APPENDIX TABLE OF CONTENTS

ORDER OF THE MICHIGAN SUPREME COURT (JUNE 2, 2021)

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BRUCE H. ZITKA,

Defendant-Appellant.

SC: 162477

COA: 349491

Ingham CC: 17-000105-FH

Before: Bridget M. MCCORMACK, Chief Justice., Brian K. ZAHRA, David F. VIVIANO, Richard H. BERNSTEIN, Elizabeth T. CLEMENT, Megan K. CAVANAGH, Elizabeth M. WELCH, Justices.

On order of the Court, the application for leave to appeal the January 7, 2021 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

/s/ Larry S. Royster
Clerk

ORDER OF THE MICHIGAN SUPREME COURT (JUNE 2, 2021)

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SUSAN K. HERNANDEZ-ZITKA,

Defendant-Appellant.

SC: 162479

COA: 349494

Ingham CC: 17-000102-FH

Before: Bridget M. MCCORMACK, Chief Justice., Brian K. ZAHRA, David F. VIVIANO, Richard H. BERNSTEIN, Elizabeth T. CLEMENT, Megan K. CAVANAGH, Elizabeth M. WELCH, Justices.

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OPINION OF THE COURT OF APPEALS
STATE OF MICHIGAN
(DECEMBER 10, 2020)

APPROVED FOR PUBLICATION
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STATE OF MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BRUCE H. ZITKA,

Defendant-Appellant.

No. 349491
Ingham Circuit Court LC No. 17-000105-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SUSAN K. HERNANDEZ-ZITKA,

Defendant-Appellant.

No. 349494

Ingham Circuit Court LC No. 17-000102-FH

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendants Bruce H. Zitka and Susan K. Hernandez-Zitka[1] each appeal as of right their convictions, following a joint jury trial, of three counts of conducting an unlicensed gambling operation, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). The trial court sentenced both defendants to five years' probation, with one year to be served in jail, subject to suspension upon successful completion of probation. In both appeals, we affirm.

This case was previously before this Court when the prosecution appealed an order granting defendants' motion to quash and dismissing all charges. The trial court, relying on the outcome of an earlier civil lawsuit brought by the Norton Shores city attorney in a civil nuisance abatement action, ruled that the prosecutor was collaterally estopped from bringing this criminal action. This Court reversed that decision and remanded the case to the trial court. *People v Zitka*, 325 Mich. App. 38, 53; 922 N.W.2d 696 (2018). This Court's prior decision provides the following summary of the relevant background facts that led to the civil litigation:

> Defendants own and operate three Internet lounges located in Muskegon County: The Landing Strip, The Lucky Mouse, and Fast

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[1] We will refer to defendant Bruce H. Zitka as "Zitka," and defendant Susan K. Hernandez-Zitka as "Hernandez-Zitka."

Lane. At these establishments, customers can open accounts to wager on and play games online, including slot and lottery-type games. On April 14, 2015, the Michigan Gaming Control Board (MGCB) began an investigation to determine whether illegal gambling activities were taking place at the lounges. The MGCB interrupted this investigation, however, when the Norton Shores Police Department began its own independent investigation of allegations that unlawful gambling activities were taking place at The Landing Strip. The city attorney for Norton Shores subsequently filed in the Muskegon Circuit Court a civil-nuisance-abatement action against The Landing Strip under the local zoning code. The parties ultimately agreed to dismissal of that case, and the court entered a stipulated order of dismissal on January 28, 2016, stating in part, "Defendants agree to operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances as it is currently operating." (Emphasis added.)

Following the conclusion of the civil lawsuit, the MGCB resumed its investigation of the three lounges in February 2016. As a result of this investigation, defendants were each charged with three counts of conducting a gambling operation without a license, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). The amended information alleges an offense period extending from February 1, 2016, through October 31,

2016. The district court conducted a two-day preliminary examination and, on January 27, 2017, issued an opinion and order determining that probable cause supported the charges and binding over the cases to the Ingham Circuit Court. In reaching this conclusion, the district court determined that the offense of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e), is a specific-intent crime, while conducting a gambling operation without a license, MCL 432.218 (1)(a), constitutes a general intent crime. With respect to the Muskegon County Circuit Court's stipulated order of dismissal, the district court was "not persuaded that the . . . [order], in a civil proceeding, is particularly helpful here in relation to the probable cause standard."

In the Ingham Circuit Court, defendants filed identical motions to quash, arguing that the district court erred by determining that the offense of conducting a gambling operation without a license was a general-intent crime as opposed to a specific-intent crime. Defendants further asserted that because the stipulated order dismissing the civil case reflected a judicial determination that defendants were operating legally, defendants were acting under a mistake of law that negated the *mens rea* elements of both offenses. The circuit court granted defendants' motions to quash and stated on the record as follows:

> My opinion is based upon the fact that the Attorney General of this state, in part, has

> the authority to intervene in any litigation that they want to that would be something that relates to state law, I believe they could have gone back to the circuit judge in this case and asked to intervene and have this reargued in some fashion as to its applicability.
>
> This appears to be a situation where apparently the Attorney General's office and their other agencies were so aggrieved by these poor people that they felt it necessary to investigate for months and months as to whether they existed. They could have walked right in and seen. But in my opinion, when a circuit judge of—is it Muskegon?
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> * * *
>
> . . . [The Muskegon Circuit Court judge] has the right to make these rulings and put these rulings in effect. But as I have seen in my cases, I have been chastised. I have been appealed. I have even had people come in here and consent to things and your office appealed that because the consent was wrong. I am just amazed. These cases are dismissed. [*Zitka*, 325 Mich. App. at 41-43 (footnote omitted).]

On appeal, this Court held that the circuit court abused its discretion in determining that the state's criminal charges were barred by collateral estoppel. *Id.* at 47. This Court reasoned that the two proceedings were not substantially similar and that the state Attorney General was not in privity with the city attorney. *Id.* at 45-47. It also stated that the purposes of the

two proceedings were "fundamentally different," which is a recognized basis for declining to apply collateral estoppel. *Id*. at 47.

In its analysis of the relevant statutes, this Court stated that the language of MCL 432.218(1)(a) indicated that conducting an unlicensed gambling operation was a general-intent crime, as opposed to a specific-intent crime. *Id*. at 50-51. This Court then held that defendants' defenses of mistake of law and entrapment by estoppel were not applicable. *Id*. at 52. This Court specifically held that defendants' mistake-of-law argument had "no effect" on the charges of conducting an unlicensed gambling operation because it was a general-intent crime. *Id*. In particular, this Court concluded that "[d]efendants . . . need not have intended to violate the law but rather simply have intended to perform the act of 'conducting' an unlicensed gambling operation" and that "defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial to a determination of whether they committed this offense." *Id*. This Court also held that defendants' argument was "equally unavailing with respect to the specific-intent charges brought under MCL 752.796 and MCL 752.797(3)(e)." *Id*. This Court noted that entrapment by estoppel and mistake of law "both require that the alleged reliance on a public official's representation be 'reasonable' or 'justified,'" and that "[d]efendants are unable to meet this requirement." *Id*. at 52-53. Accordingly, this Court reversed the trial court's dismissal order and remanded for further proceedings. *Id*. at 53.

On remand, defendants moved to admit evidence of the Norton Shores investigation and the results of that civil lawsuit. Defendants argued that this evidence

was necessary to defend against the charges, even though this Court had ruled that MCL 432.218(1)(a) was a general-intent crime and that it was unnecessary to show that defendants intended to violate the law. The trial court denied defendants' motion, ruling that the evidence was not admissible in light of this Court's decision in *Zitka*. Following a joint jury trial, the jury found both defendants guilty of three counts each of conducting an unlicensed gambling operation and three counts of using a computer to commit a crime. Defendants now appeal.

I. Admissibility of the Civil Litigation

Defendants argue that the trial court abused its discretion and violated their constitutional right to present a defense by excluding evidence related to the previous civil lawsuit at their criminal trial. In particular, they argue that the dismissal order in the civil lawsuit was admissible to show that they believed they were acting in compliance with the law. We disagree.

"The decision whether to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich. 272, 278; 662 N.W.2d 12 (2003). "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Johnson*, 502 Mich. 541, 564; 918 N.W.2d 676 (2018) (quotation marks and citation omitted). "A trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich. App. 560, 566; 876 N.W.2d 826 (2015). "To the extent that the trial court's ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts,

our review is de novo." *People v Tanner*, 496 Mich. 199, 206; 853 N.W.2d 653 (2014) (quotation marks and citation omitted). Likewise, "[t]his Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich. App. 472, 480; 769 N.W.2d 256 (2009). Whether the law-of-the-case doctrine applies is a question of law that we also review de novo. *Ashker v Ford Motor Co*, 245 Mich. App. 9, 13; 627 N.W.2d 1 (2001).

"A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses." *People v Yost*, 278 Mich. App. 341, 379; 749 N.W.2d 753 (2008), lv den 483 Mich. 856 (2009). "But this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id*. (quotation marks and citations omitted); *see also United States v Scheffer*, 523 U.S. 303, 308; 118 S.Ct. 1261; 140 L.Ed.2d 413 (1998) ("A defendant's interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process.") (quotation marks and citations omitted). For example, consistent with our rules of evidence, "the right to present a defense extends only to relevant and admissible evidence." *People v Solloway*, 316 Mich. App. 174, 198; 891 N.W.2d 255 (2016) (quotation marks and citation omitted). "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *People v Unger*, 278 Mich. App. 210, 250; 749 N.W.2d 272 (2008), quoting *Scheffer*, 523 U.S. at 308.

In considering defendants' argument that the trial court's exclusion of the challenged evidence violated their right to present a defense, the threshold question is whether the circumstances or outcome of the Norton Shores civil litigation was probative of any fact that was of consequence to the determination of the criminal action. As a general rule, "relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." MRE 402. "'Relevant evidence' [has a] 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." MRE 401. "[A] material fact need not be an element of a crime or cause of action or defense but it must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy." *People v Mills*, 450 Mich. 61, 68; 537 N.W.2d 909 (1995) (quotation marks and citation omitted). This Court's prior decision in *Zitka* establishes that the challenged evidence was not relevant, and therefore, the trial court did not abuse its discretion by excluding the evidence.

A. Relevancy of the Civil Lawsuit to the Gambling Operation Charge

This Court held in *Zitka*, 325 Mich. App. at 50-51, that conducting a gambling operation without a license is a general-intent crime. "'[U]nder the doctrine of the law of the case, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question will not be differently determined in a subsequent appeal in the same case where the facts remain materially the same.'" *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 329 Mich. App. 295, 303; 942 N.W.2d 85 (2019), quoting

Bennett v Bennett, 197 Mich. App. 497, 500; 496 N.W.2d 353 (1992). The binding nature of the doctrine typically "applies without regard to the correctness of the prior determination." *People v Herrera (On Remand)*, 204 Mich. App. 333, 340; 514 N.W.2d 543 (1994) (quotation marks omitted). However, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice." *People v Phillips (After Second Remand)*, 227 Mich. App. 28, 33; 575 N.W.2d 784 (1997). An "injustice" may occur when there has been an intervening change in the law, *see People v Spinks*, 206 Mich. App. 488, 496-497; 522 N.W.2d 875 (1994), or "where the prior opinion was clearly erroneous," *Phillips*, 227 Mich. App. at 34, citing *People v Wells*, 103 Mich. App. 455, 463; 303 N.W.2d 226 (1981).

Accordingly, this Court explained that a mistake-of-law defense was not available to the charge of conducting a gambling operation without a license because the offense is a general-intent crime. *Id.* at 51-52. This Court stated:

> Defendants therefore need not have intended to violate the law but rather simply have intended to perform the act of "conducting" an unlicensed gambling operation. *See People v Beaudin*, 417 Mich. 570, 573-574, 339 N.W.2d 461 (1983). Accordingly, defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial to a determination of whether they committed this offense. [*Zitka*, 325 Mich. App. at 52 (emphasis added).]

In addition, when discussing the additional charges of using a computer to commit a crime, this Court

held that defendants could not rely on the statement by the Norton Shores city attorney in the civil suit to defend their state criminal charges, stating:

> Entrapment by estoppel and mistake-of-law defenses both require that the alleged reliance on a public official's representation be "reasonable" or "justified." Defendants are unable to meet this requirement. They claim reliance on the Norton Shores city attorney's agreement in the stipulated order that operations at The Landing Strip were in compliance with applicable gambling laws and ordinances. It cannot be said that a statement by a city attorney in a civil suit involving a local ordinance could be authoritative on a matter of criminal state law such that reliance on it was reasonable. The statement was not made by the attorney general's office, by the MGCB, or by a county prosecutor. [*Id.* at 53.]

This Court's analysis in *Zitka* demonstrates that the trial court did not abuse its discretion by not allowing defendants to present evidence of the Norton Shores civil litigation at their criminal trial. We are bound by the earlier decision in *Zitka* under both the law-of-the-case doctrine and because this Court's prior decision is published. *See* MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.").

Defendants wanted to introduce the evidence of the civil dismissal order because it contained the parties' stipulation that "[d]efendants agree to operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances as it is currently

operating." Defendants maintain that this evidence was relevant to show that they believed they were operating their businesses in compliance with the law. Even if defendants held this belief, however, this Court's decision in *Zitka* establishes that defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial to whether they were "conducting" an unlicensed gambling operation. *Zitka*, 325 Mich. App. at 52. Defendants argue that this Court's prior decision did not totally foreclose this evidence for all purposes, and that a relevant issue in this case was whether they "intended to perform the act of 'conducting' an unlicensed gambling operation." They maintain that the stipulated civil order was relevant to that issue because it indicated that they did not intend to conduct "an unlicensed gambling operation." However, this Court's discussion in *Zitka* of the *mens rea* required for conducting an unlicensed gambling operation emphasized that the focus of this inquiry is whether defendants intended to "operate" what amounts to a gambling operation. This Court made it clear that its holding rested on the volitional character of the word "conducting," not on the intent to cause the outcome that their "conduct" set in motion. *See Zitka*, 325 Mich. App. at 50 ("[T]he statute's use of the term 'conducting' evidences an intention that the *mens rea* element of MCL 432.218(1)(a) be the intent to perform the act of 'conducting.'").

Defendants are essentially taking the position that the prosecutor needed to prove that they specifically intended to operate an *illegal* gambling operation, or to prove that they were operating a gambling operation knowing that it was illegal. This position is not sup-

ported by this Court's decision in *Zitka*, in which this Court held that the prosecutor was only required to prove that the manner in which defendants intended to operate their cafés constituted a gambling operation within the meaning of the statute. MCL 432.218(1)(a) provides that a person is guilty of a felony for "[c]onducting a gambling operation where wagering is used or to be used without a license issued by the board." "Board" is defined as the "Michigan gaming control board." MCL 432.202(f). "Gambling operation" or "casino gambling operation" refers to "the conduct of authorized gambling games in a casino." MCL 432.202(w). MCL 432.202(v), defines the term "gambling game" as:

> any game played with cards, dice, equipment or a machine, including any mechanical, electromechanical or electronic device which shall include computers and cashless wagering systems, for money, credit, or any representative of value, including, but not limited to, faro, monte, roulette, keno, bingo, fan tan, twenty one, blackjack, seven and a half, klondike, craps, poker, chuck a luck, Chinese chuck a luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game, or any other game or device approved by the board, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player. [Emphasis added.]

Therefore, while evidence concerning whether defendants' operation met the statutory requirements for a

gambling operation involving "gambling games" was relevant, evidence of whether defendants specifically intended their operation to be an unlicensed gambling operation or specifically intended to violate MCL 432.218(1)(a) was not relevant. Accordingly, the trial court did not abuse its discretion by excluding this evidence. Further, because the evidence was not relevant, the trial court's exclusion of this evidence did not violate defendants' right to present a defense.

Zitka also argues that this evidence should have been allowed after the prosecution introduced evidence that defendants knew that their businesses were operating illegally, such as cease and desist letters defendants saw in connection with other investigations. The record discloses that the prosecutor cross-examined defendants about their knowledge in response to defendants' claims that they did not know that what they were doing was illegal. Arguably, the trial court could have prevented defendants from introducing their lack of knowledge of the legality of their operations because their subjective beliefs were not relevant. However, because the trial court allowed defendants to introduce limited testimony about their knowledge, the prosecutor did not act improperly by cross-examining them on that subject to challenge the credibility of their testimony. Thus, we reject Zitka's claim that defendants should have been allowed to introduce additional irrelevant evidence in rebuttal.

B. Relevancy of the Evidence to the Unlawful Use of a Computer Charges

With respect to the crime of using a computer to commit a crime, MCL 752.796 provides:

> (1) A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime.
>
> (2) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section, including the underlying offense.
>
> (3) This section applies regardless of whether the person is convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense.

In the prior appeal, this Court characterized the offense of using a computer to commit a crime as a specific-intent crime. *See Zitka*, 325 Mich. App. at 52. However, this Court did not explain what specific intent is necessary for a conviction under MCL 752.796. The language of MCL 752.796 prohibits the use of a computer to "commit a crime." The alleged crime in this case was "[c]onducting a gambling operation in which wagering is used or to be used without a license issued by the board." MCL 432.218(1)(a). "[I]n order to commit a specific intent crime, an offender must subjectively desire or know that the prohibited result will occur, whereas in a general-intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result." *Gould*, 225 Mich. App. at 85, quoting *Lerma*, 66 Mich. App. at 569-570 (emphasis added). Thus, as

applied to this case, to obtain a conviction under MCL 752.796, the prosecutor was required to prove that defendants specifically intended to "use[] a computer program, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit" the general-intent crime of "[c]onducting a gambling operation in which wagering is used or to be used without a license issued by the board." The specific intent necessary to commit this offense is the intent to use a computer to conduct a gambling operation without a license, which constitutes a crime. Contrary to what defendants suggest, the prosecutor was not required to prove that they used the computer with the specific intent or knowledge that the gambling operation they were conducting was illegal. This would effectively convert the underlying offense into a specific-intent crime, contrary to this Court's decision in *Zitka*. Accordingly, the Norton Shores investigation and the settlement in that civil lawsuit would be no more relevant to determining defendants' guilt or innocence for the crime of unlawful use of a computer than for the underlying crime of conducting the gambling operation. Therefore, the trial court did not err when it precluded defendants from introducing evidence of the civil lawsuit to show that defendants lacked the specific intent necessary to support a conviction of using a computer to commit a crime.

C. Ineffective Assistance

Zitka also argues that defense counsel was ineffective for failing to seek introduction of the evidence of the order in the civil case to rebut the prosecution's repeated introduction of evidence that defendants knew what they were doing was illegal. To establish

ineffective assistance of counsel, a defendant must show that: (1) counsel's representation "fell below an objective standard of reasonableness"; and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Vaughn*, 491 Mich. 642, 669; 821 N.W.2d 288 (2012), citing *Strickland v Washington*, 466 U.S. 668, 688, 694; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich. 38, 52; 826 N.W.2d 136 (2012).

This Court had already determined that evidence of the Norton Shores litigation was "immaterial to a determination of whether [defendants] committed [the offense of conducting an unlicensed gambling operation.]" *Zitka*, 325 Mich. App. at 52. Despite this ruling, defense counsel endeavored to obtain a ruling allowing the evidence, but the trial court ruled that the evidence was not admissible. Given this Court's prior decision in *Zitka* and the trial court's subsequent ruling disallowing the evidence, Zitka cannot show that counsel's decision to refrain from again moving to admit this evidence was objectively unreasonable. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich. App. 192, 201; 793 N.W.2d 120 (2010).

II. Character Witnesses

Hernandez-Zitka argues that the trial court abused its discretion by granting the prosecution's motion to preclude her from offering character witnesses to testify regarding her character and reputation for being a law-abiding citizen. We disagree.

MRE 404(a)(1) permits the accused to introduce evidence of a "pertinent" character trait, and a pertinent trait must relate to the charged crime. Accordingly, a defendant has a "right to introduce evidence of his character to prove that he could not have committed the crime." *People v Whitfield*, 425 Mich. 116, 130; 388 N.W.2d 206 (1986); *see also People v Roper*, 286 Mich. App. 77, 93; 777 N.W.2d 483 (2009) ("Under MRE 404(a)(1) a defendant may offer evidence that he or she has a character trait that makes it less likely that he or she committed the charged offense."). One example of a pertinent trait would be a defendant's character for peacefulness in a crime involving alleged violent conduct. *Id*. at 93-96. As another example, our Supreme Court has held that evidence of "the truthfulness of a person" is admissible "in an action for defamation of the person's allegedly 'untruthful' character." *People v Harris*, 458 Mich. 310, 318; 583 N.W.2d 680 (1998).

Hernandez-Zitka fails to explain how her truthful character would have made her less likely to have committed the offense of conducting an unlicensed gambling operation. Her truthfulness or general reputation for adhering to the law has no bearing on whether she intended to operate the cafés in a manner that met the definition of a gambling operation, particularly where this Court had already determined that defendants' intent to "break the law" was

not relevant to the illegal gambling charges. Because Hernandez-Zitka sought to introduce this evidence only to make an irrelevant point, the trial court did not err by excluding the evidence.

III. Res Judicata and Entrapment by Estoppel

Hernandez-Zitka also argues that res judicata and entrapment by estoppel are valid defenses to her convictions in this case. She recognizes that this Court previously ruled that entrapment by estoppel did not apply, but claims that the prior decision was made without all necessary facts. We review de novo whether res judicata bars a subsequent action. *Adair v Michigan*, 470 Mich. 105, 119; 680 N.W.2d 386 (2004). Whether entrapment by estoppel applies is a question of law that we review de novo. *People v Fyda*, 288 Mich. App. 446, 456; 793 N.W.2d 712 (2010).

Although the doctrines of res judicata and collateral estoppel are distinguishable, they share the common element of privity. In *Zitka*, 325 Mich. App. at 44, this Court discussed the doctrine of collateral estoppel as follows:

> The doctrine of collateral estoppel generally precludes relitigation of an issue in a subsequent proceeding when that issue has previously been the subject of a final judgment in an earlier proceeding. *Porter v Royal Oak*, 214 Mich. App. 478, 485; 542 N.W.2d 905 (1995). Collateral estoppel applies when the following three conditions are satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair]

> opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich. 679, 682-684; 677 N.W.2d 843 (2004) (quotation marks and citations omitted; alteration in original). Mutuality of estoppel requires that the party seeking to invoke the doctrine establish that his or her adversary was either a party to, or in privy with a party to, the previous action. *Id*. at 684.

In contrast, res judicata operates to bar a second action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich. 573, 586; 597 N.W.2d 82 (1999). Res judicata is broadly applied in Michigan, barring not only claims already litigated, but also every claim arising from the same transaction that could have been brought by exercising reasonable diligence. *Id*. The burden of establishing res judicata is upon the party asserting that doctrine. *Baraga Co v State Tax Comm*, 466 Mich. 264, 269; 645 N.W.2d 13 (2002). Under either doctrine, the proponent must demonstrate the existence of privity in connection with the earlier action. *Id.*; *Monat*, 469 Mich. at 684.

In the context of collateral estoppel, this Court determined in the prior appeal that the prosecutor in this case and the Norton Shores city attorney in the civil case were not in privity, despite the Attorney General's ability to intervene in the civil case under MCL 14.28 and MCL 14.101. Thus, for the purpose of deciding whether res judicata could apply to this case, we are bound by our previous determination.

Accordingly, Hernandez-Zitka cannot show that res judicata barred her convictions in this case.

Hernandez-Zitka also argues that this Court erroneously decided that entrapment by estoppel was not available as a defense in her criminal case. Again, we are bound to follow this Court's decision in *Zitka*, 325 Mich. App. at 51-53, rejecting the availability of entrapment by estoppel in this case. The only new argument offered by Hernandez-Zitka is that the circuit court's approval of the earlier settlement should have allowed her to rely on the legality of her prior actions. However, she does not discuss how the circuit court's decision to permit the Norton Shores settlement was a binding determination regarding whether defendants' operation of the Landing Strip was a violation of MCL 432.218(1)(a), much less a decision concerning other businesses not involved in the lawsuit. Accordingly, Hernandez-Zitka's claim that she is entitled to relief under the doctrine of entrapment by estoppel is not persuasive.

IV. Opinion Testimony

Hernandez-Zitka also argues that the trial court erred when it allowed prosecution witnesses to provide opinion testimony regarding whether illegal gambling was being conducted at defendants' establishments. We review the trial court's decisions regarding the admission of evidence for an abuse of discretion. *Katt*, 468 Mich. at 278.

MRE 701 permits the admission of lay opinion testimony and provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions

> or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 702 permits the admission of expert testimony and provides:

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

MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Nevertheless, there are limits on an expert's opinion testimony. An expert witness may not "express[] an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind," *People v McFarlane*, 325 Mich. App. 507, 523; 926 N.W.2d 339 (2018), or "testify about the requirements of law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion," *People v Drossart*, 99 Mich. App. 66, 75; 297 N.W.2d 863 (1980).

Hernandez-Zitka challenges the testimony of two witnesses who testified that defendants' cafés were illegal gambling operations. Mark Laberge, a regulations officer with the MGCB, was asked to explain, in his words, what an Internet café was. He replied, "An illegal casino." After defense counsel objected, the trial court struck the term "illegal" from his response.[2] Later, after Laberge discussed his visit to Fast Lane, how he was given a café user account and access to the sweepstopia.com website, and how he was able to obtain cash from the café when he won games on the website, he was asked what he looked for to determine whether gambling was occurring. Laberge replied, "Was there consideration, was there chance, and was there a prize." He then testified that he found all of these elements in this case. When defense counsel objected, the trial court stated that counsel would be able to cross-examine Laberge about this opinion.

Laberge's initial response that Internet cafés are *illegal* casinos was improperly phrased in terms of a legal conclusion. However, the trial court adequately cured this error by quickly striking the objectionable portion of his response. Defense counsel assented to this remedy. Thus, Hernandez-Zitka cannot now claim that this remedy was insufficient. *See People v Buie*, 491 Mich. 294, 312; 817 N.W.2d 33 (2012) (explaining that a defendant should raise objections at a time when the trial court can correct them and is not permitted to "harbor error as an appellate parachute") (quotation marks and citations omitted). With respect

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[2] The trial court later instructed the jury not to consider any testimony that was excluded or stricken.

to the later testimony, Laberge's statement that the Fast Lane operation shared the characteristics of consideration, a game of chance, and a prize with other gambling establishments was not an improper comment on the ultimate question of Hernandez-Zitka's guilt. While this testimony supported a finding that defendants' cafés were gambling operations, this question was left to the jury to determine. As with the first comment, defense counsel was also permitted to cross-examine the witness regarding the bases for his conclusions that the characteristics of a gambling operation existed. Therefore, Hernandez-Zitka is not entitled to relief.

Hernandez-Zitka also argues that the prosecutor improperly elicited similar testimony from John Lessnau, the manager of the criminal investigation section for the MGCB. Lessnau was qualified as an expert witness in the field of illegal gambling. After discussing the same three elements of consideration, chance, and a prize, Lessnau also discussed Sweepstopia.com, stating that it did not have a gambling license. He then testified about his investigation into the Internet sites accessed by the customers at defendants' cafés, and stated that roughly 80 percent of the traffic went to Sweepstopia.com. Over defense counsel's objection, Lessnau was then asked about his opinion of Sweepstopia.com, and he testified that the website was operating illegally. This was not improper expert testimony because Lessnau testified about his opinion concerning the website, not defendants' cafés. This answer could have led the jury to find that because a majority of defendants' customers visited this website, the cafés were also conducting illegal gambling operations. However,

Lessnau did not provide this legal conclusion about defendants' cafés or their guilt.

After explaining sweepstakes and how they differ from a lottery, and that Michigan does not have an exception for "internet sweepstakes café" operations from the general ban on unlicensed gambling, Lessnau was asked his opinion about defendants' operations.

> Q. Okay. Having been to both–to all three locations here, were they internet sweepstakes cafés, in your opinion?
>
> A. They were illegal gambling operations.

Defense counsel immediately objected, stating, "Your Honor, if the court could clarify that the jury is going to make the ultimate decision. That this is one witness' (sic) opinion, if the court would clarify that for the jury." The trial court replied that it had already so instructed the jury twice and that the jury would receive further instructions about its duty to determine the weight and credibility of all of the evidence. The trial court later provided such an instruction.

As with Laberge's testimony, the remedy that defense counsel sought was sufficient to cure any prejudice. *See Buie*, 491 Mich. at 312. The court's instructions made it clear to the jury that it would ultimately decide whether defendants' businesses were illegal gambling operations.

"Jurors are presumed to follow their instructions," and jury instructions are presumed to "cure most errors." *People v Mahone*, 294 Mich. App. 208, 212; 816 N.W.2d 436 (2011).

Affirmed.

/s/ Jane E. Markey

/s/ Patrick M. Meter

/s/ Michael F. Gadola

ORDER OF THE CIRCUIT COURT FOR THE COUNTY OF INGHAM (JANUARY 10, 2019)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

SUSAN HERNANDEZ-ZITKA, BRUCE ZITKA,

Defendant.

Case Nos: 17-102-FH, 17-105-FH

Before: Hon. Rosemaire E. AQUILINA,
Circuit Court Judge.

This matter, having come before the Court, on January 10, 2019, upon Defendant's Motion in Limine to offer evidence of the Norton Shore Civil Case and the People's cross Motion in Limine to exclude evidence of the Norton Shores Civil Case involving the City of Norton Shores and the Landing Strip LLC. The court having considered the pleadings in this matter, oral arguments being heard, and the Court being otherwise fully advised;

IT IS HEREBY ORDERED that no testimony or argument shall be presented to the jury in this matter regarding the civil nuisance abatement case between the City of Norton Shores and the Landing Strip. LLC (specifically including but not limited to an order stating the Landing Strip LLC was operating legally).

IT IS HEREBY FURTHER ORDERED that Defendants' may not call Ron Panucci or any other witness in their case-in-chief to offer evidence relating to the Norton Shores civil abatement case or the negotiated settlement of that case.

IT IS HEREBY FURTHER ORDERED that Defendants preserve the issue of Notice regarding MCL 432.218(1) on an appeal after trial if either one or both defendant(s) are convicted at a jury trial.

SO ORDERED

/s/ Rosemaire E. Aquilina
Circuit Court Judge

Approved by:

/s/ Daniel C. Grano
Assistant Attorney General
Attorney for the People

/s/ David Dodge
Attorney for Defendants

**BENCH RULING TRANSCRIPT,
RELEVANT EXCERPTS
(JANUARY 10, 2019)**

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

SUSAN HERNANDEZ-ZITKA, BRUCE ZITKA,

Defendant.

Case Nos: 17-102-FH, 17-105-FH

Before: Hon. Rosemaire E. AQUILINA,
Circuit Court Judge.

APPEARANCES:

For the People:

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Richmond M. Riggs (P33863)
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For the Defendants:

David Dodge
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Grand Rapids, MI 49503

[January 10, 2019, Transcript p. 87]

THE COURT: I've had an opportunity to speak with counsel in chambers. I really have heard enough testimony. I have–and actually my file is back in chambers, I don't think I need it–I have heard enough testimony today to be able to make my ruling, and I think this case ought to go to a jury trial.

First of all, mistakes of law does not negate general intent, and the Court of Appeals in its decision June 26, 2008, has gone through several pages to get to that answer, basically.

The statute clearly, I think, has some holes in it. The Court of Appeals doesn't say that. I don't know if the Supreme Court will say that, but the Court of Appeals painstakingly goes through and decides what they think the legislature intended as a general intent crime, so it really doesn't matter about all of the various research and this and that that was done because people are presumed to know the law.

This case, however, is not in front of me, it's in front of the jury. I simply have to limit based on the law what can come in and what cannot. I am not going to allow the civil case or Judge Pannucci's testimony to come in, unless for some reason the testimony, because I don't have a

crystal ball, would come in for impeachment or some other purpose, but I think we need to operate under those parameters

I truly believe with the record that we've made here today that the case lies between the parties in is this a sweepstakes versus is this gambling, and the jury is astute enough to figure out all of these issues. Counsel is astute enough to lay them out in a succinct manner where the jury can figure this out. Juries are very, very smart, and as you all have laid out the testimony, both counsel and your witnesses have laid it all out to me, it is really crystal clear–although initially one can think it's complicated, it really is not a complicated issue the way you all lay it out, and I think the jury is the one who needs to decide and we need to set this for a jury trial. Have I stated the parameters and issues correctly? What other record would you like to make, on behalf of the people?

MR. GRANO: I believe you stated that correctly, Your Honor. Nothing further for the people.

MR. DODGE: Your Honor, if I can just–just so in complete fairness to the court and the Attorney General's office to state what we are preserving, Your Honor, with all due respect with the court's ruling?

THE COURT: You may.

MR. DODGE: It's our claim that our constitutional and other right to present defense in the Conley case, the Michigan case as well as the Michigan U.S. Supreme Court authority that was in our pleading, would include on this reasonable ex-

pectation of what the voluntary act could do, that it should include the Norton Shores order of dismissal, continue to operate as you're operating, should include Judge Ronald Pannucci's testimony.

I respect the court's decision. Basically the Zitkas will be testifying why it was sweepstakes.

And also, Your Honor, preserving the notice issues in the statute in terms of whether it's the Zitkas or others, that we be able to, without having a separate track, appeal right now to the Court of Appeals and further delay, that that issue is preserved for us to be able to present in the event that there were convictions and an appeal of right to the Court of Appeals and the Supreme Court.

THE COURT: You've, I think, accurately stated what you've been saying all along and what you said to me in chambers, and your issues are preserved, and just so we're clear, everyone is presumed to know the law, and just because you check on it, if you don't follow through, doesn't mean that you have approval to violate the law, and there's a number of different nuances here, so clearly those issues need to be preserved and need to go on up, but we also need resolution here. If you do an interlocutory appeal or an appeal on this, however which way, this case is going to be delayed for years, and I don't think that's in anybody's best interest. We need to get to the facts, have a jury decision, and then appeal everything at once. It will be cheaper, more cost effective, and time saving for everyone.

MR. DODGE: And can we get a firm date, Your Honor, because it involves the AG's case and the court has all—a voluminous docket with the county prosecutor's office.

THE COURT: I'll work on that in just a minute. Is there anything else you wish to address?

MR. GRANO: Nothing for the people.

[. . .]

**MOTION HEARING TRANSCRIPT,
RELEVANT EXCERPTS
(APRIL 29, 2019)**

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

SUSAN HERNANDEZ-ZITKA, BRUCE ZITKA,

Defendant.

Case Nos: 17-102-FH, 17-105-FH

Before: Hon. Rosemaire E. AQUILINA,
Circuit Court Judge.

APPEARANCES:

For the People:

Department of Attorney General
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For the Defendants:

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[April 29, 2019, Transcript p. 4]

he intends to call several character witnesses on Thursday. I've gotten statements from the character witnesses regarding Mrs. Zitka being good people, which I don't doubt that they are, but I don't think character is an issue in this trial.

I thought where we left this in January was whether the operation in this case constituted gambling or not. I don't know why character comes into play for that, so I would ask that we either limit to maybe one character witness or not have any character witnesses in this case because I don't think it's really relevant to any issue that the trier of fact would be trying.

THE COURT: Thank you. Let me–just before I hear a response, we are proceeding, it looks like on–and I've got Bruce Zitka's felony information and it's dated January 27, 2016. Just so I make sure I have the counts all correct. Is that everyone's understanding, because I know sometimes they're amended and sometimes I don't get the amendment right away.

MR. GRANO: Those are the proper counts, Your Honor. I do think it was amended since then to just narrow the date range to 2016.

THE COURT: Okay. But the counts are the same?

MR. GRANO: The counts are correct.

THE COURT: It looks like in regard to Susan Zitka, it's also January 27, right?

MR. GRANO: Correct.

THE COURT: All right. Thank you. Response in regard to character witnesses?

MR. DODGE: Thank you, Your Honor. Your Honor, Bruce and Susan Zitka are each charged with multiple felony counts, ten year as well as potential consecutive computer charges, so under rule 405, reputation or opinion, A, in all cases in which evidence of character or trait of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross examination inquiry is allowable into reports of specific instances of conduct.

Your Honor, we noticed out and subpoenaed–we have had a lot more–but four each. We have eight persons under subpoena. All the subpoenas, the witness' statements, I asked each of them to e-mail them to our office and the emails were sent as received to Mr. Grano over the past several weeks, so I believe that the relevant character traits, at a minimum, would be truthfulness since I anticipate both Bruce and Susan Zitka will be testifying, and also, Your Honor, reputation and opinion as law-abiding citizens, so that other statement, arguably, could also be admissible, but at a minimum I'm proposing that we present four witnesses for each defendant on those two relevant character traits under 405, and under–

obviously under 608 would be the truthfulness as well because they're both going to testify.

THE COURT: Just one moment and, counsel, I'll give you an opportunity. Sir, you addressed 405, but you looked at A. When we look at B, specific instances of conduct, it says, in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

When reading this as a whole, and in looking at relevance, I do not know how any character witnesses are relevant because when I look at the elements of counts one through six, it doesn't matter if they're a good person or a bad person, and I just heard the people say they have no doubt that your clients are good people. That's simply not an element. Many defendants are good people. They make mistake, and I don't know what happened here but I don't see any elements here that causes me to bring in character evidence. Response.

MR. RIGGS: Judge, you've taken about three-quarters of what I was going to say, but you're exactly right. Character is not a part of this. Counsel also skipped over the first rule before that, Michigan Rule of Evidence 404 which states that generally evidence of a character or character trait is generally not admissible for showing of person's action in conformity, and then for all the reasons you just got done saying.

THE COURT: Yes. Any response, for the record?

MR. DODGE: Well, Your Honor, they're both going to testify so under 608 any witness can be–present information related to character for truthfulness or untruthfulness, so at a minimum, since they're both going to testify, the witnesses should be able to be called on that trait, but more broadly, Your Honor, under 405, any time–these people are both charged with multiple felonies. Their reputation and the witness' opinion regarding them as law abiding citizens–if I'm a law abiding citizens and–on multiple felonies and I have witnesses to support that reputation or witness' opinion, it should definitely come in under 405, Your Honor. It is a relevant character trait. With the counts that they've got, they should be able to present that relevant character trait. It doesn't mean they go to church on Sunday. It just means it's a relevant character trait for people that have known them to be able to testify to.

THE COURT: Well, sir, I suspect, and I don't know their history, do they have a criminal history?

MR. DODGE: Mr. Zitka has a prior 1988, which all of his witnesses are aware of, larceny–attempt larceny offense in Muskegon. All of his witnesses know about that.

THE COURT: Okay. That wasn't really my point, but is that issue going to come up?

MR. GRANO: I was not planning on bringing that up, Your Honor.

THE COURT: All right.

MR. GRANO: However–

THE COURT: I don't think that has any bearing here unless you're going to say he lied then, he's lying now, and then maybe I would let some of those witnesses come in, but I don't–I think at this point it's–actually, I know at this point for the jury, it is up to them as to who's telling the truth, who's not, and the jury instructions reflect that. You can believe all, none, or part of any person's testimony and–so the credibility lies within the hands of the jury. At this point there's been no attack, it's not an element, and any character evidence would be bolstering any testimony of your clients, and I don't believe that it's in compliance with 404 and 405 that I allow it, so there will be no character witnesses.

You can keep them under subpoena. As the trial goes, there's always surprises. If we need to revisit it, I will, but at this point no character witnesses. If you want to do an interlocutory appeal, go ahead. I think I'm on solid ground here.

MR. DODGE: Your Honor, whenever it is convenient, if I can mark as a separate record exhibit their subpoenas and their emails that I sent to Mr. Grano, that would be the content of their testimony. It was actually broader than what they would be testifying to, but each one of them would have been testifying to reputation for truth and honesty, reputation as law abiding citizen, but that way we'll have the record completed that they were subpoenaed and the synopsis of their statements were provided to the Attorney General's office.

THE COURT: I don't have a problem with that. It would be really an offer of proof and you're making

a separate record. My court reporter knows how to do that separate record, and if you want to go through each one and make a little synopsis of what they'll testify to, we can do an offer of proof at this time and preserve it at this time. Is there any objection to that?

MR. GRANO: No objection.

THE COURT: All right. Let's do an offer of proof. Take your time. Let's go off the record.

(Discussion off the record at 9:59 a.m.)

THE COURT: We are back on the record.

MR. DODGE: Your Honor, one witness who's subpoenaed for trial this week, James Nielsen, N-i-e-l-s-e-n. Mr. Nielsen is the superintendent of schools at the school where Mr. Zitka has been on the school board for several years and at a minimum he would be testifying he's known Bruce and Susan for nearly 30 years and that all –he could testify about all of Bruce's community work including local baseball organizational boards and others and his community service on the school board, but James Nielsen, I believe, would be an important witness to be able to present. He's known both of them for almost 30 years and, given his community standing, to have him on the stand testifying that–regarding truth and honesty as well as law abiding citizens is an important part of our defense.

THE COURT: And, for the record, again, and if plaintiff–I'm sorry, people want to address, you certainly may, but, again, I would decline it on the reason it's, again, bolstering and it should be

in the hands of the jury as to truthfulness and this doesn't go to any element, so unless I hear something different, I suspect that's going to be the same ruling for all of them, but you may continue making your argument and then I'll give the people an opportunity to sum it up.

MR. DODGE: Thank you. Janet Taylor, J-a-n-e-t, T-a-y-l-o-r is a member of the Orchard View school board. She served on the school board with Bruce Zitka. She knows both Bruce and Susan. She would be testifying about truthfulness as well as law abiding citizen.

Diane L Bruursema, B-r-u-u-r-s-e-m-a, LMSW, would be testifying that show knows the two grandchildren. She actually works professionally with the two grandchildren that Bruce and Susan have guardianship of. She's made several observations of their care of their grand kids and both of them will be testifying, Your Honor, how they even got into this business. They both had their separate, free-standing careers, but when one of their grandchildren was born with a heroin addiction, it necessitated–and the daughter was totally under the radar. They had no idea that there was any heroin activity going on, and Susan left her position where she was working as a health care provider doing insurance physicals in people's homes five a.m. in the morning and all these odd hours and Mr. Zitka was working as a finance manager at a General Motors dealership and the care of a newborn and then four year old necessitated them to do something other than what they were doing before then, and that's how this first entity came about. It was in their

neighborhood and they could provide the care to these two grand kids.

She's important in terms of being able to anchor in her observations that Susan and Bruce are the legal guardians of these two young children. Right now, Your Honor, not only do we not get to present Ron Pannucci as far as the back drop, now we're going to be stripped as far as providing a context.

THE COURT: Every defendant comes to me before juries with some kind of a story, and this really is sympathy. There's no sympathy element and, in fact, they cannot rule on sympathy or empathy. This is no different than someone who's too drunk and they walk into the wrong house and break into that house to go sleep on the couch. It's still a home invasion. It may be pled down, but it still is a crime even though there may have been a good reason for it. It's sympathy, empathy, not an element. Denied. You may proceed.

MR. DODGE: Roni Alexander, R-o-n-i, Alexander, knows both Bruce and Susan for more than 20 years through community activities, youth wrestling program, and the grand children's activities. She would be testifying–Your Honor, these witnesses could testify about either Bruce or Susan so I had them divide it up four each instead of having anything more than that, but Roni Alexander is subpoenaed to be here.

Nancy Bon, B-o-n, known Bruce Zitka since he was ten years old and he enlisted in the navy, married Susan, and they raised their family.

She's known them for that many years, going on 50 years as far as what his reputation is and her opinion

Tom Jasick, J-a-s-i-c-k, director of operation, GE Aviation in Muskegon, known Bruce Zitka for nearly 60 years. He's got that many others that he knows as far as what Bruce's reputation is on relevant character traits.

Jeanne Parker, J-e-a-n-n-e, Parker, has known Bruce and Susan Zitka for more than 25 years. She's an employee of the Orchard View School. She's seen their activities including Bruce on the school board, things of that type, all kinds of communication with others that would be a basis for reputation testimony as well as her own opinion.

And then Brandy Carey, which I just discovered, I don't have a hard copy of this, Your Honor, so my office was going to e-mail it to Mr. Grano this morning, B-r-a-n-d-y, C-a-r-e-y, same long term relationship, primarily be testifying about Susan and her reputation and Ms. Carey's opinion regarding truthfulness and honesty as well as Susan being a law-abiding person.

If I can just check with my clients to make sure I offered each witness, Your Honor?

THE COURT: You may. Let's go off the record.

(Discussion off the record at 10:07 a.m.)

THE COURT: Just a minute. We're back on the record. I'm sorry, those were the eight?

MR. DODGE: Yes, Your Honor.

THE COURT: All right. Same ruling. It looks like it's really reputation, truthfulness, honesty. There's no compliance here that I see with 404 and 405.

Should we end up going to a sentencing, these are perfect people to come and testify to me, I certainly would allow that in regard to sentencing considerations. However, for the trial this testimony is certainly out of bounds and not relevant and violates the Rules of Evidence, as far as I can see. I certainly will now let the people address this, but my ruling stands. We'll allow, unless there's an objection, those subpoenas, one through eight or A, B, C, et cetera, however you want to number them, I will admit those to go with this separate record for the Court of Appeals, if you want that, but since they are excluded, I would invite them, should we go to sentencing, if they want to educate me on more information here, but for these elements, there's not one of these that fit into an evidence solicited regarding the Norton Shores city attorney case, the civil nuisance abatement at the Landing Strip. The people have instructed all of our witnesses, I just want to remind defense, especially since the defendants are going to be testifying, that we're going to stay away from that issue per the pretrial order. Other than that, the people are ready to proceed.

MR. DODGE: Staying away from that issue, end of quote, Your Honor, these folks never had a cease and desist letter. If they would have had any notification when they opened their first place, they would have went and hired the family law firm, Ron Pannucci's office, and that office has represented them like on some type of issue

relating getting their phones hooked up or whatever their internet connection was, that he would have been right there the same way he was with Norton Shores, so are they going to testify about, quote, Norton Shores, no? Are they going to testify if they had any information, any question that clouded whether they were doing things okay, they would have done what they did, they would have gone and talked to Attorney Pannucci and they would have litigated it.

THE COURT: You know what, I think that's okay. You just need to stay away from that other issue. They could say, I never knew, we never knew that this was illegal. They can say that. They're subject to cross examination of whatever they say. I think that's fair game, but rather than saying–mentioning the other letter, I think we're good.

MR. DODGE: But, Your Honor, on that, okay, what would they have done? What would you have done? We would have contacted an attorney to ascertain whether or not what we were doing was okay. If it weren't, we wouldn't be doing it. The state never sent us a letter, so we open up number two and three and they've taken a triple loss here instead of just litigating, the AG office, on one case the way they would have done. They've got to have that. I mean, Your Honor, that's just part of the basic history of the case and part of both of their testimony, as I anticipate it.

THE COURT: Response.

MR. GRANO: Your Honor, the order is specific. They can't talk about the City of Norton Shores saying that this was a legal operation. If they want to say they didn't know–

THE COURT: Right.

MR. GRANO:–that this was illegal, they can say that and I'll cross them on that on documents we found in their house. That's fine.

THE COURT: I think all of what you said does come in. It's a question–the order is specific as to Norton Shores so I don't have a problem with what you just said and they're subject to cross examination.

MR. DODGE: Well, Your Honor, there's a boundary issue that would be better addressed now rather than having it objected to in addition to what was just said. One of the agents, John Schaufler, was confronted by Susan Zitka back in '16 saying I know who you are, you're from the state, contact our attorney, he'll tell you what happened with Norton Shores.

MR. GRANO: Your Honor, I've been–

MR. DODGE: She–

MR. GRANO: Just as an offer of proof, I wasn't going to put that date into evidence and I've instructed Mr. Schaufler that we're not talking about anything that happened with Norton Shores and we're going to talk about the day he went in there and played the games and that was it because we're limited by that order, and he's been instructed we're not getting into that Norton Shores stuff.

He understands that and we're not going to go near it.

MR. DODGE: But what about being confronted by one of the defendants and saying, call our lawyer?

THE COURT: He can say call the lawyer. The only thing they can't testify to is Norton Shores. If she said, call the lawyer, that's what she said, it's evidence.

MR. DODGE: Okay.

THE COURT: Does that make sense? I don't think that line is blurred. Anything else?

MR. RIGGS: Judge, just since Mr. Schaufler is not going to be questioned by us about it, to inquire of Mr. Schaufler about what the defendants said, that's hearsay, and we aren't going to go into that, and because it relates to the Norton Shores matter, he should not be going into it. If his client wants to get on the stand and say–I don't know what she'll say, I don't really care what she's going to say, but my point is he can't open the door on that because the court's already ruled we're not going into the Norton Shores matter. We're not relitigating that, and the Court of Appeals agreed with you.

THE COURT: Right. We are not dealing with Norton Shores, and if there is an issue of hearsay, make your objections, but we need to steer clear of Norton Shores. I would think that's in everybody's best from.

MR. GRANO: Thank you.

THE COURT: Anything else? On behalf of defendant, sir?

MR. DODGE: Your Honor, under–just on the selection of the jury, I just want to make sure I've got this right, under 6.412, peremptory challenges, E, I believe Bruce and Susan would each be entitled to five so I just wanted to clarify that we have 10 peremptory challenges, Your Honor–up to 10. Obviously we wouldn't necessarily plan to use 10 but just to make sure–

THE COURT: That is the rule, as I recall. It's 12 if there's one, 10 if there's two, right?

MR. DODGE: So that–since it's not a life imprisonment or offense, Your Honor, each would be entitled to five so I'm assuming that we have 10 and then I can use up to that number of peremptory challenges when we pick the jury.

THE COURT: Let's see, person is five. I'm looking at the peremptory, five, you're right, this isn't life, so five per person. I don't have a problem with five, regardless.

[. . . .]