STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DMARIO ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
May 14, 2020

No. 348593
Wayne Circuit Court
LC No. 18-004703-01-FH

Before: K. F. KELLY, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felonious assault, MCL 750.82(1), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and domestic assault, MCL 750.81(2). Defendant was sentenced to five years' probation for felonious assault, two years' imprisonment for felony-firearm, and 44 days in jail, time served, for domestic assault. Defendant was also ordered to pay $1,300 in court costs, $400 in attorney fees, $204 in state minimum costs, a $130 crime victim's rights assessment, and $600 in supervision fees. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This case arises from an incident that occurred at the home of defendant's father, Dwayne Alexander. Defendant lived with Dwayne, along with 12-year-old D.A., who was Dwayne's son and defendant's brother. On the day of the incident, Dwayne and D.A. came home from the grocery store, and D.A. saw defendant's four-year-old daughter playing with D.A.'s Legos. Dwayne told her not to play with D.A.'s Legos. A verbal argument ensued between defendant and Dwayne, and defendant pulled out a gun and held it up to Dwayne's head. Dwayne grabbed defendant's arm and pulled him outside. Defendant chased Dwayne around Dwayne's truck. Dwayne got into the truck, drove for a few blocks, and called 911. When Dwayne returned home a short time later, defendant pulled Dwayne from the truck. Defendant still had the gun in his hand. As defendant and Dwayne wrestled, defendant pinned Dwayne to the ground. The police arrived, arrested defendant, and located the gun in the bushes.

Following a bench trial, the trial court found defendant guilty of felonious assault, felony-firearm, and domestic assault. Defendant now appeals.

II. DOUBLE JEOPARDY

Defendant first argues that his convictions for felonious assault and domestic assault violate the Double Jeopardy Clause of both the Michigan and United States Constitution because the convictions were based on the same assault and the language of the felonious assault and domestic assault statutes indicates that the Legislature intended to prohibit multiple punishment based on these two offenses.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

"A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). However, because defendant did not raise his double-jeopardy issue in the trial court, this issue is unpreserved. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Although we will still review this "significant constitutional question," we nonetheless "review an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings." *Id.*; see also *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).[1]

B. ANALYSIS

Both the United States Constitution and Michigan Constitution provide that no person shall be "twice put in jeopardy" for the same offense. US Const, Ams V and XIV;[2] Const 1963, art 1, § 15. The double jeopardy provision of the Michigan Constitution is construed consistently with the protection provided by the Fifth Amendment. *Nutt*, 469 Mich at 591; *People v Smith*, 478 Mich 292, 314-315; 733 NW2d 351 (2007). "The prohibition against double jeopardy protects individuals in three ways: (1) it protects against a second prosecution for the same offense after

[1] Defendant concedes on appeal that he did not raise this issue below, although he does not concede the application of plain-error review. Relying on *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002), defendant claims that a double jeopardy challenge is preserved for appeal even if not raised in the lower court. Defendant's contention is incorrect. Our caselaw supports our conclusions that defendant failed to preserve this issue for appeal and that plain-error review applies to this unpreserved claim of error. *McGee*, 280 Mich App at 682; see also, e.g., *Matuszak*, 263 Mich App at 47 n 1 (explaining that cases stating simply "that a double jeopardy issue involves a significant constitutional question that will be reviewed on appeal regardless of whether the defendant raised the issue before the trial court," including *Colon*, utilized an incomplete statement "of the more limited standard of review applicable to unpreserved constitutional issues enunciated in [*People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999)]").

[2] The protection against double jeopardy in the Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v Maryland*, 395 US 784, 787; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015) (quotation marks and citation omitted). It is this third protection, commonly referred to as the "multiple punishment" strand of double jeopardy, that is it issue in this case.

"The multiple punishments strand of double jeopardy is designed to ensure that courts confine their sentences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts." *Miller*, 498 Mich at 17-18 (quotation marks and citation omitted). To ascertain whether two offenses are the "same offense" for purposes of the multiple punishment strand of double jeopardy, we "first look to determine whether the legislature expressed a clear intention that multiple punishments be imposed." *Smith*, 478 Mich at 316, citing *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983). The Legislature may specifically authorize cumulative punishments under two different statutes without violating the multiple punishment strand of double jeopardy protection. *Miller*, 498 Mich at 18; see also *Hunter*, 459 US at 368-369. However, if the Legislature's intent regarding multiple punishments has not been clearly expressed, we "apply the 'same elements' test of [*Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932)] to determine whether multiple punishments are permitted." *Smith*, 478 Mich at 316; see also *United States v Dixon*, 509 US 688, 696-697, 704, 708-712; 113 S Ct 2849; 125 L Ed 2d 556 (1993) (holding that the *Blockburger* "same-elements" test is the proper test for determining whether two offenses constitute the "same offense" for double jeopardy purposes in both the multiple punishment and multiple prosecution contexts and that an additional "same-conduct" test is not part of the analysis).

Under the *Blockburger* test, "multiple punishments are authorized if each statute requires proof of an additional fact which the other does not . . . ." *People v Ream*, 481 Mich 223, 228; 750 NW2d 536 (2008) (quotation marks and citation omitted; ellipsis in original); see also *Blockburger*, 284 US at 304. "This test focuses on the statutory elements of the offense." *Ream*, 481 Mich at 227 (quotation marks and citation omitted); see also *Dixon*, 509 US at 696-697, 704, 708-709 ("The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.").

In this case, defendant alleges his convictions for domestic assault and felonious assault violate the double jeopardy clause.

MCL 750.81(2), which defines the crime of domestic assault, provides in relevant part:

> [A]n individual who assaults or assaults and batters his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, is guilty of a misdemeanor . . . .

MCL 750.82(1), which defines the crime of felonious assault, provides in relevant part:

> [A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony . . . .

The relevant statutory provisions do not contain any expressly stated authorization for, or prohibition against,[3] multiple punishments. Because of this silence, we turn to the same-elements test. *Smith*, 478 Mich at 316; *Dixon*, 509 US 688, 696-697, 704, 708-712. The crime of domestic assault requires the prosecution to prove the existence of one of the listed domestic relationships between the defendant and the victim, while the crime of felonious assault contains no such element. The crime of felonious assault requires the prosecution to prove that the defendant used a dangerous weapon, which is not an element of domestic assault. Because each crime contains an element that the other does not, they are not the "same offense" for double jeopardy purposes and multiple punishments are authorized.[4] *Ream*, 481 Mich at 227, 228; *Dixon*, 509 US at 696-697, 704, 708-709. Therefore, defendant's convictions did not violate his constitutional protection against double jeopardy and he is not entitled to relief on this issue.

III. COURT COSTS

Defendant next challenges the constitutionality of MCL 769.1k(1)(b)(*iii*), which authorizes a sentencing court to impose on a criminal defendant "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case." Defendant specifically argues that this statutory provision violates the due process rights of criminal defendants, as well as separation-of-powers principles, because the statute infringes on the judiciary's impartiality by creating financial incentives and pressure for judges to ensure that criminal defendants are convicted and assessed court costs so as to fund the trial courts.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

"A party challenging the constitutionality of a statute has the burden of proving the law's invalidity." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). "Statutes are presumed to be constitutional unless their unconstitutionality is readily apparent." *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

A defendant must challenge the constitutionality of a statute in the trial court to preserve the issue for appellate review. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014). Defendant did not challenge the constitutionality of MCL 769.1k(1)(b)(*iii*) in the trial court, and

[3] See *Miller*, 498 Mich at 18 ("[W]here the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial.").

[4] Defendant's additional arguments are also without merit. Defendant argues that the two statutes at issue contain "contradictory and mutually exclusive *mens rea* provisions" evincing the Legislature's intent to prohibit multiple punishment. We discern no such intent. The fact that the Legislature defined these two crimes differently does not mean that the Legislature intended to prohibit multiple punishment for these two distinct offenses.

his constitutional arguments are therefore unpreserved.[5] *Id*. We ordinarily review constitutional issues and matters of statutory interpretation de novo. *People v Patton*, 325 Mich App 425, 431; 925 NW2d 901 (2018). However, we review unpreserved challenges to the constitutionality of a statute for plain error affecting substantial rights. *Vandenberg*, 307 Mich App at 61.

The requirements under the plain-error standard of review, which is derived from federal precedent, are well settled and we quote this standard in detail below:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. [*United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993)]. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id*. at 734. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id*. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 736-737. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (last alteration in original).]

To the extent defendant's arguments also encompass a due-process right to an impartial judge, defendant also failed to preserve this issue because he did not raise it below. *Olano*, 507 US at 731 ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.") (quotation marks and citation omitted); *Carines*, 460 Mich at 761-763 (explaining that constitutional and nonconstitutional rights may be forfeited if not timely asserted). The United States Supreme Court has explained that "most matters relating to judicial disqualification [do] not rise to a constitutional level," including "matters of kinship, personal bias, state policy, [and] remoteness of interest."

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[5] We acknowledge that defendant filed a motion in this Court to remand to the trial court in an attempt to avoid having this issue treated as unpreserved. This Court denied the motion to remand. *People v Alexander*, unpublished order of the Court of Appeals, entered September 26, 2019 (Docket No. 348593). "The purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Waiting until after an appeal has been filed to make a claim of error, where nothing prevented defendant from conceiving of this argument and timely raising it in the trial court before the allegedly erroneous ruling was made falls short of accomplishing this purpose. However, more importantly, we would still reach the same conclusion that we ultimately reach in this case—that defendant has failed to demonstrate that MCL 769.1k(1)(b)(*iii*) is facially unconstitutional—even if we were to review this issue under the de novo standard of review typically applied to preserved claims of constitutional error.

Caperton v AT Massey Coal Co, Inc, 556 US 868, 876; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (quotation marks and citations omitted; first alteration in original). However, a judge's "financial interest in the outcome of a case," which is relevant to the nature of the claims alleged in the instant case, is one situation that has been held to implicate matters of constitutional due process out of a general concern about "interests that tempt adjudicators to disregard neutrality." *Id.* at 877-879. Both constitutional and nonconstitutional claims of unpreserved error are subject to plain-error review. *Olano*, 507 US at 731; *Carines*, 460 Mich at 763-764.

We acknowledge that the lack of an impartial trial judge is one of the limited number of "structural errors" that "affect the framework within which the trial proceeds." See *United States v Marcus*, 560 US 258, 263; 130 S Ct 2159; 176 L Ed 2d 1012 (2010) (quotation marks and citations omitted); see also *People v Stevens*, 498 Mich 162, 178-180; 869 NW2d 233 (2015). However, while the United States Supreme Court has left open the question whether a "structural" error "automatically satisfy[ies] the third prong of the plain-error test," *Puckett v United States*, 556 US 129, 140; 129 S Ct 1423; 173 L Ed 2d 266 (2009); see also *Marcus*, 560 US at 263, the nature of that open question itself indicates that "structural errors" are not somehow automatically exempt from plain-error review when the claim of error has not been properly preserved, see, e.g., *Puckett*, 556 US at 140-141; *Marcus*, 560 US at 263-265; *Johnson v United States*, 520 US 461, 466-467, 468-469; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *United States v Cotton*, 535 US 625, 631-633; 122 S Ct 1781; 152 L Ed 2d 860 (2002); *Stevens*, 498 Mich at 178-180, 180 n 6; *People v Vaughn*, 491 Mich 642, 655, 666-667; 821 NW2d 288 (2012); but see *People v Duncan*, 462 Mich 47, 48, 50, 51-55; 610 NW2d 551, 554 (2000) (seemingly holding that a structural error, in that case the failure to instruct the jury on any of the elements of one of the charged offenses, required automatic reversal even though the defendant did not object to the trial court's omission).[6]

In this case, however, defendant does not claim that a structural error in his trial occurred even though defendant challenges the constitutionality of MCL 769.1k(1)(b)(*iii*) based on the statute's alleged effect on the impartiality of the Michigan judiciary. Actually, the only remedy requested by defendant related to his challenge to the statute's constitutionality is for the costs imposed to be vacated. While such a relief renders defendant's arguments somewhat internally inconsistent, nevertheless, despite defendant's failure to brief and argue the potential structural error his appellate arguments seemingly implicate, we assume without deciding that the traditional plain-error test would still apply. We have no need to go further than this because we ultimately conclude below that defendant has not shown that the statute is facially unconstitutional and thus has not demonstrated any error on which appellate relief could be based.

B. ANALYSIS

"A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge." *In re Forfeiture of 2000 GMC Denali*, 316 Mich App at 569. "An as-applied challenge . . . alleges a present infringement or denial of a

[6] In *Vaughn*, our Supreme Court characterized *Duncan* as standing for the proposition that a structural error satisfied the third prong of the *Carines* plain-error test. *Vaughn*, 491 Mich at 666. Such an understanding of *Duncan* seems to be consistent with the approach implied by the United States Supreme Court in the cases cited above.

specific right or of a particular injury in process of actual execution of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (quotation marks and citation omitted). In contrast, a "facial challenge involves a claim that a legislative enactment is unconstitutional on its face, in that there is no set of circumstances under which the enactment is constitutionally valid." *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014). Our Supreme Court has explained the requirements involved in a facial challenge as follows:

> A party challenging the facial constitutionality of [a statute[7]] faces an extremely rigorous standard. To prevail, plaintiffs must establish that no set of circumstances exists under which the [statute] would be valid and [t]he fact that the . . . [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid. Indeed, if any state of facts reasonably can be conceived that would sustain [the statute], the existence of the state of facts at the time the law was enacted must be assumed and the ordinance upheld. Finally, because facial attacks, by their nature, are not dependent on the facts surrounding any particular decision, the specific facts surrounding plaintiffs' claim are inapposite. [*Bonner*, 495 Mich at 223 (quotation marks and citations omitted; ellipsis and third alteration in original).]

In this case, defendant has not made any argument that the trial judge who presided over his particular case was not impartial, nor has defendant made any attempt to argue or explain how the statute had any specific effect on the impartiality of this particular trial judge. Instead, defendant's appellate arguments clearly focus on the general operation of the statute in the state of Michigan and how it allegedly prevents *any trial court judge* in this state from being impartial. Thus, although defendant fails to discuss these two avenues for attacking a statute's constitutional validity, we discern no attempt by defendant to raise an as-applied challenge and it is clear to us that defendant has made a facial challenge to the statute's constitutionality. *Wilder*, 307 Mich App at 556. As such, defendant must demonstrate that there are no circumstances under which the statute could be constitutionally valid. *Bonner*, 495 Mich at 223. To the extent that an as-applied challenge to the statute could have been made, defendant has abandoned any such challenge by failing to raise it and we decline to address that issue further.[8] "An appellant may not merely

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[7] Although *Bonner* specifically involved the constitutionality of an ordinance, "ordinances are treated as statutes for purposes of interpretation and review." *Bonner*, 495 Mich at 221.

[8] We leave open the question whether a successful as-applied challenge could be made against the constitutionality of this statute, as there appear to be general grounds for concern related to the constitutionality of this statute regarding the manner of funding trial courts in Michigan and pressures placed by some local funding units on district court judges to "to ensure their courts are well-funded." See *People v Cameron*, 504 Mich 927, ___; 929 NW2d 785, 786-787 (2019) (MCCORMACK, C.J., concurring). However, defendant has not brought any of these issues before us in the context of his own case because he has completely neglected to relate the statute to his own circumstances in any coherent way, and he has not provided any evidence or argument that such circumstances impairing judicial impartiality occurred or were present in this case. Defendant has not alleged any particular injury, and we are therefore not properly presented with

announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Green*, 313 Mich App 526, 535; 884 NW2d 838 (2015) (quotation marks and citation omitted).

Turning to the merits of defendant's arguments, defendant first contends that MCL 769.1k(1)(b)(*iii*) violates the due process rights of criminal defendants to appear before an impartial judge because of the pressure placed on trial judges to generate revenue for their respective courts.

MCL 769.1k(1) provides as follows:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred by statute or sentencing is delayed by statute:
>
> (a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
>
> (*ii*) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
>
> (*iii*) Until October 17, 2020, *any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following*:
>
> (A) *Salaries and benefits for relevant court personnel*.

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any such as-applied challenge in this appeal that would bring the aforementioned concerns before this Court to be meaningfully addressed. *Bonner*, 495 Mich at 223 n 27. As in *Cameron*, these issues "have not been squarely presented in this case," and similar to Chief Justice MCCORMACK, we are not comfortable addressing issues without an appropriate record. *Cameron*, 504 Mich at ___; 929 NW2d 786. Instead, as we have explained, defendant's facial challenge makes the issue before us much different and the question whether the statute might potentially "operate unconstitutionality under some conceivable set of circumstances" is not relevant to resolving defendant's facial challenge. *Bonner*, 495 Mich at 223 (quotation marks and citation omitted).

(B) *Goods and services necessary for the operation of the court*.

(C) *Necessary expenses for the operation and maintenance of court buildings and facilities*.

(*iv*) The expenses of providing legal assistance to the defendant.

(*v*) Any assessment authorized by law.

(*vi*) Reimbursement under [MCL 769.1f]. [(Emphasis added.)]

Defendant maintains that MCL 769.1k(1)(b)(*iii*)(A)-(C) demonstrate that a defendant's conviction "will help pay for salary and benefits of the trial judge and her staff, goods and services necessary for the operation of the court, and expenses necessary for the operation and maintenance of court buildings and facilities," while an acquittal will "contribute nothing." Relying on a series of documents[9] that were not addressed as part of any motion or objection in the trial court but which have been provided to this Court by defendant as attachments to his appellate brief,[10] defendant claims that trial judges are under pressure to generate revenue and "cannot maintain a criminal defendant's rights to appear before a judge who is and who appears impartial." Thus, argues defendant, "The more money the judge orders the defendant to pay the more money she will generate for the county, and ultimately, for the court where she presides."

The Fourteenth Amendment of the United States Constitution prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." US Const, Am XIV.[11] "It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process."

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[9] These documents include State Court Administrative Office data on court costs imposed and collected under MCL 769.1k, a recent Trial Court Funding Commission interim report, and letters from various Michigan district court judges. Some of these letters from district court judges appear to be the same or similar to the letter discussed by Chief Justice MCCORMACK. *Cameron*, 504 Mich at ___; 929 NW2d 786.

[10] Defendant also attached these materials to his motion to remand, which this Court denied. *Alexander*, unpub order. Thus, we will treat defendant's attachment of these materials to his brief as a motion to expand the record on appeal and grant the motion. MCR 7.216(A)(4).

[11] The Michigan Constitution similarly provides that "No person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. Defendant does not specify whether his argument is premised on the federal or state constitution, nor does he expressly cite either constitutional provision in the context of his due-process based challenge to the constitutional validity of MCL 769.1k(1)(b)(*iii*). This Court has previously held that the "due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013). However, because defendant has only cited caselaw applying the federal constitution in the context of making his due-process argument, we presume that his challenge is made accordingly and we proceed to analyze defendant's due-process argument only under the Fourteenth Amendment of the United States Constitution.

Caperton, 556 US at 876 (quotation marks and citation omitted; alteration in original). Accordingly, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal . . . [which] preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done[] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v Jerrico, Inc*, 446 US 238, 242; 100 S Ct 1610, 1613; 64 L Ed 2d 182 (1980) (quotation marks and citation omitted).

With respect to allegations of a judge's financial interest in the outcome of a case, the United States Supreme Court has stated that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v Ohio*, 273 US 510, 523; 47 S Ct 437; 71 L Ed 749 (1927). However, the Supreme Court has also explained that a "remote or minute interest in the litigation might be declared by the Legislature not to be a reason for disqualification of a judge" if the "[i]nterest is so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual." *Id*. at 529, 531 (quotation marks and citation omitted). The *Tumey* Court set forth the following test for determining whether the due-process right to an impartial judge has been violated:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law. [*Id*. at 532.]

The "degree or kind of interest [that] is sufficient to disqualify a judge from sitting cannot be defined with precision," *Caperton*, 556 US at 879 (quotation marks and citation omitted), but several decisions by the United States Supreme Court and the Fifth Circuit Court of Appeals[12] provide informative illustrations of these principles.

In *Tumey*, the Court held that the defendant's due-process right to an impartial judge was denied where state statutes and a local ordinance gave the mayor of a village the authority to try defendants without a jury for alleged violations of the state's Prohibition Act and further provided that a portion of the fines imposed for convictions under the Act would go to the village and that the mayor would receive—as compensation for hearing these cases—legal fees and costs in each case in addition to the mayor's regular salary. *Tumey*, 273 US at 514-515, 516-520, 532, 535. The primary duties of the mayor, however, were executive. *Id*. at 519. The mayor was only paid for his services as a judge by defendants whom he convicted. *Id*. at 520.

The *Tumey* Court held that the defendant was denied an impartial tribunal because the mayor had a personal financial interest in the outcome of the case as well as an "official motive to convict and to graduate the fine to help the financial needs of the village." *Id*. at 535. The Court

[12] "Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive." *Patton*, 325 Mich App at 434 n 1.

explained that the mayor had "a direct personal pecuniary interest in convicting the defendant who came before him for trial" because he would not receive his costs and fees if the defendant was acquitted and that it did not "regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling, or insignificant interest." *Id*. at 523, 531-532. Regarding the mayor's motive in his official capacity, the Court noted that the mayor was the chief executive of the village who was responsible for the fiscal health of the village, that the large fines that could be imposed for violating the Prohibition Act offered a means for significantly increasing the income of the village, and that the mayor had the discretion to set the amount of the fine to be imposed within a wide range provided by statute. *Id*. at 532-534. The Court stated, "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id*. at 534.

In *Ward v Village of Monroeville*, 409 US 57, 57, 59-60, 62 n 2; 93 S Ct 80; 34 L Ed 2d 267 (1972), which concerned another situation where a village mayor was authorized by statute to serve as the trial judge in certain cases involving ordinance violations and traffic offenses, the United States Supreme Court emphasized that the "fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits" of the due-process right to an impartial judge. The mayor in *Ward* held "wide executive powers," had responsibilities related to village finances, and had "general overall supervision of village affairs." *Id*. at 58. Additionally, a "major part of village income [was] derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court." *Id*. The Supreme Court held that under these circumstances, the defendant's due-process right to an impartial judge was violated because the mayor "occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial." *Id*. at 60 (quotation marks and citation omitted). The Court reasoned that the " 'possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused' . . . may also exist when the mayor's executive responsibilit[ies] for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id*., quoting *Tumey*, 273 US at 532.

However, the factual circumstances at issue in *Dugan v Ohio*, 277 US 61, 65; 48 S Ct 439; 72 L Ed 784 (1928), provide an illustration of a financial connection between the presiding judge and the case that was too "remote" and attenuated to offend due process. In *Dugan*, much like the challenge presented in *Tumey*, the defendant raised a Fourteenth Amendment challenge to impartiality of a mayor to preside as judge over trials for illegally possessing intoxicating liquor. *Id*. at 62. However, there were significant differences between the mayor in *Tumey* and the mayor in *Dugan* regarding their respective official duties and means of compensation. The mayor in *Dugan* served a charter city, Xenia, Ohio, which was governed by a commission with five commissioners. *Id*. at 63. The mayor was one of the city commissioners, but the mayor had no executive functions and only exercised judicial functions. *Id*. The active executive was the city manager. *Id*. The commission exercised executive power along with the manager, and the commission exercised all of the city's legislative power. *Id*. "The mayor's salary [was] fixed by the votes of the members of the commission other than the mayor, he having no vote therein." *Id*. The mayor "receive[d] no fees." *Id*. In affirming the defendant's conviction and distinguishing the case from *Tumey*, the *Dugan* Court reasoned as follows:

> The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the *Tumey* Case do not cover this. [*Id*. at 65.]

Two recent decisions of the United States Court of Appeals for the Fifth Circuit provide contemporary, and particularly instructive, illustrations of the above principles set forth in *Tumey*, *Dugan*, and *Ward*.

Caliste v Cantrell, 937 F3d 525, 526-527 (CA 5, 2019), involved a federal civil rights lawsuit filed by arrestees against Judge Henry Cantrell, the magistrate for the Orleans Parish Criminal District Court who presided over the initial appearances of all defendants in the parish. In *Caliste*, 937 F3d at 526, 531-532, the Fifth Circuit Court of Appeals held that due process was violated by a system where a percentage of the value of all commercial surety bonds purchased by criminal defendants was deposited in the district court's Judicial Expense Fund, which was administered by all of the district court judges (including Judge Cantrell who set pretrial release conditions) and was used to pay for court staff salaries, office supplies, travel, and other costs, although it was not used to pay judges' salaries. The bond fees were a significant source of funding for these substantial covered expenses. *Id*. at 526. In determining that this scheme violated due process, the Fifth Circuit reasoned that even though Judge Cantrell did not directly or indirectly receive any money from his bail decisions, there were still "substantial nonmonetary benefits" of requiring a secured money bond that included funding court support staff that allowed the judge to perform more efficiently and effectively. *Id*. at 530. The Fifth Circuit concluded that Judge Cantrell was "more like the *Ward* mayor than the *Dugan* mayor" and that "[b]ecause he must manage his chambers to perform the judicial tasks the voters elected him to do, Judge Cantrell has a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate." *Id*. at 531. That the amount contributed to the Judicial Expense Fund by the bond fees was significant enough to make a "meaningful difference in the staffing and supplies judges receive[d]" was also important to the Fifth Circuit's reasoning. *Id*. The court stated, "The dual role thus may make the magistrate 'partisan to maintain the high level of contribution' from the bond fees." *Id*. at 532, quoting *Ward*, 409 US at 60. The Fifth Circuit further clarified its holding:

> Our holding that this uncommon arrangement violates due process does not imperil more typical court fee systems. Our reasoning depends on the dual role combined with the "direct, personal, [and] substantial" interest the magistrate has in generating bond fees. *Tumey*, 273 US at 523. To take one example, none of these features are present for fines in federal criminal cases. Judges do not have a say in how those funds are spent. The amount of the fines—which is supposed to take into account the costs of incarceration and thus, if anything, fund the Bureau

> of Prisons rather than the judiciary, USSG. § 5E1.2(d)(7)—are not set aside for judicial operations even on a national level, let alone for the handful of federal judges who sit on a local district court. The benefits are so diffuse that a single judge sees no noticeable impact on her chambers from the fines she imposes and thus feels no temptation from them.
>
> The temptation facing the Orleans Parish magistrate is far greater. His dual role—the sole source of essential court funds and an appropriator of them—creates a direct, personal, and substantial interest in the outcome of decisions that would make the average judge vulnerable to the "temptation . . . not to hold the balance nice, clear, and true." *Tumey*, 273 US at 532. The current arrangement pushes beyond what due process allows. . . . [*Caliste*, 937 F3d at 532 (first ellipsis in original).]

In *Cain v White*, 937 F3d 446, 448-451 (CA 5, 2019), the Fifth Circuit addressed another federal civil rights lawsuit involving the Orleans Parish Criminal District Court that was filed by former criminal defendants in Orleans Parish against 12 judges of that district court, which concerned alleged violations of due-process based on the judges' practices related to, and control over revenue generated from, fines and fees imposed at sentencing. While some fines and fees that were collected were to be placed directly into the Judicial Expense Fund, other types of fines and fees were directed by statute to other specific purposes or were to be split between the court and other agencies. *Id*. at 449. Approximately 25% of the money deposited into the Judicial Expense Fund came from the district court's collection of fines and fees, and the district court judges had exclusive control over how the funds in the Judicial Expense Fund were spent. *Id*. at 448. The *Cain* court, like the *Caliste* court, noted that the Judicial Expense Fund was not used for judicial salaries but was generally used for court staff salaries and benefits, travel, and various other office-related expenses incurred by the court. *Id*. at 448-449. Additionally, the *Cain* court noted:

> When collection of the fines and fees is reduced, the OPCDC can have a difficult time meeting its operational needs, leading to cuts in services, reduction of staff salaries, and leaving some positions unfilled. During these times, the Judges have attempted to increase their collection efforts and have also requested assistance from other sources of funding, including the City of New Orleans. [*Id*. at 449.]

The Fifth Circuit in *Cain* framed the issue as "whether the Judges' administrative supervision over the JEF, while simultaneously overseeing the collection of fines and fees making up a substantial portion of the JEF, crosses the constitutional line." *Id*. at 451. In holding that due-process was violated under these factual circumstances, the Fifth Circuit reasoned as follows:

> Here, the Judges have exclusive authority over how the JEF is spent, they must account for the OPCDC budget to the New Orleans City Council and New Orleans Mayor, and the fines and fees make up a significant portion of their annual budget. We agree with the district court that the situation here falls within the ambit of *Ward*. In doing so, we emphasize it is the totality of this situation, not any

> individual piece, that leads us to this conclusion. In sum, when everything involved in this case is put together, the "temptation" is too great. [*Id*. at 454.]

Turning to defendant's arguments in this case, we begin by observing that they are founded on a basic misunderstanding of how MCL 769.1k(1)(b)(*iii*) operates. First, a trial judge does not have unfettered discretion with respect to the amount of costs to impose under this provision because the costs imposed must be "reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case," MCL 769.1k(1)(b)(*iii*); see also *People v Konopka (On Remand)*, 309 Mich App 345, 350-351; 869 NW2d 651 (2015), and there must be a factual basis demonstrating that the imposed costs are reasonably related to the actual costs incurred by the trial court, *Konopka*, 309 Mich Ap at 359-360. Hence, contrary to defendant's argument, MCL 769.1k(1)(b)(*iii*) does not provide the trial court with the authority to increase the costs imposed on criminal defendants as a means for generating more revenue.

Second, MCL 769.1k(1)(b)(*iii*)(A)-(C) provide guidance for establishing the requisite factual basis, but these provisions *do not* indicate where the money flows after the costs have been imposed on and paid by a convicted defendant. Contrary to defendant's argument on appeal, these provisions do not indicate that money remitted for these costs flows directly or indirectly from criminal defendants to salaries or expenses related to any judges, court employees, or judicial chambers. In fact, the Michigan Constitution specifically provides that "[n]o judge or justice of any court of this state shall be paid from the fees of his office nor shall the amount of his salary be measured by fees, other moneys received or the amount of judicial activity of his office." Const 1963, art 6, § 17. Defendant does not address this constitutional provision, which clearly prohibits the type of direct nexus between a judge's compensation and any fees or costs imposed that was present in *Tumey*. Defendant also has not directed our attention to any evidence or statute that would suggest that any of the costs imposed under MCL 769.1k(1)(b)(*iii*) are funneled into a special or specific fund to be administered by judges, analogous to the Judicial Expense Fund at issue in *Caliste* and *Cain*.

To the extent that defendant appears to claim that judicial impartiality is generally compromised because the money collected for these costs eventually finds its way back to the trial courts by way of the complex system of funding the trial courts, providing a portion of the total funding allocated to the courts, we find such a connection to be far too attenuated to have any impact on a judge's decision whether to impose costs under MCL 769.1k(1)(b)(*iii*). This is particularly true where the amount of costs imposed is confined to that for which a factual basis exists showing that the costs are reasonably related to the actual costs incurred. Hence, defendant has not demonstrated evidence from which this Court could conclude that MCL 769.1k(1)(b)(*iii*) creates "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant exists, or which might lead him not to hold the balance nice, clear, and true between the state and the accused…" *Tumey*, 273 US at 532. Rather, we conclude that MCL 769.1k(1)(b)(*iii*) analogous to the factual circumstances in *Dugan*, where the "mayor" served only a judicial role and the Supreme Court concluded that his financial interest in the cases before him was "remote" because "[w]hile it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits." *Dugan*, 277 US at 63, 65.

Defendant also argues that MCL 769.1k(1)(b)(*iii*) violates principles regarding the separation of powers. Const 1963, art 3, § 2. Defendant contends that the enactment of this statute essentially created a funding system for trial courts that made it impossible for any trial judge to be impartial because all trial judges should be disqualified from presiding over criminal cases under this funding regime. However, as we have already explained, MCL 769.1k(1)(b)(*iii*) does not direct the flow of money or create a funding system for the trial courts, and defendant's argument is based on a misunderstanding of both the scope and application of this statute. Moreover, for the reasons stated above, defendant has not shown that this statute creates a situation where there exists no set of circumstances under which a judge in this state is impartial. It logically follows that defendant has not shown that all trial judges must be disqualified on the basis of an statute which he alleges, but failed to prove, creates a financial interest in the judiciary to cause them to ignore their constitutional mandates. Accordingly, defendant's additional separation-of-powers argument does not demonstrate that MCL 769.1k(1)(b)(*iii*) is facially unconstitutional.

Defendant has failed to meet the extremely rigorous standard of making a facial challenge to the constitutionality of MCL 769.1k(1)(b)(*iii*).[13]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra

[13] We note that the prosecution has oversimplified this issue by arguing that we are simply bound to affirm in this case, and "lack[] the authority to rule otherwise," based on our decision in *People v Cameron*, 319 Mich App 215, 218; 900 NW2d 658 (2017), where we held that MCL 769.1k(1)(b)(*iii*) imposed a tax that was not unconstitutional. That holding is not related to defendant's arguments in this case.