STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE
CITY OF DEARBORN,

Appellee,

vs.

NEGEEN MAYEL,

Appellant.

Wayne County Circuit Court
Case No. 10-010263-01-AR
Hon. Michael J. Callahan

Lower Court Case No. 10C1970OM

/

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STATEMENT OF JURISDICTION

Defendant/Appellant Negeen Mayel ("Appellant") appeals from the Opinion and Order Denying Motions for Bill of Particulars and for Dismissal entered on September 13, 2010, and the Judgment of Sentence entered on September 28, 2010, after trial by the Honorable Mark W. Somers of the 19th Judicial District. A timely Claim of Appeal was filed on September 30, 2010, in accordance with the provisions of MCR 7.204.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court erred by denying Appellant's motion to dismiss the criminal charge of "failure to obey a police officer's direction or order" under Section 14-38.1 of the City of Dearborn Code of Ordinance based on First Amendment and Fourth Amendment grounds.

Trial Court's Answer: No.

Appellant's Answer: Yes.

2. Whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt for "failure to obey a police officer's direction or order" under Section 14-38.1 of the City of Dearborn Code of Ordinance.

Trial Court's Answer: Yes.

Appellant's Answer: No.

3. Whether the trial court committed reversible error by denying Appellant the right to attack the credibility of crucial prosecution witnesses by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives as they relate directly to the issues and personalities in the case in violation of the Confrontation Clause of the Sixth Amendment.

Trial Court's Answer: No.

Appellant's Answer: Yes.

4. Whether the trial court erred by denying Appellant the right to present exculpatory evidence and argument to the jury demonstrating the unlawfulness of Appellant's arrest and thus the unlawfulness of the police officer's order that served as the basis for the criminal charge in this case.

Trial Court's Answer: No.

Appellant's Answer: Yes.

5. Whether the trial court erred by denying Appellant the right to present exculpatory evidence demonstrating that the police officers had knowledge of the fact that festival workers and volunteers were making false complaints against Appellant and her co-defendants.

Trial Court's Answer: No.

Appellant's Answer: Yes.

6. Whether the trial court's bias in favor of the testifying police officers denied Appellant the right to a fair trial.

Trial Court's Answer: No.

Appellant's Answer: Yes.

INTRODUCTORY STATEMENT OF THE CASE

This appeal challenges a criminal conviction that was based upon an unlawful order and illegal seizure that violated Appellant's constitutional rights protected by the First and Fourth Amendments. Specifically, Appellant challenges her conviction for "failure to obey a police officer's direction or order" under Section 14-38.1 of the City of Dearborn Code of Ordinance.[1]

The conviction at issue arises out of the free speech activity of Appellant and her co-defendants, David Wood, Nabeel Qureshi, and Paul Rezkalla. Appellant and her co-defendants are Christian missionaries, who attended the 15th Annual Dearborn Arab International Festival ("Arab Festival") in the City of Dearborn ("City") on June 18, 2010. Upon arriving at the festival, the Christian missionaries quickly became a target for festival workers and City police officers.

On June 18, 2010, Appellant and her co-defendants were arrested and jailed for discussing their Christian faith with Muslims at the Arab Festival and videotaping those discussions. Appellant was charged with one count of violating Section 14-38.1 ("failure to obey") and with one count of violating Section 14-131 ("breach of peace") of the City Code of Ordinances.[2] Her co-defendants were each charged with one count of violating the breach of peace ordinance.

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[1] Section 14-38.1. *Failure to obey police officers' direction or order.*

> Any individual who is given direction or order by hand, voice, emergency light, siren, or other visual or audible signal by a police officer ***acting in the lawful performance of his duty***, and who willfully disobeys and/or disregards that direction or order, is guilty of a misdemeanor.

(emphasis added).

[2] Section 14-131. *Breach of peace.*

> Any person who shall make or assist in making any noise, disturbance, trouble or improper diversion, or any rout or riot, by which the peace and good order of the city are disturbed, shall be guilty of a breach of the peace, and disorderly conduct.

Appellant and her co-defendants were arraigned on the criminal charges on July 12, 2010, before the Honorable Mark W. Somers in the 19th Judicial District. The defendants entered pleas of "not guilty," and the trial court set the final pretrial hearing for August 30, 2010, with a jury trial to commence on September 20, 2010.

On the day of arraignment, Appellant and her co-defendants filed motions for a Bill of Particulars, requesting the court to direct the City to "identify with specificity" the conduct each defendant engaged in that constituted the charged offenses. (Defs.' Mot. for Bill of Particulars). The criminal charges, which merely stated the name and citation number of the charged offenses, were hopelessly vague.[3] Moreover, the defendants' conduct that day—discussing their religious faith on the public streets during the festival and video recording those discussions—is constitutionally protected.

Following the City's response, Appellant and her co-defendants filed a "joint reply," requesting the court to "summarily dismiss the criminal charges" on constitutional grounds. (Joint Reply. in Supp. of Mot. for Bill of Particulars). Oral argument on the motions commenced on August 3, 2010. During argument, the court, per the request of defendants, converted the joint reply to a motion to dismiss. Appellant argued that the criminal charges against her (failure to obey and breach of peace) should be dismissed on First Amendment and Fourth Amendment grounds, and her co-defendants argued that the charges against them (breach of peace) should be dismissed on First Amendment grounds. (*See* Defs.' Joint Reply in Supp. of Mot. for Bill of Particulars at 4-12; *see also* Defs.' Joint Reply in Supp. of Mot. to Dismiss at 8-14).

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[3] In the motions for a Bill of Particulars, the defendants argued that "fundamental notions of justice and due process require the City to explain with specificity the alleged conduct that it intends to punish under its criminal laws." (*See* Def.'s Mot. for Bill of Particulars at 3). This right is protected by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 20 of the Michigan Constitution.

The hearing was continued to permit the City to respond in writing. The City and the defendants subsequently filed additional briefs, and oral argument on the motion to dismiss was held on August 30, 2010. (*See* Pl.'s Br. in Resp. to Defs.' Joint Reply in Supp. of Mot. for Bill of Particulars; Defs.' Joint Reply in Supp. of Mot. to Dismiss).

On September 13, 2010, the trial court issued its "Opinion and Order Denying Motions for Bill of Particulars and for Dismissal." (Op. & Order). In the order, the trial court stated the following, in relevant part,

> IT IS HEREBY ORDERED AND ADJUDGED that the court having found facts and evidence that complaints sufficient on their face may be drawn and filed, but that the attestation of the appearance tickets under oath or affirmation is not established on the record, the City shall forthwith cause to be filed a complaint, duly sworn or affirmed, on each charge reciting the substance of the accusation against the accused in a form that shall include, at a minimum, the language of the ordinance(s) under which the accused are charged prior to the conduct of any further proceedings.

(Op. & Order at 9).

The criminal complaint was filed and served on the defendants on September 20, 2010, the day the trial commenced.

In its September 13, 2010, order, the trial court denied the defendants' motions for a Bill of Particulars and their motions to dismiss, found that the police officers had probable cause to arrest the defendants,[4] and ordered the "cause [to] remain as scheduled to commence on September 20, 2010, at 8:00 a.m." (Op. & Order at 4-9).

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[4] The trial court's ruling on probable cause was based solely on the police reports, which the City attached as Exhibits H, I, and J to "Plaintiff's Brief in Response to Defendants' Joint Reply in Support of Motion for Bill of Particulars." More specifically, the probable cause determination was based solely upon information provided to the police by Mr. Roger Williams, a festival volunteer. (*See* Tr. of 9/22/10 at 35) ("Based on what was presented to this Court on earlier proceedings, ***they had probable cause based on Mr. Williams' complaint***. We're passed that. Probable cause is not an issue for this jury, and again, I'll say it again, I've said it in my opinion, I said it yesterday, I'll say it every day of this trial if I have to. . . .") (emphasis added). However, the only *specific* information Williams provided regarding *Appellant's conduct* was that "he noticed

A five-day jury trial commenced on Monday, September 20, 2010. The case was submitted to the jury at the end of the day on Friday, September 24, 2010. The jury returned a unanimous verdict the same day of "not guilty" on the breach of peace charges for all defendants and a verdict of "guilty" on the one failure to obey charge for Appellant. The Judgment of Sentence was entered on September 28, 2010, and a timely Claim of Appeal was filed on September 30, 2010. This appeal follows.

STATEMENT OF FACTS

I. Appellant Attends the Dearborn Arab Festival with Fellow Christian Missionaries.

On June 18, 2010, Appellant, along with co-defendants Qureshi, Wood, and Rezkalla, attended the Arab Festival, which the City has sponsored for the past 15 years. (Tr. of 9/23/10 at 127-29; Tr. of 9/21/10 at 37). The Arab Festival is essentially a street festival that takes place on Warren Avenue. It is open to the general public, and there is no admission fee to attend. (Tr. of 9/21/10 at 50).

Appellant and her co-defendants are Christian missionaries. (Tr. of 9/23/10 at 107-09). They came to the Arab Festival to discuss their Christian faith with Muslims, to video record those discussions, and to document the festival through video to promote their missionary work. (Tr. of 9/23/10 at 107-12, 124, 127-28; *see also* Tr. of 9/22/10 at 76). Appellant and her co-defendants made it a point to engage in religious discussions only with those people who approached them so as to avoid any false claims or charges of harassment. (Tr. of 9/23/10 at 136) ("[W]e're just waiting for people to approach us. We didn't want to engage anyone . . . .").

[Appellant] still filming within hearing distance," (*see* Kapanowski Rep. at 2 at Ex. H to Pl.'s Br. in Resp. to Defs.' Joint Reply in Supp. of Mot. for Bill of Particulars), which is not a crime, (*see* Kapanowski Test. at Tr. of 9/22/10 at 215) (acknowledging that it is not a crime to film someone at a public event).

Qureshi and Wood, who are members of Acts 17 Apologetics ("Acts 17"), a Christian organization that promotes the Gospel of Jesus Christ throughout the United States and overseas, post videos of their missionary work on the Acts 17 website and on YouTube as part of their religious speech activities. (Tr. of 9/23/10 at 107-11, 120). The videos made during the 2010 Arab Festival would be used for similar purposes. (Tr. of 9/23/10 at 111-12, 124-28).

Appellant and her co-defendants brought three small, hand-held video cameras with them to the 2010 Arab Festival. (Tr. of 9/23/10 at 126-27; *see also* Defs.' Exs. B-N, P-R, W). From the moment they entered the Arab Festival at around 7:00 pm on June 18, 2010, until they were arrested by City police officers at around 9:00 pm that evening, Appellant and her co-defendants ensured that a video camera was recording their activities.[5] (Tr. of 9/23/10 at 127-28; *see also* Defs.' Ex. W).

The video cameras were carried by Appellant, Wood, and Rezkalla. (Tr. of 9/23/10 at 128; *see also* Defs.' Exs. B-N, P-R, W). Qureshi was the primary speaker for the group; he used a hand-held microphone, which helped facilitate dialogue to promote their religious mission. (See Defs.' Exs. B, G, I, K, L, N, W). The microphone did not amplify sound; rather, it would pick up the sound for Rezkalla's camera to improve the recording quality. (Tr. of 9/23/10 at 54; Tr. of 9/24/10 at 47-49). Appellant's camera was used mostly for background and panoramic shots. (*See, e.g.,* Defs.' Exs. D, M, R; Tr. of 9/24/10 at 11-12). As a result, she was often standing some distance away from her fellow missionaries. (Tr. of 9/23/10 at 128; Defs.' Ex. D, M, R).

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[5] In addition to using the videos as part of their missionary work, Appellant and her co-defendants recorded their activities at the Arab Festival so as to protect themselves against false claims and charges. (Tr. of 9/23/10 at 110-12). There is little doubt that the video evidence was the primary reason for the jury acquitting all defendants of the "breach of peace" charges.

There is no prohibition on the use of video cameras at the Arab Festival. (Tr. of 9/21/10 at 190-92). And it is not a crime to videotape someone in public at a public event, such as the 2010 Arab Festival, without his or her consent. (Tr. of 9/22/10 at 215).

II. Police Ignore False Complaints Made Against Appellant and Her Fellow Missionaries by Festival Workers and Volunteers.

Shortly after Appellant and her co-defendants arrived at the Arab Festival, George Saieg and Charles Neusch, Christian missionaries who were not part of Acts 17, overheard festival workers and volunteers conspiring to make false claims and accusations against Appellant and her co-defendants in an apparent attempt to get them removed from the festival. Upon receiving this information, Saieg called Sergeant Jeffrey Mrowka, the special events coordinator for the City police department, and reported the information to him. Sergeant Mrowka, accompanied by Corporal Brian Kapanowski and Officer Justin Smith, went to the tent area where Saieg was located to receive the report. The officers took no action based on the complaint made by Saieg.[6] (Tr. of 9/24/10 at 63-71; *see also* Tr. of 9/21/10 at 196; Defs.' Exs. J, X, Y).

III. Conversation with Festival Volunteer Roger Williams.

Shortly before 9:00 pm, Appellant and her co-defendants were walking toward the western end of the Arab Festival where the food tents were located to get something to eat. (Tr. of 9/23/10 at 136-37). On their way to the food tents, Qureshi was approached by a young Christian, Luke Campbell. Qureshi had never met Campbell prior to then. Campbell told Qureshi that he was recently stopped by a festival volunteer and turned over to City police

[6] During the trial, the court limited the evidence that Appellant was able to present on this issue and thus prohibited certain evidence that was plainly relevant as to the facts and circumstances known by Corporal Kapanowski when he illegally seized Appellant. (*See* Tr. of 9/24/10 at 64-69). The illegal seizure prompted the charge of failure to obey. As a result of the judge's refusal to allow the evidence, Appellant did not call Neusch to testify. Neusch is a New York City police officer; he was on Appellant's witness list and was present to testify. (*See, e.g.,* Tr. of 9/20/10 at 26-27) (referring to the New City police officer during opening statement).

officers because he handed out a Bible tract at the festival. Qureshi asked Campbell if he would be willing to discuss what happened on camera so it could be documented, and Campbell agreed. Qureshi then interviewed Campbell and pointed out on video the double standard that was taking place at the festival by showing a Muslim man handing out literature without being stopped. (Tr. of 9/23/10 at 136-137; Defs.' Ex. N; *see also* Defs.' Ex. M (showing festival volunteers walking past Muslim man without stopping him)).

Following the video interview, but while Qureshi and Campbell were still talking, Roger Williams, a festival volunteer, interrupted the conversation and accused Qureshi of being "with" Campbell, implying that Qureshi and his fellow missionaries were violating festival rules by handing out religious literature outside of a designated booth. Williams walked away, and Campbell told Qureshi that Williams was the volunteer who had stopped him previously. Campbell then departed the area, as did Appellant and her co-defendants. (Tr. of 9/23/10 at 137-41; Defs.' Exs. M, N).

A short time later, Qureshi, Wood, and Rezkalla, who were walking down Warren Avenue, saw Campbell and Williams talking in the middle of the street. Appellant was videotaping on the other side of the vending tents, which lined the edges of Warren Avenue. The following conversation, which was captured on video and audio, proceeded:

> CAMPBELL: Hey, we're talking to [Williams], we're having a friendly conversation.
> QURESHI: You're good?
> CAMPBELL: Yeah.
> QURESHI: Okay. I just want to make sure he wasn't messing with you or anything.
> CAMPBELL: Yeah, he's not - -

After Campbell told Qureshi that there was no problem, Qureshi turned to walk away. As he was walking away, Williams shouted out to Qureshi: ***"You don't have to worry about me***

messing with him, you have to worry about me messing with you, all right?" Qureshi stopped, turned around, and the following conversation took place:

QURESHI: Why's that? What am I doing?
WILLIAMS: Guys.
WOOD: What are we doing, what are we doing that becomes a problem?
WILLIAMS: Well, right now you're complaining.
WOOD: Complaining to who? Is complaining illegal? I'm not even complaining.
CAMPBELL: It's all right, guys.
WILLIAMS: Security, this is Roger.
WILLIAMS: (Inaudible) Roger.
WILLIAMS: Security.
QURESHI: Okay, so apparently we're doing something illegal. I'm waiting to hear what it is exactly.
WILLIAMS: Nobody said you did anything illegal.
QURESHI: Okay, I'm not doing anything illegal, okay, but you were – you were calling security on us for some reason, we have no clue why.
WILLIAMS: Why.
QURESHI: Why were you calling security on us?
WILLIAMS: If you'd turn the camera off, I'd love to.

(Tr. of 9/23/10 at 141-44; Defs.' Ex. C (video recording of conversation with Williams); *see also* Defs.' Joint Reply to Mot. to Dismiss at Ex. 2 (Festival Volunteer Tr.) (emphasis added)).

At this point in the conversation, Qureshi handed the microphone to Wood, and Wood and Rezkalla turned and walked away, taking the camera off of Williams while Qureshi approached Williams to get an answer as to why he was calling security. Williams did not answer. Instead, he told Qureshi to go away, and he walked off. (Tr. of 9/23/10 at 145; Defs.' Ex. C; *see also* Defs.' Ex. D).

While this conversation was taking place, Appellant was still video recording at a considerable distance from the other side of the vending tents. Given her distance and the loud

festival music that was playing, Appellant could not hear a word of the conversation.[7] (Tr. of 9/23/10 at 145-46; Defs.' Ex. D).

IV. Roger Williams' Complaint.

Following this rather brief and innocuous conversation with Williams, Queshi, Wood, and Rezkalla continued to walk through the Arab Festival, and Appellant continued her video recording from a distance. (*See* Defs.' Exs. E, F, W). Shortly thereafter, Williams, along with several other festival workers and volunteers, including Amal Alslami, approached Appellant and her co-defendants in the middle of the street and took multiple photographs of them. (*See* Defs.' Ex. P). Williams and Alslami then jumped into a golf cart and sped off to the police command trailer. Appellant and her co-defendants, thinking that the impromptu photo session was somewhat bizarre, continued to walk through the festival. (*See* Defs.' Exs. E, F, W). In fact, at this point they were heading toward their vehicle, which was parked outside of the eastern end of the festival, so they could leave. (Tr. of 9/23/10 at 141, 146-47).

While at the police command trailer, Williams reported to the police (Corporal Kapanowski received the report) that he was being filmed without his consent while "doing his Festival duties," that he was being pestered and badgered with questions, and that he felt uncomfortable and thought he could not leave the conversation. (*See* Pl.'s Br. in Resp. to Defs.' Joint Reply in Supp. of Mot. for Bill of Particulars at Ex. H (Kapanowski Rep.)). There were no claims of a verbal threat or physical assault or any other similar *criminal* activity, because nothing of the sort happened. (Tr. of 9/21/10 at 199-200). In fact, it would be difficult to characterize the conversation with Williams as an argument—the only person who raised his

[7] Appellant's video recording of this conversation shows *without exception* that she took no part in it and that she could not hear a word that was spoken. It also shows Williams walking away and returning to the conversation, on his own, on multiple occasions (i.e., he was free to leave, and did so on several occasions). (Defs.' Ex. D) (Appellant's video recording of conversation).

voice was Williams when he made his initial threat to Qureshi that he (Qureshi) should "worry about me (Williams) messing with you, all right." (Defs.' Ex. C). Moreover, this conversation took place in the middle of a city street during a festival in which numerous people walked past without paying any attention because there was nothing that warranted anyone's attention. (*See* Defs.' Ex. C; Tr. of 9/21/10 at 203-04). Most important for purposes of this appeal is the fact that the only information reported by Williams to Corporal Kapanowski related to *Appellant*'s specific conduct was that Williams "noticed Mayel . . . filming within hearing distance." (Pl.'s Br. in Resp. to Defs.' Joint Reply in Supp. of Mot. for Bill of Particulars at Ex. H (Kapanowski Rep.) at 2; Tr. of 9/22/10 at 215). ***That is it***.

Based on this information, Sergeant Mrowka directed Corporal Kapanowski and Officer Smith to investigate the matter. (Tr. of 9/21/10 at 200; Tr. of 9/22/10 at 181-82).

V. Unlawful Search & Seizure of Appellant.

Pursuant to Sergeant Mrowka's instruction, Corporal Kapanowski and Officer Smith, accompanied by Williams, Alslami, and at least one other festival worker, approached Appellant from behind while she was filming her co-defendants walking through one of the festival tents. (Tr. of 9/22/10 at 180-82, 219; Defs.' Ex. R). Upon making contact with Appellant—contact which was understandably startling to her—Corporal Kapanowski ordered Appellant to stop and shut off her camera. (Defs.' Ex. R). Appellant did not want to shut off her camera; however, Corporal Kapanowski told her that she had to "because there was a criminal complaint and I need you to shut the camera off so you can talk to me." (Defs.' Ex. R). Appellant asked Corporal Kapanowski, "What was the criminal complaint? Can you tell what the criminal complaint was?" He told her "absolutely." She then asked, "Can you give me a second?" He responded, "No, ma'am. Can you stay over here for me?" and immediately grabbed Appellant's

arm. (Defs.' Ex. R). Appellant protested, "Don't touch me." Corporal Kapanowski continued to hold her arm and stated, "I need you to stay over here." Appellant continued her protest, "Don't touch me," "Stop touching me." Corporal Kapanowski responded, "This is what you need to do, you need to listen," and then he seized Appellant's camera and handed it over to Officer Smith. (Defs.' Ex. R). Appellant protested, "Don't take the camera." "Stop. Don't take the camera." (Defs.' Ex. R). Once Corporal Kapanowski had physically restrained Appellant and seized her camera, he began his interrogation. (*See* Tr. of 9/22/10 at 228) (admitting that "I had to actually ***grab the camera from her***, ***grab her elbow***, ***pull her from the tent*** . . . in order for her finally to . . . actually comply with my order") (emphasis added). During the detention, Corporal Kapanowski explained the "criminal complaint" against Appellant (i.e., his basis for seizing Appellant and her property against her will) as filming Williams in public without his consent. (Defs.' Ex. R; Tr. of 9/22/10 at 215). Appellant attempted to explain to Corporal Kapanowski that Williams did not tell her to stop recording and that, in any event, she was too far away to hear anything. Corporal Kapanowski responded, "Well, he did, so that's the criminal complaint, Okay. So I need to see your identification." (Defs.' Ex. R). At no time during this contact with Corporal Kapanowski was Appellant free to leave. (Tr. of 9/23/10 at 17) ("Q: Was she free to leave then? A: Not during a temporary detention, no.").

During the trial, Corporal Kapanowski testified (and thus confirmed under oath) that the only specific information he possessed regarding the activity of Appellant was that Williams complained that she was filming him in public without his consent. Corporal Kapanowski further testified that such activity is not a crime. (Tr. of 9/22/10 at 215).

After the police officers interrogated Appellant outside of the tent area, they brought her to the police command trailer where she was detained until the City police officers arrested her

co-defendants for breach of the peace.[8] Appellant was visibly upset and crying. (Tr. of 9/22/10 at 192). City police officers eventually handcuffed and hauled Appellant to jail, where she spent the night. (*See* Tr. of 9/23/10 at 160-61). While she was detained in the police command trailer, Wood's video camera, which was seized by police officers during his arrest, was left recording outside of the trailer. The video camera captured a police officer that Appellant and her co-defendants believe to be Corporal Kapanowski making the following statement, "That should be enough pain and suff[ering], we should release her right now. She should be released. . . ." The judge would not allow Appellant to use this video recording or related evidence during the trial, including during the cross-examination of Corporal Kapanowski, the prosecution's main witness for the offense at issue.[9]

ARGUMENT

I. Appellant's Conviction Must Be Reversed Because Corporal Kapanowski Was without Lawful Authority to Seize Her and Her Personal Property; therefore, He Had No Authority to Order Her to Remain and Stop Video Recording because His Order Violated Her Rights Protected by the First and Fourth Amendments.

A. Standards of Review.

While an appellate court reviews a trial court's ruling regarding a motion to dismiss for an *abuse of discretion*, *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44, 46 (1998), the application of constitutional standards to the facts is a question of law subject to *de novo* review, *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53, 57 (1999). Moreover, in warrantless search and seizure cases, such as the case at bar, an appellate court applies a *de novo* standard of judicial review concerning reasonable suspicion to stop and probable cause to search and arrest.

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[8] As noted previously, Appellant and her co-defendants were each charged with one count for allegedly causing a breach of the peace. All of the defendants, including Appellant, were acquitted of this charge.

[9] The video was marked as Defendants' Exhibit Q and included with the record as an appellate exhibit. (*See* Amendment to Tr. of 9/23/10 at 1-7; Defs.' Ex. Q (marked as appellate exhibit)).

See Ornelas v United States, 517 US 690, 699 (1996); *see also Matthew v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 377; 572 NW2d 603, 609 (1998) ("Because the inquiry before us concerns a question of law, the existence of probable cause, our review is de novo.").

B. The Officer Was Not "Acting in the Lawful Performance of His Duty" as a Matter of Law, Requiring Reversal of the Conviction.

Section 14-38.1 of the City's Code of Ordinances states, "Any individual who is given direction or order by hand, voice, emergency light, siren or other visual or audible signal by a police officer acting in the ***lawful performance of his duty***, and who willfully disobeys and/or disregards that direction or order, is guilty of a misdemeanor." (emphasis added). It cannot be gainsaid that a police officer who violates the constitutional rights of a private citizen is not "acting in the lawful performance of his duty."[10]

In its ruling on Appellant's motion to dismiss, the trial court properly concluded that "the ordinance under which [the City has] chosen to charge the defendant specifically makes 'lawfulness' of the police officer's conduct an element of the offense." (Order at 7). However, the trial court denied Appellant's motion to dismiss because, according to the court, "lawfulness of the police officers' order is, under the presently proffered charge, a question of fact for the jury not a question for the court." (Order at 8). Yet, the court made a pretrial ruling that the officer had probable cause to arrest Appellant (i.e., his "order" was lawful, requiring Appellant to obey), and then subsequently denied Appellant the right to present evidence and argument to

[10] No one could seriously argue that a police officer has the right, for example, to order a private citizen to wash his police cruiser or to submit to his sexual advances and if the citizen refused, she could be held criminally liable for refusing to obey the unlawful order. Similarly here, because Corporal Kapanowski's order (stop video recording and remain with him for interrogation) to Appellant was unlawful, she cannot be criminally charged for allegedly disobeying it.

refute this claim. In sum, the trial court's rulings are inconsistent and ultimately erroneous for a number of reasons.

First, as noted, the court ruled *as a matter of law* prior to trial that the officer had probable cause to *arrest* Appellant. This ruling is incorrect because Corporal Kapanowski had no legal authority to interfere with Appellant *in any way*. The actions of Corporal Kapanowski, including his order to Appellant to shut off her camera and to remain with him for questioning, directly violated Appellant's constitutional rights. Consequently, Appellant cannot be criminally charged nor convicted for disobeying an unconstitutional—and thus unlawful—police order. (*See* sections C. & D., *infra*). Second, the question of whether Corporal Kapanowski was acting within the lawful performance of his duties is ultimately a question of law based on the facts. *See Ornelas*, 517 US at 699. The undisputed facts demonstrate without question that the officer violated Appellant's constitutional rights and was thus not acting lawfully. (*See* sections C. & D., *infra*). Finally, the court's pretrial rulings and its rulings during the trial were contradictory, erroneous, and ultimately prejudicial to Appellant. As noted above, the court (erroneously) ruled prior to trial that the officer had probable cause to arrest Appellant. However, the court also ruled that the question of whether the officer's conduct was "lawful" in light of the charged offense was a question for the jury. But throughout the trial, the court prevented Appellant from presenting evidence and argument that the arrest (i.e., the officer's conduct and concomitant order) was unlawful, claiming that it had already ruled on the question as a matter of law. As a result, the trial court denied Appellant the right to present evidence and argument to the jury on an element of the charged offense that, according to the court, the City had the burden to prove beyond a reasonable doubt.

In the final analysis, the question of whether Corporal Kapanowski's conduct was lawful is ultimately a question of law. And based on the undisputed facts in light of the controlling law as set forth more fully below, Corporal Kapanowski's conduct violated Appellant's constitutional rights. Therefore, the conviction must be reversed.

C. The Seizure, Search, and Subsequent Arrest of Appellant Violated the Fourth Amendment.

The seizure, search, and subsequent arrest of Appellant violated her rights protected by the Fourth Amendment. Consequently, the criminal charge arising out of this unconstitutional seizure fails as a matter of law.

The Supreme Court has long recognized that,

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, *free from all restraint or interference of others*, unless by *clear and unquestionable* authority of law.

Terry v Ohio, 392 US 1, 9 (1968) (citation omitted) (emphasis added).

"The Fourth Amendment applies to all seizures of a person, including seizures that involve only a brief detention, short of traditional arrest." *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451, 455 (1986). "[A] brief detention, short of traditional arrest" is often called an "investigatory stop." *See United States v Cortez*, 449 US 411, 417-18 (1981). Investigatory stops must comport with the Fourth Amendment *at their inception*. As the U.S. Supreme Court stated, "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.* at 417. That is, "[b]ased upon the whole picture, the detaining officer must have a *particularized* and *objective* basis for suspecting the *particular person stopped* of criminal activity." *Id.* at 417-18 (emphasis added); *Brown v Texas*, 443 US 47, 51 (1979) (stating that a "seizure must be based on specific, objective facts"

that the person detained is involved in criminal activity). As the Court emphasized in *Terry v Ohio*, "[This] demand for specificity in the information upon which police action is predicated is the *central teaching* of this Court's Fourth Amendment jurisprudence." *Terry*, 392 US at 21, n.18 (emphasis added).

In *People v Shabaz*, 424 Mich 42, 56; 378 NW2d 451, 457 (1986), the Michigan Supreme Court cited with approval Justice White's plurality opinion in *Florida v Royer*, 460 US 491 (1983), which the Michigan Supreme Court viewed as "an apparent effort to bring some organization out of the kaleidoscope of Fourth Amendment search and seizure cases . . . concerning various kinds of police-citizen encounters." Justice White's opinion divided such encounters into three tiers. As the Michigan Supreme Court noted, "The first tier consists of an officer asking a person questions in a public place." *Id.* With a first-tier contact, "'[t]he person approached . . . need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained *even momentarily* without reasonable, objective grounds for doing so; *and his refusal to listen or answer does not, without more, furnish those grounds*.'" *Id.* at 57; 457-58 (quoting *Royer*, 460 U.S. at 497-98) (emphasis added).

The "second tier" of contact is the *Terry* ("investigatory") stop described previously. A lawful *Terry* stop requires the detaining officer to have an "articulable suspicion" that the person seized has committed or is about to commit a crime. *See Shabaz*, 424 Mich at 57; 378 NW2d at 458. This is a limited exception to the general rule that seizures of the person require probable cause to arrest. A *Terry* stop in which the detaining officer lacks "a *particularized* and *objective* basis for suspecting the *particular person stopped* of criminal activity" violates the Fourth

Amendment, as does a stop in which the detaining officer seeks to verify his suspicion by means that approach the condition of an arrest. *Id.* at 54-58; 456-58.

The "third tier" of contact is an arrest based upon probable cause. The U.S. Supreme Court "repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge *that are sufficient to warrant a prudent person, or one of reasonable caution*,[11] in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v DeFillippo*, 443 US 31, 37 (1979) (emphasis added).

Applying the controlling law to this case demonstrates without question that Corporal Kapanowski did not have "a particularized and objective basis for suspecting" Appellant of criminal activity.[12] Indeed, Corporal Kapanowski acknowledged during his trial testimony that he lacked information that Appellant was engaged in *any* criminal activity. (Tr. of 9/22/10 at 215). During his testimony, Corporal Kapanowski admitted that the only "specific" information he had regarding Appellant was that she allegedly videotaped Williams in public within hearing distance—an act that he also admitted was <u>not</u> criminal.[13] (Tr. of 9/22/10 at 215). The officer testified as follows:

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[11] A "prudent" officer "of reasonable caution" would take into consideration the fact that false complaints were being made by festival workers and volunteers against Appellant and her co-defendants. (*See* "Statement of Facts" at section II., *supra*).

[12] The evidence shows that Appellant was not in the immediate vicinity of the incident involving the festival volunteer (in fact, she was video recording from behind the vending tents), and at the time of her seizure, she was <u>not</u> engaging in any criminal activity. (*See* Tr. of 9/22/10 at 139 (claiming that Appellant was "forty, fifty feet" away); Defs.' Exs. C, D, M).

[13] The evidence shows that Appellant was not within hearing distance of the conversation with Williams and that Williams was not speaking to her. (*See* Tr. of 9/22/10 at 139 (claiming that Appellant was "forty, fifty feet" away) at 163 (acknowledging that the music was loud and made it difficult to hear); Defs.' Ex. D (video clip demonstrating that it was impossible for Appellant to hear the conversation with Williams)). Thus it is plain error to conclude that Williams gave Appellant any instructions whatsoever regarding her videotaping.

Q. What did he [Williams] tell you in terms of what Ms. Mayel's involvement was in the incident with Mr. Williams?
A. ***She was filming within hearing distance of the entire incident.***
Q: So the information that you had prior to going out and conducting your investigation pursuant to Sergeant Mrowka's instructions with regard Ms. Mayel is that she was filming within hearing distance of him, is that right?
A. ***Correct.***
Q. Is it a criminal offense to be able to film somebody within hearing distances at a public event that you're aware of?
A. ***No, not that I'm aware of.***

(Tr. of 9/22/10 at 215). Moreover, Corporal Kapanowski acknowledged during his testimony that when he confronted Appellant videotaping outside of the tent, "[t]here was no disturbance." (Tr. of 9/22/10 at 194).

Because Corporal Kapanowski had no basis—let alone "probable cause" or even an "articulable suspicion"—for concluding that Appellant had committed or was about to commit a criminal offense, the officer's attempts *to converse* with Appellant could not properly go beyond a "first-tier contact" to which Appellant need not respond, may decline to listen to the questions, and may even go on her way.[14] *See Shabaz*, 424 Mich at 52-58; 378 NW2d at 455-58.

Moreover, the Michigan Supreme Court made it clear that the "flight" of a surveillance subject does not justify a seizure. The court stated,

> If it were otherwise, any citizen who refuses to answer a plain-clothes police officers' investigative questions during a "tier one" inquiry, and instead exercises his constitutional right to "go on his way" - - at top speed - - would, by the act of exercising his right to "move on," invite a full-blown tier two *Terry* "stop and frisk" not because of the addition of any articulable or particularized suspicion of imminent criminal activity, but because he exercised his right to the freedom of movement the Fourth amendment guarantees.

[14] Indeed, the violation of Appellant's civil rights in this case was egregious. Appellant was not merely detained temporarily, she was illegally arrested, her personal property was illegally seized, and she was falsely imprisoned, spending an entire night in jail. *See generally United States v Mendenhall*, 446 US 544, 554 (1980) (holding that a seizure occurs when a reasonable person would have believed that she was not free to leave).

Shabaz, 424 Mich at 63; 378 NW2d at 460. Consequently, Appellant had every right to walk away from Corporal Kapanowski—and he had no right to stop her by grabbing her arm and seizing her camera, actions which constitute a battery.[15]

Thus, the City cannot criminally charge (let alone convict) Appellant for not wanting to stop her activity—the videotaping of her Christian colleagues at the Arab Festival[16]—and subjecting herself to Corporal Kapanowski's illegal seizure and interrogation without violating her constitutional rights.

In sum, there was no lawful basis for the police officer to order Appellant to stop video recording, there was no lawful basis for the police officer to put his hands on her, there was no lawful basis for the police officer to seize her camera, and there was no lawful basis for the police officer to handcuff her and take her to jail, where she spent the night. Thus, the seizure, search, and subsequent arrest of Appellant were in direct violation of the Fourth Amendment. Consequently, because the officer's actions—including his order that Appellant allegedly violated—were unlawful as a matter of law, the conviction for failure to obey must be reversed.

D. The Seizure, Search, and Subsequent Arrest of Appellant Violated the First Amendment.

On June 18, 2010, Appellant and her co-defendants attended the Arab Festival to practice their religious freedom and to document their activity via video recordings which they use as part of their public ministry. (*See* Tr. of 9/23/10 at 107-10, 124). This activity is protected by the First Amendment, which is made applicable against the States and their political subdivisions

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[15] According to Sergeant Mrowka's testimony, Corporal Kapanowski told him that he "attempted to communicate with [Appellant] and she turned and walked away," (Tr. of 9/21/10 at 181)—which she had a right to do under our Constitution. However, Corporal Kapanowski would not let her go. Instead, he "grab[bed] the camera from her, grab[bed] her elbow, [and] pull[ed] her from the tent," (Tr. of 9/22/10 at 228), in violation of the Fourth Amendment.

[16] This activity, as discussed further in section I. D., *infra*, is protected by the First Amendment.

through the Fourteenth Amendment. *See Cantwell v Connecticut*, 310 US 296, 303 (1940). As the United States Supreme Court has long recognized, "spreading one's religious beliefs" and "preaching the Gospel" are activities protected by the First Amendment. *Murdock v Pennsylvania*, 319 US 105, 110 (1943). Supreme Court precedent "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev & Adv Bd v Pinette*, 515 US 753, 760 (1995). Accordingly, the First Amendment's Free Speech and Free Exercise clauses protect Appellant's "religious proselytizing." *Id.*

Additionally, "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v James*, 408 US 169, 181 (1972) (citations omitted). "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co v Reno*, 154 F3d 281, 295 (CA 6, 1998) (citing *NAACP v Alabama*, 357 US 449, 460 (1958)). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, . . . religious, and cultural ends." *Roberts v United States Jaycees*, 468 US 609, 622 (1984). Here, Appellant associated with her co-defendants for the express purpose of promoting their shared religious beliefs at the Arab Festival and beyond. *See Boy Scouts of America v Dale*, 530 US 640, 650 (2000) ("[A]n association that seeks to transmit . . . a system of values engages in expressive activity."). And this purpose was fulfilled in large part by the use of video cameras to record their activities and events at the festival—recordings that would later be published via the Internet and broadcast on satellite television.

See *generally Nichols v Moore*, 334 F Supp 2d 944 (ED Mich, 2004) ("The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational, and historical data, or even entertainment and amusement, concerning phases of human activity in general.").

Indeed, "[t]he protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including . . . pictures, films, [and] photographs. . . ." *ETW Corp v Jireh Publ'g*, 332 F3d 915, 924 (CA 6, 2003). The First Amendment protects not only the actual expression of one's religious views, thoughts, opinions, and other information concerning religion or matters of public interest, but also non-expressive conduct that intrinsically facilitates one's ability to exercise First Amendment rights, including efforts to gather evidence and information by videotaping, as in this case. *See, e.g., Smith v City of Cumming,* 212 F3d 1332, (CA 2, 2000) (holding that the First Amendment protects the right to gather information through photographing or videotaping); *Fordyce v City of Seattle*, 55 F3d 436, 439 (CA 9, 1995) (recognizing a "First Amendment right to film matters of public interest"); *Robinson v Fetterman*, 378 F Supp 2d 534, 541 (ED Pa, 2005) (holding that the First Amendment protected the plaintiff as he videotaped and noting that "[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence").

Thus, not only did Corporal Kapanowski's order to Appellant to stop her video recording and his subsequent seizure of Appellant and her camera violate the Fourth Amendment, as discussed above, his order and subsequent actions violated Appellant's First Amendment rights as well. Consequently, the conviction must be reversed because Corporal Kapanowski was

without lawful authority—and thus not "acting in the lawful performance of his duty"—to order Appellant to cease her First Amendment protected activity.

E. The Trial Court Erred by Denying Appellant's Motion to Dismiss.

As demonstrated above, the trial court abused its discretion by not granting Appellant's motion to dismiss the charge because there were no "facts and circumstances within the officer's knowledge *that* [*were*] *sufficient to warrant a prudent person, or one of reasonable caution*, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *DeFillippo*, 443 US at 37. The trial court based its ruling to deny Appellant's motion on its erroneous conclusion that probable cause existed, even though the only "facts" within the officer's knowledge was that Williams "noticed Mayel . . . filming within hearing distance." (Pl.'s Br. in Resp. to Defs. Joint Reply in Supp. of Mot. for Bill of Particulars at Ex. H (Kapanowski police rep. at 2)). This does not constitute probable cause to charge Appellant with a criminal offense as a matter of law. And this is particularly true when, as here, the charged offense is in direct violation of Appellant's constitutional rights protected by the First and Fourth Amendments.

II. The Evidence Did Not Sufficiently Support Appellant's Conviction.

A. Standard of Review.

Claims of insufficient evidence are reviewed *de novo*. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98, 101 (Mich App Ct, 2009); *see also People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105, 115 (Mich App Ct, 2001) ("By his argument [that the evidence was insufficient to sustain his conviction], he invokes his constitutional rights to due process of law. Thus, review is de novo for this constitutional issue.").

In determining whether the prosecution has presented sufficient evidence to sustain a conviction, "a reviewing court 'must consider not whether there was any evidence to support the conviction but whether there was *sufficient evidence* to justify a rational trier of fact *in finding guilt beyond a reasonable doubt.*'" *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73, 75 (1999) (quoting *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284, 286 (1979)) (emphasis added).

"In short, when determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Johnson*, 460 Mich at 723; 597 NW2d at 75.

"The sufficient evidence requirement is a part of every criminal defendant's due process rights." *Id.*; *see also Hawkins*, 245 Mich App at 457; 628 NW2d at 115.

B. Elements of the Crime of Failure to Obey.

The trial court instructed the jury as follows:

> The defendant, Negeen Mayel, has also been charged with failure to obey the lawful order of a police officer. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt; first, that the defendant was given a direction or order by hand, voice, emergency lights, siren, or other visual or audible signal by a police officer; second, that at the time of giving the direction or order, ***the police officer was acting in the lawful performance of his or her duties***; and third, that the defendant willfully disobeyed and/or disregarded the police officer's direction or order.
>
> In determining whether or not a defendant willfully disobeyed or disregarded the police officer's direction or order, ***a verbal protest*** of a direction or order, standing alone, ***is not sufficient to establish willful disobedience or disregard***.

(Excerpts from Final Instructions, Tr. of 9/24/10 at 2) (emphasis added).

As noted previously, the prosecution did not—because it could not as a matter of law—prove beyond a reasonable doubt that Corporal Kapanowski was "acting in the lawful

performance of his duties." Corporal Kapanowski lacked any legal authority to stop Appellant, to order her to cease video recording, to grab her arm, to seize her camera, and to demand that she answer his questions. Moreover, the evidence shows that any "disobedience or disregard" on behalf of Appellant was in the form of a verbal protest to the officer's aggressive (and unlawful) conduct.[17] Therefore, the prosecution did not present sufficient evidence *as a matter of law* to sustain the conviction.

C. Appellant's Motion for a Directed Verdict.

At the close of the prosecution's case-in-chief, Appellant moved for a directed verdict on both charges, which the trial court erroneously denied. The rationale for the judge's denial of Appellant's motion with regard to the "failure to obey" offense is predicated upon his erroneous pretrial ruling regarding probable cause. The trial court ruled, in relevant part, as follows:

> Moving chronologically through the events, the contact with Ms. Mayel by Corporal Kapanowski certainly supports both charges, both the breach of the peace and the willful failure to obey the order of a police officer. Officer Kapanowski was dispatched within the scope of his duties, as he testified to, to investigate a criminal complaint that had been made by Mr. Roger Williams. ***Although not an issue for this jury***, *the Court will add the footnote that, as both sides are well aware of,* ***the Court in examining this presentation previously concluded that the officer had probable cause to effectuate an arrest of Ms. Mayel even prior to his contact with her***, *so whether the intent was to take her into custody at that time or, as the police officer indicated, whether his intent was to engage in an investigation of the criminal complaint with an eye toward allowing Ms. Mayel to present her side of the story before he took further action.* I thought, frankly the corporal's testimony was textbook of what one would expect of a police officer.[18] He indicated freely that Ms. Mayel didn't have to answer any of his questions.[19] He couldn't force her to answer

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[17] This incident was captured on video/audio and can be found at Defendants' Exhibit R. (Tr. of 9/23/10 at 18, 49; Defs.' Ex. R).

[18] This comment is demonstrative of the trial judge's bias in favor of the testifying police officers. (*See also* section V., *infra*). Undoubtedly, this bias also influenced the court's pretrial "probable cause" ruling—a clearly erroneous ruling lacking any basis in fact or law.

[19] Contrary to the trial judge's ruling (and his gratuitous comments expressing partiality for Corporal Kapanowski), when pressed during cross-examination, Corporal Kapanowski's angry responses reveal that he (incorrectly) believes his authority as a police officer is absolute (a belief that is apparently shared, in part, by the trial judge (*see, e.g.,* section V., *infra*)):

any questions. I think constitutionally, he's right dead on. That's true. If someone is stopped by a police officer, he doesn't have to say a thing. . . . At any rate, the officer approaches Ms. Mayel in, what I would describe as, almost a quiet tone of voice ***asking her if he can interrupt her for a moment***. Again, she doesn't have to say a word to the officer, ***but instead she starts, very quickly, moving away from the***

Q: Did you have an objection with her trying to link up with the other individuals she was with?

A: I was conducting a criminal investigation. She was the first person that I went to. ***She can't just feel free to walk across the street*** or walk thirty, forty feet ***or do whatever she wants. She has to listen to my order.*** I'm in the performance of my duties. ***She has to listen to the order.*** She can't willfully disobey an order.

(Tr. of 9/23/10 at 23) (emphasis added).

Q: When she was asking you what was the criminal complaint, why didn't you answer her?

A: Because she was being non-compliant.

Q: Were you being non-compliant to her question?

A: ***I'm a police officer.*** I have a duty and I was trying to perform my duty, ***okay***? When I have an investigation that I need to perform, ***I need the cooperation of the person I'm trying to talk to.***

(Tr. of 9/23/10 at 25) (emphasis added).

Consider further Corporal Kapanowski's responses to the following questions posed by the prosecutor:

Q: But was there any doubt in your mind whether she understood what you were trying to get her to do?

A: Oh, absolutely. ***Whenever any police officer talks to you, I would assume that most people know to talk to them.***

(Tr. of 9/22/10 at 188) (emphasis added).

Q: [D]id she volunteer a particular statement or did you try to get a statement from her?

A: No. She just became emotional and ***I tried to explain to her that if a police officer is conducting an investigation, and you refuse, it's a crime.*** If you don't cooperate, ***if you're not compliant with a police officer, you could be charged with a crime and you could go to jail.*** She became emotional, started crying and she told me that she [was] told to film no matter what, not to stop filming at all.

(Tr. of 9/22/10 at 191-92) (emphasis added). Indeed, the officer testified as follows: "I approached her, advised her that I was conducting a criminal investigation, and that ***I needed her to speak with me.***" (Tr. of 9/22/10 at 184) (emphasis added). Thus, it is evident that Corporal Kapanowski was requiring Appellant to answer his questions and by her questioning his authority to interfere with her liberty, she was "non-compliant." In sum, contrary to this officer's (and apparently the trial judge's) view, simply wearing a uniform and carrying a badge does not provide a legitimate basis for interfering with the freedom of a private citizen under our Constitution. (*See* Tr. of 9/22/10 at 230) ("I told her it was against the law to disobey an order from a police officer. ***I was in full uniform. There was no question who I was.***") (emphasis added).

officer, and whether it's four seconds or forty seconds or four minutes, when you combine the physical action of the person who is sought to be temporarily detained with increasingly loud verbalizations by her, this does constitute or could constitute a reasonable finding by a juror a willful failure to obey the lawful order of a police officer, starting with, ***please stay right where you are. Don't go any further. Put the camera down so that I may address you***. And I think it's important, also, to note what the officer was trying to do, according to his testimony was *to offer her an opportunity to provide an explanation.* Basically, a reasonable trier of fact could say that the officer was *giving her an opportunity to make exculpatory statements that would affect his further action.*[20] He didn't have to ask for it. *He could have taken*

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[20] The very idea that Corporal Kapanowski was "offer[ing] her an opportunity to provide an explanation" and "giving her an opportunity to make exculpatory statements that would affect his further action" is utter nonsense. The evidence shows that Appellant denied any involvement with Williams (in fact, Appellant had no idea why she was being seized by this officer in the first instance); she was merely videotaping from a distance. (Defs.' Ex. R; *see also* Defs.' Ex. D). Indeed, Corporal Kapanowski admitted that during this "investigation" Appellant "denied being directly involved. Her job was just to videotape the incident. . . . She just said that she had nothing to do with that." (Tr. of 9/22/10 at 192). Yet, despite these "exculpatory statements," Appellant was detained, handcuffed, and sent to jail. In addition, none of the officers had any interest in simply taking five minutes to view the video evidence prior to sending Appellant and her co-defendants to jail for the evening, even though the video showed that the Williams' conversation provided no basis for an arrest. (*See* Defs.' Exs. C & D). Sergeant Mrowka testified as follows:

> Q: Well, did the defendants offer to you the opportunity to look at the videotape?
>
> A: Oh, absolutely.

(Tr. of 9/21/10 at 202)

> Q: Couldn't [just] take five minutes to look at that video before sending the defendants to jail, Sergeant Mrowka?
>
> A: Absolutely not.

(Tr. of 9/21/10 at 205; *see also* Tr. of 9/22/10 at 217-18 (Officer Kapanowski testifying that "I wouldn't look at the video necessarily, no")).

After seeing the video of the Williams' conversation, Sergeant Mrowka testified as follows:

> Q: Do you know . . . where Negeen Mayel, defendant Mayel, was during that conversation with Roger Williams that we've just been discussing.
>
> A: At the time, I don't know.
>
> Q: Have you seen any video that she was on the other side of the vending tents videotaping?
>
> A: After reviewing those tapes, yes, I did.
>
> * * * *
>
> Q: In your observations [of the video of the Williams' conversation] do you see somebody that was physically not allowed to leave from that conversation?
>
> A: Not on that video, no.

(Tr. of 9/21/10 at 204).

> *her into custody immediately, but he didn't.* And her reaction could have been pure silence, but instead it became increasingly loud. A reasonable trier of fact could conclude that this was not a mere verbal protest, which she's certainly allowed to do, ***but the right to verbally protest the lawful order is not independent of the obligation not to physically oppose cooperation either***. She simply could have been charged with resisting and obstructing. She wasn't. She was charged with willful failure to obey a lawful order, but a reasonable juror could conclude, *that while she's entitled to say, I don't want to do what you're telling me to do,* ***she still has to stay put*** *at that point.* ***She can't continue to move*** *from the exterior of the tent into the tent and towards a larger gathering of people, as indicated by the officer.*

(Tr. of 9/23/10 at 96-99) (emphasis added).

Contrary to the trial court's ruling, when a police officer lacks probable cause or a reasonable articulable suspicion to believe that a private, law-abiding citizen has committed or is about to commit a criminal offense, as in this case, the officer is without legal authority to order the citizen to "***stay right where you are. Don't go any further. Put the camera down so that I may address you***." *See Shabaz*, 424 Mich at 63; 378 NW2d at 460 (holding that the "flight" of a surveillance subject does not justify a seizure). Consequently, Corporal Kapanowski was not "acting within the lawful performance of his duties" in this case. Instead, he was violating Appellant's clearly established constitutional rights such that the conviction cannot stand.

III. The Trial court Violated Appellant's Sixth Amendment Right to Confrontation by Denying Her the Right to Thoroughly Cross-examine Crucial Prosecution Witnesses as to Their Biases, Motives, and Prejudices.

A. Constitutional Right to Confrontation.

The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." US Const amend VI. United States Supreme Court cases construing the confrontation clause "hold that a primary

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In sum, the police officers were not conducting an investigation, nor did they have *any* interest in Appellant's "side of the story." The police officers were executing a plan to arrest Appellant and her co-defendants before the night was over. The Williams' complaint, which on its face does not provide a basis to arrest Appellant, was a mere pretext to affect the officer's illicit plan to remove Appellant and her co-defendants from the festival.

interest secured by it is the right of cross-examination." *Douglas v Alabama*, 380 US 415, 418 (1965). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v Alaska*, 415 US 308, 316 (1974); *see also id.* at 318 (observing that the denial of "the right of effective cross-examination" is a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it") (internal quotations and citation omitted). As the U.S. Supreme Court stated,

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.

Id. at 316 (internal quotations and citation omitted). The importance of eliciting such evidence through cross-examination is echoed by the Michigan courts as well. *See Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898, 902 (1981) ("There is a general canon that on cross-examination the *range* of evidence that may be elicited for any purpose of discrediting is to be very liberal. . . .") (citation and quotations omitted); *Hayes v Coleman*, 338 Mich 371, 381; 61 NW2d 634, 640 (1953) ("It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other.").

As the U.S. Supreme Court observed,

> While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, the focus of the Confrontation Clause is on individual witnesses. Accordingly, ***the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.*** . . . We think that a criminal defendant states a violation of the Confrontation Clause ***by showing that he was prohibited from engaging in an otherwise appropriate cross-***

> ***examination designed to show a prototypical form of bias on the part of the witness***, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.

Delaware v Van Arsdall, 475 US 678, 680 (1986) (internal quotations, punctuation, and citations omitted) (holding that the respondent had met his burden of stating a Confrontation Clause violation because "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination").

In sum, as demonstrated further below, Appellant has stated a violation of the Confrontation Clause because she was prohibited from engaging in appropriate cross-examination of crucial prosecution witnesses.

B. Appellant Has Established a Confrontation Clause Violation.

There is little doubt that Appellant's conviction was based largely, if not completely, on the testimony of Corporal Kapanowski, who presented himself to the jury as a calm, reasonable officer who was just trying to do his job. Indeed, according to this officer, his primary reason for seizing Appellant and her video camera was simply to get Appellant's "side of the story." (Tr. of 9/22/10 at 187). It goes without saying that evidence that impinges upon the bias, motives, as well as credibility of a testifying witness is relevant. More important, as noted above, to deny a criminal defendant the opportunity to fully cross-examine a witness—particularly one as crucial to the prosecution as Corporal Kapanowski in this case—as to his bias and motives violates the defendant's right to confrontation guaranteed under the Sixth Amendment.

In this case, Appellant's right to confrontation was denied by the following rulings of the trial court, which prevented Appellant's counsel from conducting an appropriate cross-examination of Corporal Kapanowski:

- The trial court prohibited questions regarding the officer's refusal to view exculpatory video evidence, even though he testified that his primary reason for confronting Appellant was to get her "side of the story." (Tr. of 9/22/10 at 217-18).
- The trial court prohibited questions regarding the officer's refusal to answer Appellant's questions related to the nature of the criminal complaint against her in light of the officer's testimony that his only motive for confronting Appellant was to "investigate" the matter to get her "side of the story." (Tr. of 9/23/10 at 25-26). Indeed, the trial judge sharply cut off any such questioning, bolstering the credibility of the prosecution's witness in the process. (*See* Tr. of 9/23/10 at 25-26).
- The trial court prohibited questions regarding the officer's rationale for the arrest of Appellant—questions that would go to the officer's motives, biases, prejudices and credibility. (*See* Tr. of 9/23/10 at 13-14) ("You can't ask him what his rationale for the arrest was. We've covered that on more than one occasion. That's a probably (sic) cause issue for the Court. . . . His subjective reasoning for the arrest is not an issue for the jury, so please keep that in mind. You've linked the two. ***You've said what is the conduct that led to the handcuffing. That's his subjective reason. His subjective reason for placing them under arrest is not an issue in the case.***") (emphasis added); *see also* Tr. of 9/22/10 at 46 ("[The arresting officer's] motivation is not an issue.").
- Finally, and perhaps most important, the trial court prohibited the showing of and concomitant questioning about a video that surreptitiously captured the officer stating, "***That should be enough pain and suff[ering]***, we should release her right now. She should be released. . . , " referring to Appellant. (Amendment to Tr. of

9/23/10 at 1-7; Defs.' Ex. Q (marked as appellate exhibit)) (emphasis added). This video evidence and line of questioning plainly demonstrates the officer's illicit motives and bias, and it undermines his credibility. (*See* Amendment to Tr. of 9/23/10 at 3-4) (arguing that showing the video and questioning the witness about its content should be permitted because "Kapanowski is a testifying witness" and "[i]t goes to the bias, the motive and the credibility of his testimony").

C. The Violation of Appellant's Right to Confrontation Was Not Harmless Beyond a Reasonable Doubt.

"[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* [*v California*, 386 US 18, 24 (1967)] harmless-error analysis." *Van Arsdall*, 475 US at 684. Thus, the inquiry for this court is "whether, assuming that *the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was *harmless beyond a reasonable doubt*." *Id.* (emphasis added). Whether the claimed error is harmless beyond a reasonable doubt "depends upon a host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

In this case, it cannot be gainsaid that Corporal Kapanowski's testimony was the basis for Appellant's conviction. He was the witness for the prosecution's case. His testimony was not cumulative. There was no evidence corroborating Corporal Kapanowski's testimony "on

material points."[21] The cross-examination was essentially limited to telling the officer's "side of the story." And absent Corporal Kapanowski's testimony, the prosecution does not have a case against Appellant for the "failure to obey" charge. In sum, by preventing Appellant's cross-examination of Corporal Kapanowski as to his motives, bias, and credibility, the trial court committed a constitutional error that was not harmless beyond a reasonable doubt. Therefore, the conviction should be reversed.

D. The Trial Court Similarly Violated Appellant's Right to Confrontation with regard to the Cross-examination of Sergeant Mrowka.

The trial court also violated Appellant's right to confrontation with regard to the cross-examination of Sergeant Mrowka. Specifically, the trial court did not permit Appellant to fully pursue cross-examination of Mrowka's claim that he couldn't take five minutes to review the exculpatory video evidence offered by Appellant and her co-defendants before arresting them and sending them to jail for the evening. (*See* Tr. of 9/21/10 at 204-05; Discussions Held at Side Bar, Tr. of 9/21/10 at 4-6). This evidence was certainly relevant to rebut the officer's testimony that he and his companions, including Corporal Kapanowski, were merely investigating allegations and wanted to get Appellant's side of the story. The evidence shows that the officers were operating with ill motives, bias, and prejudice against Appellant and her co-defendants, and that the officers' testimony to the contrary (i.e., that their only concern was investigating the veracity of Williams' allegations) is not credible. In sum, this evidence directly discredits the

[21] During his testimony, Williams acknowledged that he didn't see Corporal Kapanowski approach Appellant—he had his "back to it." (Tr. of 9/22/10 at 164). He acknowledged that he didn't observe "the first minute or two" of the contact, which is the crucial time period. (Tr. of 9/22/10 at 165). And he candidly admitted that he was "kind of observing the arrest, but [he's] not really fully comprehending what's going on because that's not [his] focus." (Tr. of 9/22/10 at 165-66). In sum, Williams' testimony does not provide a basis for Appellant's conviction. Indeed, it is noteworthy that the trial court did not make reference to Williams' in-court testimony in its ruling on Appellant's motion for a directed verdict on the "failure to obey" charge. (Tr. of 9/23/10 at 96-99).

testimony of Sergeant Mrowka as well as the testimony of Corporal Kapanowski, and for the reasons stated above, the conviction should be reversed.

IV. The Trial Court Erred by Denying Appellant the Right to Present Relevant, Exculpatory Evidence to the Jury.

A. Standard of Review.

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, 17 (2003). "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231, 243 (2003).

B. The Trial Court Abused Its Discretion by Denying Relevant Evidence.

As noted previously, the trial court did not permit Appellant to present evidence and argument demonstrating that Corporal Kapanowski was not "acting in the lawful performance of his . . . duties," an essential element of the charged offense. On multiple occasions (including in the presence of the jury), the trial court admonished Appellant's counsel for seeking to elicit such testimonial evidence, thus bolstering the prosecution's case and all but ensuring a conviction in the process. (*See also* section V., *infra*). For example, the trial court made the following statements on the record:

- "I specifically raised the issue as to whether it was being offered to demonstrate a probable cause situation and I was assured it was not. That is something that this Court has already ruled on on a pretrial motion with regard to the charges in these cases, that there was probable cause for the arrest, so we've already gone through that." (Discussions Held at Side Bar, Tr. of 9/21/10 at 2);

- "Ladies and gentlemen, you are to disregard any question and answer regarding whether that's an arrestable situation." (Tr. of 9/21/10 at 107);

- "The lawfulness of the arrests are not an issue for this jury and I would caution the jury not to infer that you are going to be deciding whether the arrests were proper. That's not an issue for you, at all. That's a legal issue for the Court and should not concern you whether or not the arrests were lawfully made. It's not your issue." (Tr. of 9/22/10 at 29-30);

- "Based on what was presented to this Court on earlier proceedings, they had probable cause based on Mr. Williams' complaint. We're passed that. Probable cause is not an issue for this jury, and again, I'll say it again, I've said it in my opinion, I said it yesterday, I'll say it every day of this trial if I have to . . . ." (Tr. of 9/22/10 at 35);

- "You can't ask him what his rationale for the arrest was. We've covered that on more than one occasion. That's a probably (sic) cause issue for the court. . . . His subjective reason for placing them under arrest is not an issue in the case." (Tr. of 9/23/10 at 13-14);

- "As we've discussed on numerous occasions, we're not going to get into a probable cause issue with regard to the legal support for effectuating the arrest. The Court has ruled previously and has so instructed the jury that they are not to concern themselves with that issue." (Tr. of 9/24/10 at 129); and

- "Not allowed. Clearly you're going to probable cause. For reasons that have been expounded upon previously, I have to step in on that one." (Tr. of 9/24/10 at 139).

Consequently, the trial court made the following erroneous evidentiary rulings. First, the trial court prohibited Appellant from asking questions that the court (and the prosecutor) perceived to be related in *any way* to "probable cause."[22] (*See, e.g.,* Tr. of 9/21/10 at 105-07; Tr. of 9/22/10 at 28-30; Tr. of 9/22/10 at 31-36; Tr. of 9/23/10 at 13-14 (prohibiting any questions that might touch upon the officer's "subjective reason" for arresting Appellant, including, "what is the conduct that led to the handcuffing")). However, the prosecutor was not so limited when soliciting responses from his witnesses. (*See* Tr. of 9/21/10 at 179) ("Q: Basically, you're going on the basis of what information? A: His information, probable cause."). And second, the trial

[22] It is evident, as demonstrated further in section V., *infra*, that the trial judge did not want the jury to hear any evidence that might suggest that the officers' actions were unprofessional, or worse yet, illicit, resulting in a one-sided presentation of the evidence.

court permitted the police officers to testify as to "complaints" made by festival workers and volunteers about Appellant and her co-defendants. (*See, e.g.,* Tr. of 9/21/10 at 177-79; *see also* Discussions Held at Side Bar, Tr. of 9/21/10 at 2-4) (permitting officer to testify that "[h]e received some complaints")). However, when Appellant sought to present evidence that festival workers and volunteers were making *false* complaints to the police, the judge wouldn't permit Appellant to even use the word "complaint." (*See* Tr. of 9/24/10 at 64-67).

There can be little doubt that based on the charged offense and the judge's instructions to the jury, the excluded evidence was relevant to challenge the conduct of the police officers in general, and, more specifically, to challenge whether Corporal Kapanowski was "acting in the lawful performance of his duties" when he seized Appellant. *See* MRE 401 ("'Relevant evidence' means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") (emphasis added). In sum, the evidence was admissible, *see People v Fletcher*, 260 Mich App 531; 679 NW2d 127 (Mich App Ct, 2004) ("Generally, all relevant evidence is admissible. . . ."), and it was an abuse of discretion to exclude it.

V. The Trial Judge Was Impermissibly Biased in Favor of the Testifying Police Officers.

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. . . . A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342, 344 (1995). When a case is tried before a jury, "the judge must be especially careful that his questions or comments do not indicate partiality." *People v Jackson (Joseph)*, 98 Mich App 735, 740; 296 NW2d 348, 350 (1980). "*A new trial will be ordered where such comments quite possibly could have influenced*

the jury to the detriment of the defendant's case."[23] *People v Pointer (Robert)*, 133 Mich App 313, 316-17; 349 NW2d 174, 177 (1984) (emphasis added); *People v Conyers*, 194 Mich App 395, 405-06; 487 NW2d 787, 791 (1992) ("The test is whether the judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, and whether partiality *quite possibly could* have influenced the jury to the detriment of defendant's case.") (internal quotations, punctuation, and citations omitted).

Examples of objectionable conduct by a trial judge include volunteering information not in evidence, "campaigning from the bench," interrupting or making disparaging remarks toward counsel, and "marked impatience in the presence of the jury," among others. *Conyers*, 194 Mich App at 405-06; 487 NW2d at 791.

In this case, it was plainly evident to Appellant and thus to the jury, that the trial judge favored the police officers' testimony. His erroneous ruling on the probable cause issue coupled with his constant reminders of this ruling to the jury and admonishment of Appellant's counsel for asking any question that even hinted at the impropriety of the officers' conduct and motives are prime examples.[24] Indeed, the trial judge's gratuitous statement praising Corporal

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[23] In *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754, 756 (1975), the court observed, "Appellate courts in this jurisdiction carefully scrutinized substantial claims of judicial partiality and have not required a specific showing of prejudice where such partiality is demonstrated. A new trial has been ordered . . . where partiality *quite possibly could* have influenced the jury to the detriment of defendant's case." (internal citations and quotations omitted).

[24] Consider the following exchanges and comments by the trial judge made in the presence of the jury:

> MR. MUISE: Your Honor, I'm probing into the procedures that the police would exercise and situations dealing with crowd control.
> MR. DEBIASI: Within the abstract or in this case?
> MR. MUISE: Quite frankly, I was trying to keep it away from the facts in this case. I'm still just trying to keep it on the public safety issue.
> THE COURT: That's not the scenario that's being presented. I'm going to sustain the objection. ***This is not, per se, about police conduct.*** The charge is disturbing the peace. The charge is whether or not, on the second count, Ms.

Mayel willfully disobeyed the lawful order of a police officer. Lawfulness of the order certainly brings in police conduct in that scenario, but this is not, broadly speaking, a case regarding police conduct. ***The lawfulness of the arrests are not an issue for this jury and I would caution the jury not to infer that you are going to be deciding whether the arrests were proper. That's not an issue for you, at all.*** That's a legal issue for the Court and should not concern you whether or not the arrests were lawfully made. ***It's not your issue.*** The objection is sustained.

(Tr. of 9/22/10 at 28-29) (emphasis added).

Q: When she was asking you what was the criminal complaint, why didn't you answer her?

A: Because she was being non-compliant.

Q: Were you being non-compliant to her question?

A: I'm a police officer. I have a duty and I was trying to perform my duty, okay? When I have an investigation that I need to perform, I need the cooperation of the person I'm trying to talk to.

Q: How about the private citizen, don't you think they have an obligation or –

MR. DEBIASI: Objection to relevance. I mean, are we in a philosophical debate or does it have some relevance to the issue?

THE COURT: Mr. Muise, relevance?

MR. MUISE: It's a question following up from his response about the duties of a police officer.

THE COURT: Your question is, does a police officer have a legal duty to obey the order of a civilian?

MR. MUISE: ***That was not my question, your Honor.***

THE COURT: Well, then what is it? Does he have an obligations (sic) to answer her questions? Is that the more accurate way of phrasing your inquiry? ***The answer is no. He does not. It's not relevant.*** The Court will be instructing the jury at the conclusion of the proofs that a verbal protest of a police officer's lawful order, standing alone, is not enough to find someone guilty of willfully disobeying the lawful order of a police officer. That, I think, places this in the proper context. ***There is no obligation of the police officer, on the other hand, to answer the civilian's questions.*** You may proceed.

(Tr. of 9/23/10 at 25-26 (emphasis added); *see also* Tr. of 9/23/10 at 14 ("[The officer's] subjective reason for placing them under arrest is not an issue in the case."); Tr. of 9/22/10 at 217-18 (sustaining objection to questions about why the officer refused to view exculpatory video evidence prior to jailing Appellant and stating, "There's no legal requirement that he do that. Therefore it's irrelevant.")). Thus, throughout the trial, the judge permitted the police officers to testify extensively as to how they were simply (and innocently) investigating a complaint and just wanted to get Appellant's side of the story. Yet, when Appellant attempted to show that the police officers' claims were bogus and their motives and conduct illicit, the judge swiftly shut down the line of questioning.

Consider further the following exchange, which was held outside the presence of the jury, but is nonetheless indicative of the trial judge's bias in this case:

Kapanowski during his ruling on Appellant's motion for a directed verdict, (Tr. of 9/23/10 at 97) ("I thought, frankly the corporal's testimony was textbook of what one would expect of a police

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> THE COURT: That all would go to the officer's motivation for arrest, right? Which is not an issue even for probable cause. How does that play into defining or characterizing the defendants' conduct, which, they're charged for what they did, not for what somebody else was thinking. How does that shed light on anything?
> MR. MUISE: How do you tell this story without understanding?
> THE COURT: Well, ***I know the story you want to tell, Mr. Muise***, but the focus of this trial is based on two charges, breach of the peace for all four and willful failure to obey a police officer's order on the other charge. How does any of that play into the defendants' alleged conduct,
> MR. MUISE: Because their alleged conduct was peaceful throughout and you've got a series of bogus complaints. ***The police are told they're bogus complaints and when they go investigate, and the evidence will show, there was no investigation. There was no, Mr. Qureshi, can I talk to you a little bit so I can corroborate this information***.
> THE COURT: ***Well, they don't have to***.
> MR. MUISE: They put him –
> THE COURT: Why do they have to? Based on what was presented to this Court on earlier proceedings, they had probable cause based on Mr. Williams' complaint. We're passed that. Probable cause is not an issue for this jury, and again, I'll say it again, I've said it in my opinion, I said it yesterday, I'll say it every day of this trial if I have to, it is not the Court giving an opinion as to the ultimate issue in the case. The ultimate issue in the case is whether or not the defendants' conduct, their conduct, created an unreasonable disturbance of the peace, not somebody else's motivation, not somebody else's reaction to the content of the speech. Was it their conduct that created the disturbance of the peace?
> MR. MUISE: So far all the evidence has been reaction, the reactions of the crowd. The crowd's reaction to them.
> THE COURT: You can argue to the jury, these people did nothing unreasonable here to cause a disturbance. You can argue there was no disturbance. You can argue that even if you think there is a disturbance, it certainly wasn't unreasonable based on their conduct. These are other people being attracted to a private conversation on the street and you can't blame them for it. What were they supposed to do? I mean, I can imagine, I don't want to give you your closing argument, but I can imagine what it could be and what it could be based on what the actual charges are, ***not on the civil suit that you seem to want to try here in this case***. I mean that respectfully. They have a right to do that, if they want, but that's not here now. It's not today.

(Tr. of 9/22/10 at 34-36) (emphasis added); *see also* Discussions Held at Side Bar, Tr. of 9/21/10 at 6) ("You want to sue the City civilly, which I gather you do, go ahead and sue them civilly and bring that up. It's relevant to that issue, but not this.")).

officer."), and his remarkable sentencing speech to Appellant, while given outside the presence of the jury, are nonetheless illustrative of the bias the judge brought to this case. During his sentencing speech, the trial judge made the following relevant (and revealing) remarks:

> After I took the bench, and I've been here nearly eight years, I will say I've gone from just sort of ordinary respect to true admiration for what the average officer does on the street here every day and every night. I've learned the 24 hour a day aspect of their job because I work 24 hours a day along with them. If they need a warrant signed, they know they can knock on my door or call me in the middle of the night and they're going to get milk and cookies and a warm greeting before they leave if they've got a moment for it because I admire what they do. They place themselves in harm's way every day for us. This may sound like a long-winded way of getting to the point, but I think they are due respect. And when I go out and I talk at the schools to young students, I try to remember at the conclusion of the talk every time, to ask that the young people in our community, please consider that anytime they run into a police officer out there on the street, who they know is a police officer, they're in uniform, they've got the badge, there's no reason to think otherwise, you run into a police officer on the street, ***even if you disagree with what you think they're doing***, absent some physical threat to your well-being, give them that deference. Give them that consideration. ***Give them that benefit of the doubt that what they are doing is appropriate***. If at some point it turns out that what they were doing is not appropriate? As I say, absent some immediate threat of physical harm to yourself, wrongful threat of harm, there are avenues to follow. You can make complaints. You can call lawyers. You can go to the police administration and file a complaint against an officer. ***We have a marvelous system here, and I think we've seen that this week, that we have a marvelous system here***. There are avenues for redress and grievances, for peacefully and civilly getting a determination of honest disputes, but give them that room, that presumption. I think they're due that. My sense in watching the testimony and the evidence in this case is that you got very much caught up in the mission of what you were doing, and I don't necessarily mean mission in the sense or religious mission of what you were doing, but I think you got very caught up in your role, your perceived role at the festival, and rightly or wrongly, my impression is that your mindset set you up for this, ***that your mindset going in was there very well could be trouble by the authorities towards you and your companions*** and ***you kind of lost that presumption that the authorities would act appropriately***, and in a sense, I think you set yourself up for this situation. I don't think I've ever listened to or watched a video of a policeman in action that was more gentle, more polite in his approach of a citizen on the street than Corporal Kapanowski, and the jurors were the same way. They thought if you had to run into a police officer on the street, this was the guy you wanted to run into. It was excuse me, ma'am. May I please have a minute? Everything that you would really hope to hear from a police officer in an encounter with a citizen, and perhaps because of your youth and your inexperience, you did not—and your predetermined mindset

> that you had to keep your camera rolling at all costs and with caution to the wind. I think you put yourself in that position. That is my honest assessment of the situation. I don't think you had a predetermined disposition to doing anything wrong, certainly not. I think you put yourself in the position that you did not appreciate the consequence of your refusal to cooperate. Again, you didn't have to answer any questions. I thought the officer was polite. ***If I was going to write a constitutional dissertation on police citizen conduct, that would be a fine, textbook example of how to do it.*** He understood you didn't have to say anything, ***but he also understood that he did have a right to temporarily, at least temporarily detain you to at least ask your side of the story.*** The irony here is that if you'd just paused for a moment, you probably would have been let go. Right then and there. ***That's the irony of it.*** Those are some of my thoughts of the situation. ***It's one day jail,*** credit time served, one day.

(Sentencing Tr. at 5-9) (emphasis added).

In sum, it is impossible to deny that the many comments made by the court in support of the testifying officers "quite possibly could have influenced the jury to the detriment of the defendant's case." *See Pointer (Robert)*, 133 Mich App at 316-17; 349 NW2d at 176; *see also Conyers*, 194 Mich App at 405-06; 487 NW2d at 791.

CONCLUSION

In the final analysis, the true "irony of" this case is that Appellant's "mindset going in" was 100% correct. She and her co-defendants were illegally detained and jailed for doing nothing more than exercising their constitutional rights. Corporal Kapanowski's actions and the actions of the Dearborn police department are "textbook" examples of civil rights violations of the highest order. We live in a free society, not a police state. No man—not even a Dearborn police officer—is above the law. The Bill of Rights—and not Corporal Kapanowski—is what makes us a Nation of free men and women. Consequently, when a conviction is based on the actions of a police officer that violate fundamental constitutional rights, as in this case, that conviction must be reversed lest our constitutional freedoms be rendered meaningless platitudes subject to the will of police officials.

For the foregoing reasons, Appellant respectfully requests that this court reverse her conviction and dismiss the charged offense or, in the alternative, reverse her conviction and grant a new trial before a different district judge.

Dated: January 27, 2011.

Respectfully submitted,

THOMAS MORE LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, a copy of the foregoing **Appellant's Brief** was served via U.S. Mail, postage prepaid, upon the following:

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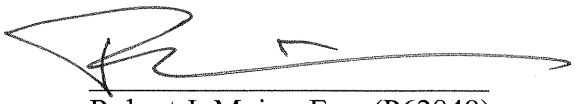

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