STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2013
v	No. 303102 Wayne Circuit Court
MICHAEL JEROME MORRIS, Defendant-Appellant.	LC No. 10-001225-FH

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of conducting a criminal enterprise, MCL 750.159i(1), conspiracy to commit false pretenses involving a value of $20,000 or more, MCL 750.157a, and three counts of false pretenses involving a value of $20,000 or more, MCL 750.218(5)(a). Defendant was tried jointly with codefendant William Theartist Perkins, who was convicted of the same offenses. Defendant and codefendant Perkins were each acquitted of additional charges. The trial court sentenced defendant to concurrent prison terms of 70 months to 20 years for the criminal enterprise conviction and 5 to 10 years each for the conspiracy and false pretenses convictions. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant was convicted of engaging in a scheme with codefendant Perkins to supply kiosks to churches in the Detroit area through an entity known as Television Broadcasting Online ("TVBO"), during which church officials were led to believe that the kiosks would be provided at no cost to the churches and that all costs would be assumed by national sponsors. Although defendant and codefendant Perkins were situated in Washington, D.C., they came to the Detroit area to make presentations and to assist in supplying the kiosks to churches. Bishop Henry Washington, who was involved in local business-orientated support for churches through the Office of Ecclesiastical Council, was enlisted to market TVBO's kiosk program in the Detroit area. According to Washington, defendant explained to him that a church could receive a kiosk at no cost to the church because sponsors would pay for the cost of the kiosks. At various presentations explaining the program, church officials were invited to submit applications to participate in the kiosk program. If the church qualified, a kiosk would be delivered to the church.

The prosecution presented evidence that at the time of delivery, various documents were presented to church officials for signature. Among the documents was a four-year lease agreement with a leasing company. The churches were provided with funds to make the initial lease payments based on representations that the funds had been provided by sponsors. The leasing company would purchase the kiosk from TVBO and acquire the lease agreement with the church. Eventually, TVBO stopped providing funds for the lease payments and the leasing company sought collection directly from the churches, leading to a number of lawsuits. One lawsuit was filed by 20 churches against defendant, codefendant Perkins, TVBO, and other entities, and led to the entry of a default judgment against defendant. The judgment awarded money damages to the civil plaintiffs and voided the lease agreements on the basis of fraud.

II. DEFAULT JUDGMENT

Defendant argues that the trial court erred in admitting evidence of the default judgment entered against him in the civil lawsuit. Defendant argues that his failure to respond to that lawsuit constituted pretrial silence protected by the Fifth Amendment privilege against self-incrimination. Although plaintiff questions whether this issue was preserved for appeal, because the trial prosecutor raised the issue whether the Fifth Amendment precluded admissibility of the default judgment, defendant and codefendant Perkins both disputed this claim in their joint response to the prosecutor's motion in limine, and the trial court adopted the prosecutor's position when allowing the evidence. We therefore conclude that this issue is preserved.

We review a preserved claim of evidentiary error for an abuse of discretion. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013); *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217. Preliminary questions of law, including whether a rule of evidence precludes admission of proposed evidence, are reviewed de novo. *Burns*, 494 Mich at 110. Questions of constitutional law are also reviewed de novo. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself[.]" US Const, Am V. In essence, it prohibits the use of a defendant's failure to take the stand as substantive evidence of guilt. *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013). Pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the defendant's privilege against compelled self-incrimination during custodial police interrogation is further protected by the requirement that a defendant be warned of his right to remain silent and that any statement he makes may be used as evidence against him. *Clary*, 494 Mich at 265. Where a defendant has not received *Miranda* warnings and there is no reason to conclude that the defendant's silence is attributed to the invocation of the Fifth Amendment privilege, no constitutional difficulties arise from the use of a defendant silence before or after his arrest, as substantive evidence of guilt. *People v Solmonson*, 261 Mich App 657, 665; 683W2d 761 (2004); *People v Schollaert*, 194 Mich App 158, 165-166; 486 NW2d 312 (1992). Here, there is nothing in the record to indicate that defendant's failure to respond to the civil lawsuit was attributable to an invocation of the Fifth Amendment privilege against self-incrimination or reliance on *Miranda* warnings. To the contrary, defendant testified at trial that he did not defend the civil action because he could not afford to do so.

Although defendant urges this Court to find a constitutional violation based on the reasoning in *Combs v Coyle*, 205 F3d 269, 283 (CA 6, 2000), this Court is not bound to follow decisions of federal circuit courts on questions of federal law. *Abela v Gen Motors Crop*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Moreover, we note that federal circuit courts of appeals are divided on whether the prosecution's use of a defendant's pre-*Miranda* silence in its case-in-chief violates the Fifth Amendment. See *People v Shafier*, 483 Mich 205, 213 n 8; 768 NW2d 305 (2009). Instead, under MCR 7.215(J)(2), we must follow the rule of law set forth in *Schollaert* and *Solmonson* and, accordingly, reject defendant's claim of constitutional error.

Defendant also argues that the default judgment was not admissible as a tacit admission under the general principles set forth in *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). The rule in *Bigge*, like MRE 801(d)(2)(B), addresses tacit admissions, i.e., the adoption of another's statement as one's own statement. *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999); *Solmonson*, 261 Mich App at 665. As set forth in MRE 801(d)(2)(B), a statement is not hearsay if it is offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth." The *Bigge* rule precludes admission of a defendant's silence in the face of an accusation as substantive evidence of guilt because the inference of relevancy rests solely on the defendant's failure to deny the accusation. *Hackett*, 460 Mich at 213. In this case, the prosecutor did not offer the default judgment as a tacit admission, but rather as a statement of a party-opponent under MRE 801(d)(2)(A). The trial court admitted the evidence for that purpose. Accordingly, defendant's reliance on *Bigge* to establish error is also misplaced.

Relying mainly on unpublished federal authority addressing FRE 403, defendant also argues that the evidence should have been excluded under MRE 403, because any probative value was substantially outweighed by the danger of unfair prejudice. The trial court expressly considered whether the default judgment should be excluded under this rule and ruled that the evidence was admissible. On appeal, defendant has not substantiated his position that the evidence lacked probative value. We are not persuaded that the trial court abused its discretion by refusing to exclude the evidence under MRE 403.

Furthermore, we agree with plaintiff that any error in admitting the default judgment was harmless. A preserved, nonconstitutional evidentiary error does not require reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Burns*, 494 Mich at 110; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The jury's decision to acquit defendant of one of the false pretenses charges and all charges of fraudulently obtaining a signature to a financial document, MCL 750.273, persuades us that jurors were not unduly influenced by the default judgment. We disagree with defendant's argument that there is a real likelihood that the jury used the default judgment to discredit his testimony and the testimony of two other witnesses, including Washington, regarding whether Jesus Linares reneged on a financial commitment. Defendant's own testimony indicated that this financial commitment was to be made in connection with a Diversity Financial Services Network (DFN), which would serve as an umbrella organization to market financial services. Although defendant testified that the plan was for DFN to use kiosks, he also acknowledged that DFN was neither a licensed nor a functioning entity when the kiosk program began in the Detroit area. Defendant has not established anything with respect to DFN that was determinative of the prosecution's contention that he and codefendant Perkins were

attempting to procure lease agreements from churches under the guise that national sponsors existed to fund lease payments for four years.

We also reject defendant's claim that the prosecutor's brief opening statement remarks regarding the "don't care" attitude of defendant and codefendant Perkins toward the default judgment is an indication that this evidence affected the outcome. The challenged remarks suggested that the evidence could be used to show consciousness of guilt. See *Solmonson*, 261 Mich App at 666-667 (nonresponsive conduct may constitute consciousness of guilt). Examined in context, however, it is apparent that the prosecutor was not asking the jury to find defendant guilty based on the default judgment, but rather the testimony of the witnesses. The prosecutor urged the jury to "[l]isten to what the ministers have to say. Listen to what the people who work for these two have to say. And you'll be satisfied this was a terrible scam[.]"

Considering the untainted evidence, the acquittal on five charges, and the prosecutor's limited comments and arguments regarding the default judgment, it does not affirmatively appear more probable than not that the evidence of the default judgment was outcome determinative. Therefore, even assuming that the trial court erred in admitting the default judgment, the error was harmless.

III. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court erroneously scored 10 points for offense variable (OV) 14 of the sentencing guidelines, resulting in a higher guidelines range. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

A court is directed to score 10 points for OV 14 where "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring this variable, "[t]he entire criminal transaction should be considered." MCL 777.44(2)(a). The word "leader" has been defined as "one who is a 'guiding or directing head' of a group." *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880; 843 NW2d 485 (2013), quoting *Random House Webster's College Dictionary* (1997). At trial, defendant testified that he was a 2/3 owner of TVBO. Further, unchallenged information in the presentence report indicates that defendant was president of TVBO and had control over its bank accounts. This evidence supports an inference that defendant was the guiding or directing head of the criminal enterprise. Therefore, the trial court did not clearly err in scoring 10 points for OV 14.

IV. RESTITUTION

Defendant argues that the judgment of sentence should be amended to reflect the trial court's post-sentencing ruling regarding restitution. After defendant filed his brief on appeal, the trial court entered a stipulated order of restitution granting defendant the relief he requests in this issue. Accordingly, this issue is moot. *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009) (where a defendant has already received the relief he requests, the issue is moot).

V. DEFENDANT'S SUPPLEMENTAL BRIEF

A. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in a supplement brief filed by substitute appellate counsel that he was denied the effective assistance of counsel. This Court previously denied defendant's pro se motion to remand for an evidentiary hearing on defendant's ineffective assistance of counsel claims. *People v Morris*, unpublished order of the Court of Appeals, entered March 23, 2012 (Docket No. 303102). Because defendant's motion to remand was denied and no *Ginther*[1] hearing was held, our review of this issue is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Vaughn*, 491 Mich at 670. Defendant must establish that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 669; see also *Carbin*, 463 Mich at 599-600.

Several of defendant's claims involve defense counsel's failure to present additional witnesses, failure to present additional evidence regarding the connection between DFN and TVBO's kiosk program, and failure to use prior statements of several witnesses to impeach the testimony of those witnesses at trial. In support of these claims, defendant has improperly attached to his supplemental brief several documents that are not part of the record on appeal. Enlargement of the record on appeal is generally not permitted. *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Because these ineffective assistance of counsel claims lack record support, they cannot succeed. *Carbin*, 463 Mich at 600.

Defendant argues that defense counsel was ineffective for failing to elicit discrepancies between Washington's preliminary examination testimony and his testimony at trial concerning DFN.

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *Horn*, 279 Mich App at 39. When reviewing defense counsel's performance, a court should first consider whether the strategic choice was made after less than a complete investigation. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Id.* In general, the failure to present evidence amounts to ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714

[1] *People v Ginther*, 436 Mich 436; 212 NW2d 922 (1973).

(2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A failure to present evidence bearing on credibility may constitute deficient performance, *People v Armstrong*, 490 Mich 281, 290-291; 806 NW2d 676 (2011), and it is not necessary to show diametrically opposed answers in order to establish an inconsistency between a witness's trial testimony and prior statements. See *People v Chavies*, 234 Mich App 274, 281-282; 593 NW2d 655 (1999), overruled in part on other grounds in *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006).

It is clear from the record that defense counsel was aware of and used Washington's preliminary examination testimony to question Washington regarding the connection between funding for DFN and TVBO's kiosk program and, in particular, Washington's conclusion regarding the funding based on his investigation. The manner in which counsel questioned Washington and the scope of counsel's cross-examination were clearly matters of trial strategy. Defendant has not established that counsel's failure to use additional preliminary examination testimony to cross-examine Washington was either unsound or rendered counsel's performance deficient. *Horn*, 279 Mich App at 39. There is no indication that further cross-examination of Washington would have provided defendant with a substantial defense. *Payne*, 295 Mich App at 190. Indeed, a more complete presentation of Washington's preliminary examination testimony might have disclosed Washington's explanation for why he did not consider Linares to be a "sponsor" of the kiosk program, but only someone who would fund kiosk installations.

Defendant has also failed to establish that defense counsel was ineffective for failing to cross-examine Pastor Steven Essenburg regarding his preliminary examination testimony concerning an unsigned advertising contract for Brown Realty and Investment. And while defendant's counsel did not cross-examine Pastor Cleodis Wells, Pastor Willie Powell, or Pastor Richard Robinson, each of these witnesses was cross-examined by codefendant Perkins's counsel. Defendant has not sufficiently explained why further cross-examination by his own defense counsel was necessary or could have further aided his defense. Thus, defendant has not overcome the presumption of reasonable trial strategy. *Vaughn*, 491 Mich at 669.

We also reject defendant's claim that counsel was ineffective for failing to object to the authenticity of prosecution exhibit 8. The prosecutor initially introduced this document, without objection, during the testimony of Bishop Meredith Bussell, who identified the exhibit as the same type of document that was provided to him during the course of the kiosk program, with the exception of the date. A later prosecution witness, Edward Anderson, who identified himself as a regional sales representative for TVBO's kiosk program in the Detroit area, similarly identified the document as one provided to churches to explain the kiosk program. Although defendant denied in his subsequent testimony that he authorized the representations contained in the document, under MRE 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." There was sufficient testimony at trial to support a finding that exhibit 8 was what it was purported to be, namely, a document outlining the kiosk program that was provided to churches participating in the kiosk program. In addition, defendant has not established that this evidence was not relevant to the charges. MRE 401. Defendant has not established that the parol evidence rule applicable to contracts precluded the admissibility of the document. Because defendant has not shown a meritorious basis for excluding this evidence, this claim of ineffective assistance of counsel cannot succeed. Defense

counsel is not required to make a futile motion or objection. *Horn*, 279 Mich App at 39-40; *People v Fike*, 228 Mich App 178, 183; 577 NW2d 903 (1998).

Lastly, defendant argues that defense counsel was ineffective for failing to object to an apparent misstatement by codefendant Perkins's counsel during closing argument that the jury must find defendant and codefendant Perkins "guilty" of the charges if there was no intent to defraud. Although the record does not indicate why defense counsel did not object to this remark, counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *Vaughn*, 491 Mich at 670. Considering codefendant Perkins's counsel's closing argument as a whole, it is apparent that the jury would have understood that counsel inadvertently made a misstatement to the extent he suggested that an intent to defraud was not required for a conviction. Thus, defense counsel reasonably may have concluded that an objection was not necessary. Or, defense counsel was aware that the trial court would later instruct the jury that "[i]f a lawyer says something different about the law, follow what I say." Hence, defense counsel could have remained silent so as to not place an undue emphasis on the obviously errant remark. Additionally, because a jury is presumed to follow the trial court's instructions, *Unger*, 278 Mich App at 235, defendant was not prejudiced by defense counsel's failure to object.

B. SUFFICIENCY OF THE EVIDENCE

Defendant argues that he was improperly convicted of the various crimes because he did not engage in any fraud. He also contends that the disputes at issue in this case should have been resolved solely in civil proceedings and on the basis of Michigan contract law. Initially, there is no merit to defendant's argument that a person cannot be exposed to both criminal and civil liability for the same conduct. It is well established that the same act can form the basis for both criminal and civil liability. *Mich State Employees Assoc v Mich Civil Serv Comm*, 126 Mich App 797, 802-803, 338 NW2d 220 (1983). The difference lies in the burden of proof to establish the act. *Id.*

In a criminal proceeding, due process commands a judgment of acquittal where the evidence at trial is insufficient to sustain a conviction. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). When considering a challenge to the sufficiency of the evidence, an appellate court "reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

Defendant was convicted of conducting a criminal enterprise, conspiracy to commit false pretenses involving a value of $20,000 or more, and three counts of false pretenses involving a value of $20,000 or more. The jury was instructed that it could consider an aiding and abetting theory of criminal responsibility. An aiding and abetting theory requires proof that the defendant or some other person committed the crime, that the defendant performed acts or gave encouragement to assist the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission when giving aid and encouragement. *Robinson*, 475 Mich at 6.

Defendant's argument on appeal is directed only at the sufficiency of the evidence to establish the element of fraud common to the charged offenses. Defendant contends that there was insufficient evidence that he intended to defraud any church. Questions of intent are generally for the trier of fact to determine. *Burns*, 494 Mich at 117 n 39. "A defendant's intent to deceive can be inferred from the evidence, and minimal circumstantial evidence is sufficient to prove a defendant's intent." *People v Dewald*, 267 Mich App 365, 372; 705 NW2d 167 (2005). Numerous witnesses testified that they were induced to participate in the kiosk program based on representations that there would be no cost to the churches because all costs would be assumed by national sponsors. Witnesses indicated that they were not informed that the kiosks would be leased to the churches, and they were led to believe that they were signing a receipt for the delivery of a kiosk rather than a four-year lease. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to infer that defendant intended to defraud the churches through at least false representations that national sponsors would make all lease payments.

C. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor engaged misconduct by knowingly allowing several witnesses to give perjured testimony at trial, and by making improper remarks in closing argument. Because defendant did not raise this issue below or object to the prosecutor's challenged remarks, this issue is unpreserved. *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999); *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). Therefore, our review is limited to plain error affecting defendant's substantial rights. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763; *Fyda*, 288 Mich App at 460-461.

It is well established that a prosecutor cannot knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). Due process commands that prosecutors have an obligation to report to the defendant and to the trial court whenever a government witness lies under oath. *Id.* at 276. In this case, defendant merely relies on alleged discrepancies between the trial testimony and prior statements of various witnesses to support his argument that the witnesses perjured themselves at trial. Such discrepancies are insufficient to conclude either that the witnesses' trial testimony was actually false, or that the prosecutor knowingly allowed false testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Accordingly, defendant has not demonstrated a plain error.

Defendant has also failed to establish a plain error during the prosecutor's closing argument. A prosecutor is afforded great latitude during closing argument. *Fyda*, 288 Mich App at 461. A prosecutor is free to argue the evidence, and all reasonable inferences arising from the evidence, as it relates to the prosecutor's theory at trial. *Unger*, 278 Mich App at 236.

The prosecutor's argument regarding the number of witnesses who testified that they were told that there would be no cost for the kiosk program was supported by the evidence. Defendant argues on appeal that the prosecutor's argument was technically inaccurate as applied to some witnesses, because their testimony reflected an awareness of some financial obligation. To the extent that testimony implicates the accuracy of the prosecutor's argument, defendant's substantial rights were protected by the trial court's jury instruction that "[t]he lawyers' statements and arguments are not evidence" and "[y]ou should only accept things the lawyers say

that are supported by the evidence or by your own common sense and general knowledge." Thus, appellate relief is not warranted. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

We also disagree with defendant's argument that the prosecutor's characterization of an agreement between TVBO and United Leasing in April 2008 as "phony" was intended to suggest that the agreement was legally invalid. Examined in context, the prosecutor's remarks indicate that he was questioning the timing and purpose of this agreement. The prosecutor later argued in rebuttal argument that the jury should consider the entire "scam" and he implored the jury to consider the evidence. A prosecutor need not state his argument in the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Examined in context, the prosecutor's use of the word "phony" was not clearly improper. Moreover, any perceived prejudice could have been cured by a timely objection and curative instruction. *Unger*, 278 Mich App at 235; *Dobek*, 274 Mich App at 66. Indeed, the trial court's jury instructions that the lawyer's statements are not evidence was sufficient to protect defendant's substantial rights. *Bahoda*, 448 Mich at 281. Accordingly, there was no plain error affecting defendant's substantial rights.

Defendant also argues that the prosecutor made misleading and false statements regarding whether a relationship existed between the kiosk program and DFN. The essence of the prosecutor's argument was that DFN provided a "convenient little story" for defendant, but it did not work because defendant continued to market kiosks after it was known that there would be no money coming from DFN. Defendant has failed to establish that the prosecutor's argument exceeded the bounds of a proper argument based on the evidence. *Unger*, 278 Mich App at 236. Further, we are not persuaded that the prosecutor's remarks regarding whether the checking account activity for TVBO reflected payments by national sponsors were improper.

D. SEQUESTRATION

Next, defendant argues that the trial court erred by failing to declare a mistrial after it became aware that a witness violated a sequestration order. Because defendant did not move for a mistrial below, this issue is unpreserved and defendant has the burden of showing plain error affecting his substantial rights. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763. We find no plain error.

Although a court is empowered to order sequestration of witnesses, the purposes of sequestration are to prevent witnesses from coloring their testimony to conform to the testimony of another witness and to aid in the detection of testimony that is less than candid. *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). Even where a sequestration order is violated, a trial court is not required to order a mistrial. *Id.* A mistrial should be granted only where an irregularity prejudices the defendant's rights and impairs his ability to obtain a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

In this case, the trial court indicated at trial that it had ordered that witnesses not discuss their testimony with any other witness during trial. Although the prosecutor informed the trial court that a prosecution witness had discussed his trial testimony with an attorney whom the prosecutor contemplated adding as a witness, the attorney was never added to the witness list and

did not testify at trial. Accordingly, we find no violation of the sequestration order, let alone an irregularity that impaired defendant's ability to obtain a fair trial. Although defendant also suggests some impropriety because the attorney offered advice to the prosecutor, defendant has not provided any factual support or legal authority for this argument. He merely questions whether the prosecutor acted on the advice and, if so, "was the advice ethical, legal, and not a violation of due process just to achieve a conviction that would aid in his and the complainants' civil pecuniary interest?" This is insufficient for defendant to meet his burden of establishing a plain error affecting his substantial rights. *Vaughn*, 491 Mich at 663-664; *Carines*, 460 Mich at 763.

Affirmed.

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