

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN STANLEY HAZEL,

Defendant-Appellant.

UNPUBLISHED

December 21, 1999

No. 209378

Ingham Circuit Court

LC No. 97-072409 FH

Before: Doctoroff, P.J., and O’Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of uttering and publishing, MCL 750.249; MSA 28.446. The trial court sentenced defendant to 180 days in the county jail, and ordered him to pay \$1,000 in costs, \$60 to the crime victims’ fund, and restitution of \$87.55 from defendant’s jail account. The trial court further stated that upon payment of the ordered costs and fees, the remainder of defendant’s jail sentence would be suspended. We affirm defendant’s conviction, but vacate the award of costs and remand for the issuance of an amended judgment of sentence.

Defendant argues that there was insufficient evidence to support the district court’s decision to bind him over for trial, and insufficient evidence to sustain his uttering and publishing conviction. Specifically, defendant claims that both the bindover and his conviction were unsupported by the evidence because the “Public Office Money Certificate” (POMC) he presented to the Secretary of State as payment for the renewal of his personalized license plate and chauffeur’s license was not a false instrument, but a valid promissory note. Defendant further contends that the prosecutor failed to establish that defendant intended to defraud the Secretary of State when he presented the POMC, and insists that he intended to honor the POMC if it was presented to him for payment. We disagree.

We first note that a circuit court’s decision to grant or deny a motion to quash a felony information is reviewed de novo to determine if the district court abused its discretion in ordering a bindover. *People v Northey*, 231 Mich App 568, 573; 591 NW2d 227 (1998). A district court’s determination that sufficient probable cause exists to bind a defendant over for trial will not be disturbed unless the determination is wholly unjustified by the record. *Id.* at 574. However, an evidentiary deficiency at the preliminary examination resulting in the bindover of the defendant in error does not

mandate reversal of a conviction following trial absent a showing of prejudice. *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). Therefore, it is appropriate to first address defendant's challenge to the sufficiency of the evidence presented at trial.

This Court reviews a challenge to the sufficiency of the evidence presented at trial by viewing the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). Both direct and circumstantial evidence, and all reasonable inferences drawn therefrom, may be considered. *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993). An actor's intent may likewise be inferred from the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

The elements of uttering and publishing are: (1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment. *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998). See MCL 750.249; MSA 28.446. The forged instrument need not be accepted as good, but merely offered as valid. *People v Fudge*, 66 Mich App 625, 632; 239 NW2d 686 (1976). Thus, once the offer is made, the crime is complete. *Id.*

A promissory note is "a written unconditional promise by one person to pay to another person therein named . . . a fixed sum of money, at all events, and at a time specified. No contract or agreement is a promissory note which does not provide for the payment of money, absolutely and unconditionally." *Parker v Baldwin*, 216 Mich 472, 474; 185 NW 746 (1921); see also Black's Law Dictionary (7th ed), p 1086. On the other hand, a POMC has been described by one court as: "[a] contrived promissory note with no real value. It is used by those who believe that only gold and silver coins are legal currency. It is tendered as a promise to pay when a 'proper' official determination is made as to what type of currency has been authorized as a substitute for gold and silver." *Federal Land Bank of Spokane v Parsons*, 116 Idaho 545, 547, n 1; 777 P2d 1218 (Id Ct App, 1989). The POMC contains what could be described as a conditional promise to pay, and therefore, it is not negotiable. MCL 440.3104(1); MSA 19.3104(1).

Although no Michigan appellate court has dealt with the specific question of the validity of a POMC, this Court has rejected defendant's underlying claim that Federal Reserve notes are worthless and that the only legal tender is silver or gold. *People v Lawrence*, 124 Mich App 230, 236; 333 NW2d 525 (1983); *Richardson v Richardson*, 122 Mich App 531, 536; 332 NW2d 524 (1983), See US Const, art I, §10. Moreover, other courts that have considered POMCs have uniformly rejected them as worthless and non-negotiable. See *Parsons v State*, 113 Idaho 421, 428; 745 P2d 300 (Idaho Ct App, 1987) and cases cited therein.

Upon review of the record and relevant law, we reject defendant's contention that the prosecution failed to establish that the POMC was a false document. There was testimony presented at trial from an investigator for the Secretary of State and a fraud investigator for Citizens Bank that the

POMC was not a money order and did not contain any information typically displayed on a check, money order, or promissory note (bank name and routing number, account number, date); however, without examining the document closely, it could easily be mistaken for a money order. In fact, defendant admitted that he designed and printed the document himself, and that he expected the clerk to reject the POMC when he presented it because he had previously been declined when he attempted to utilize the POMC as payment for another transaction. Nonetheless, the record supports the conclusion that defendant presented the POMC to the clerk hoping that she would mistake the certificate as a promissory note or money order, which she did.

In addition, defendant conceded that his purpose in presenting the POMC was “kind of a political thing” and that he desired to provoke civil litigation regarding the validity of the use of Federal Reserve notes as legal tender. Defendant acknowledged that he received a certified letter from the Secretary of State demanding payment, and that instead of issuing payment, he responded by certified letter, attaching a copy of the POMC, claiming that he would not pay the debt because the Secretary of State never presented the POMC to him for payment. However, defendant acknowledged that he had no fixed residence and that he never attempted to meet with the Secretary of State investigator to make payment. Defendant additionally stated that had a meeting taken place, he would have expected to “negotiate” over the spot price of silver before making payment in silver coins. Under these circumstances, we conclude that the POMC was a worthless document, that defendant knew that it was worthless at the time he presented it for payment, but that he nevertheless presented the POMC to the Secretary of State in exchange for renewal of his license plate and chauffeur’s license with the intent to defraud the agency. Viewing the evidence in a light most favorable to the prosecutor, we find that there was more than ample evidence presented at trial to prove the elements of uttering and publishing beyond a reasonable doubt. Thus, because there was sufficient evidence to support defendant’s conviction, any error with respect to the bindover was harmless. See *Hall, supra* at 602-603.

Defendant next claims that he was denied a fair trial when the trial court made denigrating comments to him and a defense witness during trial. Although defendant raised this issue in a post-trial motion for new trial, defendant did not object to the alleged comments at trial and has failed to preserve this issue for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). In the absence of an objection, this Court may review the matter only to avoid manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *Paquette, supra* at 340. The record should not be taken out of context to show trial court bias; rather, the record should be reviewed as a whole. *Id.* Ordinarily, judicial remarks during trial that are critical, disapproving, or hostile to counsel, or normal expressions of impatience, dissatisfaction, annoyance, and anger, do not support a determination of bias or partiality. *Cain v Dep’t of Corrections*, 451 Mich 470, 497, n 30; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994). There is a strong presumption that the trial judge is fair and impartial and the defendant bears a heavy burden of demonstrating that the judge was biased. *Cain, supra* at 497. This Court reviews alleged judicial misconduct to determine whether partiality could have

influenced the jury to the detriment of the defendant's case. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

Defendant complains of the following remarks the trial court made to him in the presence of the jury:

Stop. When I'm saying something, you're not to talk. Do not interrupt me again. You asked him all of this on cross. We're not going back through the entire thing again. If there's some new area of inquiry, now is your chance. I do not want to interfere with your right to represent yourself, but if you continue to ask questions that you asked before, I'm not going to subject this jury and everyone else to this. If you have a political philosophy, that is your business, where [sic] the rest of us don't have to live with it. You are now directed to ask new areas of inquiry or sit down now.

After reviewing the challenged remarks in context, we conclude that the trial court properly directed defendant not to interrupt the court, not to repeatedly ask questions concerning matters that were already covered, and not to force his political opinions on the jury. The first two admonitions were clearly proper and the last direction, while perhaps unnecessary, was brief and did not unduly influence the jury, particularly in light of the fact that defendant later testified that his motive for presenting the POMC was to make a political point. The remaining challenged comments made by the trial court to defendant concerning his conduct at trial were outside the presence of the jury and do not demonstrate bias that could have impacted the jury verdict. *Cheeks, supra*.

Defendant also complains of the following colloquy between the trial court and a defense witness who was an attorney:

The Court: Sustained. Mr. Speck, are you trained in the rules of evidence? Are you an attorney?

Speck: Yes, I am.

The Court: Are you trained in the rules of evidence?

Speck: Yes, I am.

The Court: Are you familiar with the word "hearsay"?

Speck: Yes, I am.

The Court: Then continue - then I would suggest you start thinking about them. When someone asks you the gist of the conversation, it doesn't mean you start telling us what the person said. Isn't that correct?

Speck: The gist of what the person -

The Court: When someone says, “Was there a conversation and what was the topic,” you then tell us the conversation? Is that the way you do that? It isn’t, is it?

Speck: It’s the topic of the conversation.

The Court: That’s right. Not what they said; isn’t that right?

Speck: That’s correct.

The Court: Thank you. Next question.

When considered in context, the trial court’s admonitions to defendant’s witness were provoked by the witness’ attempts to volunteer his legal opinions or relate improper testimony that were unresponsive to the questioning. Under these circumstances, we fail to discern any impropriety in the trial court’s comments, or any evidence of personal bias against defendant or his witness. *Cain, supra; Paquette, supra.* Accordingly, we find no manifest injustice.

Defendant also claims that the trial court exhibited improper bias following sentencing by making a disparaging comment about defendant in the presence of others in the courtroom. In support of his claim, defendant submitted an affidavit from Frank Stasa, an individual who was allegedly present at sentencing, who claimed to have heard the trial court announce to those present in the courtroom: “Guys like that really make me mad. I hate guys like that! He was a smartass!” referring to defendant.

Our review of the record from the sentencing proceedings does not substantiate the assertion contained in the affidavit. Although the affiant asserts that the alleged statement was proclaimed on the record in open court, the sentencing transcript does not contain these statements, and there is no indication that defendant requested the court reporter to prepare a transcription of the proceedings immediately after sentencing took place. See MCR 7.210(B)(2); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). This Court cannot review matters which are presented to it inadequately. *People v Johnson*, 113 Mich App 414, 421; 317 NW2d 645 (1982). In any event, we are not convinced that defendant established a personal bias by the trial court that would support disqualification under the court rules. MCR 2.003(B)(1).

Defendant next contends that the trial court erroneously instructed the jury on uttering and publishing by using a modified jury instruction that was submitted by the prosecutor, instead of using the standard instruction. We disagree.

This Court reviews challenged jury instructions in their entirety to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Jury instructions must include all the elements of the offense, as well as all material issues, defenses, and theories that are supported by the evidence. *Id.*; *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights. *Piper, supra* at 648. Use of the standard jury instructions is not mandatory, and trial courts have been encouraged to carefully examine the standard instructions “to ensure their accuracy and appropriateness to the case at hand.” *People v*

Petrella, 424 Mich 221, 277; 380 NW2d 11 (1985); *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).

The trial court instructed the jury on the offense of uttering and publishing as follows:

Now, in this particular case, the defendant is charged with the crime of uttering and publishing. Now, in order to prove this, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the document in question was designed and intended to be presented as a bill of exchange. *Now, a bill of exchange is an order to a bank to pay money to someone such as a check or money order.* Second, that the document was false in that it did not contain a Federal Reserve routing number, and did not specify a bank or account number which was responsible for payment.

Thirdly, that the defendant presented this document to another person as payment for any goods or service. Fourthly, that the defendant represented either by words or actions or both that the document was genuine or true when presented. Fifth, that when the defendant did this, he knew that the document was, in fact, false. And, sixth, and lastly, that when the defendant did it, he did it with the intent to defraud or cheat someone. In this case, the State of Michigan. [Emphasis added.]

Defendant claims that the modifications to the standard jury instructions, noted in italics above, were improper; however, he has failed to articulate, beyond mere conclusory statements, how the modified instruction was incorrect. A litigant may not merely state his position in conclusory terms, without argument or citation of supporting authority, and leave it to this Court to develop an argument in support of that position. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). In any event, we find no error with the modified instruction that was comprised of the standard uttering and publishing instruction as well as two additional statements reflecting the prosecutor's theory of how the offense was committed in this case. See MCR 2.516(D)(4). There was sufficient evidence to support the additional statements in the instruction inasmuch as the parties do not dispute that defendant presented the POMC to the clerk at the Secretary of State branch office to pay for the renewal of his personalized license plate and chauffeur's license. Accordingly, we find no error in the trial court's instruction.

Defendant next contends that the trial court erred in failing to *sua sponte* instruct the jury on the claim of right defense. Defendant did not request an instruction on the claim of right defense. Thus, while a trial court is obligated to properly instruct the jury on the law applicable to the case, the failure of the court to instruct on any particular point of law will not result in reversal unless the defendant requested such an instruction. MCL 768.29; MSA 28.1052; *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Truong (After Remand)*, 218 Mich App 325, 341; 553 NW2d 692 (1996). The trial court is not required to *sua sponte* instruct the jury on the defendant's theory of the case, *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995), particularly where there is no evidence to support the charge. *Wess, supra* at 243.

The claim of right defense is applicable to larceny-type offenses, not to uttering and publishing, because it negates the intent to permanently deprive that is a necessary element of a larceny-type offense. *People v Cain*, ___ Mich App ___; ___ NW2d ___ (# 204590, issued 10/12/99), slip op p 10; *People v Goodchild*, 68 Mich App 226, 232; 242 NW2d 465 (1976). The gist of the offense of uttering and publishing is the presentation of a false or forged instrument with the intent to defraud, not the taking of property as in a larceny offense. *Fudge, supra* at 632. That defendant believed he had a right to obtain certain property does not excuse the intentional use of a false instrument to obtain the property. The trial court did not err in failing to *sua sponte* instruct the jury on the claim of right defense. See *Wess, supra*.

In a related argument, defendant contends that he received ineffective assistance of counsel by standby counsel's failure to request an instruction on the claim of right defense.¹ Defendant did not move for a new trial or evidentiary hearing on the basis of alleged ineffective assistance of counsel, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), and this Court's review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

As noted above, the claim of right defense was inapplicable to the charged offense of uttering and publishing, and therefore, standby counsel was not ineffective for failing to request, or advise defendant to request, an inappropriate jury instruction. *Truong, supra* at 341. Trial counsel is not required to make a frivolous or meritless motion. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Accordingly, we reject defendant's claim that his standby counsel's performance was deficient or that counsel's representation caused defendant prejudice. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Finally, defendant asserts, and the prosecutor agrees, that the trial court erred by assessing costs in the amount of \$1,000 as part of defendant's sentence. We review a trial court's imposition of costs as part of a sentence de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). A trial court may only require a convicted felon to pay costs where such requirement is expressly authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995); *People v Jones*, 182 Mich App 125, 126; 451 NW2d 525 (1989). The uttering and publishing statute, MCL 750.249; MSA 28.446, provides only for imprisonment for not more than fourteen years, and makes no provision for the payment of a fine or costs in addition to, or in lieu of, the imposition of imprisonment. Therefore, because the trial court did not cite, and we are unable to find, any authority that would permit an imposition of costs in this case, we vacate the imposition of costs against defendant.² However, because defendant does not otherwise challenge the validity of his sentence, resentencing is unnecessary. *People v Jones*, 182 Mich App 125, 128; 451 NW2d 525 (1989). Instead, we remand only for the ministerial task of issuing an amended judgment of sentence that does not impose costs. *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997). In addition, defendant is entitled to a refund of any costs already paid in this matter.

Affirmed as to defendant's conviction, but remanded for the issuance of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

¹ Defendant elected to try this case in propria persona with the assistance of advisory counsel

² Our research reveals that the only statutory authority that would permit the trial court to impose costs is the probation statute, MCL 771.3(2)(c); MSA 28.1133(2)(c), or the conditional sentence statute, MCL 769.3; MSA 28.1075, and defendant was not given a probationary or conditional sentence.