

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE EDWARD AROCHA,

Defendant-Appellant.

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UNPUBLISHED

October 20, 2005

No. 256443

Oakland Circuit Court

LC No. 2004-195241-FH

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, assault and battery, MCL 750.81, and trespass, MCL 750.552. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 2-1/2 to 15 years for the felonious assault conviction, ninety-three days for the assault and battery conviction, and thirty days for the trespass conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence to delete references to an additional conviction and sentence for aggravated assault, MCL 750.81a.

I. Underlying Facts

Defendant's convictions arise from his involvement in a brawl at a bar/bowling alley on December 13, 2003. Lana Tutt, a bartender at Highland Lanes, had known defendant for several years and defendant had lived with her for a few days before the incident. On the day of the incident, defendant came into the bar with Tommy Knight, Scott Lacheski, and Michael Carlson. Defendant testified that he went to the bar to collect a debt from Tutt, and was in the bar approximately forty-five minutes before the incident. Carlson described defendant as a "drinking buddy," and indicated that both he and defendant had consumed approximately six beers before the incident. Gary Nash and Rodney Addison, who were involved in the incident, were at the bar to participate in a dart tournament. Nash testified that he knew defendant and they were friendly toward each other.

According to Tutt, defendant and Knight were at the bar when Gary Nash tripped over Knight's foot, and a brief exchange occurred between Nash and Knight. As a precaution, Tutt asked Knight to move to the opposite end of the bar, near an off-duty bartender. Subsequently, Knight yelled an expletive and, in response, Tutt walked from behind the bar to calm down Knight. Tutt explained that because the bar did not have a bouncer, part of her job responsibility

was resolving problems and asking people to leave, if necessary. Tutt stated that defendant then walked over, moved her “lightly,” and told her that he would handle the situation because it involved his friend. In response, Tutt told defendant that he did not need to get involved, and that she would handle the situation. According to Tutt, defendant said, “no, it’s my friend, I’m going to take care of it,” and pushed her out of the way. Tutt then asked defendant and Knight to leave the premises. Defendant refused to leave. Tutt testified that because it is illegal for someone to take an open container of alcohol out of the bar, she tried to remove the bottle of beer from defendant’s hand. Defendant would not give her the bottle. She then pushed defendant in the chest area toward the door, and again tried to remove the bottle of beer. Defendant refused to relinquish the beer, and instead drank it quickly, and slammed the bottle down. Because defendant “still wasn’t leaving,” Tutt continued to push him toward the door. Tutt indicated that, when she and defendant reached the vestibule, he said, “I’m gonna f\*\*k you up,” grabbed her hair, and “just kept pulling [her] and pulling on [her hair], trying to pull her through the doors.” Both Nash and Addison testified that they observed Tutt ask defendant to leave and observed defendant grab Tutt by the hair, push her down, and kick her. Tutt testified that by the time they reached the vestibule, about seven people, including Nash and Addison, came to her assistance to try to “get [defendant] off of [her],” and she ended up on the floor with defendant kicking her five or six times. Tutt heard someone scream, “Get her out of there,” and defendant let her go. Tutt denied ever hitting defendant, and indicated that her only intent was to push defendant out of the bar. Tutt went to call the police.

In the meantime, several patrons, including Addison and Nash, pushed defendant outside. Addison indicated that defendant left the establishment kicking and swinging. Nash testified that he continued outside to talk to defendant about the matter. While outside, Nash saw defendant run to his truck, which was approximately twenty feet from the door. Addison, who testified that he went outside to obtain defendant’s license plate number, saw defendant digging around under his seat as if looking for something. Both Addison and Nash testified that Nash was standing about fifteen feet from defendant at this time, and Nash had his hands up in a non-threatening manner. Nash indicated that, before this incident, he knew defendant and they were friendly toward each other. According to both Nash and Addison, as Nash took a step, defendant rushed him with what Nash and Addison described as a pipe or cue stick. Nash testified that as he stood “flat-foot,” defendant came from around his truck, rushed toward him, and struck him in the head with the object. Addison testified that he was certain that Nash was not threatening defendant when defendant struck Nash. Nash lost consciousness for approximately two minutes, during which time Addison pulled him from the path of defendant’s vehicle. Nash suffered a fractured cheekbone and a split ear, and received fifty-five to seventy-five stitches.

Tutt testified that, about five minutes after defendant let her go, she was still on the phone with the police, and heard people yell defendant’s license plate number, which she gave to the police. A police detective who interviewed defendant three days after the incident testified that defendant admitted hitting Nash, being intoxicated, and disposing of the weapon.

Defendant testified on his own behalf, and also presented a defense witness. Defendant denied that he refused to leave when requested by Tutt, and indicated that he wanted to finish his beer, but Tutt would not release him. He indicated that he grabbed Tutt by the hair and pushed her down only to loosen her grip on him, and that he may have accidentally kicked her during the scuffle. Defendant testified that he was punched several times by several patrons in the vestibule

as he was pushed out of the bar. According to defendant, he feared for his life and quickly ran to his vehicle, but could not leave because his key was in the bar. Defendant then saw “a whole bunch of people coming out at [him], and when Nash approached him, he hit him with a broken rake handle in self-defense. Defendant claimed that he subsequently retrieved his key, and left.

Carlson testified that he saw Tutt grab defendant and push him toward the door, as defendant was trying to escape her grasp. When they reached the vestibule area, ten to fifteen people, including Nash, surrounded defendant and held him as he was trying to leave. Carlson did not see defendant pull Tutt’s hair, kick her, or threaten her. Although Carlson did not see how defendant left the vestibule, he saw five or six people, including Nash, run toward defendant outside and then saw defendant strike Nash with the rake handle as Nash approached him. On rebuttal, a police detective testified that after the incident, Carlson stated that he witnessed the incident between Tutt and defendant, but that he did not see anything that occurred outside the bar.

## II. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his convictions of felonious assault on Nash, assault and battery on Tutt, and trespass. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of felonious assault are “(1) an assault, (2) with a dangerous weapon, (3) committed with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

The offense of assault and battery consists of an assault, which “is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery,” *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) (citation omitted), and a battery, which is “an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person,” *id.*

With regard to the offense of trespass, MCL 750.552 provides in pertinent part that “any person being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, the agent or servant of either, who without lawful authority neglects or refuses to depart therefrom, shall be guilty of a misdemeanor . . .”

Viewed in a light most favorable to the prosecution, a rational trier of fact could find the required elements of felonious assault, assault and battery, and trespass beyond a reasonable doubt. Evidence was presented that the bar’s agent, Tutt, was attempting to resolve an issue in

the bar concerning one of defendant's friends, and instructed defendant not to get involved. Defendant responded that he would take care of it and "pushed [Tutt] out of the way." Tutt asked defendant and his companion to leave the premises, but defendant refused to do so. Defendant instead stated that he was "not leaving," drank down a beer, slammed down the beer bottle, and "still wasn't leaving." As Tutt was pushing defendant toward the door of the establishment, defendant said, "I'm gonna f\*\*k you up," grabbed Tutt's hair, and "just kept pulling [her] and pulling on [her hair], trying to pull her through the doors." Tutt was eventually on the floor, and defendant kicked her five or six times. Tutt denied ever hitting defendant, and indicated that her only intent was to push defendant out of the bar. From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant, upon being notified to depart from the establishment, refused to do so, and that he committed an assault and battery upon Tutt.

Further, evidence was presented that, once defendant was pushed outside the establishment, Nash followed in an attempt to discover the cause of the problem. While outside, Nash saw defendant run to his truck, which was approximately twenty feet from the door, and Addison saw defendant digging around under his seat as if looking for something. Both Addison and Nash testified that Nash was standing with his hands up in a non-threatening manner at this time, and was not armed with a weapon. There was evidence that defendant then emerged with a broken rake handle, rushed toward Nash, and hit him in the head. Addison testified that he was certain that Nash was not threatening defendant when defendant struck him. This evidence, viewed in a light most favorable to the prosecution, supports a reasonable inference that defendant committed a felonious assault upon Nash.

Defendant's challenge to the sufficiency of the evidence for each offense is directed at the credibility of the witnesses and the weight of the evidence. But this Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra* at 514. The jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The evidence was sufficient to sustain defendant's convictions of felonious assault, assault and battery, and trespass.

### III. Instruction on Self-Defense (Persons Acting in Concert)

Next, defendant argues that the trial court erred by denying his request for an instruction on self-defense against persons acting in concert, CJI2d 7.24.<sup>1</sup> We disagree.

Generally, claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The determination whether a jury instruction is applicable to the facts of the case, however, is within the sound discretion of the

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<sup>1</sup> CJI2d 7.24 provides:

A defendant who is attacked by more than one person [or by one person and others helping and encouraging the attacker] has the right to act in self-defense against all of them.

trial court. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *Id.* “There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *Id.*

At defendant’s request, the trial court agreed to give the general self-defense instructions, CJI2d 7.20 and CJI2d 7.22, for the charges of felonious assault and assault and battery. Defendant also requested CJI2d 7.24, asserting that the group inside the bar vestibule, including Nash, were acting together. The trial court agreed that CJI2d 7.24 could apply to the incident involving Tutt inside the bar, but that no evidence was presented that there were a number of people attacking defendant outside the bar.

On this record, we cannot conclude that the trial court abused its discretion, or that defendant was denied a fair trial. As noted by the trial court, there was no evidence that, while outside, defendant was defending himself against anyone other than Nash. In fact, defendant testified on direct examination that he swung a broken rake handle at Nash when Nash stepped toward him to take a swing. Defense counsel then asked defendant, “after you hit [Nash] with that stick did you go and hit anybody else?” Defendant stated, “No sir.” Defendant testified that he then put the stick in his car, and that the parking lot was “pretty cleared out.” These facts indicate that defendant was defending himself against a particular person, i.e., Nash. Because a rational view of the evidence did not support the requested instruction on self-defense against persons acting in concert, it was not error for the trial court to refuse to provide that instruction.<sup>2</sup>

#### IV. Effective Assistance of Counsel

Defendant also argues that defense counsel was ineffective for failing to call exculpatory witnesses, failing to object to prosecutorial misconduct, failing to “advocate against sentencing enhancement,” and failing “to challenge the seating of two jurors.” We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court’s review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

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<sup>2</sup> The record reflects that the jury was extensively instructed on the matter of self-defense with regard to the incident involving Nash.

### A. Failure to Call Defense Witnesses

Defendant argues that defense counsel was ineffective for failing to investigate and call several witnesses who could have supported his defense. Defendant claims that, before trial, he gave defense counsel the names and addresses of “witnesses who had exculpatory evidence.” The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no “unconditional obligation to call or interview every possible witness suggested by a defendant.” *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). A trial counsel’s decisions concerning what witnesses to call, and what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding.” *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Although defendant provides a list of possible witnesses, he has not identified any proof or provided any affidavits containing the substance of the proposed testimony that allegedly would have been valuable to his defense or affected the outcome of the trial. Moreover, even if defense counsel’s inaction could be deemed unreasonable, defendant cannot establish a claim of ineffective assistance of counsel. Defendant asserts that the witnesses could have testified that he was approached in an “assaultive manner.” But defendant presented his self-defense theory at trial through his own testimony and that of a defense witness. Thus, the proposed testimony would have been cumulative, at best, and, given the compelling testimony of both complainants and an independent witness, would have been of little significance in this case. Consequently, defendant cannot demonstrate that there is a reasonable probability that, but for counsel’s actions, the result of the proceeding would have been different. *Effinger, supra*.

### B. Failure to Object to Prosecutorial Misconduct

Defendant also contends that the prosecutor impermissibly vouched for the credibility of Addison, and defense counsel was ineffective for failing to object to the prosecutor’s comments. Defendant relies on the following emphasized portion of the prosecutor’s closing argument:

But if you stop right there, I believe Lana Tutt and Gary Nash and the fact that the Defendant’s story doesn’t make sense, I believe that proves my case beyond a reasonable doubt. This isn’t self-defense. *But that leaves out the most important witness in this case. Who is the one person in this case who has no bias, no personal interest of prejudice, whatsoever? Who is the one who, when he was on the stand, you had no doubt that he was telling the whole truth, the complete truth, so much so I think at times it was funny. When Rodney Addison said “I’m not a fighter,” I almost laughed. He didn’t have to say that. Just looking at him, listening to him and seeing him on the stand you knew Rodney Addison is not a fighter and he’s not a liar. What did Rodney Addison tell you? Lana Tutt tried to get the Defendant to leave the bar. She tried to take his beer. He wouldn’t give it up. And she pushed him to try to get him out of the bar. He told you that he was in the wrong place at the wrong time. He didn’t wanna [sic] do that. And he told you what he saw next. He saw the Defendant grab Lana Tutt by the hair, pull her down, act as if he was gonna [sic] strike her, people come in and he’s kicking her. That’s what he saw. And then he saw the Defendant run*

out to his car. *Mr. Addison told you he went out to get the license plate. You think Rodney Addison went out there to continue an assault on the Defendant? I don't think so ladies and gentlemen. Use your common sense. Use your observations of Rodney Addison on the stand. He went out there to get his license plate, and then what did he see? He saw Gary Nash walking up to the Defendant with his hands up, not in a threatening way, and he saw the Defendant crack Gary Nash in the head with a pole. If you had any doubt about the defendant's guilt after you heard Lana Tutt and Gary Nash, that doubt is erased by Rodney Addison. The Defendant is guilty.*

A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, viewed in context, the prosecutor did not convey to the jury that he had special knowledge that Addison was testifying truthfully. Rather, in making the challenged remarks, the prosecutor was urging the jurors to use their common sense when evaluating the evidence, including Addison's disposition and testimony, and to consider that Addison had no reason to lie, or to fight defendant. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, and may appeal to common sense when arguing that the circumstances of certain testimony make the testimony believable. See, e.g., *People v Fisher*, 220 Mich App 133, 156, 160; 559 NW2d 318 (1996).

Furthermore, to the extent the prosecutor's remarks could be considered improper, the trial court's instructions that the jurors were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence, were sufficient to dispel any possible prejudice. (See Tr II, pp 42, 44-45.) *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, in light of our determination that the allegation of prosecutorial misconduct did not deny defendant a fair trial, it follows that counsel's failure to object did not deprive defendant of the effective assistance of counsel. *Effinger, supra*.

### C. Failure to Advocate Against Sentencing Enhancement

We reject defendant's claim that defense counsel was ineffective for failing to "advocate against sentencing enhancement," and for failing to advise the court that sentence enhancement is permissive and not mandatory. First, defendant has failed to demonstrate that there was a reasonable basis for defense counsel to advocate against sentencing enhancement. At trial, after the jury returned its verdict, defendant acknowledged that he had three prior felony convictions, and the court stated that it was "satisfied that there is sufficient, factual basis for the Sentence enhancement, fourth offense . . ." At sentencing, the trial court specifically noted on the record that defendant had a total of "eleven prior felonies and two misdemeanors." It then stated that defendant "made a particularly vicious attack on somebody and someone with a record shouldn't be attacking. Someone with a record shouldn't be drinking and shouldn't probably be in bars." Given the court's comments, it is highly unlikely that defense counsel could have successfully argued against sentence enhancement.

Furthermore, contrary to defendant's argument, nothing in the record indicates that the trial court believed it lacked discretion in sentencing defendant as an habitual offender. "Absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the

presumption that a trial court knows the law must prevail.” *Knapp, supra* at 389. Consequently, defendant cannot demonstrate that defense counsel’s inaction was prejudicial and, thus, he cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

#### D. Failure to Challenge Two Jurors

We also reject defendant’s claim that defense counsel was ineffective for failing to challenge for cause or remove by peremptory challenge two jurors who stated they were “victims of assaults.” Defense counsel’s failure to challenge a juror generally does not provide a basis for a claim of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). Rather, a decision relating to the selection of jurors is generally a matter of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). “A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror’s . . . facial expression, or manner of answering a question may be important to a lawyer selecting a jury[.]” *Robinson, supra* at 94-95.

Here, it is not apparent from the record that defense counsel lacked a sound strategic reason for retaining the two jurors, or that defense counsel’s decision affected the outcome of the proceedings. Prospective Juror #184, a massage therapist, stated that she “was assaulted by her boyfriend.” However, she also stated that she was “fair and just.” Prospective Juror #52, an assistant general manager of a restaurant, stated that he was previously a bouncer at a bar in the mid to late 1980s, and was the victim of an assault while waiting in a drive-thru. Prospective Juror #52 also stated that he “harbor[s] no ill will,” did not believe “the [assault] will affect [his] decision,” and that he would not hold any negative experiences he had as a bouncer against defendant. He stated that he “[a]bsolutely” promised to follow the law. A review of the voir dire shows that defense counsel was seeking jurors who had life experiences that likely included bars, and who would keep an open mind as to what defendant may have experienced. “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Furthermore, based on the jurors explicit indications that they could be fair and impartial, there is no reasonable probability that, but for counsel’s omission, the outcome of the case would have been different. *Effinger, supra*.

#### V. Sentence

Next, defendant contends that his judgment of sentence must be amended because the trial court erred by sentencing him for aggravated assault on Nash. The prosecutor concedes, and we agree, that defendant’s aggravated assault conviction and sentence listed on his judgment of sentence must be vacated. Defendant was charged with felonious assault on Nash and, in the alternative, with aggravated assault, MCL 750.81a. During trial, the prosecutor withdrew the alternative charge of aggravated assault, and the jury subsequently found defendant guilty of felonious assault. However, the judgment of sentence reflects that defendant was convicted of aggravated assault and he was sentenced for both felonious assault and aggravated assault. Consequently, we remand for correction of the judgment of sentence to remove the conviction and sentence for aggravated assault.

## VI. Defendant's Standard 4 Brief

### A. Charging Discretion

We reject defendant's claim that the prosecutor abused his charging discretion by charging him with felonious assault, rather than the lesser offense of aggravated assault. Because defendant did not object to the charge below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

"[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

Here, defendant does not offer any information or evidence to support that the charge was brought for an unconstitutional, illegal, or illegitimate reason, so there is no basis for this Court to conclude that the prosecutor abused his power in charging defendant with felonious assault. Moreover, as previously discussed in part II, the facts supported the charge of felonious assault and were sufficient to enable the trier of fact to convict on that charge. Consequently, this claim is without merit.

### B. Cumulative Error

We reject defendant's final argument that the cumulative effect of several errors at trial deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed and remanded for correction of defendant's judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Bill Schuette