STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID KIRCHER,

Defendant-Appellant.

UNPUBLISHED
August 14, 2008

No. 275215
Washtenaw Circuit Court
LC No. 05-001189-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Following a bench trial, the trial judge convicted defendant of water resources protection violation, MCL 324.3115(2), and water resources protection violation posing a substantial endangerment, MCL 324.3115(4).[1] The court sentenced defendant to six months' imprisonment for the water resources protection violation and five years' imprisonment for the water resources protection violation posing a substantial endangerment. He was also ordered to pay a $1,000,000.00 fine. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from the discharge of raw sewage into a catch basin or storm drain. Specifically, on October 12, 2004, sewage back up occurred in an apartment complex owned by defendant. Defendant reportedly instructed his employees to open a manhole and use a sump pump and hoses to dump raw sewage directly into a catch basin designated for storm water only. State authorities concluded that the catch basin did not lead to a treatment facility, but ultimately led to the Huron River. After the first pump burned out, defendant instructed employees to set up a second pump, and when that stopped functioning, defendant purchased a third pump. Ultimately, defendant pumped raw sewage over a three-day period before being ordered to stop by township officials. During that three-day period, employees and the plumber advised defendant that his conduct was illegal, but he did not end the pumping operation or investigate where the sewage was traveling. It was conservatively estimated that, during this three-day period, defendant discharged 107,000 gallons of raw sewage. A tenant of

[1] The information charged that defendant committed a discharge of a substance into the waters of the state that endangered the public health, safety, and welfare contrary to the provisions of MCL 324.3109 in violation of MCL 324.3115(2) and MCL 324.3115(4).

the apartment complex testified that he drank from the hose, unaware that it contained sewage, and became physically ill.

I. Constitutional Challenge and Application of Rule 62

Defendant first alleges that the statute underlying his conviction, MCL 324.3109, is constitutionally void for vagueness unless the administrative rules of the Michigan Department of Environmental Quality (DEQ), are applied to clarify the burden of proof. Specifically, defendant asserts that application of "Rule 62," providing for geometric sampling, was required to save the statute from unconstitutional vagueness, and the noncompliance with this rule demonstrates that defendant's convictions must be reversed. We disagree.

In *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007), this Court outlined the standards to be applied to a statute challenged as unconstitutionally vague:

> We review de novo constitutional challenges, and questions of statutory interpretation. 'Statutes are presumed to be constitutional, and a statute is to be construed in a constitutional manner unless the unconstitutionality of the statute is facially obvious.' … A statute may be unconstitutionally vague on any of three grounds: (1) it is overbroad, impinging on First Amendment freedoms, (2) it fails to provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred. To evaluate a vagueness challenge, this Court must examine the entire text of the statute and give the words of the statute their ordinary meanings. 'To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.' A term that requires persons of ordinary intelligence to speculate about its meaning and differ on its application may not be used. To be sufficiently definite, the meaning of a term must be 'fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.' Vagueness challenges must be considered in light of the facts at issue. [Internal citations omitted.]

MCL 324.3109 is entitled, "Discharge into state waters; prohibitions; exception; violation; penalties; abatement" and provides in pertinent part:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
>
> * * *
>
> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a

> violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. …

Defendant asserts that the term "substance" as used in the statute is commonly a scientific term that references substances or elements contained in the periodic table, and therefore, Rule 62 must be applied to the statute to save it from constitutional vagueness. Defendant's reference to scientific properties, theories, or interpretative rules is contrary to law. The rules of statutory construction provide that a statute is presumed to be constitutional, the plain words of the statute are examined to determine legislative intent, and if the terms of a statute are not defined, the commonly used meaning or reference to a dictionary may occur. *Hrlic, supra*.

There is no indication that the Legislature intended for a scientific analysis to apply to the terms "substance" or "injurious." Rather, "substance" is defined as "that of which a thing consists; physical matter or mater … substantial or solid character or quality; … consistency; body …" Random House Webster's College Dictionary (2000), p 1306. "Injurious" is defined as "harmful, hurtful, or detrimental, as in effect." *Id*. at 680. Review of the record reveals that experts for the prosecution testified that the actions by defendant caused a discharge of a substance, raw sewage that was harmful to the public health. Specifically, when a blockage in the sewer system caused a backup into the apartment complex owned by defendant, defendant instructed his employees to uncover a manhole and pump raw sewage, consisting of human feces, human urine, and gray water,[2] into a nearby grassy area and into a storm drain or catch basin. Raw sewage contained viruses, bacteria, and E. coli. Any substance that was pumped into the catch basin was not treated by any municipal facility. Rather, the substance that was poured into the catch basin traveled into the Huron River and ultimately into Ford Lake. A resident of the apartment complex who drank from the hose became physically ill. Moreover, plaintiff's expert, Dr. Joan Rose, testified that surface contact with E. coli can be dangerous to humans, and actual consumption was not required to pose a risk. Even defendant's expert, Robert Hayes testified that he would not kayak upon a water body that had been subject to the release of approximately 100,000 gallons of raw sewage. Thus, defendant's actions in discharging raw sewage into a state water body constituted a discharge of a substance that was or could be injurious to human health.[3] The statute at issue is not void for vagueness when the meaning of the statute's terms as defined by the dictionary demonstrate that defendant's conduct fell within the statutory prohibitions.

Defendant further contends that a hypothetical scenario demonstrates that the statute is void for vagueness. However, the fact that a hypothetical could be posed that would cast doubt upon the statute does not render it unconstitutionally vague. *People v Derror*, 475 Mich 316, 337; 715 NW2d 822 (2006). Rather, the analysis centers on whether the statute, as applied to the actions of the individual defendant, is constitutional. *Id*. In the present case, defendant's conduct violated the plain language of the statute, and hypothetical scenarios do not alter this conclusion.

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[2] Dr. Joan Rose testified that "gray" water consisted of shower water, dish water, etc.

[3] Defendant's maintenance supervisor for the complex, Carl Liebenthal, testified that he wore gloves because of the "gross" content of the manhole.

Defendant submits that administrative rules must be examined, Rule 62 applies to the facts at hand, and the geometric testing provisions of this rule were not satisfied; therefore, defendant's convictions must be reversed. An administrative agency may create rules and regulations that are necessary for the efficient exercise of the powers expressly granted by the Legislature, but the administrative agency cannot exceed or restrict the statutory authority granted by the Legislature. *Czymbor's Timber, Inc v Saginaw*, 478 Mich 348, 370; 733 NW2d 1 (2007). Although the courts do afford an agency some deference, an agency's interpretation is not binding on the courts, and the agency's interpretation cannot be utilized to overcome the statute's plain meaning. *Ludington Service Corp v Acting Commissioner of Ins*, 444 Mich 481, 503-504; 511 NW2d 661 (1994). The plain language of the statute at issue sets forth the conduct that is subject to criminal penalties. There is no evidence that the Legislature authorized the agency to create rules and regulations applicable to a criminal prosecution. Moreover, a proper foundation underlying the evidence is a prerequisite to admission. *People v Sullivan*, 290 Mich 414, 420; 287 NW 567 (1939). There is no indication that Rule 62 was applicable to a polluting discharge.[4] Indeed, when defense counsel questioned the experts regarding the application of Rule 62, it was opined that the rule did not apply to the circumstance at issue. Accordingly, this challenge is without merit.

In a related issue, defendant submits that the trial court's rejection of the request to apply Rule 62 and the reliance on the prima facie evidence rule addressing municipalities, MCL 324.3109(2), inappropriately shifted the burden of proof. We disagree. Although MCL 324.3109(2) specifically identifies that discharge of raw sewage into state waters is prima facie evidence of a violation, the plain language of the statute reveals that this presumption applies to municipalities. *Hrlic, supra*. When delineating its findings of fact and conclusions of law, the trial court cited to MCL 324.3109(2) on two different occasions. However, the trial court expressly noted that this provision was inapplicable to defendant. Nothing in the record shows that the trial court improperly invoked the presumption provision of MCL 324.3109(2) governing municipalities or improperly shifted the burden of proof.[5] Therefore, this claim of error is without record support.

II. Motion to Dismiss on the Basis of MCL 324.3112a

Before trial, defendant moved to dismiss the charges, on the grounds that he had complied with MCL 324.3112a by notifying the state of the discharge and by testing the affected waters for contaminants. The trial court denied the motion to dismiss, and held that the statute did not apply to defendant's actions because he was not a private sewer operator or municipal

[4] Review of the administrative rules reveals that Rule 62, R 323.1062 governing microorganisms, is found in Part 4 of the Water Resources Protection Section of the DEQ governing "Water Quality Standards." However, this part appears to be a water monitoring provision. Rather, defendant's conduct appears to fall within Part 5 of the administrative rules addressing "Spillage of Oil and Polluting Materials." Thus, defendant's reliance on Rule 62 is simply erroneous.

[5] Rather, the trial court referred to MCL 324.3109(2) to highlight the special treatment given to raw sewage.

owner for purposes of the statute. Defendant contends that, as the person responsible for the sewer system of the apartment complex, the statute applies. We disagree.

Issues of statutory construction present questions of law subject to de novo review. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). When the manifest intention of the Legislature is derived from the language of a clear statute, nothing will be read into the clear statute. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007). The Legislature is presumed to intend the meaning it plainly expressed, *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003), and courts may not speculate as to the intent of the Legislature beyond the language plainly expressed in the statute. *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004).

MCL 324.3112a is entitled, "Discharge of untreated sewage from sewer system; notification; duties of municipality; legal action by state not limited; penalties and fines, definitions," and provides in pertinent part:

> (1) Except for sewer systems described in subsection (8), if untreated sewage or partially treated sewage is directly or indirectly discharged from a sewer system onto land or into the waters of the state, the person responsible for the sewer system shall immediately, but not more than 24 hours after the discharge begins, notify the department; .
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> * * *
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> (3) Each time a discharge to surface water occurs under subsection (1), the person responsible for the sewer system shall test the affected waters for E. coli to assess the risk to the public health as a result of the discharge and shall provide the test results to the affected local county health departments and to the department. …
>
> * * *
>
> (6) This section does not authorize the discharge of untreated sewage or partially treated sewage into the waters of the state or limit the state from bringing legal action as otherwise authorized by this part.
>
> (7) The penalties and fines provided for in section 3115 apply to a violation of this section.

Although the parties dispute whether defendant qualifies as "the person responsible for the sewer system," we hold that such an inquiry is irrelevant. Rather, irrespective of whether defendant complied with MCL 324.3112a(1) and (3), the statute provides the state is not prohibited from bringing legal action for discharge of untreated sewage. MCL 324.3112a(6).[6] Accordingly, the trial court did not err in denying defendant's motion to dismiss premised on MCL 324.3112a.

[6] Both parties submit that the legislative history, in this case, a legislative analysis, supports their (continued…)

III. *Davis-Frye* Evidentiary Hearing[7]

Defendant also challenges the trial court's conclusion that an evidentiary hearing was unnecessary by holding that, within the scientific community, raw sewage was a per se hazardous substance. The decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court selects an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In a bench trial, the trial court is presumed to know the applicable law and the difference between admissible and inadmissible evidence. *People v Lanzo Constr Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006). The judge, acting as the trier of fact in a bench trial, does not abuse his discretion in excluding expert testimony where the witness would not have assisted the judge in determining the ultimate issue in the case or if the testimony would not have provided the judge with a better understanding of the evidence. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). The judge's knowledge of the law allows him to ignore errors committed at trial and to decide a case solely upon the evidence properly admitted at trial. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

MRE 702 addresses expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004), the Supreme Court held that regardless of whether the *Davis-Frye* or *Daubert* test[8] was applied, the trial

(…continued)

respective positions. Although the legislative history of an act may be examined to ascertain the reason for the action, legislative history is afforded little significance when it is not an official view of the legislators and may not be utilized to create an ambiguity where one does not otherwise exist. *Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). The plain language of MCL 324.3112a(6) plainly provides that the state can still bring legal action, and therefore, the legislative analysis in this case need not be examined. *Id*. Moreover, we note that the trial court's credibility assessments and factual findings at the completion of the trial lead to the conclusion that MCL 324.3112a(1) was not satisfied. Defendant did not "immediately, but not more than 24 hours after the discharge begins …" notify the DEQ or township officials. Rather, defendant utilized three different pumps over three consecutive days before township officials stopped the pumping operation. Therefore, his reliance on MCL 324.3112a fails.

[7] See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 45; 293 F 1013 (1923).

court's role with regard to the admission of evidence was to act as the "gatekeeper." That is, the trial court may admit evidence only after it ensures that the reliability standards contained in MRE 702 are satisfied. *Id.* Both tests require the trial court to exclude "junk science," while *Daubert* allows the trial court to consider more than just general acceptance in determining whether expert testimony must be excluded. *Id.*

Defendant contends that the trial court erred in holding that there was "general acceptance" in the scientific community regarding the treatment of raw sewage as per se hazardous when there was "no peer reviewed published support." For the prosecution, microbiologist Dr. Rose testified that untreated sewage consisted of human fecal matter, urine, and gray water, such as shower or dishwater. Untreated sewage contained viruses, bacteria, and E. coli. She testified that viruses were found in untreated sewage 100% of the time. Untreated sewage is a public health risk because it subjects people to a variety of illnesses. Ingestion was not required to become ill; one could become sick from surface contact. Symptoms include diarrhea, fever, headache, vomiting, and reactive arthritis. Untreated sewage could also cause mortality. However, when asked to produce a publication concluding that raw sewage from a manhole was hazardous, Dr. Rose testified that it was taught in classes that raw sewage was hazardous.

Although Dr. Rose did not identify a published study to substantiate her opinion, other evidence presented at trial supports her conclusion. Even if there was no "peer reviewed published support," the testimony of other witnesses established peer support and demonstrated that the hazardous conclusion was not based on "junk science." At trial, the *defense* called Dr. Shannon Briggs, a toxicologist with the water bureau of the DEQ, to testify. Dr. Briggs testified that the administrative rules provided that raw sewage alone was prima facie evidence of hazardous or injurious matter. Additionally, she noted that health departments make hazard determinations without conducting testing. Further, defendant's expert geologist, Robert Hayes, testified that although the dilution level would impact whether a discharge was injurious, a discharge of 100,000 gallons of raw sewage would be injurious. Expert testimony aside, Michael Clifton, the plumber called to address the blockage at the apartment complex, testified that raw sewage presented a concern because one could get sick or even contract hepatitis. In light of the fact that there was universal agreement, even by defense witnesses, that raw sewage was hazardous, the trial court did not abuse its discretion by admitting this testimony. *Katt, supra*. Consequently, the challenge to the failure to conduct an evidentiary hearing does not provide defendant with any relief. See *Unger, supra*.

IV. Great Weight of the Evidence Challenge

(…continued)

[8] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Defendant next asserts that the verdict was against the great weight of the evidence. We disagree. Because this case was tried before the bench without a jury, a motion for new trial on this basis was not required to preserve the issue. MCR 7.211(C)(1)(c). The trial court's decision to grant or deny a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *Unger, supra* at 232. A trial court may grant a new trial motion based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Issues surrounding conflicting testimony and witness credibility are resolved by the trier of fact and present an insufficient reason for granting a new trial. *Id*. at 642-643. The trial court's factual findings in a bench trial will not be reversed unless clearly erroneous. *People v United States Currency*, 164 Mich App 171, 179; 416 NW2d 700 (1987).

Defendant contends that his convictions must be reversed because the trial court's findings of fact were contrary to the great weight of the evidence.[9] We disagree. Defendant asserts that the testimony at trial revealed that he was unaware of the presence of the catch basin on the property[10] and that he reasonably believed that the catch basin that was installed went to a treatment facility instead of the Huron River. Further, defendant alleged that he engaged in "positive and persistent efforts" to cure the plumbing problem by hiring Ace Plumbing, by proposing to bypass the sewer line but his proposal was rejected by township officials, and by hiring a sewage truck to pump the sewage from the manhole away from the scene.

Defendant's challenge to the trial court's factual findings is contingent upon the court's assessment of credibility, *Lemmon, supra*, and the trial court rejected defendant's credibility. Indeed, defendant's factual presentation is contrary to the testimony of other witnesses. While defendant asserts that he was unaware of the presence of the catch basin on his property, a civil engineer reported that defendant was made aware of its presence over ten years earlier when construction occurred on the adjacent property. Clifton, the plumber called by Liebenthal to address the sewage backup, testified that he warned defendant that the pump operation was illegal. Clifton testified that the pumping operation was dumping sewage into a basin for storm water only, and he told defendant that the process was polluting the water. Clifton testified that, despite this notice to defendant, the pumping operation continued when he arrived on the property the next day. And, rather than investigate the plumber's knowledge, defendant

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[9] For the first time on appeal, defendant asserts that his conviction must be reversed because the tenant who became physically ill drank from a hose, a consumption that occurred prior to discharge into the waters of this state. This newly raised argument is without merit. The plain language of MCL 324.3109(1) provides that a person shall not "directly or indirectly" discharge into the waters of this state substances that are or may become injurious to the public health, safety, or welfare. Thus, the Legislature accounted for direct and indirect discharges. The plain language of the statute does not provide that the discharge must be *directly* entered into the water *first*. This argument is baseless.

[10] Defendant cites to the testimony of his employee, Carl Liebenthal, that the catch basin was not visible because of grass in the area. However, that summation of the testimony is incomplete. Liebenthal later testified that after the grass was cut, it was visible.

continued the pumping operation. Accordingly, the trial court was presented with diametrically opposed versions of events and rejected defendant's version. *Lemmon, supra*. The verdict was not contrary to the great weight of the evidence, but reflected the trial court's rejection of defendant's credibility and his version of events.

V. Admission of DEQ's Amnesty Program

The trial court did not abuse its discretion in excluding the amnesty document purportedly executed by defendant and the DEQ. *Katt, supra*. A consent judgment is not enforceable against a defendant who is not a party to the original proceedings. *Baraga Co v State Tax Commission*, 466 Mich 264, 265-266; 645 NW2d 13 (2002). Privity will not bind the state to a judgment entered into by a subordinate political division. *Id*. Furthermore, there was no evidence that the document was ultimately executed between defendant and the DEQ. The last page of the amnesty document was notably absent, and therefore, there is no evidence that the DEQ entered into the agreement. Finally, the express terms of the amnesty document provided that it did not resolve "any criminal action that may result from these same violations."[11] Under the circumstances, defendant's reliance on the document was misplaced, and the trial court's exclusion was proper.

VI. Choice of Evils Defense

Defendant also says that the trial court's rejection of his "choice of evils" defense is incorrect. We disagree.

In *People v Lemons*, 454 Mich 234, 245-247; 562 NW2d 447 (1997), the Supreme Court explained:

> Duress is a common-law affirmative defense. It is applicable in situations where the crime committed avoids a greater harm. The reasons underlying its existence are easy to discern:
>
> The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person.
>
> In order to properly raise the defense, the defendant has the burden of producing 'some evidence from which the jury can conclude that the essential elements of duress are present.' … [W]e held that a defendant successfully carries the burden of production where the defendant introduces some evidence from which the jury could conclude the following:
>
> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

[11] See section 6.10 of the amnesty document.

> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened act.
>
> Additionally, … we [have] acknowledged that the threatening conduct or act of compulsion must be 'present, imminent, and impending (,that) (a) threat of future injury is not enough,' and that the threat 'must have arisen without the negligence or fault of the person who insists upon it as a defense.' [Citations omitted.]

Defendant failed to meet the burden of proof for the trial court to apply the choice of evils defense. Although defendant asserted that he acted in the best interest of his tenants in light of the "emergency" situation, the objective evidence does not support the defense. The sewage backup began on October 12, 2004. Tenants and employees testified that, in response to the sewage backup, defendant instructed his employees to use a pump to send sewage from a hose in the manhole to the catch basin. After being alerted to suspicious activity, Deputy Adkins went to the scene at 12:22 a.m. on October 13, 2004, unplugged the sump pump operation, and unsuccessfully tried to reach defendant. On October 13, 2004, Clifton the plumber was called to the apartment complex and observed the pump operation depositing raw sewage into the basin for storm water only. Despite his report that defendant was engaged in illegal activity, defendant did not stop pumping raw sewage into the catch basin. Clifton's attempt to free the blockage failed, and he reported to defendant that he would need a vactor to remove the sewage and to "hydro jet" to free the blockage. Notwithstanding this report of what was required to end the situation, defendant did not authorize this repair, but told Clifton that he would "try other things" and Clifton could report back the next day. On October 14, 2004, Clifton returned to the scene and found that defendant continued to pump raw sewage into the catch basin and once again, he advised defendant of the illegality of the activity. Despite the fact that this was the third day of the sewage blockage, defendant did not authorize Clifton to perform the necessary repair. Instead, township officials ordered defendant to fix the problem or place his tenants in a hotel. Although defendant testified that his tenants were his predominant concern, a township official, testified that defendant balked at having to call a plumber at 6:30 p.m. on October 14, 2004, because he would be charged the "emergency" rate. During this three-day period, Liebenthal testified that three different pumps were operating, and the third was purchased at Home Depot by defendant after the first two failed. This three-day event does not reflect that defendant was concerned about his tenants. Instead, this demonstrates that defendant dumped the raw sewage in the catch basin in lieu of having to hire a vacuum truck to remove the sewage from the scene. Ultimately, the township officials ordered defendant to legally remove the sewage by hiring a service and to restore water to the apartment complex. These facts demonstrate that the defense of choice of evils was inapplicable.

VI. Sentencing Challenge

Appellate review of a sentence that is imposed based on the guidelines is limited to determining whether the sentence was imposed within the appropriate range, and if outside the

range, whether the departure was based on a substantial and compelling reason. *Babcock, supra* at 272-273.

In an extremely cursory argument, defendant alleges that the applicable sentencing guidelines are void for vagueness. However, an appellant may not merely announce a position to this Court and leave it for the Court to discover and rationalize the basis for his claims. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). Further, an appellant may not give cursory treatment to an issue with little or no citation to supporting authority. *Id*. Because defendant merely announced a position without more, he has abandoned this claim. *Id*.

Similarly, defendant contends that the fine of $1,000,000 is excessive. To determine whether a statutory fine is excessive, the following factors are examined: (1) the objective designed to be accomplished, (2) the magnitude of the public interest to be protected, (3) the circumstance and nature of the act, (4) the preventive effect upon the crime at issue, and (5) the ability to pay, although this factor alone will not render the statute unconstitutional. *People v Antolovich*, 207 Mich App 714, 717; 525 NW2d 513 (1994). In light of the crimes at issue, we cannot conclude that the statutory fine of $1,000,000 is excessive. By conservative estimates, defendant pumped over 107,000 gallons of raw sewage into a catch basin. Defendant was put on notice by employees and a plumber that his activity was illegal. Despite this information, defendant took no steps to determine if in fact the basin led to a treatment facility. Instead, he merely continued to use three pumps to remove the raw sewage to the basin before being shut down by township officials. When township officials remained on the scene, defendant's employees returned with the pump, indicating that they were doing so at defendant's direction. The offenses occurred over on a three-day period in which thousands of gallons of raw sewage were dumped into a catch basin that traveled into the Huron River and then into Ford Lake. In light of defendant's blatant disregard for public health and the law and the extensive harm to the waters of this State, the fine is not excessive; indeed, the fine is necessary to protect the public interest and to deter others. *Antolovich, supra*.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello