STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2012
v	No. 299592 Macomb Circuit Court
ROBERT LEE CHILDRESS, Defendant-Appellant.	LC No. 2009-003052-FH

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of larceny by false pretenses of $20,000 or more but less than $50,000, MCL 750.218(5)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 19 to 120 months. He appeals as of right. We affirm.

I. FACTS AND PROCEEDINGS

Defendant's conviction arises from his involvement in a scheme in Macomb County in which he persuaded his girlfriend, Tomeka Gilmore, to purchase or lease several motor vehicles in financed transactions, and then traded in one of the vehicles for consideration after obtaining a replacement certificate of title that falsely indicated that there was no security interest on the vehicle. Although all purchase agreements, lease agreements, and financing contracts were in Gilmore's name, defendant conducted all of the negotiations and handled all of the transactions, and he took possession of the vehicles. Gilmore testified that she agreed to help defendant acquire the vehicles because she trusted defendant, believed that he needed the vehicles for his "leasing company," and he told her that he would make all of the lease and installment payments.

One of the purchased vehicles, a Land Rover, was financed by Capital One Finance ("Capital One"). After a certificate of title was issued that listed Capital One as a secured creditor, a replacement certificate of title was obtained that listed Gilmore as the owner of the vehicle, but did not list Capital One's lien. Evidence indicated that the Secretary of State issued the replacement certificate of title after it was presented with (1) a form, with Gilmore's signature, authorizing a "Terence Jones" to conduct business pertaining to the Land Rover on her behalf, and (2) a separate document indicating that the Capital One lien had been satisfied. Gilmore denied knowledge of either document, denied knowing anyone named Terence Jones, and claimed that the signature on the authorization form was not hers. Defendant later used the false certificate of title to negotiate a trade-in of the Land Rover in exchange for a prepaid lease

of a Ford Fusion from Russ Milne Ford, and a cash difference of approximately $20,000. Russ Milne Ford issued the check payable to Gilmore, but Gilmore gave the proceeds to defendant when she cashed the check.

Gilmore was not charged with any crimes and testified for the prosecution at trial. The prosecution's theory at trial was that defendant used Gilmore, an unsuspecting dupe, to commit acts of fraud.[1] The defense theory at trial was that any act of fraud was committed by Gilmore, who was the listed owner of the Land Rover, the listed owner of the Ford Fusion, and the debtor to Capital One.

II. 180-DAY RULE

Defendant first argues through appellate counsel that the trial court erred in denying his motion to dismiss for violation of the 180-day rule, MCL 780.131(1). Defendant raises this same argument in a separate pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. The question whether the 180-day rule divested the trial court of jurisdiction is a question of law subject to de novo review. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

MCL 780.131(1) provides:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any *inmate of a correctional* facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be *brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint*. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail. [Emphasis added.]

[1] In 2008, defendant was convicted of larceny by conversion of property, MCL 750.362, and making a false assignment of a motor vehicle title, MCL 257.254, for his involvement in a similar scheme with a different girlfriend in Oakland County. This Court affirmed defendant's convictions in that case. *People v Childress*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 288657).

"The 180-day period begins on the day after the prosecution receives notice that the defendant is incarcerated and awaiting trial on pending charges." *People v Davis*, 283 Mich App 737, 740; 769 NW2d 278 (2009).

In *People v Lown*, 488 Mich 242, 246; 794 NW2d 9 (2011), our Supreme Court held that it is not required that a trial be commenced within 180 days after the date notice was delivered. "Rather, . . . it is sufficient that the prosecutor 'proceed promptly' and 'move[] the case to the point of readiness for trial' within the 180-day period." *Id.*, quoting *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959).

In this case, the prosecutor commenced the action well within any applicable 180-day period.[2] The delays afterward were attributable to defendant's repeated requests to adjourn the preliminary examination, defendant's requests for additional time to file a motion to quash and his delay in bringing that motion, defendant's two requests for the appointment of substitute counsel, and the need to allow additional time for new counsel to become familiar with the case and prepare for trial. Nothing in the record indicates that the delays were the result of the prosecutor's failure to proceed promptly or failure to move the case to the point of readiness for trial. Accordingly, the trial court did not err in denying defendant's motion to dismiss for violation of the 180-day rule.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues, both through appellate counsel and in his Standard 4 brief, that the evidence was insufficient to support his conviction. This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). To determine whether the evidence presented at a bench trial was sufficient to support the defendant's conviction, this Court views the evidence in a light most favorable to the prosecution to "determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* The elements of the crime can be proved by circumstantial evidence and reasonable inferences that can be drawn from such evidence. *Id.* at 619.

The elements of larceny by false pretenses are as follows:

> (1) the defendant must have used a pretense or made a false statement relating to either past or then existing facts and circumstances, (2) at the time the pretense was used the defendant must have known it to be false, (3) at the time the pretense was used the defendant must have intended to defraud someone, (4) the accuser must have relied on the false pretense made by the defendant, (5) because

[2] The earliest date that the 180-day period could have begun to run is October 14, 2008, the date defendant was sentenced to a prison term in his Oakland County case. Plaintiff argues that there is no documentation in the record that the prosecutor received notice of defendant's incarceration. However, the prosecutor acknowledged on the record below that he was aware of defendant's incarceration.

> of this reliance that person must have suffered the loss of some money or other valuable thing, and (6) the property obtained by the defendant must have had a fair market value of over . . . [$20,000, but less than $50,000] at the time of the crime. [*People v Lueth*, 253 Mich App 670, 680-681; 660 NW2d 322 (2002).]

In this case, the prosecutor presented evidence of defendant's involvement in the purchase or lease of several vehicles through his girlfriend, Tomeka Gilmore. Although Gilmore was listed as the named party to the transactions in the paperwork, the evidence indicated that it was defendant who initiated all contact and handled all of the negotiations for the transactions. The evidence showed that defendant was involved in the transaction in which a Land Rover vehicle was purchased in Gilmore's name as part of a financed transaction in which Capital One was listed as a secured creditor on the certificate of title, which was given to defendant. A few weeks later, a false certificate of title to the Land Rover was obtained that omitted Capital One's security interest in the vehicle. The evidence established that the false certificate of title was obtained by someone who submitted forged documents to the Secretary of State indicating that they had been authorized to act on behalf of Gilmore and falsely certifying the satisfaction of the Capital One debt and the release of Capital One's lien. The evidence further showed that defendant used the false certificate of title to negotiate a trade-in of the Land Rover in exchange for a prepaid lease of a Ford Fusion and a cash payment of approximately $20,000. The auto dealership relied on the false certificate by providing the Ford Fusion and cash payment under the belief that it was receiving the Land Rover free of any security interest.

Defendant argues that there was insufficient evidence that he was involved in the transactions, particularly in obtaining the false certificate of title. He emphasizes that Gilmore was the titled owner of the Land Rover, the titled owner of the Fusion, and the debtor to Capital One. Defendant also maintains that the certificate of title was valid, and that there was no evidence that he had no knowledge of, or responsibility for, the omission of the Capital One lien. We disagree with each of these claims. The prosecutor presented ample evidence that defendant was the person who initiated and handled all of the transactions culminating in the Land Rover trade-in. Gilmore testified that defendant asked her to purchase each of the vehicles for him for his business, and she agreed to do so because he told her that he could not do so personally because "he had stuff in his name already." According to Gilmore, defendant conducted all of the negotiations for the purchase of the Land Rover and the other vehicles, he filled out the credit applications on her behalf, and he promised to be responsible for all payments and insurance. Gilmore stated that she signed the purchase agreements and credit applications at defendant's direction, without really knowing what was going on, because she trusted defendant and believed that he needed her help to acquire the vehicles for his leasing business. The auto dealership salesperson similarly testified that defendant initiated all contacts with the dealership, and that defendant conducted all of the negotiations, even when Gilmore was present.

Further, Gilmore testified that she gave the certificate of title for the Land Rover to defendant, but was subsequently contacted by Capital One about over-due payments. When she asked defendant about the payments, he told her that he was "handling it." Gilmore denied authorizing anyone to conduct business with the Secretary of State on her behalf and denied that the signature on the authorization form was her signature. She also denied falsely reporting the release of Capital One's lien to the Secretary of State and denied authorizing anyone to do so. Although there was no direct evidence that defendant was the person who obtained the false

certificate of title, the evidence showed that defendant used the false certificate to negotiate the trade-in of the Land Rover. Moreover, Gilmore's testimony established that defendant was aware that the Land Rover was purchased in a financed transaction and that he knew that Gilmore was not making the payments. Thus, the evidence allowed a rational trier of fact to find that defendant knew that the replacement certificate of title, which omitted the Capital One lien, was false, and that defendant knowingly used the false certificate to fraudulently obtain the Ford Fusion and the approximate $20,000 cash payment.

Defendant also argues that there was no evidence that he acted with intent to defraud Russ Milne Ford, because his only intent was to help Gilmore purchase vehicles. However, Gilmore's testimony was sufficient to establish that she had no personal interest in acquiring the Ford Fusion or any of the other vehicles she purchased or leased at defendant's instructions. Moreover, Gilmore testified that defendant received possession of both the Ford Fusion and the cash payment that was received for the trade-in differential.

Accordingly, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of larceny by false pretenses. *Kanaan*, 278 Mich App at 618.

IV. REMAINING ISSUES IN DEFENDANT'S STANDARD 4 BRIEF

A. RIGHT TO A SPEEDY TRIAL

Defendant argues that his constitutional right to a speedy trial was violated. Defendant never raised this issue in the trial court, leaving the issue unpreserved. This Court reviews unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

The United States and Michigan Constitutions guarantee criminal defendants the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Patton*, 285 Mich App 229, 235 n 4; 775 NW2d 610 (2009). The relevant period for determining whether a defendant was denied a speedy trial begins on the date of the defendant's arrest, *id.* at 236, but a formal charge or restraint of the defendant is necessary to invoke the speedy trial guarantees, *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987). We review a defendant's claim of a speedy trial violation by balancing the following four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). Where the delay is less than 18 months, the defendant bears the burden of showing prejudice, but the prosecutor has the burden to prove that the defendant was not prejudiced when the delay is more than 18 months. *Id.* at 262. Two types of prejudice arise from a delay in the commencement of trial; prejudice to the defendant's person, and prejudice to the defense. *Id.* at 264. Prejudice to the person arises when the defendant is incarcerated pending trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Prejudice to the defense is the more serious deprivation. *Williams*, 475 Mich at 264.

Defendant was tried in April 2010, 22 months after he was formally charged in June 2008. As previously discussed in section II, the delay in bringing defendant to trial was

primarily caused by defendant's requests for adjournments and other motions. Because the delay was more than 18 months, the prosecutor has the burden of showing that defendant was not prejudiced by the delay. Defendant's argument focuses on prejudice to the defense; he does not argue prejudice to his person. First, we agree that there is no basis for finding that defendant was prejudiced by the delays when the delays were primarily intended to accommodate defense requests for additional time to file motions and to allow substitute counsel an opportunity to become familiar with the case and prepare for trial. Second, the record does not support defendant's argument that the delay affected the memory of the salesperson at Russ Milne Ford. Although the witness was unclear on some details, he was able to testify regarding the essential facts related to his involvement in this case. In any event, a general claim of prejudice to the defense from fading witness memories is insufficient. *Gilmore*, 222 Mich App at 462. Third, we find no merit to defendant's claim that he was prejudiced by the delay because he was unable to find "Terence Jones." There was no evidence that Terence Jones actually existed. Even if he did exist, there was no evidence that his location was ever known. Although an excessive pretrial delay might prejudice a defendant if a known witness later becomes unavailable because of a delay, there is no causal connection between a pretrial delay and prejudice to a defendant where the witness's existence or location was never known initially. Indeed, where the witness's existence or location has never been discovered at any point before trial, any delay would only afford additional time to find the witness.

Weighing and balancing the four factors set forth in *Williams*, 475 Mich at 261, we conclude that defendant was not denied his constitutional right to a speedy trial. The record clearly demonstrates that the delays were primarily attributable to defendant, and that defendant was not prejudiced by the delay.

B. DENIAL OF REQUEST FOR AN ADJOURNMENT

Defendant next argues that the trial court abused its discretion by denying his motion for an adjournment in order to retain counsel. A trial court's decision denying a defendant's motion for an adjournment for the purpose of retaining substitute counsel is reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *People v Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011).

The Sixth Amendment guarantees an accused the right to retain counsel of choice, but that right is not absolute and must be balanced against the public's interest in the prompt and efficient administration of justice. *Akins*, 259 Mich App at 557. The trial court's decision to grant an adjournment must take into account the difficulty of rescheduling trial. *Morris v Slappy*, 461 US 1, 11; 103 S Ct 1610; 75 L Ed 2d 610 (1983). A trial court's denial of an adjournment to allow a defendant to retain substitute counsel rises to the level of a constitutional violation only if the court unreasonably and arbitrarily favors expeditiousness over a justifiable reason for a delay. *Id.* at 11-12.

Here, the trial court's denial of defendant's request for an adjournment was reasonable. The request was made on the day of trial, and the trial date had already been substantially delayed because the court had previously adjourned several prior proceedings at defendant's requests. Further, the trial court had already twice appointed substitute counsel for defendant,

and defendant had more than ample time before trial to retain new counsel. In addition, although defendant argued that his newly appointed attorney was unprepared, that attorney was appointed two months earlier and the court had already adjourned the trial date once to give him time to prepare for trial. At trial, defense counsel informed the court that he was "ready" to proceed with trial, and defense counsel's cross-examination of Gilmore, the principal prosecution witness, showed that he was aware of the issues in the case. Under these circumstances, the trial court did not abuse its discretion in denying defendant's untimely motion for an adjournment to retain new counsel. *Akins*, 259 Mich App at 556.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was denied the effective assistance of counsel at trial. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review of this issue is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different; and (3) the resultant proceeding was fundamentally unfair or unreliable. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009).

Defendant contends that trial counsel was ineffective for failing to challenge his arrest as illegal and for failing to move to suppress illegally seized evidence. An illegal arrest does not divest a court of jurisdiction over the defendant. *Porter v Porter*, 285 Mich App 450, 462; 776 NW2d 377 (2009). Similarly, "[t]he mere fact of an illegal arrest does not per se require the suppression of evidence." *People v Corr*, 287 Mich App 499, 508; 788 NW2d 860 (2010). Only evidence recovered as a result of an illegal arrest need be suppressed. *Porter*, 285 Mich App at 462. In this case, defendant does not explain the legal bases for his assertions that his arrest was illegal or that evidence was unlawfully seized, nor does he identify the specific evidence that he believes was illegally seized. Defendant's failure to establish a factual predicate for his argument defeats this claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also asserts that trial counsel failed to prepare for trial. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The defendant "must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant." *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Although defendant contends that trial counsel should have investigated the existence of plea agreements between the prosecutor and prosecution witnesses, and should have investigated the witnesses' criminal backgrounds, there is no indication in the record that any prosecution witness testified pursuant to a plea agreement or had a criminal record that could have been discovered and used at trial. Further, the record indicates that defense counsel explored the subject of a possible agreement with the prosecution in his cross-examination of Gilmore, asking whether any

criminal charges were brought against her, or whether she had any discussions with the police or prosecutor in which she was told that charges would not be brought against her if she cooperated. She denied being charged with any offense or having any such discussions. Without evidence that a plea agreement actually existed or that any witness had a relevant criminal history that could have been used at trial, defendant cannot establish this claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6. *Id.* Defendant also argues that trial counsel failed to call res gestae witnesses, but, once again, he does not identify these witnesses or indicate what testimony they could have provided. Thus, this claim also cannot succeed.

Defendant also contends that counsel was ineffective for failing to challenge the complaint signed by Officer Michalke. Defendant argues that the complaint was invalid because it was not signed by an eyewitness or a police officer with personal knowledge of the crime and because it was not supported by an affidavit of a witness with personal knowledge. We find no merit to this issue. An examination of the complaint reveals that it complies with MCR 6.101 and MCL 764.1a. Neither the court rule nor the statute requires that the complaint be signed by an eyewitness or a person with personal knowledge. Rather, factual allegations in the complaint "may be based upon personal knowledge, information and belief, or both." MCL 764.1a(3). Therefore, defense counsel was not ineffective for failing to bring a meritless motion challenging the validity of the complaint.

D. RIGHT OF CONFRONTATION

Defendant argues that his Sixth Amendment right to confront witnesses was violated because he did not have the opportunity to confront a complaining witness. Defendant did not raise a Confrontation Clause issue at trial, leaving this issue unpreserved. *People v Dendel*, 289 Mich App 445, 450-451; 797 NW2d 645 (2010). Thus, our review is limited to plain error affecting defendant's substantial rights. *Kowalski*, 489 Mich at 505-506.

The Confrontation Clause, US Const, Am VI, states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" The Michigan Constitution also guarantees this right. Const 1963, art 1, § 20. "The Confrontation Clause . . . . bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004); see also *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

The circumstances raised by defendant do not establish a Confrontation Clause violation. The prosecution's case was based on the testimony of the other participants to defendant's transactions, the testimony of the officers who investigated the case, and the paper trail of documentary evidence. Two representatives of Russ Milne Ford, a victim of defendant's fraudulent scheme, also testified at trial. Defendant had the opportunity to confront all witnesses who testified at trial, and defendant does not identify any testimonial statement by a non-testifying witnesses that was presented at trial. Defendant has failed to establish a Confrontation Clause violation and, accordingly, has not shown plain error.

E. FAILURE TO DISCLOSE EVIDENCE

Defendant argues that the prosecutor violated his duty under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), to disclose exculpatory evidence. Defendant's failure to raise this issue in the trial court limits our review to plain error affecting defendant's substantial rights. *Kowalski*, 489 Mich at 505-506.

A defendant has a constitutional due process right to the production of exculpatory evidence in the possession of the prosecution regardless of whether the defendant requests the evidence. *Brady*, 373 US at 87; *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To establish a *Brady* violation, a defendant must prove "(1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Fox*, 232 Mich App 541, 549; 591 NW2d 384 (1998). "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

Defendant's claim is based on his assertion that the prosecution failed to disclose the existence of a plea agreement with Gilmore and failed to disclose Terence Jones's alleged criminal history. There is no record evidence that a plea agreement was made with Gilmore. Gilmore was questioned on this subject at trial and denied the existence of any agreement. Defendant has not presented any contrary evidence indicating that an agreement actually exists. Similarly, there is no evidence that Jones, even if he existed, had a criminal history. Moreover, Jones was not a witness at trial, so any criminal history would not have been relevant for impeachment. On this record, there is no basis for finding a *Brady* violation. Accordingly, defendant has not established a plain error.

F. WAIVER OF RIGHT TO COUNSEL

Defendant next argues that the trial court erred by allowing him to represent himself at trial without obtaining a proper waiver of his right to counsel.

The right to self-representation is guaranteed by the Sixth Amendment, the Michigan Constitution, and Michigan statute, *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Dennany*, 445 Mich 412, 426-427; 519 NW2d 128 (1994) (opinion by GRIFFIN, J.); MCL 763.1. The right to self-representation correlates with the equally fundamental right to counsel. *People v Brooks*, 293 Mich App 525, 536-537; 809 NW2d 644 (2011), vacated in part on other grounds 490 Mich 993 (2012). "In balancing these two essential but potentially conflicting rights, a court must 'indulge every reasonable presumption against waiver' of the right to counsel, and should not allow a defendant to proceed without counsel if any doubt casts a shadow on the waiver's validity." *Id.*, quoting *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

Waiver of the right to counsel must be a knowing and intelligent act, done with sufficient awareness of the pertinent circumstances. *Williams*, 470 Mich at 641-642. Before granting a

criminal defendant's request to represent himself, the trial court must find that the waiver request was unequivocal, that the waiver is knowingly, intelligently, and voluntarily made, and that the defendant will not disrupt or unduly inconvenience the court or the administration of court business. *People v Hill*, 282 Mich App 538, 550; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009). The court must also comply with the requirements of MCR 6.005(D).

In this case, the record does not support defendant's claim that he waived his right to counsel. Although defendant was personally involved in many aspects of the trial, such as by giving opening statement and closing argument and cross-examining several witnesses, the record reveals that he was represented by appointed counsel throughout the trial and that counsel also participated in the trial, by objecting to testimony and cross-examining Gilmore, the principal prosecution witness. This record demonstrates an arrangement between defendant and defense counsel involving "hybrid representation," which refers to "an arrangement whereby both the defendant and his attorney would conduct portions of his trial and share joint presentation of his defense, while the defendant retains ultimate control over defense strategy." *Dennany*, 445 Mich at 440 n 17. There is no substantive right to "hybrid representation," but a trial court has discretion to allow it. *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003); *People v Kevorkian*, 248 Mich App 373, 420-422; 639 NW2d 291 (2001). A "hybrid representation" arrangement differs from one involving standby counsel, in which an attorney is appointed to aid a defendant in his self-representation, especially to advise the defendant on matters such as courtroom protocol. *Id.* at 439.

Although standby counsel "cannot qualify as the assistance of counsel required by the Sixth Amendment," *People v Willing*, 267 Mich App 208, 228-229; 704 NW2d 472 (2005), we are not persuaded that the same is true in a "hybrid representation" relationship, in which the defendant and his counsel share joint representation of his defense. This conclusion is supported by the Mississippi Supreme Court's decision in *Hearn v State of Mississippi*, 3 So 3d 722 (Miss, 2008), which rejected a defendant's claim that the trial court erroneously allowed him to proceed pro se without obtaining a proper waiver of counsel where the record indicated that the defendant was represented by counsel under a "hybrid representation" arrangement. The court stated:

> We need not address whether Hearn properly waived counsel or was adequately warned about proceeding pro se because he was never left to his own defense—Duggan functionally remained counsel throughout trial in the form of "hybrid representation." Hybrid representation consists of "the participation by an attorney in the conduct of the trial when the defendant is proceeding pro se."
>
> * * *
>
> [W]e find this case analogous to other cases in which this Court held that a defendant was not deprived of counsel due to hybrid representation. Duggan was present at Hearn's counsel table during the entire trial and Hearn consulted with him on several occasions. Hearn conferred with Duggan during the cross-examination of three witnesses and before he chose to testify in his own defense. Duggan also provided substantial assistance before trial. He filed several pretrial motions and represented Hearn at a pretrial hearing on November 21, 2005, in

which the trial court partially granted a motion in limine. The trial judge further encouraged the constant accessibility of counsel, and advised Hearn to heed Duggan's advice.

The primary distinction between this case and our prior opinions is that Hearn assumed a substantial role in his defense from the very beginning of trial. Hearn made the opening statement, raised objections, cross-examined each of the State's witnesses, and testified in his own defense. The trial judge also referred to Duggan as Hearn's "legal advisor," a term commonly used when the defendant clearly has waived his rights and the attorney is expected to play a limited role.

Notwithstanding Hearn's substantial role in his own defense and the label which the trial judge ascribed to Duggan, it is clear from the record that Duggan was not a casual observer. Duggan largely conducted voir dire. Duggan objected to leading during the direct examination of Judge Roberts; advised Hearn, albeit briefly, during the cross-examinations of Drs. Moore, Nored, and Montgomery; consulted with Hearn before he chose to testify in his own behalf; examined Hearn on the stand; handled jury instructions; presented the closing argument; represented Hearn at sentencing; and filed a notice of appeal. As previously noted, Duggan filed several pre-trial motions, as well.

Considering the totality of the circumstances, we find that Hearn was never without the assistance of counsel. Duggan was available throughout the entire trial and participated on several occasions. His role was "not merely that of a skilled bystander, but of a substantive litigator." Hearn, having never been fully without the assistance of counsel, cannot now complain about inadequate warnings when he received the best of both worlds—the assistance of counsel while conducting his own defense. Accordingly, we find that there was no need for a waiver instruction. [*Hearn*, 3 So 3d at 734-735 (citations omitted).]

The record in this case demonstrates a similar arrangement between defendant and defense counsel, which was the functional equivalent of "hybrid representation." Defendant and defense counsel both participated in the conduct of trial, and defense counsel was present throughout the trial. There is no indication in the record that defense counsel was ever relieved of his representation responsibility, or that the trial court ever appointed counsel to serve in only a limited, standby role. Under these circumstances, we conclude that the trial court was not required to follow the procedures for obtaining a valid waiver of counsel, because defendant never waived his right to counsel and was never without the assistance of counsel.

G. SENTENCE CREDIT

Defendant next argues that the trial court erred in denying his request for sentence credit for time served between October 14, 2008, and the date of sentencing. We disagree.

MCL 769.11b provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing *because of being denied or*

> *unable to furnish bond for the offense of which he is convicted*, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis added.]

Defendant contends that he is entitled to sentence credit because his federal parole status was terminated. However, regardless of defendant's parole status, the record indicates that he was sentenced to a term of imprisonment on October 14, 2008, in a separate case in Oakland County. Because defendant's incarceration between October 14, 2008, and the date of sentencing in this case was the result of his convictions and sentences in the Oakland County case, and was not the result of being denied or unable to furnish bond in this case, defendant was not eligible for credit under MCL 769.11b. Therefore, the trial court properly denied defendant's request for sentence credit.

H. RESTITUTION

Lastly, defendant argues that the trial court erred in ordering him to pay restitution of $48,573.80 to Capital One, representing the amount of its lost security interest in the Land Rover vehicle. A trial court's decision to award restitution is reviewed for an abuse of discretion. *People v Dimoski*, 286 Mich App 474, 476; 780 NW2d 896 (2009). However, any factual findings by the court in regard to an order of restitution are reviewed for clear error. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). To the extent that an award of restitution involves a question of statutory interpretation, the issue is reviewed de novo as a question of law. *Dimoski*, 286 Mich App at 476.

When sentencing a defendant, the trial court "shall order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 780.766(2). The statute defines "victim" as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime" and includes a "corporation . . . or any other legal entity that suffers direct physical or financial harm as the result of a crime." MCL 780.766(1). "Restitution encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct." *Gubachy*, 272 Mich App at 708. The prosecution must prove the amount of the victim's loss by a preponderance of the evidence." *Id.*

Capital One held a security interest in the Land Rover that defendant used as a trade-in to acquire the Ford Fusion and a cash payment of approximately $20,000. Defendant accomplished the transaction by submitting a false certificate of title that listed Gilmore as the sole owner, free of encumbrances. As a direct result of defendant's conduct, Capital One lost its security interest in the vehicle. Accordingly, Capital One is a victim that suffered a direct financial loss as a result of defendant's crime. Although defendant argues that Capital One is not entitled to restitution because it was not the "complainant" and it did not send a representative to testify at trial or at the restitution hearing, the statute does not impose those conditions as eligibility requirements for restitution. Rather, any victim of the defendant's course of conduct and who suffers direct financial harm as a result of the commission of the crime is entitled to restitution, MCL 780.766(1) and (2), provided that the amount of the victim's loss is proven by a preponderance of the evidence. *Gubachy*, 272 Mich App at 708. Both Capital One's status as a victim of defendant's course of conduct and the amount of its financial loss ($48,573.80) is

supported by a preponderance of the evidence at trial. Accordingly, the trial court did not abuse its discretion in awarding restitution to Capital One, or clearly err in determining the restitution amount.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood