STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES REDMOND,

Defendant-Appellant.

UNPUBLISHED
November 14, 2006

No. 261458
Oakland Circuit Court
LC No. 04-197600-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of the common law offense of misconduct in office[1] and violation of MCL 15.322, which prohibits contracts between public servants and the public entity of which the public servant is an officer or employee.[2] The trial court sentenced him to incarceration for six months and probation for three years for the misconduct in office conviction and incarceration for 90 days for the MCL 15.322 conviction. We affirm.

Defendant's convictions arose out of his conduct related to his position as superintendent of the Oakland County Intermediate School District (OISD), a position which defendant held from 1995 until he was terminated by the OISD board of education (OISD board) effective January 31, 2003. The evidence at trial established that defendant failed to disclose to the OISD board that he was chairman of the board of directors of the MINDS Institute,[3] a non-profit

[1] MCL 750.505 provides:

> Any person who shall commit any indictable offense of the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

[2] The jury acquitted defendant of embezzlement by a public officer, MCL 750.175.

[3] Evidence at trial revealed that MINDS is an acronym for Multi-Media Instructional Network Delivery System. The concept behind the MINDS Institute was that it would provide digitized media services to educational institutions via fiber optic wiring that could be displayed on

(continued…)

organization, that he entered into contracts with the MINDS Institute on behalf of the OISD while he was simultaneously acting as superintendent of the OISD and serving on the board of the MINDS Institute, which resulted in the OISD paying the MINDS Institute more than $500,000 for services, that he failed to truthfully respond to a letter from the Michigan Department of Education inquiring whether defendant or any of his relatives profited financially from the contractual arrangement between the OISD and the MINDS Institute in that he failed to disclose that his son worked for MINDS, LLC, the for-profit companion company of the MINDS Institute, that he authorized severance packages for two OISD employees without the OISD board's approval, that he authorized the payment of $397,220 to the MINDS Institute without a contract modification, and that he directed John Fitzgerald, Director of Financial Services of the OISD, and Mark Rajter, Assistant Superintendent for Resource Management of the OISD, to recalculate his vacation payout in a manner inconsistent with the standard practices of the OISD, which resulted in defendant receiving an additional vacation payout in the amount of $6,972.50.

I.

Defendant first argues that the evidence was insufficient to sustain his convictions of misconduct in office and violation of MCL 15.322. We disagree.

This Court reviews de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The test for determining whether sufficient evidence has been presented to sustain a conviction is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

MCL 15.322 provides:

> (1) Except as provided in sections 3 and 3a, a public servant shall not be a party, directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an officer or employee.
>
> (2) Except as provided in section 3, a public servant shall not directly or indirectly solicit any contract between the public entity of which he or she is an officer or employee and any of the following:
>
> (a) Him or herself.

(…continued)

computers. The MINDS Institute itself was incorporated in 2000 to search out and obtain voice, video and data technology that would be supplied to educational institutions, and MINDS LLC was created to sell the voice, video and data technology to educational institutions.

(b) Any firm, meaning a co-partnership or other unincorporated association, of which he or she is a partner, member, or employee.

(c) Any private corporation in which he or she is a stockholder owning more than 1% of the total outstanding stock of any class if the stock is not listed on a stock exchange, or stock with a present total market value in excess of $25,000.00 if the stock is listed on a stock exchange or of which he or she is a director, officer, or employee.

(d) Any trust of which he or she is a beneficiary or trustee.

(3) In regard to a contract described in subsection (2), a public servant shall not do either of the following:

(a) Take any part in the negotiations for such a contract or the renegotiation or amendment of the contract, or in the approval of the contract.

(b) Represent either party in the transaction.

Evidence established that defendant began his employment as superintendent of the OISD in 1995 and that he became chairman of the board of the MINDS Institute in May 2000. On September 25, 2000, defendant, on behalf of the OISD, signed and entered into two three-year contracts with the MINDS Institute. These contracts were the Subscriber Agreement and the Content Agreement. At the time defendant entered into the Subscriber Agreement and the Content Agreement, he was simultaneously employed as the superintendent of the OISD and serving as chairman of the board of the MINDS Institute. The developer of MINDS, Marvin Sauer, met defendant in 1999. Sauer was seeking an educational partner that understood the educational marketplace and believed that the Oakland schools would be a good partner because the schools were well-known and well-respected. Because defendant was superintendent of the OISD, Sauer asked defendant to participate in the MINDS project so that defendant could offer his vision and guidance and assist with the direction of the MINDS project. According to Sauer, defendant was helpful in validating that the technology would make sense in an educational environment. In light of Marvin Sauer's testimony regarding defendant's involvement in the MINDS Institute as the concept was developing and before it was officially incorporated in April 2000,[4] the evidence, the circumstantial evidence, and the reasonable inferences therefrom, establish that defendant solicited, either directly or indirectly, the Subscriber Agreement and the Content Agreement between the OISD and the MINDS Institute in violation of MCL 15.322(2)(b) while he was simultaneously employed as the superintendent of the OISD and acting as the chairman of the board of the MINDS Institute and that by signing those two contracts on behalf of the OISD, defendant represented the OISD in entering into the contracts in violation of MCL 15.322(3)(b). In addition, although other representatives of the OISD and not defendant signed the Contracted Services Contract between the OISD and the MINDS Institute, in which the MINDS Institute agreed to digitize 160 hours of video for the OISD in exchange for

[4] Defendant was one of the incorporators of the MINDS Institute.

payment of $120,000, reasonable inferences from the evidence regarding defendant's early involvement with the MINDS Institute and his meetings and discussions with OISD administrators regarding MINDS suggest that defendant was part of the discussions and negotiations that led to the formal adoption of the Contracted Services Contract. Thus, there was also sufficient evidence that defendant was involved in soliciting and negotiating the Contracted Services Contract between the OISD and the MINDS Institute in violation of MCL 15.332(2)(b) and (3)(a).

The evidence was also sufficient to sustain defendant's conviction for misconduct in office. The offense of misconduct in office is a common law offense. *People v Coutu (On Remand)*, 235 Mich App 695, 705; 599 NW2d 556 (1999). "At common law, misconduct in office was defined as 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.'" *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). "An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance." *Id.* (citation omitted). In the case of malfeasance or misfeasance, the offender must act with a corrupt intent. *Id.* The term corruption means a "'sense of depravity, perversion or taint.'" *Coutu*, *supra* at 706. This Court has defined these terms as follows:

> "Depravity" is defined as "the state of being depraved" and "depraved" is defined as "morally corrupt or perverted." *Random House Webster's College Dictionary* (1997). "Perversion" is "the act of perverting," and the term "perverted" includes in its definition "misguided; distorted; misinterpreted" and "turned from what is considered right or true." *Id.* The definition of "taint" includes "a trace of something bad or offensive." *Id.* [*Id.*]

Under these definitions, "a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer." *Id.*

The prosecution alleged six separate factual theories under which it asserted that defendant was guilty of misconduct in office: that defendant unethically received additional monies for a vacation payout, that defendant entered into severance agreements with OISD employees without the approval of the OISD board, that defendant made factual misrepresentations in an affidavit in response to an inquiry by the Michigan Department of Education, that defendant engaged in misconduct in office by entering into a contract on behalf of the OISD with the MINDS Institute at the same time defendant was chairman of the board of the MINDS Institute in violation of MCL 15.322, that defendant failed to reveal his position as chairman of the board of the MINDS Institute to the OISD board, and that defendant authorized an additional payment to the MINDS Institute in the amount of $397,220 without a contract modification. We have carefully reviewed the evidence regarding these theories and conclude that there was sufficient evidence to sustain defendant's conviction based on all six factual theories. Defendant committed acts of malfeasance or misfeasance under the color of his position as superintendent of the OISD, and this conduct was bad or offensive. Therefore, there was sufficient evidence that defendant's conduct was "tainted" and therefore corrupt.

II.

Defendant next argues that the trial court erred in permitting the prosecutor to present evidence at trial regarding the improper severance agreements and vacation payout as theories under which defendant engaged in misconduct in office because the district court did not bind defendant over on the misconduct in office charge based on those two theories and the trial court therefore lacked jurisdiction with respect to those theories. We disagree.

It is true that in binding defendant over for trial on the misconduct charge, the district court did not rule on the evidence regarding the improper severance agreements and vacation payout, even though the prosecutor included the improper severance agreements and the vacation time payout as factual predicates supporting the offenses. In making its ruling, the district court stated that "[b]eing cognizant of the fact that this court sits not as the ultimate trier of fact, but rather as the examining magistrate, the Court finds that the People have met their burden of proof in at least one of the areas set forth." In finding that there was probable cause to support the misconduct in office charge, the district court properly recognized its limited role regarding resolving questions of fact and left those decisions for the fact finder. Defendant was not unfairly surprised or prejudiced by the improper severance agreement and vacation payout theories at trial because although the preliminary examination transcript was not part of the record, it appears that the prosecutor offered evidence regarding these theories at the preliminary examination. In any event, the improper severance agreement and vacation payout theories were articulated as basis for defendant's misconduct from as early as the time the OISD board made its resolution terminating defendant's employment. Moreover, any error in the sufficiency of proofs at the preliminary examination is considered harmless where the prosecution presented sufficient evidence at trial to convict defendant. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). In this case, we have concluded that there was sufficient evidence to sustain defendant's conviction for misconduct in office based on the prosecutor's theory that defendant entered into severance agreements with OISD employees without the board's approval and that defendant acted improperly in effecting the recalculation of his vacation payout. Therefore, any error in the sufficiency of proofs at the preliminary examination was harmless.

Defendant also argues that in permitting the prosecutor to proceed against defendant based on the improper vacation payout theory for both the offense of misconduct in office and embezzlement of a public official and the conflict of interest theory for both the misconduct in office and the violation of MCL 15.332, the trial court violated MCL 750.505 because the misconduct is not one "for the punishment of which no provision is expressly made by any statute of this state" and that defendant's right to be free from double jeopardy was violated. As defendant recognizes in his appellate brief, however, this Court has previously addressed whether a defendant could be charged, based on the same factual scenario, with misconduct in office under MCL 750.505 and another offense and held that charges and convictions of both offenses were not improper. In *People v Milton*, 257 Mich App 467, 470-471; 668 NW2d 387 (2003), this Court addressed whether a defendant could be charged with misconduct in office under MCL 750.505 when the facts that formed the basis for the charge also supported a charge of assault with a dangerous weapon under MCL 750.82. *Id.* at 470. In holding that the defendant could be convicted under both statutes, this Court held:

> Nevertheless, defendant claims that he cannot be convicted under MCL 750.505 because his specific misconduct, assault and battery, was also prohibited by the assault statutes and, thus, is not one "for the punishment of which no provision is

> expressly made by any statute of this state." MCL 750.505. However, the misconduct in office charge is the "indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state." *Id.* There is no statute that expressly provides punishment for misconduct in office; therefore, defendant's argument is without merit. [*Id.* at 472.]

Based on this Court's holding in *Milton*, defendant's argument that his being charged with misconduct in office, violation of MCL 15.322, and embezzlement based on the same factual predicates, violates MCL 750.505, is without merit.

We decline to address defendant's argument that his convictions of both misconduct in office and violation of MCL 15.322 based on the same factual predicates subjects him to double jeopardy. A party who fails to brief the merits of an alleged error has abandoned the issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). It is not enough for a party to simply announce a position in a brief and then leave it up to this Court to discover and rationalize the basis for the party's claims. *Id.*

III.

Defendant next argues that the trial court erred in refusing to instruct the jury that the issue of Dr. Regis Jacobs' severance package was no longer before it, when it had ruled that testimony relating to Dr. Jacobs' severance package, could not be relied upon as a factual basis for the misconduct in office charge. We disagree.

We review de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *Id.* Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

The prosecutor intended to rely on Dr. Jacobs' testimony to support its theory that defendant engaged in misconduct in office by offering Dr. Jacobs a severance package that was not presented to or approved by the OISD board. At trial, however, the testimony revealed that Dr. Jacobs' severance package was not executed within the time frame of defendant's alleged misconduct. The trial court did not explicitly rule Dr. Jacobs' testimony inadmissible, but stated: "The issue is did he [defendant] sneak it [Dr. Jacobs' severance agreement] past the Board. And he didn't sneak it past the Board. And that's going to drop it there." Defendant later asked the trial court to instruct the jury to disregard Dr. Jacobs' testimony regarding his severance agreement. The prosecutor objected to such an instruction, and the trial court sustained the objection and refused to give the instruction with no explanation.

Even if the trial court should have instructed the jury not to consider Dr. Jacobs' testimony, any error in this regard was harmless. Mere error alone in instructing the jury is insufficient to set aside a criminal conviction. *People v Schaefer*, 473 Mich 418, 441; 703 NW2d 774 (2005), mod and clarified sub nom *People v Derror*, 475 Mich 315 (2006). Rather, a defendant must establish that the erroneous instruction resulted in a miscarriage of justice. *Id.* at 441-442. See also MCL 769.26. The failure to give the requested instruction is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is

more probable than not that the error was outcome determinative. *Schaefer*, *supra* at 443. In this case, any error in the admission of Dr. Jacobs' testimony was not outcome determinative and did not result in a miscarriage of justice because it did not undermine the reliability of the verdict. As we have previously stated in this opinion, the prosecution introduced sufficient evidence on all six of its factual theories underlying the misconduct in office charge to sustain defendant's conviction on that charge. Specifically, regarding the improper severance agreement theory, we observe that there was evidence that defendant offered severance agreements to two other OISD employees, William Lee and Barbara Rebbeck, without obtaining board approval, and this evidence was sufficient to sustain the misconduct in office conviction based on defendant's improper conduct regarding severance agreements. We conclude that, even if the jury considered Dr. Jacobs' testimony and concluded that defendant improperly offered Dr. Jacobs a severance agreement without presenting it to or receiving approval from the OISD, a miscarriage of justice did not result because there was sufficient evidence to sustain defendant's misconduct in office conviction based on all six theories advanced by the prosecution.

IV.

Defendant next argues that the trial court abused its discretion in admitting into evidence the OISD's resolution terminating defendant's employment. According to defendant, the resolution should not have been admitted because it contained statements made by non-testifying individuals and therefore deprived defendant of his constitutional right to confrontation and because the information contained in the resolution constituted hearsay and was prejudicial.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Drohan*, 264 Mich App 77, 84; 689 NW2d 750 (2004). To preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). In this case, defense counsel objected to the evidence on hearsay grounds, but not on the grounds that admission of the evidence violated defendant's Sixth Amendment rights. Therefore, this Court reviews defendant's constitutional argument for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Reversal is only warranted when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* We find that reversal is not warranted based on defendant's Sixth Amendment argument because the admission of the resolution did not result in the conviction of an actually innocent defendant and did not affect the fairness, integrity, or public reputation of the judicial proceedings.

At trial, the prosecution moved to admit the OISD resolution, and defendant objected, arguing that the resolution contained "deliberative and investigative conclusions" and was therefore inadmissible in a criminal case under MRE 803(8). The trial court asserted that the resolution was a public record, but was concerned that the resolution contained factual information that was not part of the case against defendant and that could be more prejudicial than probative. Therefore, the trial court instructed the prosecution to redact portions of the resolution that could "conceivably be more prejudicial than probative" and submit the redacted resolution at a later time. The prosecutor later moved to admit a redacted copy of the OISD resolution that only contained facts that the prosecutor had litigated in the case. The trial court admitted the redacted OISD resolution terminating defendant's employment.

Assuming that the resolution was, by definition, hearsay, it was not precluded by the police officer and law enforcement personnel exception in MRE 803(8). Under MRE 803(8), the following is not excluded by the hearsay rule:

> **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

On appeal, defendant does not argue that the OISD report was not a public record; rather, defendant argues that the OISD resolution terminating defendant's employment should not have been admitted because it was based on the Whall Group's report regarding defendant's conduct and such a report constitutes a matter "observed by police officers [or] other law enforcement personnel" which would be excluded under the exception in MRE 803(8). In objecting to the admission of the resolution, defense counsel asserted on the record that the Whall Group was a private investigation firm. Furthermore, in defendant's brief on appeal, defendant acknowledges that the Whall Group's report is "not a report 'of' a law enforcement agency." The prosecutor sought to admit the OISD board's resolution that was based on the report of a private investigation firm. The report, being made by a private investigation firm, did not involve "matters observed by police officers and other law enforcement personnel[.]" Therefore, admission of the resolution is not precluded by the police officer or other law enforcement personnel exclusion in MRE 803(8). In addition, we observe that the trial court took great care to ensure that the resolution was redacted to exclude references to factual matters that were not related to the charges against defendant and would have been more prejudicial than probative. The trial court did not abuse its discretion in admitting the redacted resolution of the board.

V.

Defendant next argues that the trial court improperly instructed the jury regarding the element of corrupt intent necessary to convict defendant of the charge of misconduct in office. We disagree.

Jury instructions must include all the elements of the charged offense. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). The parties agreed on the elements of the offense, agreed that the prosecutor had to establish that defendant acted with a "corrupt intent," and agreed that *Coutu*, *supra*, was the relevant case that defined the term "corrupt intent." In *Coutu*, this Court stated that the term "corruption" means "a 'sense of depravity, perversion or taint.'" *Coutu*, *supra* at 706. In discussing the proper instructions regarding the term "corrupt intent," the prosecution explained to the trial court that it was only proceeding on the theory of "taint," and not under the theory that defendant's conduct constituted "depravity" or "perversion." Therefore, the prosecutor argued that the trial court only needed to define the term "taint" for the jury, and not the words "depravity" or "perversion." Defendant contended that the trial court should instruct the jury on all three definitions because "it fleshes out the concept of what corruption means[.]" The trial court disagreed, observing that the use of the word "or" in *Coutu* meant that the prosecutor had a choice of which theory of corrupt intent it wanted to proceed under. The trial court's corrupt intent instruction is as follows:

> Fourth, these acts must be done with a corrupt intent. A corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of an officer . . . . Corruption means depravity, perversion, or taint. Now, the definition of taint includes a trace of something bad or—we're not—apparently they're not worrying about depravity or perversion here, but they're concerned about taint, so we'll define taint. And taint includes a trace of something bad or offensive. . . .

According to defendant, by only defining the word "taint" to the jury, the trial court took the word out of context and "diluted the level of proof required to maintain a conviction." We disagree. Under MCR 2.516(D)(4), a trial court may give additional instructions concerning an area that was not covered in the standard jury instructions as long as the additional instructions accurately state the law and are applicable, concise, understandable, conversational, unslanted, and nonargumentative. *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472 (1998), rev'd on other grounds 459 Mich 53 (1998). In this case, the trial court's corrupt intent instructions accurately stated the law and otherwise complied with these requirements. In *Coutu*, this Court stated that the term "corruption" means "a 'sense of depravity, perversion *or* taint.'" *Coutu*, *supra* at 706 (citation omitted; emphasis added). The use of the disjunctive word "or" generally refers to a choice or alternative between two or more things. See *People v Neal*, 266 Mich App 654, 656; 702 NW2d 696 (2005) (interpreting the word "or" in MCL 750.335a). The words "depravity," "perversion," and "taint" express three alternative concepts or choices of corrupt behavior. Therefore, corrupt behavior for purposes of the misconduct in office charge is behavior that falls into any one of the three alternative definitions. Because the prosecutor proceeded on the theory that defendant's conduct constituted "taint," it was reasonable for the trial court to instruct the jury only on the definition of "taint." The trial court's definition of the term "corrupt intent" therefore fairly presented the issues to be tried and sufficiently protected defendant's rights.

Moreover, a trial court's refusal to give a requested instruction only warrants reversal if a defendant shows that it is more probable than not that the trial court's failure to give the requested instruction undermined the reliability of the verdict. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). In this case, the fact that the trial court did not define the "depravity" and "perversion" alternatives of "corrupt intent" did not undermine the reliability of the verdict because the prosecutor did not proceed under those theories and did not present evidence regarding those theories at trial. The prosecutor's theory and evidence related solely to the theory that defendant's conduct constituted "taint" and was bad or offensive. Therefore, the trial court's instructions did not undermine the reliability of the verdict.

Defendant next argues that the terms "bad" or "offensive" are unconstitutionally vague because they are so indefinite that they confer unlimited discretion on the trier of fact to determine whether an offense has been committed. Defendant did not make this vagueness argument before the trial court. Generally, issues that are not raised before and addressed by the trial court are not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, because this Court may consider a significant constitutional issue that has not been raised before the trial court, *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999), we will address the issue. An unpreserved constitutional error is reviewed for plain error affecting substantial rights. *Carines*, *supra* at 763, 774.

Reversal is warranted when plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation or judicial proceedings independent of the defendant's innocence. *Id.*

The trial court's instructions to the jury included instructions that the prosecutor had to prove the following elements of the misconduct in office offense beyond a reasonable doubt: that defendant either held public office or was the agent or servant of a public official, that defendant's acts must have been conducted in the exercise of the duties of the office or done under the color of the office, that the defendant's acts constituted malfeasance, misfeasance, or nonfeasance (the trial court defined all three of these terms in its instructions), and that defendant's acts must have been done with a corrupt intent. In explaining the corrupt intent element, the trial court asserted that a corrupt intent could be established "where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties . . . of an office by an officer." The trial court then defined the term "taint" as "a trace of something bad or offensive" and observed that "[t]he corrupt intent needed to prove misconduct of office does not necessarily require an intent for one to profit for oneself." The trial court also defined the term public officer. These instructions, viewed as a whole, would not confer unlimited discretion on the trier of fact to determine whether an offense was committed. The trial court's jury instructions on the misconduct offense accurately stated the applicable law and the jury was therefore properly instructed. There was no plain error.

VI.

Defendant next argues that the prosecutor made arguments that were not supported by the evidence during rebuttal closing argument and that these arguments deprived him of a fair and impartial trial. According to defendant, the prosecutor improperly suggested that defendant used his influence as superintendent of the OISD to get his son a job at MINDS LLC and that defendant himself might one day work for the parent company of the MINDS Institute and MINDS LLC. Defendant asserts that the trial court abused its discretion in denying his motion for mistrial based on the prosecutor's improper statements.

"The grant or denial of a motion for mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Prejudice is shown when the trial court's ruling is so grossly in error that it deprives the defendant of a fair trial or amounts to a miscarriage of justice. *Id.* Issues of prosecutorial misconduct are decided on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A claim of prosecutorial misconduct is a constitutional issue that is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Noble, supra* at 660. 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), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Noble, supra* at 660.

Defendant is correct that a prosecutor is not permitted to argue facts that are not supported by the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

However, a prosecutor is free to argue the evidence and any reasonable inferences arising therefrom as they relate to the prosecutor's theory of the case. *Id.* The prosecutor's comment about defendant using his influence as a public official to benefit his family was not improper because it was based on the evidence and reasonable inferences from the evidence. Marvin Sauer hired defendant's son to work for MINDS LLC. Sauer explained that he became aware that defendant's son was looking for work through a conversation he had with defendant. Sauer hired defendant's son to fill a newly created position on October 16, 2000, which was approximately two months before the $120,000 Contracted Services Contract was signed between the OISD and the MINDS Institute. Based on this evidence, an inference can be made that defendant used his influence as superintendent of the OISD and the possibility of a contract with the OISD to procure a position for his son with MINDS LLC. Therefore, the prosecutor's comment was not improper because it was based on the evidence or reasonable inferences from the evidence.

Similarly, the prosecutor's comment about the possibility of defendant working for one of the MINDS corporations was also based on reasonable inferences from the evidence. Sauer testified that he met defendant in 1999 and recruited defendant to become involved in the development of the MINDS project because of defendant's vision and guidance. According to Sauer, he sought an educational partner for the MINDS project, and the Oakland schools and defendant, as superintendent of the Oakland schools, were a good match. The MINDS Institute earned over $500,000 from the Oakland OISD because of defendant's assistance. Based on this evidence, it is reasonable to infer the possibility that defendant might work for TLC or the MINDS entities as a reward for his efforts in securing the OISD's involvement with the MINDS project and also because defendant had the educational background that made him a good educational partner for the MINDS Institute. Therefore, the prosecutor's comments about defendant potentially working for the MINDS Institute in the future were based on reasonable inferences from the evidence, and the trial court did not abuse its discretion in denying defendant's motion for a directed verdict.

VII.

Defendant finally argues that he is entitled to be resentenced because the trial court erred in assessing ten points for OV 10 and ten points for OV 16 and that the scoring of OV 10 and OV 16 violates the Fifth and Sixth Amendments to the United States Constitution because the scoring was based upon facts that had not been presented to a jury and found beyond a reasonable doubt. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any supporting evidence will be upheld. *Id.*

OV 10 "is exploitation of a vulnerable victim." MCL 777.40(1). Under OV 10, ten points is to be scored if "the offender abused his or her authority status." The evidence revealed that defendant abused his authority status as superintendent of the OISD in numerous ways. For example, defendant abused his authority as superintendent of the OISD by acting unethically in obtaining additional monies for his vacation payout. Even though John Fitzgerald, Director of Financial Services of the OISD, and Mark Rajter, Assistant Superintendent of Resource

Management for the OISD, informed defendant that items such as the tax sheltered annuity (TSA)[5] were not included in calculating the per diem basis for vacation payouts, defendant insisted that they include the TSA when calculating the per diem basis for his vacation payout. In explaining why they complied with defendant's demand that they include the TSA in recalculating defendant's vacation payout, Ratjer stated: "[defendant], he's the superintendent and he's going to prevail." Fitzgerald asserted that they had no choice but to recalculate defendant's vacation payout because defendant directed them to add the TSA into the recalculation. This evidence shows that defendant abused his authority as superintendent to receive additional vacation payout monies to which he was not entitled and that Ratjer and Fitzgerald deferred to defendant's authority. This evidence constitutes sufficient evidence to warrant a score of ten points for OV 10.

OV 16 "is property obtained, damaged, lost, or destroyed." MCL 777.46. Under OV 16, ten points is to be scored if "[t]he property had a value of more than $20,000.00 or had significant historical, social, or sentimental value." MCL 777.46(1)(b). Defendant argues that OV 16 should not have been scored at ten points because OV 16 compensates crime victims for damage to or loss of property and this case concerns financial loss. Defendant does not cite any legal authority to support his position. A party who fails to brief the merits of an alleged error has abandoned the issue on appeal. *Yee*, *supra* at 406. It is not enough for a party to simply announce a position in a brief and then leave it up to this Court to discover and rationalize the basis for the party's claims. *Id.* In this case, the evidence established that the OISD lost more than $20,000 due to defendant's misconduct. Therefore, there was evidence to support the score of ten points for OV 16.

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that the scoring of OV 10 and OV 16 violates the Fifth and Sixth Amendments to the United States Constitution because the scoring was based upon facts that had not been presented to a jury and found beyond a reasonable doubt. Defendant did not raise his challenge based on *Blakely* before the trial court and has therefore failed to preserve this issue for review. In any event, this argument is without merit because in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court held that *Blakely* is inapplicable to Michigan's indeterminate sentencing system. See also *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen

[5] Under defendant's employment contract with the OISD, a benefit of defendant's employment with the OISD was that the OISD would contribute $11,000 annually to a designated TSA.