STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 31, 2013
v	No. 306784 Berrien Circuit Court
BETSY LOUISE KWASNY, Defendant-Appellant.	LC Nos. 2009-003571-FH 2009-004979-FH 2010-005474-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 309924 Berrien Circuit Court
BETSY LOUISE KWASNY, Defendant-Appellant.	LC No. 2011-002919-FH

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

In Docket No. 306784, defendant was charged with uttering and publishing, MCL 750.249, involving a June 1, 2009, check given to Colleen Kennedy in lower court no. 2009-003571-FH (the Kennedy case); three counts of possessing or using a financial transaction device without consent, MCL 750.157n, involving the use of the credit card belonging to Marcel and Aldeane Everhart for three ATM withdrawals on November 24, 2008, in lower court no. 2009-004979-FH (the Everhart case); and drawing a check on a bank without a bank account, MCL 750.131a, involving a June 23, 2008, check given to Kelsie Penley in lower court no. 2010-005474-FH (the Penley case). The three lower court cases were consolidated for a single trial (the June 2011 trial), and defendant was convicted of all charges. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 36 to 252 months for the uttering and publishing conviction and 210 days for the other convictions. Defendant appeals as of right. We affirm defendant's convictions, but remand for entry of a new order of restitution in the Everhart case.

In Docket No. 309924, following a jury trial, defendant was convicted of subornation of perjury, MCL 750.424, and perjury, MCL 750.422. The trial court sentenced defendant as a habitual offender, second offense, MCL 769.10, to prison terms of 60 to 270 months, which were to be served consecutively to any sentences that defendant was currently serving. Defendant appeals as of right.[1] We affirm defendant's convictions and sentences.

I. DOCKET NO. 306784

Defendant first argues that the trial court erred when it admitted evidence of her three prior misdemeanors because it did not conduct the analysis required by MRE 609(b). We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

MRE 609, under certain circumstances, permits the admission of evidence of prior convictions to impeach a witness's credibility. *People v Snyder (After Remand)*, 301 Mich App 99, 101; ___ NW2d ___ (2013). Here, however, the prosecutor moved to admit evidence of defendant's prior misdemeanors under MRE 404(b) to show that defendant acted pursuant to a scheme or plan. Consistent with the prosecutor's request, the trial court admitted the evidence under MRE 404(b). Accordingly, where evidence of defendant's prior misdemeanors was not admitted under MRE 609, the trial court did not abuse its discretion when it admitted the evidence without conducting the analysis required by MRE 609(b). *Unger*, 278 Mich App at 216. Defendant makes no argument that the trial court abused its discretion in admitting evidence of her prior misdemeanors under MRE 404(b).[2]

Next, defendant argues that the trial court erred when it denied her motion to sever and consolidated the Kennedy case with the Everhart case for a single trial. "To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). We review questions of law de novo and factual findings for clear error. *Id.*

A trial court may join offenses charged in two or more informations against a single defendant for trial. MCR 6.120(B). MCR 6.120(B)(1) provides:

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[1] Defendant's appeals were consolidated by order of the Court. *People v Kwasny*, unpublished order of the Court of Appeals, entered May 24, 2012 (Docket Nos. 306784, 309924).

[2] Defendant also claims that admission of the evidence of her prior misdemeanors violated her right to an impartial jury, her right to equal protection of the law, and her right against double jeopardy. However, because defendant did not include these constitutional issues in the statement of questions presented and because defendant fails to provide any argument supported by legal authority to support the claims, defendant has abandoned the issues. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

> Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (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.

On a defendant's motion, a trial court must sever for separate trials offenses that are not related as defined in MCR 6.120(B)(1). MCR 6.120(C).

The trial court denied defendant's motion to sever the Kennedy case and the Everhart case for separate trials because it concluded that joinder was appropriate "given the similarity of the alleged offenses."[3] However, charged offenses are not "related" under MCR 6.120(B)(1) simply because they are of the same or similar character. *Williams*, 483 Mich at 235. Accordingly, we conclude that the trial court failed to provide a sufficient reason to join the two cases for a single trial. Regardless, even if we assume, without deciding, that the charged offense in the Kennedy case was not "related" under MCR 6.120(B)(1) to the charged offenses in the Everhart case, such that the trial court was required to sever the cases on defendant's motion, see MCR 6.120(C), the trial court's error in failing to sever the two cases was harmless. Joinder is a nonconstitutional concept. *Williams*, 483 Mich at 241. "A preserved, nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Id.* at 243. An error in the joinder of charges for a single trial may be harmless if under MRE 404(b) evidence of one offense would be admissible in a separate trial on the other offense. *Id.* at 244, citing *Byrd v United States*, 551 A2d 96, 99 (DC, 1988). A joinder error may also be harmless when evidence of the defendant's guilt is overwhelming. *Byrd*, 551 A2d at 99 n 8, citing *United States v Lane*, 474 US 438, 450 n 13; 106 S Ct 725; 88 L Ed 2d 814 (1986). The burden is on the defendant to show that an error was not harmless. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).[4]

In the Everhart case, without consideration of any evidence of any of defendant's other acts, including evidence of the charged offenses in the Kennedy case and the Penley case and evidence of defendant's prior misdemeanors, the evidence of defendant's guilt was overwhelming. Jason Dillenbeck and Emily McCachren, employees of the Chase Bank that housed the ATM where the three $400 withdrawals were made on November 24, 2008, viewed footage of the ATM withdrawals. When shown a photograph lineup, both Dillenbeck and

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[3] In June, on the eve of trial, defendant moved to consolidate the Penley case, in which she had not yet received a preliminary examination, with the other two cases for trial.

[4] Defendant makes no argument that, had the trial court granted her motion to sever, evidence of the charged offense in the Kennedy case would not have been admissible under MRE 404(b) in a trial on the charged offenses in the Everhart case, or vice versa.

McCachren immediately identified defendant as the person who made the withdrawals. In addition, the charges on the credit card that the Everharts denied making included charges at a casino and a casino restaurant, a charge to the city of Bridgman, a charge to Tia's Balloons & Gifts, and a charge to a Super 8 Motel. Defendant was known to frequent the casino; the charge to the city of Bridgman paid defendant's water bill; Tia's Balloons & Gifts was located in the Alabama town where defendant's mother lived; and keycards to a Super 8 Motel were found in a nightstand in defendant's house. Further, after defendant left Michigan in the summer of 2009, Michael Kwasny, her husband, found a box containing mail belonging to the Everharts, including credit card bills, in their house. This overwhelming evidence of defendant's guilt was not diminished by Sarah Brunke, who testified that, acting under Michael's direction, she was the person who made the three ATM withdrawals. Based on the trial court's statement, made outside the presence of the jury, that it could not recall testimony that was "more incredulous and patently false" than the testimony of Brunke, it is reasonable to conclude that the jury also did not believe Brunke's testimony, especially where Brunke testified that she had used the Everharts' credit card to buy groceries before she made the ATM withdrawals but no such charges appeared on the credit card bill. Under the circumstances, it does not affirmatively appear that it is more probable than not that an error by the trial court in denying defendant's motion to sever was outcome determinative in the Everhart case. *Williams*, 483 Mich at 243.

Regarding the Kennedy case and the Penley case, defendant makes no argument that, had her motion to sever been granted, the charged offense in the Kennedy case would not have subsequently been joined with the charged offense in the Penley case for a single trial. Regardless whether the two cases would have been consolidated, evidence of one charged offense would have been admissible under MRE 404(b) in the trial of the other charged offense. Evidence of a defendant's other acts is admissible under MRE 404(b) to show a scheme, plan, or system in doing an act. General similarity between the acts is not enough, by itself, to establish a plan, scheme, or system. *People v Sabin (After Remand)*, 463 Mich 43, 64; 614 NW2d 888 (2000). Rather, there must be a concurrence of common features that show the acts are naturally to be explained as part of a general plan. *Id.* at 64-65. Where defendant gave a check to Kennedy and to Penley, both of whom were young women and were friends with defendant's family, and she received all or part of the cash from the check, there is a concurrence of common features that the two acts are naturally to be explained as caused by a general plan. *Id.*

Without consideration of any evidence of defendant's act of using the Everharts' credit card, the prosecutor presented overwhelming evidence of defendant's guilt in the Kennedy and Penley cases. Penley, who in 2008 was dating defendant's son George Kaurin, testified that defendant signed the June 23, 2008, check. Elizabeth Spencer and Catherine Sorenson, tellers at the Fifth Third Bank where Penley deposited the check, testified that Penley was accompanied by a woman when she came into the bank and that Penley introduced the woman to Spencer as her boyfriend's mother. Kennedy testified that defendant gave her the June 1, 2009, check for $3,200. In text messages that were sent to her from defendant's telephone, Kennedy received promises from "Liz," the name by which Kennedy knew defendant, that money for the bounced check had been sent. In addition, two police officers testified that they had previously investigated defendant for either giving a check drawn on a closed account or a nonsufficient funds check. The evidence of defendant's guilt was not seriously undermined by defendant's witnesses, as there was an apparent lack of credibility for many of them. For example, Gerald Schwartz, who was defendant's boyfriend in May 2009, Kaurin, and Brunke testified that

Schwartz and defendant left Michigan on May 31, 2009, in the morning. However, after Kaurin and Brunke were shown the program from Kaurin's May 31, 2009, graduation, which showed 1:00 p.m. as the time of the graduation, they changed their testimony, claiming that Schwartz and defendant left Michigan in the evening on May 31, 2009. In addition, although Wendy Carlson, defendant's handwriting expert, testified that it was her opinion that Michael signed the checks given to Penley and Kennedy, she also testified that Michael signed the four checks that were the subject of Brunke's four uttering and publishing convictions. Brunke however, testified that she knew and had previously admitted that Michael had not signed those checks. Under these circumstances, where there was evidence that defendant had a pattern of using nonsufficient fund checks or checks belonging to closed accounts, including twice using young women to cash bad checks, and where credibility questions as to some of defendant's witnesses were raised, it does not affirmatively appear that it is more probable than not that an error by the trial court in denying defendant's motion to sever was outcome determinative in the Kennedy case or the Penley case. *Williams*, 483 Mich at 243.

Defendant also claims that the trial court erred in denying her motion for directed verdict of acquittal. However, no related argument appears in defendant's brief on appeal, and thus, defendant has abandoned the issue. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.").

Next, defendant claims that the trial court erred when, during the testimony of William DeWitt, it admitted into evidence an $18,000 check that DeWitt testified defendant had given him. At trial, defendant objected to the admission of the check because she had not been given the check during discovery. We review a trial court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion. *People v Rose*, 289 Mich App 499, 525; 808 NW2d 301 (2010).

In determining an appropriate remedy for a discovery violation, a trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). The relevant circumstances include the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice. *Rose*, 289 Mich App at 525-526. The exclusion of otherwise admissible evidence is a severe sanction that should be limited to egregious cases. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454-455 n 10; 722 NW2d 254 (2006).

The prosecutor learned of the $18,000 check on the second day of trial when DeWitt testified. Noncompliance with defendant's discovery demand was not intentional or done in bad faith. While defendant claims on appeal that she was prejudiced by the late disclosure of the check because her handwriting expert had already testified and could not analyze whether it had actually been written by Michael, defendant never asserted at the time of objection that she had not written the check. Thus, before the trial court, defendant never claimed any actual prejudice, nor did she claim that the check was not admissible. Under these circumstances, the trial court did not abuse its discretion in refusing to exclude the $18,000 check from evidence. *Rose*, 289 Mich App at 525.

Defendant argues that the trial court erred when it intervened at trial and held Brunke in summary contempt for giving false and evasive testimony. Because defendant did not object when the trial court held Brunke in contempt, the issue is unpreserved for appellate review. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contempt of court is a willful act, omission, or statement that tends to impede the functioning of a court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000). When an act of contempt is committed in the immediate view and presence of a court, the court may summarily punish it by fine, imprisonment, or both. MCL 600.1711; *In re Contempt of Henry*, 282 Mich App 656, 675; 765 NW2d 44 (2009). Here, regardless whether the trial court actually erred in holding Brunke in summary contempt for giving false testimony, see *In re Scott*, 342 Mich 614; 71 NW2d 71 (1955), defendant makes no argument supported by legal authority that a trial court's summary punishment of a direct act of contempt committed during a criminal trial affects or impedes the defendant's right to a fair trial. Moreover, there is nothing on the record to indicate that the contempt finding had any impact on defendant's trial. The jury was not in the courtroom when the trial court convicted Brunke of contempt. In addition, no mention of the contempt finding was subsequently made in the jury's presence. Because the jury never knew of the trial court's finding that Brunke gave false testimony, its credibility findings could not have been influenced by the trial court's opinion of Brunke's testimony. In addition, although defendant claims that the trial court's contempt finding intimidated her and her witnesses and poisoned the entire trial atmosphere, defendant fails to explain how she and her witnesses were intimidated, and we are not aware of anything on the record that supports the claim.

Defendant also claims that the trial court erred when it held that the decision of First National Bank, the issuer of the Everharts' credit card, not to treat the charges on the credit card as fraudulent was irrelevant. We review this evidentiary issue for an abuse of discretion by the trial court. *Unger*, 278 Mich App at 216.

Relevant evidence is generally admissible, while irrelevant evidence is not admissible. MRE 402; *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. First National Bank had two telephone conversations with the Everharts and decided to treat the charges on their credit card as authorized charges. However, the decision of First National Bank does not make it more probable or less probable that defendant used the Everharts' credit card without consent. First National Bank and its employee Tom Kwas had no personal knowledge regarding the charges on the credit card, and its decision was simply a determination of the facts presented to it. A third-party's determination of what occurred does not actually make it more or less probable whether a disputed fact occurred. In this criminal case, the jury was the determiner of facts, CJI2d 2.4(2), and its role included determining the weight of the evidence presented and the credibility of the witnesses testifying. See *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Under the circumstances, the trial court's decision that the position of First National Bank was not relevant

did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.[5]

Next, defendant claims that the cumulative effect of errors so poisoned the atmosphere at trial as to cause a miscarriage of justice. According to defendant, when the trial court's error in denying her motion to sever is combined with all the other errors by the trial court, she was denied a fair trial. We review a claim regarding the cumulative effect of errors to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

> The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. [*People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).]

Other than the assumed error by the trial court in failing to sever the Kennedy case and the Everhart case for separate trials, there was no other error by the trial court. Accordingly, there is no cumulative effect of errors that denied defendant a fair trial.

Next, defendant argues that she is entitled to be resentenced because the trial court failed to articulate a substantial and compelling reason to depart from the recommended minimum sentence range in the Kennedy case. We review for clear error a trial court's determination regarding the existence of a factor to depart from the recommended minimum sentence range. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). We review de novo whether factors are objective and verifiable. *Id.* Finally, we review for an abuse of discretion whether the factors constitute substantial and compelling reasons to depart from the guidelines range. *Id.*

The legislative sentencing guidelines apply to all enumerated felonies committed on or after June 1, 1999. MCL 769.34(2); *People v Wilcox*, 486 Mich 60, 65; 781 NW2d 784 (2010). A trial court, after it has scored the offense variables and prior record variables and has determined the recommended minimum sentence range, must impose a minimum sentence within that range, absent substantial and compelling reasons. MCL 769.34(3); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). A substantial and compelling reason for departure is "an objective and verifiable reason that keenly or irresistibly grabs [a court's] attention; is of considerable worth in deciding the length of a sentence and exists only in exceptional cases." *Babcock*, 469 Mich at 257-258 (quotations omitted). A trial court "shall not base a departure on an offense characteristic or offender characteristic already taken into account

[5] Regardless, there was testimony that First National Bank was not treating any use of the Everharts' credit card as fraudulent. The effect of the trial court's ruling on the prosecutor's subsequent objection was to prevent defendant from asking further questions about the position of First National Bank. The trial court did not strike previous testimony about First National Bank's decision; therefore, the previous testimony remained in evidence.

in determining the appropriate sentence range unless [it] finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). A trial court has the burden of articulating the rationale for a departure. *People v Smith*, 482 Mich 292, 318; 754 NW2d 284 (2008).

The recommended minimum sentence range for defendant's conviction for uttering and publishing in the Kennedy case was 10 to 28 months. The trial court departed from this sentence range, imposing a minimum sentence of 36 months.[6] Although the trial court stated that the substantial and compelling reasons for the departure were contained in the prosecutor's memo, it "very briefly recite[d]" the reasons for departure. Those reasons were the following: (1) the damage to the Everharts, Kennedy, and Penley; (2) defendant's orchestrated scheme against the victims; and (3) defendant's elicitation of perjured testimony from witnesses.[7]

We conclude that the trial court did not abuse its discretion in determining that substantial and compelling reasons existed for departing from the guidelines range. *Babcock*, 469 Mich at 265. The sentencing guidelines were scored in each case. Thus, in each case, the facts specific to the case were used to determine the recommended minimum sentence range for defendant's conviction(s) in that case. The three reasons articulated by the trial court for departure were already taken into account in determining the appropriate minimum sentence ranges in the three cases. MCL 769.34(3)(b). First, in each of the three cases, points were scored for offense variable (OV) 16, MCL 777.46 (degree of property damage). Five points may be scored for OV 16 if "[t]he property had a value of $1,000.00 or more but not more than $20,000.00," while 10

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[6] The trial court did not depart from the recommended minimum sentence ranges in the Penley case and the Everhart case. In these two cases, the recommended minimum sentence range was 0 to 21 months, and the sentence of 210 days for the convictions fell within this range.

[7] The trial court also stated that the defamation to Post was a substantial and compelling reason for departure. However, because Brunke testified that Post schemed with Michael and Marcel to frame defendant, the defamation of Post is part of the perjury testimony that defendant elicited from Brunke. Accordingly, this fourth reason for departure is part and parcel of the trial court's third reason for departure. Regardless, because substantial and compelling reasons to depart only exist in exceptional cases, *Babcock*, 469 Mich at 247, the defamation of Post would not constitute a substantial and compelling reason for departure. It is not uncommon in criminal cases for a defendant or a defense witness to testify that a police officer engaged in dishonest or improper conduct.

We reject defendant's contention that the trial court based its departure on her refusal to admit guilt. In sentencing a defendant, a trial court may consider the defendant's lack of remorse, but it may not base its sentence even in part on the defendant's refusal to admit guilt. *Dobek*, 274 Mich App at 104. At sentencing, defendant did not refuse to admit guilt; rather, she admitted her guilt. She told the trial court that she wanted to apologize to the Everharts, Kennedy, and Penley for the crimes for which she had been convicted. She further stated that she was "very ashamed and embarrassed and not proud of [sic] at all" and that she was "very remorseful of the [sic] former actions over the years."

points may be scored if "[t]he property had a value of more than $20,000.00 or had significant historical, social, or sentimental value." MCL 777.46(1)(b), (c). Five points were scored for OV 16 in the Kennedy case and the Penley case, while 10 points were scored in the Everhart case. Accordingly, the monetary damage suffered by the victims was already taken into account in determining the appropriate minimum sentence ranges.

Second, in each of the three cases, five points were scored for OV 13, MCL 777.43 (continuing pattern of criminal behavior). Five points may be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property." MCL 777.43(1)(f). In addition, in each of the three cases, 20 points were scored for PRV 7, MCL 777.57 (subsequent or concurrent felony convictions). Twenty points may be scored for PRV 7 if "[t]he offender has 2 or more subsequent or concurrent convictions." MCL 777.57(1)(a). Accordingly, the scheme by defendant against the victims, which resulted in felony convictions, was already taken into account in determining the appropriate minimum sentence ranges.

Third, in each of the three cases, ten points were scored for OV 19, MCL 777.49 (interference with administration of justice). Ten points may be scored for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(1)(c). Interference with the administration of justice includes interference with the judicial process. *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). Accordingly, defendant's elicitation of perjured testimony from several witnesses was already taken into account in determining the appropriate minimum sentence ranges.

Because the damage suffered by the victims, defendant's scheme against the victims, and defendant's elicitation of perjured testimony were already taken into account in determining the appropriate minimum sentence ranges, the trial court could not base its departure on these offense or offender characteristics unless it found that the characteristics were given inadequate or disproportionate weight. MCL 769.34(3)(b). The trial court articulated while imposing sentence that "the guidelines do not adequately address the nature, breadth, damage to your victims of the crime, the felonies which you have committed . . ." and "the guidelines do not adequately address the criminal conduct of the defendant." The trial court further indicted that there are "substantial and compelling reasons justifying an upward departure . . . ." The trial court indicated that defendant manipulated vulnerable people elaborating that defendant's two younger victims, Kennedy and Penley looked up to defendant and trusted her and that Kennedy was tutoring defendant's son, trying to help him and defendant abused her. Of note, Kennedy (a high school senior) also spoke at sentencing how she would like to see all of the restitution, as the money that defendant had taken from her was her entire savings for college. The trial judge explained to Kennedy, "I'll order restitution . . . But people are, you know, often sadly surprised that it's sometimes difficult to collect that restitution. You know this defendant's relatively young, so, you know, hopefully she might gain some employment after she gets out of jail . . . but . . . it can take years and years." The trial judge also stated that substantial and compelling reasons justifying a departure are contained in the prosecutor's memo dated July 21, 2011, (read into the record by the prosecutor at sentencing) indicating that the trial court was essentially adopting them as its own. Included within that memo, and addressed separately, albeit briefly, by the trial judge was the fact that not only did defendant interfere with the administration of justice by inducing witnesses to commit perjury on her behalf, but that one of those witnesses,

Brunke, was another young woman to whom defendant had acted as a surrogate mother. Brunke was initially sent to jail for her perjury, was formally charged with and plead guilty to perjury, and because she was on probation for four other offenses at the time, violated her probation and had the four original convictions entered on her record. Thus, another young life was severely affected by defendant's conduct far beyond the sentencing guidelines contemplation of an interference with the administration of justice. Defendant's conduct had an impact far beyond the immediate monetary loss suffered by the victims of her crimes and the trial judge did not abuse its discretion in recognizing the same or finding that certain offense or offender characteristics did not adequately address the circumstances before it. [8]

Finally, defendant argues that the trial court erred in ordering her to pay $32,250 in restitution in the Everhart case.[9] She argues that there was no evidence at trial that she made any charges to the Everharts' credit card without their permission and, regardless, the maximum amount of restitution that she could have been ordered to pay was $1,200, the amount of the three ATM withdrawals that were the basis for her convictions. She also claims that the trial court erred when it included repayment of loans of $2,000 and $5,000 in the ordered restitution. We generally review a trial court's order of restitution for an abuse of discretion. *People v Dimoski*, 286 Mich App 474, 476; 780 NW2d 896 (2009). However, when the question of restitution involves a matter of statutory interpretation, the issue is reviewed de novo. *Id.*

Under the Crime Victim's Rights Act, MCL 780.751 *et seq.*, a trial court is required to order a convicted defendant to pay restitution. *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012). MCL 780.766(2) provides that, "when sentencing a defendant convicted of a crime, the court shall order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate . . . ." The phrase "course of conduct" has been given a broad construction and, therefore, pursuant to MCL 780.766(2), "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 271-272; 571 NW2d 503 (1997). Accordingly, defendant's argument that the maximum amount of restitution that she could be ordered to pay was $1,200 is without merit. Although the factual basis of defendant's

[8] While the trial court's act of "adding" points to OV 9, MCL 777.39, and OVs 13 and 19 as an expression that the sentencing guidelines did not adequately take into account the damage suffered by the victims, defendant's scheme against the victims, or defendant's elicitation of perjured testimony was perhaps not the best means of tailoring a specific sentence to defendant that it felt properly addressed the guidelines inadequacy, it is clear from the prosecutor's memo and the trial court's statement at sentencing that points were added to these three offense variables at the suggestion from *Smith*, 482 Mich at 304, 306, 318, that the sentencing grid may be employed as a means to justify the extent of a sentencing departure.

[9] Defendant states that the trial court ordered her to pay $32,448 in restitution. Although defendant was ordered to pay a total of $32,448, $68 was for state costs and $130 was for a victim rights fee.

convictions in the Everhart case was the three, $400 ATM withdrawals, defendant is required to compensate for all the losses attributable to her illegal scheme of obtaining possession and using the Everharts' credit card. *Id.* at 272.

Defendant's argument that there was no evidence at trial that she made any charges on the Everharts' credit card without their permission is also without merit. The jury convicted defendant of possessing or using the credit card without consent in regard to the three $400 ATM withdrawals. As previously set forth, there was overwhelming evidence that connected defendant to the additional charges on the credit card.

The recommended amount of restitution in the presentence investigation report (PSIR) of $32,250 was the sum of the $6,250 listed in the crime victim report and the $26,000 stated in the victim impact statement attachment. The $6,250 was the total of three amounts: (1) the $250 that defendant had not paid for the $2,250 loan, (2) the $5,000 loan, and (3) the $1,000 attorney fee. Accordingly, the $2,000 of the $2,250 loan that defendant had paid back to the Everharts was not included in the $6,250 of requested restitution. Accordingly, we reject defendant's argument that the ordered restitution includes repayment of the $2,000 loan that defendant had already paid back.

No evidence was presented at trial regarding the $5,000 loan, and the only information known to the trial court about the $5,000 loan was what the prosecutor said at sentencing, which was that there was a note for the loan and the loan, which was made before the "FTD charges," had not been paid back by defendant. It is unknown when the loan was made, the circumstances under which it was made, the terms of repayment, and how the Everharts' gave the $5,000 to defendant. There was simply nothing before the trial court that connected the $5,000 loan to defendant's illegal scheme of obtaining possession and using the Everharts' credit card. *Gahan*, 456 Mich at 272. Under these circumstances, we conclude that the trial court abused its discretion when it included repayment of the $5,000 loan in the ordered restitution. We therefore remand the Everhart case for entry of a new order of restitution that requires defendant to pay $27,250 in restitution.

II. DOCKET NO. 309924

Defendant first argues that the trial court erred when it ordered that her sentences for subornation of perjury and perjury run consecutive to her sentences imposed for her convictions from the June 2011 trial. At sentencing, defendant did not object when the prosecutor requested a consecutive sentence or when the trial court ordered the consecutive sentence. Accordingly, the issue is unpreserved. See *Metamora Water Serv, Inc*, 276 Mich App at 382. We review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

In Michigan, concurrent sentencing is the norm. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). "A consecutive sentence may be imposed only if specifically authorized by statute." *Id.* Here, the consecutive sentence imposed by the trial court was authorized by MCL 768.7b(2), which provides, in pertinent part:

> Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that

> is a felony, upon conviction of the subsequent offense . . . the following shall apply:
>
> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively.

Accordingly, defendant's argument that the trial court was without authority to order that her sentences for subornation of perjury and perjury run consecutive to the sentences for her convictions from the June 2011 trial is without merit.

Next, defendant argues that the trial court erred when it denied her motion for a mistrial after she made prejudicial remarks in the presence of the jury about the trial court's harshness in sentencing, the trial judge's alleged infidelities with her, and her feelings of frustration with the court proceedings and the prosecutor's questions. We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999). Immediately after the prosecutor ended his cross-examination of her, defendant had an outburst while she remained on the witness stand and under oath. She asked the prosecutor whether he expected her to tell the truth and whether he wanted to know about the affair that she had with the trial judge. Then, when the trial court told defendant to be quiet, she asked what it could do to her that it had not already done. A defendant may not perpetrate chaos at her own trial and then obtain a mistrial on the basis of prejudice. *People v Siler*, 171 Mich App 246, 256-257; 429 NW2d 865 (1988), superceded on other grounds as stated in *People v Orr*, 275 Mich App 587; 739 NW2d 385 (2007). Where defendant created the chaos and the trial court, which was in a superior position to assess the motives of defendant, see MCR 2.613(C), stated that defendant made the outburst in an attempt to get a mistrial declared, the trial court's decision to deny the motion for a mistrial was within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant also argues that the trial court erred when it failed to give a cautionary instruction to the jury about her outburst and allowed the prosecutor to argue her outburst in his closing argument. However, because defendant has not cited any legal authority to support her argument, leaving it to this Court to discover and rationalize the basis for the claim, defendant has abandoned the issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant next claims that statements made by the prosecutor, during closing arguments and at sentencing, were improper and constituted prosecutorial misconduct. Because defendant did not object to the statements, her claims of prosecutorial misconduct are not preserved for our review. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

First, defendant argues that the prosecutor committed misconduct when, in closing argument, he referred to evidence that was presented at defendant's June 2011 trial but that was not presented in the perjury trial. A prosecutor may not argue the effect of testimony that was not entered into evidence at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). In the challenged statement, the prosecutor told the jury that, because it heard about a clerk from the city of Bridgman, a police officer from the Buchanan Police Department, and Michael, all of whom testified at defendant's June 2011 trial, he did not present as much background to the jury as he possibly could have presented. He argued that, nonetheless, he presented evidence of all the elements of the charges of subornation of perjury and perjury. Viewing the challenged statement in context, *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003), the prosecutor never argued any testimony that was not entered into evidence at defendant's perjury trial.

Second, defendant argues that the prosecutor argued his opinion regarding her veracity, repeatedly accused her of lying, and suggested that she needed to prove her innocence to the jury. A prosecutor may not vouch for the credibility of a witness or suggest that he has some special knowledge about a witness's truthfulness. *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010), rev'd in part on other grounds 491 Mich 339 (2012). A prosecutor may not express a personal belief in the defendant's guilt. *Id.* In addition, a prosecutor may not imply that a defendant has the burden to prove something or to present a reasonable explanation for damaging evidence; such arguments tend to shift the burden of proof. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Defendant refers to the prosecutor's cross-examination of her, but she does not point to any specific question that was improper. A defendant may not leave it to this Court to search for a factual basis to sustain her claim. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Regardless, a review of the prosecutor's cross-examination of defendant reveals no questions where the prosecutor expressed a personal belief in defendant's guilt or suggested that defendant needed to prove her innocence.

Defendant also refers to one instance where the prosecutor stated in his closing argument that she lied. In the challenged statement, the prosecutor told the jury that the perjury charge claimed that defendant lied when she testified in a certain way during her June 2011 trial. The prosecutor then read the jury portions of defendant's testimony from the June 2011 trial and commented on it, saying, at one point, that defendant lied when she testified that she had nothing to do with the check given to Penley. When the prosecutor's statement is read in context, *McLaughlin*, 258 Mich App at 644, it is clear that the prosecutor was only informing the jury of his theory of when defendant gave perjured testimony at the June 2011 trial. The prosecutor's statement was not a suggestion that the prosecutor had some special knowledge of defendant's truthfulness or an expression of a personal belief in defendant's guilt.

Third, defendant claims that the prosecutor committed misconduct when he requested that he be allowed to argue her outburst in closing argument and then when he did, in fact, do so. However, because defendant provides no legal argument for why the prosecutor's conduct was improper, she has abandoned the claim. *Kelly*, 231 Mich App at 640-641.

Fourth, defendant argues that the prosecutor committed misconduct when, at sentencing, he suggested that defendant was responsible for Brunke's prior criminal acts and the loss of her Holmes Youth Trainee Act (HYTA) status. The prosecutor's statement was not improper. The

evidence at trial showed that, because of defendant, Brunke gave perjured testimony at the 2011 trial and that, because Brunke subsequently pleaded guilty to attempted perjury, Brunke's prior four convictions for uttering and publishing were entered against her and were now on her record. The prosecutor did not make any statement that was not supported by record evidence.

Next, defendant argues that the trial judge and the chief judge erred when they failed to disqualify the trial judge from presiding over her trial. We review a trial court's factual findings on a motion for disqualification for an abuse of discretion, but we review the court's application of the law to the facts de novo. *People v Wade*, 283 Mich App 462, 469; 771 NW2d 447 (2009).

A judge is disqualified when he cannot hear a case impartially. *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996). MCR 2.003(C) lists situations that are deemed the equivalent of an inability to hear a case impartially. *Id.* One such instance is when "[t]he judge is biased or prejudiced for or against a party or attorney." MCR 2.003(C)(1)(a). MCR 2.003(C)(1)(a) requires a showing of actual and personal bias. *Cain*, 451 Mich at 495. A trial judge is presumed to be impartial, and the party has a heavy burden of overcoming that presumption. *Wade*, 283 Mich App at 470.

Defendant claims that the trial judge had a strong bias against her based on his presiding over her June 2011 trial. She generally relies on the trial judge's rulings, as well as his opinions and comments that were critical of her. However, "[j]udicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011). Similarly, comments by a trial court that are critical of or hostile to counsel and the parties are generally not sufficient to show bias. *Id.* Defendant makes no argument establishing that the trial judge had a deep-seated antagonism against her such that it was impossible for him to exercise fair judgment. Accordingly, defendant has not shown that the trial judge and the chief judge erred in denying her motion to disqualify.

Defendant claims that she is entitled to be resentenced because the trial court, when it sentenced her to a minimum sentence of 60 months and a maximum sentence of 270 months, departed from the sentencing guidelines without articulating substantial and compelling reasons for the departure. The sentencing guidelines set a range for a defendant's minimum sentence. *McCuller*, 479 Mich at 684. Here, defendant's minimum sentence of 60 months fell within the recommended minimum sentence range of 29 to 71 months. Accordingly, there was no departure for which the trial court needed to articulate substantial and compelling reasons. Because defendant's minimum sentence fell within the appropriate guidelines range, we must affirm it and not remand for resentencing unless the trial court made an error in scoring the sentencing guidelines or relied on inaccurate information in determining defendant's sentence. MCL 769.34(10). We reject defendant's argument that the trial court relied on inaccurate information when it relied on the prosecutor's statement that defendant was responsible for Brunke's prior convictions and the loss of her HYTA status. As explained, *supra*, the prosecutor's statement was supported by record evidence. In addition, we reject defendant's argument that the trial court based its sentence on defendant's refusal to admit guilt. In sentencing a defendant, a trial court may consider the defendant's lack of remorse. *Dobek*, 274 Mich App at 104.

> To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, this Court focuses on three factors: (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. If there is an indication of the three factors, then the sentence was likely to have been improperly influenced by the defendant's persistence in his innocence. [*Id.* (internal citations, quotations, and alternation omitted).]

At sentencing, defendant maintained her innocence, but the trial court never attempted to get defendant to admit guilt. Further, based on the trial court's explanation for the sentence it imposed, there is no indication that, had defendant admitted guilt, the trial court would have imposed a less severe sentence.

In addition, defendant's maximum sentence of 22-1/2 years does not exceed the statutory maximums authorized for subornation of perjury and perjury. In the information, defendant was charged as an habitual offender, second offense, MCL 769.10. This allowed the trial court to sentence defendant to a maximum sentence that was "not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term." MCL 769.10(1)(a). The maximum sentence prescribed for a first conviction for subornation of perjury and perjury is 15 years. MCL 750.422; MCL 750.423; MCL 750.424.[10] Because the statutory maximum sentence for subornation of perjury and perjury is 15 years, the maximum sentence imposed by the trial court of 22-1/2 years was proper under MCL 769.10. The maximum sentence imposed by the trial court was not more than 1-1/2 times the longest sentence prescribed for a first conviction of the offenses. MCL 769.10(1)(a).

Finally, defendant contends that the prosecutor failed to present sufficient evidence for the jury to convict her of subornation of perjury and perjury. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

According to defendant, her convictions are not supported by sufficient evidence because she "entirely denied" any involvement in the checks given to Penley and Kennedy and in the unauthorized use of the Everharts' credit card and because Brunke's testimony was "blatantly

[10] The subornation of perjury statute, MCL 750.424, states that "[a]ny person who shall be guilty of subornation of perjury, by procuring another person to commit the crime of perjury, shall be punished as provided in the next preceding section." The "next preceding section" is MCL 750.423. If, as defendant contends, "the next preceding section" is MCL 750.425, then the term "preceding," which means "that precedes; coming before; previous," *Random House Webster's College Dictionary* (2000), is given no meaning. Any interpretation of a statute that would render any part of the statute surplusage or nugatory should be avoided. *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005).

unreliable." Defendant is arguing the credibility of the witnesses. However, it is well established that the credibility of witnesses is a question for the jury, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and that this Court will not interfere with the jury's role in determining the credibility of the witnesses, *Williams*, 268 Mich App at 419. Defendant makes no argument that when the testimony of the prosecution's witnesses, including that of Penley, the Everharts, Kennedy, and Brunke, is viewed in a light most favorable to the prosecution, *Cline*, 276 Mich App at 642, the testimony failed to establish any element of either subornation of perjury or perjury. Accordingly, we reject defendant's argument that her convictions are not supported by sufficient evidence.

In Docket No. 306784, defendant's convictions are affirmed, but the Everhart case, lower court no. 2009-004979-FH, is remanded for entry of a new order of restitution. In Docket No. 309924, defendant's convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens