

FILED: June 4, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JIMMY RAY KELLY, JR.,
Defendant-Appellant.

Clackamas County Circuit Court
CR1000472

A146496

Jeffrey S. Jones, Judge.

Argued and submitted on February 22, 2013.

Laura A. Frikert, Deputy Public Defender, argued the cause for appellant. With her on the opening brief was Peter Gartlan, Chief Defender, Office of Public Defense Services. Jimmy R. Kelly, Jr., filed the supplemental brief *pro se*.

Janet A. Klapstein, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

NAKAMOTO, J.

Affirmed.

1 NAKAMOTO, J.

2 Defendant, owner and president of a construction company, challenges a
3 judgment of conviction for racketeering, ORS 166.720(3), under an indictment that
4 alleged multiple theft- and fraud-related predicate offenses stemming from defendant's
5 procurement and misuse of home-improvement loans. Defendant raises four assignments
6 of error on appeal. He contends, first, that the trial court erred in denying his demurrer on
7 the ground that the indictment was not sufficiently definite and certain; second, that the
8 court erred in denying his motion for judgment of acquittal because there was insufficient
9 evidence of the required intent; third, that the court impermissibly ranked his conviction
10 as a "level-9" offense for purposes of sentencing; and fourth, that the court committed
11 plain error by empanelling an anonymous jury. We reject defendant's second assignment
12 of error without discussion and, as we explain below, otherwise affirm.¹

13 Because the jury found defendant guilty, we review the evidence in the
14 light most favorable to the state. *State v. Hale*, 335 Or 612, 614, 75 P3d 448 (2003), *cert*
15 *den*, 541 US 942 (2004). Defendant was the owner and president of Jemm Corporation,
16 doing business as Northwest Home Source (NHS). NHS focused on home-remodeling
17 projects. In 2004, defendant hired Gary Remer to head NHS's sales and marketing.

¹ Defendant raises four additional claims in a *pro se* brief. He assigns error to the participation by an assistant attorney general in the prosecution against him; to the trial court's rejection of his requested special "pattern of racketeering" instruction; and to the court's denial of his demurrer, in which he argued that the court lacked jurisdiction. We reject those assignments of error without discussion. Later in this opinion, we address and reject defendant's remaining supplemental assignment of error regarding the court's instruction on the elements of the predicate fraud offenses.

1 indictment on the ground that it did not adequately allege the enterprise element of the
2 racketeering charge under the Oregon Racketeer Influenced and Corrupt Organizations
3 Act (ORICO), ORS 166.715 to 166.735. We review a trial court's ruling on a demurrer
4 to a charging instrument for legal error. *State v. Magana*, 212 Or App 553, 556, 159 P3d
5 1163, *rev den*, 343 Or 363 (2007).

6 The state charged defendant with one count of racketeering in violation of
7 ORS 166.720(3), under an indictment that alleged 25 predicate offenses including theft,
8 bank fraud, and wire fraud. The indictment charged, in relevant part:

9 "Defendant Jimmy Ray Kelly Jr. between December 8, 2005 and
10 June 26, 2009, being associated with an enterprise, to wit: Jemm
11 Corporation, doing business as Northwest Home Source, *and/or an*
12 *association in fact including but not limited to: Jimmy Ray Kelly, Jemm*
13 *Corporation, doing business as Northwest Home Source, and Gary Remer*
14 *and others*, did unlawfully and knowingly conduct and participate, directly
15 or indirectly, in such enterprise through a pattern of racketeering activity *
16 * *[".]"

17 (Emphasis added.)

18 Defendant demurred to the indictment, arguing that it was impermissibly
19 indefinite and uncertain because it did not "list who 'the others' are nor [did] discovery
20 narrow the focus." The state responded that the identities of the unnamed members of the
21 alleged association-in-fact did not constitute an element that must be pleaded and that
22 discovery identified the "names, dates of birth, addresses, telephone numbers, statements,
23 and other identifying information of individuals and entities who were associated with the
24 named enterprise components during the racketeering activity." The trial court denied the
25 demurrer, agreeing with the state that the identities of the unnamed "others" were not

1 material and therefore need not be pleaded.

2 On appeal, defendant assigns error to the trial court's denial of his demurrer,
3 renewing his argument that the state's reference to unnamed "others" rendered the
4 indictment deficient both formally and functionally: formally, in that, as a matter of law,
5 the state was required to allege the identities of the unnamed "others"; functionally, in
6 that the state's failure to so allege deprived defendant of notice of the charge against him
7 and hindered his ability to adequately prepare a defense, because it enabled the state to
8 shift theories of the case during trial as needed. According to defendant, in other words,
9 the indictment is both insufficiently specific and impermissibly expansive.

10 The state counters that the trial court correctly held that the indictment need
11 not name the unknown individuals associated with the illegal enterprise because their
12 identity was not a material element of the racketeering charge. The state adds that any
13 potential harm from lack of specificity was adequately offset by the availability of
14 additional information through discovery. We agree with the state.

15 "A demurrer to an indictment on the ground that it is not sufficiently
16 definite or certain is properly raised under ORS 135.630(2), which, by express reference,
17 requires that the indictment conform to ORS 132.550(7)." *State v. Morgan*, 151 Or App
18 750, 753 n 4, 951 P2d 187 (1997), *rev den*, 327 Or 82 (1998) (emphasis omitted). Under
19 ORS 132.550(7), an indictment must contain a "statement of the acts constituting the
20 offense in ordinary and concise language, without repetition, and in such a manner as to

1 enable a person of common understanding to know what is intended[.]”²

2 We begin with defendant's argument that the indictment was insufficiently
3 specific because it failed to specifically identify the unnamed "others." "[A]s this court
4 so many times has held, an indictment generally is sufficient if it charges an offense in
5 the words of the statute." *Hale*, 335 Or at 621; *see also State v. Fitzpatrick*, 149 Or App
6 246, 249, 942 P2d 819 (1997) (holding that an indictment phrased in the statutory
7 language was sufficient to satisfy ORS 132.550(7)). Additionally, "as a matter of law,
8 the identity of persons connected with a criminal offense need not be stated in an
9 indictment unless such identity is an essential element of the crime charged." *State v.*
10 *Shadley/Spencer/Rowe*, 16 Or App 113, 121, 517 P2d 324 (1973).

11 To assess whether the identity of such persons is a material element that
12 must be alleged in an indictment, we look to the plain language of the statute defining the
13 crime charged. The Supreme Court explained the nature of that examination in *State v.*
14 *Nussbaum*, 261 Or 87, 491 P2d 1013 (1971). In that case, the trial court had sustained
15 demurrers by several defendants to indictments charging them with rioting, because the
16 indictments failed to allege the names of co-offenders. 261 Or at 88-89.³ We affirmed

² Although defendant based his demurrer on ORS 135.630(6) (providing that a defendant may demur to the accusatory instrument when it appears on its face that it is "not definite and certain"), that provision "applies only to accusatory instruments other than indictments, *i.e.*, informations and complaints." *State v. Wright*, 167 Or App 297, 299 n 1, 999 P2d 1220, *modified on recons*, 169 Or App 78, 7 P3d 738, *rev den*, 331 Or 334 (2000).

³ The grounds for challenging an indictment that were previously contained in certain of the statutes upon which the defendants in *Nussbaum* based their arguments--

1 the trial court, and the Supreme Court reversed. The Supreme Court first noted that "[i]t
2 has always been the general rule in Oregon that an indictment in the language of a statute
3 is good on demurrer." *Id.* at 91. The court then explained that, "*unless a statute required*
4 *it, the name of a third person whose identity is not an essential element of an offense or*
5 *material to the commission thereof need not be stated[.]" id.* at 96 (internal quotation
6 marks omitted; emphasis in original), and, citing the language of the statute prohibiting
7 rioting, reasoned:

8 "[T]he names of three co-participants in the crime of rioting are not an
9 essential element of that offense under ORS 166.040(1). All that is
10 required by ORS 166.040(1), insofar as this element of that crime is
11 concerned, is proof that there were 'three or more persons acting together.'
12 For the same reasons, we hold that the names of such co-participants are
13 not facts 'necessary to constitute' that crime for the purposes of determining
14 the definiteness and certainty required of such an indictment by ORS
15 132.520(2), [ORS] 132.530, and [ORS] 132.540(1)(f). It follows that such
16 an indictment need not allege the names of co-rioters or that names of the
17 co-rioters are unknown to the grand jury.

18 "We therefore hold that defendants are not entitled to demand that
19 such facts be alleged because of their 'right to know what they must defend
20 against.' For the same reasons it follows, in our opinion, that a defendant in
21 such a case is not entitled to demand that such facts be alleged so as to
22 'enable him to make a defense.'"

23 *Nussbaum*, 261 Or at 96-97.

24 Following *Nussbaum*, we held in *Shadley* that, under a statute making it a
25 crime to "furnish narcotic or dangerous drugs" and when the term "[f]urnishes" means to
26 sell, barter, exchange, give or dispose *to another*," the "identity of the person to whom

former ORS 132.520 to 132.540 (1971), *repealed* by Or Laws 1973, ch 836, § 358--are now stated in ORS 135.630(2) and ORS 132.550(7). *Shadley*, 16 Or App at 121 (so stating).

1 drugs are furnished is not an essential element of this crime. It follows that * * * the trial
2 court erred in holding the present indictments defective for failure to identify the person
3 to whom drugs were furnished." *Shadley*, 16 Or App at 122 (emphasis in original). The
4 same rules and reasoning apply here.

5 The state charged defendant with violating ORS 166.720(3), which
6 provides, "It is unlawful for any person employed by, or associated with, *any enterprise*
7 to conduct or participate, directly or indirectly, in such enterprise through a pattern of
8 racketeering activity * * *." (Emphasis added.) "Enterprise" is a statutorily defined term.
9 An enterprise "includes *any* individual, sole proprietorship, partnership, corporation,
10 business trust or other profit or nonprofit legal entity, *and includes any* union, association
11 or group of individuals associated in fact although not a legal entity, and both illicit and
12 licit enterprises and governmental and nongovernmental entities." ORS 166.715(2)
13 (emphasis added).

14 Defendant does not dispute that the indictment charges the offense of
15 racketeering in the language of the relevant statutes. Based on that statutory language
16 and the holdings in *Nussbaum* and *Shadley*, we conclude that the names of the additional
17 "others" referenced in the indictment do not constitute a material element of the charge of
18 racketeering at issue here. All that is required by the text of ORS 166.720(3) and ORS
19 166.715(2), insofar as the enterprise element is concerned, is that the defendant was
20 associated with "any enterprise," which may "include" "any" individual or entity. *See*
21 *State v. Cheek*, 100 Or App 501, 505, 786 P2d 1305, *rev den*, 310 Or 121 (1990) ("It is

1 apparent that the legislature wanted to include *every* kind of enterprise within the
2 definition of ORS 166.715(2)." (Emphasis in original.)). It follows that the identities of
3 the unnamed members of the association-in-fact are not required here to render the
4 alleged enterprise in the indictment sufficiently specific.

5 Defendant relies on *State v. Kincaid*, 78 Or App 23, 714 P2d 624 (1986), in
6 an attempt to persuade us otherwise. In *Kincaid*, we reversed the trial court's denial of
7 the defendant's demurrer to an indictment charging him with racketeering under ORS
8 166.720(3). 78 Or App at 25, 31. On appeal, the defendant challenged the state's
9 "pattern of racketeering activity" allegation, which alleged, in relevant part, that the
10 defendant had participated "in such enterprise through a pattern of racketeering activity,
11 to-wit: thefts in the first degree[.]" *Id.* at 25-26. Thus, the issue in *Kincaid* was the
12 requisite level of specificity when pleading the predicate offenses underlying a charge of
13 racketeering. *Id.* at 27. We agreed with the defendant's contention that, although the
14 indictment "identified theft as the *kind* of predicate offense, it was defective because it
15 failed to describe the *incidents* of theft which the state intended to prove." *Id.* at 26, 30-
16 31 (emphasis in original). According to defendant, the deficiency in the indictment at
17 issue in this case is analogous to the deficiency of the indictment in *Kincaid*. But *Kincaid*
18 is distinguishable for several reasons.

19 As an initial matter, *Kincaid* dealt with a different element of racketeering--
20 the pattern-of-racketeering-activity element--than is at issue here. The pattern-of-
21 racketeering-activity element is subject to a particular statutory specificity requirement.

1 See ORS 166.720(6).⁴ No other element of racketeering is subject to such a requirement.
2 The existence and terms of such a requirement for the pattern-of-racketeering-activity
3 element suggests that the standard of specificity required when pleading the offenses
4 predicate to a racketeering charge is not the same standard by which the sufficiency of
5 the enterprise allegation should be measured.

6 Additionally, although defendant likens the allegation in this case to the
7 defective allegation in *Kincaid*, the state in this case alleged the enterprise element with

⁴ The text of ORS 166.720(6) provides, in full:

"An allegation of a pattern of racketeering activity is sufficient if it contains substantially the following:

"(a) A statement of the acts constituting each incident of racketeering activity in ordinary and concise language, and in a manner that enables a person of common understanding to know what is intended;

"(b) A statement of the relation to each incident of racketeering activity that the conduct was committed on or about a designated date, or during a designated period of time;

"(c) A statement, in the language of ORS 166.715(4) or other ordinary and concise language, designating which distinguishing characteristic or characteristics interrelate the incidents of racketeering activity; and

"(d) A statement that the incidents alleged were not isolated."

ORS 166.715(4), in turn, provides, in relevant part:

"'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents * * *."

1 greater specificity than the state in *Kincaid* alleged the pattern-of-racketeering-activity
2 element. The state in *Kincaid* alleged for that element only that the defendant in that case
3 had committed "thefts in the first degree[.]" The state in *Kincaid* listed *no* specific
4 incidents that formed the basis for the predicate offenses. In contrast, in the indictment in
5 this case, the state alleged that defendant was "associated with an enterprise" and further
6 specified the enterprise as "Jemm Corporation" or an association-in-fact or both. The
7 indictment then named four specific individuals or entities as members of the association-
8 in-fact before referencing the unnamed "others."

9 Two other cases concerning the sufficiency of the pleading of the ORICO
10 enterprise element, *State v. Vermaas*, 116 Or App 413, 841 P2d 664 (1992), *rev den*, 316
11 Or 142 (1993), and *State v. Fair*, 326 Or 485, 953 P2d 383 (1998), are instructive. In
12 *Vermaas*, the defendant, who had admitted that he was growing and selling marijuana
13 and using the proceeds to buy rental properties, argued that the enterprise element as
14 pleaded in the indictment charging him with racketeering lacked the specificity required
15 under ORS 132.550(7). 116 Or App at 416. That indictment alleged that, over a period
16 of "approximately three years," the defendant, "along with several named individuals, had
17 conducted an 'enterprise through a pattern of racketeering activities' and 'thereby'
18 committed two or more of the alleged predicate offenses." *Id.* at 416-17. The defendant
19 contended that he was unable to tell what the alleged unlawful enterprise was because the
20 predicate offenses were alleged to have extended over multiple years. *Id.* at 417. In
21 support of his argument, the defendant relied exclusively on *Kincaid*. We concluded that

1 the indictment was sufficient and rejected the defendant's argument and reliance on
2 *Kincaid*, reasoning:

3 "*Kincaid* is distinguishable. There, the ORICO indictment alleged
4 only that the defendant engaged in a 'pattern of racketeering activity, to wit:
5 thefts in the first degree.' We held that the allegation of the predicate
6 offenses was not specific as to time of the theft and did not describe them in
7 any detail.

8 "The indictment here does not suffer from the defects identified in
9 *Kincaid*. It is specific as to the periods of time when the several offenses
10 occurred and describes each in detail."

11 *Id.* (citation omitted).

12 In *Fair*, the Supreme Court approved the sufficiency of the pleaded
13 enterprise element. The state charged the defendant with racketeering, alleging five
14 predicate offenses. 326 Or at 488. With respect to the enterprise element, the indictment
15 stated that the defendant was associated with "the Woodland Park Bloods, a street gang
16 not a legal entity but an association in fact[.]" *Id.* The defendant demurred to the
17 indictment on grounds that, *inter alia*, it was not sufficiently "definite and certain"
18 because it quoted, essentially *verbatim*, the text of ORS 166.175(4) in alleging a "pattern
19 of racketeering activity." *Id.* at 487-88. The trial court denied the demurrer, reasoning
20 that it tracked the statutory language, and we reversed. *Id.* at 489. On review, the
21 Supreme Court disagreed and affirmed the trial court. In doing so, it observed that the
22 indictment stated the "particular circumstances" of both the predicate offenses and the
23 enterprise. *Id.* at 490. In addition, the Supreme Court held that the state need not also
24 specify the "particular circumstances" of its theory or theories of nexus instead of using

1 the statutory definition of "pattern." *Id.* After noting that the indictment sufficiently
2 spelled out six alternative relationships, the court explained that

3 "[a]t its core, defendant's argument is that the charged crime is
4 complex, making the indictment difficult to defend against. But complex is
5 not the same as uncertain, and difficult is not the same as indefinite. Even
6 if it is complex or difficult to defend against, an indictment may allege
7 multiple theories of committing the same crime in the words of the statute
8 defining the crime. The racketeering indictment in this case was
9 sufficiently definite and certain to fulfill the constitutional and statutory
10 functions that this court has identified."

11 *Id.* at 491.

12 Here, the relevant allegations are more specific than both those disapproved
13 in *Kincaid* and those approved in *Vermaas*, and similar to those approved in *Fair*.
14 Furthermore, *Fair* establishes that racketeering allegations that track the statutory
15 language may suffice even when that language is open-ended and susceptible to multiple
16 possible interpretations. Based on the foregoing, we hold that the trial court did not err in
17 denying defendant's demurrer to the indictment based on its conclusion that the identities
18 of the unnamed "others" was not a material element of racketeering that must be alleged.

19 We turn now to defendant's argument that the state's reference to unnamed
20 "others" rendered the indictment impermissibly expansive and, therefore, vague.
21 Defendant argues that, without knowing who the "others" were, he could not anticipate
22 the nature of the state's case against him and that, in any event, such open-ended language
23 would permit the state to change theories at will as the evidence developed. Defendant
24 also contends that this is an instance in which the discovery process would not remedy
25 that defect. We disagree. We do not decide whether reference to the unnamed "others"

1 makes the indictment impermissibly vague. Instead, assuming without deciding that it
2 does, we hold that discovery in this case was sufficient to cure any such imprecision in
3 the indictment.

4 Defendant acknowledges that, in the general run of cases, "imprecision in
5 the instrument resulting from the use of the statutory language may be cured by pretrial
6 discovery." *State v. Andre*, 178 Or App 566, 569, 38 P3d 949 (2002). But defendant also
7 points, again, to *Kincaid*, in which we stated:

8 "The very volume of the discovery material, together with the large number
9 of predicate offenses on which the state can potentially rely in ORICO
10 prosecutions, is what makes discovery inadequate as an alternative to
11 notifying an ORICO defendant by indictment of the 'acts constituting the
12 offense in ordinary and concise language * * * in such manner as to enable
13 a person of common understanding to know what is intended.' Stated
14 differently, discovery is not a satisfactory substitute for specificity in
15 indictments in ORICO cases, because effective notice is as much obscured
16 by too much information as it is denied by too little information."

17 78 Or App at 30 (quoting ORS 132.550 (7)) (omission in *Kincaid*). Defendant merely
18 quotes *Kincaid* without articulating how this court should apply it to the facts of this case.
19 To the extent that defendant is suggesting that the volume of discovery in this case
20 rendered discovery an inadequate alternative to specificity, the mere suggestion is
21 insufficient.⁵

⁵ In *Magana*, 212 Or App at 560, we rejected the defendant's reference to the volume of discovery:

"defendant's arguments in this case do not focus on the kind of discovery available; instead, they are directed to its volume: '[D]efendant could not realistically be expected to sift through [discovery documents] and divine which purposed acts and purported omissions corresponded to which alleged crimes.' It may well be difficult to review large amounts of

1 We briefly consider and reject defendant's third assignment of error. On
2 appeal, defendant reprises his argument that the trial court erred when it ranked his
3 conviction for racketeering as a "level-9" offense on the crime-seriousness scale of the
4 sentencing guidelines grid.⁶ Citing *Blakely v. Washington*, 542 US 296, 301, 124 S Ct
5 2531, 159 L Ed 2d 403 (2004), defendant contends that, because racketeering is an
6 unranked offense under the sentencing guidelines, the court cannot rank a conviction for
7 that crime as high as it did without factual findings by the jury to support such a ranking.

8 That argument is foreclosed by our recent holding in *State v. Ibarra-Ruiz*,
9 250 Or App 656, 663, 282 P3d 934, *rev den*, 353 Or 127 (2012), that *Blakely* does "not
10 apply to discretionary matters decided by trial courts, such as the ranking of [unranked]
11 offenses under the sentencing guidelines." In *Ibarra-Ruiz*, we also approvingly cited a
12 pre-*Blakely* opinion, *State v. Coleman*, 130 Or App 656, 666-67, 883 P2d 266 (1994), *rev*
13 *den*, 320 Or 569 (1995), in which we affirmed that trial courts have the discretion to
14 assign a defendant's racketeering conviction a crime-seriousness level higher than that of

⁶ As the Supreme Court has summarized,

"The centerpiece of the sentencing guidelines is the 99-block Sentencing Guidelines Grid. *See* OAR ch 253, app 1 (setting out the grid). A 'Crime Seriousness Scale' serves as the vertical axis of the grid. * * * A 'Criminal History Scale' serves as the horizontal axis of the grid. * * * The appropriate sentence for a given felony conviction is determined by (1) locating the appropriate category for the crime of conviction on the Crime Seriousness Scale; (2) locating the appropriate category for the convicted offender on the Criminal History Scale; and (3) locating the grid block where the two categories intersect."

State v. Davis, 315 Or 484, 487, 847 P2d 834 (1993).

1 the underlying crime, as the trial court here did. *Ibarra-Ruiz*, 250 Or App at 663. In
2 short, "it is clear that the sentencing court has the discretion to determine the seriousness
3 of an unranked offense." *Id.* Defendant's reliance on *Blakely* to argue otherwise is
4 unavailing.

5 JUROR ANONYMITY

6 In his next assignment of error, defendant argues that the trial court erred
7 by empanelling an anonymous jury. According to defendant, the trial court's unexplained
8 use of numbers, instead of names, to refer to the jurors created a risk that the jury would
9 regard defendant as dangerous. As a result, contends defendant, the trial court violated
10 his state and federal constitutional rights to a fair and impartial trial and to the
11 presumption of innocence. Defendant concedes that he did not preserve this claim of
12 error but urges this court to exercise its discretion to correct it as "plain error" under
13 ORAP 5.45. The state counters that the alleged error in empanelling the jury is not
14 evident on the face of the record and therefore does not qualify as plain error. We affirm
15 despite any error, as we explain below.

16 Our review of the trial transcript, as well as the trial court file, reveals the
17 following relevant facts. On the first day of trial, before *voir dire*, the trial court
18 discussed what it described as "housekeeping" matters with the parties, including jury
19 selection. In that context, the court told the parties:

20 "We'll put together a jury chart for you, and it'll be on one page. At
21 the top of the page--well, the top half of the page it will be as if you're
22 looking at the jurors in the jury box. And we'll refer to the jurors by juror

1 number, not by name. And juror number--seat number 1 will be in the back
2 left, moving left to right."

3 The court then also discussed the configuration of the courtroom and the procedure for
4 approaching witnesses with an exhibit. Next, for "the last local courtroom rule," the
5 court informed the parties that there would be no sidebar conferences. The court did not
6 offer any further commentary of any sort regarding the use of juror numbers instead of
7 names, and neither party objected to or asked for clarification regarding the matter.

8 Later that day, the court and parties conducted *voir dire*. After addressing
9 preliminary matters, the court introduced defense counsel who began by stating, "Good
10 afternoon. I don't know any of your names, that's not being provided * * *." Defense
11 counsel initially stumbled when addressing prospective jurors, calling on one as "Mr.--
12 Mr. 49[,]" and then referring to another, "Mr.--I'm sorry. I just--force of habit. Juror
13 number 38." Defense counsel and the state then proceeded to question the prospective
14 jurors, referring to them at all times--as did the court--by their juror numbers.

15 The following day, the trial court issued a permit authorizing a local
16 television news reporter to attend and videotape defendant's trial that day. In the course
17 of the proceedings that morning, the court explained to the jury:

18 "There also--I can also let you know that it's possible that later in the
19 day there will be a camera in the courtroom from a news agency. The local
20 Uniform Trial Court Rules require that the camera never be directed at the
21 jury. It can be on the witness, me, the lawyers, but not you. So I want to
22 give you the assurance that none of you will be filmed. And if that does
23 happen, then their permit will be forfeited and appropriate measures taken."

24 Following the parties' closing arguments, the trial court excused the jurors

1 to begin deliberating and then turned to address the two alternate jurors, telling them:

2 "Okay. I still want to have your names. If you'd write down your
3 names, your juror number, and phone numbers where I can reach you. It's
4 still possible that you could be called on to deliberate. And I'm not going to
5 get into the scenarios where that might happen, but I do need to have you
6 write down your name and your number--your juror number and your
7 phone number. That's for my eyes only, and I'll get a--I'll give you a call."

8 After the trial court announced the verdict reached by the jury, the court
9 noted that the verdict form had been "dated this 18th day of June, but it's not yet
10 signed[,]" and asked the presiding juror to sign it. The presiding juror confessed
11 confusion as to whether "I was to sign it or put my number on it[,]" to which the trial
12 court responded, "Signature, please."

13 With those facts in mind, we turn to the merits of defendant's argument. To
14 constitute plain error for purposes of ORAP 5.45, the error must satisfy three criteria: (1)
15 it must be legal error; (2) it must be "apparent," such that "the point must be obvious, not
16 reasonably in dispute"; and (3) it must appear on the face of the record, such that we
17 "must not need to go outside the record to identify the error or choose between competing
18 inferences, and the facts constituting the error must be irrefutable." *Ailes v. Portland*
19 *Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991). If the asserted error satisfies
20 those criteria, we then must decide whether to exercise our discretion to correct the error.
21 *Id.* at 382.

22 As the Supreme Court in *Ailes* underscored,

23 "Even if the error meets that test, * * * the appellate court must
24 exercise its discretion to consider or not to consider the error, and if the
25 court chooses to consider the error, the court must articulate its reasons for

1 doing so. This is not a requirement of mere form. A court's decision to
2 recognize unpreserved or unraised error in this manner should be made
3 with utmost caution. Such an action is contrary to the strong policies
4 requiring preservation and raising of error."

5 *Id.* (citation omitted). "The criteria we must apply ensure that review of plain error will
6 be the exception, and not the rule. Those criteria ensure that the appellate courts will
7 bypass principles of preservation only in extraordinary circumstances." *State v. Jury*, 185
8 Or App 132, 138-39, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003). In determining
9 whether we should exercise our discretion under *Ailes*, we generally consider "the
10 competing interests of the parties, the nature of the case, the gravity of the error, and the
11 ends of justice." *Jury*, 185 Or App at 139. With those factors in mind, and assuming,
12 without deciding, that the trial court here did commit plain error by empanelling an
13 anonymous jury, we decline to exercise our discretion to address any such error.

14 In arguing that empanelling an anonymous jury violated his constitutional
15 right to an impartial jury, defendant relies heavily on *State v. Sundberg*, 349 Or 608, 247
16 P3d 1213 (2011).⁷ In *Sundberg*, the Supreme Court concluded that

17 "[e]mpañelling an anonymous jury *can* affect a defendant's right to * * * an
18 impartial jury * * * because it is an external factor--not the facts or the law--
19 that *may* compromise the jury's ability to remain impartial by implying that
20 a defendant is dangerous, thus undermining the presumption of innocence."

21 349 Or at 620 (emphasis added). In assessing the possibility that the jury's impartiality

⁷ We reject the state's argument that *Sundberg* is not relevant here because it was not decided until after defendant's trial. *See Jury*, 185 Or App at 136 (holding that appellate courts analyze plain error "by reference to the law as of the time the *appeal* is decided[,]" rather than the extant law at the time of the disputed trial court ruling) (emphasis added)).

1 may have been compromised by the trial court, the Supreme Court looked to the totality
2 of the circumstances of the case:

3 "The possibility that jurors might draw such an implication was heightened
4 in this case because a number of prospective jurors had participated in
5 standard *voir dire*, where they had disclosed their names, addresses, and
6 employers, on the same day in another courtroom. Moreover, the risk that
7 the use of an anonymous jury may have prejudiced the defendant was
8 particularly great in this case. * * * In contrast to cases in which there is
9 physical evidence of harm, expert testimony regarding DNA or other
10 evidence linking defendant and victim, or other witnesses who provide
11 admissible independent testimony to support the state's case, this case, in
12 large part, turned on whether the jury believed defendant or the victim.

13 "In the circumstances of this case, the unexplained use of an
14 anonymous jury created too great a risk that the jury may have believed that
15 defendant was dangerous--and, therefore, that he was more likely to be
16 guilty, denying defendant the right to a trial by an impartial jury. The error
17 was not harmless, and defendant is entitled to a new trial."

18 *Id.* at 625.

19 By contrast, here, defendant points to no such circumstances, nor does he
20 articulate how an anonymous jury caused him harm, beyond summarily asserting that it
21 caused the jury to believe that he may have been dangerous. We find no indication in the
22 record, however, that the jury drew such a conclusion or even that the possibility that
23 they may have was heightened.⁸ Defendant was on trial for using his business to commit
24 white-collar crime, as opposed to committing a person crime such as, for example, sexual
25 abuse, as in *Sundberg*, or aggravated murder, as in *State v. Rogers*, 352 Or 510, 288 P3d
26 544 (2012), the only other case besides *Sundberg* to consider this issue. Thus, in the

⁸ The fact that defendant did not object to the empanelling of an anonymous jury at trial indeed suggests the possibility that defendant may have perceived no such harm.

1 totality of the circumstances of this case, we are not persuaded of the plainness of the risk
2 that the jury's deliberations were affected because they perceived defendant to be
3 dangerous.

4 Additionally, there were no circumstances marking the use of juror
5 anonymity as somehow conspicuous such as there were in *Sundberg*, as quoted above.
6 *See also Rogers*, 352 Or at 543 (noting that the jurors were told that the defendant's
7 attorneys, but not the defendant himself, would have access to their names and other
8 identifying information). And, in both *Sundberg* and *Rogers*, the implication that the
9 defendant was dangerous bore much more directly on a dispositive issue: in *Sundberg*,
10 "the state's case, * * * in large part, turned on whether the jury believed defendant or the
11 victim[,]" 349 Or at 625; *Rogers* involved "a penalty-phase proceeding where [the]
12 defendant's 'future dangerousness' was specifically at issue." 352 Or at 544. No such
13 linkage or association between any suggestion of defendant's potential dangerousness and
14 the crime charged or the proceeding appears in this case. Indeed, as the state argues, it is
15 possible that the jury concluded that juror anonymity at trial was due to a factor unrelated
16 to defendant, namely, the request of the news media to bring a camera into the courtroom.

17 In sum, there is little likelihood that any error by the trial court in
18 empanelling an anonymous jury compromised the jury's impartiality or affected the
19 verdict. Given "the nature of the case, the gravity of the error, and the ends of justice[,]"
20 *Jury*, 185 Or App at 139, we decline to exercise our discretion under *Ailes*.

21 INSTRUCTIONAL ERROR

1 Acting *pro se*, defendant contends in an additional assignment of error that
2 the trial court committed plain error by failing to instruct the jury that materiality of a
3 falsehood is an element of the fraud crimes alleged by the state as predicate offenses.
4 Defendant acknowledges that he did not object to the trial court's fraud instruction but
5 urges us to exercise our discretion under ORAP 5.45 to consider it as "plain error."
6 Defendant is correct that materiality is an essential element of the crimes of federal bank
7 fraud and mail fraud. *See Neder v. United States*, 527 US 1, 25, 119 S Ct 1827, 144 L Ed
8 2d 35 (1999) (so holding). Defendant is also correct that the trial court did not instruct
9 the jury accordingly. However, assuming, without deciding, that the trial court thus
10 committed plain error, we decline to exercise our discretion to correct the error. *See*
11 *Ailes*, 312 Or at 382 (stating that an appellate court "must exercise its discretion to
12 consider or not to consider the error"); *see also Hernandez v. Barbo Machinery Co.*, 327
13 Or 99, 106, 957 P2d 147 (1998) (instructional error "requires reversal only if the jury
14 instructions given by the trial court, considered as a whole, cause prejudice to the party
15 requesting the instruction").

16 In the context of federal mail fraud and bank fraud, the materiality of a
17 fraudulent statement turns on whether "it has a natural tendency to influence, or [is]
18 capable of influencing, the decision of the decisionmaking body to which it was
19 addressed." *Neder*, 527 US at 16 (internal quotation marks omitted; brackets in original);
20 *see also* Ninth Circuit Model Jury Instruction 8.127 ("In order for the defendant to be
21 found guilty of [bank fraud in violation of 18 USC section 1344(2)], the government

1 must prove * * * beyond a reasonable doubt * * * the statements or promises were
2 material; that is, they had a natural tendency to influence, or were capable of influencing,
3 a financial institution to part with money or property[.]"). Here, a jury found defendant
4 guilty of racketeering based on predicate offenses including bank fraud and wire fraud
5 after the state introduced evidence that defendant falsely represented to First Security that
6 the remodeling projects were completed and that First Security transferred funds to
7 defendant based on those representations. Defendant does not contest those aspects of his
8 trial or conviction. Defendant does not even argue on appeal that the fraudulent
9 statements were not material. Because defendant does not identify any prejudice and we
10 discern none, we do not exercise our discretion to correct any error. *See State v. Davis*,
11 336 Or 19, 32, 77 P3d 1111 (2003) (holding that there is no prejudice if an error had little
12 likelihood of affecting the verdict).

13 In conclusion, we hold that the trial court did not err when it denied
14 defendant's demurrer to the indictment or when it determined the crime seriousness score
15 for defendant's racketeering conviction. We decline to exercise our discretion to correct
16 any error that the court may have committed in empanelling an anonymous jury and in
17 delivering the fraud instruction.

18 Affirmed.