STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2011
V	No. 293011 Wayne Circuit Court
MARY DIANE BUKOWSKI, Defendant-Appellant.	LC No. 08-019011-FH

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of resisting or obstructing a police officer, contrary to MCL 750.81d(1). She was sentenced to probation for one year and ordered to pay a $2,000 fine for each conviction. She appeals as of right. We affirm.

I. BACKGROUND

Defendant is a reporter for the *Michigan Citizens* newspaper. On November 4, 2008, she was arrested by Michigan State Police Troopers who were investigating a fatal traffic accident involving a collision between a motorcyclist and a pedestrian. The motorcyclist collided with the pedestrian while fleeing from the police. The motorcyclist's arm was severed from his body, and he was pronounced dead at the scene. Several state troopers and police officers responded to the scene to conduct an investigation and to deal with a large unruly crowd that had gathered. The police secured a large area using yellow tape that was marked "police line do not cross."

According to several state troopers, defendant was present at the scene, identified herself as a reporter, and requested information about the accident while standing outside the area secured by police tape. However, several troopers testified that they later observed defendant inside the secured area taking pictures with a camera. According to Trooper Andrea Barber, defendant refused her directives not to take pictures and to leave, and then pulled away when Trooper Barber attempted to escort defendant from the secured area. Trooper Matthew Keller testified that he attempted to assist Trooper Barber and that defendant pulled away when he held defendant's arm to escort her to a patrol vehicle. Defendant testified that she was gathering information and taking pictures when she was arrested. She denied crossing the police line or failing to follow any police instructions.

Defendant was originally charged with five counts of resisting or obstructing a police officer contrary to MCL 750.81d(1), with each count relating to a different police officer. Following a preliminary examination, she was bound over for trial on only the two counts relating to Troopers Barber and Keller. The jury convicted defendant of both counts. Defendant filed a motion for a new trial raising many of the issues that she now raises on appeal. The trial court denied the motion.

II. JURISDICTION

Defendant first argues that the trial court lacked jurisdiction over the charges to the extent that the prosecutor pursued a factual theory at trial that was based on her entry into the secured area, because the district court rejected that theory at the preliminary examination. Defendant argues that she was bound over for trial only on the allegations that she physically resisted being taken into custody.

Because defendant did not challenge the prosecutor's theory of guilt at trial, this issue is unpreserved. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An unpreserved issue is reviewed for plain error affecting a defendant's substantial rights. *Id.* However, defendant did raise this issue in her motion for a new trial. A trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). To the extent defendant challenges the trial court's denial of her motion for a new trial, we review the trial court's decision for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). A trial court abuses its discretion by choosing an outcome outside the principled range of outcomes. *Id.* Any factual findings made by the trial court are reviewed for clear error. *Id.*

Further, to the extent that this issue implicates the circuit court's subject-matter jurisdiction, review is appropriate because a defect in subject-matter jurisdiction may be raised at any time. *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994). Whether a court has jurisdiction is reviewed de novo as a question of law. *People v Laws*, 218 Mich App 447, 451; 554 NW2d 586 (1996).

We reject defendant's jurisdictional argument because it is based on case law that precedes the adoption of the rules of criminal procedure in 1989. MCR 6.112(G) and (H) allow a circuit court to permit the prosecutor to amend an information before, during, or after trial, unless the amendment would unfairly surprise or prejudice the defendant, and also preclude reversal of a conviction because of a variance between the information and the facts of the offense absent a timely objection and showing of prejudice. See MCL 767.76; *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998); *People v McGee*, 258 Mich App 683, 687; 672 NW2d 191 (2003). Moreover, subject-matter jurisdiction is "the right of the court to exercise jurisdiction over a class of cases, such as criminal cases." *Goecke*, 457 Mich at 458. The circuit court acquires subject-matter jurisdiction over the case, along with personal jurisdiction over the defendant, when the magistrate files a return. *Id.* at 458-459. Because a return was filed in this case in which the district court ordered that defendant be bound over on the two counts under MCL 750.81d(1) relating to Troopers Barber and Keller, there was no jurisdictional defect.

Defendant's alternative due process claim was not raised in her motion for a new trial, although the trial court considered whether she was unfairly surprised. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Nonetheless, considering defendant's constitutional claim in light of the record and the trial court's findings, no plain error has been shown.

A due process claim is generally reviewed de novo as an issue of law. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Here, defendant had a due process right to reasonable notice of the charges against her. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). The amended information charged defendant with two violations of MCL 750.81d(1),[1] and recited the offense date of November 4, 2008, the location of the offense, and contained an offense description that generally followed the statutory language. Each count alleged that defendant "did assault, batter, wound, resist, obstruct, oppose or endanger" the state trooper and that defendant knew or had reason to know that the state trooper was performing his or her duties. While an information is also presumed to be framed by reference to facts disclosed at the preliminary examination, *People v Hunt*, 442 Mich 359, 363; 501 NW2d 151 (1993), the record of defendant's preliminary examination does not support her argument that she did not have reasonable notice of the charges. Trooper Barber testified at the preliminary examination, as she did at trial, that her encounter with defendant occurred inside the area secured by the police tape. Trooper Barber also testified about how Trooper Keller came to assist her and how defendant failed to follow both her and Trooper Keller's directives.

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[1] MCL 750.81d provides, in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
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> * * *
>
> (7) As used in this section:
>
> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.
>
> (b) "Person" means any of the following:
>
> (i) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.

Defendant's reliance on the variance doctrine applied to federal indictments, as in *Hunter v New Mexico*, 916 F2d 595, 599 (CA 10, 1990), is misplaced. Some courts have carried over the variance doctrine to state prosecutions where fair notice is required. See *Haines v Risley*, 412 F3d 285, 291 (CA 1, 2005). In Michigan, however, the preliminary examination is a statutory procedure. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). The description of each offense in the amended information in this case was sufficient under Michigan law, because it contained the "nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged" and the time of the offense. MCL 767.45(1)(a) and (b). The prosecutor's factual theories at trial neither broadened nor altered the information.

Even if there was some variance between the charges in the information and the evidence at trial, the relevant inquiry is whether defendant was unfairly surprised or prejudiced. *Goecke*, 457 Mich at 460; *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008), see also MCL 767.76; MCR 6.112(H). We find no clear error in the trial court's posttrial finding that defendant could not claim unfair surprise in light of the pretrial proceedings regarding the charges. Further, considering that defendant was tried on the very charges for which she was bound over following the preliminary examination, defendant has failed to establish any violation of her due process right to reasonable notice of the charges. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to this issue. *Miller*, 482 Mich at 544.[2]

III. UNANIMITY INSTRUCTION

Defendant next argues that the trial court's jury instructions were insufficient to protect her right to a unanimous jury verdict. Because defense counsel specifically indicated that he had no objections to the instructions as given, this claim of instructional error has been waived. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A waiver, as distinguished from an issue forfeited by lack of objection, extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Nonetheless, because the trial court considered this issue in its decision denying defendant's motion for new trial, we too shall consider it in that context.

Questions of law involving jury instructions are generally reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). But a trial court's determination whether a jury instruction applies to the facts of the case is reviewed for an abuse of discretion. *Id*. Jury instructions are examined as whole to determine whether error requiring reversal occurred.

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[2] Defense counsel contends that the prosecutor did not appeal the ruling by the district court regarding the bindover, and therefore, the district court decision became the law of the case. However, a circuit court judge is required to follow the published decisions of the Court of Appeals and the Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). Further, the district court bindover referred to the charges against two particular individuals and did not limit the factual basis for the charges. More importantly, the factual basis underlying the charges was discussed at the motion to quash hearing and included the disregard of the police tape.

People v Martin, 271 Mich App 280, 337-338; 721 NW2d 815 (2006), aff'd in part 482 Mich 851 (2008); *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if the instructions are imperfect, there is no error if the instructions fairly present the issues to the jury and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

Here, the trial court gave a general unanimity instruction, which is adequate in most instances. *Martin*, 271 Mich App at 338. A specific unanimity instruction is appropriate where the prosecutor offers alternative acts to establish the actus reus element of a charged offense and

> 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or whether either party has offered materially distinct proofs regarding one or more alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

A separate issue arises where a statute lists different means of committing an offense, which do not in and of themselves constitute separate and distinct offenses. In this circumstance, jury unanimity is not required with regard to the alternative theories. *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). For example, a defendant properly may be convicted of a single offense of first-degree criminal sexual conduct under MCL 750.520b, even if the jurors do not agree on the particular aggravating circumstance that accompanied the sexual penetration. *Id*. at 31-32.

We conclude that the alternative theory approach in *Gadomski* is not applicable to this case because the prosecutor presented evidence of more than one act that would constitute a violation of MCL 750.81d(1) with respect to each of the two state troopers. Nonetheless, we disagree with defendant's suggestion that the relevant acts are simply whether she entered the area secured by the police tape or physically resisted being arrested and handcuffed. Although the trial court commented during the jury instructions that there was testimony regarding defendant's direct actions with each trooper or "just in terms of crossing the yellow line," the jury was required to find that defendant "either obstructed or opposed or endangered or resisted" each trooper. Consistent with MCL 750.81d(7)(a), the court defined "obstruct" as "a knowing failure to comply with a lawful command." The jury was permitted to consider what defendant said and did in determining whether she resisted. The jury was also required to find that defendant knew or had reason to know that each trooper was performing his or her duties at the time of her actions.

A defendant's knowledge is a limiting feature of MCL 750.81d(1), which requires the fact-finder to engage in an analysis to determine whether the facts and circumstances indicate that the defendant knew or had reason to know that an officer was performing his or her duties. *People v Nichols*, 262 Mich App 408, 413-414; 686 NW2d 502 (2004). Therefore, whether defendant was inside the secured police tape area when she was approached by Troopers Barber and Keller was relevant to the charges, regardless of whether defendant's behavior involved obstructing, resisting, opposing, or endangering the troopers. And while it is apparent that the prosecutor treated the "police line do not cross" tape as a written order linked to each trooper, there was also evidence of verbal orders that defendant failed to follow. As a whole, the

evidence showed a single continuous transaction that began with defendant moving inside the police tape area and ended with defendant's arrest. The jury had an opportunity to view part of the transaction to determine whether defendant resisted because a videotape taken by a television cameraman was introduced at trial. The videotape showed defendant in the process of being handcuffed and continued until she was placed in a patrol vehicle. Defendant's defense theory was that she did not cross the police line or fail to follow any police instructions. Consistent therewith, defense counsel argued in closing argument that the police witnesses were not credible.

Because the evidence regarding defendant's behavior and knowledge of the troopers' duties was developed as part of a continuous course of conduct, and there is no indication of juror confusion, the general unanimity instruction was sufficient to protect defendant's rights. *Martin*, 271 Mich App at 338. Therefore, even if this issue was not waived, there was no plain instructional error. *Id*. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

IV. REBUTTAL WITNESS

Defendant next argue that the trial court abused its discretion when it allowed the prosecutor to call Karl Scales as a rebuttal witness, to rebut defendant's testimony that she did not enter the area secured by the police tape. A trial court's decision whether to allow rebuttal testimony is reviewed for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Contrary to what defendant argues, rebuttal testimony is not rendered inadmissible merely because it could have been offered in the prosecutor's case in chief. *Id*. at 399. Rather, the test for admissibility is "whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id*. Here, Scales's testimony that he observed defendant inside the secured area was properly responsive to defendant's testimony that she did not enter the secured area.

Defendant also argues that Scales should not have been permitted to testify because he was not named on a pretrial witness list and the police report of Scales's police interview was not provided during discovery. Defendant did not object to Scales's testimony on these grounds at trial, leaving them unpreserved. *Carines*, 460 Mich at 763.

Although the record indicates that the prosecutor violated MCL 767.40a by not disclosing Scales on a witness list, a trial court has discretion to permit an unlisted witness to be added for good cause. MCL 767.40a(4); *People v Steele*, 283 Mich App 472, 483; 769 NW2d 256 (2009). A defendant claiming an abuse of discretion must demonstrate unfair prejudice. *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). Because defendant did not timely raise this issue, the material question is whether defendant's substantial rights were affected by the prosecutor's error. *Carines*, 460 Mich at 763. This requirement requires a showing of prejudice, i.e., that the error affected the outcome of the proceedings. *Id.*

The trial court considered this issue in the context of defendant's motion for a new trial. Defendant denied receiving a copy of the police report that contained a summary of Scales's police interview, even though the prosecutor claimed that it was included with the discovery materials that were provided to defense counsel. The trial court found that it was unable to

resolve this factual dispute, but stated that it had no reason to believe that the prosecutor acted in bad faith. The court assumed for purposes of defendant's posttrial motion that defendant did not receive the police report, but concluded that defendant was not prejudiced because defense counsel had an opportunity to interview Scales before he testified at trial.

A trial court has discretion in determining an appropriate remedy for a discovery violation. MCR 6.201(J). Further, to be entitled to relief on appeal, defendant must show that she was prejudiced by the prosecutor's failure to disclose the police report. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). A prosecutor's mere negligence does not justify the exclusion of otherwise relevant evidence. *Callon*, 256 Mich App at 328.

We agree that defendant has not established any unfair prejudice arising from the prosecutor's failure to disclose Scales on a witness list. It is apparent that defense counsel would have been aware of this defect at the time of trial, but no objection on this ground was raised. Further, the trial court did not err in determining that defense counsel's opportunity to interview Scales before trial was sufficient to put him on notice of the testimony that Scales would provide. Therefore, even assuming that the prosecutor failed to provide the police report to defense counsel, the trial court did not abuse its discretion in denying a new trial on this ground.

V. WITHDRAWAL OF COUNSEL

Defendant next argues that the trial court erred in denying her initial counsel's pretrial motion to withdraw, so that she could retain new counsel. We conclude that this issue is moot because the trial court later allowed counsel to withdraw pursuant to an order and stipulation in which newly retained counsel represented that he was prepared for the scheduled trial. See *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009) (issue is moot where an event occurs that makes it impossible for a court to grant relief)

Further, defendant has failed to establish that the trial court abused its discretion in denying newly retained counsel's subsequent motions for adjournment after he had stipulated that he was prepared for trial. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). Relevant factors in deciding a motion for an adjournment include whether the defendant "(1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). To warrant reversal, a defendant must also show prejudice resulting from the denial of an adjournment request. *Coy*, 258 Mich App at 18-19.

Here, newly retained counsel relied on the trial court's pretrial ruling granting the prosecutor's motion in limine to justify his first motion for an adjournment. However, that ruling was made before counsel stipulated that he was prepared for trial. Counsel did not adequately explain why the trial court's prior ruling should negate his later stipulation. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for an adjournment. Counsel later moved for an adjournment on the first day of trial based on his receipt of discovery items from defendant. However, counsel failed to explain why defendant could not have furnished the items sooner, or their materiality to the defense. Without more, the trial court did not abuse its discretion in denying the motion. *Coy*, 258 Mich App at 17.

VI. DEFENSE-OF-PRESS PRIVILEGE

Defendant next challenges the trial court's decision granting the prosecutor's pretrial motion in limine to preclude defendant from presenting a defense based on her constitutional rights as a news gatherer. Defendant also argues that the trial court erred by failing to provide a jury instruction regarding this defense. We review questions of constitutional law de novo. *People v Ventura*, 262 Mich App 370, 373; 686 NW2d 748 (2004); *Pitts*, 222 Mich App at 263.

"It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "A trial court may exclude from the jury testimony concerning a defense that has not been recognized by the Legislature as a defense to the charged crime." *People v Demers*, 195 Mich App 205, 207; 489 NW2d 173 (1992); see also *People v Kevorkian*, 248 Mich App 373, 442-443; 639 NW2d 291 (2001).

Here, defendant does not argue that the Legislature has recognized, implicitly or explicitly, any special immunity from prosecution under MCL 750.81d(1) for news gatherers. This Court examined the intent of MCL 750.81d in *Ventura*, 262 Mich App at 375, when rejecting a claim that prosecution is not permitted if a person uses reasonable force to resist an unlawful arrest. The Court found that the statute clearly and unambiguously provides that a violation is established if a person resists an individual known or reasonably known to be performing his or her duties. *Id*. at 376. The Court observed that precluding the right to resist serves safety concerns, and that there are other mechanisms in place for an individual to correct any injustice arising from an arrest that is later determined to be unlawful. *Id*. at 377.

Although this case does not involve a defense based on an illegal arrest, the clarity of the statute in terms of its intent and its elements supports a conclusion that defendant may not defend based on her status as a news gatherer. The statute does not call upon an officer performing his or her duties to ascertain whether the person obstructing, resisting, opposing, or endangering the officer is a news gatherer, or permit a person that is gathering news to avoid criminal liability for such actions with respect to an individual who is known or should be known to be an officer who is performing his or her duties.

Defendant's reliance on the First Amendment is misplaced, especially given that defendant does not argue that MCL 750.81d is constitutionally infirm. The First Amendment right to gather news is not unlimited. For example, "[n]ewsmen have no constitutional right of access to the scenes of crimes or disaster when the general public is excluded." *Branzburg v Hayes*, 408 US 665, 684-685; 92 S Ct 2646; 33 L Ed 2d 626 (1972). Indeed, "[i]t would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws." *Id*. at 691.

Defendant's reliance on *Connell v Hudson*, 733 F Supp 465 (D NH, 1990), is likewise misplaced because that case did not involve criminal charges, but rather a civil action brought by a news gatherer who was ordered away from an accident scene and threatened with arrest if he

persisted in taking pictures. In finding a violation of the plaintiff's First Amendment rights, the district court noted that the plaintiff had "followed all instructions reasonably designed to prevent interference with police and emergency activities." *Id*. at 470.

Finally, we reject defendant's argument that she should have been allowed to use a First Amendment defense to show that she did not knowingly or intentionally commit the offense. "People are presumed to know the law." *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000); see also *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215; 575 NW2d 95 (1997) (deeply rooted rule in criminal law is that ignorance of the law or a mistake of law is not a defense), and *People v Weiss*, 191 Mich App 553, 561; 479 NW2d 30 (1991) (in general, ignorance of the law or a mistake of law is not a defense to a criminal prosecution). Although a law must nonetheless give a person fair notice of what is prescribed to overcome a void for vagueness challenge, this Court has found that MCL 750.81d is not unconstitutionally vague because it contains a knowledge element. *Nichols*, 262 Mich App at 409-415. Because defendant's proposed defense based on her status as a news gatherer is not a legally cognizable defense to a violation of MCL 750.81d(1), the trial court did not err in precluding the defense, or by failing to instruct the jury on this alleged defense.

VII. DESTRUCTION OF PHOTOGRAPHS

Defendant next argues that this case should have been dismissed, or a new trial ordered, because Trooper Eric Byerly deleted two photographs from her camera at the time of her arrest. Although the trial court granted defendant's request for an adverse inference instruction that permitted the jury to infer that the deleted photographs would have been unfavorable to the prosecutor's case, defendant now argues that the instruction should have contained a mandatory inference.

Initially, we hold that any claim of instructional error was waived because defense counsel informed the trial court that he was satisfied with the permissive inference instruction that the court intended to give. *Carter*, 462 Mich at 216; *Ortiz*, 249 Mich App at 311. Further because defendant never moved for dismissal of the charges on this ground before trial, that issue is not preserved. *Carines*, 460 Mich at 763. But because the trial court considered whether dismissal was an appropriate remedy when it denied defendant's posttrial motion, we shall address it.

The deleted photographs were potentially exculpatory to the extent the images could have supported an inference that defendant was standing at a distance, rather than inside the secured area. While defendant claimed in support her posttrial motion that the photographs would have conclusively shown that she was outside the secured area, Trooper Byerly's trial testimony indicated that the photographs showed that they were taken from inside the secured area, consistent with his own observations of defendant standing next to the deceased motorcyclist inside the secured area. Trooper Byerly explained that when defendant was detained, he took her camera and, upon viewing the last couple of photographs, he decided to delete them because,

> [t]hey were obviously taken from within the police tape. And basically I didn't want her to have pictures of this gentleman that been killed to do with them

> whatever she wanted to do. You know, post them on the Internet or whatever the case may be.

Trooper Byerly further testified that he did not consider the photographs to be evidence at that time, stating, "I wouldn't see us keeping her camera or downloading photos off her camera to be used as evidence. I just would not see that taking place."

We disagree with defendant's argument that the permissive adverse inference instruction given by the trial court was insufficient to remedy the deletion of the photographs. Under *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988), a government's failure to preserve potentially exculpatory evidence violates a defendant's due process rights if the defendant can show bad faith. See *People v Anstey*, 476 Mich 436, 460-461; 719 NW2d 579 (2006). The presence of bad faith turns on the police knowledge of the exculpatory value of the evidence at the time that it is lost or destroyed. *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996). There must be a conscious effort to suppress exculpatory evidence. *Id.*

Here, while the trial court considered Trooper Byerly's conduct in deleting the photographs to be improper, it did not find that they were deleted in bad faith, or with knowledge of their potentially exculpatory value. To find such conduct, one would have to conclude that the photographs supported an inference that defendant was not inside the police tape area. According to Trooper Byerly's trial testimony, however, the photographs depicted just the opposite, i.e., that defendant was inside the secured area. Thus, his testimony indicates that the photographs would have been inculpatory, not exculpatory.

Even where bad faith is shown, it is appropriate for a trial court to give a permissive adverse inference instruction, as was given in this case, which allows the jury to infer that the destroyed evidence would have been favorable to the defendant. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), see also *People v Cress*, 250 Mich App 110, 157-158; 645 NW2d 669 (2002), vacated in part 466 Mich 833 (2002), rev'd on other grounds 468 Mich 678 (2003). An inference is permissive, and comment and instruction is permitted, "only when the connection between the circumstances of the case and the inference that the evidence would be adverse is so logical that the factfinder is permitted to make the connection[.]" *People v Fields*, 450 Mich 94, 105-106; 538 NW2d 356 (1995).

Because defendant received an appropriate instruction, the trial court did not abuse its discretion in denying his motion for a new trial with respect to this issue. Indeed, it is questionable whether the instruction should have been given at all without a finding of bad faith. Regardless, defendant has not establish that either dismissal of the charges, or a mandatory adverse inference instruction, was required. "Almost all presumptions are made up of permissible inferences." *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). Neither the rebuttable presumption of negligence in *Johnson v Secretary of State*, 406 Mich 420,

440-441; 280 NW2d 9 (1979), nor the presumption recognized in *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957), a civil case, supports a different result in this case.[3]

For these reasons, the trial court did not err in denying defendant's posttrial request to dismiss the charges or abuse its discretion in denying defendant's motion for a new trial.

VIII. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor's misconduct denied her a fair trial. Defendant concedes that she did not object to the prosecutor's conduct at trial, leaving these claims unpreserved. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Claims of prosecutorial misconduct are generally reviewed de novo. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Any factual findings made by the trial court are reviewed for clear error. *Id*. But where a defendant fails to preserve a claim of prosecutorial misconduct, review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763; *Brown*, 279 Mich App at 134. Review is precluded if an objection could have cured any error. *Unger*, 278 Mich App at 234-235. In addition, we review the trial court's denial of a new trial based on a defendant's untimely claims of prosecutorial misconduct for an abuse of discretion. See *Miller*, 482 Mich at 544.

"Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process of law." *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and their relationship to the evidence admitted at trial. *Brown*, 279 Mich App at 134-135.

Defendant first argues that the prosecutor engaged in misconduct by arguing a factual theory that was not supported by the district court's bindover decision. This matter is addressed in section II of this opinion, in which we concluded that there was no jurisdictional error and that the prosecutor's factual theories at trial neither broadened nor altered the information. Accordingly, there is no merit to this claim of misconduct.

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[3] We find no merit to defendant's cursory claim that structural error occurred. Structural errors are "intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). Such an error necessarily renders the determination of guilt or innocence unfair or unreliable. *Id.* Although there were clearly credibility issues raised by the evidence in this case, the deleted photographs may have harmed the prosecutor more than defendant. The destroyed evidence did not render the determination of defendant's guilt or innocence unfair or unreliable, especially given the trial court's grant of defense counsel's request for a permissive adverse inference instruction.

Defendant next argues that the prosecutor improperly cross-examined her regarding an irrelevant matter, namely, whether she had her cell phone on during the first day of trial. Evidentiary issues are not constitutional in nature. *Blackmon*, 280 Mich App at 259. Further, a prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). In *People v Bell*, 88 Mich App 345, 349; 276 NW2d 605 (1979), this Court, quoting *People v Dellabonda*, 265 Mich 486, 499-450; 251 NW 594 (1933), observed:

> One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness.

While the relevance of the cell phone incident appears to be questionable, it is not apparent that the prosecutor acted in bad faith. Thus, this claim of misconduct cannot succeed. *Dobek*, 274 Mich App at 70. Furthermore, we agree with the trial court's characterization of this evidence as harmless when denying defendant's motion for a new trial. Contrary to what defendant asserts, the prosecutor did not suggest to the jury that it should convict defendant of the charges because she ignored the "no cell phones" signs in the court. The prosecutor stated that defendant should have been aware of the signs and suggested that she was willing to disregard them, but the prosecutor asked the jury to evaluate defendant's behavior at the scene of the accident investigation to determine defendant's guilt. To the extent defendant believed that the prosecutor's argument was improper, a timely and proper objection could have alleviated any perceived prejudice. Indeed, even without an objection, defense counsel appears to have effectively handled the "cell phone" matter in his closing argument by suggesting that the prosecutor was looking for his evidence in defendant's handbag. Because there is no likelihood that either the cell phone evidence or the prosecutor's argument affected the outcome, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

Defendant also argues that the prosecutor engaged in misconduct by commenting on her "predisposition" to take on the establishment through illegal acts. Examined in context, the prosecutor was commenting on testimony provided by defendant's character witnesses regarding defendant's willingness to challenge authority and take on the establishment. Because defendant placed her own character into issue, and there was evidence to support the prosecutor's argument, the prosecutor did not act improperly. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as it relates to the prosecutor's theory of the case. *Unger*, 278 Mich App at 236.

Defendant also argues that the prosecutor improperly cross-examined her regarding the credibility of prosecution witnesses. While it is generally impermissible for a prosecutor to ask a defendant to comment on the credibility of other witnesses, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), we note that the challenged cross-examination here followed defendant's volunteered testimony that the police officers "were lying. They were perjuring themselves." When a defendant raises an issue, she opens the door to a full development of the subject. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). The prosecutor may fairly respond to an issue raised by a defendant. *Brown*, 279 Mich App at 135. Thus, defendant has

failed to establish any bad faith conduct amounting to misconduct. Cf. *Dobek*, 274 Mich App at 71. Moreover, the jury would have understood from the evidence and defense counsel's opening statement that defendant believed that the prosecution witnesses were not being untruthful. Accordingly, any error was not outcome determinative. *Carines*, 460 Mich at 763.

Defendant also argues that the prosecutor improperly argued facts not in evidence by commenting on the limited circulation of the *Michigan Citizen* newspaper. It is improper for a prosecutor to make factual statements that are not supported by the evidence. *Dobek*, 274 Mich App at 66. In this case, the circulation of the *Michigan Citizen* was not a significant issue. Moreover, the trial court later instructed the jury that the "lawyers' statements and arguments are not evidence" and "you should only accept things that the lawyers say that are supported by the evidence or by your own common sense." These instructions were sufficient to dispel any prejudice. *Schutte*, 240 Mich App at 721-722. Although the prosecutor also used names of well known news reporters, such as Tom Brokaw, in his rebuttal argument, the thrust of the argument was that there was no evidence that any police witness recognized defendant as a reporter with the *Michigan Citizen* newspaper. Examined in context, defendant has failed to show that the remarks were plainly improper. *Unger*, 278 Mich App at 236.

We also reject defendant's claim that the prosecutor argued facts not in evidence when commenting that the cameraman who made the videotape at the accident scene was standing outside the perimeter of the police line. The prosecutor was permitted to make reasonable inferences from the evidence, including the videotape itself. *Id*. Further, any perceived error was cured by the trial court's instruction that the lawyer's statements and arguments are not evidence. *Schutte*, 240 Mich App at 721-722. Defendant has also failed to establish any outcome-determinative plain error based on the prosecutor's closing argument concerning the audiotape evidence, namely, whether it indicated that there was confirmation that the motorcycle involved in the police pursuit was stolen. We also reject defendant's argument that the prosecutor improperly commented on the credibility of witnesses. The prosecutor did not vouch for the credibility of witnesses, but rather argued from the evidence that the prosecution witnesses, rather than defendant, were credible. *Dobek*, 274 Mich App at 67; *Schutte*, 240 Mich App at 722.

In sum, defendant has not established any outcome-determinative plain error. Further, defendant has not demonstrated that the cumulative effect of the prosecutor's alleged misconduct undermined the reliability of the verdict. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *Brown*, 279 Mich App at 145-146. "Defendant was entitled to a fair trial, not a perfect one." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The trial court did not abuse its discretion in denying defendant's motion for a new trial based on the prosecutor's conduct.

IX. TRIAL COURT'S CONDUCT

Defendant next argues that the trial court's conduct at trial deprived her of a fair trial. We disagree because defendant has not established that the trial court's conduct pierced the veil of judicial impartiality. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The trial court's interruption of defense counsel's cross-examination of Derlyn Snider and questioning of this witness to clarify testimony did not deny defendant a fair trial. A trial court

properly may question a witness to clarify testimony or elicit additional relevant testimony. *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996). The trial court here did not disparage defense counsel or demonstrate any prejudice, unfairness, prejudice, or partiality in doing so.

The other remarks challenged by defendant mostly involve the trial court's admonishment of defense counsel's continued disregard of the court's ruling that the propriety of the police chase that preceded the traffic accident was not a relevant issue for trial.[4] Regardless of whether defendant agreed with the trial court's ruling, the trial court had wide discretion in matters of trial conduct, *Paquette*, 214 Mich App at 340, including in determining how far afield defendant would be permitted to inquire to present a possible motive for a witness to give false testimony. *People v Perkins*, 116 Mich App 624, 628; 323 NW2d 311 (1982). While some of the trial court's remarks were arguably intemperate, its response to defense counsel's continued disregard of its evidentiary ruling did not rise to a level that deprived defendant of a fair trial by unduly influencing the jury. Indeed, the trial court instructed the jury:

> [W]hen I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. And if you believe I have an opinion about how you should decide this case, then pay no attention to what you think that opinion is.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, 256 Mich App at 279. The trial court's conduct does not warrant a new trial.

Finally, the record does not support defendant's claim that the trial court's conduct during the prosecutor's cross-examination of defendant deprived defendant of a fair trial. The record indicates that the trial court intervened when defendant gave unresponsive testimony and became argumentative. A trial court properly may interject itself when a witness is "difficult." *Davis*, 216 Mich App at 49-50.

X. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next raises multiple claims of ineffective assistance of counsel, many of which are related to matters previously addressed in this opinion. With the exception of defendant's claim that defense counsel should have moved to suppress or strike Trooper Byerly's description of the deleted photographs, defendant preserved this issue by moving for a new trial on the ground that she was denied the effective assistance of counsel. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

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[4] Defendant has abandoned any challenge to the merits of the trial court's evidentiary ruling by failing to sufficiently brief that issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Nonetheless, to the extent that there was no *Ginther*[5] hearing, our review is limited to errors apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "[A] defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667. Defendant must also overcome a strong presumption that counsel engaged in sound trial strategy. *Id.* at 667-668.

Initially, we reject defendant's argument that she is entitled to a new trial, without the need to show prejudice, because defense counsel failed to subject the prosecutor's case to meaningful adversary testing. A presumption of prejudice requires that counsel's failure be complete. *Bell v Cone*, 535 US 685, 696-697; 122 S Ct 1843; 152 L Ed 2d 914 (2002). This is clearly not the situation here, where defense counsel attacked the credibility of the prosecution witnesses and used defendant's own testimony to present a different version of her encounter with Troopers Barber and Keller.

Turning to defendant's specific claims, defendant first argues that counsel was ineffective for not asserting the claim of jurisdictional error discussed in section II, *supra*. Given our determination that defendant has not shown a jurisdictional defect, this ineffective assistance of counsel claim cannot succeed. Counsel is not required to advocate a meritless or futile position. *Unger*, 278 Mich App at 257; *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant also argues that defense counsel was ineffective for not objecting to the prosecutor's use of leading questions or elicitation of hearsay testimony. However, defendant does not identify any of the allegedly improper questions. Without more, defendant's argument is insufficient for meaningful review. Defendant may not leave it to this Court to discover and rationalize the basis for her claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant next argues that defense counsel was ineffective for not requesting a jury instruction based on her constitutional rights as a news gatherer, or requesting a special unanimity instruction. Given the trial court's ruling that defendant was not entitled to assert a defense based on her status as a news gatherer, it would have been futile for defense counsel to request the instruction. *Unger*, 278 Mich App at 257. Further, because defendant has failed to establish that the trial court's general unanimity instruction was insufficient to protect her rights, see section III, *supra*, and the trial court's ruling when denying defendant's motion for a new trial that it would not have given a special unanimity instruction if requested, defendant cannot

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

demonstrate the requisite prejudice necessary to succeed on this claim of ineffective assistance of counsel.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's conduct discussed in section VIII, *supra*, and the trial court's conduct discussed in section IX, *supra*. In light of our conclusions that neither the prosecutor's conduct nor the trial court's conduct deprived defendant of a fair trial, these ineffective assistance of counsel claims also cannot succeed.

Defendant next argues that defense counsel was ineffective for failing to call four fact-based witnesses. The decision whether to call a witness is presumed to be a matter of trial strategy. *Horn*, 279 Mich App at 39. Where a defendant claims that counsel was ineffective for failing to call a witness, she must show that the failure to call the witness deprived her of a substantial defense. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

The record reflects that the four proposed witnesses executed affidavits in November 2008, long before the trial began in April 2009. At trial, defense counsel advised the trial court that he was considering calling two fact-based witnesses, Amber Willingham and Roshell Shoulders. Ultimately, only Shoulders was called to testify in support of defendant's claim that she did not cross the police line. Although the record does not indicate why Amber Willingham or the three other individuals were not called at trial, defendant has not overcome the presumption that counsel elected not to call them as a matter of trial strategy. Counsel was able to advance the defense theory that defendant never crossed the police line through defendant's testimony and Shoulders's supporting testimony. "The presentation of only one witness has the advantage of eliminating the possibility of distracting inconsistencies." *Carbin*, 463 Mich at 604. The witnesses' pretrial affidavits present such concerns. Indeed, one witness averred that she saw the "reporter walk past the yellow tape." Thus, defendant has failed to establish that defense counsel's failure to present additional fact-based witnesses was unsound strategy or deprived her of a substantial defense.

We also reject defendant's claim that defense counsel was ineffective for failing to move for dismissal based on Trooper Byerly's deletion of the photographs. Because dismissal was not an appropriate remedy, see section VII, *supra*, a motion to dismiss would have been futile. *Unger*, 278 Mich App at 257. Defendant's additional claim that defense counsel should have moved to suppress or strike Trooper Byerly's description of the photographs is also unavailing. Because Trooper Byerly's description of the images in the photographs did not encompass any out-of-court statement, there is no merit to defendant's claim that the testimony involved inadmissible hearsay, or see MRE 801(a) and (c), or violated defendant's constitutional right to confront witnesses.

In addition, considering that MRE 1004(1) and (4) allows other evidence to establish the contents of a photograph that was not destroyed in bad faith, or where the content of the photograph is "not closely related to the controlling issue," we are not persuaded that defense counsel was ineffective for not moving to exclude Trooper Byerly's description on this ground. See also *People v Girard*, 269 Mich App 15, 20; 709 NW2d 229 (2005). The critical fact in this case was whether defendant was inside the secured police area when she was approached by

Trooper Barber. While inferences that might be drawn from the photographs were potentially probative of this issue, the photographs were not closely related to this issue. Moreover, even if the photographs could be considered closely related to a controlling issue, as indicated previously, the trial court did not find that Trooper Byerly acted in bad faith when deleting the photographs. Defendant had the burden of establishing the factual predicate of her ineffective assistance of counsel claim. *Carbin*, 463 Mich at 601. Defendant has failed to establish a reasonable probability that defense counsel would have succeeded in having Trooper Byerly's testimony excluded or stricken had an objection been made based on MRE 1004.

Further, Trooper Byerly's description of the photographs added little to the credibility issue already presented by his testimony that he saw defendant standing by the deceased motorcyclist's body. At best, his explanation for deleting the photographs provided another circumstance for the jury to consider in evaluating the credibility of his account of his actions and observations. In addition, defense counsel used the deleted photographs in his closing argument to support his claim that the police were hiding the truth. Defendant was also given the benefit of a permissive adverse inference instruction to support his argument, even without the court making a finding of bad faith. Considering the record as a whole, there is no reasonable probability that the result of the proceeding would have been different if Trooper Byerly's testimony regarding the photographs had been stricken.

Defendant also argues that defense counsel should have investigated and presented witnesses to establish common practices of news gatherers at crime or accident scenes. Because defendant was not entitled to a defense based on her status as a news gatherer, and the trial court found when denying her motion for a new trial that it would not have allowed such a witness to testify, this ineffective assistance of counsel claim cannot succeed. Defendant has not shown that she was deprived of a substantial defense. *In re Ayres*, 239 Mich App at 22.

We also reject defendant's claim that defense counsel's failure to object to Scales's rebuttal testimony on the ground that Scales was not disclosed on the prosecutor's witness list requires a new trial. As discussed previously, the trial court had discretion to allow the prosecution to add a witness for good cause. *Steele*, 283 Mich App at 483. It is apparent from the trial court's posttrial ruling that it found Scales's rebuttal testimony appropriate, despite the prosecutor's failure to include him on a witness list. Defense counsel was not required to make a futile objection. *Unger*, 278 Mich App at 257.

XI. CUMULATIVE ERROR

Finally, defendant argues that she was denied a fair trial because of the cumulative effect of many trial errors. We disagree. Only actual errors are aggregated to determine their cumulative effect. *Bahoda*, 448 Mich at 292 n 64. We find no actual errors that, cumulatively considered, had the effect of undermining confidence in the reliability of the jury's verdict. *Brown*, 279 Mich App at 146.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood