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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME LAMAR MILLER,

Defendant-Appellant.

UNPUBLISHED
December 28, 2021

No. 352283
Wayne Circuit Court
LC No. 19-005562-01-FH

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering a vehicle, causing damage to the vehicle, MCL 750.356a (3). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12 to 46 months to 10 years' imprisonment. We affirm.

I. FACTS

On or about 3:00 a.m., on July 8, 2019, Highland Park fire chief Kevin Coney was driving an unmarked police car on Woodward Avenue during his shift when he noticed a Ford vehicle in the parking lot of a mechanic's shop. Defendant was in the passenger seat of the vehicle. Deeming the situation suspicious, Coney turned his spotlight on the Ford as his vehicle approached Coney thereafter exited his vehicle and asked defendant if he was ok, at which point defendant exited the Ford, put his hands up, said he was fine, and then took off running. Coney called the Highland Park police for assistance and pursued defendant. When Highland Park police officers arrived, they located defendant nearby, lying in the grass next to a vacant house. The police arrested defendant, and Coney and the police later observed that the driver's side window of the Ford had been broken out and the contents of the vehicle appeared to have been rummaged. Defendant was ultimately convicted of breaking and entering a vehicle, causing damage to the vehicle ("breaking and entering").

II. PRELIMINARY EXAMINATION BINDOVER

On appeal, defendant raises several issues[1] with respect to his bindover after preliminary examination and the trial court's actions after the bindover. Specifically, defendant asserts that the district court deprived him of due process and his 14th amendment rights in binding him over for trial on the charge of receiving and concealing stolen property when there was no evidence presented to support this charge, and that the trial court erred and acted impartially in, unrequested, substituting its judgment for that of the district court regarding probable cause and the charge upon which to bind defendant over. Defendant further asserts that the prosecutor's filing of an amended information infringed upon his due process rights.

We review a trial court's decision to grant a motion to amend the information for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). We review a circuit court's decision to grant or deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering bindover. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

The district court held a preliminary examination, after which it bound defendant over for trial on a single count of receiving and concealing stolen property (the Ford), MCL 750.535(7). At the first trial court pretrial, when it became apparent that the trial court and the prosecutor believed defendant had been bound over for trial on his original charge of breaking and entering, replacement defense counsel indicated that the charge had been reduced at the preliminary examination to receiving and concealing stolen property. The prosecutor stated that he would look into it and file "an amended information to reflect . . . the correct charges."

At the next pretrial, the prosecutor informed the trial court that defendant was, indeed, bound over on the charge of receiving and concealing stolen property. The prosecutor also stated, however, that because the magistrate never specifically spoke to the original charge of breaking and entering, it believed defendant had been bound over for trial on the original charge as well. Defense counsel disagreed, stating that defendant had been bound over for trial on only a single count of receiving and concealing stolen property. The trial court agreed with defense counsel and advised that the prosecutor could file an amended information.

Defense counsel thereafter moved to quash the information, arguing that the prosecution had failed to establish probable cause to believe that defendant received and concealed stolen property because there was no evidence that the car was stolen, and that the magistrate abused its discretion in binding defendant over for trial on that charge. Prior to a hearing on defendant's motion to quash, the prosecutor filed an amended information containing charges of *both* breaking and entering a vehicle with damage to the vehicle (MCL 750.356a) and receiving and stealing stolen property, that being the Ford, (MCL 750.535(7)).

At the hearing on defendant's motion to quash, the trial court determined that sufficient evidence had been presented at the preliminary examination to find probable cause for binding defendant over for trial on his original charge, but not for binding defendant over on the charge of receiving and concealing stolen property. The trial court thus entered an order granting

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[1] The issues addressed are those presented by appellate counsel as well as those presented in two briefs filed by defendant pursuant to Admin Order No. 2004-6.

defendant's motion to quash with respect to the receiving and concealing stolen property charge, but allowed the original charge of breaking and entering to proceed to trial.

The purpose of a preliminary examination is to determine whether a crime has been committed and if there is probable cause to believe that the defendant committed it. *People v Laws*, 218 Mich App 447, 451–52; 554 NW2d 586 (1996). At a preliminary examination, the magistrate's duty is to pass judgment on the weight and competency of the evidence, and on the credibility of the witnesses. *People v King*, 412 Mich 145, 153; 312 NW2d 629 (1981). The magistrate is required to make a bindover decision after examination of the whole matter and should not discharge when the evidence conflicts or raises reasonable doubt of the defendant's guilt, since that presents the classic issue for the trier of fact. *Id*. at 154. The magistrate should determine, from the evidence presented, whether the crime charged in the warrant had been committed and whether there is probable cause to believe that the defendant committed it and, if not, "then he should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied." *Id*. Thus, the magistrate may bind defendant over on the charged offense if, in its determination there is probable cause to believe a crime was committed and that defendant committed it, but may also bind defendant over on a lesser, uncharged offense.

First and foremost, it is abundantly clear from the preliminary examination transcript that the district court did not bind defendant over on the charge of breaking and entering. The magistrate explicitly found:

> The Court finds and has heard the testimony and has found that the Defendant was in the vehicle. The Officer happened to come upon the vehicle, he ran from the scene. The vehicle had been ransacked, the window was broken. The Count finds probable cause that a crime was committed, that the Defendant was in possession of stolen property and probable cause that the Defendant committed that offense. The Defendant is bound over on that charge. Your next court date will be arraignment on the Information two weeks from today on July 30th at 9 a.m. and bond is continued (p 38).

The district court stated that defendant was in possession of stolen property, that there was probable cause that defendant committed *that* offense and that defendant was bound over on *that* charge. The trial court also found that "[t]he charge was that the defendant was bound over on receiving and concealing a motor vehicle and that's the correct charge. And the Court, the District Court did not find probable cause for what's charged in the information, breaking and entering a vehicle with damage to the vehicle. That is not . . . the charge that the defendant was bound over on, but it was receiving and concealing a motor vehicle."

Additionally, the register of actions shows that on the July 23, 2019 preliminary examination date, the charge of breaking and entering was dismissed and that defendant was bound over to the reduced charge of receiving and concealing stolen property. The "Return to Circuit Court Felony," signed by the district court magistrate on July 23, 2019, also shows that defendant was bound over on an "amended lesser charge" of "R & C stolen property." Thus, while defendant was charged with breaking and entering, he was clearly and unquestionably bound over on only the charge of receiving and concealing stolen property.

Turning to defendant's arguments, we note that receiving or concealing stolen property is a cognate lesser included offense of breaking and entering. *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993). "Cognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *People v Mendoza*, 468 Mich 527, 532 n 4; 664 NW2d 685 (2003). Because a district court could bind defendant over for trial on an uncharged lesser offense so long as the evidence supported the charge, *King*, 412 Mich at 153, we first address whether the evidence at preliminary examination did, in fact, support the district court's bindover.

The elements of receiving and concealing stolen property are:

> (1) the property was stolen; (2) the value of the property met the statutory requirement; (3) defendant received, possessed, or concealed the property with knowledge that the property was stolen; (4) the identity of the property as being that previously stolen; and (5) the guilty actual or constructive knowledge of the defendant that the property received or concealed was stolen. [*People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002)]

There was no evidence presented at the preliminary examination that the vehicle was stolen. Instead, it was parked at a specific location by the registered owner of the vehicle and it remained at that location at all times. There was also no evidence presented concerning the value of the vehicle that was allegedly stolen or that if the vehicle had been stolen, that defendant knew it had been stolen. The magistrate clearly abused its discretion in binding defendant over for trial on a charge of receiving and concealing stolen property.

Defense counsel appropriately addressed the charge upon which defendant was bound over in a motion to quash the information. See MCR 6.008(B) ("A party challenging a bindover decision must do so before any plea of guilty or not contest, or before trial."), which the trial court granted. The erroneous bindover decision was thus corrected and the trial court did not abuse its discretion in granting defendant's motion to quash.

The issues for our review next turn to whether the trial court's decision to allow an amendment to the information pierced the veil of impartiality, prejudiced defendant, was unsupported by the preliminary examination evidence, and/or constituted an abuse of discretion. We answer all in the negative.

First, no claim of judicial bias was raised before the trial court, as required to preserve such an issue. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). Moreover, while due process requires that an unbiased and impartial decision-maker hear and decide a case, a trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption. *Kern v Kern-Koskela*, 320 Mich App 212, 231; 905 NW2d 453 (2017). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 231-232, quoting *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Here, while the trial court strongly encouraged the prosecutor to file an amended information, it appeared to be doing so in recognition of the

magistrate's actual bindover determination.[2] It does not appear that the trial court held any belief as to defendant's guilt or innocence and it showed no deep-seated antagonism toward defendant.

Next, amendment of an indictment is addressed in MCL 767.76:

> No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. . . .

"Although MCL 767.76 refers to 'indictments,' unless specifically noted otherwise, all laws applying to prosecutions on indictments also apply to prosecutions by information." *People v McGee*, 258 Mich App 683, 687; 672 NW2d 191 (2003).

MCL 767.76 has, for many years, been construed to allow amendments to cure errors in the indictment, but not to allow an amendment that would add a new charge. *People v Fortson*, 202 Mich App 13, 15–16; 507 NW2d 763 (1993). The statute only permits amendments that cure "defects in the statement of the offense which is already sufficiently charged to fairly apprise the accused and court of its nature." *McGee*, 258 Mich App at 688, quoting *People v Sims*, 257 Mich 478, 481; 241 NW 247 (1932). Thus, MCL 767.76 is inapplicable when an amendment adds a new offense. *Id*.

Even when MCL 767.76 is inapplicable, however, an information can be amended to add new charges by way of MCR 6.112(H). MCR 6.112(H) provides, in relevant part, "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." As a rule of procedure, MCR 6.112(H) supersedes MCL 767.76. *McGee*, 258 Mich App at 689.

Here, the amendment of the information came about in an unusual manner. However, contrary to defendant's claim, the trial court did not simply amend the information on its own. The prosecutor stated at a pretrial that it was going to file an amended information to conform to what it believed to be the district court's bindover decision. The trial court affirmatively told the prosecutor it could do so. There is no requirement in MCR 6.112(H) that the prosecutor file a written motion to amend the information. Thus, the trial court could permit amendment of the information under MCR 6.112(H) unless the proposed amendment "would unfairly surprise or prejudice the defendant." On that issue, our Supreme Court has recognized that once a preliminary

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[2] The prosecutor thereafter filed an amended information which contained both the dismissed charge and the bindover charge, as it still held the belief that the magistrate bound defendant over on both charges. As indicated, the trial court dismissed the receiving and concealing stolen property charge.

examination is held and the defendant is bound over on any charge, the circuit court obtains jurisdiction over the defendant and

> Jurisdiction having vested in the circuit court, the only legal obstacle to amending the information to reinstitute an erroneously dismissed charge is that amendment would unduly prejudice the defendant because of "unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).[] Where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial . . . . [*People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998)]

Thus, defendant cannot sustain his claim that he was unfairly surprised or prejudiced by the amendment of the information.

Finally, we address whether amendment of the information was unsupported by the preliminary examination evidence, and thus whether allowing the amendment constituted an abuse of discretion. The elements of breaking and entering a vehicle to steal or unlawfully remove property from it, causing damage to the vehicle (which is a specific intent crime) are:

> First, that there was either a breaking or an entering of the [motor vehicle / house trailer / trailer / semitrailer]. For a breaking, it does not matter whether anything was actually broken; however, some force must have been used. The opening of a closed door or the pushing open of a vent window, for example, is enough force to count as a breaking. For an entry, it does not matter whether the defendant got [his / her] entire body inside. If the defendant put any part of [his / her] body into the [motor vehicle / house trailer / trailer / semitrailer], that is enough to count as an entry.
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> Second, that in breaking or entering, the defendant damaged the [motor vehicle / house trailer / trailer / semitrailer].
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> Third, that at the time of the breaking or entering, the defendant intended to permanently deprive the owner of some property. [It does not matter whether the defendant actually took the property]. [M CRIM JI 23.7]

Thus, bindover on the above charge would be appropriate if there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred." *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000). "If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the fact-finder at trial resolve those questions of fact." *Id*.

At the preliminary examination, Highland Park police officer Hasaam Zaarour testified he received a call around 3:00 a.m. that their fire chief was in foot pursuit of someone who broke into a vehicle. He received a description of the alleged suspect and he and another officer located defendant, who met the exact description of the suspect provided by the fire chief, hiding in the grass within 100 yards of a vehicle that had a shattered driver's side window. Highland Park fire chief Coney testified that on July 8, 2019, at approximately 3:00 a.m., he observed someone sitting

in the passenger side of a vehicle whose window has been broken. The person put his hands up, then jumped out of the vehicle and began running. When the officers found defendant, Coney positively identified defendant for the officers.

While no one saw defendant break the window of the vehicle, Coney affirmatively testified that at 3:00 a.m. he saw defendant sitting in the vehicle, which had been parked, locked and intact when the owner had dropped it off the morning prior. There was also testimony that defendant had no permission to be in the vehicle and that defendant ran when confronted by Coney with a spotlight. Coney further testified that the vehicle appeared to have been ransacked, with papers all over the ground near the vehicle. While the evidence concerning defendant causing damage to the vehicle and having an intent to steal from the vehicle is circumstantial, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of a defendant if such evidence establishes probable cause. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003) (quotation marks and citation omitted).

In sum, there was sufficient circumstantial evidence to establish probable cause to believe that the crime of breaking and entering causing damage to a vehicle was committed and that defendant committed it. Amendment of the information to add the charge back amendment was supported by the preliminary examination evidence and the trial court did not abuse its discretion in allowing the amendment to the information.

III. SELF-REPRESENTATION

Defendant contends that his request to represent himself at trial was not unequivocal and voluntary because he made the request only out of desperation when he felt his attorney was unprepared. We disagree.

The Sixth Amendment provides that the accused in a criminal prosecution "shall enjoy the right ... to have the Assistance of Counsel for his defence." US Const, Am VI. This requirement was made applicable to the states through the Due Process Clause of the Fourteenth Amendment. "While a defendant may choose to forgo the assistance of counsel at trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent.[] In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right,[] including the waiver of the right to the assistance of counsel." *People v Russell*, 471 Mich 182, 187–88; 684 NW2d 745 (2004).

In *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), our Supreme Court applied an oft-cited federal standard for self-representation and established requirements regarding the judicial questioning necessary to cause a valid waiver and permit a defendant to represent himself. Where a defendant requests to proceed pro se, a court must determine that the defendant's request is unequivocal, the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *Id*. at 367-368.

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (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.

The scope of judicial inquiry required by *Anderson* and MCR 6.005(D) when confronted with an initial request for self-representation is "substantial compliance, which requires the trial court to engage in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. *Russell*, 471 Mich at 191, quoting *People v Adkins*, 452 Mich 702, 706; 551 NW2d 108 (1996), abrogated on other grounds by *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

"The inquiry regarding waivers of Sixth Amendment rights mirrors the inquiry of whether a defendant has validly waived his Fifth Amendment rights: In each instance, the question is whether the defendant gave a knowing, intelligent, and voluntary waiver." *Williams*, 470 Mich at 640. We review for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of his or her Sixth Amendment rights to counsel. *Id*. The meaning of "knowing and intelligent" is a question of law that we review de novo. *Id*.

The record does not support defendant's appellate argument that the trial court failed to adequately comply with MCR 6.005 and *Anderson*, supra. Defendant wrote a letter to the trial judge on October 25, 2019, stating "Also my counsel didn't [illegible] her profession to the best of her ability and by not doing so I will like to take this time to exercise my right to self-representation." On the day of trial, November 5, 2019, the very first thing the trial court did was state that it had received a letter from defendant and asked defendant, "It's my understanding that you want to represent yourself, is that correct?" Defendant responded, "Correct." The trial court swore defendant in and advised defendant of his charge and the maximum penalty that could be imposed upon him for that charge The court then again asked defendant if he was proficient with the Michigan rules of evidence, constitutional law, or criminal rules of procedure, stating that if defendant decided to represent himself, the court could not coach him and that defendant would be held to the same standard under the rules of evidence that an attorney would. Defendant stated he understood. The trial court asked defendant if he was willing to abide by the rules of evidence, professional rules of conduct, and court rules and defendant responded affirmatively. The trial court then asked if defendant understood there could be pitfalls to self-representation and defendant informed the court that he "was at a crossroads with that. If I thought I was getting proper representation, I wouldn't be representing myself. So, by me feeling that I'm not getting the proper representation . . . to represent myself because I feel that if I'm going to run the gauntlet and not be defend[ed] properly, then I know I will . . . defend myself to the best of my ability because I'm not getting the best of my attorney's ability in return". The trial court inquired what, specifically, his issue with appointed counsel was and defendant responded that it involved his counsel's argument at the motion to quash hearing. The trial court said that counsel argued the motion to quash thoroughly and defendant's unhappiness with the result was "not a reason." The

court then asked if defendant wanted to go forward with the trial and knew what the pitfalls were and defendant said he did. The trial court found that defendant had made an unequivocal request for self-representation and had defendant's appointed counsel remain present as standby counsel.

The record reflects that the trial court conscientiously complied with every requirement of MCR 6.005(D) and *Anderson*, 398 Mich at 367-368, exceeding the "substantial compliance" required under *Adkins*, 452 Mich at 706. Based on the record, the trial court satisfied all the waiver-of-counsel procedure required and did not err in granting defendant's request to waive counsel and allowing defendant to proceed *in propria persona*.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was denied the effective assistance of counsel, leaving him no option but to represent himself and that the trial court should have granted him an evidentiary hearing on the issue. We disagree.

This Court reviews a circuit court's decision whether to conduct an evidentiary hearing for an abuse of discretion. *Unger*, 278 Mich App at 217. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 216. Because a *Ginther*[3] hearing has not been held, our review of defense counsel's effectiveness is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20. In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, a defense lawyer has discretion over his method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In an affidavit, defendant states that his first appointed defense counsel did not object to his being bound over for trial on the charge of receiving and concealing stolen property, did not appear at his trial court arraignment, and spoke to him only two minutes before his August 2, 2019 court appearance. Defendant further states that at his final conference, the trial court appointed him replacement counsel who only had time to speak to him a few minutes before appearing with him before the judge. Defendant states that his replacement counsel did not make effective arguments concerning the actual charge he was bound over on and did not request a remand to the district court when his charge was questioned but instead filed a motion to quash, and visited with

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)

defendant only on that date of his motion to quash hearing. Defendant also argues that counsel's lack of communication and lack of preparedness left him with the undesirable option of representing himself.

Addressing the claim of ineffective assistance of counsel as it relates to pretrial matters, it appears that defendant's first appointed counsel was Rebecca Tieppo. Counsel held a preliminary examination, at which the prosecution called two witnesses, Officer Zaarour and Fire Chief Coney, to testify. Our review of the preliminary examination transcript shows that counsel Tieppo advocated strongly on defendant's behalf. She asked pointed, relevant questions upon cross–examination of the witnesses and, at the conclusion of the preliminary examination, argued that the charge against defendant should be dismissed. Counsel was somewhat successful in her argument, as the district court did not bind defendant over on the charged crime, but instead erroneously found that "[he] was in possession of a car that he clearly should have known was stolen." The district court then bound defendant over on the charge of receiving and concealing stolen property.

While defendant asserts that Tieppo did not appear for his trial court arraignment, an attorney stood in for counsel of record with defendant's express permission. Tieppo appeared at defendant's next court date (his pretrial) at which she advocated for defendant. At the next hearing, held on September 25, 2019, the trial court stated that because defendant had written to him regarding his counsel's lack of communication with him, he had appointed Nicole James as substitute counsel. Nicole James was present at the hearing and raised the issue concerning the exact charge upon which defendant had been bound over. At the next hearing, James vigorously argued that defendant had been bound over on the charge of receiving and concealing a stolen vehicle. The trial court agreed but, unfortunately, the prosecution indicated it would be filing an amended information. James stated she would be filing a motion to quash, which she thereafter did.

At the October 24, 2019 hearing on defendant's motion to quash, James again stressed that the lower court only bound defendant over for trial on the charge of receiving and concealing stolen property and, there having been no evidence presented at the exam that the vehicle was stolen, the information should be quashed altogether. The trial court agreed with counsel regarding the receiving and concealing stolen property charge, but nevertheless found that even if the district court was not clear on the issue of the breaking and entering charge, its review of the exam showed that probable cause existed for binding defendant over on that charge.

The day after the hearing, on October 25, 2019, defendant wrote a letter to the trial judge, exercising his right to self-representation. Thus, defendant asserted his desire to represent himself before James could take any action on the trial court's ruling of allowing the amendment of the information. The matter proceeded to trial on November 5, 2019— less than two weeks after the trial court's ruling and defendant' assertion that he wished to represent himself. We see no lack of advocacy on behalf of defendant or any action/inaction in defense counsels' pretrial representation that would establish either's performance fell below an objective standard of reasonableness or prejudiced defendant in any way.

Concerning counsel's argument, to the extent one appears to have been made, that counsel was ineffective during his trial, defendant waived his right to counsel and represented himself. A

defendant who asserts his right to self-representation has no absolute entitlement to standby counsel and, as such, a defendant proceeding *in propria persona* has no basis to claim that the attorney must abide by constitutional standards. *People v Kevorkian*, 248 Mich App 373, 422, 424; 639 NW2d 291 (2001). Defendant also cannot, logically, challenge the qualify or effectiveness of his representation of himself on appeal.

V. JURY INSTRUCTIONS

According to defendant, the trial court gave the jury an erroneous instruction that improperly shifted the burden of proof to defendant to prove his innocence. There is no merit to this argument.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010). "[T]his Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997) (citation omitted). We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *Dupree*, 486 Mich at 712.0). Unpreserved claims of instructional error, such as here, however, are reviewed for plain error affecting substantial rights. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). And, expressions of satisfaction with the trial court's instructions constitute a waiver of any instructional error. *Id*.

Defendant's argument concerning the jury instructions is not entirely clear. Defendant asserts that the trial court erroneously instructed the jury with respect to an intent to steal when no evidence was presented that defendant intended to steal anything. However, the trial court instructed the jury using, almost word for word, what is contained in the model criminal jury instruction concerning defendant's charge, M CRIM JI 23.7. As such, we find no error in the instructions provided. The jury was properly instructed and the trial court fairly presented the issues to be tried to the jury. Moreover, at the conclusion of the jury instructions, the trial court asked defendant if he had any objections to the instructions or the verdict form. While defendant had a question concerning the verdict form, he affirmatively stated he had no objections to the final jury instructions. Defendant's expressions of satisfaction with the trial court's instructions constituted a waiver of any instructional error. *Matuszak*, 263 Mich App at 48.

VI. SUFFICIENCY/GREAT WEIGHT OF THE EVIDENCE

Defendant contends that because there was no evidence that defendant damaged the Ford vehicle, there was insufficient evidence to convict him of the charge of breaking and entering a vehicle causing damage to the vehicle and that his conviction is thus against the great weight of the evidence. We disagree.

We review de novo challenges to the sufficiency of the evidence, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found every essential element proved beyond a reasonable doubt. *People v Ericksen,* 288 Mich App 192, 195–196; 793 NW2d 120 (2010). We review a properly preserved great weight of the

evidence issue by deciding whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Cameron*, 291 Mich App 599, 617;806 NW2d 371 (2011).

In a criminal trial, the prosecution has the burden of proving all the elements of a crime beyond a reasonable doubt. *People v Butler*, 413 Mich 377, 386–87; 319 NW2d 540 (1982). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

Defendant was convicted of breaking and entering a motor vehicle causing damage to the vehicle, in violation of MCL 750.356a(3). The elements of breaking and entering a vehicle to steal or unlawfully remove property from it, causing damage to the vehicle (which is a specific intent crime) are:

> First, that there was either a breaking or an entering of the [motor vehicle / house trailer / trailer / semitrailer]. For a breaking, it does not matter whether anything was actually broken; however, some force must have been used. The opening of a closed door or the pushing open of a vent window, for example, is enough force to count as a breaking. For an entry, it does not matter whether the defendant got [his / her] entire body inside. If the defendant put any part of [his / her] body into the [motor vehicle / house trailer / trailer / semitrailer], that is enough to count as an entry.
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> Second, that in breaking or entering, the defendant damaged the [motor vehicle / house trailer / trailer / semitrailer].
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> Third, that at the time of the breaking or entering, the defendant intended to permanently deprive the owner of some property. [It does not matter whether the defendant actually took the property. [M CRIM JI 23.7]

At trial evidence was presented that the owner of a Ford left the vehicle at a mechanic's business for repair at approximately 8:00 a.m. on July 7, 2019. The owner testified that he had locked the vehicle and taken all valuables out of the vehicle before leaving it at the mechanics. The owner further testified that all windows were intact in the vehicle when he left it, and that he did not know or give permission to defendant to be in his vehicle.

Highland Park fire chief Coney testified that he was driving an unmarked police car, in the course of his duties on or about July 8, 2019 at approximately 3:00 a.m. when he saw a Ford parked near a mechanic's garage. Coney testified that defendant was sitting in the vehicle and that he (Coney) identified himself as a police officer and asked defendant if he was okay. Defendant then exited the Ford, put his hands up, said he was ok, then took off running. Coney testified, as did Officer Zaarour, that defendant was located a short time later, hiding in the grass of a field near the vehicle's location. Both Coney and Zaarour further testified that a window on the Ford Escape had been broken out.

As to the first element of MCL 750.356a(3), the evidence stablished that defendant either broke or entered the Ford. As indicated in M Crim JI 23.7, "it does not matter whether anything

was actually broken; however, some force must have been used. The opening of a closed door or the pushing open of a vent window, for example, is enough force to count as a breaking." Defendant does not dispute that he was in the vehicle when first approached by Coney. To get into the vehicle, defendant could have either broken the window to gain entry, or he could have opened the closed door of the vehicle. Either circumstance was sufficient to find that the first element was established.

The second element of MCL 750.356a(3) requires that defendant damaged the vehicle while breaking and entering the same. The jury was presented with evidence that defendant was found at 3:00 a.m. sitting in a vehicle that was not his and that he had no permission to be in. While, as previously indicated, defendant could have entered the vehicle by opening the closed door, the jury was provided evidence that when the owner dropped the vehicle off for service, the doors were locked and the windows intact. When defendant was found in the vehicle less than 24 hours later, a window was broken out. There was thus circumstantial evidence presented from which the jury could infer that defendant gained access to the vehicle by breaking the window. The trier of fact, not this Court, determines what inferences may be drawn from the evidence presented at trial and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility of the witnesses are also left for the trier of fact and this Court will not interfere with the trier of fact's role. *Id*.

The last element of MCL 750.356a(3) requires the prosecution to prove beyond a reasonable doubt that at the time of the breaking or entering the vehicle, the defendant intended to permanently deprive the owner of some property. It does not, however, matter whether defendant actually took the property. "[L]arceny is a specific intent crime requiring the prosecutor to prove that the defendant had the intent to steal or permanently deprive the owner of his or her property." *People v Smith*, __Mich App__; __NW2d __; __ (March 11, 2021), slip op at 3. "Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010).

Defendant does not offer a challenge to this element, instead focusing only on the first and third elements. However, we note that defendant was sitting in a car in the wee hours of the morning that did not belong to him. He then ran when confronted by Coney and hid. While no one testified to seeing defendant remove anything from the vehicle, a rational jury could infer that defendant's purpose of being the vehicle without permission and at such late hour was to take something of value from the vehicle. While this case relies heavily upon circumstantial evidence, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction and the conviction was not against the great weight of the evidence.

VII. OFFENSE VARIABLE 19

Defendant asserts that the trial court erred in scoring offense variable (OV) 19 because there was inconsistent testimony concerning whether defendant knew that fire chief Coney was an officer. We disagree.

The trial court's factual determinations in its scoring decisions are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438;

835 NW2d 340 (2013). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

Defendant's arguments require this Court to interpret OV 19, MCL 777.49. Statutory interpretation is a question of law that we review de novo on appeal. *People v Gibbs*, 299 Mich App 473, 484; 830 NW2d 821 (2013). This Court interprets sentencing guidelines in accordance with the rules of statutory construction, which means this Court gives effect to the intent of the Legislature. *People v Hershey*, 303 Mich App 330, 336; 844 NW2d 127 (2013).

OV 19 addresses interference with the administration of justice. 10 points are assessed for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order." MCL 777.49(c). Our Supreme Court has held that "interference with the administration of justice" contemplated in MCL 777.49(c) is broad and can include activities that (1) do not necessarily rise to independently chargeable acts and (2) that affect something other than the judicial process itself. *People v Barbee*, 470 Mich 283, 286–288; 681 NW2d 348 (2004). In that case, our Supreme Court specifically found that providing a false name to the police when they are investigating a crime constitutes conduct for which points can be assessed under OV 19. *Id*. at 288. This Court has also recognized

> the following conduct to constitute an interference or attempted interference with the administration of justice: providing a false name to the police, threatening or intimidating a victim or witness, telling a victim or witness not to disclose the defendant's conduct, fleeing from police contrary to an order to freeze, attempting to deceive the police during an investigation, interfering with the efforts of store personnel to prevent a thief from leaving the premises without paying for store property, and committing perjury in a court proceeding. . . . Each of these acts hampers, hinders, or obstructs the process of administering judgment of individuals or causes by judicial process. For instance, the acts of witness intimidation and deceiving police investigators seek to prevent incriminating evidence from being used throughout the process of administering judgment of individuals by judicial process, including during the pretrial and, potentially, trial stages. [*Hershey*, 303 Mich App at 344-345]

At sentencing, defendant elected to have his appointed counsel to represent him. Counsel objected to the scoring of OV 19 at 10 points, but the trial court stated, "He fled the scene of the crime. I think that would constitute . . .OV 19 will be scored at 10."

Defendant now asserts that trial testimony was inconsistent with preliminary examination testimony concerning defendant's first encounter with Fire Chief Coney such that he could not have been found to interfere with the administration of justice. Defendant is correct that at the preliminary examination Coney testified that oath the time of his encounter with defendant, he was in an unmarked police vehicle, but was not working and that when he shone a spotlight on

defendant and asked what defendant was doing, he could not hear what defendant said in response because they were in their respective vehicles. At trial, on the other hand, Coney testified that when he saw defendant in the Ford at issue "I was technically working." Coney further testified at trial that he turned his spotlight on defendant "And I get out of the vehicle and I say: I'm a police officer. Are you okay?" On cross-examination, Coney testified that when he shined his spotlight on defendant, defendant did not say anything. He was impeached with his prior preliminary examination testimony that he could not hear what defendant said.

The conflicting testimony highlighted by defendant is not relevant to the issue of whether defendant should have been scored 10 points for OV 19. Relevant to this instant matter, while there was no testimony at the preliminary examination that Coney identified himself as a police officer to defendant, at trial, he testified that he identified himself as a police officer and asked defendant if he was okay. And, at both the preliminary examination and at trial, Coney testified that defendant fled from him. Moreover, there was testimony at both the preliminary examination and at trial that at least two other officers in patrol cars quickly arrived on the scene and began searching for defendant. Thus, the trial court's factual determination in its scoring OV 19 at 10 points is supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly