Circuit Court for Prince George's County
Case No.: CT180238X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2834

September Term, 2018

WILLIE FRED LOCKETT

v.

STATE OF MARYLAND

Kehoe,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 11, 2020

Appellant Willie Fred Lockett was charged with multiple counts of burglary, theft, arson, malicious destruction of property and violations of a protective order. The victim in all of these was his estranged spouse. Following a jury trial in the Circuit Court for Prince George's County, appellant was acquitted of some charges but was convicted of: first-degree, third-degree, and fourth-degree burglary; misdemeanor theft; unlawful taking of a motor vehicle; unauthorized removal of property; three counts of malicious destruction of property; eleven counts of violating a protective order; and harassment. He was sentenced to imprisonment for twenty years on the first-degree burglary conviction, with the remaining sentences, totaling an additional eleven years and ten months, either merged or suspended, to be followed by supervised probation for a period of five years. Appellant asks us to address the following questions, which we have reworded:

> 1. Did the court err in denying the motion to dismiss the misdemeanor theft count?
>
> 2. Did the court err in admitting video footage because it was not properly authenticated?
>
> 3. Did the court abuse its discretion in denying Appellant's motions for mistrial?
>
> 4. Was the evidence sufficient to sustain Appellant's convictions as to certain counts?
>
> 5. Did the court err in refusing to instruct the jury regarding affirmative defense to the theft charges?
>
> 6. Did the court abuse its discretion in failing to address what appellant now terms his request to discharge counsel?

We will vacate appellant's conviction as to the theft charge and otherwise affirm.

Background

Because appellant challenges the sufficiency of the evidence as to certain counts, we will set out in some detail the evidence adduced at trial.

Teretha Lockett testified that she and appellant were married on February 14, 2017. On October 27, 2017, Ms. Lockett obtained a temporary protective order against appellant, which, following a hearing, became a final protective order on November 6, 2017. Pursuant to the terms of the order, appellant was not allowed to reside in or enter upon their residence, located in Temple Hills, Maryland, nor to have any contact with Ms. Lockett. The temporary protective order was served on appellant on October 28, 2017.

On several separate occasions in the week before the order became final, appellant contacted Ms. Lockett via telephone and text message. He acknowledged the existence of the protective order by informing her that she needed to drop the order, that he was homeless, and, according to Ms. Lockett, that if she did not "get it right, he was going to kill me." He also told her that he would appear at the hearing on the final protective order. However, although Ms. Lockett attended the hearing, appellant did not.

At around 3:30 p.m. on the afternoon of November 5, 2017, that is, the day before the hearing on the final protective order, appellant broke into the house through the basement window and confronted Ms. Lockett in the kitchen. Appellant told Ms. Lockett that "I just wanted to prove to you that I can get to you at any time." Ms. Lockett told him to leave, and reminded him of the protective order. Her godmother and roommate, Dalciler

Roberts, called 911. Ms. Lockett testified that Warner Murphy was also residing with her at the time but was not home when this occurred.

Later that evening, Ms. Lockett discovered that her 2008 blue Mercedes was missing from the driveway.[1] She had not given anyone permission to take the vehicle. The theft was reported to the police that same evening. She agreed, on cross-examination, that she did not see the theft of her vehicle. However, Warner Murphy testified that when he arrived at the house that day, he saw appellant get into the Mercedes and drive away.

On November 6, 2017, and after the final protective order was granted, appellant tried to contact Ms. Lockett, via telephone and text. Appellant wanted to know what happened at the hearing, and Ms. Lockett told him that the final protective order had been granted. The final protective order gave Ms. Lockett exclusive possession of the Mercedes and so she told appellant that he should return it to her. According to Ms. Lockett, appellant replied the Mercedes belonged to him because she had given it to him. Ms. Lockett testified that although she had previously given appellant permission to drive the Mercedes, she had never given him the vehicle.

In the following weeks and despite the no-contact provisions of the final protective order, appellant contacted Ms. Lockett multiple times by phone, text, and letter. Indeed, between the issuance of the final protective order (November 6, 2017) and January 2018, appellant contacted Ms. Lockett approximately 188 times, some of which conveyed threats as well as vulgar sexual messages.

[1] Ms. Lockett later testified that the Mercedes was valued at "$12,000-plus."

Late in the evening of December 18, 2017, Ms. Lockett was sitting in her kitchen when she heard glass shattering in her bedroom. After finding that a brick had been thrown through the window, she contacted the police. A recording of her 911 call was played for the jury. Ms. Lockett testified that, although she did not see who threw the brick through her bedroom window, earlier that same evening, appellant was "at the living room window banging" and appeared to be "trying to break the window[.]" And, she also received another vulgar text from appellant, telling her that he was going to kill her and that she should end her relationship with Mr. Murphy. She denied any such relationship at trial.

Ms. Lockett also testified that, at some point on that same evening, her home surveillance system, of which appellant was aware, was disabled. Someone cut the wires leading to the outside cameras. After the surveillance system was again repaired, appellant was seen slashing Mr. Murphy's tires on December 21, 2017.

Ms. Lockett heard again from appellant on December 23, 2017, which was her birthday. Appellant texted her and informed her that he left her a birthday gift in her backyard. When she and Mr. Murphy went outside, they discovered that all of the tires on her other two vehicles, another Mercedes and a Ford truck, were slashed. Two days later, on December 25th, the tires on the vehicle belonging to an unidentified visiting female friend were also slashed.

On December 26, 2017, Ms. Lockett received another threatening text from appellant, informing her that she "was going to burn and he was going to kill me[.]" He also called her a variety of vulgar names, and told her that he "shouldn't have married

me[.]" He also texted her and told her that, according to her testimony, that "I better get [Mr. Murphy] out of the house. He is going to cut [Mr. Murphy's penis] off and shove it in my mouth." Mr. Murphy also testified at trial and confirmed that appellant threatened him.

The next day, December 27, 2017, Ms. Lockett went outside and saw that a wooden bench in front of her house had been set on fire. She discovered a note, addressed to "Spain," which was her surname from a prior marriage. The note read: "Warner [Murphy] must leave or you know what next Spain." Ms. Lockett testified that she did, in fact, leave her house on New Year's Eve, December 31, 2017, at police instruction, after the back of her house was set on fire.[2]

On January 1, 2018, Mr. Murphy went back to the residence and informed Ms. Lockett that someone had broken into her basement. The basement door was "off the hinges" and the wires to two indoor security cameras were cut. In addition, a television located in the basement was missing, as were a laptop computer, wireless entertainment devices, a spare key to the front door, half a gallon of liquor and several cases of beer. Ms. Lockett had recently changed the locks and the new spare key had been stolen. She also was missing gold jewelry and coins worth approximately $1,300. Some of these items were recovered by the police from appellant's possession after he was arrested.

At some point after this, between January 1st and 6th, appellant phoned Ms. Lockett and told her that she, as well as her godmother and Mr. Murphy should leave the house. He

[2] Detective Mark Albright testified that the police received a total of eighteen (18) calls involving these parties and this case, including on the early morning hours between December 30th and 31st, when the rear part of Ms. Lockett's house was set on fire.

said that "it was going up in smoke and you better run into the woods" because appellant would be there behind them. Appellant also threatened to kill her and whoever was in the house if she did not have Mr. Murphy leave. Appellant told her she was "violating my marriage vows," and threatened to kill her on a daily basis. And, at one point, referring to the earlier arson, appellant inquired "if the police have me on camera setting your house on fire." In all, she received between four or five calls a day, as well as a number of texts, between December 31, 2017 and early January 2018. Although the texts came from different phone numbers, Ms. Lockett knew they were from appellant because "he was mentioning things that no one else would know."

Ms. Roberts (Ms. Lockett's godmother and roommate) also testified. She confirmed that she lived in the house and that, on several occasions, she overheard appellant's threatening remarks. She also testified that she called 911 because appellant "was banging at the window, the living room window." Ms. Roberts also called 911 a second time "when he broke in through the basement[.]"

Detective Albright arrested appellant on January 5, 2018. After he waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), appellant admitted that he told Ms. Lockett that he would throw a brick through her window. He further admitted to cutting the tires on the Mercedes and the Ford truck. According to the detective, appellant also admitted that he took the Mercedes. He further informed the detective that he knew about the protective order. On cross-examination, Detective Albright agreed that the protective order

appellant was aware of was the temporary order because he was removed from the house on October 28, 2017 following its issuance.

The parties stipulated to the following with respect to January 5, 2018 statements made by appellant after he waived his *Miranda* rights:

- You talking about that picture thing you had Sir. I flattened the tires.
- I left that thing on the doorstep. I admit that.
- I told her I'd slash the tires and burst the window out the house. But I don't know anything about a brick being thrown through any window.
- I flattened the tires on the Mercedes and the truck.
- Two sheriffs told me I gotta leave.
- Some white guy at the park did it.
- I took the Mercedes from the property and went to Southern Maryland Hospital.
- I been at the neighbor's house.
- On 12/30-31, I was probably walking around. I probably stopped at the house and a neighbor's house.
- The card you found out front was the day I slashed the tires.
- On 11/13/18 [sic], I was held at gunpoint and they took the car. I didn't call the police because I knew she had a warrant out against me.
- Called her off of someone else's phone because my number was blocked. She answered the phone and asked me why the number showed up in private.
- Used to call her using wifi, another number pops up.
- I deny all other accusations against [me].
- I love my wife and I would never hurt her.

Appellant presented no evidence at trial.

Analysis

1.

Appellant first contends that the court should have dismissed Count 21, the misdemeanor theft count, because it did not describe the property allegedly stolen. The State concedes this issue. We agree.

Without belaboring the matter, Count 21 did not identify or describe the property that Lockett was accused of stealing, which is required for charging documents alleging theft. *See generally, Linkins v. State*, 202 Md. 212, 216 (1953) (Although detailed descriptions are unnecessary, "[t]here must be proper averments of the thing taken and of ownership.") *see also Imbraguglia v. State*, 184 Md. 174, 176-77, 181 (1944) (holding that count that alleged theft of "One tractor truck of great value, One Tractor trailer of great value, One automobile of great value, One vehicle of great value, Two hundred and fifty-three thousand packages of cigarettes, each package of cigarettes of great value, of the goods and chattels, moneys and properties of The Baltimore Transfer Company of Baltimore City, Inc." was insufficient and demurrer should have been granted).[3]

[3] Because appellant's sentence for misdemeanor theft was suspended, we conclude that, in this case, our mandate vacating Count 21 does not alter the sentencing "package" devised by the trial court and that a remand for resentencing is not required. *See Twigg v. State*, 447 Md. 1, 26-28 (2016).

2.

Appellant next asserts that the court erred in admitting indoor and outdoor video from Ms. Lockett's home on the grounds that the videos were improperly authenticated. The State responds that the authentication evidence was sufficient. The State is correct.

We review a trial court's rulings on the admissibility of evidence for abuse of discretion. *State v. Robertson*, 463 Md. 342, 351 (2019). The same standard applies to trial court decisions as to whether evidence has been properly authenticated. *Miller v. State*, 421 Md. 609, 622 (2011).

Ms. Lockett had a home security system which included two exterior cameras and one interior camera. One of the video recordings showed Lockett banging on a window in Ms. Lockett's home, another showed him destroying a security camera, while others showed him vandalizing the motor vehicles parked on her property and breaking into her house. These recordings were presented to the jury in eight separate segments or clips, each lasting from approximately one to six minutes. The images on six of the clips were taken by outside cameras. Two are from the inside of the house. Some of the clips have digitally-imposed time and date stamps. Some don't.

Appellant argues that the recordings show "two distinct time markings, one marking on the file name and another marking reflected when the clip [was] played." He points out that, during her testimony, Ms. Lockett appeared to be unsure as to whether the dates were for the time the recording was made or the time that it was played. He continues:

> Whether the system reliably gives the date for when the footage was viewed is not what matters. What matters is whether the system reliably gives the

> date for when the footage was taken, and Ms. Lockett's testimony does not provide a basis for finding that reliability[.]

Appellant concedes that, after the clips were admitted, Ms. Lockett provided additional testimony to the reliability of the security camera but "[t]hese efforts came too late."[4]

These arguments are not persuasive. Maryland Rule 5-901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The burden imposed by this threshold authentication showing is "slight." *Jackson v. State*, 460 Md. 107, 116 (2018). The trial court determines whether "there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Sublet v. State*, 442 Md. 632, 678 (2015). If a reasonable juror could find the evidence authentic, the evidence comes in, and the jury decides the ultimate question of authenticity. *Gerald v. State*, 137 Md. App. 295, 305, *cert. denied*, 364 Md. 462 (2001).

The Court of Appeals has provided additional guidance when the evidence is a photograph or video recording:

> Photographs may be admissible under one of two distinct rules. Typically, photographs are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time. There is a second, alternative method of authenticating

[4] The State correctly points out that appellant's argument as to clip no. 7 is waived because he did not object to the admission of that recording at trial.

> photographs that does not require first-hand knowledge. The 'silent witness' theory of admissibility authenticates 'a photograph as a 'mute' or 'silent' independent photographic witness because the photograph speaks with its own probative effect.

Washington v. State, 406 Md. 642, 652 (2008) (cleaned up).

Observing that security recordings fall into the "silent witnesses" category, the Court explained that:

> Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.

Id. at 653 (cleaned up).

Before the State moved to enter the video clips into evidence, it elicited testimony from Ms. Lockett that: the video cameras were installed in her home in 2016 by Monitronics Security Company, two cameras were located in the front of the residence and the third was inside Ms. Roberts' bedroom,[5] the footage was stored in a DVR system that was functioning properly, Ms. Lockett was familiar with the system, she checked the cameras periodically to make sure that they were functioning properly, the security system's recordings were clear, and that she was able to recognize her home and people in the footage. She specifically testified that the video surveillance recordings were reliable and that, to her knowledge, the system recorded the date or time accurately. She also

[5] Ms. Lockett testified that she was the caregiver for Ms. Roberts who was in frail health.

testified that she was present when a Prince George's County police technician downloaded the recordings onto a flash drive (she called it a "stick"). In its totality, this evidence comfortably crossed the low evidentiary threshold for authentication and admission of the video recordings.

Appellant's reliance on *Washington* is unpersuasive. In that case, two patrons, the petitioner and Jermaine Wright, began arguing with each other at a bar. The argument escalated and eventually the two stepped outside, where Wright was shot in the stomach. *Washington*, 406 Md. at 645. There were no other witnesses to the shooting. *Id*. The State introduced silent witness evidence in the form of a videotape and still photographs compiled from security footage, "to counter petitioner's argument that he was not the shooter, as well as to negate any mutual affray defense." *Id*. at 656. On appeal, the Court of Appeals held that "[t]he State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath." *Id*. at 655. The Court of Appeals highlighted the following problems with the State's evidence:

> Here, the foundational requirement is more than that required for a simple videotape. The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures.

Id. Furthermore, the Court of Appeals noted that the testimony of the detective assigned to the case also failed to authenticate the video, as he only saw the footage only after it had been edited by an unidentified technician. *Id.*

Returning to the present case, the jury was not presented with a compilation but with discrete recordings identified as such by the prosecutor. Thus, in the words of the *Washington* Court, they were "simple videotapes." And, as we have explained, Ms. Lockett's testimony was sufficient for the jury to authenticate the recordings.

The trial court did not abuse its discretion in allowing the video recordings to be introduced into evidence.

3.

Appellant next asserts the trial court erred by not granting his motions for a mistrial concerning testimony by Ms. Lockett during trial. The State responds that the court properly exercised its discretion.

"[D]eclaring a mistrial is an extreme remedy not to be ordered lightly." *Nash v. State*, 439 Md. 53, 69 (2014). "We review a court's ruling on a mistrial motion under the abuse of discretion standard." *Id.* at 66-67. As this Court has explained:

> A mistrial is an extreme remedy and it is well established that the decision whether to grant it is within the sound discretion of the trial court. In the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any . . . alleged improper remarks. The key question for the appellate court is whether the defendant was so prejudiced by the improper reference that he was deprived of a fair trial.

Howard v. State, 232 Md. App. 125, 161, *cert. denied*, 453 Md. 366 (2017) (cleaned up).

During Ms. Lockett's direct examination, she was asked who else was living with her in November 2017, at around the time appellant broke into the basement, and she replied that it was Warner Murphy. The following then ensued:

[BY PROSECUTOR]

Q. Who is Mr. Warner Murphy?

A. A friend that I met during [appellant's] previous incarceration.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Move to strike, Your Honor. At this point I'd ask for a mistrial.

THE COURT: Approach.

At the bench conference, defense counsel argued that a mistrial was warranted under the circumstances. The court responded that a mistrial is "most serious" and that the statement would be stricken and the jury would be told to disregard it. After the bench conference, the court then issued the following curative:

> Ladies and gentlemen of the jury, the last statement made by the witness is stricken from the record. You, as the jury, are to totally disregard that statement.
>
> Next question.

On further direct examination, Ms. Lockett testified that appellant contacted her via telephone and told her "he was out on bail." Appellant's counsel objected, and the court convened a bench conference, wherein it advised the prosecutor that it should tell the witness not to mention appellant's prior incarcerations lest a mistrial be granted, and that, at this time, it would issue a curative instruction. The court then instructed the jury: "Ladies and gentlemen, you are to disregard the last statement made by the witness and you are not to consider it at all."

In both instances, the court struck the testimony and issued a curative instruction. "[W]here the trial court has admonished the jury to disregard the [objected to] testimony, it has been . . . consistently held that the trial court has not abused its discretion in refusing to grant a motion for mistrial." *Wilson v. State*, 261 Md. 551, 568-69 (1971); *accord Cantine v. State*, 160 Md. App. 391, 409 (2004), *cert. denied*, 386 Md. 181 (2005). *See also Simmons v. State*, 436 Md. 202, 222 (2013) ("When curative instructions are given, it is generally presumed that the jury can and will follow them . . . . the trial judge is in the best position to determine whether his instructions achieved the desired curative effect on the jury") (citation omitted).

This is the general rule. There are of course cases that reach different results, and appellant relies on two of them: *Rainville v. State,* 328 Md. 398 (1992), and *Guesfeird v. State*, 300 Md. 653 (1984). Appellant's reliance on these decisions is misplaced.

Both cases involved prosecutions for child sexual abuse. In *Guesfeird*, during the course of her testimony, the victim, a middle school-aged child, stated that she had taken a lie detector test. Defense counsel objected and asked for a mistrial on the basis that the jury would infer that she had passed the test. The trial court denied the request for a new trial and, without consulting counsel, instructed the jury to disregard any evidence of a lie detector test. 300 Md. at 657. The victim's testimony was the only evidence of the defendant's guilt and family members, including her brother and her mother, testified as to various reasons why the victim would have lied and to another incident when she accused

another adult of assaulting her but later retracted the accusation. *Id.* at 358. In deciding that the trial court abused its discretion in denying the motion for a mistrial, the Court stated:

> Because credibility was the determinative issue in the trial, we must consider whether the trial judge committed reversible error when he denied appellant's motion for a mistrial after [the victim's] inadvertent and unsolicited reference to taking a lie detector test.
>
> * * *
>
> In determining whether evidence of a lie detector test was so prejudicial that it denied the defendant a fair trial, courts have looked at many factors. The factors that have been considered include: whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and, whether an inference as to the result of the test can be drawn. No single factor is determinative in any case. The factors themselves are not the test, but rather, they help to evaluate whether the defendant was prejudiced.

Id. at 358–59 (cleaned up).

In applying these factors, the Court concluded that the defendant was irredeemably prejudiced and that the trial court abused its discretion in denying the motion for a mistrial. *Id.* at 666–67.

In *Rainville*, the defendant was on trial for sexually abusing a seven-year-old girl. During the course of her testimony, the victim's mother stated that the defendant was "in jail" for sexually abusing her son. *Rainville*, 328 Md. at 399. Again, virtually the only evidence of Rainville's guilt was the victim's testimony. Applying the so-called "*Guesfeird* factors," the Court of Appeals concluded that:

> It is highly probable that the inadmissible evidence in this case had such a devastating and pervasive effect that no curative instruction, no matter how quickly and ably given, could salvage a fair trial for the defendant.

Id. at 411.

When we apply the relevant *Guesfeird* factors to the present case, we reach the following conclusions:

(1) although the references to appellants' criminal history were not a "single, isolated statement," there were only two such references throughout the trial;

(2) the references were not solicited by the prosecutor;

(3) although Ms. Lockett was the principal witness for the prosecution, the State's case was by no means dependent upon her testimony; and

(4) there was a small mountain of additional evidence against appellant: the security camera footage, appellant's text messages, his letters, his inculpatory statement to the police, the testimony of Mr. Murphy, and the testimony of Ms. Roberts.

The Court of Appeals has explained:

> The fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial court is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his [or her] finger on the pulse of the trial.

Hill v. State, 355 Md. 206, 221 (1999).

Judge Engel had her finger on the metaphorical pulse of the trial and we have no reason to conclude that she abused her discretion in denying the motions for a mistrial.

4.

Appellant next asserts that the evidence was insufficient to support a number of his convictions. In considering a challenge to the sufficiency of the evidence, we ask "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). In this exercise, appellate courts "must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference." *Cox v. State*, 421 Md. 630, 657 (2011) (cleaned up). Finally, "[a] valid conviction may be based solely on circumstantial evidence." *State v. Smith*, 374 Md. 527, 534 (2003).

Violations of the Final Protective Order

Appellant contends that the evidence was insufficient to sustain his multiple convictions for failing to comply with the final protective order issued in the domestic violence case. He argues that there was no evidence he had knowledge of the order or its contents.

The statute in question is Fam. Law § 4-509, which states in pertinent part:

> (a) A person who fails to comply with the relief granted in . . . a final protective order . . . is guilty of a misdemeanor[.]

The State correctly points out that actual knowledge is not an element of the offense. Appellant replies by maintaining that he did not have knowledge of the existence of the final protective order (a contention which is not supported by the record), and that it is

"absurd to predicate notice on delivery of a document to a residence from which a defendant must stay away, especially when the defendant has been made homeless by the protective order, as was Appellant."

As Judge Engel noted when this issue was raised at the close of the State's case, there was evidence that members of the Sheriff's Department escorted appellant from Ms. Lockett's home when the temporary protective order was served on him. The temporary protective order contained a notice of the time and date of the hearing for a final protective order. Appellant called Ms. Lockett a day or so prior to that date and told her that he intended to attend the hearing, but he never appeared. She also testified that appellant contacted her after the hearing, and she told him that the final protective order had been granted. The final protective order was mailed to appellant's last known address, the same residence he had shared with Ms. Lockett. This complied with the statutory requirement for notice and, by statute, constituted actual notice.[6]

[6] *See* Fam. Law § 4-506(i):

> (i)(1) A copy of the final protective order shall be served on the petitioner, the respondent, any affected person eligible for relief, the appropriate law enforcement agency, and any other person the judge determines is appropriate, in open court or, if the person is not present at the final protective order hearing, by first-class mail to the person's last known address.
>
> (2) A copy of the final protective order served on the respondent in accordance with paragraph (1) of this subsection constitutes actual notice to the respondent of the contents of the final protective order. Service is complete upon mailing.

Domestic violence cases are civil actions, *see* Md. Rule 1-101(b), and parties in civil actions are under a continuing obligation to keep the court informed of their current mailing addresses. *See Smith-Myers Corp. v. Sherill*, 209 Md. App. 494, 512 (2013) (citing, among other cases, *Estime v. King*, 196 Md. App. 296, 306 (2010).

Indisputably, there was evidence that appellant was aware that a final protective order had been issued. After the order had been granted, and a time or times that Ms. Lockett and the other residents were absent, someone broke into her house to destroy the inside security camera. A fact-finder could reasonably infer that the "someone" was appellant. (The last images recorded by the inside camera before it was destroyed were introduced into evidence. They were of appellant reaching towards it.) From the surreptitious manner and timing of his entry, the fact-finder could conclude that appellant was aware that he was not allowed on the property.

Assuming without deciding that a conviction for violating a protective order requires proof that the accused had actual knowledge of the terms of the protective order as well as knowledge of the order itself, we hold that there was both direct and circumstantial evidence to satisfy both requirements.

Date of offense – December 31 or January 1st

Appellant was charged with burglary of Ms. Lockett's home, malicious destruction of her property, and violating the final protective order "on or about" December 31, 2017. Some of the evidence supporting these convictions were a videotape from Ms. Lockett's security system that was dated January 1, 2018. Appellant asserts that this constitutes a fatal variance between what was charged and what was proven. He is wrong. Maryland Rule 4-202 (a) provides, in pertinent part: "A charging document shall . . . contain a concise and definite statement of the essential facts of the offense with which the defendant is charged, and with reasonable particularity, the time and place the offense occurred." Pertinent to the issue raised, the Court of Appeals has recognized that "the time of an

offense stated in an indictment need not be precise." *Mulkey v. State*, 316 Md. 475, 482 (1989). Depending "upon the facts and circumstances of each case," *id*. at 488, "general allegations as to time" may be "sufficient." *Id*. at 484. Moreover, the Court of Appeals has noted that the State is "not confined in its proof to the date alleged in the indictment." *Chisley v. State*, 236 Md. 607, 608 (1964).

5.

Appellant next claims that the court erred by not giving his requested instructions on the defense of good-faith claim of right to property, honest belief and mistake of fact regarding the 2008 Mercedes. The State responds that there was insufficient evidence to support these defenses.

Appellant's counsel argued that the defense of good faith and honest belief, pursuant to Section 7-110(c) of the Criminal Law Article, applied in this case based on evidence that appellant used the Mercedes.[7] Defense counsel noted that it was only the final protective order that indicated that Ms. Lockett had exclusive possession of the Mercedes and that, because appellant did not know about that order, he was not required to comply with that provision.

[7] Crim. Law § 7-110(c) states in pertinent part:

(c) It is a defense to the crime of theft that:

(1) the defendant acted under a good faith claim of right to the property involved; [or]

(2) the defendant acted in the honest belief that the defendant had the right to obtain or exert control over the property as the defendant did[.]

* * *

The State replied that Ms. Lockett made clear that the Mercedes was her car, although she allowed him to use it. Further, the car was on her property, and the protective order, even the temporary one, required him to stay off the property. The State also noted that there was no evidence that appellant had an "honest belief" that he could take the car. Further, all of the testimony about Ms. Lockett's permission to use the car concerned the time-frame before the temporary protective order.

The trial court declined to give the requested instructions, finding as follows:

> In this case what we have is that Ms. Lockett owned the Mercedes. There was no testimony indicating that the Defendant had any possessory right of the car. The testimony was that he used the car. The testimony was that he had a key to the car. The testimony, however, showed that the Defendant – on October 27th, the victim was granted a temporary protective order which indicated that the Defendant was ordered, by a Court, that he was not to enter the property of the victim. That was served prior to November 4th – I'm sorry – November 5th, when the testimony was the Defendant came [onto Ms. Lockett's property] and looked at . . . Mr. Murphy[.]
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> * * *
>
> [Appellant] looked at [Mr. Murphy], jumped in the car and took off in the car. So there has been no testimony that he didn't understand that he could not go on the property when specifically it says that he is not to enter the property of the victim. So I do not believe that there has been sufficient evidence to generate the defense of good faith or honest belief. Because he was ordered by the Court, it was served upon him, he was escorted out of the house by the sheriff's deputies and so I do not believe it's been generated. So I'm going to deny your motions for those instructions.

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "[T]he decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge,' unless the refusal amounts to a clear error of law." *Preston v.*

State, 444 Md. 67, 82 (2015) (citations omitted). In determining whether a trial court has abused its discretion we consider whether "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction." *Bazzle v. State*, 426 Md. 541, 548 (2012) (citation omitted).

Whether a requested instruction "is applicable under the facts of the case" is a question of law for the judge. The task of an appellate court is to determine whether there was "some evidence" before the jury to support the proffered instruction. *Bazzle*, 426 Md. at 550. The "some evidence" standard "calls for no more than what it says 'some,' as that word is understood in common everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Arthur v. State*, 420 Md. 512, 526 (2011).

We are not persuaded that there was "some evidence" that support appellant's contentions that he was entitled to either of the requested instructions. The only evidence that appellant had any claim on the Mercedes was Ms. Lockett's admission that she let him drive it from time to time before the temporary protective order was issued. Permission to use does not equate to possession by right. *See generally*, *Jones v. State*, 304 Md. 216, 221 (1985) (holding that defendant could be prosecuted for unauthorized use of a vehicle once the bailment relationship ended). The trial court properly exercised its discretion in declining these instructions.

6.

Appellant was convicted on August 16, 2018 and sentenced on November 2, 2018. Between those events, appellant filed a pro se motion for a new trial which set out a number of reasons as to why a new trial was necessary in the interests of justice. Although the thread of appellant's reasoning in the motion is difficult to follow at times, it is clear that he was not satisfied with his counsel's advocacy. He asserted that (1) had a motion for a mistrial been made during the trial, it would have been granted but that his attorney "refuse[d] to fulfill her duties to fulfill my request to file such a motion"; (2) trial counsel exhibited "tru[e] ineffectiveness" for not filing certain pre-trial motions; (3) she failed to keep him informed of the merits of the case; (4) she "completely changed our defense tactics through my entire trial without my knowledge and just completely sold me out in an all aspects"; and (5) refused to "question the State's witnesses with the truth and facts of what I had told her months prior to trial." It is equally clear that appellant did not ask that his trial counsel be discharged, that the court should appoint new or additional counsel, or that he wished to represent himself.[8]

At the sentencing proceeding, defense counsel addressed the court at length about what she asserted were inaccuracies in the pre-sentence report and argued that facts in appellant's record that suggested that he suffered from an underlying mental health disorder. During his allocution, appellant paused to consult with counsel on at least two

[8] Appellant later filed another motion for a new trial that advanced additional grounds but none of them related to adequacy of counsel.

occasions. At no point in the sentencing hearing did appellant express dissatisfaction with his counsel, ask that his counsel be discharged, indicate that he wished to have new or additional counsel, or wished to proceed pro se.

At the close of the sentencing proceeding, the trial court reminded the parties that there were outstanding motions, including the motion for a new trial. The court and the parties agreed to set the motion in for a hearing on December 12, 2018. There is no transcript of this hearing in the record, but the docket entries indicate that the court denied that the motion for new trial after a hearing. In his reply brief, appellant asserts that his counsel was present at that hearing but "essentially silent."

With this as background, appellant argues that the court erred because it did not treat his motion for a new trial based in part on a claim of inadequate representation by counsel as a request to discharge counsel for purposes of his sentencing proceeding. He relies on several appellate decisions applying Rule 4-215(e), which he concedes is not applicable to his contention, to support his argument. Even if we agreed that decisions applying Rule 4-215(e) were relevant—and we do not—we would be unable to address the merits of his argument because it is not preserved for appellate review.

Appellant's statement that he was not satisfied with his lawyer's performance occurred after trial had commenced. Therefore, Md. Rule 4-215 does not apply to this case. *State v. Brown*, 342 Md. 404, 412 (1996). Whether a defendant should be permitted to obtain new counsel or to discharge counsel after the trial begins lies in the sound discretion of the trial court. *Id.* at 415. Good cause "may include a conflict of interest, a complete

breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict." *Id.* (quoting *McKee v. Harris*, 649 F.2d 927, 971 (2d Cir. 1981)). In exercising that discretion, the trial court should consider the following factors:

> (1) the merit of the reason for discharge; (2) the quality of counsel's representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings; (4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.

Id. at 428.

Appellant asserts that the trial court "never exercised the discretion it was required to exercise," and that its failure to do so was an abuse of discretion.

In the present case, appellant's expressions of dissatisfaction came in his pro se motion for a new trial. He was next before the court for sentencing. In that proceeding, neither he nor his counsel raised the issue. Because the issue was not raised at sentencing, the logical and appropriate forum for the court to address appellant's views as to the adequacy of his lawyer's efforts was the hearing on the motion for a new trial. This is particularly so because the relief he sought in his motion was a new trial and not a new lawyer. There is no transcript of that hearing in the record because appellant did not request one to be made.[9]

[9] The letter requesting transcripts from the Office of the Public Defender for this appeal is in the record and it does not request a transcript of the hearing on the motion for a new trial. The written docket entries also do not indicate that a transcript was ordered.

We don't know whether or how the trial court addressed appellant's complaints about his trial counsel. However, we do know that, in light of the assertions in the motion for a new trial, it is difficult to conjure up a scenario in which the adequacy of counsel issue would not have arisen at the hearing. Appellant has waived this issue by failing to provide a transcript of the critical hearing. *See, e.g.*, *Mora v. State*, 355 Md. 639, 650 (1999) ("It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed, and he has not done that in this case."); *Whack v. State*, 94 Md. App. 107, 126-27, *cert. denied*, 330 Md. 155 (1993) (holding that appellant's failure to provide tapes and transcripts is dispositive of contention relying on those materials).

THE CONVICTION AND SENTENCE FOR COUNT 21 (MISDEMEANOR THEFT) IS VACATED.

THE REMAINING JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE AFFIRMED.

COSTS TO BE ASSESSED 5/6 TO APPELLANT AND 1/6 TO PRINCE GEORGE'S COUNTY.