STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 1, 2013
v	No. 281248 Sanilac Circuit Court
THOMAS JAMES EARLS, Defendant-Appellant.	LC No. 05-006016-FC

Before: K.F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of safe breaking, MCL 750.531, second-degree home invasion, MCL 750.110a(3), receiving or concealing stolen firearms, MCL 750.535b, and receiving or concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to a prison term of 3 to 30 years for each conviction, to be served concurrently. In a prior opinion, we vacated the trial court's order denying defendant further appointment of appellate counsel after original appellate counsel was permitted to withdraw, and, while retaining jurisdiction, we remanded "for either an explicit determination regarding whether defendant wishes to pursue his claim of appeal with appointed appellate counsel, or an assessment of whether defendant desires to represent himself in pursuing his claim of appeal." *People v Earls*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 281248), slip op, p 5. On remand, new appellate counsel was appointed for defendant.[1] The case is now before us for a decision on the merits of defendant's convictions and sentences. We affirm.

The underlying facts of this case are found in our prior opinion, *id.* at 1-2, and are repeated here:

[1] On May 4, 2012, this Court granted defendant's motion to proceed in propria persona but directed that appointed appellate counsel be available to serve as stand-by counsel should defendant desire his assistance. *People v Earls*, unpublished order of the Court of Appeals, entered May 4, 2012 (Docket No. 281248).

In October 2004, Randy Parrent was renting a home to Mike and Laura Flanagan. Parrent maintained a business office above the garage at that home, which he used for running the family farm. Parrent stored a safe in the office that contained "birth certificates, immunization cards for [Parrent's] daughters, two promissory notes, two old pistols, some coins, some . . . silver . . . silver certificate dollar bills, two dollar bills and between [$135,000] and $140,000 in cash." The cash was kept in $20, $50, and $100 denominations, and were bundled in purple, yellow, and red bank wrappers. Parrent was in the office on either October 29, 2004 or October 30, 2004, and the safe was present.

On October 31, 2004, at approximately 4:30 p.m., Laura left the home to go trick-or-treating. When she returned between 9:00 and 9:30 p.m., she put her children to bed and then noticed a missed telephone call from 648-2037, which she did not recognize. An AT&T employee confirmed that that call was made at 5:49 p.m., on October 31, 2004, from a pay telephone at a local business known as "Mr. Chips." A surveillance video showed defendant at Mr. Chips that evening around 5:50 p.m. A white Dodge Intrepid was then seen driving slowly through the neighborhood surrounding the Flanagan home between 5:30 p.m. and 6:00 p.m. Later that evening, a white car was also spotted at the home itself. At trial, the evidence showed that a white Dodge Intrepid was subsequently seized by police from defendant's home.

At approximately 7:00 a.m., on November 1, 2004, Parrent learned that the office door at the Flanagan garage was ajar. Parrent visited the office and discovered that the safe was gone. An ex-boyfriend of defendant's daughter, Carl Begley, testified at trial that defendant and Anthony Gadomski gave him $300 on November 1, 2004. At that time, Begley saw a bag with a lot of money wrapped in red, yellow, and purple wrappers in it. According to Begley, defendant stated that he and Gadomski "did the rock farm" and that they took Parrent's safe.[2] Begley further recalled that defendant explained how he and Gadomski called the Flanagan home first from Mr. Chips to ensure that nobody was home. Several witnesses testified that they learned that defendant received 60 percent of the proceeds from the safe and others saw him with large amounts of cash and two guns after the safe was taken. [Footnote in original but with different number.]

I. JUDICIAL BIAS

Defendant initially maintains that the trial judge was biased against him during the proceedings. Defendant did not file a timely motion to disqualify the trial judge "within 14 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a); see also *Davis v Chatman*, 292 Mich App 603, 615; 808 NW2d 555 (2011) (noting that a defendant who neglects to pursue a motion to disqualify in conformity with MCR 2.003 "waive[s] the issue of disqualification"). But the court rules contemplate that "[u]ntimely motions . . . may be granted

[2] Parrent had recently sold a rock farm for over $2,000,000.

for good cause shown," and a defendant's "untimeliness is a factor in deciding whether the motion should be granted." MCR 2.003(D)(1)(d).

To establish a judge's bias or prejudice, a litigant "must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The litigant must demonstrate that the judge possessed an actual, personal, and extrajudicial bias against him. *Id*. at 495-496; see also MCR 2.003(C)(1)(a).

Defendant first claims that the trial judge had a personal and extrajudicial bias against him, arising from the court's "longstanding relationship with the alleged victim's wife," for whom the judge "made a position materialize at the courthouse." The only documentation that defendant references as supportive of this bias claim is a May 2012 affidavit of defendant that he attached to a July 2012 motion to remand.[3] Defendant simply offers no specific proof about the extent or details of the alleged relationship and, thus, has failed to overcome the "heavy presumption of judicial impartiality." *Cain*, 451 Mich at 497.

Defendant also claims that the trial judge's bias manifested when the judge "allowed the alleged victim, Randy Parrent, to perjure himself concerning the loss of a home security device and . . . order[ed] Defendant . . . to pay for an alarm system which didn't exist." However, these contentions lack merit because, as explained in Part IV, *infra*, the court specifically disallowed as restitution any amount for a home security system.

Defendant next asserts that the trial judge "used the court as an instrument of fraud to enrich his female companion and co-worker." There is no evidence in the lower court record to support this allegation of fraudulent enrichment. In addition, the court rules envision judicial disqualification for a pecuniary interest only when a judge has knowledge that "the judge's spouse, parent, or child . . . or any other member of the judge's family residing in the judge's household has more than a de minimis economic interest in the subject matter in controversy." MCR 2.003(C)(1)(f). Defendant offers nothing more than speculation and conjecture that there was a relationship between the judge and the victim's wife and offers no evidence that they had a relationship of a familial nature.

Defendant next argues that several alleged, adverse actions by the trial judge are further indication of judicial bias. While defendant avers that the trial judge "suppressed [exculpatory] surveillance videos," disallowed "evidence that others conspired and may have committed the alleged crime in question," and sanctioned perjury by "numerous government witnesses," defendant has presented no specific proof reasonably tending to establish any of these

[3] Defendant's motion to remand is not properly before us because we previously denied the motion, *People v Earls*, unpublished order of the Court of Appeals, entered July 5, 2012 (Docket No. 281248), and the Supreme Court denied defendant's application for leave to appeal that order. *People v Earls*, 493 Mich 897; 822 NW2d 591 (2012). Even if we were inclined to consider the affidavit, it merely avers on the basis of unidentified hearsay declarants that "according to courthouse employees, and an officer of the court, [the trial court] made a job materialize at the courthouse which previously didn't exist."

contentions. Defendant also incorrectly states that the trial judge did not permit him "to address the jury about the miscarriage of justice." The judge allowed defendant to testify in his own behalf at trial and only precluded defendant from addressing the jury during closing arguments. Since defense counsel was representing defendant during closing arguments, we perceive no error. See *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996), quoting *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994); *United States v Tucker*, 773 F2d 136, 141 (CA 7, 1985). Further, defendant provides no authority in support of his position that he should have been allowed to address the jury during closing arguments. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Moreover, "[j]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003) (internal quotation and citation omitted). Similarly, "[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester, Mich Lodge No 2225 of Benevolent & Protective Order of Elks of USA*, 228 Mich App 20, 39; 577 NW2d 163 (1998). "Repeated rulings against a litigant, even if erroneous, are not grounds for disqualification. The court must form an opinion as to the merits of the matters before it. This opinion, whether pro or con, cannot constitute bias or prejudice." *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001) (internal quotation and citation omitted). None of the actions defendant complains of on appeal displayed "a deep-seated favoritism or antagonism that would make fair judgment impossible," and we located no such rulings in the record. *Gates*, 256 Mich App at 440. To the contrary, the transcripts of the lengthy trial reveal that the judge remained solicitous of defendant and defense counsel throughout the trial and affirmed most of defense counsel's many objections.

Finally, defendant argues that the trial judge's failure to disclose his reasoning for granting defendant's posttrial motion for the judge's disqualification requires a presumption that the preceding judicial process was impaired. We disagree.

Because the trial judge stated in his order that he was disqualifying himself on the sole basis that "Defendant now contends in post conviction motions that I am biased against him," defendant's argument that no reason was provided is not supported. Importantly, however, the trial judge did not admit that defendant's allegation of bias had any merit. Since the mere allegation of bias is insufficient to disqualify a judge, see MCR 2.003(C)(1)(a), we recognize that a question exists regarding whether the trial judge's disqualification was appropriate. However, we decline to address that specific question because it has not been raised by the parties.

In conclusion, defendant has not established any bias, impropriety, or good cause for the trial judge's disqualification. As a result, defendant's related ineffective assistance of counsel contention lacks merit because defense counsel need not file groundless motions in his defense. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

II. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next raises many, often-interrelated contentions that the prosecutor committed misconduct and that trial counsel was ineffective. Defendant did not assert any claims of prosecutorial misconduct or ineffective assistance of counsel in the trial court; therefore, these claims are not preserved for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

This Court considers unpreserved claims of prosecutorial misconduct only to ascertain whether any plain error affected the defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). As a result, this Court will not find error requiring reversal unless a timely curative instruction could not have cured the prejudice caused by the prosecutor's comments. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

As this Court explained in *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004):

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the [fact-finder] that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "'[T]he right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."

To establish that counsel's performance was deficient, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance" and that his counsel's actions represented sound trial

strategy. *Strickland*, 466 US at 689; see also *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007) (observing that a defense counsel possesses "wide discretion in matters of trial strategy"). This Court may not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will [the Court] use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotations and citation omitted). But because no evidentiary hearing occurred in the trial court to address any allegations that defendant's trial counsel was ineffective, this Court limits its consideration of these contentions to the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A. PROSECUTOR'S CLOSING ARGUMENT

1

Defendant's first claim of misconduct is that the prosecutor made a misrepresentation of fact, unsupported by the evidence, when he made the following statement during closing argument: "[Defendant] also indicated that as he turned around and went back, that the safe was put into the trunk of the vehicle, that he knew about the safe from Cal[e] Ho[a]g, and that it contained a couple of guns." Defendant asserts that misconduct occurred because the prosecution framed the statement to wrongfully imply that *defendant* made these admissions. Defendant accurately notes that he did not make these admissions and that, instead, the evidence concerning defendant's conduct and knowledge was introduced into the record through Begley's testimony. Thus, although the prosecutor's statement was not accurate, any prejudice from the prosecutor's misstatement was not so severe that a curative instruction would have been inadequate to cure any error. See *Unger*, 278 Mich App at 238. Further, the jury was instructed that it was to rely on its own recollection of the evidence and that the attorneys' comments were not evidence. Thus, because juries are presumed to follow their instructions, *People v Fyda*, 288 Mich App 446, 465; 793 NW2d 712 (2010), we perceive no error requiring reversal.

Likewise, defendant cannot prevail on his claim of ineffective assistance of counsel related to the prosecutor's misstatement. Assuming arguendo that counsel's failure to object could be considered as falling below an objective performance standard, defendant cannot establish the requisite level of prejudice. Had defense counsel objected, at best, the jury would have been instructed that the attorneys' remarks were not evidence. Here, the jury was eventually given this instruction, which means that a separate cautionary instruction would not have produced any different result.

2

Defendant next contends that the prosecutor misattributed some testimony to his son, Justin Earls, during closing argument and that this errant attribution also constitutes misconduct.

However, defendant's brief only (mis)quotes a portion of one sentence of the prosecutor's comments to support his position.[4] The prosecutor's relevant statement is as follows:

> *You also heard the testimony of Todd Davis indicating that* either the day after or two days after Halloween that he walked to the Earls' residence to work on the Stokely building to do something relative to the flashing . . . . And as he walked into the residence he observed [defendant] with a freezer bag full of cash, that it had multiple colored wrappers in it . . . . And that in his opinion based on what he saw by way of [defendant] counting out the money that there was somewhere in the area of $40,000 to $41,000, that he had piles, $17,000 for credit cards, $9,000 for [defendant's mother-in-law], that this was in the living room of the residence, that his son was also there, Justin Earls[,] and he also indicated that he got a big score or he got the money from the rock farm. [Emphasis added.]

Defendant mistakenly complains that the prosecutor insinuated that his son had discussed defendant's "big score." While there could be some pronoun confusion related to which "he" made the indication about the "big score," reading the statement in context reveals that the prosecutor was conveying that it was *Davis* who testified that defendant made the comment related to the "big score." This was permissible because Davis testified that defendant told him, "I got the rock farm. I finally got my big score." Consequently, there was no prosecutorial misconduct, and defense counsel was not ineffective for failing to object to the proper argument. *Brown*, 279 Mich App at 142.

3

Defendant next asserts that the prosecutor misrepresented the record in the following comments during closing argument:

> The videotape clearly shows it [the involvement of two people] as it relates to what you saw by way of the actions of those parties. The car comes in the west and pulls out of view. It doesn't just pull around or pull right up to a pump. It pulls out of view towards the pay phone as the photographs show the distance between. It stays out of view, we submit, for up to thirty seconds. *The call is made from that pay phone. There is no question that the call is made from that pay phone to the Parrent . . . residence. No question it was made to that number at that time where two people with [defendant] one of them was present*. [Emphasis added.]

According to defendant, no *testimony* showed that the car remained out of view for 30 seconds or that he or a companion made a call from the pay phone. However, defendant fails to appreciate that the video *itself* was evidence that was admitted at trial. Thus, testimony corroborating the contents of the video was not necessary. Regardless, there was testimony –

[4] Defendant in his brief on appeal asserts that the prosecutor incorrectly stated, "Justin Earls has also indicated that he got a big score or he got the money from the rock farm."

Detective James Johnson testified that, according to the video, defendant's vehicle "pulled out of view which would be in the area where the pay phone was [located]." While Detective Johnson did not specifically reference a 30-second time window, this is of little consequence since the prosecution made it clear it merely was estimating the time that elapsed by "submit[ting]" to the jury that it was "*up to* thirty seconds." (Emphasis added.)

Defendant also claims that the prosecutor improperly stated that two other individuals, in addition to defendant, were present on the videotape. This argument is unavailing. Reviewing the statement in context, it is clear that the prosecutor was referring to a total of two people being present. Elsewhere in the prosecutor's closing argument, he stated, "Look at the videotape. There are two people involved as it relates to this crime . . . ." Then moments later, the prosecutor stated, "No question [the call] was made to that number at that time where two people[,] with [defendant] one of them[,] was present." While the transcript contained different punctuation,[5] it is clear, from context, that the prosecutor was stating that there were two individuals present in the video, one of which was defendant. The fact that the transcript contains punctuation errors is inadequate to support a conclusion that defendant was denied a fair trial. And because the prosecutor's closing arguments were grounded in the trial record, defense counsel was not ineffective by failing to object to them. *Brown*, 279 Mich App at 142.

4

Defendant next submits that the prosecutor misrepresented his income level in the following passages:

> As it relates to the cash deposits, payments or purchases made by [defendant] in this time frame, deducting off the Moore and Carter $1,200, which Mr. [Brad Zentgrebe] didn't say . . . was in cash, it was a payment on the account, we submit to you it's in cash consistent with all the other [sic], but he didn't testify to that. But that total comes to $1,200 off $33,250 in cash for that time period.
>
> * * *
>
> And the Paw Paw [roofing project], I must apologize. I do not remember that $16,000 figure coming out of [defendant's] mouth. If you've heard it, refer to it. I do not recall that number being mentioned by [defendant] whatsoever . . . .

The first paragraph reflects the prosecutor's accurate summary of the trial record concerning "cash deposits, payments, or purchases" that defendant made in November 2004. Our addition of the November 2004 cash transactions of record totaled $32,558, a figure that did

[5] The transcript has the sentence as, "No question it was made to that number at that time where two people with Mr. Earls, one of them was present." Clearly, the sentence is muddled at best and flat out incomprehensible at worst. But removing the existing comma and adding the two commas as we have done makes the meaning clear.

not include defendant's $1,200 payment to Moore and Carter Lumber on November 2, 2004, which Zentgrebe had not specified was made in cash.[6]

Given the record documentation of $32,558, exclusive of the $1,200 lumber store payment, we detect no significant misstatement of the record in the prosecutor's reference to $33,250, and certainly no intentional or reckless misstatement. *Schutte*, 240 Mich App at 721. We further conclude that any error did not affect defendant's substantial rights in light of (1) the minor or negligible misstatement of the November 2004 cash transaction total; (2) the properly admitted evidence of defendant's guilt; and (3) the trial court's proper instruction that the jury had the sole prerogative to determine the facts on the basis of the evidence presented at trial, which did not include the attorney's arguments. *Unger*, 278 Mich App at 237; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Similarly, defendant's related assertion that trial counsel should have objected "when the prosecutor deliberately misrepresented Defendant's cash income" lacks merit. Even assuming that defense counsel should have corrected the minor discrepancy, we find no reasonable likelihood that an objection to the prosecutor's reference to $33,250 affected the outcome of defendant's trial, because of the de minimis nature of any misstatement and the ample, properly admitted evidence of defendant's guilt. *Unger*, 278 Mich App at 237; *Solmonson*, 261 Mich App at 663-664.

5

Defendant further characterizes as a misstatement of the record the prosecutor's declaration during closing argument that Begley had received no compensation for his trial testimony. However, when asked on direct examination if he had "received any compensation" for his testimony, Begley replied, "No, I have not." Thus, the prosecutor's statement was supported by the evidence, and defense counsel was not ineffective for failing to object to it. *Brown*, 279 Mich App at 142; *Schutte*, 240 Mich App at 721.

B. PROSECUTOR'S EVIDENCE SUPPRESSION

Defendant contends that the prosecutor withheld from him and his counsel several items of exculpatory evidence. In *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), this Court summarized the principles governing a defendant's allegation of evidence suppression:

> A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. In order to establish a *Brady* [*v Maryland*, 373 US 83, 87;

[6] The cash transactions in the record included $1,500 to Sanilac Oil, a $2,000 deposit on the trailer, a $6,000 payment to Square Deal, $7,208 for the spa, a $2,000 deposit to Chase Bank, a $2,000 deposit at Independent Bank, a $3,100 deposit to Tri-County Bank, multiple deposits at Eastern Michigan Bank totaling $5,300, $1,800 for Todd Davis's used pickup, $300 to roofing worker Begley, and $1,300 to roofing worker James Coburn.

> 83 S Ct 1194; 10 L Ed 2d 215 (1963),] violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

"Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence may make the difference between conviction and acquittal." *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998) (quotation omitted).

1

Defendant initially avers that the prosecutor withheld exculpatory records of defendant's accounts with TCF Bank. We disagree.

First, there is nothing on the record to indicate what the TCF Bank records contained; thus, defendant has not established that those bank records would have been favorable to him. Second, and more importantly, defendant offers no explanation why with reasonable diligence he could not have secured the information concerning *his own* TCF bank accounts.

In a related claim, defendant submits that trial counsel should have introduced the TCF Bank records. However, there is nothing in the record to indicate that defense counsel was aware of the records in the first place, thereby making it impossible for defendant to establish that defense counsel's performance fell below an objective standard of reasonableness. Additionally, since the contents of those records are unknown, defendant cannot show he was prejudiced from them not being admitted into evidence at trial.

2

Defendant next maintains that the prosecutor did not give "defense counsel a copy of the video of Mr. Chips Gas Station where a telephone call was made to the alleged crime scene." Defendant has not substantiated that the video from the store constituted "evidence favorable to . . . defendant." *Cox*, 268 Mich App at 448. Instead, he merely speculates that the recording "*may* have showed that someone drove up in the direction of the pay phone prior to Defendant['s] arrival," or "*may* have been relevant in providing information (i.e., identity of individuals, car/truck/etc.) after Defendant left the gas station." (Emphasis added.) And given defendant's speculation that the recording contained information favorable to him, he similarly has demonstrated no "reasonable probability . . . that the outcome of the proceedings would have" differed had the defense possessed a copy of the recording. *Id*. As such, defendant cannot prevail on his *Brady* claim.

Defendant offers the related contention that trial counsel was ineffective in neglecting to procure and introduce surveillance recordings from Mr. Chips, as well as businesses along "his route of travel from" the convenience store that "would have exonerated Defendant." But defendant has failed to establish a factual predicate for these claims that counsel provided ineffective assistance because there is nothing in the record to reveal the existence of these other

recordings or how they would have assisted his defense. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

3

Defendant next insists that the prosecutor "withheld . . . [a] police report pertaining to their investigation of Chris Ball," who was a suspect in the safe theft. Defendant has submitted an excerpt from this report that contains no information particularly favorable to the defense. The portion of the police report relevant to our consideration documents a deputy's phone conversation with Dave Hoag, who stated that Ball was known to steal "things" and that he thought "Ball would be a good place to start being that he was up the night before in the Sandusky area." However, that same report also acknowledges that Hoag later admitted to the officer that he did not know whether Ball had in fact visited the Sandusky area around the time of the safe theft.

We reject defendant's claim of a *Brady* violation on the basis of this police report excerpt. Not only does defendant fail to explain how he obtained this report the prosecution allegedly withheld, defendant also does not establish from the record evidence that the prosecutor ever had possession of this report.

Further, even if the evidence supported a finding that the prosecutor improperly suppressed this report, while Ball reportedly had a reputation for theft and may have been in the Sandusky area around the time of the safe theft, the police report regarding Ball contains no specific information reasonably tending to connect him with the theft. *Cox*, 268 Mich App at 448. Assuming arguendo that the Ball tip qualified as exculpatory evidence that the prosecutor suppressed, in light of the properly admitted evidence of defendant's guilt, he has not demonstrated a "reasonable probability . . . that the outcome of the proceedings would have" differed had the prosecutor shared with the defense the portion of the police report mentioning Ball. *Id*.

4

Defendant further argues that the prosecutor "withheld information from defense counsel and [the] jury that Todd Davis was not being prosecuted for crimes in exchange for testi[mon]y against" defendant. In support of this argument, defendant has submitted two pages from a 73A District Court register of actions, which references the Sanilac County prosecutor's October 2005 filing of domestic violence and malicious destruction of personal property charges against Davis. Defendant emphasizes that a January 11, 2006, register entry states "[r]emoved from calendar," "[s]cheduled for review," and "[r]eview date extended to after Earls trial in circuit court." However, defendant fails to offer any proof that the prosecution possessed this document or that the document reflects that there was some kind of agreement between the prosecutor and Davis.

Moreover, defense counsel extensively cross-examined Davis at trial and elicited from him, "I decided to help myself" by telling the authorities about defendant's theft of the safe when he learned that defendant had accused him of having stolen defendant's tools. Because defense counsel established that Davis had potential ulterior motives to incriminate defendant in his trial

testimony (anger at defendant, benefitting himself), defendant has failed to establish a "reasonable probability . . . that the outcome of the proceedings would have" differed had the prosecutor given this information to defendant. *Id*.

5

With respect to trial witness Peter Kanan, defendant asserts that the prosecutor withheld from him that Kanan "was arrested for" three criminal charges, including a May 2006 charge of possessing less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). Defendant maintains that this information "confirms that Pete Kanan was an addict/informant" and that, as such, his testimony "may not be truthful." However, defendant has not established that the prosecutor had possession of Kanan's arrest record and, even if it did have that information, that it did not provide the information to defendant. In fact, it is clear that defense counsel did have knowledge of Kanan's past drug usage because, on cross-examination, defense counsel asked Kanan about that topic. Kanan responded that, while he no longer was a drug addict, he was a "recovering drug addict." Thus, contrary to defendant's assertion on appeal, the jury was made aware of Kanan's prior drug addiction. As a result, defendant cannot establish any "reasonable probability . . . that the outcome of the proceedings would have" differed had the prosecutor given defendant the information regarding Kanan.

6

Defendant alleges that the prosecutor withheld information concerning Begley's criminal history. Specifically, defendant asserts that the prosecution should have disclosed to him that Begley had been convicted of destruction of personal property because that information is material to Begley's credibility. We disagree. The rules of evidence control what type of evidence can be used to impeach a witness's credibility, and while the rules allow for some criminal convictions to be used for such purposes, destruction of personal property is not one of them. MRE 609(a) provides that only convictions of crimes containing an element of dishonesty, false statement, or theft are applicable to be used as evidence of impeachment. Thus, because the crime of destruction of personal property contains none of those elements, the conviction was not impeachment evidence and falls outside the mandates of *Brady*. Moreover, even if the prosecution had provided this information to defendant, the conviction could not have been used at trial as defendant suggests. Therefore, defendant cannot show how this information would have affected the trial's outcome.

7

Defendant lastly complains that the prosecutor suppressed exculpatory information concerning trial witness Dan McGregor. With respect to defendant's allegation that the prosecutor withheld information about a police investigation of McGregor for a 2004 theft of "a safe . . . taken from [McGregor's] grandma's house," defendant has presented no documentation substantiating this allegation and no evidence that the prosecution was aware of or possessed information related to this alleged police investigation. Thus, defendant cannot establish a *Brady* violation.

Defendant further alleges that McGregor had served a prison term for a "narcotics [conviction] in or around 1998" and that this information should have been provided to him. However, as discussed earlier, only crimes involving elements of dishonesty, false statement, and theft are able to be used to impeach a witness's credibility. As such, defendant was not entitled to this information, it was not admissible at trial to impeach McGregor, and defendant cannot establish any prejudice from not having this information.

C. OTHER INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

1

With respect to Davis, defendant maintains that trial counsel was ineffective for failing to impeach his testimony with a police report. However, defendant attached only one page of the police report to his brief on appeal. Because the complete report is not in the record, we cannot determine the soundness of defense counsel's strategy, assuming he had a copy of the report. As a result, defendant cannot establish that defense counsel was ineffective. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant additionally avers that trial counsel was ineffective for failing to present the testimony of Larry Shay and Billy Seales and evidence of Workers Compensation records, all of which allegedly would have impeached Davis. However, defendant does not point to anything in the record to indicate what these witnesses and records would have revealed. Thus, defendant cannot establish any prejudice from this evidence not being presented, and his claim of ineffective assistance of counsel fails. Moreover, "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks omitted).

2

Defendant complains that trial counsel should have questioned Gene Bucholtz, a private investigator for the defense, about McGregor's alleged repeated admissions to Bucholtz "that he was making misrepresentation[s] of material facts to help the government procure the conviction of Defendant." Again, there is nothing in the record to indicate that these admissions took place. As such, defendant cannot sustain a claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6.

3

Defendant insists that his counsel ineffectively cross-examined Begley. Specifically, defendant first asserts that defense counsel "should have testified at trial concerning what" Begley had told him during a pretrial interview. However, this argument is meritless since attorneys are prohibited from testifying at a trial in which they are also representing someone else. *People v Petri*, 279 Mich App 407, 417; 760 NW2d 882 (2008); citing MRPC 3.7(a). Defendant also maintains that his counsel should have "obtain[ed] the police report where Officer James Wagester interviewed Begley in 2005." Similar to defendant's other claims, he has not pointed to anything in the lower court record that would detail the existence, let alone the

content of, this police report. As such, defendant's claim of ineffective assistance of counsel is deemed waived. *Davis*, 250 Mich App at 368.

4

Defendant submits that his trial counsel inexplicably failed to pursue the defense "that Chris Ball, Cale Hoag, and others conspired and may have committed the theft of . . . Parrent's property." However, this issue is insufficiently briefed. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kelly*, 231 Mich App at 640-641. Defendant in his brief generally avers that other evidence exists to vindicate his innocence, but he fails to specify exactly what this evidence consists of. The only specific items he references is that (1) he was not allowed to testify that Hoag made the call from Mr. Chips and (2) other video recordings would show that he did not commit the crime. Regarding the first point, defendant did testify at trial, where he stated that he did not recall seeing anyone else using the pay phone at that time.[7] Thus, defendant's assertion that he was denied the opportunity to testify at trial that Hoag used the phone is meritless. Regarding the second argument, defendant has offered no factual basis for the contention that any other surveillance recordings existed, let alone any that would have implicated others or exonerated him. *Hoag*, 460 Mich at 6.

5

Defendant claims that his trial counsel was ineffective when he did not allow defendant to testify related to several topics. But there is nothing in the record to support defendant's position that counsel precluded defendant from testifying related to any topics. Without any factual support in the record, the issue is considered waived. *Davis*, 250 Mich App at 368.

6

Defendant next alleges that his counsel "collu[ded] with the prosecutor" to "manipulate the truth seeking process by submitting evidence . . . that was false." In support, defendant points to his statements during the sentencing hearing that he possessed "two tape recordings that . . . can prove" his allegation that defense counsel had "collaborated and lied." However, the contents of those tapes is not ascertainable from a review of the record; therefore, defendant has not produced any evidence that establishes factual support for this claim of ineffective assistance. *Hoag*, 460 Mich at 6.

III. SELF-REPRESENTATION

Defendant avers that the trial court erred in refusing to allow defendant to represent himself at the sentencing hearing. In *People v Dunigan*, 299 Mich App 579, 587; ___ NW2d

[7] In fact, defendant also testified that it was possible that Gadomski, who was in the car with defendant, had used the phone during this time.

___ (2013), this Court reiterated the legal principles governing a defendant's request for self-representation:

> The right of self-representation is secured by both the Michigan Constitution, Const 1963, art 1, § 13, and by statute, MCL 763.1. The right of self-representation is also implicitly guaranteed by the Sixth Amendment to the United States Constitution. To invoke the right of self-representation: (1) a defendant must make an unequivocal request to represent himself, (2) the trial court must determine that the choice to proceed without counsel is knowing, intelligent, and voluntary, and (3) the trial court must determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business. [Internal quotation and citation omitted.]

In August 2007, defendant filed a handwritten notice of hearing concerning a "Motion for Relief from Judgment and Notice that counsel Dave H[e]rrington is no longer representing defendant/prisoner [and] request for stand-by counsel [to] be appointed by the court," with a two-page "notice" that summarized Herrington's deficiencies purportedly constituting ineffective assistance of counsel. Defendant also filed a 40-page (exclusive of appendices), handwritten motion for relief from judgment further detailing his ineffective assistance of counsel claims. In the midst of an August 2007 "petition" that defendant filed, he mentioned, in pertinent part, "If the court has a [sic] evidentiary hearing, then the defendant requests appointed stand-by counsel in accord with MCR 6.505(A)." However, we located nowhere in any of defendant's posttrial, presentence filings a clear and unequivocal expression of his desire to represent himself at sentencing.

Defendant's motion sought to have "stand-by counsel" appointed. There is no right to hybrid representation through stand-by counsel. *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003). Accordingly, defendant's request was properly denied on this ground alone. Further, even if defendant's request was considered a request for self-representation, it was not clearly erroneous for the trial court to conclude that allowing defendant to proceed would have unduly disrupted the proceeding. At sentencing, where defendant argued his motion, he repeatedly interrupted and castigated both the trial judge and Herrington in unfounded and unprofessional language. Defendant failed to adhere to the trial court's repeated instructions and, instead, continued his diatribe, resulting in him being removed from the courtroom and taken to the arraignment cell to follow the proceedings on closed circuit television. Notably, at no point during this proceeding, did defendant ever voice an unequivocal desire to represent himself.

Because defendant failed to "make an unequivocal request to represent himself" and because defendant's behavior at the sentencing hearing established that his self-representation would have disrupted, unduly inconvenienced, or burdened "the court and the administration of the court's business," we conclude that defendant did not demonstrate his entitlement to represent himself during sentencing. *Dunigan*, 299 Mich App at 587.

IV. ACCURACY OF INFORMATION AT SENTENCING

Defendant argues that the trial court improperly proceeded with sentencing on the basis of inaccurate information, including Parrent's alleged perjured account that defendant stole a home security system. We conclude that defendant is not entitled to any relief.

In *People v Waclawski*, 286 Mich App 634, 689-690; 780 NW2d 321 (2009), this Court summarized the following relevant principles governing review of a defendant's challenge to information contained in a PSIR:

> At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. MCL 771.14(6); MCR 6.425(E)(1)(b). The information is presumed to be accurate, and the defendant has the burden of going forward with an effective challenge, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge. When the accuracy of the presentence report is challenged, the trial court must allow the parties to be heard and must make a finding as to the challenge or determine the finding is unnecessary because the court will not consider it during sentencing. MCR 6.425(E)(2). [Case citations omitted.]

Defendant objected at sentencing that the PSIR contained erroneous information from Parrent, who in his victim impact statement had requested that defendant repay him $3,000 for a home security system. Because defendant failed to comply with MCR 7.212(C)(7) and provide a copy of the PSIR to this Court, the issue is not properly presented for review, and we decline to address it. In any event, it is clear that the trial court did not order restitution for the security system because it explicitly stated that the $138,300 restitution amount it imposed "does not include [money for] a security system."

V. INVESTIGATORY SUBPOENAS

Lastly, defendant claims that the Michigan Supreme Court erred in a prior, interlocutory appeal in this case, where it rejected defendant's challenges to several investigatory subpoenas directed to other individuals. In the prior interlocutory appeal, this Court affirmed a trial court order suppressing "investigative subpoenas issued in violation of MCL 767A.1 *et seq*." *People v Earls*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 2006 (Docket No. 267976), slip op, p 1. Our Supreme Court, in *People v Earls*, 477 Mich 1119; 730 NW2d 241 (2007), reversed this Court's opinion in an order stating:

> In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we remand this case to the Sanilac Circuit Court for further proceedings not inconsistent with this order. The Court of Appeals clearly erred in affirming the ruling of the Sanilac Circuit Court that suppressed evidence seized in violation of MCL 767A.1 *et seq*. This Court has held that where, as here, there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied. The Legislature has given no indication in the text of MCL 767A.1 *et*

seq. that the drastic remedy of exclusion of evidence was intended for a statutory violation. *The Court of Appeals also clearly erred in holding that defendant has standing to challenge the admission of records held by third parties. As a general rule, criminal defendants do not have standing to assert the rights of third parties.* [Citations and quotations omitted; emphasis added.]

We decline defendant's invitation to revisit our Supreme Court's 2007 ruling concerning investigatory subpoenas and to "[a]pply the exclusionary rule to the instruments obtained by the prosecutor via the bogus subpoenas" because (1) "[a]n elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of th[e] [Michigan Supreme] Court is binding upon lower courts," *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987), and (2) the law of the case doctrine precludes this Court from revisiting legal issues previously decided in the same case, even "without regard to the correctness of the prior determination," *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher