

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY JOE GILDNER,

Defendant-Appellant.

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UNPUBLISHED

April 22, 2021

No. 354288

Charlevoix Circuit Court

LC Nos. 20-000034-FH; 20-000035-FH

Before: MURRAY, C.J., and MARKEY and LETICA, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted<sup>1</sup> the circuit court’s orders denying in part his motion to quash the information and denying his motion for reconsideration. The district court bound defendant over to the circuit court on 31 counts of using a computer to commit a crime, MCL 752.796, 30 counts of surveilling an unclothed person, MCL 750.539j, and one count of human trafficking, MCL 750.462d(b); MCL 750.462f(1)(b); MCL 750.159f(a). The circuit court rejected defendant’s attempt to dismiss the charges except with respect to two counts of surveilling an unclothed person and two counts of using a computer to commit a crime. We affirm.

I. BACKGROUND

Shortly after marrying his wife in 2012, defendant began pressuring her to engage in sexual intercourse with other men. When she eventually relented, defendant started arranging for men to come to his home and have sex with his wife while defendant would remain in another room. Defendant recorded some of these sexual encounters and posted the videos on pornographic websites. Defendant’s wife testified at the preliminary examination that defendant told her that he received financial compensation for posting the videos. She further testified that she had a child, that defendant was not the father of the child, and that defendant threatened to withhold financial

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<sup>1</sup> *People v Gildner*, unpublished order of the Court of Appeals, entered September 29, 2020 (Docket No. 354288).

support from her and the child if she refused to engage in sexual intercourse with other men. In January 2017, defendant and his wife moved to Tennessee. The police executed a search warrant for defendant's Tennessee home and seized from computer equipment found in the home videos of defendant's wife having sex with other men. One of the men whom defendant had videotaped having sexual intercourse with defendant's wife testified that he did not know that defendant was filming him and the sex act. On the basis of what was observed in the videos, the police believed that many other men were also unaware that they were being videotaped.

When testimony at defendant's preliminary examination concluded, the parties agreed that the district court judge would privately view the 30 videos that had been admitted into evidence before making a ruling. But the judge retired before this task could be completed; consequently, the case was assigned to a new judge. The successor judge watched a video recording of the preliminary examination, read the transcript of the preliminary examination, and watched the 30 videos before binding defendant over on all charges. In the circuit court, defendant moved to quash the information and dismiss the charges. The circuit court granted the motion with respect to two counts of surveilling an unclothed person and the two corresponding counts of using a computer to commit a crime, but the court denied the motion with regard to all the remaining charges. Defendant moved for reconsideration, and the circuit court denied the motion. This appeal followed.

## II. DISCUSSION

Defendant first argues that his due-process rights were violated because the district court judge who made the bindover decision was not the same judge who had presided over the preliminary examination. Defendant complains that the successor judge was forced to rely on review of the video recording and transcripts of the preliminary examination instead of assessing the evidence and the credibility of witnesses in person, which was necessary to protect defendant's constitutional rights. The circuit court ruled that defendant waived review of this issue. We agree.

An alleged violation of a criminal defendant's due-process rights presents a constitutional question that is reviewed *de novo*. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). "This Court has defined 'waiver' as the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citation omitted). "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." *People v Buie*, 491 Mich 294, 306; 817 NW2d 33 (2012) (quotation marks and citations omitted). "Defense counsel cannot acquiesce to the court's handling of a matter at trial, only to later raise the issue as an error on appeal." *Id.* at 312 (quotation marks and citations omitted). A party is not permitted to assert as error on appeal an issue that the party deemed proper below because doing so would allow the party to harbor error as an appellate parachute. *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014); *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *Kowalski*, 489 Mich at 503.

There is nothing in the record to suggest that defendant raised any objections or expressed any dissent with respect to the successor judge taking over the preliminary examination and ruling on whether to bind defendant over to the circuit court. Furthermore, when the successor judge

resumed the preliminary examination, she noted that the previous judge had set aside three hours for additional testimony and asked if the parties wished to present more testimony. The prosecution responded that the actual purpose of those three hours was to afford the court the opportunity to ask any additional questions, and defense counsel acknowledged that the prosecution's characterization was "hundred percent true." Defense counsel noted, however, that he had been given a mountain of information by the prosecutor a day earlier that justified additional testimony. Defense counsel stated:

In light of that information I think that additional testimony from the complaining witness in this case would assist the court in making the bind over decision so I would ask for that opportunity on that basis, although that is not what was intended when we made the agreement, but I couldn't have known about this information because I didn't have it then.

The parties then engaged in extensive argument regarding the need or propriety of having defendant's wife retake the stand and continuing the preliminary examination. The record thus revealed that defendant specifically asked *the successor judge* to preside over a continuation of the preliminary examination. And after the successor judge declined to reopen the proofs, the parties presented their arguments against and in favor of binding defendant over on the charges. In the process, defense counsel specifically requested that *the successor judge* render a bindover ruling. Under these circumstances, we hold that defendant intentionally relinquished and abandoned any right to later challenge the involvement or participation of the successor judge in the preliminary examination. To rule otherwise would allow defendant to harbor error as an appellate parachute. Moreover, defendant has failed to show that he was in any way prejudiced by the continuance of the preliminary examination before the successor judge. See *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995) (applying harmless error to the substitution of a new judge during jury deliberations).

Defendant next argues that the district court abused its discretion by finding that the prosecution presented sufficient evidence to bind defendant over on the human trafficking charge and the corresponding count of using a computer to commit a crime. We disagree. In *People v Henderson*, 282 Mich App 307, 312-313; 765 NW2d 619 (2009), this Court discussed the law regarding preliminary examinations, observing as follows:

The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. Probable cause that the defendant has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. Circumstantial evidence and reasonable inferences from the evidence can be sufficient. If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial, where the questions can be resolved by the trier of fact.

A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. In reviewing the bindover decision, a circuit court must consider the entire record of the preliminary examination and may not substitute its judgment for that of the district court. The decision to bind over a defendant may only be reversed if it appears on the record that the district court abused its discretion. This Court also reviews the bindover decision de novo to determine whether the district court abused its discretion. Thus, this Court gives no deference to the circuit court's decision. [Citations omitted.]

The charge of human trafficking required proof that defendant knowingly benefited financially from participation in a criminal enterprise that resulted in an individual being engaged in commercial sexual activity. MCL 750.462d(b); MCL 750.462f(1)(b); MCL 750.159f(a). Defendant's argument on appeal is that the prosecution did not present sufficient evidence showing that defendant benefited financially as required by MCL 750.462d(b). Defendant's wife testified that defendant told her that he received money in exchange for posting the sex videos on the Internet. This evidence was sufficient to support a finding of probable cause that defendant benefited financially. But defendant argues that the testimony by defendant's wife regarding the financial benefit defendant received was admitted in violation of the *corpus delicti* rule. In *People v Schumacher*, 276 Mich App 165, 180-181; 740 NW2d 534 (2007), this Court explained the *corpus delicti* rule:

In a criminal prosecution, proof of the *corpus delicti* of a crime is required before the prosecution may introduce a defendant's inculpatory statements. The *corpus delicti* rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur. Under the *corpus delicti* rule, a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury and (2) some criminal agency as the source of the injury. Proof of the identity of the perpetrator of the crime is not part of the *corpus delicti*. Moreover, the *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt. If the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission. [Citations, quotation marks, and ellipses omitted.]

The *corpus delicti* rule does not require independent proof of every element of a crime. *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985).

Once again, defendant's wife testified that defendant told her that he received money for uploading the videos depicting sex acts. Establishing that defendant received money to upload the pornographic videos was not alone sufficient to prove that defendant was guilty of human trafficking—far from it. The prosecution also relied on the videos and defendant's wife's testimony that defendant pressured her to engage in sexual activity with other men and threatened to withhold financial support if she did not comply. Because additional evidence was required to establish probable cause that defendant committed the offense of human trafficking, the alleged

statement by defendant about receiving a financial benefit constituted a mere admission and not a confession of guilt. Therefore, the *corpus delicti* rule was not violated. *Schumacher*, 276 Mich App at 180. Defendant's admission related to only one element of the crime, and the *corpus delicti* rule does not require independent proof of every element. *Williams*, 422 Mich at 391.

Defendant next contends that the district court's bindover decision was based on inadmissible hearsay evidence. Defendant fails to identify the testimony that was purportedly barred by the hearsay rule and fails to engage in any discussion of the law governing hearsay. Accordingly, review of this issue has been waived or abandoned. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Nevertheless, assuming that the hearsay claim concerns the testimony by defendant's wife that defendant stated that he received a financial benefit for uploading the videos, we find that the testimony was not hearsay because defendant's statement constituted an admission by a party-opponent. MRE 801(d)(2)(A).

Finally, defendant argues in cursory fashion that his constitutional right to confront witnesses against him was violated because the successor judge relied on a video of the preliminary examination in binding defendant over to the circuit court. We quickly dispense of this illogical argument. At the preliminary examination, defendant cross-examined the prosecution's three witnesses, and the successor judge's review of their testimony by videotape did not implicate further rights of confrontation. Reversal is unwarranted.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Anica Letica