some of the testimony that's been...presented here today" (TTR v II(a), p. 40). The trial court

[4] The official charge "Juror- Attempting to influence," is also sometimes referred to as "jury tampering" by the trial court and parties.

discussed the compelling interest in making sure both parties to an action have a fair and impartial jury then went on to indicate "it is also very clear to me that [the defendant] was very interested in [the *Yoder*] case and knew that that case was set for trial that day (*id*, p. 40). Based, in part, on her factual findings that the Appellant was specifically targeting jurors in the *Yoder* case, rather than generally informing the public of a particular viewpoint, the Court denied Appellant's motion.

After trial the jury found Appellant guilty of Attempting to Influence a Juror. Appellant now appeals that conviction.

STANDARD OF REVIEW

Decisions regarding constitutional interpretations are reviewed de novo (*People v. Hall*, 499 Mich. 446, 452 884 N.W.2d 561 (2016)). Likewise, Appellate courts review questions of statutory construction de novo (*Bank of America, NA v. First American Title Ins. Co.*, 499 Mich. 74, 85; 878 N.W.2d 816 (2016)). Statutes are presumed to be constitutional unless the contrary is shown (*Phillips v. Mirac, Inc.*, 470 Mich. 415, 442, 685 N.W.2d 174 (2004)). A trial court's factual findings "shall be given to the special opportunity of the trial court to judge the credibility of the witnesses" and shall be reviewed only to the extent that they are clearly erroneous (*People v. Hartwick*, 498 Mich. 192, 214; 870 N.W.2d 37 (2015)).

"The test for determining the sufficiency of the evidence in a criminal case is whether the evidence, viewed in the light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 285 N.W.2d 284 (1979); *Jackson v Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *People v*

Wolfe, 440 Mich. 508, 515, 489 N.W.2d 748 (1992), articulated the governing standard for reviewing sufficiency claims:

> [W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court 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."

(entire quote from *People v Nowack,* 462 Mich 392, 399-400; 614 NW2d 78 (2000).

LAW AND ARGUMENT

I. THE COURT OF APPEALS AND THE TRIAL COURT PROPERLY INTERPRETED THE TERM JUROR IN MCL 750.120a

Appellant maintains his rather remarkable position that the broad term "juror" as used in MCL 750.120a should only apply to persons already sworn as juror's in a case and not to juror's summoned to serve. Appellant apparently believes the legislature intended to allow jury tampering so long as it was done sufficiently early in the process. Appellant's limiting construction of the statute was neither the intent of the legislature nor the import of the words enacted into law. The Court of Appeals properly ruled on this issue and should be affirmed.

A. Trial Court's definition of the word juror was consistent with the law.

The issue presented here is whether a person is guilty of a crime under MCL 750.120a(1) when he seeks to sway the opinion of a juror in a specific case after the juror has been summoned to appear for court, but before she has taken her juror "oath." The statute in question is MCL 750.120a(1):

> A person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor

The trial court provided the following definition of juror: (TTR v II(b), p. 145):

> The word "juror" includes a person who has been summoned to appear in court to decide the facts in a specific trial.

First, Appellant has objected to the definition of the word juror as including a person summoned to jury duty. Second, Appellant has complained that the trial court should have allowed him to argue that since there was no trial, there were no jurors. These are, in essence, the same argument wrapped in different words. The question to be decided is whether a person can be a juror when they have not yet sworn a juror oath. If they can, then Appellant's argument was properly excluded by the trial court.[5]

In determining legislative intent, the plain language of a statute must be analyzed as a whole, "and understood in its grammatical context" (*Potter v. McLeary*, 484 Mich. 397, 411, 774 N.W.2d 1 (2009)). Importantly, "[a] statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained" and "interpreted in a manner that ensures that it works in harmony with the entire statutory scheme" (*id*, at 11). "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written" (*Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236, 596 N.W.2d 119 (1999)).

MCL 750.120 and MCL 750.120a must be read together. It is within these two statutes we see the intent of the legislature. In MCL 750.120, the legislature discusses the illegality of a person "summoned as a juror" to accept bribes (MCL 750.120). It is important to note that the

[5] Whether a person qualifies as a juror is a question of law. It is well settled that juries are to decide questions of fact, not of law (*Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 513 N.W.2d 773 (1994)).

legislature does not use the restrictive terms Appellant seeks to inject into the language of MCL 750.120. The legislature does not refer to people being summoned as "potential" jurors, "prospective" jurors, members of a "jury pool," or "future" jurors. Under MCL 750.120, people summoned to appear for court are "jurors."

Statutes are designed to provide notice to potential actors that certain acts are criminal. The language "summoned as a juror" is provided to give notice to any juror that if they accept a bribe regarding a case after they are summoned for jury duty, they are guilty of a felony. Whereas, MCL 750.120a provides notice to individuals who wish to influence jurors, that any attempt to affect the decision of a juror in a specific case, (whether they have been summoned, have sworn oaths, or are currently deliberating), is a misdemeanor under the law. This reading of the statute does not render the words "summoned as a" superfluous as Appellant argues.

Through his analysis, Appellant asks this court to define the word "juror" as used in MCL 750.120 as being different from the word "juror" as used in MCL 750.120a. This assertion is made despite the fact that the legislature, in both statutes, used exactly the same word. The word "juror" is used in MCL 750.120a with and without qualifiers or restrictors. Under the law, it is illegal to attempt to influence the decision of a "juror" under MCL 750.120a(1).

The legislature did not add any qualifying or restricting language to the word "juror" in subsection (1) of the statute. The word used is simply "juror." However, later in the same statute, it states that "Subsections (1) and (2) do not prohibit any *deliberating* juror from attempting to influence other members of the jury by any proper means" (MCL 750.120a(3); *emphasis added*). In this subsection, the legislature added a restricting word which narrowed the definition of juror to one who is *deliberating.*

The word "deliberating" was clearly placed into the language so to avoid making it a crime for *deliberating* jurors to attempt to sway one another. This is exactly the point of adding such restricting language next to the word juror, and demonstrates that the legislature understood how, and was perfectly capable of, adding restricting language to differentiate jurors at different points in time. The fact that the legislature chose not to add any such restricting language in regard to attempts to influence jurors demonstrates a desire for all permutations of jurors to be protected against undue influence. The legislature did not criminalize attempts to sway a "sworn" juror or a "deliberating" juror or a "summoned" juror. The legislature made it illegal to attempt to sway the opinion of *any* juror outside the courtroom.

The restrictive language in MCL 750.120a(3) (ie *deliberating*) must be read in contrast to the language in subsection (1) which is *less restrictive* "a juror in any case" (*id*). If the legislature wished to limit the criminal act of attempting to influence a juror to mean only "after the juror has been sworn," it would have used more restrictive language, as it did later in the same statute. It would have prohibited the attempt to influence a "sworn" juror, or a "deliberating" juror. Instead, the legislature chose to provide the completely unrestricted word "juror," without the narrow qualifications Appellantt now seeks to have inserted into the law.

Though the criminal statute itself does not provide a definition of "juror," the legislature has used that term many times in contexts relevant here. The Revised Judicature Act, MCL 600.1300ff, establishes the method by which jurors are selected for jury service. An initial list is obtained from the Secretary of State, gleaned from driver's license and personal identification information and limited to the jurisdiction of the court. From that point persons are selected to receive juror qualification questionnaires. The jury board conducts a preliminary screening for qualification of persons referred to in the preliminary screening stage as "prospective jurors"

(MCL 600.1320(1)). Those who qualify through preliminary screening provide the names from which a "second jury list is created" (MCL 600.1320; 600.1321(1)).

Once the second list is created, all persons on the second list receive the statutory appellation of "jurors" (MCL 600.1321(2)). Persons who are included in each panel drawn from the second list are referred to as "jurors" (MCL 600.1322).

The jury board has the duty "to select jurors for jury service" (MCL 600.1324). The referenced "jurors" are clearly all the persons in a jury panel rather than merely those who are ultimately chosen to serve on a given case:

> "Each such order shall contain all of the following information:...
>
> "(b) The number of jurors to be selected for a panel." MCL 600.1324(1)(b).

The usage of the term "juror" continues throughout the remainder of this portion of the Revised Judicature Act to refer to all members of a panel. In fact, the jurors who appeared for court in the District Court case relevant here appeared in response to summons sent out as commanded by MCL 600.1332 which establishes the duty to "summon *jurors* for court attendance...." (*emphasis added*).

Appellant seeks to limit the word juror and construct its meaning so restrictively as to frustrate the entire purpose of the involved statute. According to his definition of "juror," a person who accosts individuals summoned for jury duty, in order to sway their opinion regarding a particular case, is not acting in violation of the law so long as the jurors have not yet taken their oath. The clear purpose of the jury tampering statute is to maintain fair, orderly, and proper trials, where the jury is provided information and instructions within the courtroom, by parties adhering to the rules of evidence and other procedural safeguards. A reading of the statute as restrictively as attempted by the Appellant would negate any ability of the law to achieve its goal. By way of

example, according to Appellant's reading, before jury selection has begun on a particular case, a victim of a crime may seek out and speak with the entire jury pool regarding the facts of a specific case, thereby tainting the entire pool, but no crime has been committed.

To read the law as proposed by Appellant would abrogate the courts of any ability to insulate juries from improper third-party contacts. The Courts have continuously stressed, in multiple contexts, the need to keep juries, and individual jurors, insulated from outside influences, so they may render a true and just verdict (*Skilling v. U.S.*, 561 US 538, at 378, 130 S.Ct. 2896 (2010); *People v. Budzyn*, 456 Mich. 77, 566 N.W.2d 229 (1997)).

Appellant quotes the dissenting position in *People v. Cain,* 498 Mich. 108, 139, fn. 6 (2015) to support his opinion. The Supreme Court's ruling in *Cain* did not involve jury tampering, or when a person can be considered a "juror" under MCL 750.120a; rather it addressed whether a defendant was denied a fair trial when the proper oath was never read to the jury. The Court ruled that even when the proper oath was not read, the defendant had still been afforded a fair trial (*id*). In *Cain*, after a jury was selected, the Circuit Court clerk mistakenly read the oath provided before jury voir dire, rather than the proper oath used to swear in the jury.[6] No one objected to the use of the improper oath until after the defendant was found guilty on all counts, and his conviction was appealed (*id).*

The Court of Appeals overturned the conviction, stating that since the jury was not properly "sworn in" there was no jury, and the conviction could not stand. The Supreme Court disagreed and found that there was an error, but that the error was harmless. The Court specifically stated that "[o]ur review of the record in this case reveals that the error of failing to

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[6] The oath administered was the promise to answer questions truthfully, rather than the oath to render a verdict "only on the evidence introduced and in accordance with the instructions of the court" as required under MCR 2.511(H)(1) or to deliver a verdict "according to the evidence and the laws of the state" as required under MCL 768.14.

properly swear the jury did not undermine the proceedings with respect to the broader pursuits and values that the oath seeks to advance" (*Cain*, 498 Mich. 108, 122 (2015)).

Appellant faults the trial court for not addressing the *Cain* ruling, however the ruling is not relevant to this case. Harmless Error was found by the Supreme Court even when the jury had not been sworn with the proper oath. Even without the proper oath, the jurors were not defrocked, the jury was still the jury - the conviction stood.[7] More importantly, the ruling does not address the definition of juror as it applies to MCL 750.120a. It discusses the importance of having a sworn "jury" in deliberation of a trial, but does not seek to define a "juror."

Appellant further cites a case addressing workman's compensation law (*Jochen v. Saginaw*, 363 Mich. 648 (1990)). In *Jochen*, the Plaintiff/Appellee had been summoned for jury duty, and injured herself inside the courthouse while reporting for service (*Jochen*, at 663-664). The issue before Supreme Court was whether a person summoned for jury duty qualified as a county "employee" under the Workmen's Compensation Act (*id*; C.L.S. 1956, Sec. 411.7). Justice Souris based his opinion on the definition of "employee" under the Act and found that since she was selected before a determination on her qualifications for service, she did not qualify as an "employee" (*Jochen*, at 650).

It is important to note that the Opinion in *Jochen* centered on whether the plaintiff was an "employee" as defined under workman's compensation law. It had no bearing on whether she qualified as a juror under the Michigan Penal Code. Much of the reasoning in Justice Carr's Concurring Opinion discussed the relationship of a juror being compulsory, as opposed to an employer/employee relationship, which is consensual. "One who is summoned for such duty has

[7] If anything, the ruling in this case cuts against Defendant's argument.

no option other than to comply with the mandate served on him...The ordinary incidents pertaining to the relationship of employer and employee are not present." (*id* at 664).

In this case, involving a criminal charge for attempting to influence the decisions of a juror, we are not analyzing whether a juror (under any definition) qualifies as an employee. To the contrary, the only issue is whether the Appellant attempted to influence a juror's decision in a specific case. Appellant's definition of juror is so restrictive that the People have found no case law—in any state—dealing with jury tampering statutes (or the common-law form of embracery), which would agree with his narrow reading.

In contrast, the legal disinclination to draw a line between jurors who have officially taken their oaths, and jurors who have not yet been sworn in, is manifested in *Honey v Goodman*, 432 F2d 333 (CA6 1970), discussed below. In that case the defendant and his cohorts mailed some 1,200 letters to an entire community specifically addressing an upcoming jury trial. Though that case addressed the issues as they relate to the common-law crime of embracery, the reasoning, that a person's criminal responsibility in attempting to influence a juror is not restricted to include only after the juror has been sworn, is still sound. *Turney v. Pugh*, 400 F3d 1197 (CA9 2005), involved jury tampering designed to include people summoned for jury duty.[8]

Finally, as pointed out by the trial court in her opinion on the issue. Black's Law Dictionary, fourth edition defines a juror as not simply being those who have sworn an oath, but also including those "selected for jury service." Further, Black's Law Dictionary, tenth edition, provides the same wider definition of juror as being more than just a sworn juror (Motion Hearing, March 23, 2016, pp. 37-38). Courts may, in deciding the definition of otherwise

[8] See also: *United States v. Heicklen*, 858 F. Supp. 2d 256 (2012), where the court decision turned on whether Defendant sought to influence juror on a specific case, not on whether the jurors were yet sworn.

undefined terms, consult dictionary definitions (*Koontz v. Ameritech Services, Inc.*, 466 Mich. 304, 312, 645 N.W.2d 34 (2002)). The Court of Appeals also found dictionary definitions to include persons summoned for service even though they had yet to be seated or sworn.

Under statutory construction, general-consensus of case-law involving juror tampering and embracery charges around the country, the plain meaning of the word, and even dictionary definitions, the conclusion is straight-forward. People who are summoned to appear to court in order to decide the facts of a specific trial are jurors, regardless of whether they have been sworn. As discussed above, even *Cain*, the case Appellant complains was not properly cited by the trial court, ruled that the proper oath need not necessarily be sworn in order for a jury to be a jury.

The Court of Appeals properly found that the term "juror" as used by the legislature in MCL 750.120a clearly applied to the persons summoned for jury duty, though no jury was ever empaneled. The reasoning of the Court of Appeals was and is appropriate. The Court of Appeals should be affirmed.

B. Defendant attempted to influence a juror, regardless the definition of 'juror'.

As was first stated by Supreme Court Justice Holmes almost a century ago, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (*Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado*, 205 US 454 at 462, 27 S.Ct. 556 (1907); see also: *Skilling v. U.S.*, 561 U.S. 358 (2010). The importance of having a fair and impartial jury, who decides a case based solely on the evidence presented at trial is based on the idea that "our system of law has always endeavored to prevent even the probability of unfairness" (*In re Murchison*, 349 US 133 at 136, 75 S.Ct. 623 (1955);

see also: *Grievance Adm'r v. Fieger,* 476 Mich. 231, 719 N.W.2d 123 (2006); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 115 S.Ct. 2227 (1999)). Appellant's actions on November 24th 2015 were specifically designed with the intent to circumvent the justice system, and the ideals of a fair and unbiased jury.

This case does not revolve around whether the Appellant tampered with a juror after they have taken an oath. The issue is whether Appellant "willfully *attempts to influence the decision of a juror* in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case" (MCL 750.120a(1); *emphasis added*).

When Appellant approached separate members of the jury panel summoned to appear for jury duty, asked whether they were jurors in the case, then handed them the flyers, he was attempting to influence the decisions of jurors in a specific case. It is irrelevant whether these people were sworn jurors at the time the Appellant handed them the flyers. It is irrelevant whether a trial ended up taking place after Appellant's actions. The issue is whether Appellant acted with an intent to sway the opinions of jurors. Regardless the status at any given moment, Appellant attempted to influence at least two juror's decisions, knowing that they were there for a specific trial, hoping these members of the venire would be chosen for the petit jury to decide on a specific matter. The statute makes no distinction between a person who is successful in their attempt, and a person who is unsuccessful. In the end, the only question posed is whether he attempted to influence a juror. Appellant selected these people to attempt to influence because they were already in the subset of persons from whom the ultimate triers of fact would be selected.

To argue that he could not be guilty of "attempting" to influence a juror because the people he was attempting to influence were not yet jurors is disingenuous. Imagine the office of

a prosecutor receiving a jury list for a specific criminal trial, then contacting the jurors within that list (before they have appeared in court), to discuss how often courts refuse to admit evidence of a defendant's criminal history, or how courts will never tell a jury when defendants have failed polygraph tests. It would be difficult to imagine that same prosecutor later saying that he was not attempting to influence a juror, because the people on the jury pool list were not yet jurors. It would be clear, from the context of his actions, that despite the status of the people at the time of the phone call, an attempt was made to influence the decisions of jurors in a specific case.

Appellant's action, which was made with the intent to influence the decision of jurors, was complete before the jury was sworn in. At the point he completed this action, it was too late for Appellant to abandon the course of conduct and absolve himself from criminal liability. His actions put a cause into motion that could have, and was intended to, influence jurors in a specific case. Regardless of the line which might be drawn as to when a person becomes a juror, the people approached by Appellant would be the ones to become jurors. More important to criminal liability, Appellant knew this and acted with the specific intent to affect their opinions.

The Michigan legislature has created a law that criminalizes any attempts to influence a juror's decision, rather than dictating that the act is only illegal when the attempt is successful (MCL 750.120a(1)). The decision to avoid looking into the mind of a juror during her decision-making process is consistent with the general rule that jurors are not to be asked to impeach their own verdicts (*Brillhart v. Mullins*, 128 Mich.App. 140, 339 N.W.2d 722 (1983)). By legislating based on the intent of an outside individual to influence a juror, rather than the status and internal mental workings of the jurors themselves, the legislature has created a law which requires a factfinder to decide on the intent of the defendant.

Appellant argues that the people summoned to appear at trial could not have been considered jurors for the *Yoder* trial, because their summons' did not state which trial they were appearing for (*Defendant's Brief*, p. 29). However, whether the *jurors* knew which trial they were appearing for makes no difference. The criminal charge does not look into a juror's intent, it looks only to Appellant's intent. Appellant knew the *Yoder* case was the only one scheduled for the day he was there and, by his actions, attempted to sway the opinions of jurors in the *Yoder* case, whether they knew they were jurors in the *Yoder* case or not.

In the end, the issue is whether Appellant took specific actions with the intent to influence the decisions of jurors in a specific matter. It must be stressed that the People are <u>not</u> attempting to construe this statute so broadly as to encompass any speech that might tend to influence any person summoned for jury duty. Generally speaking, public dissemination of information and ideas has always been the bedrock of this Country, and the very foundation of freedom of speech. Providing information which "may" or even "does" influence a particular juror in a case is not illegal, and this office has never argued that it is, or even should be. Criminal behavior occurs when a person crosses the line by making a specific attempt to corrupt a specific juror and sway their opinion regarding a specific case.

By looking at the intent of a defendant, the law separates the criminal act of juror tampering from the noncriminal act of generally disseminating information and ideas. The jury in this case was tasked with making the factual decision as to whether Appellant's intent was to sway a juror regarding the decision in a specific case, or simply to "inform" the public of what he believed to be a right to jury nullification. In the end, his jury decided the former.

The Court of Appeals properly resolved this issue and should be affirmed.

II. THE FIRST AMENDMENT WAS NOT VIOLATED WHEN MR WOOD WAS ARRESTED, CHARGED, AND CONVICTED FOR ATTEMPTING TO INFLUENCE THE DECISION OF A JUROR

The law has long recognized that there is no First Amendment protection for a person attempting to tamper with jurors. "In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote" (Justice Frankfurter concurring *Pennekamp v State of Florida*, 328 U.S. 331, 366 (1946)). In this case, with the facts and argument presented, there can be no valid First Amendment claim. Appellant concedes that MCL 750.120a, as written, is constitutionally valid. As agreed by the parties, if it were proven that Appellant willfully attempted to sway the opinions of jurors in a specific trial outside the proceedings in open court, he would be guilty of a misdemeanor. Therefore, there would be no need for a First Amendment analysis, as there is no First Amendment protection for a person attempting to tamper with jurors (*Pennekamp*, supra).

On the other hand, **if** Appellant had not attempted to influence the opinions of jurors in a specific case (ie simply broadening public discourse and enlightening his fellow citizens), then the necessary element of intent would not have been met. Appellant would have been acquitted by either jury or directed verdict, as the evidence would have been insufficient to support a conviction. No First Amendment analysis would be necessary for purposes of a criminal prosecution because Appellant would have been (factually) innocent of the charge against him.

A. THERE WAS SUFFICIENT EVIDENCE TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

The issue, then, is not that of constitutional interpretation, but whether the People satisfactorily proved Appellant's attempts to sway the decisions of jurors in a specific trial. The elements of the crime, as expressed in the jury instructions, were as follows: (TTR v II(b), pp 144-145):

> First, that Jennifer Johnson and/or Theresa DeVries was a juror/were jurors in the case of *People v. Yoder*.
>
> Second, that the defendant willfully attempted to influence that juror by the use of argument or persuasion.
>
> Third, that the defendant's conduct took place outside of the proceedings in open court in the trial of the case.
>
> A person acts willfully when he or she acts knowingly and purposefully.

To prove the elements, the People presented, *inter alia,* the following evidence, that must be viewed in the light most favorable to the prosecution, *People v Nowack, supra.*:

1. Appellant showed a pretrial interest in the Yoder case, calling the local newspaper to develop interest in the Yoder case and engaging in an extended conversation with a reporter about the case.

2. Appearing in court for the Yoder pretrial, the only case on the docket at the time Appellant appeared, where Appellant learned the trial date for the Yoder case.

3. Appellant ordered the FIJA pamphlets specifically for the purpose of handing them out at the Yoder trial.

4. Appellant handed out the pamphlets during the time the jury was arriving for the Yoder trial. This was the only time and place that Appellant ever passed the pamphlet out and the Yoder trial was the only jury trial on any court docket that day.

5. Appellant specifically asked some jurors if they were jurors before giving them the pamphlet while with others he just told the jurors as they approached the courthouse that he had information about juror rights that jurors needed to know. Appellant did not give pamphlets to persons who were clearly not jurors, including the large number of Mr. Yoder's fellow Amish who wore traditional clothing.

6. The content of the pamphlet was clearly anti-government and could only be applied to encourage the jurors to acquit Yoder. The content thus indicating Appellant's intent.

7. Appellant testified to his own motive when on cross examination he was asked what he didn't like about what was going on in the Yoder case, Appellant stated, "Well, it talked about a wetlands violation on private property, it was an Amish man, and something to do with DEQ. So I was interested that – it just interested me that the government would have jurisdiction on somebody's private property. So yes, it did pique my interest." Obviously, Appellant did not think the government should be able to tell a private citizen what he could or could not do with his private property and Appellant wanted the jury to overrule Michigan's wetlands laws.

As presented to the jury in the first two elements, the statute required proof of an intent to influence jurors in the *Yoder* case (TTR v II(b), pp 144-145). These elements guaranteed that otherwise innocent—and constitutionally protected activities—were not, and could not, be criminalized. The jury, the finders of fact in this case, decided that Appellant did make such an attempt. This factual finding should only be overturned if it is clearly erroneous (*People v. Hartwick*, 498 Mich. 192, 214; 870 N.W.2d 37 (2015)). Appellant attempts to

circumvent the jury's factual conclusion that he willfully attempted to influence a jury by creating a false perception of constitutional implications for his criminal act.

B. WHERE, AS HERE, SPEECH IS AN ACTION, DEFENDANT HAS NO FIRST AMENDMENT PROTECTION.

The law is clear that "[w]here speech is an action intended to instigate an illegal act, the *context* rather than the content can become the issue" (*People v. Cervi*, 270 Mich.App. 603, 621, 717 N.W.2d 356 (2006); *emphasis added*). In *Cervi,* the defendant appealed the denial of his motion to quash one count of using a computer to communicate with someone he believed was a minor for the purpose of committing a CSC III (*Cervi,* at 611). His argument was that the charge violated his First Amendment right to freedom of speech. The court denied defendant's appeal based on the well settled law that "words themselves may be overt acts under some circumstances, in fact overt acts sufficient to constitute crimes" (*id*, Quoting: *People v. Coleman*, 350 Mich. 268, 280, 86 N.W.2s 281 (1957)).

There is no violation of either the Michigan Constitution, or the U.S. Constitution, when a law is directed toward conduct, and statements are "swept up incidentally within the reach of a statute directed at conduct rather than speech" (*Burns v. City of Detroit (On Remand)*, 253 Mich.App. 608, 623-624, 660 N.W.2d 85 (2002); Quoting: *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538 (1992); internal quotations omitted). In this case, it was Appellant's conduct which was criminal, not the pamphlet.

Despite Appellant's argument, the People have never claimed the jury nullification pamphlet--or its contents--to be illegal. Neither the pamphlet, nor any words or ideas expressed within, are criminal and no such allegation has been made. Likewise, it has never been asserted by the People in this case that distribution of the jury nullification pamphlet is illegal (whether it

be by electronic communication, mail, or in a public street). Like every other case that involves speech incidentally within the reach of a statute, it is the context of the communication--in conjunction with a defendant's action's--which is at issue (*Cervi*, supra). Within the context of the testimony presented at trial, the jury nullification pamphlet was evidence of Appellant's intent in his attempt to influence jurors in the *Yoder* trial.

Even without a countervailing constitutional right, freedom of speech is not absolute (*Konigsberg v State Bar of California,* 366 U.S. 36, 50-51 (1961);[9] *Terminiello v City of Chicago,* 337 U.S. 1, 4-5 (1949)). The Hatch Act's limitation on political activities by certain governmental employees has been repeatedly upheld (*United Public Workers v Mitchell,* 330 U.S. 75 (1947), *Civil Service Commission v National Association of Letter Carriers,* 413 U.S. 548 (1973), *Bush v Lucas,* 462 U.S. 367 (1983)). So called "fighting words," among others, have never been protected speech (*Chaplinsky v New Hampshire,* 315 U.S. 568 (1942)).[10] A First Amendment defense was unavailing in a prosecution for burning a draft card in *United States v O'Brien,* 391 U.S. 367, 376-377 (1968).[11]

C. THIS CASE IS NOT ABOUT SPEECH THAT WAS AN END IN ITSELF.

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[9] *Konigsberg,* at 50-51 "general regulatory statues [state bar admission at issue], not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass...."

[10] *Chaplinsky,* at "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. "

[11] *O'Brien,* the statute prohibited any destruction of a draft card. Defendant claimed his actions were political speech (like flag burning) the court said "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element of O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien,* 391 U.S. at 376-77. The *O'Brien* doctrine has been applied for many years. See *Turner Broadcasting System v FCC,* 512 U.S. 622 (1994).

Appellant wrongly claims that the mere use of speech to commit a crime allows him to use the First Amendment as a shield from prosecution of his criminal acts. The United States Supreme Court, in its most recent statement on the issue, said that "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Packingham v North Carolina,* ____ US ____; 137 S.Ct. 1730, 1737; 198 L.Ed.2d 273 (2017).

MCL 750.120a is best understood by reading the entire statute, not merely the subsection under which Appellant was convicted. This is not a statute designed to punish speech. Rather, the statute codifies common law embracery and obstruction of justice as it relates to improper efforts to influence jurors. It is divided into subsections to distinguish between the relative severity of the actor's conduct, not object of the actor's conduct.

Consistent with the language of *Packingham,* above, the statute punishes the attempt to willfully influence jurors outside the proper procedures in court as a misdemeanor when the means by which the offense is committed is, in the terms of the statute, "by (means) argument or persuasion..." MCL 750.120a(1). Clearly "argument or persuasion" are not the offense proscribed by the statute, they are merely the means by which offenses under subsection (1) are committed.

This understanding is further validated by reading subsection (2) where the statute repeats the words of the conduct proscribed, "A person who willfully attempts to influence the decision of a juror in any case" but distinguishes the misdemeanor in subsection (1) from the felony in subsection (2) in regards to the severity of the means when the statute says "by intimidation..." MCL 750.120a(2). Punishment is further enhanced by subsection (2)(a)-(c) as the seriousness of the case in which the interference is attempted increases and the seriousness of the means by which the interference is attempted increases.

A fair paraphrase of MCL 750.120a is "A person who willfully attempts to influence the decision of a juror in any case, other than as a part of the proceedings in open court is guilty of a crime. If the person only used argument or persuasion, the person shall be punished by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." "Argument or persuasion" are not the crime punished, they are merely the means which the offense was committed, a means which the legislature determined mitigated criminal liability.

Appellant raised only an "as applied" challenge to his conviction. The resolution of this case in regard to all of Appellant's arguments is incredibly fact specific. And in light of the facts presented, as found by the Court of Appeals, an overbreadth claim simply has no place here.

The specifics of this case take it out of First Amendment protections. As is demonstrated further below.

There is no doubt that, as a general rule, "handing out leaflets in the advocacy of a politically controversial viewpoint...is the essence of First Amendment expression," *McCullen v Coakley,* ___ U.S. ____; 134 S.Ct. 2518, 2536 (2014), even this form of First Amendment activity is not unlimited. Under varying tests the Supreme Court has found conduct, such as Appellant's in this case, unprotected by the First Amendment.

In *Schenck v United States,* 249 U.S. 47, 51-52 (1907), applying a clear and present danger test, the court upheld an Espionage Act conviction of an individual who passed out circulars encouraging insubordination in military service. The court noted that the same conduct may be protected "in many places and ordinary times...[b]ut the character of every act depends upon the *circumstances* in which it is done..." (*Schenck* at 51-52; *emphasis added*). Freedom of speech would not protect one from shouting "fire" in a crowded theater, the court stated, because of the clear and present danger. Likewise, Schenck's targeting of persons called and accepted for

military service, created a clear and present danger of the insubordination advocated, therefore, the nature of the speech did not preclude the prosecution.[12]

A variant of the clear and present danger test was applied in *Brandenburg v Ohio*, 395 U.S. 444 (1969) where the court reversed the convictions of Ku Klux Klan members for their advocacy of violent overthrow of the government. The convictions arose out of speeches made by Klan members that were made at rallies under circumstances where the Klan members to whom they spoke were in no position to take immediate action. As well, the content of the speeches were conditional, that is, the speakers only advocated armed insurrection if at some point in the future the government did not address their concerns. The court found the behavior to be "mere advocacy." The holding was simply that the State could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg* at 447).

Here, Appelant argues that his criminal conviction amounts to an unconstitutional "content-based" application of the jury tampering statute. To support his position, Defendant selects a quotation from *United States v. Alvarez*, 567 US 709; 132 S.Ct. 2537 (2002).

In *Alvarez*, a defendant was convicted under the "Stolen Valor Act," a Federal statute which criminalized a person falsely claiming the receipt of military decorations (*Alvarez*, at 2539). That defendant challenged the Act as being content-based suppression of pure speech (*id* at 2543). The Government defended the Act as being necessary to preserve the integrity of

[12] The clear and present danger test, though not always used, has not been completely abandoned. Liability for damages on the part of leaders of black protestors was circumscribed by the clear and present danger each presented in encouraging unlawful conduct in *NAACP v Claiborne Hardware, Co.*, 459 U.S. 886 (1982). "The First Amendment does not protect violence....No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." Id at 916-917.

military decorations and that "false claims have no First Amendment value in themselves" (*id, supra*). The Court disagreed with the government, stating that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar" (*id* at 2544, 717). Among those "historic and traditional categories" the Court included "speech integral to criminal conduct" (*id*). The Court ruled the Act did not fall under any of these categories, and was therefore unconstitutional (*id*).

This case is entirely distinguishable from *Alvarez* because there has been no allegation that the jury tampering statute is in violation of the First Amendment. The "speech" Appellant used to commit his crime is what has historically been considered "speech integral to criminal conduct" (*Alvarez, supra*). There can be no comparison between this case and the *Alvarez* matter. Here, Appellant used speech to commit a crime. In *Alvarez* the crime was speech.

Any question of the constitutionality of Government action based on the use of a criminal statute must first begin with a simple question: whether the statute is being challenged on its face, or as applied by the government actors (*In re Forfeitire of 2000 GMC Denali Contents*, 316 Mich.App. 562, 569, 892 N.W.2d 388 (2016)). Which challenge a party uses changes the nature of the analysis (*id*, supra). "When faced with a claim that *application* of a statute renders it unconstitutional, the Court must analyze the statute 'as applied' to the particular case." (*Keenan v. Dawson,* 275 Mich.App. 671, 680, 739 N.W.2d 681 (2007), Quoting: *Crego v. Coleman,* 463 Mich. 248, 269, 615 N.W.2d 218 (2000)).

Since Appellant seeks to challenge the application of the statute, the issue becomes whether the statute was applied in an unconstitutional manner (*Dawson*, supra). "Although advocacy of jury nullification could no more be flatly forbidden than advocacy of Marxism,

nudism, or Satanism, we cannot think of a more reasonable regulation of the time, place, and manner of speech than to forbid its advocacy in a courthouse" (*Braun v. Baldwin*, 346 F.3d 761 (2003)).

The Michigan statute in question is written as follows:

> A person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor (MCL 750.120a).

Since Appellant's argument is that the statute was unconstitutional as applied, this court must look at the law as it was actually *applied* to Appellant (*Dawson,* supra). Appellant does not argue the set of facts which were proven to the jury. Instead, he argues a story which the finders of facts specifically rejected. He attempts to subvert the factual decision of the jury, but makes no argument that their decision was clearly erroneous (*Hartwick*, supra). Appellant labels his argument as being that of constitutional implications, but in substance he argues that the jury incorrectly rejected his personal narrative (that he was simply passing out pamphlets on a street corner to inform the general public of a political viewpoint). [13]

During the trial, the People argued that Appellant attempted to influence the decisions of jurors specifically appearing for the *Yoder* trial. Appellant argued that he was not attempting to influence the decisions of the *Yoder* jurors, but was simply trying to inform the public of a personal political viewpoint. The court instructed the jury, specifically, that before Appellant could be found guilty, the Prosecution must prove, beyond a reasonable doubt, that "the Defendant willfully attempted to influence" a juror in the *Yoder* case (TTR v II(b), p. 144, lns.

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[13] It should be noted that "courts are not bound by the labels a party gives to an argument but rather the substance of the argument" *People v. Latz*, 318 Mich.App. 380, 384, 898 N.W.2d 229 (2016)).

19-20). The Court then went on to define willfully as "knowingly and purposefully" (TTR v II(b), p. 145, ln. 1).

As noted by the Court of Appeals, the triers of the facts did not believe Appellant's narrative. They applied the facts contrary his assertion and found him guilty. Yet Appellant continues to argue a story which the triers have specifically, through their verdict, rejected. He does so to create a false "analysis" of how the law was applied. If Appellant's true argument were that it is unconstitutional to convict a person for distribution of information when that person has no intent to influence a juror in a specific case, the People would agree whole-heartedly with that proposition. If those were the facts presented to the jury here, we would have a completely different case.[14]

In short, Appellant wishes to apply his own set of facts to this case by claiming that he was arrested because certain government actors did not "like" his political views. In reality, no one is arguing that the content of the jury nullification pamphlet is somehow contrary to any law. In fact, during closing argument, the People specifically stated "I want to make crystal-clear; having [the jury nullification] pamphlet is not illegal, passing out the pamphlet to a friend is not illegal, *even passing it out in public is not illegal*" (TTR v II(b), p. 98-99; *emphasis added*).

The law, as applied in this case, was never interpreted to criminalize the general distribution of ideas; it was interpreted to criminalize attempts to influence jurors. It would not have mattered if the pamphlet advocated for jury nullification or finding a defendant guilty because of the color of his skin. It would have made no difference whether the pamphlet was pro-prosecution or pro-defense. The issue is whether the pamphlet was used in an attempt to

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[14] Defendant's legal argument can only, then, be that he is not guilty of jury tampering because he happened to be on a sidewalk when he committed the crime. Or, alternatively, that the statute should not apply to him because his attempt to tamper with a juror was effectuated by use of a pamphlet.

persuade jurors in a specific case to agree with Appellant's point of view and vote accordingly. The contents of the pamphlet—the words within—only hold meaning in that they are evidence of his intent and his offense. Contrary to Appellant's argument, the jury was told time and again, by both parties, that it is not illegal to generally distribute the jury nullification pamphlets. Those are not the facts as applied to the law in this case. That is a story that was specifically rejected by the triers of fact.

Imagine that a citizen, while on a public sidewalk, hands a pamphlet to a congressman which clearly delineates the reasons why an upcoming bill should be struck down. There is nothing wrong with this act. Place that same fact within a different context, imagine the citizen making threats to injure the congressman's family if he does not abide by the pamphlet. The pamphlet used by the defendant in that case would still not be illegal. The contents of that pamphlet are still not illegal, nor are the ideas it expresses. It is the *context* in which that pamphlet is used that establishes a crime (*Cervi, Schenck*, supra). If charged, it would be absurd for the defendant to later claim a First Amendment violation, that the only reason he was charged was because the government did not "like" the contents of the pamphlet and did not want the official to vote the same way. True threats are not protected by the First Amendment any more than attempts to tamper with jurors (*Virginia v. Black*, 538 US 343, 359-360; 123 S.Ct. 1536 (2003)).

Likewise, either saying out loud or in writing on a piece of paper "put all the small unmarked bills in this bag" can be protected speech. However, if the statement is made or the paper is passed to a bank teller, not only does the speaker lose any First Amendment protections, the speaker becomes liable for prosecution for attempted bank robbery. The additional fact of the interaction with a bank teller crosses a line. On one side, the speech is protected, on the

other, the actor is a felon. The specifics of the message of the bank robber is important not for its political content, but as it illuminates the robber's intent.

A letter to the editor of a newspaper advocating for a right of jury nullification would unquestionably be protected speech under the First Amendment.[15] An interested citizen's entry into the jury room during deliberations to deliver the same message would, without any doubt, be subject to sanction. The additional fact of the interaction with the jury crosses a line between free speech and criminal conduct. The issue then is not whether there is a line beyond which speech is not protected, the only question is where that line is drawn.

The most authoritative case which is on point with the facts of the instant case is *Turney v Pugh,* 400 F3d 1197 (CA9 2005). [16] Turney was charged under the Alaska jury tampering statute. Prior to jury selection in an Alaska criminal case, Turney, a jury nullification proponent like Defendant here, "approached three members of the venire in the courthouse and told them to call the toll-free number of the Fully Informed Jury Association. Some of the individuals Turney lobbied were wearing badges that identified them as jurors" (*Turney* at 1198).

The toll free number, 1-800-TEL-JURY provided by Turney, is the same number as appears on the front of the pamphlet Appellant knowingly and intentionally handed to the members of the jury venire in a Michigan criminal case, *Yoder*. The toll free number accessed a message from the Fully Informed Jury Association that advised the caller, in accord with the

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[15] See generally *Pennekamp v State of Florida,* 328 U.S. 331 (1946) and *Bridges v California,* 314 U.S. 252 (1941).
[16] There are several cases that are close to the point in the case at bar so the People have limited the review to some of the most relevant. Eg. *United States v Ogle,* 613 F2d 233 (CA10 1980) where the defendant was properly convicted of the Federal offense of "knowingly and corruptly endeavoring to influence, impede and obstruct the due administration of justice in a case pending in the United States District Court." Ogle gave a pamphlet regarding tax law and the jury's supposed right to nullify the law in tax cases to an individual with the intent that it be given (and it was given) to a juror. The trial court properly instructed on the First Amendment question as has been suggested by the People brief herein.

FIJA pamphlet defendant gave jurors, that jurors had a right to disregard the law as given by the judge and decide the case according to each juror's inclination.

One of the jurors to whom Turney gave a pamphlet was ultimately chosen for the final jury in the underlying criminal case. That juror called the number. After listening to the message, the juror announced that he was changing his vote because "I can vote what I want." (*Turney* at 1199). That juror's vote resulted in a hung jury.

The Alaska juror tampering statute applied to all persons impaneled, drawn or summoned for jury service. The Alaska Supreme Court further construed the statute to apply only to efforts to "influence a juror in his or her capacity as a juror in a particular case" (*Turney* at 1199).

The *Turney* court reviewed much of the case law referenced in this brief and then settled on the following as a summary of the applicable constitutional law:

> In light of the subsequent evolution of the clear and present danger test, it can be extrapolated that, as a general rule, speech concerning judicial proceedings may be restricted only if it 'is directed to inciting or producing' a threat to the administration of justice that is both 'imminent' and 'likely' to materialize (*Turney* at 1202).

The *Turney* court noted that "speech to jurors about pending cases presents a special problem because of its grave implications for defendants' right to a fair trial and the public's interest in fair and impartial justice" (*id).* The court went on to note that communications outside the rules of procedure are *"presumptively prejudicial"* (*Turney, id).* The *Turney* court recognized that in the long line of United States Supreme Court cases dealing with the First Amendment and court proceedings "the Court was careful to distinguish the publications it deemed protected under the First Amendment from speech aimed at improperly influencing jurors." The court found particularly important the following:

> The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper (*Turney* at 1202 citing *Bridges v. California,* 314 U.S. 252, 271 (1941)).

The *Turney* court's holding follows:

> Reading all of these cases together leads us to conclude that the First Amendment, while generally quite protective of speech concerning judicial proceedings, does not shield the narrow but significant category of communications to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome of a particular case. What Alaska's jury tampering statute covers in the main, then, is speech that is not protected by the First Amendment (*Turney* at 1203).

Turney's conviction was upheld.

There is very little difference between the facts and law in *Turney* from the facts and law in the instant case. It is evident that Appellant knowingly and intentionally directed his actions towards persons who were appearing for jury duty in the *Yoder* case (the only case set for trial that day). Appellant had shown an interest in that specific case. He appeared for the pretrial. He believed the case to be so important that he called the local newspaper and had a 10 to 15-minute conversation with the reporter trying to convince her to report on it. At no point before or after the date and time of the *Yoder* trial did Appellant appear (in any public forum) to hand out those pamphlets. He appeared at the time jurors would be arriving, outside one of the two entrances to the courthouse, and had specific conversations with many of the jurors about their status as jurors before handing them the pamphlet, which is in-of-itself directed to jurors. The evidence supported the jury's conclusion that Appellant was acting with an intent to sway the opinions of the jurors in a specific case. Appellant had a specific desire to see a not guilty verdict in the *Yoder* case and he did what he could to bring about that outcome. The First Amendment provides this behavior no protection.

Persuasive law, though not the mirror image of the present case as *Turney*, can be found in *Honey v Goodman,* 432 F2d 333 (CA6 1970) where the Sixth Circuit found that the First Amendment was no bar to prosecution for common law embracery. Honey and his cohorts mailed some 1,200 letters to an entire community specifically addressing an upcoming jury trial. The letters went out prior to the date upon which any juror was required to report for court. One of the letters was addressed to and received by a person who had been summoned for jury service on the case addressed in the letter. In denying the First Amendment challenge to the prosecution the court said:

> Although the First and Fourteenth Amendments forbid the making of any law 'abridging the freedom of speech, or of the press,' states may punish for embracery by letter, or any other crime applicable to the exercise of pure speech, where it is proven that the 'words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about' substantive evils that the states have the right to prevent. [citation omitted] One of the substantive evils that the states have a right to regulate is a threat to the administration of justice. [citations omitted]. *Honey v Goodman,* at 338.

No other result should be reached in the case at bar. To rule otherwise would leave the citizenry without remedy against an attack on the fair administration of justice. Those who would oppose the government's power in the instant case, would plead for its exercise in another. The fair administration of justice demands a remedy for the attack in this case and in every other regardless of the interests involved.

A defendant cannot claim freedom of speech in his attempt to sway the opinions of the jurors outside the courtroom simply because a pamphlet was used to commit the crime. It does not matter where or how an attempt to influence the juror occurs, the criminal act is the attempt.

The law, as applied, required a finding that Appellant was acting with that specific intent, and the jury so found.[17]

"Before ruling that a law is unconstitutionally overbroad, [the courts] must determine whether the law reaches a substantial amount of constitutionally protected conduct" (*People v. Rapp*, 492 Mich. 67, 73, 821 N.W.2d 452 (2012)). In this case, the conduct in question is the act of attempting to influence the decisions of jurors in the *Yoder* case. As discussed above, the law has long held there is no constitutional right to illegally tamper with the jury trial process.

Despite Appellant's best efforts to make this case about something else, it has always been about one issue: whether Appellant, through his actions and words, attempted to influence the decisions of jurors of the *Yoder* case outside the courtroom. During a two-day trial, a jury of Appellant's peers listened to the testimony, reviewed the jury nullification pamphlet, and decided that he did, in fact, attempt to influence jurors for the *Yoder* case outside the courtroom. They found him guilty. There is no First Amendment implication for Appellant's actions.

D. THE JURY'S DETERMINATION THAT THE PEOPLE HAD PROVED ITS CASE BEYOND A REASONABLE DOUBT TAKES THIS CASE OUTSIDE THE REALM OF FIRST AMENDMENT ANALYSIS AS THE INTENT REQUIREMENT ASSURES THAT CONVICTION COULD NOT BE OBTAINED IN VIOLATION OF THE FIRST AMENDMENT.

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[17] There are countless examples, similar to the jury tampering statute, where speech is incidental to the crime committed and therefore does not afford First Amendment protection. A person who attempts to convince someone else to commit perjury (even if a pamphlet is used in the attempt) cannot claim Freedom of Speech when prosecuted for the use of words when committing his crime (MCL 750.424). A defendant cannot claim protection under the First Amendment after demanding a woman give him her purse during the commission of a robbery, regardless whether he is on the street corner (MCL 750.357). Nor can a Police Officer claim Freedom of Speech for submitting a police report with a deliberately false statement (MCL 752.11). A kidnapper cannot make such a claim for telling a parent where to leave the cash (MCL 750.349).

Appellant wants to deny reality and have this case be about speech as an end in itself.[18] The facts, however, are that this case is about speech as a means to a criminal end.

The distinction between punishment or prohibition of speech as an end as opposed to speech as a means causes the two concepts to be polar opposites. This distinction is illustrated by cases involving threats. A threat is simply a statement. Two statements that contain the same words may lead to opposite legal conclusions, one being protected speech, the other having no First Amendment implications at all. The distinction that causes the polar opposite results is built on whether the statement is a non-serious remark, that is, speech without more, or a serious remark, that is, speech with the added element of an intent that the threatening words be taken seriously rather than as an off-handed joke.

The above distinction has been made both in Michigan law when dealing with the statute outlawing terrorist threats, MCL 750.543m and the United States Supreme Court in dealing with what have been defined as "true threats." *People v Osantowski,* 274 Mich App 593; 736 NW2d 289 (2007) and *Virginia v Black,* 538 US 343, 359; 123 SCt 1536; 155 LEd2d 535 (2003), see Justice Alito's concurrence in part, dissent in part in *Elonis v United States,* ___ US ___; 135 SCt. 2001, 2014-2015; 192 LEd 2d 1 (2015). Once it is determined that a case involves a "true threat," any analysis of the types of issues Appellant wants to raise here are at an end as they are irrelevant. "True threats" cases do not deal with content analysis, there is no analysis of the governmental interest involved and no questions arise as to whether the government used appropriately narrow means to circumscribe the prohibited conduct[19]. If the statute in question

[18] Appellant would want this case to be about something like the "gag order" in *People v Sledge,* 312 Mich App 516 (2015) which prohibited all speech in regard to a case, regardless of any "end" that the speaker may intend or of which the speech might be capable.

[19] Appellant's time, manner, place, government interest and the like arguments would have been much more appropriate had this case been like the case involving groups randomly handing out FIJA pamphlets at the Denver Courthouse without any interest at all in any particular case, but even they were properly subject to rather

outlaws "true threats" and that defendant made a true threat, there is no First Amendment issue because true threats are not protected by the First Amendment. Proof of the elements of the offense guarantee that no First Amendment violation can possibly occur. See *United States v Elonis,* (after remand) 841 F3d 589, 597 and n. 6 (CA3 2016) cert. den.138 SCt 67 (Oct. 2, 2017).

The statute in question in this case, MCL 750.120a(1) does not regulate the place of speech, the form of speech, the time of speech, or the content of speech. The statute regulates the use of speech to commit a criminal act of attempting to improperly influence a juror. A necessary element of the offense, as this jury was instructed, is that Appellant "willfully attempted to influence that juror by the use of argument or persuasion" and that a person acts "willfully" when he or she acts "knowingly and purposefully" and to do so specifically in the *Yoder* case in accord with *Turney, supra* at 1199. The jury is presumed to have followed its instructions. *People v Abraham,* 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, the jury found the necessary mens rea to take this case out of the First Amendment context just as the mens rea in the "true threats" cases take them out of the context of First Amendment analysis as there is neither a right to issue "true threats" nor a right to improperly influence jurors. Appellant's First Amendment argument is inapplicable to this case.

Even if this Court were to conclude some First Amendment analysis is appropriate, the Court of Appeals was correct when it noted that the statute is narrowly written to target a compelling state interest involving the sanctity of the right to fair trials. The statute is narrowly drawn. Appellant clearly violated it. There is no risk of chilling effect on the actions of those

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significant restrictions that kept them away from jurors. See Verlo v Chief Judge, Case 1:15-cv-01775-WJM-MJW (U.S. Dist. Ct. Dist. of Colo.) Final Findings of Fact & Conclusions of Law July 27, 2017.

who merely want to advocate general opinions rather than improper influence jurors. The Court of Appeals should be affirmed.

III. DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT RULED TO EXCLUDE ILLEGAL ARGUMENTS AND IRRELEVANT TESTIMONY

A. The Statute in question is not void for vagueness, the trial court did not incorrectly interpret the statute.

Appellant has conceded, through his brief, that the statute in question (MCL 750.120a) is constitutional as written. However, the law Appellant cites in this portion of his brief discusses the constitutionality of Statutes, as they are written.[20]

As discussed above, Appellant's argument regarding vagueness conflates the facts applied in this case with the narrative that was rejected by the triers of fact. Unlike the cases he cites, Appellant's argument is based on the *application* of the jury tampering statute to the facts in this particular case. "Even where a statute is vague on its face, reversal is not required where the statute can be narrowly construed and where defendant's conduct falls within that proscribed by the properly construed statute" (*People v. Hicks*, 149 Mich.App. 737, 741, 386 N.W.2d 657 (1986), Citing: *People v. Harbour*, 76 Mich.App. 552, 558, 257 N.W.2d 165 (1977), *internal quotations omitted*). A statute can be constitutional on its face but still unconstitutionally vague as applied to a defendant (*People v. Barton*, 253 Mich. App. 601, 659 N.W.2d 654 (2002)).

Since the parties agree that the statute--as written--is proper, the only question remaining is whether the application of the law to the facts of this case was so vague as to render the statute

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[20] *Grayned v. City of Rockford*, 408 US 104 (1972), ruled on the constitutionality of an anti-noise city ordinance, as written. *Kolender v. Lawson*, 461 US 352 (1983), ruled on the constitutionality of a California loitering statute, as written. *People v. Lino*, 447 Mich. 567 (1994), ruled on the constitutionality of the law against Gross Indecency Between Males, as written. *FCC v. Fox*, 132 S.Ct. 2307 (2012), ruled on the constitutionality of an FCC regulation, as written.

unconstitutional. In other words, was the jury properly instructed on the elements of the crime, or were the elements presented in such a way as to render the crime unconstitutionally vague. This has all been argued above. Any potential constitutional ramifications regarding First Amendment issues were addressed in Issue Presented II and will not be repeated here. The question of statutory construction was argued in Issue Presented I and will not be repeated here. However, the People will attempt to provide an additional Due Process analysis, based on Appellant's claims.

A person's right to Due Process is found in both the U.S. Constitution, and the Michigan constitution (U.S. Const. Amend. 14; MI Const. of 1963, Art. I, Sec. 17). In addressing whether a particular *statute* is unconstitutionally void for vagueness, a court "must assume that a statute is constitutional and construe that statute as constitutional unless it is clearly unconstitutional" (*People v. Douglas*, 295 Mich.App. 129 at 135 (2011)). The party challenging a statute has the burden of proving it invalid (*id*). There are three grounds by which a party may challenge a statute as being unconstitutionally vague: (1) lack of fair notice of the proscribed conduct, (2) the statute is so indefinite that confers upon the trier of fact "unstructured and unlimited discretion" to decide when an offense has been committed, and (3) the statute is so overbroad as to impinge on protected First Amendment rights (*People v. Petrella*, 424 Mich. 221, 253 (1985), quoting *Woll v. Attorney General*, 409 Mich. 500, 533 (1980)). "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity" (*Phillips, supra,* Citing: *Cady v. Detroit,* 289 Mich. 499, 505, 286 N.W. 805 (1939)).

In regard to the fair notice test, the courts have ruled that "[w]hen a statute is challenged on the basis that it fails to provide fair notice, the statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required" (*Hackel v. Macomb County Com'n*, 298 Mich.App. 311, 333, 826 N.W.2d 753 (2012)).

Here, the statute addressing attempts to influence jurors is written clearly enough to provide fair notice of criminal conduct and does not provide the trier of fact "unlimited discretion", nor is it written so broadly as to unconstitutionally impinge a person's First Amendment rights.[21] The trial court did not "rewrite" the statute. The trial court interpreted the statute to define the word juror in accordance with relative caselaw (*See Turney, supra*), statutory construction (see argument above), and the definition of the word juror as listed in Black's Law Dictionary Fourth edition and Tenth edition (See: Motion Hearing Transcript, March 23, 2016, pp. 37-38).

Appellant creates a straw-man argument when he writes that "there was no proper notice to the citizens of the State of Michigan that the distribution of a pamphlet of general information on a public sidewalk to a person who was merely summoned for jury duty is a criminal act" (Defendant's Appeal, pp. 33-34). As stated in the Issues Presented above, and indeed throughout the entirety of this case, the People have never argued that a person who intends to disseminate literature (even jury nullification pamphlets) to the general public is breaking the law. Nor is the law broken if some of the general public just happen to be jurors. The facts proven at trial demonstrated Appellant acted with a specific intent to sway jurors in the *Yoder* trial.[22]

When a statute criminalizes juror tampering, a person is on notice that they may not attempt to influence a juror in a case. Any attempt to do so (when it is knowingly and

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[21] As agreed by the parties.

[22] *See testimony of:* witness Johnson, witness Devries, witness Lenahan, and witness Erridge

intentionally made) is criminal. Appellant was on notice when he attempted to have an effect on the outcome of the *Yoder* trial that to knowingly and intentionally attempt to influence jurors was criminal.

The trial court specifically instructed the jury that before they find Appellant guilty, they must first find that "the defendant *willfully attempted to influence that juror* by argument or persuasion" (TTR vII(b), p. 144, lns. 19-21). The court defined willfully as "knowingly and purposefully" (TTR vII(b), p. 145). If the jury had any inclination to believe the story proffered by Appellant (that he was simply handing out a pamphlet to the general public on a street), they would have been duty-bound to find the Appellant not-guilty. Jurors are presumed to have followed their instructions (*People v. Abraham*, 256 Mich.App. 265, 662 N.W.2d 836 (2003)).

A person who intends to influence the decisions of jurors in a specific case, and who attempts to do so (by whatever means) is committing a misdemeanor, and MCL 750.120a is very clear and concise in providing notice of that fact. The circumstantial evidence in this case clearly indicate that Appellant's intent was to influence the jurors in the *Yoder* case. He was not found guilty for disseminating literature to the general public while on a sidewalk. He was convicted for willfully attempting to influence juror's decisions in a specific case. The law was properly applied, based on the facts of this case as decided by the jury.

The Court of Appeals properly ruled that Appellant's Due Process rights were not violated.

B. Mr. Wood did receive a fair trial

Though not listed as a separate issue presented, Appellant argues his Sixth Amendment right to a fair trial was violated. He argues that his right to cross-examine witness Lyons was violated. The right to cross-examine is secured by the Confrontation Clause of the Federal

Constitution (U.S. Const. Amend. 6; *Delaware v. Van Arsdall,* 475 U.S. 673, 678, 106 S.Ct. 1431, 1434, 89 L.Ed.2d 674 (1986)). However, "[t]he right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject" (*People v. Adamski*, 198 Mich.App. 133, 138, 497 N.W.2d 546 (1993), citing: *People v. Hackett,* 421 Mich. 338, 347, 365 N.W.2d 120 (1984); *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

Furthermore, "[t]he right of cross-examination does not include a right to cross-examine on irrelevant issues" (*Adamski, supra;* citing: *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974)). Finally, it must be noted that "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" (*Van Arsdall*, supra, at p. 679).

Relevant evidence is defined as being evidence which has a tendency to make the existence of any fact of consequence to the determination of an action more or less probable (MRE 401). Relevant evidence is generally admissible, whereas irrelevant evidence is inadmissible (MRE 402). Finally, relevant evidence may still be excluded if its probative value is substantially outweighed by the danger unfair prejudice, confusion of the issues, or misleading the jury (MRE 403).

The topics Appellant wishes to have cross-examining magistrate Lyons on were (1) Appellant's arraignment; (2) the amount of bond set by magistrate Lyons; (3) magistrate Lyon's

decision not to provide a court appointed attorney to Appellant.[23] None of these issues are relevant to whether Appellant committed the crime charged. Appellant's arraignment and the amount of bond has no effect on whether Appellant attempted to influence a juror. Neither does a decision regarding whether Appellant could afford to retain his own attorney. These areas have no impact on credibility, and no bearing on the truthfulness of the witness testimony. More importantly, none of the issues complained of would have any tendency to make a fact of consequence to the criminal charge against Appellant more or less probable. The evidence sought by Appellant is not relevant, and therefore not admissible (MRE 402).

Even if the evidence were relevant, any marginal probative value that might be gleaned from it would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or waste of time (MRE 403).

The question as to whether bond was reasonable was not what the jury in this criminal case was tasked to decide. Allowing this as a separate issue of litigation would require proofs regarding why the bond was set as it was. This would involve testimony of Appellant's post arrest behavior (also irrelevant to his charge) and might require testimony of separate witnesses such as corrections officers and jail personnel. The true issue of Appellant's guilt or innocence would be lost in an attempt litigate the question of whether Appellant's bond was reasonable. This is an issue completely outside the purview of the jury. The same is true for a decision regarding whether to appoint an attorney. This would require more testimony regarding the Appellant's finances (as the magistrate understood them), the amount of money he had, his assets, his debts, and a whole litany of facts which have no relevance to whether Appellant

[23] The issue regarding court appointed counsel was not addressed during trial (TTR v1 pp. 140-144). The People object to this being discussed now, as the issue was not properly preserved, and the court never ruled on that specific subject area. However, this drafter will still respond as if it were.

committed a crime. The additional testimony would only waste the jury's time on issues outside their scope of determination. It would have no probative value, no impact on the credibility of the witness, and would create the substantial danger of the jury confusing or being misled regarding the true question which they were summoned to decide. From Appellee's understanding, had the trial court allowed a full exploration of the facts underlying the setting of bond and denial of court appointed counsel, Appellant would now be claiming prejudice from the testimony that would not be flattering to him.

Even if the trial court did err in refusing to allow the cross-examination, it would have amounted to a harmless error because Appellant never disputed any of the substantive testimony presented by witness Lyons. Witness Lyon's testimony addressed: (1) the date, time and location of the *Yoder* jury trial; (2) the times jurors began appearing for court; (3) when witness Lyons first saw the pamphlets in question; (4) identification of People's Exhibit 1 as the jury nullification pamphlet being handed out that day; (5) identification of Mr. Wood as the person handing out the pamphlet; (6) his interaction with Appellant; and (7) that he did not see any Amish citizens in possession of the pamphlet (TTR v 1, pp. 122-136).

It is difficult to see what testimony Appellant wished to impeach from witness Lyons through cross-examination. Appellant did not, at any point during testimony or argument, dispute the evidence presented by Magistrate Lyons. In essence, Appellant (1) agreed to the date, time, and location of the *Yoder* trial; (2) agreed that he showed up early that morning at the courthouse; (3) agreed that Exhibit 1 was the pamphlet he handed out; (4) agreed that he

interacted with witness Lyons[24]; (5) agreed that he was the only person handing out the pamphlet in question; (6) agreed that he only handed one pamphlet to one Amish individual.

There is nothing in witness Lyon's testimony relevant to the charge which has been disputed by Appellant. The additional cross-examination would change nothing regarding the witness testimony. Even if the subject areas sought to be introduced by Appellant had any impact on credibility, there is no fact presented by witness Lyons--of consequence to the outcome of the case-- which Appellant called into question.

This is not a case where a defendant disputes a witness identification, or where a witness has made a prior inconsistent statement. There is nothing to impeach from the testimony, because none of it is in dispute. The only reason, then, for Appellant to even attempt to bring this testimony out is to confuse or mislead the jury, or to create unfair prejudice against the witness. Appellant's right to cross-examination is not limitless and does not confer the ability to waste time on irrelevant issues (*Adamski*, supra).

The Court of Appeals properly found that Appellant was not denied a Fair Trial.

CONCLUSION

There is no first amendment protection for a person who acts with intent to sway the opinions of jurors outside the courtroom. A jury of Appellant's peers found that he was not simply handing out pamphlets to the general public, rather he was acting with an intent to sway jurors in a specific case. Appellant has made no argument that the factual findings of the jury (or the trial court during its ruling) are clearly erroneous, therefore his claim cannot stand.

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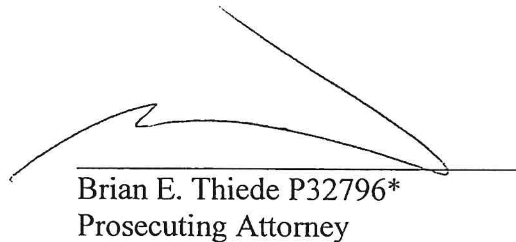
[24] This is the only area that has some discrepancy, though none of the inconsistencies impact the elements of the crime. Magistrate Lyons testified that Defendant refused to go inside when asked (TTR v I, p. 133). Defendant testified that he simply did not hear or understand what Magistrate Lyons was saying to him (TTR v II(b), p.47).

Furthermore, Appellant's narrow definition of the word 'juror' is contrary to caselaw around the country involving the criminal charges of juror tampering and embracery. Appellant's other claims are, likewise, meritless. The People request that this Honorable Court AFFIRM the Court of Appeals.

RELIEF

WHEREFORE, the PEOPLE request that this Honorable Court AFFIRM the Court of Appeals.

DATED: December 26, 2019



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* Significant contributions to this brief were made by then Mecosta County Assistant Prosecutor Nathan Hull (P72265), who is no longer with this office, though this author takes responsibility for the entirety of the content now presented.

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

-v-

KEITH ERIC WOOD
Defendant/Appellant.

______________________/

Supreme Court No. 159063
Court of Appeals No. 342424
Circuit Court No. 17-24073-AR
District Court No. 15-45978-FY

CERTIFICATE OF MAILING

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I, Nicole Marshall, served a copy of the BRIEF ON APPEAL=APPELLEE, and this CERTIFICATE OF MAILING, December 26, 2019 on the following:

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By first class mail, postage prepaid, and deposited the envelope in an U.S. Mail receptacle, said envelope bearing the following return address:

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12/26/19
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