

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 7, 2014

v

STEVEN ADERRICK ODOM a/k/a STEVE
ODOM,

No. 304699
Washtenaw Circuit Court
LC No. 10-000618-FC

Defendant-Appellant.

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and bank robbery, MCL 750.531. The trial court sentenced defendant to concurrent prison sentences of 210 to 420 months for the armed robbery conviction and 86 to 420 months for the bank robbery conviction. We affirm.

On the morning of January 14, 2009, a lone male, wearing a heavy black parka and with his face obscured, entered the Check 'n Go payday loan business in Ann Arbor. One employee and one customer, both women, were in the facility at the time. The man indicated that he was robbing the store and pointed an object at the women. The women followed his command to sit down while he stepped around the counter and removed the contents of the cash drawer, totaling nearly \$3,000.00.

At trial, evidence was presented establishing that DNA taken from a pair of binoculars found in the parking lot outside the Check 'n Go by police immediately after the robbery matched defendant's, and that defendant's physical description matched that given by the two women in the store at the time of the robbery. The mother of defendant's two adult children also testified at trial that on the night of January 14, 2009, defendant showed up at her apartment acting nervous and scared and told her he had robbed the Check 'n Go that morning. Defendant, who represented himself throughout the proceedings (assisted by stand-by counsel), was convicted as charged.

I. Restraints

On appeal, defendant first contends that the trial court violated his due process rights by restraining him at trial without good cause and further contends that remand for an additional

evidentiary hearing to specifically determine whether jurors were aware of his restraints is required. We disagree.

This Court reviews a trial court's decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

In *People v Dunn*, 446 Mich 409; 521 NW2d 255 (1994), our Supreme Court stated the rule for when a defendant may be shackled:

The rule is well-established in this and other jurisdictions that a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order. In *People v Duplissey*, 380 Mich 100, 103; 155 NW2d 850 (1968), this Court quoted with approval the following statement of the United States Court of Appeals for the Tenth Circuit:

“Freedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial. 14 Am Jur, Criminal Law, § 132. Ordinarily such procedure should be permitted only to prevent the escape of the prisoner or to prevent him from injuring bystanders and officers of the court or to maintain a quiet and peaceable trial.” [Quoting *Odell v Hudspeth*, 189 F.2d 300, 302 (1951).]

The American Bar Association Standards of Criminal Justice provide that a defendant in a criminal case should not be subjected to physical restraint while in court unless the judge, for reasons entered on the record, finds such restraint “reasonably necessary to maintain order.” [*Id.* at 425-426.]

In that case, the Supreme Court stated that the “record contain[ed] no evidence that would support an order requiring that [the defendant] wear leg irons or *otherwise be physically restrained* after he entered the courtroom.” *Id.* at 427 (emphasis added). By stating that the trial court could not require the defendant, on retrial, to wear leg irons or to “otherwise be physically restrained” absent a finding supported by record evidence that “such restraint” was justified, *id.* at 427, the Supreme Court in *Dunn* prohibited any physical restraint without the necessary justification. The *Dunn* Court also concluded, however, that because no juror saw the defendant's shackles, the defendant was not entitled to a new trial on the ground that he was forced to wear shackles. *Dunn*, 446 Mich at 425.

The Supreme Court, citing *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005) has remained consistent with this position. See, e.g., *People v Arthur*, 439 Mich 935; 825 NW2d 578 (2013)(“We ORDER the trial court to articulate with particularity, on the record, its reasons for requiring the defendant to wear shackles at his jury trial. The court shall receive

evidence and make findings of fact regarding: (1) whether the physical restraints were justified under *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005), and (2) whether those restraints were visible to any jurors, either during jury selection or afterward.”), and *People v Arthur*, ___Mich __; 836 NW2d 694 (2013).

Here, in ordering that defendant would wear a security device on his leg during trial, the trial court did not provide any findings supported by record evidence for why the physical restraint was necessary. It simply stated that it had discretion on how to fashion a remedy regarding security. Thus, the trial court abused its discretion when it required defendant to wear the security device. *Dixon*, 217 Mich App at 404-405.

Case law from the Supreme Court and this Court is well established, however, that even if a trial court erred in requiring a defendant to wear a physical restraint, a defendant is not entitled to relief unless he suffered prejudice as a result of the restraint. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009); *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). A defendant is not prejudiced if the jury was unable to see the physical restraint. *Dunn*, 446 Mich at 425; *Horn*, 279 Mich App at 36.

This Court previously granted defendant’s motion for remand to allow him to move for a new trial and for the trial court to hold an evidentiary hearing “to determine whether any of the deliberating jurors saw” the restraint worn by the defendant. *People v Odom*, unpublished order of the Court of Appeals, entered June 22, 2012 (Docket No. 304699). At the conclusion of an evidentiary hearing, the trial court denied defendant’s motion for a new trial because there was no record evidence that would lead to a conclusion that a juror saw the security device on defendant’s leg. We agree with this conclusion.

The testimony at the evidentiary hearing established that jurors did not see the actual security device on defendant’s leg. The device was worn under defendant’s pant leg, and there is no indication it ever protruded out of his pant leg into view. In fact, defendant does not dispute that, as the trial court found, the actual security device was not visible to the jury. According to defendant, even if jurors did not actually *see* the device, there is a strong possibility that the jurors were *aware* of the security device on his leg. He points to the facts that the security device caused him to walk with a limp, he had to unlock the security device on a number of occasions, and he could not sit as a regular person. These facts were testified to by defendant and stand-by counsel at the evidentiary hearing. Nevertheless, a juror, having seen defendant walk with a limp, bend down on a handful of occasions during closing argument, and be unable to sit as a natural person, would not necessarily conclude that defendant wore a physical restraint.

It is questionable in the first instance whether a juror would even have the knowledge to connect the observable effects of the security device on defendant’s physical movements and posture with a physical restraint. In addition, there are rational explanations for the observable effects of the security device. For example, a rational explanation for defendant’s limp and his inability to sit as a regular person was that defendant had suffered an injury to his back or leg. A rational explanation for defendant’s acts of bending down to adjust the restraint (during which the restraint was not revealed but was adjusted through defendant’s clothing) was, as the trial court stated, he was tending to an itch. Thus, although a juror may have observed the effects of the security restraint on defendant’s physical movements and posture, there is nothing in the

record to suggest that a juror would likely attribute the effects to a physical restraint, rather than some innocuous happening. The trial court thus complied with the Court's remand order and no further evidentiary hearing is required, as argued and requested by defendant. Further, because there is no claim and no indication that any juror saw the actual security device, defendant was not prejudiced by having to wear the restraint. *Horn*, 279 Mich App at 36.

II. Waiver of Counsel

Defendant next contends that he was denied his constitutional right to counsel at critical stages of the prosecution where he did not execute a valid waiver of counsel. Specifically, defendant claims that there was no substantial compliance with *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976) and MCR 6.005(D) at the "felony arraignment" and the October 20, 2010, motion hearing because, at these proceedings, the "trial court" did not advise defendant of his right to represent himself. We disagree.

This Court reviews de novo the entire record to determine whether the trial court's factual findings regarding the defendant's waiver of counsel were clearly erroneous. *People v Willing*, 267 Mich App 208, 218; 704 NW2d 472 (2005). "To the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, [this Court's] review is de novo." *Id.* at 219 (quotation omitted). This Court reviews unpreserved claims of constitutional and nonconstitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error, which is error that is clear or obvious, affects a defendant's substantial rights when it affected the outcome of the lower court proceedings. *Id.* at 763.

The Sixth Amendment, US Const, Am XI, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, safeguards the right of an accused to counsel at all critical stages of the criminal process. *People v Rodney Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). However, the United States Constitution does not force a lawyer upon a defendant; a defendant may choose to represent himself. *Id.* In addition, the right of self-representation is secured by the Michigan Constitution, 1963 Const, art 1, § 13. *Id.* at 642. In *Anderson*, 398 Mich 361, the Supreme Court held that a trial court must make the following three findings before it may grant a defendant's request to represent himself:

(1) the defendant's request is unequivocal, (2) 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 (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004)]

MCR 6.005 also addresses a defendant's waiver of his right to counsel. MCR 6.005(A) provides:

At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all subsequent court proceedings, and

(2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

MCR 6.005(D) further provides:

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

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Regarding *Anderson's* required findings, the Supreme Court has "rejected a 'litany approach' in favor of a 'substantial compliance' standard." *Russell*, 471 Mich at 191. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) 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." *Id.* at 191 (quotation omitted). If a court fails to substantially comply with the requirements of *Anderson* and MCR 6.005(D), then the defendant has not effectively waived his right to the assistance of counsel. *Id.* at 191-192.

If a defendant waives the right to counsel, the court must continue to advise defendant of his right to counsel. MCR 6.005(E) provides, in pertinent part:

If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need only show that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

In arguing that there was not substantial compliance with the requirements of *Anderson* and MCR 6.005(D) at the “felony arraignment,” defendant does not specifically indicate whether he is referring to the arraignment on the complaint or to the arraignment on the information. However, because defendant argued before the trial court that he was never advised of his right to counsel at the “arraignment on the felony information” and referred to the preliminary transcript examination it appears that defendant is referring to the arraignment on the information when he uses the term “felony arraignment.”

Defendant’s preliminary examination was held on May 26, 2010. At the start of the examination, the following exchange occurred:

Mr. Holtz [the prosecutor]. . . . It’s my understanding that Mr. Odom is representing himself. I know that it’s been addressed to the Court when he was arraigned and he does state that he does not wish to have an attorney. He’s made that clear to the Court and he’s also made it clear to me that he is representing himself. So it is my understanding that we are going to proceed with a preliminary examination with the Defendant representing himself.

The Court. Is that true, Mr. Odom?

Mr. Odom. Yes, sir.

The Court. Okay.

The examination then proceeded. At the conclusion of the preliminary examination, the district court bound defendant over for trial on charges of armed robbery and bank robbery. The district court then arraigned defendant on the information. After defendant received a copy of the information, the district court read the information aloud in court. Immediately upon finishing its reading, the district court entered a not guilty plea on behalf of defendant. The district court did not engage in any colloquy with defendant that would constitute substantial compliance with the requirements of *Anderson* and MCR 6.005(D). Thus, defendant’s affirmation to the district court that it was true that he would be representing himself was not a valid waiver of his right to counsel. *Russell*, 471 Mich at 191-192. Accordingly, the issue becomes whether the deprivation of counsel for defendant at the arraignment on the information after the preliminary examination entitles defendant to a new trial.

“The Sixth Amendment right to counsel provides that a criminal defendant shall enjoy the right to the assistance of counsel at ‘critical stages’ of the proceedings.” *People v James Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004), overruled in part on other grounds *People v Antsy*, 476 Mich 436; 719 NW2d 579 (2006). “The phrase ‘critical stage’ refers to a ‘step of a criminal proceeding, such as arraignment, that holds significant consequences for the accused.’” *Willing*, 267 Mich App at 228, quoting *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 1 Ed 2d 914 (2002). See also *James Green*, 260 Mich App at 399, where this Court stated that “the right to counsel applies to preliminary proceedings where rights may be sacrificed or defenses lost.” The total or complete deprivation of the right to counsel at a

“critical stage” of the proceedings is a structural error requiring automatic reversal. *Willing*, 267 Mich App at 224. However, an ineffective waiver of the right to counsel is harmless if the deprivation of counsel “does not ‘pervade the entire proceeding’—for example, cases in which the ‘evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial.” *Id.* (citation omitted).

In this matter, we fail to see how the deprivation of counsel pervaded the “entire proceeding.” *Id.* Only two things happened at the arraignment on the information: (1) the district court read the information aloud to defendant, and (2) the district court entered a not guilty plea on behalf of defendant. The events did not prejudice defendant, in any way, at subsequent proceedings. The not guilty plea entered by the district court was never used against defendant. Compare *Willing*, 267 Mich App at 228-229 (holding that the deprivation of counsel at the combined *Walker*¹ and entrapment hearings pervaded the entire proceeding because the hearings were the defendant’s only opportunity to present his entrapment defense, which would have been a complete defense to the charge against him). Further, in *People v Trudeau*, 51 Mich App 766; 216 NW2d 450 (1974), as well as in *People v Stewart*, 22 Mich App 51; 176 NW2d 700 (1970), the defendants were denied counsel at the arraignment on the information and the Court held that the deprivation of counsel did not entitle the defendants to a new trial. In *Stewart*, 22 Mich App at 52-53, the Court stated, “It is not claimed, however, that the defendant was in any way prejudiced by the failure of his attorney to appear If it appeared that the entry of the not guilty plea had disadvantaged the defendant, who ultimately pled guilty, another question would be presented.” Accordingly, the deprivation of counsel for defendant at the arraignment on the information in this matter was harmless. *Willing*, 267 Mich App at 224.

Defendant also correctly notes that the trial court, at the October 20, 2010, hearing, failed to inform him of his right to counsel. However, that error was also harmless. There were numerous pretrial hearings before the trial court. The first hearing was on June 23, 2010, and this was defendant’s first appearance before the trial court. At the hearing, the trial court stated that it understood that defendant wanted to represent himself. Given “the very serious charges and some of the issues before” it, the trial court appointed standby counsel for defendant. Hearings followed on June 30, 2010, July 28, 2010, August 25, 2010, October 20, 2010, November 1, 2010, and February 9, 2011. In his brief on appeal, defendant does not dispute that the trial court advised him of his right to counsel at the hearings on June 30, 2010, July 28, 2010, August 25, 2010, and at the two hearing that followed the October 20, 2010 hearing—those on November 1, 2010, and February 9, 2011. Nor does defendant dispute that, on the first day of trial, the trial court again informed him of his right to counsel. More importantly, defendant makes no argument that, had he been advised of his continued right to counsel at the October 20, 2010, hearing, he would have invoked the right or that the failure to properly advise him at one out of many proceedings affected his substantial rights. And, this Court is not required to (nor will it) search the record for a factual basis to sustain a defendant’s position. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). That the trial court advised defendant of his right to counsel at two subsequent hearings and at trial, and the fact that defendant did not invoke this

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

right at those proceedings make it implausible to think that defendant would have invoked his right to counsel at the October 20, 2010, hearing. Accordingly, the trial court's failure to comply with MCR 6.005(E) at the October 20, 2010, hearing was harmless.

III. Hearsay Evidence

Defendant next contends that the improper admission of hearsay evidence concerning his location on the morning of the incident violated his due process rights and rendered his trial unfair and requires the grant of a new trial. We disagree.

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217. However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "A 'declarant' is a person who makes a statement." MRE 801(b). Hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 802.

Over defendant's objection, the trial court allowed Gregory Roach, custodian of records for the agency that administered the monitoring program for the GPS device that defendant wore as part of his parole, to testify concerning information on a computer disk put together by his staff and Pro-Tech, an internet computer application. The information on the disk indicated defendant's location between 7:00 a.m. and 11:00 a.m. on January 14, 2009. We agree that this information was used for the truth of the matter asserted. MRE 801(c). The information showed that defendant was in the area of the Check 'n Go at 10:00 a.m., and the truth of this fact was used to prove that defendant committed the robbery. In order to constitute hearsay, however, the information objected to must be *generated by a person*, given the definition of declarant provided in MRE 801(b).

In *People v Dinardo*, 290 Mich App 280; 801 NW2d 73 (2010), the defendant was arrested on suspicion of drunk driving. He was taken to the local police department for alcohol testing using a DataMaster machine. The DataMaster machine provided a ticket, which stated the blood alcohol percentage for each of the defendant's two breath samples. On appeal, this Court concluded that the test results from the DataMaster machine did not constitute hearsay. *Id.* at 291. It explained:

"Hearsay" is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," MRE 801(c), and "declarant" is defined as "a *person* who makes a statement," MRE 801(b) (emphasis added). A printout of machine-generated information, as opposed to a printout of information entered into a machine by a person, does not constitute hearsay because a machine is not a person and therefore not a declarant capable of making a statement. See, e.g., *State v*

Reynolds, 746 NW2d 837, 843 (Iowa, 2008); *United States v Hamilton*, 413 F3d 1138, 1142 (CA 10, 2005); *United States v Khorozian*, 333 F3d 498, 506 (CA 3, 2003); *State v Weber*, 172 Or App 704, 709; 19 P3d 378 (2001); *State v Van Sickle*, 120 Idaho 99, 102; 813 P2d 910 (1991). Indeed, as one well-known Michigan treatise explains, “[w]hen . . . a ‘fact’ is ‘asserted’ by a non-human entity, such as a clock ‘telling the time’ or a tracking dog following a scent, the ‘statement’ is not hearsay because the ‘declarant’ is not a ‘person.’” Robinson, Longhofer & Ankers, *Michigan Court Rules Practice: Evidence* (2d ed), § 801.3, pp 7–8. The DataMaster machine at issue in the present case is not a declarant because it is not a person, but a tool for analysis that self-generates test results and prints those results on a paper ticket. Since the DataMaster machine is not a declarant capable of making a statement, the results that it generates are not hearsay. [*Id.* at 291-292.]

According to defendant, the information about defendant’s location on the disk constituted “assertions” by members of Roach’s staff. It is true that Roach directed his “staff and Pro-Tech” to generate the disk. However, the information about defendant’s location was not statements from Roach’s staff. Roach testified that defendant’s GPS device accumulated a GPS signal every minute and, because the device “called in” those signals once an hour, Roach and his staff were able to stay informed of defendant’s location. Accordingly, the statements of defendant’s location between 7:00 a.m. and 11:00 a.m. on January 14, 2009, were made by the GPS device that defendant wore. Because the GPS device is a machine, and not a person, it is not a declarant and, therefore, any information that it provides is not hearsay. *Dinardo*, 290 Mich App at 291-292. Roach did not testify, nor did anyone else, that any individual contributed information to the disk and there is nothing in the record to suggest that the disk, which contained a program illustrating defendant’s speed, time, and direction of travel in the morning hours of January 14, 2009, was anything other than a computer-generated visual demonstration of the GPS signals that were “called in” by defendant’s GPS device. Thus, the trial court did not err when it concluded that the information concerning defendant’s location was not hearsay. *Washington*, 468 Mich at 670-671.

IV. Right to Confront Witnesses

Defendant next argues that his Sixth Amendment right to confront witnesses was violated when the trial court admitted evidence of defendant’s location on the morning of the incident through the testimonial hearsay statements of an unavailable declarant. We review this unpreserved claim of error for plain error affecting the defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

Defendant argues that the trial court’s admission of the information on the computer disk concerning his location between 7:00 a.m. and 11:00 a.m. on the morning of January 14, 2009, violated his right of confrontation. According to defendant, the information was testimonial because it was collected in anticipation of potential criminal litigation and, therefore, the Confrontation Clause required the member of Roach’s staff who prepared the disk to testify at trial.

In *Dinardo*, 290 Mich App at 288-289, this Court explained the applicable contours of the Confrontation Clause:

The Confrontation Clause of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” US Const, Am VI. This “bedrock procedural guarantee applies to both federal and state prosecutions.” *Crawford* [*v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004)]. The Michigan Constitution provides the same guarantee for criminal defendants. Const. 1963, art 1, § 20; see also *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). Testimonial statements of witnesses absent from trial are therefore admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant. *Crawford*, 541 US at 59 Ordinarily, whether a statement is testimonial in nature depends on whether it constitutes a “‘declaration or affirmation made for the purpose of establishing or proving some fact.’” *Crawford*, 541 US at 51 (citation omitted). More particularly, we have explained that “[s]tatements are testimonial where the ‘primary purpose’ of the statements or the questioning that elicits them ‘is to establish or prove past events potentially relevant to later criminal prosecution.’” *People v Lewis (On Remand)*, 287 Mich App 356, 360; 788 NW2d 461 (2010), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

The Court concluded, however, that the ticket produced by the DataMaster machine did not constitute testimonial hearsay. *Id.* at 290. It explained:

As explained previously, the Confrontation Clause guarantees a criminal defendant the right “to be confronted with the *witnesses* against him.” US Const, Am VI (emphasis added). . . the DataMaster ticket at issue in this case was generated entirely by a machine without the input of any human analyst. No human analyst entered data into the DataMaster machine or recorded findings or conclusions on the DataMaster printout. Nor was any expert interpretation required for the DataMaster test results to be understood. . . . We agree with courts from other jurisdictions that have held that a machine is not a witness in the constitutional sense and that data automatically generated by a machine are accordingly nontestimonial in nature.

Similarly, defendant’s GPS device, while it was worn by defendant, accumulated a GPS signal every minute and “called in” those signals every hour. As previously indicated, there was no testimony regarding how members of Roach’s staff made the disk, which contained a program that showed defendant’s speed, time, and direction of travel on January 14, 2009. There was no evidence that the information on the disk was generated, in any part, by data entered by a human or with findings or conclusions made by a human. *Dinardo*, 290 Mich App at 290. Likewise, there was no evidence that any expert interpretation of the GPS signals “called in” by defendant’s GPS device was necessary to generate the program on the disk. *Id.* Simply stated, there is nothing on the record to contradict a conclusion that the GPS device was the sole source of the information on the disk. Accordingly, because the record does not indicate that the

information on the disk was generated through any human analysis or interpretation, the trial court did not plainly err when it failed to exclude the information on the disk under the Confrontation Clause. *Id.* at 290-291. The GPS device, because it was a machine, was not a witness against defendant, as contemplated by the Confrontation Clause, and the data generated by the GPS device was nontestimonial. *Id.*

In addition, Roach, who narrated the program on the disk for the jury when it played at trial, was available for cross-examination by defendant. And, defendant cross-examined Roach at trial. Accordingly, because the GPS device was a machine and, therefore, not a witness against defendant, *Dinardo*, 290 Mich App at 290-291, and because Roach was available for cross-examination, there was no violation of defendant's right of confrontation. There was no admission of an out-of-court testimonial statement by a declarant who was absent from trial. *Id.* at 288.

V. Scoring of OV 4

Defendant next contends that his constitutional rights were violated due to judicial factfinding on less than proof beyond a reasonable doubt at sentencing. This Court reviews this unpreserved claim of error for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764. We disagree.

Defendant argues that the trial court's scoring of ten points for OV 4, MCL 777.34 (psychological injury to victim), violated his Sixth Amendment right to jury because the facts the trial court used to score OV 4 were neither admitted by defendant nor proven beyond a reasonable doubt. In support of his argument, defendant relies upon *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d (2013), wherein the United State Supreme Court extended the rule announced in *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), that, pursuant to the Sixth Amendment right to jury, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" to also apply to mandatory minimum sentences. Accordingly, any fact that increases a mandatory minimum sentence must be submitted to the jury. *Alleyne*, 133 S Ct at 2163.

Our Supreme Court has definitively held that the rule announced in *Apprendi* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). And, the *Alleyne* decision addressed *mandatory minimum* sentences. Michigan uses an indeterminate sentencing scheme, where the trial court imposes a minimum sentence based on a sentence range that is calculated by scoring the prior record variables and offense variables. *Drohan*, 475 at 161. An imposed minimum sentence is not based on a statutory mandatory minimum sentence. Thus, *Alleyne* has no effect on Michigan's indeterminate sentencing scheme and defendant's allegation of error premised upon that decision has no merit. Accordingly, the trial court's scoring of OV 4 did not violate defendant's Sixth Amendment right to jury.

VI. Defective Complaint

In a standard 4 brief², defendant next asserts that he was denied due process and equal protection where he was arrested and taken into custody based upon a charging instrument that was statutorily and constitutionally defective. We disagree.

This Court reviews a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

According to defendant, the complaint was defective because the copy that was that was provided to him, at his request, only contained the signature of the magistrate. When defendant brought this matter to the district court and trial court's attention via motions to dismiss, the courts advised him that the court file contained the original complaint with all of the appropriate information and required signatures and that the courts had no explanation as to why defendant did not receive a copy of the original complaint.

The courts accurately stated the existence of a proper complaint in the court file. There is a complaint, filed on April 9, 2010, that is signed by Burke, who was the complaining witness. Magistrate Chris Easthope also signed the complaint, and indicated that the complaint had been "[s]ubscribed and sworn to before" him on April 5, 2010, at 2:00 p.m. In addition, Conrad Siller, whom the trial court indicated was a prosecuting attorney, signed the complaint. Immediately below this complaint in the court file is a complaint that is only signed by Magistrate Easthope. This complaint does not have a timestamp on it. That appears to be the complaint that was copied and sent to defendant.

The purpose of a complaint is to move the magistrate to determine whether a warrant shall be issued. *People v Higuera*, 244 Mich App 429, 443; 625 NW2d 444 (2001); see also MCR 6.102(A) ("A court must issue an arrest warrant . . . if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense."). "The complaint must include the substance of the accusation against the accused and the name and statutory citation offense." MCR 6.101(A). It must be signed and sworn to before a judicial officer or court clerk. MCL 764.1a(1); MCR 6.101(B). In addition, "[a] complaint may not be filed without a prosecutor's written approval endorsed on the complaint or attached to it . . ." MCR 6.101(C); see also MCL 764.1(1) (stating that a magistrate shall not issue an arrest warrant unless "the authorization is signed by the prosecuting attorney").

Defendant does not argue that the April 9, 2010, complaint does not contain the necessary signatures. He only argues that, because the copy of the complaint that he received only had the signature of Magistrate Easthope, the April 9, 2010, complaint was signed sometime after he was arrested and, therefore, was a fraud on the court. However, defendant has not presented any documentary evidence, either to the two courts below or to this Court that provides any inference

² See Administrative Order No. 2004-6, Standard 4.

that the April 9, 2010, complaint was not the complaint that led to the issuance of the warrant for his arrest. In other words, defendant offers nothing but speculation to support his belief that the April 9, 2010, complaint was signed by Burke and Siller after he was arrested. Accordingly, the decisions by the district court and the trial court to deny defendant's motions to dismiss based on a defective complaint were not an abuse of discretion. *Adams*, 232 Mich App at 132.

VII. Affidavit for Search Warrant to Obtain DNA

Defendant next argues that the affidavit for a search warrant to obtain samples of his DNA was premised on false and misleading statements and that he was not provided a copy of the supporting affidavit for the search warrant. As a result, defendant contends that the evidence seized pursuant to the warrant should have been suppressed. We disagree.

This Court reviews a trial court's findings regarding a motion to suppress for clear error. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). However, the trial court's conclusions of law and its ultimate decision on the motion are reviewed de novo. *Id.* This Court reviews unpreserved claims of error for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764.

A search warrant may not be issued unless probable cause exists. US Const, Amend IV; *People v Anthony Brown*, 297 Mich App 670, 675; 825 NW2d 91 (2012). "Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime exists in the stated place." *Anthony Brown*, 297 Mich App at 675. "Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation, such as by affidavit." *Id.* A defendant has the right to challenge the truthfulness of an affidavit's factual statements, but under a difficult standard. The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause. *People v [Charles] Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000).

Defendant first argues that numerous paragraphs in the affidavit that Officer Burke submitted for a search warrant to obtain a sample of his DNA contained false and misleading statements and omissions. On October 9, 2009, Burke submitted an affidavit for a search warrant to obtain a DNA sample from defendant. Paragraphs H, J, L, M, N, O, P, and S of the affidavit state:

H. During the initial investigation, I located a pair of binoculars in the parking lot outside of the Check N Go business. After confirming that they were not police property from the officers outside, I picked them up with a gloved hand and brought them into the business. Upon inquiring with Officer Scott to see if they were his, I heard from both Ritchie and Dowker that the binoculars could very possibly have been the object that the suspect had been holding in his hand as a weapon.

* * *

J. In late July, 2009, Sgt. Jim Stephenson with AAPD received a tip that the suspect in this case was Steve Aderrick Odom, 8/1/62. The unknown caller stated that Odom was on Parole and was on tether. The caller stated that Odom claimed to have used a pair of binoculars as a gun.

* * *

L. On 10/5/09, I received an email from Sgt. Hughes telling me that Sgt. Pat Bell from WCSD had received a tip on their tip line regarding the Check N Go robbery. I called Sgt. Bell and listened to the message. The caller stated that the person that committed the Check N Go robbery on "Jan 15" is Steve Odom. She stated that he had GPS on a tether at the time and that he told her he had committed this crime. She stated that she saved the article in the newspaper and stated that his height and weight "fit like a T" for what was reported. The caller stated that Steve Odom is currently locked up in the prison in Newberry. The caller did not leave a name but left a phone number.

M. I called the phone number left in the message and ended up making contact with a female by the name of Shawn Williams. Shawn stated that she was the one that left the tip message with WCSD. Shawn stated that she is the mother of two of Steve Odom's adult sons. She stated that they are not married and have been in an off and on relationship for years. She stated that Steve told her directly the day after the robbery that he had committed the crime. She stated that he was on parole at the time and was really nervous that he was going to get caught. She stated that he had a GPS monitor on him at the time of the robbery. I asked her if he made any mention of doing something with the GPS she stated that he had not.

N. Williams told me that after she found out that he was back involved with criminal behavior, she broke off the relationship. This did not go over very well and he began to assault and stalk her. She stated that this is the reason that Odom is back in prison (parole was revoked), and she is trying to get him prosecuted through WCSD. Now that Odom is in prison, she felt it was time to come forward with the Check N Go information.

O. I asked Williams if Odom had mentioned that he had carried or held anything during the robbery. She asked "You mean a weapon?" and I answered "Anything". At first she stated no, and then quickly stated that he had mentioned that he had a pair of binoculars with him. She stated that she did not know why he had the binoculars or how he had used them. She also stated that she is familiar with the binoculars that he was talking about, and stated that she has not seen those binoculars since the time of the incident. She stated that the binoculars belonged to Steve.

P. Williams told me that Odom had also told her that he had been all covered up and was wearing all black when he committed the robbery. She also stated that the height and weight listed in the newspaper for the suspect were correct for Odom.

* * *

S. During the week of Sept 28, 2009, I received notification from the MSP Crime Lab in Grayling that the binoculars had been turned over to them and had been swabbed for DNA. I was notified that the swabs had been sent back to the Northville lab to be the subject of further DNA analysis. The binoculars remained in Grayling for fingerprinting. [Affidavit for search warrant.]

Defendant argues that ¶ H was a false statement because, at trial, the Check 'n Go employee, Ritchie, testified that she did not tell Burke that the binoculars looked like what the perpetrator held in his hand. He argues that ¶ J was a false statement because, as revealed by ¶ K of the affidavit, in which Burke stated that she spoke with defendant's parole officer on July 8, 2009, Burke was investigating defendant before late July. He argues that ¶¶ L, M, and P were false and inaccurate statements (1) because the paragraphs show that Williams used information she gathered from the newspaper article, not information obtained from defendant and (2) because Williams, even though she disclosed that she attempted to have defendant prosecuted for domestic violence, failed to disclose to Burke that she owed defendant money for a car he had maintained and purchased from her, that her son and others had broken into defendant's apartment, a crime which she helped conceal, and that her son threatened defendant's mother. Defendant offers no explanation why ¶¶ N, O, and S were false statements.

Although Burke misstated in ¶ H that both Ritchie and the Check n' Go customer, Dowker, claimed that the binoculars could have been what the perpetrator held in his hand, nothing in the record supports that the mistake was anything other than a negligent or innocent mistake. See *People v Waclawski*, 286 Mich App 634, 701; 780 NW2d 321 (2009). Regardless, because Dowker told Burke that the binoculars appeared to be what the perpetrator held in his hand, Burke's mistake about Ritchie was not necessary to the finding of probable cause. *Id.* Second, at trial, Burke testified that she may have made a mistake in the affidavit about when the first tip was received in July 2009. And, again, nothing in the record supports that the mistake was anything but a negligent or innocent mistake. *Waclawski*, 286 Mich App at 107. In addition, whether the tip was received in early July or late July was not necessary to the finding of probable cause. *Id.* Third, defendant's claim that Williams reported information to Burke that she learned from a newspaper article, rather than from defendant, does not relate to the truth or falsity of any factual statements in the affidavit. The argument concerns the credibility of Williams. Fourth, defendant's argument that Williams failed to disclose certain alleged facts to Burke also concerns the credibility of Williams. Defendant makes no claim that, after speaking with Williams, Burke knew of and failed to report in the affidavit that Williams owed defendant money for a car he bought from her, that her son and others had broken into defendant's apartment, and that her son had threatened Shirley. Burke's failure to report these alleged facts of which she was not aware does not constitute a reckless disregard for the truth. *Id.* For these reasons, the trial court did not plainly err when it failed to suppress evidence of defendant's DNA based on false statements in the affidavit. *Carines*, 460 Mich at 763.

In addition, defendant complains of ¶ U in the affidavit, which reads:

U. Given the tip information received, a search warrant requiring a DNA sample from Steve Odom is requested. The preferred method of the DNA sample

is a buccal swab from the inside of the mouth. In the event that a buccal swab cannot be obtained, an alternate method of obtaining Odom's blood by a blood draw by trained medical staff is also requested. The known DNA sample from Odom will help the lab expedite the identification or elimination process in this case.

Defendant argues that, because the magistrate was not informed that his DNA profile was already in CODIS (Combined DNA Index System) and that Heather Vitta had entered the DNA profile obtained from the swabbing of the binoculars into CODIS, the magistrate should not have granted a search warrant for his DNA.³ According to defendant, pursuant to the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, a search warrant may not be issued for a person's DNA if the person's DNA profile is already in CODIS.

The DNA Identification Profiling System Act requires the Department of State Police to permanently retain a DNA profile of all individuals who are convicted of certain criminal offenses. See MCL 28.176(1)(a), (b). While defendant does not explain how or why the act prohibits a search warrant for a person's DNA when the person's DNA profile has already been collected by the Department of State Police, we presume that defendant relies on MCL 28.176(3), which provides:

Notwithstanding subsection (1), if at the time the individual is convicted of or found responsible for the violation the investigating law enforcement agency or the department of state police already has a sample from the individual that meets the requirements of this act, the individual is not required to provide another sample or pay the fee required under subsection (5).^[4]

MCL 28.176(3) offers no support for defendant's argument. The statute only states that when an individual is convicted of a crime for which the person is required to give a sample of

³ Vitta, a forensic scientist employed at the Northville crime laboratory, testified that, in February 2010 after receiving a report from Bode Technology, she entered the DNA profile that was obtained from the binoculars into CODIS. Accordingly, when Burke requested a search warrant in October 2009, the DNA profile obtained from the binoculars had not yet been entered into CODIS. Defendant's argument before the trial court did not include any reference to the fact that the DNA profile from the binoculars was again entered into CODIS.

⁴ MCL 28.173a(2) contains similar language:

If at the time an individual who is required by law to provide samples for DNA identification profiling is convicted the investigating law enforcement agency or the department already has a sample from the individual that meets the requirements of the rules promulgated under this act, the individual is not required to provide another sample. However, if an individual's DNA sample is inadequate for purposes of analysis, the individual shall provide another DNA sample that is adequate for analysis.

his or her DNA, the person need not provide a DNA sample if the Department of State Police already has a DNA sample from the individual. The statute does not concern when a person's DNA may be obtained pursuant to a search warrant issued during the investigation of a crime. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Because defendant has not provided this Court with any legal authority suggesting that a person's DNA may not be obtained through a search warrant issued during the investigation of a crime when the Department of State Police has previously obtained a sample of the person's DNA upon conviction of a criminal offense, the circuit court's decision to deny defendant's motion to suppress was not in error.

Defendant additionally argues that evidence of his DNA should have been suppressed because he was not given a copy of Burke's affidavit when the search warrant was executed. In support of his argument, defendant relies on MCL 780.654(2). The statute, in whole, states:

(1) A search warrant shall be directed to the sheriff or any peace officer, commanding the sheriff or peace officer to search the house, building, or other location or place, where the person, property, or thing for which the sheriff or peace officer is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized.

(2) The warrant shall either state the grounds or the probable or reasonable cause for its issuance or shall have attached to it a copy of the affidavit.

(3) Upon a showing that it is necessary to protect an ongoing investigation or the privacy or safety of a victim or witness, the magistrate may order that the affidavit be suppressed and not be given to the person whose property was seized or whose premises were searched until that person is charged with a crime or named as a claimant in a civil forfeiture proceeding involving evidence seized as a result of the search.

However, in his argument, defendant fails to acknowledge MCL 780.655(1), which provides:

When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things that were seized. The officer taking property or other things under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. *The officer is not required to give a copy of the affidavit to that person or to leave a copy of the affidavit at the place from which the property or thing was taken.* [Emphasis added.]

MCL 780.655(1) was amended to its current version in 2002. Pursuant to the amended version of MCL 780.655(1), no one was required to give defendant a copy of Burke's affidavit. Accordingly, defendant's argument that evidence of his DNA should have been suppressed because he was not provided a copy of Burke's affidavit fails.

VIII. Prior Bad Acts Evidence

Defendant next contends that his right to a fair trial was violated where the trial court allowed the introduction of prior bad acts evidence and then failed to provide a limiting instruction to the jury on the use of such evidence. We disagree.

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

MRE 404(b)(1) provides:

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

Other acts evidence, to be admissible under MRE 404(b), must be offered for a proper purpose, which is any purpose other than to establish the defendant's character or propensity to commit the offense. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). In addition, other acts evidence must be relevant under MRE 402 and, pursuant to MRE 403, its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Finally, upon request, a trial court may provide a limiting instruction. *Id.* at 56.

Defendant challenges evidence that was introduced about (1) his incarceration after January 14, 2009; (2) his GPS device; and (3) his incarceration before January 14, 2009. All of this evidence was admissible under MRE 404(b)⁵.

First, the mother of defendant's adult children, Williams, testified that after defendant came to her house on the evening of January 14, 2009, and told her that he committed the robbery of the Check 'n Go, she did not report defendant to the police because defendant's "whole demeanor and everything" changed for the worse. She eventually obtained a PPO

⁵ Prior to trial, the prosecutor presented the trial court, pursuant to MRE 404(b), with a "notice of intent to introduce evidence of defendant's incarceration prior to the date of offense and subsequent to the date of offense."

against defendant, and he was arrested and incarcerated after he violated the no-contact order. Williams called Crime Stoppers in October 2009, explaining that she had decided to report defendant because he was incarcerated and she felt it was necessary for the safety of her life. The evidence of defendant's incarceration after January 14, 2009, was not admitted to establish defendant's character or propensity to commit the charged offenses. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Rather, the evidence of defendant's incarceration (and defendant's acts that led to the incarceration) was used to explain why Williams waited ten months to report defendant to the police. The evidence was offered for a proper noncharacter purpose.

This evidence was also relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. When the credibility of a witness is in dispute, the parties may produce evidence supporting and assailing the witness's credibility. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, the jury needed to decide whether Williams was a credible witness, and it was better equipped to make a determination regarding her credibility with knowledge about why Williams waited until October 2009 to report defendant.

Further, the probative value of the evidence of defendant's incarceration after January 14, 2009, was not substantially outweighed by the danger of unfair prejudice. MRE 403. "Evidence is unfairly prejudicial when it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Bryan Brown*, 294 Mich App 377, 383-384; 811 NW2d 531 (2011). Here, the evidence of defendant's incarceration was more than marginally probative; it filled the "chronological and conceptual void," *Sabin (After Remand)*, 463 Mich at 70 n 12 (quotation omitted), for the ten-month period between defendant's confession to Williams and Williams's report to Crime Stoppers. And, because the jury was not presented with extensive detail about the acts that led to defendant's incarceration, there was little danger that the evidence would be given undue preemptive weight. Under these circumstances, the trial court did not abuse its discretion in failing to exclude evidence of defendant's incarceration after January 14, 2009. *Unger*, 278 Mich App at 216.

Second, Williams testified that defendant wore a GPS device. Roach also testified about the GPS device that defendant wore. He testified that persons who are required to wear a GPS device are given instructions on how to properly wear and use the device and that the GPS signal from the device can be blocked. The evidence showed that the GPS signal from defendant's device was lost at 9:09 a.m. on January 14, 2009, and that, at 10:00 a.m., a signal from defendant's GPS device bounced off a cellular telephone tower near an intersection close to the Check 'n Go. The evidence relating to defendant's GPS device was not admitted to establish defendant's character or propensity to commit the charged offenses. *Johnigan*, 265 Mich App at 465. Rather, the evidence was used to show that defendant may have interfered with the signal from his GPS device, thus preventing the GPS device from showing that he was at the Check 'n Go when it was robbed, and that, although his exact location was unknown at 10:05 a.m., he was in the area of the Check 'n Go only minutes earlier. The evidence was offered for a proper purpose.

In addition, the evidence relating to defendant's GPS device was relevant. The evidence, which suggested that defendant may have interfered with the signal from his GPS device and that defendant was in the area of the Check 'n Go near the time of the robbery, had a tendency to make the existence of fact—that defendant was the perpetrator of the robbery—more probable than it would be without the evidence. MRE 401. Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Because the jury was not told any details about the acts that defendant committed that led to the requirement that he wear the GPS device, there was little, if any danger, that the jury would give undue weight to the fact that defendant was required to wear the device. *Bryan Brown*, 294 Mich App at 383-384. Under the circumstances, the trial court did not abuse its discretion when it failed to exclude, under MRE 404(b), the evidence relating to defendant's GPS device. *Unger*, 278 Mich App at 216.

Third, the prosecutor did not introduce any evidence regarding defendant's incarceration before January 14, 2009. The prosecutor questioned Williams about her relationship with defendant and, after Williams testified that she has known defendant from "back in the 80s," the prosecutor stated that he "want[ed] to go forward in time" to 2008. Williams then testified that when defendant "came home" in 2008, they reestablished a relationship. The prosecutor did not ask Williams from where defendant "came home." Evidence that defendant had been incarcerated before January 14, 2009, came during *defendant's* questioning of witnesses. For example, when defendant asked Williams when their relationship ended, Williams replied, "When you got locked up in '81." In his standard 4 brief, defendant does not identify any evidence regarding his incarceration before January 14, 2009, that was introduced by the prosecutor. Defendant may not argue that evidence introduced by him denied him a fair trial. See *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995)("Defendant may not assign error on appeal to something that his own counsel deemed proper at trial.")

Defendant also protests the trial court's failure to provide a limiting instruction to the jury, despite its earlier statement at a pretrial hearing that it would. However, on the fourth day of trial, the court presented the parties with "an initial set of jury instructions" that did not include an instruction on other acts evidence. The prosecutor informed the trial court that he had previously submitted a proposed instruction modeled after CJI2d 4.11 (the instruction for other acts evidence), but he was now withdrawing the instruction. Defendant posed no objection to the initial set of instructions or the prosecution's withdrawal of its proposed instruction. In addition, when the trial court asked him if he was requesting any other jury instructions, defendant stated he was only requesting "a third party culpable defense instruction." After the trial court instructed the jury, it asked defendant if he was satisfied with the jury instructions. Defendant replied, "Yes, your Honor." A defendant waives any claim of instructional error when he expresses satisfaction with the trial court's instructions. *People v Kowalski*, 489 Mich 488, 503-504; 803 NW2d 200 (2011). Waiver extinguishes error, causing there to be no error for this Court to review. *Id.* Because defendant stated that he was satisfied with the jury instructions, defendant waived his claim of instructional error. *Id.*

IX. Request for Evidentiary Hearing to Establish Fraud

Defendant next claims that he was denied his rights to due process and a fair trial when the trial court denied his request for an evidentiary hearing to establish a factual record of fraud perpetrated by Williams on the court. We disagree.

This Court reviews a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. *People v Rose*, 289 Mich App 499, 528; 808 NW2d 301 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant moved the trial court to quash the information and for an evidentiary hearing alleging that Williams had essentially lied to have him charged with the robbery when another individual had admitted to defendant that he had committed the robbery, and that Williams had provided false testimony at the preliminary examination, and would be providing false testimony at trial. On appeal, defendant makes no argument that the district court abused its discretion in finding that probable cause existed to believe that he committed the robbery of the Check 'n Go, see *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009), but only contends that the trial court should have held an evidentiary hearing. However, defendant was essentially requesting that the trial court assess the credibility of Williams, i.e., determine that Williams' testimony that defendant told her that he committed the robbery at the Check 'n Go was false and that she was framing defendant. However, it is the function of the jury to decide the facts of the case and the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Defendant cites no legal authority to support a proposition that a trial court, during pretrial proceedings, may hold an evidentiary hearing to determine the credibility of a witness and the facts of a case. Thus, the trial court's decision to deny defendant's request for an evidentiary hearing fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

X. Evidence Concerning GPS Results

Next, defendant argues that the trial court abused its discretion in allowing the prosecution to introduce the results of the GPS device without laying a proper foundation as to its accuracy and without establishing that Roach was qualified to testify regarding the functionality of the device under MRE 701 and 702. We disagree.

MRE 702 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.

Under MRE 702, a trial court is placed in the role of a "gatekeeper." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). A trial court is required "to ensure that each

aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable.” *Id.* at 779. “While the exercise of the gatekeeper function is within a court’s discretion, the court may neither abandon this obligation nor perform the function inadequately.” *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007).

Roach’s testimony, pertinent to the present issue, was that at 9:09 a.m. on January 14, 2009, defendant’s GPS device lost its GPS signal, the GPS signal continued to be lost at 10:00 a.m., and at 10:44 a.m. the device indicated that defendant had returned to his apartment. Roach also testified that persons who are required to wear a GPS device are given instructions on how to properly wear and use the device and that the GPS signal from a device can be blocked through such means as carrying the device in a backpack or putting a large coat or an arm over it. Roach, however, was not qualified by the trial court as an expert witness, the prosecutor never offered him as such, and defendant never claimed that Roach was giving expert testimony. Further, Roach did not provide any testimony regarding how global positioning systems worked, nor did he provide an opinion regarding why defendant’s device lost its GPS signal at 9:09 a.m. on January 14, 2009. While Roach’s testimony allowed an inference that defendant’s device lost its GPS signal on January 14, 2009, because defendant had interfered with it, Roach only provided general testimony as to how his agency tracked persons who wore GPS devices and where defendant’s GPS device tracked defendant on January 14, 2009. Because Roach did not provide the jurors with any opinions based on scientific, technical, or other specialized knowledge that would help them understand the evidence and did not apply any principles and methods to the facts of the case, MRE 702 does not apply to Roach’s testimony. Defendant’s reliance on MRE 702 is thus misplaced.

Defendant also makes passing references to MRE 701, which provides:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.

As indicated above, Roach simply testified as to the role of his agency and defendant’s GPS tracking devices in general. He did not testify to any opinions based on his perceptions. Thus, MRE 701 also has no application to Roach’s testimony.

Moreover, defendant does not contest the reliability of GPS tracking but, rather, contends that cell-tower tracking is unreliable. However, defendant does not connect his claim regarding “cell-tower tracking” to any action that the trial court failed to take. He makes no argument that the jury should not have heard evidence about the location of the cellular telephone towers from which signals from his GPS device were bounced. Defendant’s argument, when read as a whole, is that the jury should not have been allowed to conclude that he interfered with the GPS signal from his device. But, the trier of fact is to determine what inferences may fairly be drawn from the evidence and what weight should be afforded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

XI. DNA Evidence Found on Binoculars

Next, defendant contends that he was denied due process and a fair trial when the prosecutor was allowed to introduce DNA evidence found on the binoculars despite the fact that no kinship DNA analysis was performed on the DNA mixture and the prosecutor was aware that close male relatives of defendant had also handled the binoculars and could have been the source of the DNA. We review this unpreserved claim of error for plain error affecting the defendant's substantial rights, *Carines*, 460 Mich at 763-764, and we find no error.

Defendant essentially challenges the expert testimony of Rebecca Preston, a DNA analyst at Bode Technology who performed the analysis of DNA taken from binoculars found at the scene of the Check 'n Go shortly after the robbery. Defendant does not challenge Preston's qualifications to serve as an expert witness, nor does he challenge Preston's use of the "PCR" method in analyzing the DNA evidence found on the binoculars.⁶ Defendant's contention with Preston's expert testimony is that Preston did not conduct any kinship DNA analysis on the DNA mixture found on the binoculars. At trial, in response to defendant's questioning, Preston acknowledged that "kinship analysis" is possible, but that such an analysis was not necessary in the present case because she looked at a "single source contributor," not a "mixed sample."

It is true that Ann Chamberlain, a former DNA analyst for the Michigan State Police and defendant's expert at trial, testified that she was concerned that nothing was done to determine whether any of defendant's relatives were contributors to the DNA mixture found on the binoculars. According to Chamberlain, if related individuals contributed to the DNA mixture, a circumstance could be created where one of the alleles, believed to be part of the DNA profile of the major male contributor, was not actually associated with defendant. However, the fact that Chamberlain and Preston, two experts in DNA analysis, disagreed regarding whether a kinship DNA analysis should have been done on the DNA mixture found on the binoculars does not clearly and obviously render Preston's testimony unreliable, such that it becomes "junk science" as argued by defendant. *Gilbert*, 470 Mich at 782. Chamberlain's testimony simply affected the weight, rather than the admissibility, of Preston's testimony. Thus, the trial court did not plainly err in failing to exclude the expert testimony of Preston on the basis that she did not perform any kinship DNA analysis.

XII. Withholding/Concealing Material Evidence

Defendant next argues that he was denied due process and a fair trial by virtue of the prosecutor's withholding or concealing material evidence in violation of the trial court's discovery order. We disagree.

Before trial, defendant moved the trial court for discovery of DNA evidence, including all bench/analyst notes from the scene and all reports generated by the people's experts "or used by them in this case." At the hearing on defendant's motion, the prosecutor told the trial court

⁶ This Court has acknowledged the general acceptance of the "PCR" method. *People v Coy*, 243 Mich App 283, 291-292; 620 NW2d 888 (2000).

that earlier in the day he had gone to the crime laboratory and picked up the case file from the State Police about all of the DNA information and had turned the case file over to defendant.

At trial, during defendant's cross-examination of Jennifer Patchin, a forensic analyst for the Michigan State Police, Patchin testified that in preparing the DNA sample, she completed "a work sheet that is an electronic file." She did not believe that the electronic file had ever been requested by the prosecutor. Similarly, on cross-examination, Brandon Good, a forensic scientist for the Michigan State Police at the Northville crime laboratory, testified that he had taken "bench notes" and that he did not provide those notes to the prosecutor. Defendant argues that the prosecutor's failure to provide him the notes of Patchin and Good violated MCR 6.201(A)(3) and MCR 6.201(B)(1), as well as the trial court's discovery order. We conclude that neither court rule was violated when the prosecutor failed to provide defendant with the notes of Patchin and Good.

First, under MCR 6.201(A)(3), a party upon request must provide "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." The plain language of the court rule does not require that an expert's bench notes be shared with the opposing party, and such a provision may not be read into the rule. See *People v Orr*, 275 Mich App 587, 595; 739 NW2d 385 (2007)("[W]here the plain language of the rule . . . is clear, it must be enforced as written with no further judicial construction or interpretation."). Second, under MCR 6.201(B)(1), a prosecutor upon request must provide "any exculpatory information or evidence known to the prosecuting attorney." Exculpatory evidence is evidence that tends to establish a defendant's innocence. Black's Law Dictionary (7th ed). There is no argument by defendant that the bench notes of Patchin and Good would tend to prove his innocence.

Because the trial court granted defendant's discovery request for a copy of all records pertaining to the DNA testing performed, including bench notes, we will assume, for the sake of defendant's argument, that the prosecutor's failure to provide defendant with the bench notes of Patchin and Good was a violation of the trial court's discovery order. A trial court has discretion in determining the appropriate remedy for a discovery violation. *Rose*, 289 Mich App at 525. In determining a remedy, a trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). The relevant circumstances include the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice. *Rose*, 289 Mich App at 525-526. The objecting party suffers actual prejudice when its ability to prepare its own case or to test the authenticity of the opponent's evidence has been prejudiced. *People v Taylor*, 159 Mich App 468, 486-487; 406 NW2d 859 (1987).

Here, there is nothing in the record to indicate that the prosecutor intentionally kept the bench notes from defendant. The prosecutor went to the Northville crime laboratory and obtained the case file and, according to his statements to the trial court, he gave defendant everything that he had received. And, defendant did not make any claim of actual prejudice before the trial court. He did not claim that he had been unable to prepare his case. In addition, although defendant claimed that he could not effectively cross-examine the witnesses without the bench notes, he never specifically explained how his failure to have the bench notes prejudiced

him during his cross-examination of Patchin and Good. Under these circumstances, the trial court's decision not to grant any relief to defendant for the prosecutor's failure to provide him the bench notes of Patchin and Good fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant also complains about the prosecutor's failure to provide him with Preston's bench notes or case files or with any of the underlying data supporting Preston's findings and conclusions of Preston. However, there is no record support for defendant's complaint that the prosecutor failed to comply with the trial court's discovery order with regard to Preston's work. And, defendant did not make a claim of actual prejudice before the trial court. He did not claim that, because he lacked bench notes or any other information regarding Preston's work, he was unable to prepare his case or that he was unable to effectively cross-examine Preston on the work she did. Under these circumstances, the trial court's decision to overrule defendant's objection to Preston's report fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

XIII. Double Jeopardy

Defendant next claims that he was subjected to double jeopardy where he was charged with and convicted of armed robbery and bank robbery for a single act of larceny. We disagree.

The United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, protect a person from being twice placed in jeopardy for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Id.* "A double jeopardy challenge presents a question of constitutional law that this Court reviews do novo." *Id.* at 573.

In *People v Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007), the Supreme Court adopted the *Blockburger*⁷ "same-elements test" to determine whether multiple punishments for the same offense are prohibited on double jeopardy grounds. "Under the *Blockburger* 'same elements' test, two offenses are not the 'same offense' if each requires proof of an element that the other does not." *People v Chambers*, 277 Mich App 1, 5; 742 NW2d 610 (2007).

Armed robbery is defined at MCL 750.529 as follows:

A person who engages in conduct proscribed under [MCL 750.530] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony

⁷ *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

MCL 750.530 provides:

A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony

In order to convict a defendant of armed robbery, a prosecutor must thus prove the following two elements:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*Chambers*, 277 Mich App at 7.]

The offense of bank robbery is provided for at MCL 750.531 as follows:

Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money, bond or other valuables, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony

The offense can be committed in two separate ways: (1) bank robbery involving assaultive conduct, or (2) safecracking. *People v Campbell*, 165 Mich 1, 6; 418 NW2d 404 (1987).

The offenses of armed robbery and bank robbery each require proof of an element that the other offense does not require. The offense of armed robbery requires proof that the defendant possessed or feigned possession of a dangerous weapon. MCL 750.529; *Chambers*, 277 Mich App at 7. The offense of bank robbery does not require proof that the defendant possessed or feigned possession of a dangerous weapon. See MCL 750.531. The offense of bank robbery requires proof that the defendant acted with the intent to steal property from “any building, bank, safe, vault or other depository of money, bonds, or other valuables.” *Id.* The offense of armed robbery does not require proof that the defendant intended to steal from any such place. See MCL 750.529; *Chambers*, 277 Mich App at 7. Because the offenses of armed robbery and bank robbery each require proof of an element that the other offense does not

require, defendant's convictions for the two offenses do not violate the constitutional prohibitions against double jeopardy. *Smith*, 478 Mich at 296; *Chambers*, 277 Mich App at 5.

XIV. Insufficient Evidence/Convictions Against the Great Weight of the Evidence

Defendant also argues that there was insufficient evidence to support his convictions and that his convictions were against the great weight of the evidence. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). The Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the elements of the crime were proved beyond a reasonable doubt. *Id.* This Court reviews a trial court's decision on a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2010).

Defendant argues that his convictions for armed robbery and bank robbery are not supported by sufficient evidence because the prosecutor failed to present evidence establishing that he was the person who committed the robbery of the Check 'n Go. Identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2003). In determining whether a conviction is supported by sufficient evidence, this Court must resolve any conflicts in the evidence in favor of the prosecution, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and make all credibility choices in favor of the jury verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v John Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Here, although one of the women present during the robbery testified that she was unsure whether defendant was the person who robbed the Check 'n Go, another woman present testified that, after observing defendant at his preliminary examination, she was 100 percent sure that defendant was the perpetrator of the robbery. Further during an investigation of the robbery, an officer found binoculars in the parking lot outside the Check 'n Go during her investigation, and the woman identifying defendant as the perpetrator believed that the binoculars were what the robber had held in his hand.

The mother of defendants' children, Williams, additionally testified that, on the evening of January 14, 2009, defendant came to her home and told her that he had robbed the Check 'n Go. Defendant told her that he had used binoculars in the robbery but he had dropped them when he came out of the Check 'n Go. A mixture of DNA belonging to at least three persons was found on the binoculars and defendant's DNA matched the DNA profile of the major male contributor. In addition, the information obtained from the GPS device that defendant wore placed him in the area of the Check 'n Go near the time of the robbery. Accordingly, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant was the person who committed the robbery of the Check 'n Go. *Cline*, 276 Mich App at 642.

Defendant also argues that his conviction for bank robbery is not supported by sufficient evidence because there was no evidence that the Check ‘n Go was a “depository of money” or a “bank.” Defendant’s argument implicates the phrases “for the purpose of stealing from any building, bank, safe *or* other depository of money, bond or other valuables” and “compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds, *or* other valuables” in MCL 750.531 (emphasis added).

The goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). The most reliable indicator of the Legislature’s intent is the language of the statute, and if the statutory language is unambiguous, the Legislature is presumed to have intended the meaning plainly expressed. *Id.* Words in a statute are to be given their plain and ordinary meaning. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007).

The word “or” is a disjunctive term and indicates a choice between alternatives. *People v Nicholson*, 297 Mich App 191, 199; 822 NW2d 284 (2012). Accordingly, to obtain a conviction for bank robbery, the prosecutor was not required to present evidence that the Check ‘n Go was a “bank” or “other depository of money, bond, or other valuables” if he presented evidence from which a rational trier of fact could have found beyond a reasonable doubt that defendant, with the intent to commit a larceny, either (1) maimed, injured, wounded, or attempted or threatened those actions, or put a person in fear for the purpose of stealing *from any building or safe* or (2) by *intimidation, fear, or threats* compel, or *attempt to compel*, a person to disclose or surrender the means of *opening any building, safe, or vault*. MCL 750.531 (emphasis added). Ritchie, the Check ‘n Go employee, testified that there was a safe in the Check ‘n Go, which was right below the cash drawer, and that the perpetrator, after he opened the cash drawer and learned there was more money in the safe, told her to open it. According to the testimony of Ritchie and Dowker (the customer), the perpetrator held something in his hand, which he pointed at Ritchie. At the time, Ritchie thought it could have been a gun or some kind of weapon. Ritchie testified that she was frightened, while Dowker testified that she was terrified. Accordingly, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant, with the intent to commit a larceny, put a person in fear for the purpose of stealing from a safe. *Cline*, 276 Mich App at 642.

The jury’s verdict was also not against the great weight of the evidence. “The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *Lacalamita*, 286 Mich App at 469. The same evidence, which allowed a rational trier of fact to have found beyond a reasonable doubt that defendant was the person who committed the robbery of the Check ‘n Go, reasonably supported the jury’s determination that defendant was the perpetrator of the robbery of the Check ‘n Go. *Id.* In addition, although defendant claims that the prosecutor provided no evidence of motive, the prosecutor was not required to. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976) (“[M]otive is never an essential element to be proved in a criminal case.”).

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan