STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2013
v	No. 295538 Mecosta Circuit Court
JONATHON JOSEPH GOOD, Defendant-Appellant.	LC No. 08-006437-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of safe breaking, MCL 750.531, seven counts of breaking and entering with intent to commit a larceny or felony, MCL 750.110, first-degree home invasion, MCL 750.110a(2), two counts of armed robbery, MCL 750.529, unlawfully driving away a motor vehicle (UDAA), MCL 750.413, two counts of conspiracy to commit first-degree premeditated murder, MCL 750.316 and MCL 750.157a(a), two counts of assault with intent to murder, MCL 750.83, attempted murder, MCL 750.91, witness intimidation, MCL 750.122(7)(c), criminal enterprise, MCL 750.159i(1), and seven counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because the trial court's closure of the courtroom during an inquiry into possible juror misconduct did not violate defendant's right to a public trial, the trial court did not abuse its discretion by referring to jurors by number rather than name, and for other reasons discussed in this opinion, we affirm defendant's convictions. But, because the trial court erred by imposing attorney fees for the time period after which defendant began representing himself in the lower court proceedings, we vacate that portion of defendant's judgment of sentence and remand for a determination and imposition of court-appointed attorney costs only for assistance rendered from March 28, 2008, to March 19, 2009.

I. FACTS

The criminal enterprise charge was based on numerous crimes, including most of the other charged crimes in this case, which occurred on March 5, 2008, March 20, 2008, and March 24, 2008. The evidence showed that defendant, who was 36 years old, led a group of individuals, primarily teenagers, in carrying out the various crimes.

March 5, 2008

Alexa Zimmerman and Alec Cove testified that, together with Tom Knofsky and defendant, they broke into seven businesses in the Canadian Lakes Plaza shopping center in Mecosta County. Cove testified that all four went into A Little Bit, Barefoot Nail and Spa, and Patterson Flowers. Zimmerman indicated that she and Knofsky then returned to the car to listen to a police scanner while defendant and Cove, with whom they were communicating by "two-ways," proceeded across the street. Cove testified that he and defendant then broke into Lakeland Title, K & K Movies, Antler's Restaurant, and First Bank of Canadian Lakes, where they broke into two or three safes.

March 20, 2008

According to Cove, because the initial break-in had been so easy, he, defendant and others planned an armed robbery of the First Bank of Canadian Lakes. The plan included multiple home invasions to obtain cars so that the money would always be in two separate vehicles and the vehicles could be switched every few miles. Cove testified that he, defendant, Knofsky, Zimmerman, Hillary Allen and Amber Smith headed to Mecosta County and randomly picked a one-story home with two vehicles. Allen testified that defendant was in charge.

Teresa and Michael Korpal owned the home. Teresa testified that at approximately 2:00 a.m., three armed people[1] dressed in black and wearing ski masks jumped out of a hallway and ordered her to the floor. She protested, but eventually laid face down on the couch. Teresa maintained that the man with a mustache was in charge. Michael testified that there were five individuals, three male and two female,[2] and that all but the leader were teenagers. Amber Smith remained in the car. Duct tape was used to bind and gag the Korpals. Ultimately, the robbers got the Korpals to promise not to call the police until 3:00 p.m. and told the Korpals that they were putting pipe bombs on the doors that would not be disabled until noon. They put a fake pipe bomb on one of two doors with a note in Knofsky's handwriting saying that it would "blow" if the door was opened before a specific time. The group then left, taking the Korpals' 2000 gold Ford Windstar van, some cash and coins, and other miscellaneous items. The Korpals freed themselves and, despite the phone cords having been cut, figured out a way to call the police.

March 24, 2008

Cove testified that after they left the Korpals, he expressed that he did not want to go through with the bank robbery and defendant agreed to call it off. They retrieved some supplies from the Korpals' van but left some things behind. Defendant and Allen were en route to Mecosta County to try to retrieve the items when Cove informed them that the van had already

[1] According to Cove, the three people were defendant, Knofsky, and Allen.

[2] Cove testified that he and Zimmerman joined the group inside.

been found. According to Cove, defendant decided that their problem could be solved if Knofsky killed the Korpals and directed that the Korpals be killed.

Cove testified that he, Knofsky, and Cody Bodo proceeded to the Korpals with an M-16. Cove broke a window, and Bodo was going to throw an artillery shell inside to startle the Korpals, but it went off outside. Knofsky planned to go inside to shoot the Korpals, but began shooting through the window when he discovered that the doors were locked. Cove estimated that after eight to ten shots were fired, they ran back to the car. Teresa Korpal was stuck once in the upper thigh, lower buttock.

II. LEGAL ANALYSIS

A. EXCLUSION OF THE PUBLIC DURING TRIAL

The trial court proceedings were closed to the public on three occasions. We conclude that defendant waived his argument with respect to the first and third closures and that the second closure did not violate his right to a public trial.

1. FIRST CLOSURE (PRELIMINARY VOIR DIRE)

On the first day of trial, the trial court indicated that it would begin voir dire by individually questioning prospective jurors in the jury room, and that a record would be made but the proceeding would be closed to the public. The court noted that there had been widespread publicity about the case, as well as publicity about defendant's escape from jail after he was arrested on the subject charges, and reasoned that discretion and privacy would encourage candor, more fully enable exploration into what potential jurors knew, and decrease the chance that prospective jurors would be influenced by the press or other prospective jurors being questioned. The closed voir dire was to be limited to what was known about the case, health issues, and potential witnesses who prospective jurors might know, and was to involve only challenges for cause. Voir dire was then to continue in open court. The trial court opined that this manner of conducting voir dire balanced the interests of the press against defendant's Fifth and Sixth Amendment rights to a fair trial. Defendant acknowledged the public's First Amendment right of access to a criminal trial, see *Globe Newspaper Co v Superior Court*, 457 US 596, 603-606; 102 S Ct 2613; 73 L Ed 2d 248 (1982), but affirmatively approved of the trial court's balancing of his right to a fair trial against the public's and/or his right to a public trial.

The right to a public trial extends to voir dire. *People v Vaughn*, 491 Mich 642, 650-652; 821 NW2d 288 (2012). Moreover, in *Vaughn*, 491 Mich at 657, the Michigan Supreme Court rejected this Court's conclusion that the Sixth Amendment right to a public trial could be waived by the failure to assert it at the time of closure. The Court held that the failure to assert the error merely results in forfeiture. In this case, however, defendant intentionally relinquished his right to a public trial, thereby waiving it. See *id.* at 663. Although defendant asserts that he did not understand that he had a Sixth Amendment right to a public trial, in *Vaughn*, 491 Mich at 657, the Court held:

> Neither the Supreme Court of the United States nor this Court has held that the Sixth Amendment right to a public trial is so fundamental to the

> protection of a defendant's other constitutional rights that it falls within th[e] exceedingly narrow class of rights that are placed outside the general preservation requirements and require a personal and informed waiver. . . .

Accordingly, the waiver was effective. "A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right." *Vaughn*, 491 Mich at 663.

2. SECOND CLOSURE (INVESTIGATION OF JURORS)

On the 21st day of trial, the trial court questioned each juror individually in the courtroom with only the parties, their attorneys, and court personnel present. Based on some jurors' conduct, expressions and gestures, there was a concern that they were improperly communicating about the case and/or deliberating. The questioning established that some talking or whispering and other distracting behaviors had occurred, especially with respect to juror number three. There were no reports of comments on witnesses' testimony, however, or of jurors' attempts to influence other jurors regarding the case.

Defendant objected to the closure of the courtroom. Whether the trial court violated defendant's right to a public trial by closing the proceeding presents a question of constitutional law that we review de novo. *Vaughn*, 491 Mich at 649-650.

In *People v Feagin*, 34 Cal App 4th 1427, 1438-1439; 40 Cal Rptr 2d 918 (1995), the court interviewed jurors in chambers during deliberations after being advised that one juror had prejudged the case and was not following jury instructions. The defendant objected to the closure and, on appeal, argued that his right to a public trial had been violated. The court held:

> [T]he proceeding involved here is not one which the public or the defendant has a right to attend. It has long been recognized that the trial of the action, so far as the term "public trial" is concerned, consists in the proceedings for the impanelment of the jury, the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury and the return of the verdict, but does not include conferences between court and counsel where the subject matter of the conferences between court and counsel was a question or questions of law, and not matters advanced for consideration of the triers of fact. The accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him or her. [*Id.* at 1438-1439 (quotation marks, citations, and brackets omitted).]

In *United States v Ivester*, 316 F3d 955 (CA 9, 2003), the trial court questioned a juror in a closed courtroom about comments regarding safety concerns. Thereafter, the trial court questioned the entire jury about safety concerns in a closed courtroom. On appeal, the appellate court stated:

> [Q]uestioning the jurors to determine whether they felt safe is an administrative jury problem. The closure here did not infect any witness's testimony. It did not even infect counsel's opening or closing arguments to the

> jurors. It did not attack the government. . . . Additionally, the questioning of the jury was very brief in duration. This further supports our conclusion that the closure does not implicate Ivester's right to a public trial. . . . [*Id*. at 960].

In *United States v Edwards*, 823 F2d 111 (CA 5, 1987), the trial court twice questioned jurors individually in chambers during trial. The first time occurred because the court learned that one juror had informed another that during a previous trial resulting in a mistrial the jurors had been "paid for voting acquittal." The second time occurred because one juror reported that another juror had referenced what might have been an attempted bribe. Three news organizations claimed that the First Amendment right to a public trial had been violated. Of import here is the following discussion explaining the value of closing the courtroom during such questioning:

> Experience and logic do indeed provide the reasons why midtrial proceedings involving the questioning of jurors have traditionally been closed to the public: holding such proceedings in open court would itself introduce an element of bias and would substantially raise the risk of destroying the effectiveness of the jury as a deliberative body. Whenever one juror reports the potential misconduct of another, the jury as an institution is instantly cast in jeopardy. It is vitally important to all parties, and it is the duty of the court, to ascertain whether the "offending" juror is biased and whether a taint of bias has affected other jurors. This process is different in several respects from the other types of proceedings found by the high court to be presumptively open—differences not of degree, but of kind. Wrenched from their neutral posture, the jurors themselves are suddenly cast on the defensive, facing counsel who are now their cross-examiners, a most difficult situation for all. During voir dire of potential jurors, counsel is armed both with challenges for cause and with peremptory challenges; counsel can probe to elicit indications of bias. Here, the jury, with a limited number of alternates, is fixed. At the risk of alienating sitting jurors, counsel must delicately ascertain whether bias now infects one or more of them, a task made doubly difficult when the juror accused flatly denies the claim. This process itself can create undesirable bias against the defendants whom counsel represent. The deleterious effects can only be exacerbated by requiring jurors to "defend" themselves in open court. As the process takes on an adversarial nature, counsel will likely demand recusals, even of those jurors whom they believe were not biased before the proceeding. The potentially divisive effects on relationships between jurors would be exacerbated by a "public hearing." If involved jurors are retained, the reservoir of goodwill between jurors, so important to reaching group consensus, is drained, thus increasing the potential that deliberations will end with a hung jury. If involved jurors are retained and the jury does convict, the defendant will almost surely contend on appeal that his sixth amendment right to a fair trial was violated.
>
> If the questioning of impaneled jurors were held in open court, there is a substantial probability that what may have begun as a "tempest in a teapot" will end in a mistrial, a hung jury, or a reversal on appeal. The interest in preserving the jury as an impartial, functioning, deliberative body is not only a higher value

> than that served by openness here, it is a *sine qua non* of our system of criminal justice as envisioned in the sixth and seventh amendments. Thus, for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors. [*Id*. at 117 (footnotes omitted).]

Defendant suggests that the instant case is distinguishable because the closed proceeding in this case was not yet a misconduct hearing, but rather an exploration of whether misconduct had occurred. Defendant's argument presents a distinction without a difference. The inquiry here was whether the jurors were engaging in disruptive conduct and/or improperly commenting on witnesses' testimony or attempting to influence other jurors regarding the case. Thus, the concerns expressed in *Edwards* were applicable. In addition, defendant attempts to distinguish *Ivester* from the instant case on the basis that the closed proceeding in this case, unlike in *Ivester*, was not "too trivial" to implicate defendant's Sixth Amendment right to a public trial. Although the closed proceeding in *Ivester* was "very brief in duration," *Ivester*, 316 F3d at 960, the closure at issue here was also very brief. The closed proceeding in this case was two hours and 50 minutes long during a trial that spanned 38 days over the course of more than 10 weeks. Thus, defendant's attempt to distinguish *Ivester* is unavailing.

Further, *Edwards*, although a First Amendment case, indicates that the concern that a defendant receive a fair trial overrides the interest in a public trial. Thus, the right to a public trial is not absolute. *Presley v Georgia*, 558 US 209, 213; 130 S Ct 721; 175 L Ed 2d 675 (2010). "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id*. at 213, quoting *Waller v Georgia*, 467 US 39, 45; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Here, the trial court inquired into the jurors' conduct to determine whether they were improperly communicating about the case or engaging in improper deliberations. For the reasons stated in *Edwards* and to ensure defendant's right to a fair trial, the closure did not violate defendant's Sixth Amendment right to a public trial.

3. THIRD CLOSURE (JUROR NO. 3)

On the 25th day of trial, after a juror complained about juror number three, the trial court questioned some of the jurors who sat near her. Just as the trial court commenced questioning the jurors, defendant said: "Judge, I apologize. Did you want to exclude anyone regarding this?" The judge proceeded to excuse people who were not parties or part of the litigation teams. Thus, even if excluding the public constituted error, it was invited and any error was therefore extinguished. See *People v Nyx*, 479 Mich 112, 128 n 43; 734 NW2d 548 (2007).

B. REFERENCE TO JURORS BY NUMBERS

Defendant next argues that his due process right to a fair and impartial jury was violated and that the presumption of innocence was eroded when the trial court required that jurors be referred to by number rather than name during the initial voir dire. In granting the prosecution's motion to refer to jurors by number, the trial court reasoned that doing so would protect jurors given defendant's violent criminal history and that jurors might benefit from measures to assure that they would not be harassed by the media and others. The trial court's ruling did not

constitute an abuse of discretion. See *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000).

In *Williams*, 241 Mich App at 522-524, this Court stated:

> The courts have recognized that the use of an "anonymous jury" may promote the safety of prospective jurors, but at a potential expense to two interests of the defendant: (1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence. In order to successfully challenge the use of an "anonymous jury," the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised. [Citations omitted.]
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> * * *
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> [T]here is nothing in the record to indicate that the use of numbers undermined the presumption of innocence. There is no suggestion that jurors understood the use of numbers rather than names to be anything out of the ordinary. Thus, there was no suggestion that defendant's trial was being handled in a special way, with the resulting implication that he was generally dangerous or guilty as charged. . . .

The *Williams* Court made a distinction between "anonymous juries," where information is withheld from the parties, and referring to jurors by number. It noted that the defendant had access to the jurors' biographical information.

Defendant acknowledges that he was given all pertinent information regarding the jurors in this case. Moreover, the trial court provided the jurors with a nonprejudicial reason for using numbers instead of names, indicating that it was being done "to avoid any interference with [the jurors'] duties as a juror or any unnecessary exposure to publicity." Nevertheless, defendant maintains that the presumption of innocence was undermined because the jurors must have assumed that they were being protected from defendant since they were told that they were being protected from the public when no public was present for the first four days during the initial voir dire. There is no basis for assuming that the jurors had any such understanding. Nothing suggested that using numbers rather than names was not ordinary practice. Moreover, it does not follow that the jurors would have disregarded the explanation in favor of presuming that defendant was a threat just because the proceedings were closed during individual questioning when no member of the public would have heard references to their names. They more likely would have assumed that there was a desire to refer to them consistently throughout the proceedings. Accordingly, neither the presumption of innocence nor defendant's due process right to a fair and impartial jury was compromised.

C. ATTORNEY FEES

In response to defendant's March 28, 2008, petition for a court-appointed attorney, in which he acknowledged that he might "be ordered to repay the court for all or part of [his] attorney and defense costs," the district court appointed James R. Samuels to represent

defendant. On March 19, 2009, the trial court granted defendant's motion to waive his right to counsel and to proceed in propria persona. The court acknowledged that defendant did not want Samuels to act as standby counsel but, noting the "number and severity of the charges" and Samuels's history with the case, as well as his "fine reputation as a criminal defense attorney," the court ordered that Samuels serve as standby counsel. Over defendant's objection at sentencing, the court ordered defendant to pay $67,000 for "court-appointed counsel." The prosecution concedes that it was error to impose attorney fees for the period after defendant began representing himself, particularly when defendant objected to Samuels serving as standby counsel. Accordingly, we vacate that portion of defendant's judgment of sentence. Because MCL 769.1k(1)(b)(iii) unequivocally authorized the imposition of expenses for legal assistance rendered from March 28, 2008, to March 19, 2009, however, we remand this case to the trial court for a determination and imposition of those expenses.

D. REFERENCES TO PREVIOUS TRIAL AND CONVICTIONS[3]

Defendant next argues that his Sixth Amendment rights were violated when the prosecution referenced his statements and defenses at a previous trial related to a 1988 murder and related crimes. Defendant's convictions for those crimes had been set aside because he was not represented by and had not effectively waived counsel. Apparently, defendant then pleaded guilty to second-degree murder and was paroled on April 4, 2004, after serving approximately 16 years in prison.

Before trial in the instant case, the court ruled that the previous convictions and attendant facts could not be used as other acts evidence, but that defendant's statements to his accomplices claiming that he had previously been convicted of murder would be admissible to show that he had attempted to intimidate them. Thereafter, during his direct examination of himself, defendant detailed the 1988 crimes. He testified that when he was 16 years old he was involved in an armed robbery during which three people were shot in the leg. He explained that the next day he went to the home of Robert Worthington to steal a car and encountered both Worthington and Pierre Compau. He claimed that Compau had molested defendant's former girlfriend, implied that he therefore feared Compau, and stated that he shot and killed him. He testified that he and a friend then committed another robbery during which the same gun was fired into a wall and that his intent was to make the killing look like part of a crime spree committed by someone else.

On cross-examination, the prosecution recapped the previous crimes and resulting convictions. Defendant acknowledged that he had implicated an accomplice in the shooting of Compau when initially talking to the police and at his previous trial. Defendant also indicated that the Worthington residence witnesses had said that the perpetrator was not limping, even though defendant had a limp, and that he had used that in his defense at the previous trial. Further, defendant acknowledged that he was responsible for the crimes. Thus, the prosecution

[3] Defendant raised this argument and all the remaining arguments in his supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

established that, knowing he was responsible, defendant had offered defenses and misrepresented the true state of facts in a courtroom in front of a jury.

Defendant asserts that the prosecutor impugned him and, to the extent that he was representing himself, his "counsel," thereby undermining the presumption of innocence and shifting the burden of proof. While a prosecutor generally cannot argue that defense counsel is attempting to mislead the jury, *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991), a prosecutor is not precluded from bringing out evidence to impeach a testifying defendant and does not improperly impugn in pro per "counsel" by impeaching the defendant. Moreover, defendant did not object to the questions on this ground and never asserted that the prosecutor was engaging in misconduct by asking the questions. Thus, he has failed to establish plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant takes issue with a question about the plan to commit another robbery to make the murder look like it was part of a crime spree. The prosecutor asked, "[k]ind of like what you're accused of doing with the Korpals, correct?" Defendant argues that the prosecutor was thereby using prior acts evidence as propensity evidence. Prior acts evidence, however, may properly be used to show a scheme, plan, or system in doing an act. MRE 404(b)(1). In essence, the prosecutor was suggesting that there was a common approach with both crime sprees. Defendant has not shown that the evidence would have been inadmissible for that purpose.

Defendant also argues that an invalid conviction cannot be introduced as evidence and that its introduction violated due process and created a jurisdictional defect. He, cites, among other cases, *Burgett v Texas*, 389 US 109; 88 S Ct 258; 19 L Ed 2d 319 (1967), and further contends that invalid convictions generally cannot be used to impeach since they lack reliability. See *Loper v Beto*, 405 US 473, 483-484; 92 S Ct 1014; 31 L Ed 2d 374 (1972). Defendant, however, was the first to bring out evidence of the underlying crimes that led to his previous conviction and the fact that he had gone to trial without counsel and "lost terribly." He does not take issue with the admission of evidence regarding the fact of the conviction, but argues that nothing that happened during the previous trial could be introduced as evidence. Defendant, however, did not object on that basis. Moreover, he has not identified any case in which evidence of admissions and defenses raised at a prior proceeding where the defendant did not have and had not effectively waived counsel was deemed constitutionally infirm. Defendant cannot simply announce a position and then leave it to this Court to search for authority to sustain or reject it. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) We note that the statements would not be subject to exclusion as hearsay given MRE 801(d)(2) (admission by party opponent). Moreover, while convictions without the benefit of counsel might lack reliability, defendant himself introduced the fact of the conviction and admitted the circumstances of the underlying crimes as well as his resulting plea. Thus, although the reliability of the initial conviction may have initially been at issue, there was no question that defendant was responsible for the crimes and that he had denied responsibility and implicated others knowing himself to be responsible. Accordingly, defendant has failed to establish plain error affecting his substantial rights. See *Carines*, 460 Mich at 764.

E. LIMITING INSTRUCTION REGARDING UNCHARGED OFFENSES

Defendant next contends that he was entitled to a limiting instruction regarding 32 uncharged res gestae crimes to the criminal enterprise charge and that the failure to give the instruction violated his Sixth and Fourteenth Amendment rights to a fair trial as well as due process of law. We note that defendant did not develop these constitutional arguments and therefore they need not be considered. *Kevorkian*, 248 Mich App at 389. We nevertheless will address defendant's claims.

> We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion. The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice. [*People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010) (citations omitted)].

In *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003), this Court stated:

> In reviewing claims of error in jury instructions, we examine the instructions in their entirety. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if the instructions are imperfect, there is no error if they fairly represented the issues to be tried and sufficiently protected the defendant's rights. [Quotation marks and citations omitted.]

The prosecution filed a document entitled "Bill of Particulars for Criminal Enterprise," which documented numerous crimes that defendant committed outside Mecosta County between September 30, 2007, and March 24, 2008. The prosecution's intent regarding evidence of those crimes was to establish the res gestae of the criminal enterprise charge. The felony information indicates that counts 1 through 20 also comprised predicate acts for the criminal enterprise charge. Further, in a notice of intent to use other acts evidence, the prosecution indicated that it would offer other acts evidence regarding the dynamics of the criminal enterprise, i.e., how defendant "initiated, directed and maintained control over members of his gang," which would have overlapped with evidence regarding the crimes listed in the bill of particulars.

The trial court gave the following instruction on other acts evidence, which was patterned after CJI2d 4.11:

> You have heard evidence that was introduced to show that the Defendant committed crimes for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the Defendant used a plan, system, or characteristic scheme that he has used before or since; whether co-Defendants gained and used knowledge of the Defendant's past for any purpose; whether the alleged relationship or sexual relationship between the Defendant and Hillary

> Allen,[4] if proven, shows or is consistent with some pattern of recruiting, gaining control of, influencing or retaining younger individuals or others to perform criminal acts.
>
> You may not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crime, other are [sic] you must find him not guilty.

The trial court did not modify this instruction to indicate how the crimes listed in the bill of particulars could be used. Thus, the jury was in essence instructed to use them in accord with this instruction.

Consistent with the jury instruction on criminal enterprise, the prosecution had to establish that the 20 predicate offenses listed in the Information and the uncharged res gestae offenses had the same or a substantially similar purpose, result, participants, victim or method of commission, or were otherwise interrelated by distinguishing characteristics and not isolated acts. This is similar to showing that there was a common "scheme, plan, or system," which was a proper purpose for admission under MRE 404(b).

Had the trial court instructed that the uncharged res gestae offenses could only be considered for the criminal enterprise charge, confusion would have resulted because the criminal enterprise charge was also predicated on 20 other charges and it would not have been clear how the evidence could have been used with respect to establishing the predicate offenses. "Jury instructions must clearly present the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Admittedly, the jury instruction appeared to allow the jury to consider the res gestae offenses for the purpose of deciding counts 21 through 25 even though they were not predicate acts. The fact that they were not predicate offenses, however, would not necessarily have precluded evidence of a similar scheme, plan, or system under MRE 404(b). Defendant has failed to establish that the evidence would have been subject to exclusion with respect to any of the charges under MRE 404(b). Accordingly, he has failed to establish entitlement to the limiting instruction and has failed to establish a due process violation or that the failure to give the instruction violated his Sixth and Fourteenth Amendment rights to a fair trial.

F. POST-ESCAPE OTHER ACTS EVIDENCE

Defendant next argues that evidence of crimes committed after his escape from jail should have been excluded and that admission of this evidence violated his Sixth and Fourteenth Amendment rights and denied him a fair trial. Again, defendant failed to develop these

[4] Allen testified that defendant engaged in sexual relations with her when she was 15 years old.

constitutional arguments and therefore they need not be considered. *Kevorkian*, 248 Mich App at 389.

Defendant escaped from his maximum security jail cell while incarcerated on the current charges. The metal grate to a skylight was bent and the skylight was broken. After his escape, defendant went into a fraternity house and took a knife and a jacket with a passport inside a pocket. When he left the fraternity house, he took a car without the owner's permission. He also took a cell phone that he planned to activate and send to another state with the intent of making the police think that he was in another state. The trial court determined that the res gestae of the escape included actions taken "in furtherance of finally accomplishing a complete escape," meaning "getting away from, not being detected, carrying it out without apprehension." Further, the court denied a requested limiting instruction that would have advised that only the escape itself, and not the subsequent crimes, could be used to show consciousness of guilt, reasoning that the subsequent efforts to complete the escape could also be used for that purpose.

We review a decision to admit evidence for an abuse of discretion, but we review de novo a preliminary question of law regarding whether a rule or statute precludes the admission of the evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "Other-acts evidence may be used to negate innocent intent" and "[e]vidence of flight may be used to show consciousness of guilt." *McGhee*, 268 Mich App at 613. Moreover, "MRE 404(b) does not preclude evidence of criminal actions accompanying an escape because these actions are part of the res gestae of the incident." *Id*., citing *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995).

Defendant argues that the res gestae of the escape is comprised only of crimes intertwined with the escape, such as an assault to accomplish the escape, and not of crimes committed after the escape itself is complete. He asserts that the escape was complete after he left the jail through the skylight.

In *McGhee*, the defendant was apprehended in Georgia in 2001 after being declared a fugitive in 1998. *McGhee*, 268 Mich App at 605. When apprehended, he had false identification documents, and a gun and ammunition were found in his car. *Id.* The Court held that "the circumstances surrounding defendant's 2001 apprehension in Georgia, including his change of identity and the gun and ammunition found in his car, indicated his intent to avoid capture and were probative to negate innocent intent." *Id.* at 613. Just as the *McGhee* defendant's criminal actions indicated his intent to avoid capture, defendant's entry into the fraternity house and his theft of a gun, car, passport, and cell phone that he intended to use to trick the police into looking for him elsewhere were all actions consistent with his intent to avoid capture. Accordingly, they were properly admitted, defendant was not denied a fair trial, and there was no violation of due process or the Sixth and Fourteenth Amendments.

G. RIGHT OF CONFRONTATION

Defendant next argues that his rights of confrontation, due process, to present a defense and to a fair trial were violated because the accomplices were provided with incident reports and codefendant statements and/or had access to media accounts and opportunities to mingle, thereby enabling coordination of their renditions of pertinent events. He maintains that their testimony

was likely perjured and that the failure to prevent collusion resulted in him having nothing with which to challenge their credibility except his attempts to seek admissions that they planned to falsify their testimony and highlight inconsistencies. He suggests that his constitutional rights could only have been protected by an opportunity to cross-examine before the witnesses had an opportunity to collude. Further, he claims that the prosecutor was on notice that the testimony was false, pointing to evidence that Cove and Knofsky had at one point tried to frame someone else and to changes in details between their original and subsequent statements. Finally, defendant likens the failure to preclude "the untainted accounts" to a failure to preserve evidence and suggests that the testimony would have to be suppressed at a retrial.

In essence, the subject witnesses—Cove, Zimmerman, Bodo, Allen, Amber Smith and Michael Smith (who was involved in planning but not in executing the crimes)—acknowledged their own participation in the subject crimes, implicated defendant, and generally indicated that defendant was in charge. Further, they were either allowed to plead to fewer or lesser charges and received recommended sentencing caps or were granted use immunity.

There are several problems with defendant's argument, the first being the supposition that the witnesses lied while testifying. While there was plenty of evidence to impeach them, not the least of which was their favorable plea deals, there was no obvious perjury. Second, defendant has not identified any authority for the proposition that witnesses, absent a sequester order or some other direction from a court, cannot discuss a case with each other even if they are accomplices. Third, defendant has not identified any authority for the proposition that the police or the prosecution are precluded from letting witnesses, even if accomplices, know what other witnesses intend to testify.

Defendant relies on *People v Albert*, 89 Mich App 350; 280 NW2d 523 (1979), in support of his argument that witnesses cannot be placed in the same van after arrest or in the same cell pod. In *Albert*, a police officer destroyed a tape-recorded statement in which an accomplice, who testified against the defendant pursuant to a plea deal, had confessed without implicating the defendant. *Id.* at 351. The officer acknowledged that the defense would have wanted the evidence, *id.* at 353, and this Court therefore concluded that it was destroyed in bad faith and reversed the conviction, *id.* at 354. This Court further held that since the defendant would be unable to impeach the witness with the confession on remand, the witness's testimony would have to be suppressed. *Id.* In the instant case, however, the state did not destroy any statements of the accomplices. Moreover, defendant was not deprived of the chance to bring out the opportunities to collude on cross-examination.

"The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20." *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). While it is not absolute, it generally "'guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.'" *Id.*, quoting *Coy v Iowa*, 487 US 1012, 1016; 108 S Ct 2798; 101 L Ed 2d 857 (1988). Here, defendant had the opportunity to confront the witnesses against him at trial. The Confrontation Clauses did not afford him the right to confront the witnesses before they spoke with the police, each other, or the prosecutor, or before they had an opportunity to review documents pertaining to the crimes. Rather, the right of confrontation afforded defendant the opportunity to question them on the stand, including questions regarding

any factor that may have suggested that their testimonies were untruthful, such as the potential for collusion and inconsistencies with previous statements. Moreover, while he may have been deprived of the opportunity to present his defense in the manner that he preferred, he was not deprived of "a meaningful opportunity to present a complete defense," *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012) (quotation marks and citation omitted). To the extent that his defense rested on the assertion that his accomplices were lying, he was able to cross-examine them regarding their opportunity for collusion as well as inconsistencies between their trial testimony and earlier statements. Moreover, the jury was instructed to consider the accomplices' testimonies more cautiously than they would an ordinary witness, consistent with CJI2d 5.6. Thus, defendant was not denied his rights of confrontation, due process, to present a defense, and to a fair trial.

H. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed misconduct on several occasions. In a cursory manner, he again avers that this infringed on his Sixth and Fourteenth Amendment rights to a fair trial and, again, these arguments need not be considered. *Kevorkian*, 248 Mich App at 389. In *People v Bennett*, 290 Mich App 465, 475-476; 802 NW2d 627 (2010), this Court stated:

> Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. Further, allegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context.
>
> Unpreserved issues are reviewed for plain error affecting substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. . . . Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. [Quotation marks and citations omitted; brackets in original.]

1. SHOE SIZE

A witness testified that a shoe print found at the Canadian Lakes Plaza shopping center was "[a]pproximately 11 inches" and the prosecutor subsequently argued that the testimony was that it was 11-½ inches long, the same length as defendant's shoe. Although defendant did not object to the argument, he contends that the reference to 11-½ inches constituted arguing facts not in evidence. While a prosecutor may not make a statement of fact that is not supported by the evidence, *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008), 11-½ inches is within the realm of "approximately 11 inches." Accordingly, there was no misstatement, let alone a misstatement that could not have been cured by a curative instruction, and thus there was no violation of any constitutional right.

2. LOWE'S VIDEO

Amber Smith testified that she and defendant went to a Lowe's store where, pursuant to defendant's decision, they bought pipes and pipe caps. The store's loss prevention manager obtained video of the transaction and traced it back to entry of a male and female from the parking lot. The woman then went down the paint aisle while the male went across the front of the store. They did not reunite inside the store. The woman bought four caps for black iron pipe while the male purchased a bear saw, blades and two black pipes. The video then showed the man and woman walking separately to a vehicle from different exits. Smith testified that she knew what was in defendant's bag because she watched him pick it up, indicating that the pipe and pipe caps were in the same aisle.

During closing argument, defendant argued that Smith had lied about being in the aisle where defendant obtained the pipe based on the testimony indicating that after they entered the store and separated, they never reunited until they met at the vehicle. The prosecutor responded by arguing, in part, that the loss prevention manager had testified that "he followed them all the way back to the aisle where they purchased the thing and then followed them back out." Defendant did not object. While the prosecutor's statement can be read as an impermissible misstatement of the testimony, *Unger*, 278 Mich App at 241, Smith's testimony supported the substance of the statement and, in any event, whether defendant and Smith met in the aisle does not appear consequential. Any harm could have been cured by an instruction. Accordingly, there is no error, constitutional or otherwise, that requires reversal.

3. WINGATE ALIBI

Rochelle Wingate, who identified defendant as her live-in boyfriend, testified that in the early morning on March 20, 2008, defendant was not home and she was trying to reach him as evidenced by cell phone records. She also testified that defendant wanted her to testify that he was home with her during that time and that she had lied at a previous hearing. In response to an objection during closing argument, the prosecutor said, in front of the jury, that defendant had asked Wingate to testify that he was with her on the night of the 20th. Defendant maintains that that statement was misleading in light of other evidence. While Wingate did not expressly testify that defendant "asked her" to lie, however, the prosecutor's statement was supported by a legitimate inference from Wingate's testimony. Thus, no prosecutorial misconduct occurred and there was no constitutional violation.

4. STATEMENT REGARDING COIN ROLL

One of the res gestae crimes relative to the criminal enterprise charge involved a January 31, 2008, break-in of a bank in Rives Junction. Cove testified that he, defendant, Knofsky, and Zimmerman were involved. Defendant represented that Knofsky regularly borrowed his truck, did so on a night late in January, and did not return until the next morning. Defendant further represented that when he cleaned out his truck on February 14, 2008, he found a coin wrapper with "Independent Bank, Rives Junction" and someone's name handwritten on it. He maintained that he did not have an account at that bank or know where Rives Junction was, so he looked it up on the Internet and learned that there had been a bank robbery. He claimed that he confronted Knofsky and asked, "is this what you've been doing when you've been going out at night?" He asserted that Knofsky denied as much and then showed him a checkbook and said that he banked with Independent Bank.

The prosecution called an Independent Bank assistant manager who testified that there was no record that Knofsky had ever had an account with the bank. She further testified that, according to bank policy, coin rolls were blank. If coin rolls came in with writing on them, the writing was blacked out. If the writing was still visible, they were rewrapped.

Defendant claims that there was evidence, albeit not admitted, of a coin roll seized from Knofsky's car with "Independent Bank" written on it[5] and that the prosecutor submitted perjured testimony and failed to correct perjured testimony, violating due process. He further argues that the prosecutor violated due process when he relied on this known perjured testimony while arguing in closing that Knofsky could not have had a coin roll that said "Independent Bank."

Defendant has failed to establish that the testimony constituted perjury and has thus failed to show that the prosecutor introduced known perjured testimony or that there was a due process violation.[6] Moreover, even if he could establish that there was a picture among the myriad documents provided to the defense by the prosecution that showed "Independent Bank" markings on a coin wrapper, this would not establish that the assistant manager lied about bank policy or that the prosecutor was aware of this single document such that he knew a document existed that would question the manager's testimony or that he committed prosecutorial misconduct during closing argument. See *People v Aceval*, 282 Mich App 379, 389-390; 764 NW2d 285 (2009). Accordingly, defendant has not established prosecutorial misconduct or any constitutional violation.

5. CONSPIRACY PROOFS

Tiffany Jury testified that she was released from jail on March 13, 2008, and saw defendant once or twice before his arrest on March 24, 2008. On the last occasion, he discussed having her sell some guns but indicated that a prospective buyer would not want one because "it was going to become dirty." He also apparently discussed going up north to take care of a hit. Defendant argues that cell phone records showing calls between the two establish that this conversation could only have occurred on March 18, 2008, that the conspiracy to kill the Korpals was limited to the dates of March 20 to March 24, 2008, and that in rebuttal closing argument the prosecutor impermissibly relied on the March 18, 2008, conversation as support for the conspiracy. Defendant, however, does not cite record support for the proposition that the subject conversation occurred on March 18. He attaches copies of purported cell phone records to his appellate brief but he does not identify where they were admitted in the record and, in any event, they are not part of the record on appeal. A "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260;

[5] Defendant purports to attach a supporting exhibit to his Standard 4 brief. While the record could be expanded on appeal pursuant to MCR 7.216(A)(4), the image on the exhibit is blackened and thus does not establish the point he is trying to make.

[6] Apart from the prosecutorial misconduct argument, defendant argues that his rights to due process and a fair trial were violated because the conviction was the result of perjury. Because there was no showing of perjury, this related argument also fails.

457 NW2d 136 (1990). He must "support[] his argument with citations to the record, as required by MCR 7.212(C)(7)." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Moreover, even if accurate the cell phone records would not rule out the possibility that defendant and Jury communicated again after March 20 and/or that Jury used a different phone. Accordingly, the prosecutor did not rely on proofs at variance with the crime charged or commit misconduct by mentioning Jury's testimony in connection with the conspiracy charge. Therefore, defendant was not denied due process or the right to a fair trial.

I. RIGHT TO SELF-REPRESENTATION

Defendant next argues that his right to self-representation under the Sixth Amendment and his rights to due process and a fair trial were infringed when the trial court denied his motion to sever counts 1 through 8 from counts 9 through 26, and then denied his motion to proceed with a form of hybrid representation, i.e., in propria persona on counts 9 though 25 and with counsel on counts 1 through 8 and 26. We review a trial court's ultimate ruling on a motion to sever and its decision whether to allow hybrid representation for an abuse of discretion. *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009); *People v Dennany*, 445 Mich 412, 441; 519 NW2d 128 (1994).

MCR 6.120 provides, in pertinent part:

> (A) The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> (B) On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may . . . sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

* * *

> (C) On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

The trial court declined to order permissive severance under MCR 6.120(B) or mandatory severance under MCR 6.120(C). It noted that the criminal enterprise charge could be properly brought and that "the relatedness of charges 1 through 8 and 9 through 26 is primarily based on this criminal enterprise charge," justifying denial under subrule (C). Regarding permissive severance, the court saw no problem with the timeliness of the motion but concluded that the drain on the parties' resources would favor joinder. It noted that 26 counts had the potential to lead to juror confusion or prejudice, but thought that that issue could be addressed in part by allowing juror note taking and questions, and by giving the jurors a breakdown of the elements for each crime. Further, the court thought that the complexity would lead to a challenge with regard to proofs that defendant was in charge, but that the challenge would exist with respect to joinder of counts 9 through 26 and not significantly enlarged by also joining counts 1 through 8. The court did not see harassment as an issue, concluding that a carefully-selected and instructed jury could be trusted not to convict based on a conclusion that the number of charges signaled guilt. It concluded that witnesses would be less inconvenienced by joinder and, in essence, that readiness for trial would not be significantly affected. In sum, it found that the factors did not predominate in favor of severance.

Thereafter, the court concluded that Michigan law disfavored hybrid representation, and that the present "extremely complex" case was not amenable to such representation, stating:

> The difficulty of managing the sheer number and severity of charges would be challenging enough, but there are likely to be complex evidentiary issues that would make hybrid representation burdensome on the court and disruptive to how the trial proceeds. It is not unusual in cases like this one to have a large amount of evidence that must be presented and challenged in a particular way in order to make connections between things and events. Again, hybrid representation undermines the ability to handle this productively.

Defendant has not established error with respect to the denial of his motion to sever. The trial court thoughtfully considered the factors set forth in the court rule and reached a well-reasoned decision. Given that the charged offenses were predicate offenses for the criminal enterprise charge, they were unquestionably related, undermining any right to severance under MCR 6.120(C). Moreover, given the relationship as well as the fact that an analysis of the factors militated against severance, denial was appropriate under MCR 6.120(B).

Defendant argues that the trial court could not deny severance and then base a denial of hybrid representation on the problems caused by joinder. While a defendant has a right to self-representation, *Faretta v California*, 422 US 806, 818-832; 95 S Ct 2525; 45 L Ed 2d 562 (1975), there is no substantive right to hybrid representation, although a court has discretion to allow it. See *Dennany*, 445 Mich at 441; *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003); *People v Kevorkian*, 248 Mich App 373, 420-422; 639 NW2d 291 (2001). If counts 1 through 8 had been severed, the confusion endemic from hybrid representation in a trial of this

complexity would not have been present since there would have been no hybrid representation. The trial court did not abuse its discretion by denying severance, however, because there is no absolute right to hybrid representation, and hybrid representation would likely have created a chaotic trial. Thus, it cannot be said that the constitutional rights to self-representation, due process or a fair trial were infringed, or that the trial court abused its discretion by denying hybrid representation.

J. "SNITCHES DIE" COMMENT

Defendant next argues that the trial court erred by allowing defendant's accomplices to testify that they were afraid of defendant because defendant had told them that "snitches" die and that he had once murdered someone. Further, he argues that the ruling violated his Sixth and Fourteenth Amendment rights to a fair trial. Defendant contends that that evidence could not be used to bolster credibility under *People v Sabin*, 463 Mich 43; 614 NW2d 888 (2000). He also argues that rehabilitation of a witness can only come after the witness is impeached by opposing counsel, citing *Tome v United States*, 513 US 150, 115 S Ct 696; 130 L Ed 2d 574 (1995), or after credibility is attacked, citing *People v Murry*, 108 Mich App 679; 310 NW2d 836 (1981), and that it was elicited from the witnesses here before they were impeached. The trial court excluded evidence of the murder itself but held that defendant's recent statements indicating that he had committed murder were admissible to show that the witnesses who heard them gave inconsistent statements because they were intimidated by the statements. We review for an abuse of discretion decisions admitting evidence. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

Preliminarily, *Sabin* held only that "evidence of sexual acts between the defendant and persons other than the complainant is not relevant to bolster the complainant's credibility because the acts are not part of the principal transaction." *Sabin*, 463 Mich at 70. Regarding rehabilitation after impeachment, we note that *Tome* and *Murry* addressed rehabilitation with prior consistent statements, not rehabilitation generally. Moreover, in his opening statement, defendant did impugn the witnesses' credibility, averring that they were trying to frame him and had otherwise lied. Accordingly, we find no abuse of discretion in the admission of this evidence and no constitutional violation.

Defendant points out, however, that Cove testified on direct examination not only that defendant had said that he had murdered someone, but that defendant had told Cove that he had been convicted of murder and had served time, and that after the murder he and his cohort committed a string of robberies to try to "cover it up." Although defendant did not object, the court stopped Cove when he started talking about the robberies. While a finer line, those statements still related to what defendant had said about the murder. Cove did not testify that there actually was a prior conviction, or that defendant actually had served time, or that the robberies actually had been committed. Moreover, in denying defendant's motion for a mistrial, the court noted that defendant had previously brought up his incarceration relative to the murder

while cross-examining Zimmerman.[7] Since allusions to defendant having served time had already been made by defendant and Cove's comment on the robberies still pertained to what defendant had told Cove, and there is no indication that the prosecutor knew in advance that the witnesses would be referencing prison or robberies related to the previous murder,[8] there was no abuse of discretion by denying a mistrial, see *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001), and no violation of the rights to due process or a fair trial.

K. MONITORING OF TELEPHONE CALLS AND MAIL, AND INTERFERENCE WITH CASE PREPARATION

Defendant next argues that evidence obtained from his telephone conversations while in jail should have been excluded. In connection with defendant's motion to suppress that evidence, Kevin Wood, the jail administrator, explained that all non-attorney calls are recorded, that a recording at the beginning of the call advises that the call may be monitored or recorded, and that defendant would have received a copy of the jail rules, which advise that mail can be inspected and telephone calls are subject to monitoring and recording. Defendant maintains that the recording constituted an equal protection violation because those who are not financially poor could post bond and their conversations would therefore be private. He also argues that there was no demonstration that the purpose of monitoring was rationally related to safety, that getting case information was not rationally related to safety, and that there was a failure to follow MCL 791.270, which applies to the Department of Corrections and requires the posting of a sign advising that calls are subject to being monitored. More generally, he argues violations of his substantive and procedural due process rights, his privacy rights, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

The trial court relied on *People v DeGeer*, 140 Mich App 46, 47-48; 363 NW2d 37 (1985), and an unpublished decision for the proposition that with notice, telephone calls may be monitored in jail and evidence garnered from them may be admitted as evidence without violating constitutional or statutory rights. *DeGeer* broadly referenced "constitutional and statutory rights" but was focused on Fourth Amendment rights. Defendant, however, has failed

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[7] Defendant asserts that the first mention of prison was earlier in the trial when Amber Smith testified that she knew defendant had a record that prevented him from purchasing firearms. In fact, she did not mention a "record," but said only that she knew of something in defendant's past that prevented him from making purchases at a gun store. Even though defendant did not object, the trial court contemporaneously instructed the jury that the evidence could only be used to show how it influenced the witness's behavior. Defendant also points to Michael Smith's earlier testimony on direct examination that he met defendant when they were both in prison. Nothing indicates that the prosecutor anticipated that comment and, again, defendant did not object. Moreover, defendant had alluded to earlier problems with the law when, in his opening statement, he posited that "[w]hat the evidence is going to show is that in 2004, I started my life over, to begin anew, from a past that I was hindered by."

[8] Defendant's argument that the prosecutor committed misconduct by intentionally eliciting the testimony is not borne out by the record.

to cite to any case that bars such evidence on alternative constitutional grounds. Defendant's arguments are in essence premised on cases dealing with prisoners' rights regarding conditions of confinement or civil equal protection claims. There is no basis for the claim that the evidence violated any constitutional right.

Defendant also avers that the jail administrator impermissibly read all correspondence between him and his attorney after the escape. He fails to substantiate that assertion. He points to an "exhibit A," a memorandum from the jail administrator to staff regarding defendant's mail, which was referenced at a motion hearing. The substance of the memo, however, is not apparent from the record.

Finally, defendant argues, in essence, that he was treated poorly while in jail. He avers that his poor treatment interfered with his preparation for trial. Again, the record does not support defendant's claim. As an alternative to a new trial, he asks for an evidentiary hearing so he can develop facts in support of the claim. Because he failed to make any record of such claims at trial, however, an evidentiary hearing is not warranted. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994) ("As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances").

L. PRIOR CONSISTENT STATEMENT

Defendant next avers that the trial court abused its discretion by excluding portions of a recorded telephone conversation in which defendant spoke with Wingate on April 2, 2008, regarding his defense that he was framed. Further, he argues that the exclusion of this evidence violated his Sixth and Fourteenth amendment rights to a fair trial.

MRE 801(d)(1)(B) provides that the prior statement of a witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication." There "must be an express or implied charge of recent fabrication" and "the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." *People v Mahone*, 294 Mich App 208, 214; 816 NW2d 436 (2011) (quotation marks and citation omitted).

The prosecutor's comments and questions can be construed as an implication that defendant fabricated his testimony only after having the chance to review voluminous discovery. The prior statement to Wingate, however, was made during a telephone call after defendant's arrest. At that time, defendant would have had the same motive to falsify that he had at trial. Accordingly, the trial court did not abuse its discretion by excluding the portions of the recorded telephone conversation at issue and defendant was not denied a fair trial.

M. REJECTION OF LENGTHY STANDARD 4 BRIEF

Finally, defendant argues that this Court violated his right to due process by rejecting his initial Standard 4 brief. He points out that the state has conferred a constitutional right of appeal, Const 1963, art 1, § 20, and avers that it must comport with the due process clause of the federal constitution. Moreover, he argues that there was an equal protection violation since he was not

given a proportionately larger page limit when compared with the page limit that would apply to a "smaller" case.

On March 12, 2013, more than two years after defendant's appellate counsel had filed the 76-page appellate brief in this case, defendant filed a motion for extension of time to file a Standard 4 brief and for an increase in the page limit. Along with the motion he submitted a 299-page brief raising 26 issues. This Court rejected the brief, but granted the extension of time and allowed defendant to file a 100-page brief. *People v Good*, unpublished order of the Court of Appeals, issued March 28, 2013 (Docket No. 295538). On May 3, 2013, defendant filed a 100-page brief together with a motion to remand for an evidentiary hearing relative to claimed Fourth Amendment violations and for resentencing, as well as a motion for peremptory reversal based on claims of judicial impropriety. These motions were considered and denied. *People v Good*, unpublished order of the Court of Appeals, issued May 31, 2013 (Docket No. 295538); *People v Good*, unpublished order of the Court of Appeals, issued June 20, 2013 (Docket No. 295538).

We note that defendant has no constitutional right to represent himself on direct appeal, *Martinez v Court of Appeal of California*, 528 US 152, 163; 120 S Ct 684; 145 L Ed 2d 597 (2000), and thus has no "constitutional entitlement to submit a pro se appellate brief on direct appeal in addition to the brief submitted by appointed counsel." *McMeans v Brigano*, 228 F3d 674, 684 (CA 6, 2000). The right to file a Standard 4 brief is conferred by Administrative Order No. 2004-6. Because defendant has the right, it follows that some level of due process attaches. It does not follow, however, that a brief of unlimited length is the process due.

Preliminarily, defendant conflates the effectiveness of a brief with the length of a brief. In *State of Arizona v Cruz*, 175 Ariz 395, 401; 857 P2d 1249 (1993), the court noted:

> Choosing the most effective arguments for presentation on appeal is the hallmark of good appellate litigation, *see* *Jones v Barnes*, 463 US 745, 752-53; 103 S Ct 3308, 3313; 77 L Ed 2d 987 (1983), and "[a page] limitation induces the advocate to write tight prose, which helps his client's cause." *Morgan v. South Bend Community Sch Corp*, 797 F2d 471, 480 (CA 7, 1986)[.]

Because a more concise brief is generally a more effective brief, it does not follow that a page limitation would give rise to equal protection concerns.

Numerous courts have recognized that imposing page limits on appellate briefs does not violate due process. See, e.g., *Washington v State*, 308 Ark 322, 323; 823 SW2d 900 (1992) ("Due process does not require courts to provide an unlimited opportunity to present post-conviction claims or prevent a court from setting limits on the number of pages a petition may contain."); *State of Iowa v Brown*, 397 NW2d 689, 700 (Iowa, 1986) ("Focusing on due process, defendants are constitutionally entitled to a meaningful opportunity to be heard. A sixty-five page brief coupled with an opportunity to file a reply brief and present oral argument provided Brown such an opportunity."); *Goncalves v Commonwealth of Kentucky*, 404 SW3d 180, 208 (Ky, 2013) ("There is no due process violation when an appellate brief page limit is imposed."); see also *State of Ohio v Powell*, 90 Ohio App 3d 260, 271-272; 629 NE2d 13 (1993) ("[A] page-limitation claim is unrelated to anything which occurred at trial and, therefore, is not cognizable

in an action for postconviction relief.") Accordingly, defendant was afforded all the process he was due when he was granted the opportunity to file a 100-page Standard 4 brief and there was no equal protection violation.

Affirmed in part, vacated in part, and remanded for a determination and imposition of attorney costs for court-appointed legal assistance rendered from March 28, 2008, to March 19, 2009. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello