

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 11, 2012

v

AARON LAMONT DANIELS,
Defendant-Appellant.

No. 300354
Wayne Circuit Court
LC No. 10-004178-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MARTEZ ROMAL BICKHAM,
Defendant-Appellant.

No. 300952
Wayne Circuit Court
LC No. 10-004178-FC

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendants Aaron Lamont Daniels and Martez Romal Bickham were tried jointly before separate juries. Defendant Daniels was convicted of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, assault with intent to rob while armed,¹ MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant Daniels to concurrent terms of life imprisonment for one count of first-degree murder supported by two theories, and 20 to 40 years for the armed robbery conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction.

¹ The court subsequently vacated defendant Daniels's conviction for assault with intent to rob while armed.

Defendant Bickham was convicted of second-degree murder, MCL 750.317, armed robbery, assault with intent to rob while armed, and felony-firearm. The trial court sentenced defendant Bickham to concurrent prison terms of 25 to 40 years for the murder conviction, 15 to 30 years for the robbery and assault convictions, and a consecutive two-year term for the felony-firearm conviction.

Defendant Daniels appeals as of right in Docket No. 300354, and defendant Bickham appeals as of right in Docket No. 300952. The appeals have been consolidated for this Court's consideration. *People v Daniels*, unpublished order of the Court of Appeals, entered December 15, 2010 (Docket Nos. 300354 and 300354). We affirm in both appeals.

I. DOCKET NO 300354

A. SUBSTITUTE COUNSEL

Defendant Daniels initially contends that the trial court erred by denying his request for substitute trial counsel, which he made approximately three weeks before trial was scheduled to start. This Court reviews for an abuse of discretion a "trial court's decision regarding substitution of counsel." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

"An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." [*Id.*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

We have reviewed the transcripts of the several pretrial hearings during which defendant Daniels, his appointed counsel, and the court discussed the relationship between Daniels and his appointed attorney. The transcripts reveal that the trial court solicitously invited defendant Daniels on several occasions to elaborate on his complaints concerning appointed counsel, but that defendant Daniels never specified any legitimate difference of opinion between them with regard to a fundamental trial tactic. The record also fails to disclose any inadequacy of representation, or absence of diligence or disinterest by appointed counsel. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). To the contrary, appointed counsel regularly visited defendant Daniels in jail and spent substantial time preparing for his trial. The trial court, which had some familiarity with defendant Daniels's appointed counsel, characterized him as a very competent lawyer, a point that defendant Daniels conceded more than once. The primary strain that existed between defendant Daniels and appointed counsel stemmed from their arguments attributable to defendant Daniels's emotional state. However, defendant Daniels "may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution." *Traylor*, 245 Mich App at 462 (internal quotation and citation omitted). Furthermore, the trial court observed on several occasions that a substitution of counsel close to trial likely would prejudice defendant Daniels. And the court suggested that any substitution of counsel shortly before the trial, a date

scheduled for trial with another defendant and several attorneys, likely would unreasonably disrupt the proceedings.

Accordingly, we conclude that the trial court acted within its discretion in denying defendant Daniels's request for substitute counsel.

II. VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant Daniels argues that the trial court erred in denying his request for a voluntary manslaughter instruction as a lesser-included offense of murder. We disagree. We review de novo claims of instructional error. *People v Wade*, 283 Mich App 462, 464; 771 NW2d 447 (2009).

“[A]n inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense; meaning, all the elements of the lesser offense are included in the greater offense, and *a rational view of the evidence would support such an instruction.*” *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003) (emphasis added). “Manslaughter is an inferior offense of murder because manslaughter is a necessarily included lesser offense of murder.” *Id.* “Manslaughter is murder without malice.” *Id.* at 534:

The act of killing, though intentional, is committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition. [*Id.* at 535 (internal quotation and citation omitted).]

“Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Id.* at 535-536.

Our review of the record reveals no evidence reasonably substantiating any adequate provocation for the shooting of the decedent. In support of defendant Daniels's request for a voluntary manslaughter jury instruction, he proffered a defense theory grounded in anger that a Chevrolet Trailblazer driven by the decedent stopped in a Coney Island parking lot behind an old, white Mercedes driven by defendant Daniels and a Ford Taurus containing defendant Bickham. The record confirms that the decedent parked the Trailblazer behind the Mercedes and Taurus in anticipation of taking on a female passenger, but nothing in the record suggests that defendants approached the Trailblazer provoked by anger over being blocked into their parking spaces; instead, the record shows only that defendants approached the Trailblazer and confronted the decedent and robbery victim Rodrick Wilson, intending to deprive them of their property. With respect to the further defense suggestion that arguments outside the Trailblazer shortly before the shooting may have escalated tempers, some evidence showed that people who had

disembarked from the Mercedes or Taurus were talking loudly or arguing, but the record reveals no evidence of any specific argument that could qualify as adequate or reasonable provocation for the robbery and shooting.² Moreover, no evidence of record suggests that the decedent or Wilson possessed a firearm or any kind of weapon. Accordingly, because the record reveals no factual circumstances that would potentially allow a jury to find defendant Daniels guilty of voluntary manslaughter, the trial court properly declined to instruct the jury on voluntary manslaughter as a lesser-included offense of second-degree murder.

II. DOCKET NO. 300952

A. PUBLIC TRIAL

Defendant Bickham first argues that the trial court's closure of the courtroom during voir dire violated his right to a public trial and amounts to a structural error mandating the reversal of his convictions. We disagree.

After the trial court directed the jury panel to enter the courtroom, defendant Bickham's attorney and the court shared the following colloquy:

[Defendant Bickham's counsel]: Not to cause a lot of consternation, but . . . just for the record, . . . [*Presley v Georgia*, 558 US 209; 130 S Ct 721; 175 L Ed 2d 675 (2010)]. I believe it's improper for court officers to clear the courtroom in voir dire process. [*Presley*,] decided last April indicated that the family members or witnesses for the defendant can be present during voir dire.

The Court: The Court is not excluding people from being in the courtroom. Right now the deputies are removing the spectators or people who are in the courtroom in order to allow that the jury panel of over fifty people be allowed in, and so that they are not intermixed with the audience, and so once the whole panel is in, those who fit separately from the jury can be allowed in. But we cannot bring a jury in with the number of people in this courtroom. They fill the bleachers, and in order to conduct voir dire, we need the jury panel to fit into the courtroom.

² Defendant Daniels also submits that some discussion or argument occurred concerning something that the decedent had asked for from 15-year-old Jazmine Young, in exchange for his driving Young and her friend Lakisha Crawley downtown. Young testified that the decedent "asked me to do something I didn't want to do," but denied that anyone inside the Trailblazer had broached the topic of oral sex. Wilson testified that the decedent and Young had agreed that "if [the decedent] could get [Young's] friend that's in trouble [downtown], they would see each other," and Crawley denied that the decedent and Young had touched each other inside the Trailblazer. Again, no evidence showed that the decedent or Wilson had conducted themselves during the ride in a manner that would qualify as reasonable provocation for the shooting and robbery.

At this point, there were no available seats to fit jurors in. So for that reason, those people have to be removed initially in order to bring in the panel.

After jury selection concluded, defendant Bickham's attorney and the court engaged in the following discussion:

[Defendant Bickham's counsel]: Judge, I would just once again under *[Presley]*, the other family members of the defendant, supporters and possible witnesses were not allowed to come back in, or were not allowed to be seated in the courtroom during voir dire after they were excluded for the seating.

The Court: All right. Thank you. I would state that there was no additional request made after the court explained the situation, and that the jury panel being [a] fifty-two member panel filled the entire courtroom, except for the small bench that can hold two people. If there was a request for two people to be in, specifically because there was a crowd of probably fifty people in the courtroom, some may be family or friends, or some having to do with other cases, I have no idea who they were. But there was no ruling made on any request. It was not made. . . .

Because defendant Bickham's attorney never asked the trial court to readmit any spectators during jury selection, and instead only mentioned the courtroom closure after the jury selection was completed, he did not preserve this issue with a timely objection.

An unpreserved claim involving "a defendant's right to a public trial is subject to the forfeiture rule articulated in *People v Carines*," 460 Mich 750, 763; 597 NW2d 130 (1999). *People v Vaughn*, 491 Mich 642, 646; ___ NW2d ___ (2012).

In analyzing a forfeited claim of error, a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id.* at 654.]

A criminal defendant possesses "the right to . . . a public trial" pursuant to the federal and Michigan constitutions. *Id.* at 650, citing US Const, Ams VI and XIV, and Const 1963, art 1, § 20. The "right to a public trial . . . encompasses the right to public voir dire proceedings." *Vaughn*, slip op at 6. In *Vaughn*, our Supreme Court analyzed a defendant's unpreserved claim that his right to a public trial was violated when the trial court closed the courtroom to the public during jury selection. The Court stated that plain error had occurred given the trial court's neglect to "advance an overriding interest . . . likely to be prejudiced" absent closure of the courtroom during voir dire. *Id.* at 665 (internal quotation and citations omitted). The Court also found "that a plain structural error satisfies the third *Carines* prong" because "structural errors are intrinsically harmful, without regard to their effect on the outcome." *Id.* at 665-666 (internal quotation and citation omitted).

However, the Court cautioned that "even if [a] defendant can show that the error satisfied the first three *Carines* requirements," an appellate court "must exercise discretion and only grant

. . . a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation and citation omitted).³ The Court in *Vaughn, Id.* at 668, held as follows that the courtroom closure in that case did not *seriously* and adversely impact those judicial proceedings:

A review of the circuit court transcript during defendant’s voir dire shows that both parties engaged in a vigorous voir dire process, that there were no objections to either party’s peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen. Moreover, because “the *venire* is drawn from the public itself,” individual veniremembers “remain public witnesses during much of the *voir dire* proceedings, listening to the court’s questions and observing the conduct of counsel, until such time as they are chosen for the jury, disqualified, or excused.” [*United States v Gupta*, 650 F3d 863, 870 (CA 2, 2011).] Thus, “the presence of the *venire* lessens the extent to which (the court’s) closure implicates the defendant’s public trial right because the *venire*, derived from and representative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review.” [*Id.* at 870-871.] Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” [*Carines*, 460 Mich at 774.] . . .

In *People v Russell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 304159, issued September 4, 2012), this Court considered whether the defense counsel was ineffective for “failing to object to the [trial court’s] partial closure of the courtroom during jury voir dire.” *Id.*, slip op at 6. We noted:

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. *Vaughn*, [491 Mich 650-653]. However, the effect of a partial closure of trial does not reach the level of total closure and only a substantial, rather than compelling, reason for the closure is required. *People v Kline*, 197 Mich App 165, 170; 494 NW2d 756 (1992).

The record reveals that the voir dire proceedings were partially closed as a result of the limited capacity of the courtroom. The limited capacity of the courtroom was a substantial reason for the closure, and thus, this partial closure did not deny defendant his right to a public trial. [*Russell*, slip op at 7.]

Here, as in *Vaughn*, the trial court closed the courtroom only during a probing voir dire of the prospective jurors; neither the prosecutor nor either defense counsel objected to “any peremptory challenges of potential jurors,” and neither the prosecutor nor either defense counsel voiced objections to the juries selected. Therefore, as in *Vaughn*, we cannot conclude that the

³ No indication exists that defendant Bickham is actually innocent.

closure seriously affected the fairness, integrity, or public reputation of judicial proceedings. Similarly, as in *Russell*, the trial court cited the limited courtroom capacity as the basis for the partial courtroom closure during voir dire. Defendant Bickham's attorney did not dispute the trial court's courtroom-space explanation. The limited capacity of the courtroom was a substantial reason for the closure, and, thus, this partial closure did not deny defendant his right to a public trial. Accordingly, defendant is not entitled to relief on appeal with respect to this issue.

B. VERDICT FORM

Defendant Bickham next complains that the verdict form improperly precluded the jury from finding him not guilty of second-degree murder, as a lesser offense of first-degree felony murder and that defense counsel was ineffective in failing to raise a timely objection to the jury form. We disagree. The record reflects that defendant Bickham's counsel affirmatively expressed approval of the jury instructions and verdict form, which constitutes a waiver that extinguishes any appellate claims of verdict-form-related error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000); *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007). Furthermore, our review of the verdict form reveals that, contrary to the defective verdict form in *Wade*, 283 Mich App at 464-468, on which defendant Bickham premises his appellate argument, the present form "included a box through which the jury could have found defendant not guilty of [first-degree felony murder and not guilty of] second-degree murder." *Id.* at 468. The form in the record reflects that defendant Bickham's jury returned the following verdict:

Count No. 2

POSSIBLE VERDICTS:

You may return only one verdict on this charge. Mark only one box on this charge.

Not Guilty

Or

Guilty of Felony Murder (while in the perpetration or attempted perpetration of an Armed robbery)

-OR- Guilty of the Lesser Offense of:

Second-Degree Murder

Thus, the verdict form was proper and counsel was not ineffective for neglecting to raise a groundless objection to the proper verdict form. *People v Comella*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301458, issued May 24, 2012), slip op at 7.

C. RIGHT OF CONFRONTATION

Defendant Bickham additionally avers that the prosecutor's introduction of a Coney Island surveillance video recording enhanced by a witness who did not testify at trial violated his constitutional right of confrontation. We disagree. An appellate court generally reviews "for an abuse of discretion a circuit court's decision concerning the admission of evidence," but considers de novo preliminary questions of constitutional law. *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford*[v *Washington*, 541 US 36, 41; 124 S Ct 1354; 158 L Ed 2d 177 (2004)]. The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. . . . [*People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) (emphasis added, some citations omitted).]

In *Crawford*, 541 US at 51-52, the United States Supreme Court offered the following guidance for discerning whether a statement qualified as "testimonial":

An accuser who makes a formal statement to government officers bears testimony

Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing. [Internal quotations and citations omitted.]

Defendant Bickham theorizes that a blue dot oval enhancement to the Coney Island surveillance video played for the jury meets the definition of a hearsay "statement" in MRE 801(a), specifically an "assertion that the person circled at the beginning of the video was the same person circled at the back door of . . . [the] Trailblazer at the point when . . . Wilson claimed he was robbed" by defendant Bickham and that the introduction of the video without accompanying testimony by the police sergeant who placed the blue dot oval in the enhanced video recording constituted a violation of defendant Bickham's right of confrontation.

Even assuming that the enhanced Coney Island surveillance video embodied testimonial evidence violative of defendant Bickham's right of confrontation, we conclude that after a thorough review of the entire record, "it is clear beyond a reasonable doubt that a rational jury would have found . . . defendant [Bickham] guilty absent the error." *People v Shepherd*, 472

Mich 343, 347-348; 697 NW2d 144 (2005) (internal quotation and citations omitted). Other evidence, which defendant Bickham does not specifically challenge on appeal, amply establishes his guilt of aiding and abetting the decedent's murder and his armed robbery of Wilson. Wilson testified that at the Coney Island, defendant Bickham opened the Trailblazer's rear passenger door nearest Wilson, approached him, pointed a black revolver at Wilson's stomach, said "We about to eat," "took the phone out of [Wilson's] lap, and then put his hand in [Wilson's] pocket" and took \$10 or \$20." Wilson then saw defendant Daniels produce a dark gun containing a clip, point it at the decedent's head, and use the gun to strike the decedent's head. Wilson recalled seeing defendant Bickham standing "right . . . next to" defendant Daniels and hearing defendant Bickham announce, "We need the car, too." Wilson observed that as the decedent began to drive away, defendant Bickham grabbed the Trailblazer's interior, "grabbed [the decedent's] neck, and put [the Trailblazer] in park," shortly before defendant Daniels shot the decedent. Wilson testified that he had a clear view of defendant Bickham during the robbery and shooting, and Wilson identified defendant Bickham at trial. Moreover, the prosecutor initially introduced into evidence and played for the jury an unenhanced copy of the Coney Island surveillance video, the admissibility of which defendant Bickham does not challenge, thereafter introduced and played for the jury a copy of the enhanced Coney Island surveillance video, and during deliberations the jury specifically asked to see only the unenhanced Coney Island surveillance video, which the trial court twice played for the jury. Accordingly, an error in the introduction of the enhanced video was harmless.

D. PROSECUTOR'S CONDUCT

Finally, defendant Bickham argues that the prosecutor deprived him of a fair trial by injecting two inappropriate instances of argument during closing arguments. We disagree. Defendant Bickham failed to preserve either claim of misconduct because he lodged no timely, contemporaneous objection to the allegedly improper arguments by the prosecutor. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review for plain error unpreserved claims of prosecutorial misconduct. *Id.*

We review a prosecutor's conduct in accordance with the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds in *Crawford*, 541 US at 64.]

1. IMPROPER VOUCHING

Defendant Bickham first contends that the prosecutor improperly vouched for her case. During the closing argument of defendant Bickham's counsel, he repeatedly suggested that the

prosecutor had shifted the burden of proof to the defense by failing to investigate and present all pertinent evidence. Defense counsel further asserted:

The court is going to give you an[] instruction as to whether or not you think the witnesses were testifying honestly, or whether they are trying to be cooperative or they are trying to come up with an answer to the question. I am going to submit to you that all of the prosecution's witnesses including police officer, they didn't want to come forward with the frank admission they don't have all of the evidence to prove their case. And it's my argument that's why the assistant prosecuting attorney always asks questions they know aren't really questions. They are statements and then asks the officer to adopt her statement.

The prosecutor began her rebuttal argument as follows:

Ladies and gentlemen, there is an old expression. I don't know, but it's a saying: if you don't have a defense try the police, try the prosecutor. If you don't have a defense then try the witnesses. And if that doesn't work then try pounding on the podium. We have seen all of that here.

What counsel is suggesting—and then I'm going to move out of this because it is so ridiculous—is that I am going to put my career, my family, my freedom on the line, and hide evidence to get people and [let] another murderer go free. That Sergeant Bowser, fourteen years is going to do that. Sergeant Gibson, 33 years, put his family, his freedom on the line to get these people he has never seen in [his] life; and Officer Sullivan. That we have had to get together and do that, and conspire to do it, and then we are to rely on 15 year olds to back us up. That, ladies and gentlemen, is ridiculous. It is a desperate defense and it makes no sense.

We conclude that no impropriety inherent in the prosecutor's remarks affected defendant Bickham's substantial rights. Instead, the prosecutor properly responded to defendant Bickham's misleading suggestion that the police and the prosecution manufactured the case against him. To the extent that the prosecutor's comments reflect some element of improper vouching, the trial court properly instructed the jury regarding defendant's presumption of innocence, the prosecutor's burden of proof, that the arguments and statements of the attorneys did not constitute evidence, and that the jury "should only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge." "Thus, the trial court's instructions dispelled any prejudice arising from the prosecutor's comment, and defendant received a fair and impartial trial." *Callon*, 256 Mich App at 331.

2. MISSTATEMENT OF LAW

Defendant Bickham additionally complains that the prosecutor misstated Michigan law regarding aiding and abetting when she declared in her closing argument, "There is an expression: in for a penny or in for a pound. Martez Bickham and Aaron Daniels were in it together, with each other and accomplices." However, defendant Bickham's contention ignores the fact that the prosecutor's preceding remarks correctly describing the elements of aiding and

abetting contained in CJI2d 8.1(3). Additionally, the trial court's instructed the jury that "[i]t is my duty to instruct you on the law, and you must take the law as I give it to you. If a lawyer said something different about the law, follow what I say" and then correctly set forth the law concerning a defendant's potential guilt as an aider and abettor of a crime, MCL 767.39, by reading instructions substantially tracking CJI2d 8. 1 (aiding and abetting), 8.4 (inducement) and 8.5 (mere presence insufficient). *People v Grayer*, 252 Mich App 349, 358-359; 651 NW2d 818 (2002) ("[r]egardless of our conclusion that some of the prosecutor's statements were erroneous statements regarding the law, we hold that any error was harmless because the trial court correctly instructed the jury on the law and the essential [offense] elements").

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Deborah A. Servitto