STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 311452 Kent Circuit Court
ALBERT LEWIS WOODS, JR., Defendant-Appellant.	LC No. 11-009552-FC

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Albert Lewis Woods, Jr. of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157, for his role in the late-night holdup of a McDonald's restaurant in Grand Rapids. The circuit court sentenced defendant to a lengthy term of imprisonment as a fourth habitual offender.

Through his appointed appellate counsel and in a brief filed pursuant to Administrative Order No. 2004-6, Standard 4, defendant raises multiple challenges to his convictions and sentences. We agree with defendant that the Kent County Sheriff's Department should have secured a warrant before placing a GPS tracking device on defendant's vehicle. However, exclusion of the evidence generated from that search was not warranted because the sheriff reasonably believed based on existing caselaw that a warrant was unnecessary. We further agree that the prosecution should not have presented DNA evidence through a witness who did not conduct the analysis. But the evidence was of minimal import and defendant cannot establish prejudice demanding relief. As argued by defendant, the circuit court should not have scored 10 points for Offense Variable (OV) 13, continuing pattern of criminal behavior, because consideration of defendant's conspiracy conviction, which is a crime against public safety, was prohibited by the plain language of the statute. The remainder of defendant's claims lack merit. Accordingly, we affirm defendant's convictions but remand for resentencing.

I. BACKGROUND

In the early morning hours of September 1, 2011, two masked men robbed a McDonald's restaurant on Alpine Road in Grand Rapids at gun point. The robbers entered the dining room through a door that mistakenly had been left unlocked. After ordering the restaurant's three employees to lie on the ground, the masked men forced the store manager to give them the contents of the safe. The robbers absconded with $400 worth of paper gift certificates and

$3,233.73 in cash. The victims were only able to describe their assailants as African-American males who wore dark or black clothes. The victims agreed that one of the men carried a revolver. Surveillance footage also revealed that the robbers wore white cloth gloves.

As the robbers fled the scene, surveillance cameras captured their images and showed the men entering an older black Camaro. The men were witnessed by two employees of a nearby Wal-Mart. And a man, who had been at the drive-through window during the robbery, testified that he saw a dull black Camaro drive away at a high rate of speed.

Later that morning, a Kent County Sheriff's deputy located a dull black, older Camaro parked in a nearby apartment complex, York Creek. Sheriff's deputies conducted visual surveillance of the vehicle from 8:00 a.m. until 4:00 p.m. The deputies executed a search warrant for the vehicle's interior and found several white gloves. Inside one glove, investigating deputies found DNA evidence, which later testing matched to defendant. Without first securing a warrant, the deputies placed a magnetic GPS tracking system under the vehicle's rear bumper. The deputies then discontinued visual surveillance.

Within ten minutes of leaving the scene, the deputies received a text message from the GPS system indicating that the Camaro was in motion. Several units followed the vehicle until its driver committed a traffic infraction. A fully marked sheriff's vehicle effectuated a traffic stop and the detectives approached. Defendant was the lone occupant of the car. He indicated that he had purchased the vehicle only two hours earlier but could not remember where he made the purchase. And a certificate found in defendant's wallet showed that he had secured insurance for the vehicle four days earlier.

One deputy directed defendant to exit the vehicle and conducted a pat-down search, finding several large rolls of currency in defendant's pocket. The funds were of various denominations (193 singles, 53 fives, 13 tens, 33 twenties, and 2 fifties), totaling $1,348. Defendant claimed that the funds were the proceeds of a check he had just cashed. Yet, defendant could not tell the officers the amount of the check or how much money he had on his person. The deputies seized the currency, as well as defendant's wallet and cell phone, and took defendant into custody.

The officers secured a warrant to search the contents of defendant's cell phone. The deputies found a video of defendant and another man, codefendant Cedric Welch, Jr., pretending to swim in a pile of money. They also found pictures of defendant and Welch holding a large amount of currency near their faces. The video had been e-mailed to defendant's Google account from an account owned by Welch. The pictures and the video were all taken or transferred on the morning of September 1, following the time of the robbery.

After taking defendant into custody, the deputies executed a search warrant at his apartment. They found 18 booklets of McDonald's paper gift certificates. They also found dark clothing lying on the ground outside of the master bedroom closet. There were spores on the pants matching plant life found along the trail between the Camaro's parking spot and the York Creek apartment of Welch's girlfriend. The deputies matched the still photographs of defendant and Welch holding currency to this location.

The deputies secured a warrant to search an apartment in York Creek belonging to Welch's girlfriend. The video of the men swimming in money was matched to this location. The officers then secured a search warrant for the home where Welch resided with his parents. In Welch's bedroom, the deputies found a plastic case for a revolver-style Daisy air gun. There was an alternate second barrel inside the case, but the revolver was never found. The deputies also never recovered the remainder of the currency. Of note, investigation of defendant's and Welch's cell phone records revealed that they were in the area of the Alpine Road McDonald's near the time of the robbery.

Welch apparently was not arrested immediately. On November 2, 2012, defendant used a recorded jail telephone to contact Welch. The conversation was very cryptic and defendant immediately instructed Welch not to use any names. Defendant instructed Welch to send a text message to defendant's cell phone that would activate a Prey software application he had downloaded onto his phone. This task was never accomplished.

Based on the evidence presented at trial, the jury convicted both defendant and Welch of armed robbery and conspiracy. Defendant thereafter filed this claim of appeal.

II. WARRANTLESS ARREST

Defendant challenges the admission of evidence secured as a result of his arrest because the sheriff's deputies did not first secure an arrest warrant. Defendant failed to preserve this issue by filing a motion to suppress the evidence in the trial court, *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004), and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

First and foremost, we reject any implication that defendant was not placed under arrest until the deputies secured a warrant two days after the traffic stop. "[A] person is 'seized'" for Fourth Amendment purposes, "when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v Mendenhall*, 446 US 544, 553; 100 S Ct 1870; 64 L Ed 2d 497 (1980). "[A] person has been 'seized' . . . if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554. Following the traffic stop, the deputies placed defendant in handcuffs and transported him to the sheriff's station in a patrol vehicle. The deputies restrained defendant's freedom of movement and he reasonably believed that he was not free to leave.

Second, contrary to defendant's contention on appeal, he was not illegally arrested for committing a traffic violation; defendant was arrested on suspicion of robbing the McDonald's. The sheriff could effectuate this arrest without a warrant. Pursuant to MCL 764.15(1)(c), a police officer may arrest a person without a warrant if "[a] felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it." "The benchmark for satisfaction of Fourth Amendment rights is reasonableness," *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009), and reasonableness is a statutory requirement. Thus, an arrest made in compliance with this statute is constitutional.

It is undisputed that an armed robbery occurred at the McDonald's. The arresting deputies had reasonable cause to believe defendant had committed that felony. Defendant was

found driving a vehicle matching the description given by witnesses and surveillance footage images of the vehicle that fled the scene after the robbery. An earlier search of the vehicle yielded white gloves like those worn in the robbery. Accordingly, the evidence secured as a result of defendant's arrest was properly admitted at trial.

III. WARRANTLESS GPS TRACKING

Defendant contends that the circuit court should have excluded evidence secured as a result of the warrantless GPS tracking of his vehicle. Defendant failed to move for the suppression of this evidence and our review is again limited to plain error. See *Carines*, 460 Mich at 763. Although the sheriff was required to secure a warrant for this search, we discern no error requiring reversal as the deputies acted in good faith.

In *United States v Jones*, ___ US ___; 132 S Ct 945, 949; 181 L Ed 2d 911 (2012), the Supreme Court of the United States held that the "installation of a GPS device on a target's vehicle, and [the] use of that device to monitor the vehicle's movements, constitutes a 'search.'" The installation of a tracking device is a physical invasion of private property for an information-seeking purpose, which the Supreme Court deemed "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* In addition, such a trespass onto a person's personal effects invades a person's reasonable expectation of privacy. *Id.* at 950. The Court noted that its decision did not conflict with prior cases holding that the exterior of a vehicle is inherently in the public eye and therefore a visual inspection does not amount to a search. By attaching a device to the exterior of the vehicle, the officers moved beyond a permissible visual inspection and "encroached on a protected area." *Id.* at 952. The Court also acknowledged that "'[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" *Id.* at 953, quoting *United States v Knotts*, 460 US 276, 281; 103 S Ct 1081; 75 L Ed 2d 55 (1983). While visually tracking a vehicle's movements is constitutional, the Court noted: "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." *Jones*, 132 S Ct at 954. Ultimately, the government did not have a warrant to attach the GPS device at the time and place that it did and the search was deemed to have been conducted without a warrant. *Id.* at 948 n 1.

This does not end the discussion. Just because a search is unconstitutional does not mean that the evidence is automatically suppressed. *Jones* left unresolved whether the officer's good-faith reliance on existing precedent could validate the search and seizure. *Id.* at 954.

In *People v Goldston*, 470 Mich 523, 538; 682 NW2d 479 (2004), our Supreme Court adopted the federal exclusionary rule and good-faith exception for Fourth Amendment violations outlined in *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984). In *Leon*, the United States Supreme Court noted that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands[.]" *Id.* at 906. The illegal search completes the wrong and the use of the evidence obtained does not inflict a new Fourth Amendment violation. "[T]he exclusionary rule," continued the *Leon* Court, "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" *Id.* (citation omitted). Rather, it is "'a judicially created remedy designed to

safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *Id.* (citation omitted).

Whether to apply the exclusionary rule in any given case is therefore a consideration separate and distinct from whether a Fourth Amendment violation occurred. *Id.* And the *Leon* Court opined that the rule should only be applied in situations "where its remedial objectives are thought most efficaciously served." *Id.* at 908 (quotation marks and citation omitted). Specifically, illegally obtained evidence should be admitted when it was "obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *Id.* at 909 (quotation marks and citation omitted). In *Leon*, the Court found no benefit in "suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant[.]" *Id.* at 922.

In *Davis v United States*, ___ US ___; 131 S Ct 2419, 2423; 180 L Ed 2d 285 (2011), the Supreme Court extended the good-faith exception to the exclusionary rule to situations in which "the police conduct a search in compliance with binding precedent that is later overruled." Like *Leon*, *Davis* noted that the Fourth Amendment "says nothing about suppressing evidence obtained in violation of [its] command." *Davis*, 131 S Ct at 2426. The Court also emphasized that the exclusionary rule serves a deterrent effect against police misconduct and does not redress injuries endured by the defendant. *Id.* at 2426-2427. The *Davis* Court found no ground to exclude the evidence obtained against the defendant because the police did not engage in culpable behavior that needed to be deterred. Rather, they "acted in strict compliance with binding precedent, and their behavior was not wrongful." *Id.* at 2428-2429.

The question then becomes whether the sheriff's deputies acted in reasonable reliance on binding precedent when they failed to secure a search warrant for the placement of the GPS tracking device. The detective in charge of the investigation, Kent County Sheriff's Deputy Bryan Muir, testified that he believed that a warrant was unnecessary pursuant to the law at the time of the search. Muir's securing of a search warrant for the interior of the vehicle, for the contents of defendant's cell phone, and the interior of three separate residences evidences that Muir was not deliberately attempting to evade Fourth Amendment protections. And caselaw from around the country generally supported Muir's reliance.

Precedent from the United States Supreme Court regarding the use of beeper tracking devices could have led investigating deputies to believe that no warrant was required before installing a GPS tracking device. In *Knotts*, 460 US 276, the Supreme Court affirmed the warrantless use of beeper technology to track the movements of a vehicle. The Court described a "beeper" as a "radio transmitter, . . . which emits periodic signals that can be picked up by a radio receiver." *Id.* at 277. The officers in *Knotts* placed a beeper into a five-gallon drum of chloroform that had been purchased by one of the defendant's cohorts. The drum was then loaded into a vehicle. The officers used the periodic signals emitted by the radio transmitter to trace the chloroform, which was purchased in Minnesota, to a secluded cabin in Wisconsin. The defendant and his accomplices were later convicted of conspiracy to manufacture a controlled substance. *Id.*

Knotts discussed a line of cases culminating in the standard that a person invoking the Fourth Amendment's protections must have a justifiable, reasonable or legitimate expectation of

privacy that was invaded by government action. *Id.* at 280-281. The Court described the surveillance conducted in *Knotts* as being akin to "the following of an automobile on public streets and highways." *Id.* at 281. The Court had previously held that a person "has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Moreover, a vehicle "travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* (quotation marks and citation omitted). The Court concluded therefore that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* The Court continued:

> Visual surveillance from public places along [the accomplice's] route or adjoining [the defendant's] premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [the accomplice's] automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case. [*Id.* at 282.]

In the end, "there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment," and there was nothing to challenge in the Supreme Court's estimation. *Id.* at 285. This Supreme Court precedent was surely relied upon by law enforcement officials across the country to support the warrantless use of tracking devices on vehicles travelling public roads.

Following its decision in *Jones*, the Supreme Court remanded two cases back to federal circuit courts that had previously found no Fourth Amendment violation for the placement of a GPS tracking device on a vehicle without a warrant. In *Cuevas-Perez v United States*, ___ US ___; 132 S Ct 1534; 182 L Ed 2d 151 (2012), the Seventh Circuit Court of Appeals has not yet issued an opinion on remand. In *United States v Pineda-Moreno*, 688 F3d 1087 (CA 9, 2012), remanded by ___ US ___; 132 S Ct 1533; 182 L Ed 2d 151 (2012), the Ninth Circuit Court of Appeals concluded that suppression was unnecessary. The court reasoned that precedent within that circuit before *Jones* "held that placing an electronic tracking device on the undercarriage of a car was neither a search nor a seizure under the Fourth Amendment" and "that the government does not violate the Fourth Amendment when it uses an electronic tracking device to monitor the movements of a car along public roads." *Id.* at 1090.

Various other federal circuit courts have reached the same conclusion. In *United States v Sparks*, 711 F3d 58, 65-66 (CA 1, 2013), the First Circuit held that officers attaching GPS tracking devices reasonably relied on the Circuit's own decisions and on *Knotts* for the proposition that no warrant was needed to attach a beeper device to a vehicle. The Fifth Circuit similarly found that officers had reasonably relied upon circuit precedent allowing the use of beeper devices without a warrant. *United States v Andres*, 703 F3d 828 (CA 5, 2013). Prior to *Jones*, the Seventh Circuit Court of Appeals relied on the *Knotts* analysis to hold that no warrant was necessary before installing a GPS tracking device on a suspect's vehicle. *United States v Garcia*, 474 F3d 994, 997 (CA 7, 2007). And the Eighth Circuit Court of Appeals had concluded that the installation of a GPS device was not a search because a person has no

expectation of privacy in the movements of his vehicle along public streets. *United States v Marquez*, 605 F3d 604, 609-610 (CA 8, 2010).[1]

Sixth Circuit precedent also suggested that no warrant was required before installing the GPS tracking device on defendant's vehicle. In *United States v Cassity*, 720 F3d 451 (CA 6, 1983), the Sixth Circuit found unconstitutional the warrantless placement of a beeper in a box of chemicals delivered to the defendant. The officers in *Cassity* did not intend to track the movement of the chemicals en route, only to reconnect with the beeper signal at a later time to discern where on his property the defendant ultimately placed the box (a use directly criticized in *Knotts*, 460 US at 285). The *Cassity* Court acknowledged that the facts before it were inapposite of *Knotts* and found more relevant to the particular circumstances a case that required a warrant to install a beeper on personal property located in private areas. *Id.* at 455-456, citing *United States v Bailey*, 628 F2d 938 (CA 6, 1980).

The conclusion law enforcement officers would reasonably draw from these cases is that they were free to place a tracking device on a vehicle parked in a public location, like an apartment complex community parking lot, to discern when that vehicle would be moved. Given this caselaw, any error in admitting evidence obtained from the GPS tracking does not qualify as plain.

IV. CONFRONTATION RIGHTS

Defendant contends that the circuit court violated his Sixth Amendment right to confront the witnesses against him by allowing the prosecutor to present a DNA report, not through the report's preparer, but through the deputy tasked with collecting evidence related to the case. Our review is limited to plain error as defendant failed to object at trial. *People v Fackelman*, 489 Mich 515, 537; 802 NW2d 552 (2011). Although the admission of this evidence was erroneous, defendant is not entitled to relief because he cannot establish that he was prejudiced.

> The Confrontation Clauses of our state and federal constitutions provide that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. The United States Supreme Court has held "that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," . . . but has also held that "the face-to-face confrontation requirement is not absolute[.]" [*People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012).]

The Confrontation Clause bars the admission of testimonial hearsay in the absence of the declarant when the declarant is available or the defendant has not had an opportunity to cross-examine the witness. *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Evidence such as a DNA analysis is testimonial if, at the time the report is made, the circumstances would lead

[1] We acknowledged that the Third Circuit reached a contrary conclusion in *United States v Katzin*, 732 F3d 187 (CA 3, 2013).

a person to reasonably believe it would be available for use in a criminal prosecution or trial. *People v Lonsby*, 268 Mich App 375, 390-391; 707 NW2d 610 (2005).

In *Lonsby*, 268 Mich App at 391, this Court reasoned that a DNA analysis prepared from crime evidence is testimonial. The preparer is a police crime lab scientist and any analysis is conducted "with the ultimate goal of uncovering evidence for use in a criminal prosecution." A DNA report is "based on [the preparer's] subjective observations and analytic standards." *Id.* at 392. If the report is presented through another witness, that witness will only be able to "speculate regarding [the preparer's] reasoning," and the defendant is left unable to "question or attack" the test results. *Id.* Based on *Lonsby*, the prosecution's admission of the DNA report through a deputy violated defendant's right to confront the witness against him, i.e., the crime lab technician that prepared the report.

Defendant is not entitled to relief, however, because he cannot establish that the error affected his substantial rights. To warrant relief, a defendant must show that the court's plain error caused him prejudice by affecting the outcome of the lower court proceedings, "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of [the] judicial proceedings[.]" *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

The impact of the DNA evidence found inside the white glove pales when compared to the strength of the other evidence. Defendant was driving a vehicle matching the description of the one used in the robbery. Immediately after the robbery, defendant and Welch took photographs and a video of themselves with large amounts of currency. When defendant was arrested, he had large rolls of small denomination bills in his pocket and deputies found 18 booklets of paper McDonald's gift certificates in defendant's apartment. Defendant's cell phone records placed him in the area of the robbery. Ultimately, the presence of defendant's DNA, along with the DNA of two other individuals, inside a glove found inside defendant's car seems trivial.

V. EXPERT AND LAY OPINION TESTIMONY

Defendant contends that Ricardo Leal, an expert witness presented by the prosecution, exceeded the scope of his expertise when testifying before the court. Defendant further challenges Muir's testimony regarding the Prey Smartphone application, contending that it was inaccurate. Defendant objected to the use of Leal's testimony to do anything more than read the cell phone records placed into evidence. We review this preserved challenge for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). Defendant failed to object to the admission of Muir's testimony, see *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008), and our review is therefore limited to plain error. See *Carines*, 460 Mich at 763.

A. Leal Did Not Exceed The Scope Of His Expertise

Leal is a subpoena analyst with Sprint Nextel with expert experience in reviewing and interpreting Sprint Nextel records. Leal testified that he is "not an expert on the actual towers themselves and how, how—which tower is up and, you know, that's an engineer's job." On voir

dire, Leal testified that he is not an engineer but could "tell where phone calls are originated from or what tower is used" because such information is included in the cell phone records. Defense counsel objected to Leal's testimony, "I see him as an expert of reading the records, essentially, and so other than that I would oppose him being qualified as an expert." The court did not specifically address this objection.

Leal proceeded to testify that the records for both defendant's and Welch's cell phones showed that their phones were in the area of the robbery during the relevant time period. The records indicated that both men placed and received calls during that time frame that were intercepted and transmitted by the cell phone tower closest to the McDonald's restaurant. To verify the accuracy of the prosecution-produced map of local cell phone towers, and the prosecutor asked Leal to use the Google maps feature on his phone to locate the latitude and longitude points of the particular cell tower.

The admission of expert witness testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

To ensure that expert testimony is reliable, the trial court is required to first consider the qualifications of the expert through the conducting of voir dire, as was done in this case. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004). The court must also ensure that the subject of the witness's testimony falls within his or her scope of expertise. "An expert who lacks 'knowledge' in the field at issue cannot 'assist the trier of fact'" as required by the court rule. *Id.* at 789.

Defendant's challenge to Leal's testimony is baseless. The cell phone records included information about the cell towers used in the calls made and received around the time of the robbery. The location of the cell towers was also part of the records. Leal simply read those records and hypothesized that defendant was in the general vicinity of the Alpine Road cell tower when the calls were made. This was within the scope of the expertise for which Leal was qualified by the trial court.

B. Defendant Elicited The Challenged Prey Software Testimony From Muir

Regardless of whether Muir's testimony about the uses of Prey Smartphone application could be categorized as an expert or lay opinion and regardless of whether Muir's testimony was accurate, defendant is not entitled to relief. Defense counsel elicited this testimony at trial, creating any potential error. Moreover, Muir's testimony was not prejudicial because it revealed that Muir did not actually know the range of uses for the software.

When defendant telephoned Welch from jail on November 2, 2011, he instructed Welch to send a text message to defendant's cell phone (which was in police custody) that would

activate the Prey application. During direct examination by the prosecutor of Deputy Muir, the taped telephone conversation was played to the jury. The prosecutor asked no questions to bring out any explanation of the Prey software application mentioned during the conversation.

On cross-examination, however, defense counsel elicited testimony that Muir has the same application installed on his own Smartphone. Muir continued, "It has several different options. You can do GPS tracking of your own cellular phone, or the default to deactivate your phone" remotely. Defense counsel then asked Muir a series of questions to clarify that Prey software cannot actually delete the contents of one's phone; rather, it can be used to "freeze" one's phone so no one else can access its contents.

It is a well-established maxim that a defendant may not "create[] the very error that it wishes to correct on appeal" and expect relief. *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). "[A] party may not harbor error at trial and then use that error as an appellate parachute." *Id.* In his appellate brief, defendant ignores that his counsel introduced this information to the jury and does not contend that trial counsel was ineffective in this regard.

In any event, defendant cannot establish that he was prejudiced by any uninformed opinion testimony presented by Deputy Muir. Defense counsel effectively established that Muir did not really know the full range of uses for Prey software. This actually helped defendant because the prosecution presented no definitive evidence about the meaning of defendant and Welch's jailhouse conversation.

VI. BINDOVER

In his Standard 4 brief, defendant contends that the district court erred in binding him over on the conspiracy charge. Defendant failed to preserve this challenge by filing a motion to quash the bindover. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

The prosecution initially charged defendant with one count of armed robbery. Following the preliminary examination, the prosecutor asked to include three additional armed robbery charges to reflect that three employees, in addition to the store manager, were present and held at gunpoint. The prosecutor also wished to add a conspiracy charge. The district court allowed the addition of the conspiracy charge, but not the new armed robbery counts.

The prosecutor and the district court were within their rights to add a conspiracy count following the preliminary examination. "[T]he court may amend an information at any time before, during, or after trial." *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998), citing MCL 767.67. "[T]he court may permit the prosecutor to amend the information unless to do so 'would unfairly surprise or prejudice the defendant.'" *Id.* at 460, quoting MCR 6.112(H).[2] As the prosecutor amended the information early in the proceedings and defendant had ample

[2] The *Goecke* Court actually quoted then subsection (G), of which the contents have since been redesignated as subsection (H).

opportunity to consider the additional charge before trial, defendant was not unfairly surprised or prejudiced.

Moreover, any error in binding defendant over on the conspiracy charge was rendered harmless by the subsequent trial. At the preliminary examination, the prosecution's burden of proof is low. The prosecution must show probable cause "to believe that a crime was committed and that the defendant committed it." *People v Bennett*, 290 Mich App 465, 480; 802 NW2d 627(2010) (quotation marks and citation omitted). "[T]he presentation of sufficient evidence to convict at trial" on the stricter beyond-a-reasonable-doubt standard "renders any erroneous bindover decision harmless." *Id.* at 481. Accordingly, defendant is not entitled to relief.

VII. DISCOVERY

Defendant contends that the prosecution failed to provide copies of the search warrants and affidavits and the video evidence against him when requested during discovery. Defendant filed no motion to compel discovery and this issue is unpreserved. See *State Treasurer v Downer*, 199 Mich App 447, 449; 502 NW2d 704 (1993).

"There is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). However, MCR 6.201(B)(4) provides that the prosecution is required to disclose search warrants and affidavits to a defendant upon request. Here, the prosecutor did disclose the video evidence requested by defendant and his attorney was able to review it before trial. There is no discovery violation where defense counsel was unable to play the video for defendant at the jail. And there is no record indication that defense counsel did not actually receive the search warrants and affidavits requested.

VIII. TAINTED JURY

Defendant asserts that he was wrongfully convicted by a tainted or biased jury. On May 22, 2012, the court ended proceedings at approximately 1:30 p.m. Thereafter, a staff member watched a video exhibit in the courtroom. As the staff member walked from the courtroom to the judge's chambers, he or she "made some comments about what they had seen" to another staff member. The court described the comments as "[n]othing inappropriate or unusual." One of the jurors was still in the jury room and may have overheard the comments. The following morning, the court separated the juror from the rest of the panel upon her arrival. Upon defense counsel's request, the court agreed to dismiss the juror from service. The court asked defendant if he understood and agreed with this plan. Defendant affirmatively stated that he was "comfortable" with the plan.

Defendant waived this claim of error by personally expressing satisfaction with the circuit court's resolution of the jury issue. As stated in *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011):

> This Court has defined "waiver" as "the intentional relinquishment or abandonment of a known right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." When defense counsel clearly expresses

satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver.

Accordingly, any potential error was extinguished and there is nothing for this Court to review.

IX. ASSISTANCE OF COUNSEL

Following his conviction, defendant filed an in pro per motion for a new trial raising, among other issues, the performance of defense counsel. Defendant specifically challenged counsel's failure to file motions to suppress the evidence secured as a result of his warrantless arrest and GPS tracking of his vehicle. Defendant also criticized counsel's decision not to present the testimony of defendant's proposed alibi witness.

The court did not grant defendant's request for a hearing. Accordingly, our review is limited to errors in the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "A judge must first find the facts, then must decide whether those facts establish a violation of defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Regard should be given to the trial court's opportunity to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), mod 481 Mich 1201 (2008). This Court reviews a trial court's decision not to grant an evidentiary hearing for an abuse of discretion. *Unger*, 278 Mich App at 217.

"'[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of reasonable professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

Defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). We may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Payne*, 285 Mich App at 190 (quotation marks and citation omitted). And "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy[.]" *People v Horn*, 279 Mich App

31, 39; 755 NW2d 212 (2008). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Payne*, 285 Mich App at 190 (quotation marks and citation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defense counsel was not ineffective for failing to present defendant's proposed alibi witness, Toni or Tori Pratt. On the final day of witness testimony, defense counsel informed the court that he needed to retract defendant's notice of alibi defense. Pratt had contacted counsel's office the night before and told counsel "she is no longer willing to be an alibi." Counsel "informed her that she could still be subpoenaed, but she informed [counsel] that the information she gave [counsel] at that time would make her no longer a viable witness." The court questioned defendant to ensure that he "underst[oo]d what happened" and defendant responded, "I believe so." After defendant filed his motion for an evidentiary hearing, the court addressed the issue at sentencing. Defense counsel informed the court that Pratt told him "she could not say for sure that was the correct night." Counsel continued, "I went over that with great length on this on the telephone, and she adamantly was not going to verify the alibi that she had previously told me."

Defense counsel made a strategic decision to forego the presentation of a witness who indicated she would no longer testify in defendant's favor. The circuit court acted within its discretion in determining that no evidentiary hearing was necessary to consider counsel's motives. And as noted above, defendant had no grounds to support suppression of the evidence based on his arrest or the placement of the GPS tracking device on his car. Accordingly, defense counsel was not ineffective in failing to file the motion, see *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), and the court had no reason to hold a hearing.

X. SENTENCE

Defendant argues that the circuit court imposed a retaliatory sentence as a result of his decision not to accept a plea agreement and also erred in scoring OV 13.

A. The Circuit Court Did Not Impose A Retaliatory Sentence

A defendant need not "take any special steps to preserve the question of the proportionality of [his] sentence." *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). A challenge to a vindictive or retaliatory sentence is premised on a violation of the defendant's right to choose a trial by jury. It is therefore a constitutional issue that this Court reviews de novo. See *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011).

The record does not support defendant's contention that his sentence was based on vindictiveness or retaliation because he rejected a plea bargain and chose to proceed to trial. Rather, the prosecution had offered defendant a generous plea agreement with no habitual offender enhancement. Defendant's sentence following trial was substantially higher because it was enhanced due to defendant's fourth habitual offender status.

At defendant's preliminary hearing, Welch's defense counsel noted that there were plea bargains on the table for both defendants under which the prosecution would dismiss the habitual

offender enhancements and would not seek to add conspiracy charges if defendant and Welch pleaded to armed robbery. Counsel advised the court that he had discussed the sentencing impact of taking the plea agreement with defendant. Specifically, if defendant went through trial and was convicted, he could receive an enhanced sentence of 540 months. If defendant pleaded, his guidelines range would likely be only 126 to 210 months.

Before conducting juror voir dire, the court discussed various issues on the record with defendant. Defendant admitted to the court that he was very nervous. The court told defendant, "You should be," and informed defendant, "it is highly likely you will spend the next 20 to 40 years in prison . . . I can't imagine how your sentence will be anything less than multiple decades in prison."

Before the sentencing hearing, defendant filed a lengthy motion in propria persona that included a request for the trial judge to recuse himself from sentencing because the court likely would impose a vindictive sentence for forcing the case to trial. At sentencing, the court addressed defendant's motion. In relation to the vindictive sentencing issue, the court stated:

> The Court does recall advising this defendant and his co-defendant of what the sentencing guidelines were and that it was entirely possible that if he were convicted as a supp. 4 felony offender, his sentence would be worse than if he took a plea agreement that was offered.
>
> That is not a communication of any type of threat. That is a statement of what happens. It is in an effort for the defendant to understand what the consequences are. He chose not to have the case pled, that's fine, so it went to trial. So today he'll receive his sentence. Is it going to be more substantial than if he had pled guilty with a plea agreement that limited his sentence to 108 months, you bet it will. Why? Well, because I think it's appropriate that this supp. 4 felony offender, who was on probation to this Court when he committed this felony and this conspiracy to commit this felony, should be punished severely, and he's going to be, in about – well, however, many minutes it takes me to complete this ruling on this matter.

After allowing defendant an opportunity for allocution and giving defense counsel an opportunity to speak, the court proceeded with its sentence. The court emphasized, "[T]he defendant is going to receive a very substantial sentence. It is based on the criminal activity he chose to undertake." The court continued that the sentence was also based on defendant's extensive criminal history for such a young person.

A judge may not impose sentence based on vindictiveness or to retaliate against a defendant. As held in *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985):

> It is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty. While confronting a defendant with the risk of more serious punishment may discourage defendant's assertion of his constitutional right to trial by jury, the imposition of these difficult choices is an inevitable and permissible attribute of a system that

> tolerates plea negotiation. Nevertheless, courts have vacated sentences which were higher than what was promised if defendant pled guilty where the record supported any inference that the higher sentence was based on defendant's decision to go to trial rather than to plead guilty. [Citations omitted.]

Here, there is no indication that the court imposed a higher sentence simply because defendant rejected the plea offer and proceeded to a jury trial. Rather, the trial judge noted that defendant had been before him on a previous case, the judge had been lenient and defendant went on to continue his criminal behavior. The court and counsel warned defendant that his minimum sentencing range would be much higher if he did not accept the plea agreement. This was an obvious point as a sentence with a fourth habitual offender enhancement is higher than a sentence with no enhancement. Moreover, the court explained at great length the reasons supporting the particular sentence imposed. The record does not support that vindictiveness rather than proportionality motivated the sentence. The sentence was within the minimum sentencing guidelines range, and a sentence within the appropriate range is presumed to be proportionate. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 281 (1993).

B. The Court Erred In Scoring OV 13 At 10 Points

Defendant objected to the scoring of OV 13 in the circuit court, but on different grounds than raised on appeal. This issue is therefore not preserved for appellate review. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.*, involve legal questions that this Court reviews de novo." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011).

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. 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. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

MCL 777.43 governs the scoring of OV 13 as follows:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person..... 25 points
>
> * * *
>
> (f) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property..... 5 points

(g) No pattern of felonious criminal activity existed..... 0 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

* * *

(c) Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.

OV 13 is used to assess points against a defendant who has committed a series of certain serious crimes. The plain language of MCL 777.43(c) provides that 10 points may be scored only if the sentencing offense is "part of a pattern of felonious criminal activity involving 3 or more crimes *against a person or property*." (Emphasis added.)[3] See *Bonilla-Machado*, 489 Mich at 424. The crimes used to score OV 13 were defendant's armed robbery (a crime against a person), MCL 777.16y, and an earlier retail fraud conviction (a crime against property), MCL 777.16r, as well as defendant's current conspiracy conviction. Conspiracy, however, is a crime against public safety. MCL 777.18.

In *Bonilla-Machado*, 489 Mich at 424, the Supreme Court held that the reference to crimes against persons or property in OV 13 is "limited to those offenses designated as such by the Legislature in MCL 777.11 through 777.19." The Court held that crimes against public safety cannot be transformed into crimes against a person, even if a person is the victim. *Id.* at 425-427. In an order, the Supreme Court specifically extended this reasoning to conspiracy. Even if the charge underlying the conspiracy is a crime against a person, the conspiracy itself is still a crime against public safety and cannot be used to score OV 13. *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012).

These cases had already been decided when defendant was sentenced. The circuit court, prosecutor and defense counsel all should have been aware of them. Accordingly, the court should have scored OV 13 at zero points. This error was clear and plain.

However, the circuit court reduced defendant's OV 12 score from 25 to zero points when changing defendant's OV 13 score. The court did this because conduct scored in OV 13 cannot be scored in OV 12. It is unclear from the record whether the trial court would have scored OV 12 had defense counsel not pushed for the scoring of OV 13 instead.

MCL 777.42 provides for the scoring of OV 12 as follows:

[3] Subsection (1)(d) includes controlled substance crimes that are not at play in this matter.

(1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Three or more contemporaneous felonious criminal acts involving crimes against a person were committed..... 25 points

(b) Two contemporaneous felonious criminal acts involving crimes against a person were committed..... 10 points

(c) Three or more contemporaneous felonious criminal acts involving other crimes were committed..... 10 points

(d) One contemporaneous felonious criminal act involving a crime against a person was committed..... 5 points

(e) Two contemporaneous felonious criminal acts involving other crimes were committed..... 5 points

(f) One contemporaneous felonious criminal act involving any other crime was committed..... 1 point

(g) No contemporaneous felonious criminal acts were committed..... 0 points

(2) All of the following apply to scoring offense variable 12:

(a) A felonious criminal act is contemporaneous if both of the following circumstances exist:

(*i*) The act occurred within 24 hours of the sentencing offense.

(*ii*) The act has not and will not result in a separate conviction.

The circuit court could not score defendant's prior retail fraud conviction against defendant in scoring OV 12 because it did not occur within 24 hours of the sentencing offenses. And the court could not consider the conspiracy because it resulted in a separate conviction. Technically, defendant held four people at gunpoint when robbing the McDonald's restaurant. The circuit court could count that uncharged conduct as additional crimes against a person for scoring OV 12. Accordingly, we cannot simply order the circuit court to impose a particular sentence and must remand for reconsideration of the OV scores.

We affirm defendant's convictions and remand for resentencing in light of the correct scoring of OV 13 and potential scoring of OV 12. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher