[Cite as *State v. Nixon*, 2023-Ohio-4871.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - DAVID A. NIXON, Defendant-Appellant.	**CASE NO. 2023-P-0001** Criminal Appeal from the Court of Common Pleas Trial Court No. 2022 CR 00534

O P I N I O N

Decided: December 29, 2023
Judgment: Affirmed

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

David A. Nixon, pro se, PID# A794-609, Lorain Correctional Institution, 2075 Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, David A. Nixon ("Mr. Nixon"), pro se, appeals from the judgment of the Portage County Court of Common Pleas, which, after a jury found him guilty, sentenced him to serve an indefinite prison term of seven years up to 10 and 1/2 years for burglary, with a one-year mandatory consecutive term for a firearm specification, to be served consecutively to two concurrent 36-month prison terms for grand theft and having a weapon while under disability. The evidence presented at trial revealed Mr. Nixon broke into his former girlfriend's house, where he stole her son's gun and ammunition and hid them in the woods of her property.

{¶2} Mr. Nixon raises eight assignments of error on appeal, contending (1) the indictments against him were invalid; (2) the trial court erred by allowing him to proceed pro se without a valid written waiver of counsel; (3) the state failed to introduce sufficient evidence to sustain his convictions; (4) the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to turn over exculpatory evidence to the defense; (5) the trial court erroneously allowed the state to introduce phone calls between himself and the victim from jail, and excluded testimony that would have shown the Portage County Prosecutor's Office had a disqualifying conflict; (6) the trial court erred by denying his repeated requests for the grand jury transcripts and/or for an in camera inspection; (7) the state engaged in prosecutorial misconduct by questioning him on his drug use; and lastly, (8) the trial court erred by failing to grant his motions to dismiss counsel.

{¶3} After a careful review of the record and pertinent law, we find Mr. Nixon's assignments of error to be without merit.

{¶4} More specifically, Mr. Nixon's first and sixth assignments of error are without merit because he failed to allege a particularized need for the grand jury transcripts and he failed to demonstrate the indictments were invalid. The record reveals the grand jury foreperson attested to her signature on the indictment, the grand jury report listing the indicted charge of "burglary" instead of "aggravated burglary" has no bearing on the validity of the indictment, and he was not subjected to double jeopardy simply because the state re-presented the case to the grand jury and charged Mr. Nixon with the lesser included offense of burglary.

{¶5} Mr. Nixon's second and eighth assignments of error are also without merit. The pretrial hearing transcripts reveal that the court investigated Mr. Nixon's request for

self-representation "as long and as thoroughly as the circumstances of the case before it demanded" and that he "unequivocally and explicitly invoked" his right to self-representation on every occasion it was discussed until he decided to have counsel appointed, even going so far as deciding which public defenders he wished to represent him. At that time, he waived his request for self-representation by acquiescing in counsel's representation. Lastly, any error on the part of Mr. Nixon's counsel failed to cause any prejudice given the overwhelming evidence of his guilt.

{¶6} Mr. Nixon's third assignment of error is without merit since the state presented sufficient evidence by way of witness testimony and other evidence from which a jury could find, beyond a reasonable doubt, that Mr. Nixon committed grand theft, burglary, and had a weapon while under disability.

{¶7} Mr. Nixon's fourth assignment of error is without merit since he failed to allege a *Brady* violation. The state was not in possession of the victim's phone records, and it has no duty to gather evidence on behalf of a defendant.

{¶8} Mr. Nixon's fifth assignment of error is without merit because the trial court did not abuse its discretion in allowing phone calls between himself and the victim to be played for the jury since they were being offered for the purpose of impeachment. Nor did the trial court abuse its discretion by excluding the testimony of an assistant prosecutor Mr. Nixon called shortly after the incident occurred. A review of the testimony revealed it was highly prejudicial to Mr. Nixon, and it did not reflect a conflict with the prosecutor's office that would require the appointment of a special prosecutor.

{¶9} Lastly, Mr. Nixon's seventh assignment of error is without merit because he failed to allege the state's cross-examination regarding his drug use was prejudicial. The trial court sustained defense counsel's objection to any further questioning after Mr. Nixon

denied using methamphetamine; the jury was aware a "white, crystalline substance" was found in his backpack; there was some testimony that he may have been using drugs; and he failed to request a curative instruction.

{¶10} The judgment of the Portage County Court of Common Pleas is affirmed.

Substantive and Procedural History

{¶11} For ease of discussion, this chart detailing the various indictments is included for reference:

Date:	Charges Indicted by Grand Jury:
5/12/2022	Aggravated burglary, grand theft, and having a weapon while under disability
7/11/2022	Firearm specification added to charge of aggravated burglary
10/13/2022	Burglary with a firearm specification
10/25/2022	Matter proceeded to trial on the charges of grand theft, having a weapon while under disability (first indictment) and burglary with a firearm specification (third indictment)

{¶12} On May 12, 2022, the Portage County Grand Jury indicted Mr. Nixon on three counts: (1) having a weapon while under disability, a third-degree felony, in violation of R.C. 2923.13; (2) aggravated burglary, a first-degree felony, in violation of R.C. 2911.11; and (3) grand theft, a third-degree felony, in violation of R.C. 2913.02.

{¶13} Mr. Nixon, pro se, entered pleas of not guilty to the charges and waived an explanation of his rights and the penalties.[1]

1. While Mr. Nixon was proceeding pro se, he filed numerous motions as well as several appeals to this court that were all subsequently denied for lack of a final appealable order. He elected to have defense counsel appointed in August 2022. Those motions will be addressed as relevant to this appeal.

Firearm Specification

{¶14} On July 11, 2022, the Portage County Grand Jury filed an indictment against Mr. Nixon that added a firearm specification pursuant to R.C. 2929.14 and R.C. 2941.141 to the count of aggravated burglary.

{¶15} At the arraignment on the specification, Mr. Nixon attempted to enter a plea of "once in jeopardy" pursuant to R.C. 2943.03(D). The court entered a plea of not guilty on Mr. Nixon's behalf, noting it was being entered without his consent. In a judgment entry issued the following day, the court explained such a plea must be in writing and granted Mr. Nixon leave to file a written plea, which he did several days later.

Burglary Charge

{¶16} Because the prosecutor determined the facts did not support the aggravated burglary charge, the state re-presented the case to the grand jury. On October 13, 2022, the grand jury indicted Mr. Nixon on the lesser included offense of burglary, a second-degree felony, in violation of R.C. 2911.12(A)(2), with a firearm specification pursuant to R.C. 2929.14 and R.C. 2941.141.

{¶17} At the arraignment, Mr. Nixon entered an oral plea of "once in jeopardy," and the court, "sua sponte, entered a plea of Not Guilty to the charges contained in the amended indictment."

Challenges to the Indictments

{¶18} Mr. Nixon, both pro se and through counsel, filed multiple motions challenging the indictment and/or requesting the transcripts of the grand jury hearings.

{¶19} In Mr. Nixon's first such motion, filed shortly after his first arraignment, he contended without any specificity that the state withheld material, exculpatory evidence from the grand jury. The trial court found that Mr. Nixon failed to offer a particularized

need for the testimony and that the failure to disclose the testimony would not deprive him of a fair trial.

{¶20} Mr. Nixon also filed several motions to verify the foreperson's signature. He contended the indictments were invalid because the foreperson signed a "squiggly line," and a signature was required. In addition, he requested a handwriting expert to analyze the signatures of the prosecutor and the foreperson.

{¶21} In response, the state filed an affidavit of the grand jury foreperson attesting to her signatures on the indictments. At a hearing several days later, Mr. Nixon again moved to dismiss the indictment. The court overruled the motions, finding the affidavit satisfied that the signature and the indictment were valid.

{¶22} After he was indicted on the count of burglary, Mr. Nixon's counsel filed a "Motion to Inspect the Transcript of the Grand Jury Proceedings," contending no new facts or evidence were presented to the grand jury at the subsequent hearings to add the firearm specification and the charge of burglary. After the state filed a brief in opposition, the court issued a judgment entry overruling Mr. Nixon's motion. The court found that Mr. Nixon failed to demonstrate a particularized need necessitating the disclosure of the grand jury testimony and that the failure to disclose testimony would not deprive him of a fair trial.

{¶23} Mr. Nixon's counsel filed a "Motion to Dismiss the Amended Indictment," contending the criminal rules do not allow for amendments that change the penalty or degree of the charged offense.

{¶24} The trial court overruled the motion, finding the state re-presented the case to the grand jury because the facts did not comport with the charge of aggravated burglary, and the state obtained a true bill on a count of burglary with a firearm

specification. While the indictment document has the word "amended" on it, it is clear from the record that the state did not move to "amend" the charge.

{¶25} Mr. Nixon filed an appeal of the trial court's judgment denying his motion to dismiss the "amended" indictment, which we dismissed for lack of a final appealable order. *See State v. Nixon*, 11th Dist. Portage No. 2022-P-0067, 2022-Ohio-4467.

Appointed Counsel

{¶26} At a pretrial hearing, the trial court inquired whether Mr. Nixon wanted to continue to proceed pro se. Mr. Nixon informed the court he would hire his own advisory counsel. The prosecutor interjected to note Mr. Nixon employed the same tactics regarding the hiring of counsel in his prior cases, and it was common for him to tell the court on the day of trial that he was not able to hire the counsel he wanted. The court reviewed that Mr. Nixon "made [it] very clear that he wants to represent himself" and that if they got to the day of trial without Mr. Nixon hiring anyone, it would appoint him counsel.

{¶27} In early August 2022, at another pretrial hearing, Mr. Nixon informed the court that he "needed some trial counsel" and that he had a particular attorney in mind from the Public Defender's Office. The court reminded Mr. Nixon he could not have a "hybrid-type of representation" and inquired whether he wanted a lawyer appointed instead of proceeding pro se. Mr. Nixon elected to have two public defenders appointed, whom he specified by name, which the trial court appointed at a hearing two days later.

{¶28} In September 2022, Mr. Nixon filed a "Written Waiver of Counsel," moving "to dismiss counsel of record, because to defend this case properly, and to expose the state's corruption, would only warrant 'negative repercussions' on two outstanding attorney's [sic] at law, by an extremely insidious judicial circus referred to as a criminal justice system in Portage County, Ohio."

{¶29} In October 2022, Mr. Nixon filed a "Second Motion to Dismiss Counsel of Record," contending he wanted to dismiss his counsel since he had not met with them, and he did not want to delay the trial because they were not prepared.

{¶30} On the same day, Mr. Nixon appeared at a pretrial hearing without his defense counsel. The court informed him it would not dismiss his defense counsel without them being present. After some discussion with the court, Mr. Nixon expressed his desire to proceed represented.

{¶31} On the first day of trial, Mr. Nixon refused to appear in regular clothing. Defense counsel made a motion to continue, contending they were not prepared for trial. The trial court reminded counsel and Mr. Nixon that Mr. Nixon had ample time to prepare with an investigator and defense counsel, and that trial would not be delayed any longer. The court noted he was in court "many, many times." Mr. Nixon then orally moved to dismiss his counsel and proceed pro se. The trial court overruled his motion, finding Mr. Nixon was engaging in delay tactics because he was not "getting his way." He requested that the court take him "back to jail." Eventually, he agreed to put on street clothing and proceed with trial.

{¶32} Defense counsel stated on the record that a motion to withdraw representation had been filed several weeks earlier but that they had decided to "work through it." Defense counsel also believed there was an issue of hybrid representation because many of the subpoenas and the defense witness list that Mr. Nixon had filed pro se were not reissued. The court reviewed that defense counsel had withdrawn their motion to withdraw and appeared to be "getting along" with Mr. Nixon. The court found these were "continuous delay tactics that are either orchestrated, I'm assuming by Mr. Nixon, with the assistance of counsel. And I get it, you are making logical arguments * *

*." Defense counsel also inquired as to several complaints Mr. Nixon filed with the local bar association. The trial court found that bar complaints would not delay the trial.

Exculpatory Evidence

{¶33} As relevant to this appeal, Mr. Nixon filed a "Motion for Court Order and Warrant for Cell Phone Records," contending the cell phone of one the victims, his former girlfriend, Rachel Horvath ("Ms. Horvath"), contained exculpatory evidence. Mr. Nixon contended Ms. Horvath texted him on the morning of the incident and gave him permission to be at her home and "[s]he will testify to that." Mr. Nixon claimed that he needed her cell phone records because he lost his phone at the bottom of a creek when the police apprehended him, and that his lost phone was a track phone so it had no records. At a hearing on the motion, Mr. Nixon clarified he had been using his friend's phone to text Ms. Horvath. The court ordered the state to investigate and to respond to his motion.

{¶34} At a subsequent hearing, the state informed the court that a DVD containing the records from the phone of Mr. Nixon's friend was disclosed to defense counsel. Mr. Nixon further informed the court that his defense counsel intended "to get those records from [Ms. Horvath's] cell phone, but I have not had any contact so I don't know if [counsel] got them or not."

{¶35} On the first day of trial, defense counsel again raised the issue of Ms. Horvath's phone records and requested a continuance so they could be obtained. The trial court reminded them that if the state did not intend to use that evidence, it had no duty to obtain it. In addition, this matter was pending for quite some time, and Mr. Nixon had ample time to prepare both pro se with an investigator and with appointed counsel.

{¶36} Mr. Nixon also filed a motion for a warrant for the personal cell phone records of several deputies and prosecutors. One of these requests was for the phone records of an assistant prosecutor, Stephen Michniak ("Pros. Michniak"), who is an acquaintance of Mr. Nixon and was not involved in the prosecution of the instant case. Mr. Nixon had called Pros. Michniak shortly after the incident to "voluntarily surrender." He believed this phone call was exculpatory evidence, and contended the state was omitting the conversation because it was claiming the evidence, i.e., the handgun, was found at a different time.

{¶37} At a July 2022 hearing, the trial court denied the request for a warrant, and scheduled an in camera hearing to allow Pros. Michniak to testify.

{¶38} Several months later, the trial court held a hearing at which Pros. Michniak was present. Mr. Nixon withdrew his request for the assistant prosecutor's personal cell phone records after admitting he called the prosecutor's office. He believed he recorded the conversation on his cell phone, which was at his mother's house.

{¶39} Several weeks later, the court held the in camera hearing so Pros. Michniak could testify. The state had filed a motion in limine to prohibit the defense from asserting a claim of immunity from prosecution for "voluntary surrender" of the firearm pursuant to R.C. 2923.23. The state contended such immunity did not apply because Mr. Nixon could not voluntarily surrender a firearm that was the subject of his alleged crimes. Mr. Nixon's counsel informed the court they were unable to locate the recorded phone conversation.

{¶40} Pros. Michniak testified that Mr. Nixon called him on December 15, 2021, which was the day after the incident. At the time, he had no knowledge of the incident. Mr. Nixon explained to him that he felt concerned for his safety because Ms. Horvath's new boyfriend had a firearm and was going to use it against him. He asked Pros.

Michniak how he could be charged when he was "let in the house." Pros. Michniak grew concerned because Mr. Nixon "seemed despondent." He asked Mr. Nixon where the gun was. Mr. Nixon denied taking the gun. Pros. Michniak reminded him that he had just admitted to taking it. Mr. Nixon again denied taking the gun. Pros. Michniak attempted to "talk him down a little bit," telling Mr. Nixon if he did not "permanently wish to deprive these folks of this gun and you just took it because you were afraid of this guy, * * * maybe it's not a crime"; "why don't you tell me where it's at"; and "I'll go with you." Mr. Nixon told him "they are looking for him. She lied and said it was a burglary or something. This is bullshit."

{¶41} The conversation continued in a similar fashion until Mr. Nixon brought up another prosecutor as well as a deputy from the Portage County Sheriff's Office, both of whom he did not like. At this point, Pros. Michniak grew concerned given the possibility that Mr. Nixon was still armed. Eventually, Mr. Nixon told him where the gun was, giving him a "detailed description of like a little stream and maybe an old car or something or a shed." Pros. Michniak encouraged Mr. Nixon to turn himself in.

{¶42} Pros. Michniak called the Portage County Sheriff's Office and spoke with a deputy, who informed him they had already found the handgun (in the location Mr. Nixon had disclosed) the night before when the incident had been reported. Pros. Michniak never heard from Mr. Nixon again and did not know when Mr. Nixon was arrested.

{¶43} The court overruled Mr. Nixon's motion for a special prosecutor, finding there was no conflict with the prosecutor's office continuing the prosecution, and granted the state's motion in limine. The court further found Pros. Michniak's testimony would not be used by either party.

{¶44} At trial, during the defense's case-in-chief, Mr. Nixon's counsel asked the court if they would have the ability to call Pros. Michniak as a witness. The court found Pros. Michniak would not be called as a witness to bolster Mr. Nixon's testimony but it would delay a ruling on whether the state could call him as a rebuttal witness "if and when the issue arose." Despite the court's ruling, Mr. Nixon attempted to testify that he called Pros. Michniak. The court stopped him since the call occurred after the crime was committed. Mr. Nixon proffered Pros. Michniak's testimony for the record.

Jury Trial

{¶45} The case was tried to a jury in late October 2022.

The State's Case

{¶46} The state presented the testimony of the victims, Ms. Horvath and her two adult children, Joseph ("Mr. Horvath") and Tori; various officers from the Portage County Sheriff's Office; and a forensic DNA scientist from the Ohio Bureau of Criminal Investigation ("BCI"). The state also entered into evidence the retrieved firearm and ammunition, phone calls between Ms. Horvath and Mr. Nixon from jail shortly after his arrest, evidence of Mr. Nixon's prior conviction for domestic violence, photographs from the incident, a hammer and a towel that were found in Ms. Horvath's home after the incident, a note from Mr. Nixon the police found on Ms. Horvath's driveway, and DNA reports.

{¶47} The testimony of the state's witnesses revealed Mr. Nixon went to Ms. Horvath's home on the morning of December 14, 2021. Only Mr. Horvath was home, and he awoke to Mr. Nixon pounding on the windows. His history with Mr. Nixon made him concerned for his safety, so he locked the door. He described Mr. Nixon's behavior as "all over the place." Mr. Nixon told him that he was dropped off and was waiting for a ride.

Later, he changed his story and told Mr. Horvath he had walked to the house. Mr. Nixon asked for a drink of water and tried to go inside. Mr. Horvath handed him the water and refused to let him in. He observed Mr. Nixon roaming the wood line at the back of the property. He took his 9-millimeter handgun upstairs, which he had purchased two days before, and placed it under his mother's bed while he got ready for work.

{¶48} While he was in the shower, his sister, Tori, came home for lunch. Mr. Nixon followed her inside and told her he was waiting for Mr. Horvath to give him a ride. He asked if her mom had a boyfriend and told her he was ready to kill himself. Mr. Nixon went outside to the garage, and Tori locked the door behind her when she left. When Mr. Horvath left, he made sure all the doors and windows were locked and the garage door was down. Mr. Nixon was sitting on the porch.

{¶49} Later that afternoon, Tori was the first to arrive home. She noticed the lock and the panel of the door from the garage to the laundry room were broken and there was blood on the door, on the curtains in her daughter's room, and on the light switch in her bathroom.

{¶50} When Mr. Horvath arrived home, he discovered his handgun was missing. He never told Mr. Nixon he purchased a firearm, and he never gave Mr. Nixon permission to take it. A hammer was found in Ms. Horvath's room, and a bloody towel was found in her bathroom.

{¶51} The Horvaths called the Portage County Sheriff's Office. While the deputies were there, Ms. Horvath received a text message from an unknown number that stated, "Are you guys going to call the cops?"

{¶52} One of the deputies investigating the scene found a note in the driveway that said, "I'll be back for this stuff later." Mr. Nixon's email and password were written on

the back. In the woods, the deputies found a blue backpack that was hidden by sticks. Inside were Mr. Horvath's gun and two loaded magazines, toothpaste, weed eater line, a phone charger, and a bag with a white crystalline substance.

{¶53} The next day Mr. Nixon texted Ms. Horvath, disclosing that he took the gun and where she could find it. He also told her he thought she had a boyfriend.

{¶54} Mr. Nixon's DNA was identified on the hammer found in Ms. Horvath's room and on the bloody towel found in her bathroom.

{¶55} Ms. Horvath described her relationship with Mr. Nixon as possessive, mean, and controlling. They had been dating for approximately ten years, and she ended the relationship over a year ago. They had lived together for a time, and Mr. Nixon still had some belongings in her garage. Ms. Horvath was the victim of several domestic violence incidents with Mr. Nixon.

{¶56} The last time she could recall Mr. Nixon in her home was approximately one month before the incident. Mr. Nixon appeared to be "on something," and she did not feel safe. She could not drive him anywhere because she was too scared to be alone with him. She slept downstairs with her son.

{¶57} Ms. Horvath confirmed Mr. Nixon does not receive mail at her house. When he does, she writes "wrong address, return to sender" and leaves it for the mail carrier.

{¶58} Mr. Horvath had texted her on the morning of the incident, asking if she "could find some sort of insurance paper of his mom's, which didn't make sense to me. I just said we'll see if I have time to stop [at home]." Mr. Nixon did not tell her he was coming over, and he was not allowed inside her home.

Jail Phone Calls

{¶59} As relevant to this appeal, two phone calls between Mr. Nixon and Ms. Horvath, recorded on May 5 and 6, 2022, at the Portage County Jail shortly after Mr. Nixon was arrested were played for the jury. The court overruled defense counsel's motion in limine to prohibit the calls from being played for the jury since they were offered for the purpose of impeachment. Further, the trial court determined defense counsel would have the opportunity to cross-examine Ms. Horvath on the calls (which they chose not to do).

{¶60} In the May 5 phone call, Mr. Nixon explained to Ms. Horvath that he had been arrested. He had been hiding in the woods at Tinkers Creek in Twinsburg, Ohio, when he decided to turn himself in. He asked Ms. Horvath several times if she would "stand with him" and if she was his friend. He admitted to using drugs, telling her he needed help. He said he wanted "to go after" the prosecutor and several judges. He said he had a plan to "beat" the burglary charge and told Ms. Horvath he took the gun because he thought she had a boyfriend, asking her if she believed him.

{¶61} In the May 6 phone call, Mr. Nixon grew argumentative because Ms. Horvath would not agree with him that he was not in the house two days before the incident. He resorted to name-calling and told her they were "on different sides."

The Defense

{¶62} Mr. Nixon; his sister, Susan Pitts; and Ms. Horvath's ex-husband, Donald Horvath, testified for the defense. Mr. Nixon entered into evidence mail he received at Ms. Horvath's address and text messages.

{¶63} Mr. Nixon testified that he moved back in with Ms. Horvath in April 2020. He moved back out for two weeks and then lived with her until the incident. He noted that

he had called children services and made a report against Tori and that she was the one who did not want Mr. Nixon to live with them. He stayed at Ms. Horvath's two nights before the incident and saw Mr. Horvath's blue backpack and his gun under her bed.

{¶64} Mr. Nixon went to Ms. Horvath's home on the morning of the incident to retrieve some of his hunting gear that was stored in the garage. He laid everything out on the driveway and sat on the porch with Mr. Horvath. He asked him for a lighter and noticed a can of cigarette butts. Knowing no one smoked, he called Ms. Horvath to question her. Mr. Horvath took Mr. Nixon into the dining room of the house where he "cried my eyes out to the kid."

{¶65} Mr. Nixon explained that the laundry room door leading to the garage broke six or seven months before the incident. Further, he had placed the note the deputy had found on his hunting gear, and "[i]t must have blown off and went in the driveway or whatever." He told the jury that the blood on the towel in Ms. Horvath's bathroom might have been from shaving and that his blood was all over the house because he had cut his finger pulling out an arrow while getting his hunting gear.

{¶66} He claimed he found his backpack in Ms. Horvath's room when he was looking for a band-aid for his finger. Because Mr. Horvath was in Ms. Horvath's shower, he went into Tori's bathroom, inadvertently getting blood on her light switch. He took his bookbag from under Ms. Horvath's bed and, when he opened it, he saw the gun. He thought it was Ms. Horvath's new boyfriend's gun. He hid the backpack in the woods and decided to wait for Ms. Horvath and her boyfriend. When it began to rain, Mr. Nixon walked down the road to Ms. Horvath's ex-husband's house to spend the night. He further testified he did not have to break into Ms. Horvath's house because he had permission to

be there. He did not know how the debris got in the house, and the blood in the other areas of the house "could have been [from] anybody."

{¶67} In the interim between the incident and his arrest (he was not arrested until May 2022), he was living and working in Rootstown, Ohio. He saw Ms. Horvath "all the time," sometimes spending the night together intimately at her house, his mother's house, or his place. Among his felony convictions were three domestic violence convictions, which involved Ms. Horvath as the victim.

{¶68} As relevant to this appeal, on cross-examination, Mr. Nixon denied being under the influence of methamphetamine on the day of the incident and denied ever using it. The state inquired, "Is it true, you've told me you've used meth?" Defense counsel objected, and the court called counsel to the bench. The state explained that in a previous case in April 2020, Mr. Nixon told him he was "on meth, had a major addiction and needed help." The trial court sustained the objection since Mr. Nixon denied using drugs. Mr. Nixon failed to request a curative instruction for the jury.

Jury Verdict and Sentencing

{¶69} The jury returned a guilty verdict on all three counts, and the court referred the matter for a presentence investigation and sentencing.

{¶70} At the sentencing hearing, the court sentenced Mr. Nixon to an indefinite prison term of seven years up to 10 and 1/2 years on count two, burglary, with a consecutive, mandatory one-year prison sentence on the firearm specification, and to two, concurrent 36-month prison terms on count one, having a weapon while under disability, and count three, grand theft, to be served consecutively to count two.

{¶71} Mr. Nixon raises eight assignments of error on appeal:

{¶72} "[1.] The Trial Court, the State and Its Agents Deprived the Appellant of a Fundamentally Fair Grand Jury Process and Fair Trial As Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of Ohio's Constitution.

{¶73} "[2.] The Judgment is Void Ab Initio as a Result of the Trial Court having Created a Jurisdictional Bar, Causing the Trial Court to Lose Jurisdiction by Failing to Complete the Court and by failing to Ensure the Appellant Had Counsel in the Absence of a Waiver; The Trial Court Erred to the Prejudice of the Defendant's-Appellant's Substantial Rights by First Depriving Him of his Right to Counsel, the Later Depriving Him of His Right to Self-Representation, Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

{¶74} "[3.] The Appellant's Conviction is Not Supported by Constitutionally and Statutorily Sufficient Evidence, and is Against the Manifest Weight of the Evidence.

{¶75} "[4.] The Trial Court Erred to the Prejudice of the Appellant's Substantial Constitutional Rights, Including Due Process, Compulsory Process, and His Right to Confront Adverse Witnesses, and by Refusing to Allow the Appellant to Subpoena an Essential Witness; by failing to Ensure that the State Disclosed Exculpatory Evidence; and by Permitting the State to Present Evidence that the Trial Court and State knew to be Irrelevant, Misleading, and Inflammatory.

{¶76} "[5.] Trial Court, Prosecutor and Witness Misconduct at Trial Prejudiced the Appellant's Substantial Rights Under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as Well as Article I, Sections 10 and 16, of the Ohio Constitution.

{¶77} "[6.] The Trial Court Erred to the Prejudice of the Appellant's Substantial Rights When Denying the Appellant's Repeated Request to Inspect the Grand Jury Transcripts, and/or for an *in Camera* Inspection of the Grand Jury Transcripts, When the Appellant Presented a Particularized Need, and Such Particularized Need was Plain Upon the fact of the Record.

{¶78} "[7.] The State Committed Prejudicial Misconduct by Failing to Disclose Exculpatory Evidence, By Subornation of and Failing to Correct Perjured Testimony, and by Prejudicing the Jury's Perception of the Appellant.

{¶79} "[8.] The Appellant was Denied His Sixth Amendment and Due Process Rights to Effective Assistance of Counsel and a Fair Trial."

Grand Jury

{¶80} Mr. Nixon's first and sixth assignments of error challenge the grand jury process; thus, we will address them together. In his first assignment of error, Mr. Nixon contends the state should have dismissed the prior indictments before proceeding on the third indictment. Thus, his third indictment was barred by "double jeopardy." He also contends the jury foreperson's signature was invalid, and he was erroneously indicted in the first instance for aggravated burglary instead of burglary. In his sixth assignment of error, Mr. Nixon contends the trial court erred to his prejudice by denying his repeated requests for the grand jury transcripts and/or for an in camera inspection.

{¶81} "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus. "Whether particularized need for disclosure of

grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony." *Id.* at paragraph three of the syllabus.

{¶82} A decision to deny the release of grand jury transcripts and/or to hold an in camera inspection will not be reversed absent an abuse of discretion. *State v. Coley*, 93 Ohio St.3d 253, 261, 754 N.E.2d 1129 (2001); *State v. Johnson*, 11th Dist. Lake No. 2004-L-215, 2006-Ohio-4540, ¶ 33. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.2004). "When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error." *Id.* at ¶ 67. "By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id.*

{¶83} The trial court denied Mr. Nixon's multiple motions to review the grand jury testimony and/or for an in camera inspection, finding that he failed to demonstrate a particularized need for the transcripts and that the failure to disclose the testimony would not deprive him of a fair trial.

{¶84} We agree. A review of Mr. Nixon's motions reveals he only asserted general, vague speculations that the grand jury testimony contained potentially exculpatory evidence. "A general request for grand jury transcripts and/or mere speculation about the content of grand jury proceedings does not demonstrate a particularized need." *Desmond v. State*, 2020-Ohio-181, 141 N.E.3d 1052, ¶ 22 (7th

Dist.), quoting *State v. Richardson*, 2014-Ohio-3541, 17 N.E.3d 644, ¶ 17 (3d Dist.). *See also State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 44 (The appellant's speculative claim that the grand jury testimony might have contained material evidence or might have aided cross-examination did not establish a particularized need).

{¶85} Mr. Nixon next contends that the trial court erred by failing to dismiss the multiple indictments against him and that his subsequent indictments were barred by double jeopardy. Mr. Nixon was not indicted multiple times on the same charges. Rather, the original indictment charged him with aggravated burglary, grand theft, and having a weapon while under disability. The second indictment added a firearm specification to the charge of aggravated burglary, and the third indictment charged him with burglary, which is a lesser included offense of aggravated burglary, along with a firearm specification. This did not affect the first indictment charging him with grand theft and having a weapon while under disability.

{¶86} Further, the jury could have found Mr. Nixon guilty of burglary regardless of whether it was presented to the grand jury to charge. R.C. 2945.74 provides that a criminal defendant may be found guilty of a lesser included offense even though it was not separately charged in the indictment. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 8. "Lesser included offenses need not be separately charged in an indictment, because when an indictment charges a greater offense, it '"necessarily and simultaneously charges the defendant with lesser included offenses as well."'" *Id.*, quoting *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 151, ¶ 14, quoting *State v. Lytle*, 49 Ohio St.3d 154, 157, 551 N.E.2d 950 (1990). "Thus, a conviction for a lesser included offense does not deprive an offender of his constitutional right to presentment or indictment by the grand jury, because by indicting the offender for the

greater offense, the jury has necessarily considered each of the essential elements of the lesser offense." *Id.*

{¶87} Moreover, double jeopardy is not an issue under the circumstances of this case. Mr. Nixon was not tried twice for the same crime. In criminal proceedings, jeopardy does not attach until the jury is sworn, or in a bench trial, when the first witness is sworn and testimony is taken. *State ex rel. Smith v. Ohio Adult Parole Auth.*, 10th Dist. Franklin No. 88AP-565, 1990 WL 74013, *2 (June 5, 1990), citing *State v. Calhoun*, 18 Ohio St.3d 373, 481 N.E.2d 624 (1985); *State v. Dallman*, 11 Ohio App.3d 64, 463 N.E.2d 96 (9th Dist.1983); and *Keener v. Taylor*, 640 F.2d 839 (6th Cir.1981). Mr. Nixon was only indicted once on each charge.

{¶88} Mr. Nixon also takes issue with the authenticity of the signature of the grand jury foreperson. The state filed an affidavit from the grand jury foreperson attesting to her signature on the indictment. Mr. Nixon offered no evidence to the contrary. We cannot say the trial court erred in finding this was sufficient evidence that the indictment was valid, i.e., signed by the grand jury foreperson.

{¶89} Lastly, Mr. Nixon filed a public records request for the grand jury report of the grand jury term when he was first indicted. The report listed all of the defendants that were indicted during that term. The report reflected that Mr. Nixon had been indicted for burglary instead of aggravated burglary. The court informed Mr. Nixon the grand jury report was solely for the court's use and it was a clerical error that had no bearing on the validity of the indictment. Since the indictment itself is the only charging instrument, we find no error in the trial court's finding.

{¶90} Quite simply, Mr. Nixon failed to allege a particularized need for the grand jury transcripts and/or offer evidence that the indictments were invalid due to the fact of

multiple indictments, an alleged lack of a valid grand jury foreperson's signature, or a clerical error on the grand jury report.

{¶91} Mr. Nixon's first and sixth assignments of error are without merit.

Waiver of Counsel/Right to Proceed Pro Se

{¶92} We address Mr. Nixon's second and eighth assignments of error together because they both challenge his legal representation. In his second assignment of error, he contends the trial court erred in allowing him to proceed pro se without a valid written waiver of counsel. Conversely, in his eighth assignment of error, he contends the trial court erred in failing to grant his motions to dismiss counsel.

{¶93} The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution provide that a criminal defendant has a right to counsel. However, a criminal defendant also has the constitutional right to waive counsel and to represent himself or herself at trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In such a situation, "the Constitution * * * require[s] that any waiver of the right to counsel be knowing, voluntary, and intelligent * * *." *Iowa v. Tovar*, 541 U.S. 77, 87-88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004); Crim.R. 44(A). "In order to establish an effective waiver of [the] right to counsel, the trial court must make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right." *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph two of the syllabus.

{¶94} Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right, including the right to be represented by counsel. *State v. Herron*, 11th Dist. Lake Nos. 2009-L-119 et al., 2010-Ohio-2050, ¶ 20. However, in certain situations, the court may be permitted to infer a waiver of the right to counsel after

considering the "total circumstances of the individual case including the background, experience, and conduct of the accused person." *Id.*, quoting *State v. Gabel,* 11th Dist. Ashtabula No. 2008-A-0076, 2009-Ohio-3792, ¶ 42 (citation omitted).

{¶95} "Importantly, the right of self-representation exists 'to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.'" *State v. Graham*, 11th Dist. Portage No. 2022-P-0086, 2023-Ohio-2728, ¶ 58, quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-177, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). "The right 'does not exist * * * to be used as a tactic for delay; for disruption; for distortion of the system; or for manipulation of the trial process.' (Citations omitted.)" *Id.*, quoting *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir.2000).

{¶96} "There is no '"prescribed * * * formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election * * * will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."' *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 101, quoting *Iowa v. Tovar* * * * [at] 88 * * * . Stated differently, '[t]he Sixth Amendment does not require extensive warnings in every case.' *Id.* at ¶ 102. Rather, 'a trial judge "must investigate [a defendant's request for self-representation] as long and as thoroughly as the circumstances of the case before him [or her] demand."' [*State v.*]*Obermiller*[, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93,] * * * ¶ 42, quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed. 309 (1948)." *Graham* at ¶ 59.

{¶97} "'Generally, we review a trial court's denial of a request for self-representation asserted prior to the commencement of trial de novo; when the right is invoked after the commencement of trial we generally review for abuse of discretion.'" *Graham* at ¶ 53, quoting *State v. Degenero*, 11th Dist. Trumbull No. 2015-T-0104, 2016-Ohio-8514, ¶ 19. "'The balance in question is primarily the accused's interest in self-representation versus the disruption of proceedings that are already in progress.'" *Id.* at ¶ 53, quoting *Degenero* at ¶ 19.

{¶98} Firstly, this is the "certain" type of situation where waiver of counsel can be inferred from the circumstances. *Herron* at ¶ 20, quoting *Gabel* at ¶ 42. Our review of the transcripts of the pretrial hearings reveals that when Mr. Nixon was proceeding pro se, the trial court held multiple hearings for his benefit, appointed Mr. Nixon an investigator, and ensured he had opportunities to file motions and to hold multiple meetings with his investigator in jail. Further, the state was directed to investigate Mr. Nixon's claims that "exculpatory evidence" existed, and the court repeatedly inquired whether Mr. Nixon wished to continue to proceed pro se.

{¶99} Thus, the court investigated Mr. Nixon's request for self-representation "as long and as thoroughly as the circumstances of the case before [it demanded]," and Mr. Nixon "unequivocally and explicitly invoked" his right to self-representation on every occasion it was discussed until he decided to have counsel appointed, even going so far as deciding which public defenders he wished to represent him. *Obermiller* at ¶ 29, 42. At that time, he waived his request for self-representation "by acquiescing in counsel's representation." *Obermiller* at ¶ 31. *See also State v. Pulley*, 2d Dist. Montgomery No. 29501, 2023-Ohio-3277, ¶ 69-78 (the appellant, who had a history of proceeding with counsel and then pro se with standby counsel, waived request for self-representation by

asking standby counsel to assume representation after opening statements ended). Thus, Mr. Nixon "'kn[ew] what he [was] doing'" and that his choices were made with his "'eyes open.'" *Faretta* at 835, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268.

{¶100} We also cannot find the trial court abused its discretion by denying Mr. Nixon's request to proceed pro se on the first day of trial. As we recently stated in *Graham*: "It appears the trial court believed [the appellant's] true motive in representing himself was to advance frivolous and irrelevant arguments. Having the benefit of observing [the appellant's] behavior and listening to his rhetoric, the trial court was in the best position to distinguish between a manipulative effort and a sincere desire to proceed pro se. *See State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 72 ('A request for self-representation may be denied when circumstances indicate that the request is made for purposes of delay or manipulation of the trial process'); *Frazier-El*, *supra*, at 560 ('A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel')." *Id.* at ¶ 69.

{¶101} Secondly, Mr. Nixon complains that his counsel failed to prepare for trial by failing to interview and subpoena witnesses and failing to secure evidence. Further, they admitted to ineffectively assisting him and to hybrid representation on the morning of trial when they sought a continuance and Mr. Nixon expressed his desire to proceed pro se.

{¶102} While Mr. Nixon contends his counsel were ineffective, he fails to demonstrate that "but for" counsels' ineffectiveness, the outcome of trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). "[A] court need not determine whether counsel's performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), quoting *Strickland* at 697.

{¶103} Most fundamental to our analysis is the overwhelming evidence of Mr. Nixon's guilt, including his own testimony. While counsel may have been more diligent in their pretrial investigation, this is not a case where the lack of further diligence affected the outcome in any way. *See Bradley* at 146. The test for prejudice "must be conducted in light of the evidence in the record," which in this case is replete with evidence that supports the jury's verdicts. *Id*.

{¶104} Mr. Nixon also fails to specify which witnesses his counsel should have investigated and what their testimony would have shown or what evidence should have been secured and how these actions would have changed the outcome. "'Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.'" *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 222, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). Moreover, "'[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective.'" *Id.*, quoting *State v. Murphy*, 91 Ohio St.3d 516, 542, 747 N.E.2d 765 (2001), quoting *United States v. Davenport*, 986 F.2d 1047, 1049 (7th Cir.1993).

{¶105} Thus, it is clear that under these circumstances Mr. Nixon chose his counsel (pro se and appointed) deliberately throughout the instant case, and he was neither deprived of a valid waiver of counsel nor ineffectively assisted by counsel.

{¶106} Mr. Nixon's second and eighth assignments of error are without merit.

Sufficiency of the Evidence

{¶107} In Mr. Nixon's third assignment of error, he challenges the sufficiency of the evidence for his convictions for burglary, grand theft, and having a weapon while under disability.[2]

{¶108} ""[S]ufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1433 (6th Ed.1990). "In essence, sufficiency is a test of adequacy." *Id.*

{¶109} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶110} When conducting a sufficiency of the evidence analysis, this court is to look at the actual evidence admitted at trial, both admissible and inadmissible. *State v. Kessler Scott*, 11th Dist. Lake No. 2022-L-018, 2022-Ohio-4054, ¶ 26. Further, a claim of

2. Mr. Nixon also contends his convictions are against the manifest weight of the evidence; however, he makes no argument in support of this assertion. Accordingly, we disregard this portion of his assignment of error since it fails to comply with App.R. 16(A)(7). *State v. Turner*, 11th Dist. Lake No. 2020-L-088, 2021-Ohio-1921, ¶ 23.

insufficient evidence invokes a question of due process, the resolution of which does not allow for a weighing of the evidence. *Id.*

"Purpose to Deprive"

{¶111} Mr. Nixon first contends the evidence is insufficient to support his conviction for grand theft because the state failed to introduce evidence that he acted with the purpose to permanently deprive Mr. Horvath of his firearm since he hid the gun on the property, and texted Ms. Horvath after the incident, admitting he took the gun and advising where she could find it.

{¶112} Grand theft, pursuant to R.C. 2913.02(A)(1) and (B)(4), provides, in relevant part:

{¶113} "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶114} "Without the consent of the owner or person authorized to give consent;

{¶115} "* * *

{¶116} "If the property stolen is a firearm * * *, a violation of this section is grand theft. * * * [G]rand theft when the property stolen is a firearm * * * is a felony of the third degree. * * * The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm * * * consecutively to any other prison term or mandatory prison term subsequently imposed upon the offender."

{¶117} "'Deprive' means to do any of the following:

{¶118} "(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

{¶119} "(2) Dispose of property so as to make it unlikely that the owner will recover it;

{¶120} "(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration." R.C. 2913.01(C).

{¶121} A review of the state's evidence reveals the state introduced sufficient evidence from which a jury could find Mr. Nixon intended to purposely deprive Mr. Horvath of his gun, i.e., the evidence reflected Mr. Nixon was at the Horvaths' prior to the break-in, his DNA was identified in different areas of the home, and the gun was found in his blue backpack with his belongings. Simply because there was evidence that Mr. Nixon confessed after the fact does not equate to a finding that Mr. Nixon did not have the intent to purposely deprive Mr. Horvath at the time he took the gun or that the state failed to introduce sufficient evidence on this element.

{¶122} As the Fifth District aptly explained in *State v. Anderson*, 5th Dist. Stark No. 2018 CA 00029, 2018-Ohio-5228: "We * * * find whether or not Appellant intended to permanently deprive the owner of his vehicle is of no consequence. *See State v. Breaston,* 8 Ohio App.3d 144, 145, [456 N.E.2d 538] (10th Dist.1982) ('It is no longer necessary that defendant have an intent to permanently deprive the owner of the property to be guilty of theft or of receiving stolen property.'); *State v. Bilick*, 8th Dist. Cuyahoga No. 71238, 1997 WL 358282, (June 26, 1997) (Dyke, J., concurring), citing *Breaston* and Committee Comment to House Bill 511, effective January 1, 1974 ('The definition of "deprive" in this section is also broadened to include a temporary deprivation of property resulting in some substantial loss to the owner.'). *See also State v. Jordan*, 9th Dist. Summit No. 26598, 2013-Ohio-4172, ¶ 28 ('Pursuant to R.C. 2913.02(A)(1), a defendant

need only have "purpose" to deprive the owner of property; he need not actually permanently withhold or dispose of the property.')." *Id.* at ¶ 42. *See also State v. Sidders*, 3d Dist. Union No. 14-08-24, 2009-Ohio-409, ¶ 30 (whether the appellant was ultimately unable to withhold the property permanently is not the issue; rather, the issue is whether he acted with the purpose to permanently deprive).

"Likely to Be Present"

{¶123} Mr. Nixon next contends there was insufficient evidence to support his conviction for burglary because the state failed to introduce evidence that someone was likely to be present when the theft occurred.

{¶124} Burglary, pursuant to R.C. 2911.12(A)(2), provides:

{¶125} "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense."

{¶126} The term "likely to be present" connotes something more than a mere possibility. *State v. Haas*, 11th Dist. Portage No. 2009-P-0068, 2010-Ohio-6249, ¶ 33. A person is likely to be present when a consideration of all the circumstances would seem to justify a logical expectation a person could be present. *Id.*

{¶127} The Supreme Court of Ohio has held that this element is satisfied where the structure is a permanent dwelling house that is regularly inhabited, the occupants were in and out of the house on the day in question, and the occupants were temporarily absent when the burglary occurred. *See State v. Kilby*, 50 Ohio St.2d 21, 23, 361 N.E.2d 1336 (1977).

{¶128} The state introduced evidence by way of Ms. Horvath's testimony that Mr. Nixon had texted her in the morning asking if she could find some insurance papers for him. Ms. Horvath replied that she would stop at home if she had time. Ms. Horvath was at her morning job when he called, and she was going to her job as a caregiver in the afternoon. In one of the recorded calls, Ms. Horvath told Mr. Nixon she was unable to get away (and come home) after he texted her on the day of the incident. Mr. Nixon appeared at her house later that morning, waking up her son. Tori arrived home shortly after for lunch. In addition, Tori had a young child who lived with them.

{¶129} Thus, the state put forth sufficient evidence that the Horvaths were "in and out of the home" and "temporarily absent" when the burglary occurred. Under these circumstances, it is not objectively unreasonable or unlikely that any of the Horvaths would return home at any time for any number of reasons. *See*, *e.g.*, *State v. Lehman*, 2018-Ohio-1145, 109 N.E.3d 701, ¶ 14 (9th Dist.) (testimony that wife homeowner regularly came home for lunch, forgotten items, or appointments, and that her daughter and her fiancé regularly came over to bring their dog during that timeframe, was evidence from which a trier of fact reasonably could have inferred that was someone was "likely to be present" during that timeframe).

Having a Weapon Under Disability

{¶130} Lastly, Mr. Nixon contends the state failed to introduce sufficient evidence to support his conviction for having a weapon while under disability because there was no evidence that he "knowingly" took Mr. Horvath's gun. No one testified that Mr. Nixon "knew the gun was in his backpack." Further, he testified he did not know the gun was in the bag when he reclaimed it from under Ms. Horvath's bed.

{¶131} Having a weapon while under disability, pursuant to R.C. 2923.13(A)(2), provides, in relevant part:

{¶132} "Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm * * * if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence * * *."

{¶133} "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." R.C. 2901.22(B).

{¶134} Our review of the evidence contradicts Mr. Nixon's argument. The state put forth evidence by way of witness testimony and the recorded jailhouse calls indicating Mr. Nixon admitted he took the gun. Further, the police found Mr. Nixon's bag hidden on the property, with the handgun inside. Thus, there was more than sufficient evidence from which a jury could find that Mr. Nixon "knowingly" "acquired, had, carried or used" the firearm.

{¶135} Because there was sufficient evidence from which a jury could find, beyond a reasonable doubt, that Mr. Nixon committed grand theft and burglary, and had a weapon while under disability, we find Mr. Nixon's third assignment of error to be without merit.

Brady **Violation**

{¶136} In Mr. Nixon's fourth assignment of error, he contends the trial court erred by allowing the state to suppress exculpatory evidence. More specifically, he contends

the trial court refused to issue a court order and a warrant for Ms. Horvath's cell phone records. He contends her text messages would have reflected that (1) Ms. Horvath never told her children to ask Mr. Nixon to leave and/or told them he was not allowed to be there on the morning of the incident, (2) he and Ms. Horvath were in contact with each other in the days prior to the incident, and (3) Tori told Ms. Horvath that Mr. Nixon had been in the garage and she allowed him into the main part of the residence.

{¶137} In *Brady*, *supra*, the Supreme Court of the United States held that "[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

{¶138} To establish a *Brady* violation, an appellant must demonstrate (1) the prosecution failed to disclose evidence upon request, (2) that was favorable to the defense, and (3) material. *State v. Jones*, 11th Dist. Ashtabula No. 2000-A-0083, 2002 WL 737074, *4 (Apr. 26, 2002).

{¶139} The Supreme Court of the United States has noted that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' [under these circumstances] is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶140} Mr. Nixon has failed to allege a *Brady* violation since he failed to allege Ms. Horvath's cell phone records were in the state's possession. As the Sixth District

succinctly stated in a similar case in which the appellant repeatedly sought text messages between himself and the victim, "the state cannot suppress records that it does not have—and that have never been in the possession of a state agent." *State v. Jury*, 6th Dist. Erie No. E-22-005, 2022-Ohio-4419, ¶ 17. Further, the state obtained—and disclosed—some of the information he was seeking by obtaining his friend's cell phone records.

{¶141} Just as in *Jury*, Mr. Nixon seems to suggest "the state should be responsible for obtaining evidence that is potentially useful to the *defense* and that the state does not otherwise have or need * * *." (Emphasis sic.) *Id.* at ¶ 18. The state, however, has no duty to gather exculpatory evidence. *State v. Farris*, 2d Dist. Clark No. Civ.A.2003 CA 77, 2004-Ohio-5980, ¶ 20. "Rather, when the state has failed to gather exculpatory evidence or to fully investigate the allegations, the defendant may either investigate the charge and collect the evidence himself, if such evidence is available, or he may point out the deficiencies in the state's investigation at trial." *Id.*

{¶142} In addition, Mr. Nixon's claims that the text messages may contain exculpatory evidence is wholly speculative. *See State v. Brown*, 2017-Ohio-8416, 99 N.E.3d 1135, ¶ 54 (2d Dist.) (the state has no duty to gather exculpatory evidence, and appellant's claims of exculpatory evidence were speculative).

{¶143} Mr. Nixon's fourth assignment of error is without merit.

Admissibility and Exclusion of Evidence

{¶144} In Mr. Nixon's fifth assignment of error, he argues the trial court erred by allowing the state to introduce phone calls between himself and Ms. Horvath shortly after he was arrested and by failing to allow Pros. Michniak to testify on his behalf.

{¶145} "All relevant evidence is admissible, Evid.R. 402, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, Evid.R. 403(A)." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 144.

{¶146} A determination as to the admissibility or exclusion of evidence is a matter within the sound discretion of the trial court. *Ambrose v. USAA Gen. Indemn. Co.*, 11th Dist. Portage No. 2021-P-0108, 2022-Ohio-2629, ¶ 123. Indeed, "'[t]he issue of whether testimony is relevant or irrelevant, confusing or misleading, is best decided by the trial judge who is in a significantly better position to analyze the impact of the evidence on the jury.'" *Id.*, quoting *Columbus v. Taylor*, 39 Ohio St.3d 162, 164, 529 N.E.2d 1382 (1988). Consequently, a reviewing court will not reverse a lower court's determination as to the admissibility of evidence absent an abuse of discretion. *Id.* Where the decision to admit evidence is purely a legal one since it involves solely a question of law, our standard of review is de novo. *Id.*

Jail Phone Calls

{¶147} Mr. Nixon contends the trial court erroneously overruled his motion in limine and admitted two phone calls he made to Ms. Horvath the day after he was arrested because he mentioned a different gun that was found at the time of his arrest. He contends this was irrelevant and misleading to the jury.

{¶148} A review of the two phone calls reveals no such confusion. In one of the calls, Mr. Nixon briefly mentioned the other gun to Ms. Horvath when he was explaining the circumstances under which he turned himself in. Mr. Nixon also admitted to taking Mr. Horvath's handgun and was attempting to persuade Ms. Horvath to testify in his favor. The trial court allowed the phone calls to be played for the purpose of contradicting Mr. Nixon's statements, and Mr. Nixon was free to cross-examine Ms. Horvath to clear up any confusion, which he chose not to do. *See, e.g.*, *McKelton* at ¶ 145 (recorded jailhouse

phone call between appellant and former girlfriend where appellant swore repeatedly and demanded the girlfriend bring him money was relevant to show her potential bias as a witness and far outweighed any danger of unfair prejudice).

{¶149} We cannot find the trial court abused its discretion since the probative value substantially outweighed any danger of unfair prejudice and there is no indication of a confusion of the issues or that the jury was misled.

Proffered Testimony of the Assistant Prosecutor

{¶150} Mr. Nixon also contends the trial court should have allowed Pros. Michniak to testify because it would have revealed a special prosecutor should have been appointed due to a conflict with the prosecutor's office.

{¶151} Our review of Pros. Michniak's testimony reveals the trial court did not abuse its discretion in excluding this testimony. Pros. Michniak testified that Mr. Nixon confessed he took the firearm and hid it on Ms. Horvath's property. The testimony was extremely prejudicial to Mr. Nixon. While it did not reveal a conflict with the prosecutor's office, it did reveal Mr. Nixon was extremely hostile and threatening towards a different prosecutor in the department and a Portage County Sheriff's Office deputy. Simply put, Mr. Nixon cannot complain that highly prejudicial evidence against him was properly excluded.

{¶152} Mr. Nixon's fifth assignment of error is without merit.

Prosecutorial Misconduct

{¶153} In Mr. Nixon's seventh assignment of error, he alleges the state engaged in prosecutorial misconduct by questioning him about his methamphetamine use, which prejudiced the jury.

{¶154} In a claim of prosecutorial misconduct, we determine (1) whether the prosecutor's remarks were improper, and if so, (2) whether the remarks prejudicially affected the appellant's substantial rights. *Treesh*, *supra*, at 464. The allegedly improper statements are evaluated in the context of the entire trial. *Id.* "An improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *Id.*

{¶155} In *State v. Fast*, 2021-Ohio-2548, 176 N.E.3d 361 (11th Dist.), we recently explained: "Evidence of a witness's drug use may be probative of his or her capacity or ability to observe, remember, or relate under Evid.R. 616(B). *See State v. Jacobs*, 4th Dist. Highland No. 11CA26, 2013-Ohio-1502, ¶ 57 (Harsha, J., concurring). However, courts have recognized there is considerable danger that evidence a witness has used illegal drugs may so prejudice the jury that it will excessively discount the witness's testimony. *See Flythe v. District of Columbia*, 4 F.Supp.3d 222, 229 (D.D.C.2014) (collecting cases).

{¶156} "Thus, this court has held that 'the credibility of testimony can be attacked through evidence of a witness's intoxication *at the time of the matter about which the witness seeks to testify.*' (Emphasis added.) *Kenney v. Fealko*, 75 Ohio App.3d 47, 51, 598 N.E.2d 861 (11th Dist.1991). 'Such evidence is relevant to the issue of credibility, since it questions the ability of the witness to correctly perceive the events which allegedly occurred.' *Id.*

{¶157} "Similarly, federal courts have held that '"a witness's use of drugs may not be used to attack his or her general credibility, but only his or her ability to perceive the underlying events and testify lucidly at trial."' *United States v. March*, 114 Fed.Appx. 671,

674 (6th Cir.2004), quoting *Jarrett v. United States*, 822 F.2d 1438, 1446 (7th Cir.1987)." *Id.* at ¶ 80-82.

{¶158} Since the record reveals, beyond a reasonable doubt, that the jury would have found Mr. Nixon guilty, the prosecutor's questions, whether improper, did not affect his substantial rights and/or affect the trial. The trial court stopped the inquiry once Mr. Nixon denied using drugs on the day of the incident. Furthermore, the jury was already aware a white crystalline substance was found in Mr. Nixon's backpack; Mr. Horvath testified Mr. Nixon's behavior "was all over the place" on the morning of the incident; and Mr. Nixon admitted to having issues with drug use to Ms. Horvath in one of their recorded calls. In addition, Mr. Nixon failed to request a curative instruction to the jury.

{¶159} Mr. Nixon's seventh assignment of error is without merit.

{¶160} Finding Mr. Nixon's assignments of error are without merit, the judgment of the Portage County Court of Common Pleas is affirmed.

MATT LYNCH, J.,

EUGENE A. LUCCI, J.,

concur.