Court of Appeals, State of Michigan

ORDER

People of MI v Omar Rashad Pouncy

Docket No. 269298

LC No. 05-017154-FC

Michael R. Smolenski
Presiding Judge

William C. Whitbeck

Kirsten Frank Kelly
Judges

The Court orders that the motions for reconsideration are GRANTED. This Court's opinion issued December 27, 2007, is VACATED as to case number 269298 only.

A new opinion is attached to this order, revising the discussion of case number 269298, but retaining the discussion as to the consolidated case number 270604.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 25 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2007
v	No. 269298 Genesee Circuit Court
OMAR RASHAD POUNCY, Defendant-Appellant.	LC No. 05-017154-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 270604 Genesee Circuit Court
OMAR RASHAD POUNCY, Defendant-Appellant.	LC No. 05-017448-FC

Before: Smolenski, P.J., Whitbeck, C.J., and Kelly, J.

PER CURIAM.

In these consolidated appeals, defendant Omar Pouncy appeals as of right from two separate trials. In Docket No. 269298, defendant appeals his convictions from the Brady and Sandstrom jury trial (Brady trial). In Docket No. 270604, defendant appeals his convictions from the Haynes bench trial (Haynes trial). Both cases arise out of defendant's involvement in carjackings during which defendant posed as a potential buyer of vehicles advertised for sale. In each incident, after arranging to take the vehicle for a drive, defendant would allegedly pull a gun on the seller and steal the vehicle.

In Docket No. 269298, the Brady trial, defendant appeals his jury conviction of four counts of carjacking, MCL 750.529a, four counts of armed robbery, MCL 750.529, two counts of carrying a firearm during commission of a felony (felony firearm), MCL 750.227b, and one count of being a felon in possession of a firearm (felon in possession), MCL 750.224f. The trial court sentenced defendant as a third offense habitual offender, see MCL 769.11, to concurrent sentences of 2 years each for the felony firearm counts, followed by concurrent sentences of 562 months to 800 months' imprisonment for each of the four counts of carjacking, to 562 months to

800 months' imprisonment for each of the four counts of armed robbery, and two to 10 years' imprisonment for felon in possession. On appeal, defendant presents numerous claims of error. Because we conclude that there were no errors warranting relief, we affirm defendant's convictions and sentences in Docket No. 269298.

In Docket No. 270604, the Haynes trial, defendant appeals his bench conviction of one count each of carjacking, armed robbery, felony firearm, felon in possession, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant as a fourth offense habitual offender, see MCL 769.12, to 2 years in prison for felony firearm and to 450 to 900 months' imprisonment for each of the remaining counts. The trial court determined that the first 24 months of the concealed weapon sentence should run concurrent with the felony firearm sentence. After defendant serves the felony firearm sentence, the armed robbery, felon in possession, and the remainder of the concealed weapon charge would run concurrently. Finally, the carjacking sentence would be served last, consecutive to all other counts. In his appeal, defendant again presents numerous claims of error, but we find only one dispositive. We conclude that defendant experienced a total deprivation of counsel during a critical stage of the proceedings because he did not unequivocally waive his right to counsel during the pretrial proceedings. For this reason, we reverse defendant's convictions in Docket No. 270604 and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

A. The Haynes Carjacking

In September 2005, Ralph Haynes had a Monte Carlo on display for sale in the front yard of Samuel Anderson's home. Ralph was selling the car to pay for anticipated funeral expenses associated with his impending death from cancer. Anderson explained that on Saturday, September 24, 2005, a person came to look at Ralph's car. At trial, Anderson identified defendant as the prospective buyer. Anderson testified that defendant had looked at the car on three or four previous occasions. Anderson explained that during defendant's first visit, which was probably on the Sunday or Monday before the 24th, defendant inquired about the price, stated that "[m]oney is no object," and then left. On defendant's second visit, probably on Tuesday, he asked to drive the car, but Anderson refused. Sometime during his Tuesday visit, defendant mentioned to Anderson his desire to take the vehicle to his mechanic. Defendant arranged to come over again on Wednesday, but Anderson did not meet with him. Instead, Ralph and his brother Dan Haynes remained at Anderson's house in order to meet with defendant and defendant's mechanic.

Dan testified that he went to Anderson's house with Ralph on Wednesday, September 21, 2005, in order to meet some people who were interested in purchasing the Monte Carlo. At trial, Dan identified defendant as the prospective buyer. After briefly discussing the car, defendant asked to take it for a test drive, but, because the car did not have a license plate, Dan offered to take defendant for a ride instead. Defendant agreed, but during the ride he told Dan that he really wanted to take the car to his mechanic. Dan refused, but told defendant that he would ask Ralph about it, and then took defendant back to Anderson's house. Ralph refused to let defendant take the car to his mechanic, so Dan offered to let defendant go get his mechanic and bring him back to Anderson's house. Dan stated that defendant then left and came back shortly thereafter with his mechanic. After defendant and his mechanic looked at the car, defendant asked whether he

needed to leave a deposit, but Dan declined, promising that the car would still be there the next day. Defendant agreed to come back the next day at 12:30 p.m., but he never showed up. According to Dan, defendant called Ralph on Friday, apologized for not showing up, and asked to see the car again.

On September 24th, defendant arrived at Anderson's house and asked to take the car for a test drive. Anderson agreed to accompany defendant on the test. Anderson informed defendant that the car was not insured and instructed defendant on a specific route for the test drive. Anderson testified that part of the instructed route included getting on the expressway, but as they approached the expressway ramp, Anderson realized that defendant was in the wrong lane. When Anderson advised defendant that he needed to change lanes, defendant replied, "No, the car is mine now[,]" pulled out a gun, and pointed it at Anderson. Anderson told defendant he could have the car and asked to be let out. Defendant stopped at a red light and told Anderson, "All right when that light turns green you better be out the door or I will blow you through the door." Anderson got out.

B. The Brady Carjacking

Joseph Davis testified that Earl Brady brought a Camaro drag-racing car to his racecar chassis fabrication shop to display it for sale. Approximately four or five days before September 29, 2005, three men came to look at the Camaro; one of them identified himself as "Jacob Woods." At trial, Davis identified defendant as "Jacob Woods" and noted that he had been the one doing most of the talking. Defendant came back a second time and then a third time on the 29th. On September 29th, defendant called Davis and indicated that he was ready to make a deal, so Davis called Brady and told him to come over. Brady arrived in his truck with his friend Patrick Wendell. Defendant and two other men showed up later in a grey Intrepid. During negotiations, defendant told Davis that he wanted to take the Camaro to his mechanic at King Automotive. Brady agreed, loaded the Camaro onto a trailer attached to his truck, and they all left.

At trial, both Brady and Wendell identified the prospective buyer of the Camaro as defendant. The group arrived at a house where defendant said they would meet the mechanic and defendant asked Brady to back the truck into the driveway. Defendant and Brady were discussing the Camaro, when one of defendant's associates pulled out a gun and demanded Brady's keys and cell phone. When Brady refused, the associate fired the gun up into the air; Brady then complied. The men also took Wendell's cell phone. The men told Wendell and Brady to walk across the street and into the woods. While in the woods, Brady and Wendell heard the vehicles drive away. Brady and Wendell walked to a nearby house and called the police.

Wayne Grimes, defendant's stepbrother, testified that he helped defendant commit the Brady carjacking. Grimes testified that he owned an Intrepid, in which he drove defendant and defendant's friend, Tiaqua, to Davis's race shop on September 29, 2005. After defendant spoke to some men about a car, defendant directed Grimes to drive to defendant's "engineer." On the way, defendant told Grimes that he planned to "take" the cars and sell them, and Tiaqua handed Grimes a gun. Grimes testified that they arrived at a house, and, after Grimes gave him the signal, he pointed the gun at one of the men and took his keys and cell phone. He testified that he shot the gun in the air when the man first refused. He also testified that he ordered the men to

walk into the woods. According to Grimes, after the men walked into the woods, he got in his car and left defendant and Tiaqua. Grimes testified that he had pleaded guilty to armed robbery and felony firearm.

C. The Sandstrom Carjacking

Thomas Sandstrom testified that on October 11, 2005, a man, who had already called the previous day, came to his home in a metallic Intrepid to see a Cadillac that Sandstrom had advertised for sale. At trial, both Thomas and his wife Maria Sandstrom identified defendant as the prospective buyer. Defendant asked to take the car to his mechanic at King Automotive and Thomas agreed. Thomas rode in the Cadillac with defendant, defendant's associate drove the Intrepid, and Maria followed in her Corvette. They ended up at the last house on a dead end dirt road. Defendant asked Thomas for the title and they went to the Corvette to retrieve it from Maria. Thomas then felt defendant stick a gun in his side and defendant told Maria to get out of the Corvette. Thomas was asked for his wallet, and both the Sandstroms were ordered into the woods. Thomas heard the cars drive away, so he and Maria walked back to the road and flagged down a passing police car. Maria had memorized the license plate of the Intrepid and gave it to the police.

Grimes testified that he also helped defendant commit the Sandstrom carjacking. He testified that he, Tiaqua, and defendant were driving around, and defendant was looking at automotive sales ads in the newspaper. At some point, defendant called about an ad and then directed Grimes to drive to the seller's house. After defendant spoke to a man about a car, defendant told Grimes that he was going to take the car for a test drive. On the way, Grimes "[f]ound out that . . . it's about to happen again"—that defendant planned to steal the cars. Grimes testified that just after they arrived at the house, he heard the women screaming, and he got out of his car, covered his license plate, and then drove away, leaving defendant and Tiaqua behind. Grimes admitted that, when he was first arrested, he denied any involvement in the carjackings.

D. The Arrest and Trials

Detective James Gagliardi testified that he was assigned to investigate the Brady carjacking, but his investigation hit a dead-end. However, on October 12, 2005, he received notice of the Sandstrom carjacking and, after investigating the Intrepid lead, he was able to locate Grimes. Grimes was arrested, and, during interrogation, he identified defendant as one of his accomplices. Gagliardi testified that he put together a photo showup of defendant, and that Davis, Brady, and the Sandstroms all immediately identified defendant. Sometime around October 13, 2005, Anderson and Dan Haynes viewed a photo showup, and both men identified defendant as the carjacker. Gagliardi testified that defendant was taken into custody on Friday, October 14, 2005.

In late January and early February 2006, the trial court held the Brady trial. The trial lasted six days and included all the charges stemming from both the Brady and the Sandstrom carjackings. The jury convicted defendant as charged of four counts of carjacking, four counts of armed robbery, two counts of felony firearm, and one count of being a felon in possession of a firearm.

The Haynes trial lasted four days in April 2006. After the close of proofs, the trial court convicted defendant of one count each of armed robbery, carjacking, being a felon in possession of a firearm, carrying a concealed weapon, and felony firearm.

Defendant now appeals his convictions from both trials.

II. Docket No. 269298: Appeal from the Brady Trial

A. Waiver of Right to Counsel

Defendant first argues that he did not knowingly, intelligently and voluntarily waive his right to have counsel represent him at trial. Specifically, defendant contends that his waiver was contingent on the appointment of standby counsel and that he was not properly informed of the risks inherent in self-representation. As a result, defendant further argues, his convictions must be reversed. We disagree.

1. Standard of Review

When reviewing whether a defendant validly waived the right to counsel, this Court reviews de novo the entire record to determine whether the trial court's factual findings regarding the waiver were clearly erroneous. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). In conducting this review, this Court must respect the trial court's special "role in determining factual issues and issues of credibility." *Id.* at 641. However, the meaning of "knowing and intelligent" is a question of law, which this Court reviews de novo. *Id.* at 640. A trial court's ultimate decision to permit a defendant to represent himself is reviewed for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

2. The Right to Counsel

Both the United States and Michigan constitutions guarantee the right to counsel during all critical stages of the criminal process for an accused who faces incarceration. US Const, Am VI; Const 1963, art 1, § 20; *Williams*, *supra* at 641-642. The United States Constitution also implicitly guarantees a criminal defendant's right to represent himself, *People v Russell*, 471 Mich 182, 188-190; 684 NW2d 745 (2004), while the same right is explicitly guaranteed under Michigan's constitution and by statute. See Const 1963, art 1, § 13; MCL 763.1; *Williams*, *supra* at 641-642. Under Michigan law,

> a trial court must make three findings before granting a defendant's waiver request. First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Williams*, *supra* at 642.]

Additionally, under MCR 6.005(D),

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Failure to substantially comply with the above requirements renders the defendant's waiver of counsel ineffective. *Russell, supra* at 191-192.

> When determining whether the requirements were met, [this Court] indulge[s] every reasonable presumption against waiver of fundamental constitutional rights. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. [*People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005) (internal quotations and citations omitted).]

3. Defendant's Waiver

At the beginning of trial, defendant expressed dissatisfaction with his appointed attorney. Defendant claimed that he and his attorney Michael Breczinski were "really not on the same page." Defendant indicated that he was not comfortable with Breczinski's representation because Breczinski had not filed some requested motions or an alibi notice and the longest contact he had had with Breczinski was a 15-minute conversation on the day of trial. Defendant requested replacement counsel. The trial court explained that Breczinski could not file legal documents without a proper basis and that defendant did not have the knowledge or experience to know whether the requested motions were proper. The trial court also assured defendant that Breczinski was a very experienced attorney. The trial court denied defendant's request for new counsel, noting that "we're here on the day of trial, we got a jury downstairs that's ready to go and we're gonna try this case today[.]" Although the trial court denied defendant's request, it still inquired about the efforts Breczinski had taken with regard to defendant's alibi and other matters. Breczinski explained that he had taken steps to investigate defendant's alibi and address the other issues raised by defendant.

After jury selection, defendant proffered an objection.

> *Mr. Pouncy:* Can that sign be taken, this moved 'cause I'm not guilty. It say if Omar Pouncy guilty.
>
> *The Court:* Mr. Pouncy this is the prosecutor's side of the case. You're not runnin' anything in here, okay?
>
> *Mr. Pouncy:* I'm just askin' though—

The Court: No, no. He has the right to present his side of the case, your lawyer will present his side and if your lawyer believes there's somethin' wrong goin' on he'll get up and say somethin'. He doesn't need you to jump in okay? You're not a lawyer okay?

Mr. Pouncy: Would I, don't I have the right to represent myself though? I'm just askin', I'm just askin'.

The Court: Mr. Pouncy if you decide that you want to represent yourself then you're gonna represent yourself in total. The only thing Mr. Breczinski will be doin' is sitting there okay?

Mr. Pouncy: Okay.

The Court: And I can tell you right now that if you represent yourself you really are a fool okay and the reason is because you don't have a clue as to what you're doin'.

After the prosecution's opening statement, defendant requested permission to give his own opening statement.

The Court: . . . Is it true that you're asking to make your own opening statement?

Mr. Pouncy: Yes I'm, yes that is true but I would ask that if there are any objections needed that I'm not further, that I'm not known to do is properly object if my attorney can do it . . . because like I first stated to you earlier I haven't even had a conversation, we seen each other—

* * *

The Court: [S]ir if you make the opening statement, you'll have to represent yourself through this trial. Now I'm not gonna have him doin' half the trial and you doin' half. Either one, one of you is gonna be the lawyer and the other one isn't. Now if you decide to represent yourself, then he's gonna be sittin' back just as an advisor and that'll be it and you'll be able to get advice from him but you'll be callin' the shots through the entire trial. That includes objections and everything else. And if you don't know when and how to make 'em then I guess, you know, that's . . . on you. Now you say this is your life . . . then I would caution you to be very careful as to how you proceed right now—

* * *

[T]here's no way if, if I needed to have my transmission rebuilt that I would pull my car into a place to have it rebuilt and say to them look you guys step to the side I'm gonna rebuild this transmission because I don't know anything about buildin' transmissions. I've never built one. Are you hearin' what I'm sayin'?

After this, defendant again expressed dissatisfaction with how Breczinski was handling his case and indicated that he could do a better job. The trial court reiterated that Breczinski was doing what he was supposed to do and asked defendant whether he would let Breczinski represent him.

> *Mr. Pouncy:* So it's not an option for me to be able to get, even though I complained earlier and don't feel comfortable with the representation, for me to get further (inaudible)?
>
> *The Court:* No sir if you want to, if you want to decide who's gonna represent you then you get your money together and you go hire the lawyer you want to represent you. Otherwise, you're gonna get the lawyer that we appoint for you to represent you.
>
> *Mr. Pouncy:* Well yeah I'm gonna hire a lawyer then.
>
> *The Court:* Well I'm sorry sir it's late for that. It's trial day today.
>
> *Mr. Pouncy:* It's too late?
>
> * * *
>
> *The Court:* The only issue now is . . . are you gonna let Mr. Breczinski represent you or are you gonna represent yourself, that's the only thing that's on the table right now.
>
> *Mr. Pouncy:* Well let me ask you this. Would you let somebody represent you that didn't come and see you the day before your trial that didn't come and talk to you, that you didn't discuss your case with?
>
> *The Court:* Sir I would let Mr. Breczinski represent me in a heartbeat before I would represent myself with the knowledge that you have.
>
> *Mr. Pouncy:* So will I, I won't be able to talk at all if he talk? I won't be able to say nothin' at all?
>
> *The Court:* No sir. He is gonna represent you. That's what he does. . . .

The trial court then determined that Breczinski should continue representing defendant and make the opening statement.

Just before Breczinski was about to cross-examine the first trial witness, Breczinski told the court that defendant had passed him a note during the direct examination that stated, "I'm gonna represent myself from now on so you can tell the Judge."

> *The Court:* Mr. Pouncy you understand you have the right to an attorney and you have the right to Court appointed counsel if you can't afford one, do you understand that?

Mr. Pouncy: I don't have attorney right now.

The Court: Sir I'm just asking you do you understand your rights sir?

Mr. Pouncy: Oh yes I do understand.

The Court: You understand that if you represent yourself that I will have to treat you like any other lawyer and if you don't comply with the Court rules I'm gonna have to call you on it you understand that?

Mr. Pouncy: Yes sir.

The Court: And you understand that Mr. Breczinski will be here just simply to advise you from this trial forth and if you stand up and start representing yourself you're not gonna be able to change horses in the middle of the stream. You're gonna be representing yourself from beginning to end sir. Is that what you really want to do?

Mr. Pouncy: Yes. Yes.

The Court: Mr. Pouncy I'm gonna tell you that in my opinion you have no business representing yourself, none whatsoever.

Mr. Pouncy: The fact that they found the (inaudible) shoe-

The Court: [S]ir I just want you to understand that . . . .

Mr. Pouncy: All right I'm ready to go then.

The Court: All right then . . . .

As can be seen from these exchanges, this is not a case where defendant "steadfastly rejected the option of proceeding to trial without the assistance of counsel," by repeatedly insisting on the appointment of substitute counsel. *Russell*, *supra* at 192. Rather, defendant repeatedly raised the issue of self-representation. After defendant's initial inquiry about his entitlement to represent himself, several exchanges transpired between defendant and the trial court regarding whether he actually wished to represent himself. But after each exchange the trial court erred on the side of ruling against waiver. During the last exchange, defendant confirmed that he understood the risks associated with self-representation and ultimately indicated that he was ready to proceed. Only then did the trial court permit defendant to represent himself.

Nevertheless, relying on *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994), defendant argues that his simultaneous request for standby counsel rendered his waiver equivocal. However, this Court in *People v Hicks* noted that the plurality opinion of *Dennany* was not binding authority and held that "a request for self-representation can be accompanied by a request for standby counsel and maintain its unequivocal nature." *Hicks*, *supra* at 528. The Court explained that, "[i]nherent in the trial court's ability to evaluate a waiver of counsel is the ability to determine whether the defendant is vacillating in his choice or merely requesting that

which . . . will likely be granted to the defendant anyway." *Id.* at 529. Deferring to the trial court's superior ability to judge credibility, see *Williams*, *supra* at 640-641, we conclude that defendant's reference to having standby counsel did not invalidate his otherwise unequivocal waiver of counsel.

Defendant also argues that his waiver was not knowing and intelligent because the trial court failed to adequately advise him of the risks of self-representation. We do not agree.

The existence of a knowing and intelligent waiver of counsel depends on the particular facts and circumstances of a case. *People v Riley*, 156 Mich App 396, 399; 401 NW2d 875 (1986), overruled in part on other grounds *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996). An explanation of the risks of self-representation requires more than informing the defendant that he waives counsel at his own peril. *People v Blunt*, 189 Mich App 643, 649-650; 473 NW2d 792 (1991). A defendant must be specifically and rigorously warned of the hazards ahead. *Russell*, *supra* at 193 n 27, citing *Iowa v Tovar*, 541 US 77, 88-89; 124 S Ct 1379; 158 L Ed 2d 209 (2004). An explanation of the risks of self-representation should include, for example, a warning that exercising the right to self-representation is usually an unwise decision and the defendant may be acting to his own detriment, and a warning that the defendant will not be afforded any special treatment and will be held to abide by the special skills and training required of any professional attorney. *Blunt*, *supra* at 649-650.

In the present case, the record demonstrates that the trial court properly advised defendant of the risks of self-representation. The trial court told defendant that he would be a "fool" to represent himself and warned him that the court would treat him "like any other lawyer." Indeed, the trial court explained that defendant would be bound to comply with the court rules, which included making "objections and everything else." After defendant effectively asserted his right to represent himself, the trial court was not required to repeatedly pressure defendant into relinquishing that right. *People v Morton*, 175 Mich App 1, 7; 437 NW2d 284 (1989). Based on the totality of the exchanges, we conclude that the trial court properly apprised defendant of the risks associated with self-representation.[1]

Moreover, the record reflects that the trial court repeatedly advised defendant of the charges against him, including the minimum and maximum prison sentences associated with the various charges, both at the beginning of trial and at every subsequent proceeding. See MCR 6.005(E); *Lane*, *supra* at 137. Additionally, when advising defendant of the charges and sentences, the trial court again advised defendant of his right to counsel and confirmed that defendant waived that right. The record also reflects that throughout the entire proceeding, Breczinski was available to advise defendant as standby counsel and actively participated in the trial by performing voir dire and questioning witnesses. See MCR 6.005(D)(2).

[1] Contrary to Defendant's assertion, the trial court was not required to advise him "of the manner in which to make objections or explain the manner of decorum to be followed in the courtroom." Regardless, the record demonstrates that the trial court repeatedly, as necessary, advised Defendant with respect to proper procedure, including, for example, introducing evidence and making objections.

The trial court did not clearly err when it determined that defendant knowingly, intelligently and voluntarily waived his right to counsel. Therefore, the trial court did not err when it permitted defendant to represent himself.

B. Continuance to Obtain Substitute Counsel

Defendant argues that the trial court erred when it failed to order a continuance of the trial in order to give defendant time to obtain alternate counsel after he expressed dissatisfaction with his current counsel. We disagree.

To the extent that defendant claims that the trial court erred by denying him substitute *appointed* counsel, his claim is without merit. Criminal defendants are not entitled to appointed counsel of their choice. *Russell*, *supra* at 192 n 25. The decision to permit substitute counsel is within the trial court's discretion. *Id.* A defendant may be granted replacement counsel upon a showing of good cause and a finding that substitution of counsel will not unreasonably disrupt the judicial process. *People v Meyers* (*On Remand*), 124 Mich App 148, 165; 335 NW2d 189 (1983). Here, defendant's expression of dissatisfaction with how Breczinski was handling the case did not adequately demonstrate a breakdown in the attorney-client relationship to warrant substitution of counsel. Moreover, as will be discussed below, good cause was not supported by defendant's allegations that Breczinski was ineffective.

Turning to defendant's ability to obtain *retained* counsel, the constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel. *US v Gonzalez-Lopez*, 548 US ___, ___; 126 S Ct 2557; 165 L Ed 2d 409 (2006). However, the right is not absolute; a court must balance the defendant's right to choice of counsel against the public's interest in the prompt and efficient administration of justice. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003).

> "When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision." [*Id.*, quoting *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

Although defendant did briefly express a desire to retain counsel, he did not make a formal motion for a continuance to do so. The trial court cannot be faulted for failing to grant a continuance that was never requested. Further, even if we were to conclude that this statement were a request for a continuance, we would conclude that the trial court did not abuse its discretion in denying the request. Defendant failed to demonstrate that his appointed counsel was not providing him with effective assistance and the purported request did not come until trial was already underway and after he had already expressed a desire to represent himself.

The trial court did not err when it permitted the trial to proceed without a continuance.

C. Severance of Charges

Defendant next argues that the charges stemming from the Brady carjacking should not have been joined together in a single trial with the charges stemming from the Sandstrom carjacking because the two incidents were not related within the meaning of MCR 6.120(B)(1). Defendant argues that Breczinski's objection to the joinder of the trials at defendant's preliminary examination hearing preserved this joinder challenge. But, when read in context, it appears that Breczinski did not object to the joint trial of the Brady and Sandstrom charges. Rather, he expressed concern over the potential confusion regarding the consecutive versus concurrent nature of the sentences for the various charges. Therefore, defendant's challenge to the joinder of the Brady and Sandstrom trials is unpreserved. We review unpreserved claims of error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

1. MCR 6.120

MCR 6.120 governs joinder and severance of charges against a single defendant. MCR 6.120 provides:

> (A) Charging Joinder. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> (B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.
>
> (3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

> (C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).[2]

Under MCR 6.120(A), it is clear that the prosecutor could properly file an information that charged defendant with multiple offenses. The crux of this claim, therefore, is whether this case warranted a *postcharging* severance of the charges.

The prosecution points out that joinder of charges against a single defendant is appropriate when the offenses are related, i.e., when the offenses are based on a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1)(c). Accordingly, the prosecution argues that it is clear from the record that the Brady and Sandstrom carjackings were parts in a series of acts constituting parts of a single carjacking scheme or plan. Defendant and his accomplices devised an elaborate plan to groom sellers into thinking that defendant wanted to purchase the sellers' vehicles. In both instances, defendant contacted the sellers by phone before arranging to come to look at the vehicles. Once he arrived, defendant would indicate that he was interested in purchasing the vehicle, but condition the purchase on having his mechanic inspect the vehicle. Defendant would then lead the sellers to a remote location where the sellers were threatened at gunpoint, their personal belonging were taken, they were ordered into the woods, and then their vehicles were stolen. Thus, the prosecution argues, based on the systematic manner of both carjackings, it was appropriate for the trial court to try all the charges for these two related criminal acts together.

Based on the language of the court rule alone, the prosecution's argument appears to have merit. However, case law interpreting the language of the court rule leads us to conclude that the offenses here were not related because they were *not* in fact based on a series of acts constituting parts of a *single* scheme or plan.

MCR 6.120 is a codification of the Michigan Supreme Court's decision in *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). See *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690 (1992). In *Tobey*, the Court held that the defendant was entitled to separate trials on charges related to two heroin sales, made to the same undercover police agent 12 days apart. *Tobey*, *supra* at 144, 145. In reaching this decision, the Court recited several examples taken from the commentary to the ABA Standards Relating to Joinder and Severance:

> "[S]ame conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle." "A series of acts connected together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery." "A series of acts . . . constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of

[2] The current version of MCR 6.120, which was adopted on July 13, 2005, and became effective January 1, 2006, is applicable to defendant's trial, which commenced on January 24, 2006.

which were designed to conceal his thefts of money from the bank[.]" [*Id.* at 151-152.]

The *Tobey* Court concluded that the two heroin sales, although "substantially similar conduct," were not the "same conduct" because they transpired on two different dates. *Id.* at 152. The Court also concluded that the sales were not "connected" because, although they involved the same seller and buyer, they did not occur out of substantially the same transaction where proof of the acts committed was essential to a conviction on each of the counts, or out of a series of connected events committed to aid in accomplishing another. *Id.* at 152. Finally, the Court concluded that the sales were not part of a single scheme or plan because, again, although the sales involved the same seller and buyer, there was no evidence of any single scheme or plan for the seller to make continuing sales to that buyer. *Id.* at 153. Accordingly, because the only basis for joining the two offenses was that they were merely of the same or similar character, the Court concluded that the defendant had a right to severance. *Id.* at 153. Because the charges were not severed, the Court reversed the convictions. *Id.* at 154.

In a case more factually similar to this case, the Court in *Daughenbaugh* held that the defendant was entitled to separate trials on four separate armed robberies, which involved three different victims. *Daughenbaugh*, *supra* at 508, 511. Three of the robberies occurred on various dates in July 1988, and one occurred in September 1988. *Id.* at 508. Although the defendant was dubbed the "Blue Bandit" because he allegedly wore a blue hooded sweatshirt and blue jeans when committing the robberies, *id.*, the *Daughenbaugh* Court stated that "[t]he acts here are even less closely related than were those in *Tobey*[,]" noting that the robberies involved different victims on different dates, and pointed out that there was "no indication that one robbery was committed to facilitate another." *Id.* at 510. This Court has also recognized that "the relationship among [common plan] offenses . . . is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses." *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983) (internal quotation marks and citation omitted).

Following the *Tobey* and *Daughenbaugh* interpretations, we conclude that the Brady and Sandstrom carjackings were not related for *purposes of joinder*. The two carjackings, although very similar, were not the "same conduct" because they took place several days apart and involved different victims. Nor were the carjackings "connected," because proof of one of the carjackings was not essential to a conviction on the other; that is, the two incidents were not part of a series of connected events committed to aid in accomplishing another.

Moreover, although the two carjacking incidents were of the same character and involved similar conduct, there is no evidence that the carjackings were part of a single scheme or plan. There was no evidence of a single plan that tied the offenses together or that demonstrated that the objective of each separate offense was to contribute to the achievement of a single goal not attainable by the independent commission of either of the individual offenses. Stated differently, there was "no indication that one [carjacking] was committed to facilitate another." *Daughenbaugh*, *supra* at 510. Defendant denied any involvement in either of the carjackings, and Grimes testified that he had no idea either carjacking was going to take place until moments before each event transpired. Therefore, as stated, the record is lacking in evidence to support that the carjackings were committed as part of a single scheme or plan. Accordingly, because the

only basis for joining the charges from the two carjackings in a single trial was that they were executed in a similar fashion, the offenses were not related within the meaning of MCR 6.120 and defendant had a right to severance. See *Tobey*, *supra* at 145, 151, 153-154.

Although MCR 6.120(C) requires a trial court to sever unrelated offenses for separate trials, a defendant's motion triggers that obligation. But defendant never moved for severance of the charges. Consequently, the trial court was not required to sever the charges.

Under MCR 6.120(B), the trial court is afforded discretion, on its own initiative, to sever offenses charged in a single information against a single defendant "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." Factors relevant to the fairness of severance include: the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. MCR 6.120(B)(2). Here, the potential prejudice to defendant from trying the cases together did not necessarily outweigh the interests of judicial economy. Thus, we cannot conclude that trial court abused its discretion by failing to sua sponte sever the charges.

2. Ineffective Assistance Of Counsel

Defendant alternatively argues that Breczinski was ineffective for failing to bring a motion for severance. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A defendant has a constitutionally protected right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 684-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant does not receive adequate assistance of counsel when a defendant's trial counsel's conduct so undermines "the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, *supra* at 686. In order to demonstrate that counsel's assistance was so defective as to require reversal of a conviction, the defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Id.* at 687. Defendant has met neither requirement.

A counsel's performance is deficient if it falls below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688. As we already noted, defendant clearly had a right to severance of the charges against him. Therefore, had Breczinski moved to sever the trials for the two unrelated carjackings, the trial court would have been required to grant the motion under MCR 6.120(C). But this alone does not constitute proof that Breczinski's

decision not to request severance fell below an objective standard of reasonableness. There are "countless ways to provide effective assistance in any given case" and "[e]ven the best criminal attorneys would not defend a particular client in the same way." *Strickland, supra* at 689. The decision to request a severance is a matter committed to the professional judgment of trial counsel. And this decision is entitled to considerable deference. Indeed, counsel "is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. As the Court in *Strickland* aptly explained:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [*Id.* at 689 (citations omitted).]

Under some circumstances, a defendant's trial counsel might reasonably conclude that it would best serve the client's interests to defend against charges, which could otherwise be severed under MCR 6.120(C), at a single trial. In the present case, defendant's trial counsel may very well have determined, among other things, that defendant had a better chance of obtaining an acquittal of some or all of the charges in a trial before a single jury. The fact that this decision proved to be wrong does not transform an otherwise reasonably competent decision into one that falls below an objective standard of reasonableness. See *People v Mitchell*, 454 Mich 145, 171; 560 NW2d 600 (1997) ("[T]he Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel."). Because defendant failed to overcome the strong presumption that his trial counsel's decision not to request a severance was sound trial strategy, he is not entitled to a new trial on the basis of ineffective assistance of counsel for failing to request a severance.

Even if the decision not to request a severance fell outside the range of reasonable professional conduct, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland, supra* at 691. In order to warrant a new trial, the defendant must "affirmatively prove prejudice." *Id.* at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* But neither must the defendant show that "counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* Instead, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Accordingly, in order to warrant a new trial, defendant must show that, but for his trial counsel's decision not to request a severance, there is a reasonable probability that he would not have been convicted of the charged offenses.

At trial, there was considerable evidence that defendant committed the charged offenses, including the testimony of defendant's coconspirator in the carjackings. Further, the most significant testimony would have been available to the prosecution even if the charges had been tried in separate trials. Indeed, because the prosecution can meet the requirements of MRE 404(b), even with the trials severed, the prosecution would be able to present testimony concerning each of the carjackings at the separate trials. This significantly mitigates any prejudice that may have occurred as a result of the joined trials.[3] After examining the totality of the evidence before the jury and considering the limited nature of the prejudice caused by joining the charges in a single trial, we cannot conclude that, but for the decision not to request a severance, there is a reasonable probability that defendant would not have been convicted of one or more of the charges against him. See *Strickland*, *supra* at 695 (noting that a court hearing an ineffectiveness claim must consider the totality of the evidence and determine whether "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

Therefore, defendant is not entitled to relief on this basis.

3. Conclusion

In sum, the charges stemming from the Brady carjacking and the Sandstrom carjacking were not related within the meaning of MCR 6.120. But the trial court did not err by not severing the unrelated charges given that defendant failed to specifically request severance of the charges. Further, the trial court did not abuse its discretion by not severing the charges sua sponte. Finally, defendant failed to overcome the presumption that his trial counsel's decision not to request a severance was anything other than trial strategy and has failed to demonstrate prejudice. Consequently, his trial counsel was not constitutionally deficient.

D. Pretrial Identification Procedures

Defendant next argues that there were several errors based on suggestive identifications, which he claims warrant relief. Because defendant failed to preserve any of these claims of error, we shall review them for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

First, defendant claims that the trial court erred when it failed to grant his request for a corporeal lineup. However, defendant states that he "may" have requested a corporeal lineup and otherwise fails to identify record evidence that he did in fact request a corporeal lineup. Therefore, defendant has abandoned any claim of error on this basis. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

[3] We agree that there is a qualitative difference between charging a defendant with a crime and merely presenting evidence of a similar criminal act through MRE 404(b). See *Daughenbaugh*, *supra* at 511. However, the difference is not necessarily a prejudicial difference. Instead, the nature of the charges and the evidence that could be presented through MRE 404(b) must be analyzed and compared on a case-by-case basis to determine whether the failure to sever resulted in prejudice.

Next, defendant argues that the police purposefully delayed his arrest so that they could hold a photo showup rather than a corporeal lineup, which would have been required if he been in custody. See *People v Kurylczyk*, 443 Mich 289, 298 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). However, defendant fails to demonstrate that Grimes' statement to police was sufficient to warrant his arrest. Indeed, as the prosecution points out, Grimes' flip-flopping—first denying knowledge of the incidents and then confessing to participating while implicating other parties—raised concerns about his credibility. It was a reasonable tactic for the police to verify and corroborate Grimes' accusation by seeking to have the witnesses identify defendant in a photo showup before attempting to arrest him. Moreover, "there would be numerous problems with a rule requiring police officers to arrest a suspect as soon as probable cause is established simply because they wanted to obtain some sort of identification." *Id.* at 298 n 8 (Griffin, J.).

We also find no merit to defendant's claim that the police unfairly conducted the Sandstroms' photo showup because the Sandstroms were allowed to view the showup simultaneously. A photographic identification procedure can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the total circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 306 (Griffin, J.), 318 (Boyle, J.). Factors to consider include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id.* If a pretrial procedure was impermissibly suggestive, testimony regarding that identification is inadmissible at trial. *Id.* at 303.

Detective Gagliardi testified that he put together a photo showup for defendant. Gagliardi testified that he took both Thomas and Maria Sandstrom into the same conference room and presented them with the photo showup. Gagliardi indicated that the Sandstroms "looked at the picture for a brief second" and then both picked defendant. Thomas and Maria confirmed that they viewed the photographic showup together. But Maria explained that when she and her husband were presented with the photos, they agreed not to choose a photograph until they both independently knew which picture they were going to choose. Although she waited for her husband to indicate that he was ready to choose, Maria stated that "in [her] mind [she] picked out the picture almost immediately." According to Maria, after they were both ready, they both immediately chose defendant's picture.

The simultaneous presentation of the photo showup to both the Sandstroms may not have been a prudent decision on Gagliardi's part. However, looking at the total circumstances, there is no indication that this procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. Maria's testimony revealed that she and her husband took care to make sure they were not influenced by one another when they chose the picture. The trial testimony revealed that they both had ample opportunity to view defendant at the time of the crime because they both had direct conversations with him while in close physical proximity. Further, both Thomas and Maria almost immediately chose defendant from the photo showup and they both expressed unwavering certainty during trial that defendant was the man who carjacked them at gunpoint.

Further, according to Gagliardi, Davis "almost immediately" pointed out defendant as the man who claimed to be "Jacob Woods." Similarly, Brady immediately picked out defendant. Therefore, to the extent that defendant challenges their photo identifications, his argument is without merit. We find no clear error in the trial court's admission of their identifications into evidence. Accordingly, we conclude that the police use of a photo showup rather than a corporeal lineup did not prejudice defendant and that the photographic identification procedure was not so suggestive as to deprive defendant of due process.

Finally, defendant argues that the identifications at trial were tainted by the suggestive nature of the confrontation at the preliminary examination. However, on the record before this Court, there is no indication that the identifications at the preliminary examination were unduly suggestive. Therefore, there was no need to establish an independent basis for the identifications at trial. *People v McElhaney*, 215 Mich App 269, 287-288; 545 NW2d 18 (1996). There were no plain errors warranting relief.

E. Instructional Error

Defendant next argues that the trial court erred when it failed to properly instruct the jury. Specifically, defendant argues that the trial court should have given instructions on alibi, accomplice credibility and mere presence. The failure to give these instructions, defendant contends, constitutes error warranting relief. We disagree.

Although defendant claims that the trial court entrusted the selection of jury instructions to Breczinski, the record demonstrates that defendant took an active role in deciding which instructions the court should give. Further, the trial court specifically asked both Breczinski and defendant if they were satisfied with the reading of the instructions and both expressed satisfaction with the reading. By expressly approving the instructions, defendant waived any claim of error. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant also argues that Breczinski, although serving only as standby counsel, was ineffective for failing to request instructions on the defense of alibi, accomplice credibility, and mere presence. However, a defendant who asserts his right to self-representation has no entitlement to the effective assistance of advisory counsel. *People v Kevorkian*, 248 Mich App 373, 425-426; 639 NW2d 291 (2001).

Accordingly, there were no instructional errors warranting relief.

F. Ineffective Assistance of Counsel

Although defendant ultimately elected to represent himself during his trial, defendant argues that his trial counsel nevertheless rendered ineffective assistance that affected the outcome of his trial and, therefore, warrants reversal of his convictions. We do not agree.

1. Failure to Present Alibi Defense

Defendant argues that Breczinski was aware of the existence of potential alibi witnesses "well before trial" and yet he failed to file a timely notice of alibi, which failure this Court has held falls below the professional norm. See *Pickens*, *supra* at 327.

During defendant's arraignment, Breczinski moved to adjourn trial on the ground that he had not yet been able to investigate numerous witnesses allegedly related to defendant's defense. The trial court granted the motion and rescheduled the trial for later that same month. The morning of trial, defendant complained that Breczinski had not prepared an alibi defense. However, the record shows that Breczinski hired an investigator for the specific purpose of tracking down and interviewing potential alibi witnesses. The investigator met with defendant to collect the names of potential witnesses. Defendant conceded that he only gave the investigator the name and number for one potential witness. The investigation apparently revealed no legitimate potential for an alibi defense. Therefore, Breczinski was not ineffective for failing to raise a futile defense. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Moreover, despite the lack of alibi notice, the trial court allowed defendant to present his mother as a witness. She testified that at approximately 6:00 p.m. on October 11, 2005, defendant called her and asked that she bring "lunch" to him at his job site. Therefore, even assuming that Breczinski's failure to file an alibi notice fell below an objective standard of reasonableness, the failure did not deprive defendant of a substantial defense. *People v Wilson*, 159 Mich App 345, 354; 406 NW2d 294 (1987).[4]

2. Failure to Obtain Identification Expert

Defendant next argues that Breczinski was ineffective for failing to obtain an expert to testify on the reliability of eyewitness identifications.

> Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. Further, "a defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." [*People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002) (citations omitted).]

Defendant has failed to overcome the presumption that his counsel's decision not to obtain an identification expert was a matter of trial strategy. *Strickland*, *supra* at 690.

3. Failure to Move for a Corporeal Lineup

Defendant also argues that Breczinski was ineffective for failing to request a corporeal lineup. This Court has held that a defendant has no constitutional right to a pretrial lineup. *People v Farley*, 75 Mich App 236, 238; 254 NW2d 853 (1977). "[T]he granting of a pretrial lineup is a matter which is addressed solely to the examining magistrate's discretion." *Id*. at 238-

[4] Defendant also appears to contend that the trial court erred by denying him a continuance to present his additional alibi witnesses. However, because this issue was not properly set forth in the statement of questions presented, we need not address it. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nevertheless, we conclude that this issue is without merit because Defendant never requested a continuance related to the presentation of alibi witnesses.

239. Further, defendant fails to explain how presentation of a corporeal lineup rather than the photo showup would have affected the witnesses' identification. Indeed, given that the witnesses repeatedly identified defendant both in the photo showup and during various court proceedings, defendant has failed to show how the absence of a corporeal lineup prejudiced his substantial rights. Therefore, Breczinski was not ineffective for failing to move for a corporeal lineup.

4. Failure to Object to Suggestive Identification Procedures

Defendant argues that Breczinski was also ineffective for failing to object to the allegedly suggestive photo showup procedures. Because defendant represented himself at the time that the prosecution sought to introduce evidence of the witnesses' photo showup identifications, he had no entitlement to the effective assistance of counsel from Breczinski. See *Kevorkian*, *supra* at 425-426. Regardless, as we already noted, the photographic identification procedure was not so suggestive as to deprive defendant of due process. Thus, even if defendant had been entitled to Breczinski's effective assistance, Breczinski had no obligation to present a frivolous objection. *Fike*, *supra* at 182.

5. Failure to Request Severance of the Charges and Jury Instructions

Finally, defendant argues that Breczinski was ineffective for failing to request a separate trial for the charges arising from the Brady and Sandstrom carjackings and for failing to request jury instructions on alibi, accomplice witness credibility and mere presence. However, for the reasons already discussed, we conclude that these claims of error are without merit.

Defendant was not deprived of the effective assistance of counsel.

G. Other Acts Evidence

Defendant was tried on the charges arising from the Sandstrom and Brady carjackings at the same trial, but the prosecutor also sought to introduce evidence of the Haynes carjacking as a "similar act" under MRE 404(b) to prove similar scheme and conduct. Defendant argues that the trial court committed reversible error because the MRE 404(b) evidence of the Haynes carjacking was both unduly prejudicial and confusing to the jury. We disagree.

Before delving into our analysis of this issue, it is important to note that, here, our review of whether the Haynes evidence was properly admissible in the Brady trial differs significantly from the analysis that we employed in reviewing the joinder of the Brady and Sandstrom charges in a single trial. In the joinder analysis above, we needed to determine whether the Brady and Sandstrom carjackings constituted parts of a *single, continuing plan* to commit carjackings. Here, under a MRE 404(b) analysis, we determine whether the Haynes carjacking was of the *same character or involved similar conduct* as the Brady and Sandstrom carjackings.

1. Standard of Review

This Court reviews for an abuse of discretion the trial court's decision to admit other acts evidence. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Even when properly preserved, the defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227

(2001). Reversal is not required unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id.*

2. MRE 404(b)

The prosecutor argued that the Haynes carjacking was "done in a similar manner and fashion" because of the fact that the perpetrator there stated the need to take the car to "King's Automotive," the same mechanic mentioned in Sandstrom and Brady carjackings. Breczinski simply argued that the evidence did not serve to bolster the prosecution's case in light of the existing evidence. The trial court stated that MRE 404(b) was a rule of inclusion but requested more information about the circumstances of the Haynes carjacking before ruling. The prosecution then related the facts that, like the Brady and Sandstrom carjackings, defendant expressed interest in purchasing Haynes' car, took the car for a test drive, and then stole the car at gunpoint. The prosecution explained that the only difference between the carjackings was that, in the Haynes carjacking, Anderson refused to drive to the mechanic, so defendant simply ordered him to pull over during the test drive. The trial court acknowledged that the evidence was prejudicial but found that the probative value of the evidence outweighed the prejudice, noting that the trial court would instruct the jury on use of the evidence. Accordingly, the trial court granted the prosecution's request to introduce evidence of the Haynes carjacking "to establish the defendant's identity[.]"

MRE 404(b)(1) governs the admissibility of other bad acts evidence and provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The prosecutor bears the burden of establishing relevance. *Knox*, *supra* at 509. The proffered evidence would be unfairly prejudicial if it presents a danger that the jury will give undue or preemptive weight to marginally probative evidence. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

> [E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. Further, logical relevance is based on the system, as shown through the similarities between the charged and uncharged acts, rather than on defendant's character, as shown by the uncharged act. *Also, relevant similar acts are not limited to circumstances in which the charged and uncharged acts are*

> *part of a single continuing conception or plot.* . . . [T]he evidence of other acts must indicate the existence of a plan rather than a series of similar spontaneous acts, but unlike evidence of other acts used to prove identity, the plan need not be unusual or distinctive; *it need only exist to support the inference that the defendant employed that plan in committing the charged offense*. [*People v Ackerman*, 257 Mich App 434, 440-441; 669 NW2d 818 (2003) (internal quotations and citations omitted; emphasis added).]

We conclude that the evidence of other acts—the Haynes carjacking—had significant probative value in establishing a scheme, plan, or system for committing the charged offenses—the Brady and Sandstrom carjackings. The other acts evidence showed that defendant had engaged in repeated conduct where he would lure away persons selling vehicles and then steal their vehicles at gunpoint. The charged offenses here were consistent with the 404(b) conduct. Thus, the trial court properly admitted evidence under MRE 404(b) when, in each of the three instances, defendant employed a preconceived and distinct plan to steal cars at gunpoint by pretending to be interested in purchasing the vehicle.

We note that when ruling on the prosecution's motion the trial court stated that "the prosecution is bringing it in for the purpose of . . . showing identification of the defendant as the perpetrator[.]" However, the trial court misunderstood the prosecution's argument. The prosecution actually sought to introduce the evidence to show a similar scheme, plan, or system in doing an act. The significance of this distinction is that the requirements for reviewing evidence introduced to show identity are more stringent than those required when simply showing similar scheme, plan, or system.

If the bad acts evidence is offered to establish identification through a system in doing an act, (1) there must be substantial evidence that the defendant committed the bad act, (2) there must be some special quality or circumstance of the act tending to prove the defendant's identity or system, (3) it must be material to the defendant's guilt of the charged offense, and (4) the danger of unfair prejudice must not substantially outweigh the probative value of the evidence. *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982). "'The [commonality of circumstances] must be so unusual and distinctive as to be like a signature.'" *Id.* at 310-311, quoting McCormick, Evidence (2d ed), § 190, p 449.

> It is because of the combined value of . . . the unique and uncommonly distinctive style employed by the defendant in committing the "substantially proved" uncharged similar offense, and the same distinctive *modus operandi* employed in the charged offense, that the jury is permitted to infer, if it believes the evidence, that both crimes were the handiwork of the same person, the defendant. [*Id.* at 311.]

Here, the circumstances of the Haynes, Brady, and Sandstrom carjackings were of such distinctive character as to justify an ordinarily reasonable juror to infer that all were the handiwork of the same person. In all three carjackings, defendant was able or attempted to lure the victim to an alleged mechanic, and then steal the vehicle at gunpoint. Because we conclude that the Haynes carjacking met the more stringent standard required to establish identification, the trial court did not abuse its discretion in admitting the evidence for that purpose.

The trial court did not abuse its discretion by admitting evidence of the Haynes carjacking during the Brady trial.

H. Bolstering Witness Credibility

Defendant next argues that the trial court erred when it permitted Grimes to bolster his own credibility by testifying about his own religious conversion. We do not agree. All of the allegedly inappropriate responses were directly and fairly in response to questions posed by defendant. Because defendant solicited the allegedly prejudicial comments, he has waived any claim of error. See *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003) ("[W]hen a party invites the error, he waives his right to seek appellate review . . . .").

I. Tape Recording

Defendant next argues that the trial court erred when it permitted the admission and playing of a recording that was so inaudible as to be untrustworthy without proper authentication. We disagree.

Generally, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists if the results are outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Because this issue is unpreserved, we shall review it for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

The prosecutor requested leave to introduce a tape recording of a message allegedly left on the Sandstroms' answering machine on Thursday, October 11, 2005, claiming that it was defendant's voice on the recording. The prosecutor alleged that the complainants recognized the voice based on "previous dealings" with defendant. The trial court ruled that the tape recording would be admissible, provided that the prosecution laid a proper foundation and authenticated it.

During trial, the prosecution questioned Thomas Sandstrom about the phone message. Thomas testified that he recognized the voice as belonging to the individual that came to look at the car. And, after the trial court pointed out that the witness had not named the specific individual to whom the voice on the recording belonged, Thomas stated that he recognized the voice on the recording as that of defendant. The prosecution then admitted the tape without objection, and it was played for the jury. Because it was difficult to hear, the tape was stopped, moved closer to a microphone, and then played again. The tape was then moved closer to the jury box and played two more times. The recording played as follows:

> *Tape:* (inaudible)—call the police station or county jail and identify me. (inaudible) Do you hear me? And you better not press no fucking charges or nothing. (inaudible) I'm telling you. You press charges on me I'll fucking kill you. (inaudible)—because I fucking know where you live (inaudible) Take it like a man—(inaudible) in this fucking county. I'll send some people after you. I fucking don't want you to press charges or nothing. Don't you identify me so you live with—(inaudible) Do you think I'm playing? I'm already have someone watching your fucking house. And they know where it's at.

Defendant argues that the prosecution failed to lay a proper foundation for the tape's admission into evidence. MRE 901, which sets forth the requirements for authentication of evidence, provides, in pertinent part:

> (a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> * * *
>
> (5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

The prosecution properly authenticated the recording for admission into evidence by having Thomas state that, based on his previous dealings with defendant, it was his opinion that the voice heard on the recording belonged to defendant. "[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more." *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991).

Defendant also argues that the tape was inaudible. However, the jury heard the recording repeatedly, and the jurors were in the best position to evaluate and decipher the recording for themselves and then assess the weight to be accorded it. *People v Drohan*, 264 Mich App 77, 88; 689 NW2d 750 (2004).

The trial court did not abuse its discretion in allowing the admission of the recording.

J. Prosecutorial Misconduct

Defendant next argues that the prosecution denied him a fair trial by failing to reveal the full extent of the promises of leniency to Grimes, which defendant could have used to impeach Grimes' credibility. More specifically, defendant argues that the prosecution denied him a fair trial by failing to disclose that Grimes received a significant sentence reduction in return for his testimony. Although framed as a Confrontation Clause challenge, defendant's argument regarding the prosecution's alleged failure to disclose "the full extent of the promises of leniency" to Grimes is more aptly framed as a due process prosecutorial misconduct challenge.

Generally, this Court reviews de novo a claim of prosecutorial misconduct based on a failure to disclose evidence. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because defendant failed to object below, this issue is not preserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

"Where an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor . . . to disclose such fact to the jury upon request of defense counsel." *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976). MCR 6.201(B)(5) requires the prosecutor to disclose upon request "any plea agreement, grant of immunity, or other agreement for testimony in connection with the case."

> Due to the undeniable relevance of evidence of a witness' motivation for testifying, the prosecutor must, upon request of defense counsel, disclose to the jury "the fact that immunity or a plea to a reduced charge has been granted to the testifying accomplice [or coconspirator]." Defendant is "entitled to have the jury consider *any fact* which might have influenced an informant's testimony." The disclosure requirement may be considered satisfied where the "jury [is] made well aware" of such facts "by means of . . . *thorough and probing cross-examination* by defense counsel." [*People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990) (emphasis in original; internal citations omitted).]

On direct examination the prosecution asked Grimes whether he had been charged with crimes related to the carjackings and Grimes admitted that he pleaded guilty to armed robbery and felony firearm. On cross-examination defendant questioned Grimes regarding the total number of charges that were originally filed against him. The cross-examination established that Grimes was originally charged with significantly more crimes than those to which he eventually pleaded. Hence, any duty of disclosure was satisfied because, through defendant's cross-examination, the jury was informed of Grimes' possible motivations for changing his account of the carjacking events to police. See *id.* at 152-153. Defendant presented to the jury the possibility that the prosecution's leniency—dropping numerous charges against Grimes—served as the potential motivation for Grimes' alteration of his account of the events to include defendant. Moreover, the prosecutor did not mislead the jury or elicit false testimony.

Accordingly, defendant has failed to show plain error affecting his substantial rights with regard to the prosecution's alleged failure to disclose "the full extent" of the prosecution's plea agreement with Grimes.

K. Verdict Form

Defendant next argues that the verdict form used in this case constituted a substantial departure from the ABA standard 3.24 verdict form and was "coercively worded" because it did not allow for the possibility of the jury not being able to reach a decision on one or more counts. The standard jury verdict form, as established by the ABA and adopted by CJI2d 3.24 states:

> POSSIBLE VERDICTS:
>
> You may return only one verdict on this charge. Mark only one box on this sheet.
>
> __ Not Guilty
>
> __ Guilty of _____

According to defendant, the term "*POSSIBLE* VERDICTS" and use of the word "may" leaves open the possibility of no verdict. Here, the verdict form, stated as follows:

> WE, THE JURY, FIND THE DEFENDANT:
>
> (Select One)
>
> [Listing of various charges, with Guilty or Not Guilty option for each.]

Defendant also notes that the verdict form designated the Sandstroms, Earl Brady, and Patrick Wendell as "victims"; thereby purportedly precluding the jury from deciding that those witnesses were not actually victims.

A trial court is not required to strictly adhere to the standard criminal jury instructions because they are not binding authority. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Moreover, MCR 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, *on the ground of misdirection of the jury*, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in *a miscarriage of justice*. [Emphasis added.]

Even assuming that the jury form constituted "misdirection of the jury" for failure to indicate that they could choose not to render a verdict on one or more of the counts, there is no indication in the record that the jury would have chosen that option even had it been offered. The trial court polled each member of the jury to ask him or her if he or she agreed with the verdict and each responded affirmatively. Accordingly, there was no plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

L. Sentencing Errors

This Court reviews de novo issues concerning the proper application of the statutory sentencing provisions. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Breczinski represented defendant at sentencing. Defendant states that Breczinski objected to the scoring of the sentencing guidelines. While Breczinski did in fact object to the scoring of numerous offense variables, he did not specifically object to the scoring of OV 12. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). "A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the

court of appeals." MCL 769.34(10). Moreover, an erroneous scoring of the guidelines range does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

Here, defendant's crime class was A, and his overall OV score was 165, placing him well within OV level VI, which includes any point total above 100. MCL 777.62. The trial court scored 25 points for OV 12. MCL 777.42(1)(a). Thus, even if the trial court had not scored any points for OV 12, defendant would still have been well within OV level VI. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights and resentencing is not required. Finally, we decline to consider defendant's challenge to the extent that he is challenging the trial court's scoring of OV 7, because it was not properly set forth in the statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

M. Issues Raised in Defendant's Standard 4 Brief

In his Standard 4 brief, defendant raises numerous additional claims of error, which he contends warrant relief. Specifically, defendant argues that he was deprived of a fair trial by the delay in his arrest, by the trial court's deprivation of defendant's right to have the public present during certain motion hearings and voir dire, by the trial court's exercise of its discretion to limit cross-examination, by permitting defendant to represent himself without making an effective waiver of the right to counsel, by the suppression of exculpatory and impeaching evidence by the prosecution, by the trial court's failure to allow defendant to represent himself during the pretrial stages or allow defendant to retain counsel, by the prosecution's improper closing arguments, and by the cumulative effect of the errors. We have carefully examined these claims of error and conclude that none of them have merit.

IV. Docket No. 270604: Appeal from the Haynes Trial

A. Sixth Amendment Right To Counsel

1. Standard of Review

Defendant argues that he suffered a total deprivation of counsel during pretrial proceedings, beginning on the date of his second motion hearing held on February 27, 2006. He contends that Breczinski was acting merely as stand-by counsel when the trial court and Breczinski were under the mistaken impression that defendant was representing himself at the pretrial hearings. Defendant asserts that he did not actually waive his right to counsel until the first day of trial in the Haynes trial on April 4, 2006.

This Court reviews for clear error a trial court's factual findings surrounding a defendant's knowing and intelligent waiver of the assistance of counsel. *Williams*, *supra* at 640. However, the meaning of "knowing and intelligent" is a question of law, which this Court reviews de novo. *Id.* "Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." *Id.* at 640 (citations omitted).

2. Relevant Facts

Breczinski represented defendant at his January 9, 2006 arraignment and at the first pretrial motion hearing, held on February 6, 2006. However, the following exchange transpired during the second pretrial motion hearing on February 27, 2006:

> *The Court:* . . . Mr. Breczinski if you would state your appearance please.
>
> *Breczinski:* Michael Breczinski appearing I guess of counsel? I'm not sure.
>
> *The Court:* Uh—I'm not sure either. I thought—I am not sure on this one. I guess we'll see.
>
> * * *
>
> *The Court:* . . . Mr. Breczinski what did you want to say about whether you are representing Mr. Pouncy or whether he is representing himself?
>
> *Breczinski:* Your Honor I'm not sure about that . . . ."

During that same hearing, defendant made a request for a court-appointed memory expert. The trial court expressed its concern regarding defendant's apparent choice to represent himself, stating as follows:

> Yeah this is part of the concern that I have any time you know certainly people ought to be allowed to represent themselves, but to me this just shows part of the problem with that whole process. You're coming up with things that may or may not really have any real value in the trial.

When, later during that same hearing, defendant requested the witnesses' medical records in an effort to discover any vision problems, the following exchange transpired:

> *The Court:* . . . again you know I think because you're not a lawyer you're focusing on these things and I understand that. But they're really not the real issue in this—
>
> *Mr. Pouncy:* I don't even really have a lawyer you know what I'm saying?
>
> *The Court:* Well you got a lawyer right there. Well you're shaking your head.
>
> *Mr. Pouncy:* He ain't came to talk to me about nothing you know what I'm saying?
>
> *The Court:* Well he should be talking to you.
>
> *Mr. Pouncy:* He ain't—he ain't—
>
> *The Court:* But he's not your babysitter either. I want you to understand that.
>
> *Mr. Pouncy:* He ain't been there. You asked for him to come.

* * *

> . . . He ain't even been there man. This is my first time seeing him since the last time we was in court. . . . I'm really asking—

* * *

> . . . I'm really asking can I get another lawyer?

Upon the trial court's questioning, Breczinski admitted that he had not seen defendant since February 1, 2006, the date of defendant's conviction in the Brady trial. The trial court admonished Breczinski, stating that he should have been seeing defendant "at least every two weeks." Breczinski then agreed to visit defendant later that week. Turning its attention back to defendant, the trial court stated:

> *The Court:* . . . [S]o you do have a lawyer. He knows what he is doing whether you think so or not. To be honest with you lawyers don't win cases by spending their time with you in jail all day long either. . . .
>
> *Mr. Pouncy:* But at least go over the case with me.
>
> *The Court:* Well I agree. . . .

The trial court ordered that the trial be adjourned, so that Breczinski could spend time with defendant to help him prepare his case. The trial court stressed that Breczinski make sure he worked closely with defendant so that he would understand everything that was going on.

At a March 20, 2006 motion hearing, when asked for his appearance, Breczinski stated: "Michael Breczinski appearing *I guess* of counsel for the Defendant." (Emphasis added.) Later during that same hearing, in response to defendant's request for access to the court's law library, the trial court stated: "Mr. Breczinski is your counsel. You're going to have to rely on him for the law. That's what he's here for to give you that advice. . . . I will suggest . . . that you . . . make your suggestions known to your . . . legal counsel here and let him find the material for you. Mr. Breczinski is very good at . . . research. Well you say no, but you know I've seen things that he has written and put together." In response to defendant's assertion that Breczinski had refused to help him, the trial court instructed defendant to be more specific in his requests to Breczinski, noting that Breczinski was not going to give defendant the "whole defender trial booklet."

At March 27 and March 28, 2006 motion hearings, Breczinski unequivocally told the trial court that he was appearing as stand-by counsel.

3. The Law

As already noted above, under Michigan law,

> a trial court must make three findings before granting a defendant's waiver request. First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made.

> To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*Williams*, *supra* at 642.]

Additionally, under MCR 6.005(D),

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first:
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Failure to substantially comply with the above requirements renders the defendant's waiver of counsel ineffective. *Russell*, *supra* at 191-192.

4. Analysis

(a) No Waiver

The record reveals that during the pretrial proceedings of the Haynes trial, Breczinski repeatedly stated that he was not sure whether he was representing defendant. Despite this ambiguity regarding defendant's representation, the trial court never directly asked defendant, nor did he directly state, whether he wished to represent himself. Indeed, contrary to a finding of waiver, defendant complained that he felt like he did not have an attorney, and, at one point, he actually requested replacement counsel. Further, the trial court never once attempted to comply with the MCR 6.005(D) requirements during the pretrial proceedings. Thus, under the circumstances, we conclude that defendant did not unequivocally waive his right to counsel during the pretrial proceedings.

(b) Total Deprivation Of Counsel

Invalidly permitted self-representation that results in a complete deprivation of the right to counsel at a critical stage of the proceeding is structural error that requires reversal. But a limited deprivation can be harmless error. *Willing*, *supra* at 224. Thus, we must determine whether defendant's ineffective or equivocal waiver resulted in a total or complete deprivation of his right to counsel, whether this total deprivation occurred during a critical stage of the proceeding, and whether the effect of the deprivation pervaded the entire proceeding. *Id.*

This Court has held that the provision of standby counsel is not the provision of counsel that can negate the total deprivation of the right to counsel. *Id.* at 227-228. We conclude that defendant never unequivocally waived his right to counsel during the pretrial proceedings. We therefore conclude that defendant experienced a total deprivation of counsel despite the fact that standby counsel was present to assist him.

Further, the total deprivation of counsel occurred during a critical stage of the proceedings. "The phrase 'critical stage' refers to 'a step of a criminal proceeding . . . that [holds] significant consequences for the accused.'" *Id.* at 228. In this case, with the exception of the arraignment and first motion hearing, defendant was left unrepresented during the pretrial proceedings. During these proceedings, he made several motions, including a critical motion to quash the information. Further, the hearings took place after defendant had been formally charged. Thus, there can be little doubt that the hearings constituted a critical stage of the proceedings, and his deprivation of counsel during this critical stage affected the entire proceeding.

(c) Failure To Comply with MCR 6.005(D) Requirements At Trial

Although defendant unequivocally waived his right to counsel on the first day of the Haynes trial, the trial court again never even attempted to comply with the MCR 6.005(D) requirements. And on the third day of trial, the trial court completely failed to advise defendant of his rights or reconfirm his waiver of counsel as required: once a defendant has waived his right to counsel, the record must at each subsequent proceeding affirmatively show that the court advised the defendant of his continuing right to counsel and that the defendant waived that right. MCR 6.005(E); *Lane*, *supra* at 137; *Dennany*, *supra* at 433 n 13 (Griffin, J). Thus, even assuming defendant did not suffer a total deprivation of counsel during the pretrial proceedings, the trial court's subsequent failure to substantially comply with the MCR 6.005 requirements at trial rendered defendant's waiver of counsel ineffective. *Russell*, *supra* at 191-192.

(d) Effect Of Prior Waiver Made During Brady Trial

We disagree with the prosecution's assertion that the trial court's compliance with MCR 6.005(D) in the Brady trial was sufficient to constitute compliance with MCR 6.005(D) in the Haynes trial.

The following timeline is helpful here:

- January 9, 2006 - Defendant is arraigned in the Haynes trial proceedings. Breczinski represents defendant during this proceeding.

- January 24, 2006 - The Brady trial begins, and defendant knowingly, voluntarily, and unequivocally waives his right to counsel *in that case*.

- February 1, 2006 - The Brady trial ends.

- February 6, 2006 - Pretrial motion hearings begin in the Haynes trial proceedings. Breczinski represents defendant during this proceeding.

- February 27, 2006 - Pretrial motion hearings continue in the Haynes trial proceedings, and Breczinski first indicates that he is not sure whether he is representing defendant in the Haynes trial proceedings.

- March 9, 2006 - The trial court sentences defendant in the Brady trial. Breczinski represents defendant during this proceeding.

- March 20, 27, and 28, 2006 - Pretrial hearings in the Haynes trial continue.

- April 4, 2006 - The Haynes trial begins.

Given the overlapping nature of the proceedings, it is understandable that the trial court might have confused the two cases and simply assumed that defendant intended to represent himself in the Haynes trial, just as he had done in the Brady trial. Indeed, it is arguable that requiring the trial court to rehash the waiver procedures in the Haynes trial when the court had just gone through them with defendant approximately one month earlier in the Brady trial would unnecessarily elevate form over substance. In other words, it could reasonably be assumed that defendant was still aware of and capable of knowingly exercising his rights in the Haynes trial when he knowingly, voluntarily, and unequivocally waived his right to counsel in the Brady trial. However, the fact that the trial court's error was *understandable* does not make it constitutionally *acceptable*.

> When determining whether the requirements were met, [this Court] indulge[s] every reasonable presumption against waiver of fundamental constitutional rights. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. [*Willing*, *supra* at 220 (internal quotations omitted.).]

We conclude that defendant's unequivocal decision to represent himself in the Brady trial can have no effect on his choice of representation in the Haynes trial. The fact that a trial court follows procedure with a certain defendant in one trial does not alleviate the trial court's obligation to adhere to proper procedure during a different and independent proceeding. A defendant's repeated presence before the court does not make him any less worthy of the court's adherence to proper procedure and constitutional safeguards. Therefore, the trial court erred by presuming defendant's waiver of counsel in the Haynes trial proceedings.

(e) Conclusion

We conclude that defendant experienced a total deprivation of counsel during a critical stage of the proceedings. Because the effects of that deprivation pervaded the entire proceeding, and because the trial court failed to comply with the MCR 6.005(D) requirements, we must reverse his convictions in the Haynes trial. As we find this issue dispositive of the appeal brought under Docket No. 270604, we need not address several of defendant's remaining claims of error. However, because several issues are likely to recur on remand, in the interest of the efficient administration of justice, we will address those issues below.

B. Pretrial Identification Procedures

Defendant requested a corporeal lineup during his preliminary examination and during the pretrial proceedings. Further, defendant repeatedly challenged the identifications made during the preliminary examination during subsequent pretrial and trial proceedings. Therefore, he preserved these issues, *Davis*, *supra* at 547, and we will review them for clear error. *Gray*, *supra* at 115; *Kurylczyk*, *supra* at 303 (Griffin, J.), 318 (Boyle, J.).

Defendant argues that the trial court erred in denying him a corporeal lineup. However, this Court has held that a defendant has no constitutional or statutory right to a corporeal lineup. *Farley*, *supra* at 238. "[T]he granting of a [corporeal] lineup is a matter which is addressed solely to the examining magistrate's discretion." *Id.* at 238-239. In the present case, before the preliminary examination hearing began, defense counsel moved for a corporeal lineup. The district court questioned whether a corporeal lineup was necessary when the prosecution was required to establish witness identification of the defendant during the preliminary examination. Defense counsel responded that defendant was concerned about being identified solely because he would be the only person sitting at the defense table in a jail jumpsuit. The district court opined that was not a legitimate legal basis on which to grant a corporeal lineup. The district court noted that, if it were a legitimate legal basis, a corporeal lineup would have to be held in every case. The prosecution agreed with the court and noted that Anderson had already immediately picked defendant out of a photo showup. The district court then stated that the "bottomline" was that the victim was bound to testify truthfully under oath regarding the identity of the defendant. We find no abuse of discretion in the district court's decision.

We also reject defendant's argument that he was denied due process because Anderson was allowed to identify defendant while he was singled out as the defendant at the preliminary examination.[5]

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Kevin Dale Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To establish that an identification procedure denied him due process, a defendant must show that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.* Appropriate factors to consider when determining whether the in-court identification would result from a sufficiently independent basis include: (1) the witness's prior knowledge of the defendant; (2) the witness's opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness's level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Gray*, *supra* at 116; *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Here, during the preliminary examination, Samuel Anderson testified that on September 24, 2005, defendant came to his house to look at the Monte Carlo that he was selling for Ralph Haynes. Anderson testified that defendant "came to the house looking at the car several times." Anderson agreed to accompany defendant on a test drive. Anderson testified that his encounter with defendant on the 24th occurred during daylight hours and, although he stated that he wore glasses, he confirmed that nothing obstructed his vision. Anderson further testified that he was

[5] We note that defendant does not challenge Anderson's identification of him during the photographic showup.

only about "two foot or a foot and-a-half" away from defendant while they were in the car. Moreover, the prosecution specifically asked Anderson: "Other than the fact that he's present in the courtroom, would you recognize [Defendant]?" Anderson answered affirmatively and explained that "his face is embedded in my mind over this." Anderson confirmed that he had previously identified defendant in a photo showup.

We conclude that Anderson demonstrated a sufficiently independent basis for identification. Therefore, the fact that defendant was the only defendant in the courtroom during his preliminary examination was not so suggestive as to lead to a substantial likelihood of misidentification. Anderson had ample opportunity to observe defendant during the crime, only three months had passed between the crime and the preliminary examination, and Anderson previously identified defendant during the photo showup. Accordingly, the identification procedures used in this case did not deprive defendant of due process.

C. MRE 404(b) Evidence

Defendant also argues that the trial court erred when it permitted evidence of the Sandstrom carjacking to be admitted under MRE 404(b) even though the Sandstrom carjacking was not sufficiently similar to prove identity and was unduly prejudicial.

We reiterate that in our review of the joinder of the Brady and Sandstrom carjackings we needed to determine whether those two carjackings constituted parts of a *single, continuing plan* to commit carjackings. Here, under a MRE 404(b) analysis, we need determine whether the Sandstrom carjacking was of the *same character or involved similar conduct* as the Haynes carjacking.

At the first motion hearing, the prosecution moved to introduce evidence of the Sandstrom carjacking as a "similar act" under MRE 404(b) to prove similar conduct and identification. The prosecution noted that Thomas Sandstrom "spent a significant amount of time with Mr. Pouncy driving with him in a vehicle." The trial court sought clarification of the prosecution's argument, asking, "So you want to introduce this information for the purpose of identification is that what you're saying?" The prosecution responded, "Yes it is. Exactly." The trial court found that the evidence's prejudicial effect did not outweigh the probative value of the evidence "to identify who may or may not have been the perpetrator in this case." Accordingly, the trial court granted the prosecution's request to introduce evidence of the Sandstrom carjacking and granted the prosecution's motion to add Thomas Sandstrom to its witness list as a 404(b) witness.

We conclude that the circumstances of the Sandstrom and Haynes carjackings were of such distinctive character as to justify an ordinarily reasonable juror to infer that both were the handiwork of the same person. In both carjackings, defendant was able to or attempted to lure the victim to an alleged mechanic. Moreover, the evidence of the Sandstrom carjacking had significant probative value in establishing a scheme, plan, or system for committing the Haynes carjacking. Here, the other acts evidence showed that defendant had engaged in repeated conduct where he would lure away persons selling vehicles and then steal their vehicles at gunpoint. The charged offenses here were consistent with the 404(b) conduct. Thus, the trial court properly admitted evidence under MRE 404(b) to show that in each instance defendant

employed a distinctive *modus operandi* to steal cars at gunpoint by pretending to be interested in purchasing the vehicle. *Golochowicz*, *supra* at 310-311.

Accordingly, we conclude that the trial court properly admitted under MRE 404(b) Thomas Sandstrom's testimony during the Haynes trial for the purposes of establishing identity.

D. Prejudicial Arrest Delay

Defendant argues that the delay in his arrest prejudiced his rights because he was not able to obtain and preserve exculpatory evidence in the form of surveillance footage from the Genesee County Jail.

Defendant did not raise this issue below, but because a pre-arrest delay challenge implicates constitutional due process rights, the failure to raise the issue before the trial court does not preclude appellate consideration of the issue. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). We generally review constitutional errors de novo. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). However, we review unpreserved constitutional claims for plain error affecting the defendant's substantial rights. *Carines*, *supra* at 774.

Here, defendant claims that he was prejudiced because he was not able to obtain and preserve the surveillance footage from the Genesee County Jail. He argues that this footage would have proved that he was in jail on September 24, 2005, when the Haynes carjacking occurred. However, defendant has not demonstrated the requisite actual and substantial prejudice necessary to shift the burden of persuasion to the prosecution to show the reasonableness of the delay. See *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). Indeed, the officer in charge of defendant's work release program, testified that defendant signed in to jail at 12:50 a.m. on the morning of September 24, 2005, signed back out at 6:00 a.m., and then signed back in on the evening of September 24th at 11:50 p.m. Therefore, defendant has offered nothing more than mere speculation concerning the exculpatory nature of the evidence of which he claims he was deprived.

Accordingly, we conclude that defendant's due process rights were not violated.

V. Conclusion

Because we conclude that there were no errors warranting relief, in Docket No. 269298 we affirm defendant's convictions and sentences. In Docket No. 270604, because Defendant suffered a total deprivation of counsel during a critical stage of the proceedings, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction in either case.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly