STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARNEST GRIFFIN,

Defendant-Appellant.

UNPUBLISHED
February 23, 2001

No. 220900
Berrien Circuit Court
LC No. 99-410526-FH

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant was convicted, after a trial by jury, of use of a motor vehicle without authority, MCL 750.414; MSA 28.646. Defendant was sentenced to twenty-two to forty-eight months' imprisonment after he was found to be a third habitual offender, MCL 769.11; MSA 28.1083. Defendant now appeals as of right. We affirm.

Defendant first contends that there was insufficient evidence to support his conviction. We disagree.

In reviewing the sufficiency of the evidence, we must conduct a de novo review of the evidence, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid,* 233 Mich App 457, 466; 592 NW2d 767 (1999). In addition, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen,* 201 Mich App 98, 100; 505 NW2d 869 (1993).

Here, the applicable statute provides as follows:

> Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who shall be a party to such unauthorized taking or using, shall upon conviction thereof be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years or by a fine or [of] not more than 1,000 dollars . . . . [MCL 750.414; MSA 28.646.]

Further, "motor vehicle" is defined as "all vehicles impelled on the public highways of this state by mechanical power, except traction engines, road rollers and such vehicles as run only upon rails or tracks." MCL 750.412; MSA 28.644. In other words, the elements of use of a motor vehicle without authority are "(1) the motor vehicle did not belong to the defendant, (2) having obtained lawful possession of the vehicle from the owner, the defendant used it beyond the authority which was given to him, and (3) the defendant must have intended to use the vehicle beyond the authority granted to him, knowing that he did not have the authority to do so." *People v Hayward*, 127 Mich App 50, 60-61; 338 NW2d 549 (1983). See also *People v Crosby*, 82 Mich App 1, 2-3; 266 NW2d 465 (1978).

We conclude that, when viewing the evidence in the light most favorable to the prosecutor, the elements of the crime were established beyond a reasonable doubt. At trial, Nickodem, the owner of the motor vehicle, testified that defendant asked to borrow his truck for a fourth time. Nickodem informed defendant that he could not borrow the truck because it was getting late and he wanted to go to bed. Yet, defendant left with the truck anyway, after threatening Nickodem and removing the truck keys from Nickodem's desk.

Defendant asserts that the testimony revealed that defendant told Nickodem that he would return at 1:00 a.m. or 1:30 a.m. and left Nickodem a telephone number where he could be reached. We acknowledge that defendant points out facts that were established at trial. Nevertheless, we do not find that this testimony established that defendant had permission to take Nickodem's truck for the fourth time. To the contrary, Nickodem repeatedly testified that he did not give defendant permission to use the truck and continually asked defendant to return the truck.

Moreover, to the extent that defendant argues that Nickodem's testimony was incredible, we find that this argument is also without merit. Even when reviewing an appeal based on the sufficiency of evidence, we will not interfere with the role of the jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Indeed, credibility is a matter for the trier of fact to decide. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). See also *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999) ("questions of intent and the honesty of belief inherently involve weighing the evidence and assessing the credibility of witnesses, which is a task for the jury").

> "[An appellate court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact . . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." [*Wolfe, supra*, 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).]

We decline to interfere with the jury's role of determining the weight of evidence or the credibility of witnesses in the instant trial. In this case, the jurors were presented with conflicting testimony which required them to make a determination concerning the credibility of each witness and the weight to afford each witness' testimony. The jury apparently found the testimony of Nickodem to be credible because it found defendant guilty. We will not disturb this finding on appeal.

Defendant also argues that his conviction should be reversed because testimony at trial established that defendant was intoxicated, providing a complete defense to the crime. Defendant even argues that the trial court erred when it failed to provide such an instruction to the jury sua sponte.

We specifically addressed defendant's argument and concluded that intoxication was not a defense to the crime of unlawful use of a motor vehicle in *People v Laur*, 128 Mich App 453, 455; 340 NW2d 655 (1983). We explained that intoxication is a defense only to specific intent crimes. *Id.* However, using a vehicle without authority is not a specific intent crime because "no intent is required beyond that to do the act itself; this is a general intent crime." *Id.*, 456. Thus, we find that defendant's argument fails.

Next, defendant argues that the trial court abused its discretion when it refused to provide defendant with another court-appointed attorney. Again, we disagree.

We review a trial court's denial of a request for a continuance, in order to obtain another court-appointed attorney, for an abuse of discretion. *In re Conley*, 216 Mich App 41, 45; 549 NW2d 353 (1996).

> An indigent defendant, entitled to the appointment of a lawyer at public expense, is not entitled to choose his lawyer. He may, however, become entitled to have his assigned lawyer replaced upon a showing of adequate cause for a change in lawyers.
>
> When a defendant asserts that his assigned lawyer is not adequate or diligent or asserts, as here, that his lawyer is disinterested, the judge should hear his claim, and, if there is a factual dispute, take testimony and state his findings and conclusion.
>
> A judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that conviction following such error be set aside. [*People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).]

"Genuine disagreement between counsel and the defendant over the use of a substantial defense or of a fundamental trial tactic satisfies the good cause requirement in view of the importance of protecting the accused's right to counsel. However, a mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause, particularly when the request is belated." *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989), remanded sub nom *People v Musick*, 437 Mich 867; 462 NW2d 586 (1990) (citations omitted). Defendant must also demonstrate that substitution of counsel will not result in a disruption of the judicial proceedings. *People v Flores*, 176 Mich App 610, 613-614; 440 NW2d 47 (1989).

In this case, defendant clearly informed the trial court that he wanted a new court-appointed attorney because his trial counsel did not ask defendant's suggested questions of a witness. The trial court listened to defendant's complaint and disagreed with defendant's

interpretation, explaining that defendant's trial counsel had asked the questions that defendant requested. We find defendant's rationale, as did the trial court, to be unsupported by the record. We also find that defendant offered the trial court no other explanation to support his contention that he needed a new court-appointed attorney. Indeed, "[n]o conflict in trial strategy, allegation of incompetence, or inadequate trial preparation emerged. Although defendant expressed his dissatisfaction, he failed to demonstrate a breakdown in the attorney-client relationship." *Tucker, supra*, 255. Furthermore, "[t]o the extent his [defendant's] claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level . . . ." *Ginther*, *supra*, 443. Thus, we conclude that the trial court did not abuse its discretion when it denied defendant's request.

Finally, defendant argues that he was deprived of due process because he was entitled to a trial by jury on the habitual offender notice. We disagree and note that we review constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

MCL 769.13(5); MSA 28.1085(5), which is directly on point, provides:

> (5) The existence of the defendant's prior conviction or convictions *shall be determined by the court, without a jury*, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> (a) A copy of the judgment of conviction.
>
> (b) A transcript of a prior trial or plea-taking or sentencing proceeding.
>
> (c) Information contained in a pre-sentence report.
>
> (d) A statement of the defendant. [Emphasis added.]

Furthermore, in *People v Zinn*, 217 Mich App 340, 347-348; 551 NW2d 704 (1996), we directly addressed defendant's argument and discussed the applicability of the statute. We explained that the statute is

> applicable where a prosecutor "seeks to enhance the sentence of a defendant" as an habitual offender. It *eliminates the statutory right to a jury trial* as well as the right to have guilt proved beyond a reasonable doubt. This language reaffirms the long-held legislative intent that the habitual offender statutes are merely sentence enhancement mechanisms rather than substantive crimes. Hence, *defendant is not entitled to a trial by jury* . . . . [*Id.*, 347 (emphasis added).]

We also addressed the due process implications of the statute, concluding that the statute did not violate the "constitutional guarantees of due process." *Id.* We explained that due process only required that "a sentence be based on accurate information and that a defendant have a reasonable opportunity at sentencing to challenge the information." *Id.*, 347-348.

Thus, defendant did not have a right to a trial by jury on the habitual offender notice and defendant was not denied due process, given the fact that defendant had an opportunity to speak at sentencing and address any concerns that he had with the presentence investigation report.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey