STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2002
v	No. 225990 Wayne Circuit Court
CORDALE HENRY, Defendant-Appellant.	LC No. 99-003949

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree murder, under alternative theories of premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b), one count of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to four concurrent terms of natural life imprisonment for the murder convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

The case stems from allegations that, on April 4, 1999, at approximately 1:00 a.m., defendant and his uncle, David Lamb,[1] robbed the Prestige Barbecue restaurant, where defendant previously worked, during which the restaurant owner, his brother, and his twelve-year-old son, and a cook were murdered.

I

Defendant first argues that, because there was insufficient evidence to support the charges of first-degree murder, felony murder, and armed robbery, the trial court erred by denying his motion for a directed verdict. We disagree. This Court reviews a trial court's decision on a motion for directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court will not interfere with the trier of fact's role of

[1] Defendant and codefendant Lamb were tried jointly, before separate juries.

determining the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), and all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A. Premeditated Murder

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted." *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

During trial, the prosecution relied on an aiding and abetting theory. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation and internal quotations omitted).

Viewed in a light most favorable to the prosecution, sufficient evidence was presented from which a jury could infer all necessary elements. Defendant knew the restaurant owner because he had previously worked for him at the restaurant. As the prosecution theorized during trial, it could be inferred that defendant used his previous relationship with the owner to gain access to the restaurant after closing. A restaurant employee who knew defendant, testified that, when she left the restaurant, the four victims, defendant, and another man, whom defendant introduced as his uncle, were the only people at the establishment. Indeed, in a statement made to the police, defendant admitted that he was in the restaurant on the evening in question. The employee testified that, within seconds of her leaving the restaurant by bike, she heard noises that sounded like gunshots. When she arrived home, in approximately five minutes, she called the restaurant and there was no answer. While she was still on the phone, defendant unexpectedly knocked on her door. The employee's boyfriend, who also knew defendant, stepped outside and talked to him very briefly, and defendant then got into the passenger side of a car and left.

Hours later, the four victims were found dead, having been shot at close range. The restaurant owner was shot twice, once in the face and once in the back of the head. The owner's

brother sustained a single gunshot wound in the head, and was found in a kneeling position, clasping rosary beads. The owner's twelve-year-old son sustained one gunshot wound in the back of the head. The evidence indicated that the fourth victim attempted to escape, but was shot multiple times, in the back and in the head. Two types of spent shell casings were recovered, indicating that the gunshots were fired from two different weapons. Moreover, the jacket that defendant was wearing on the night of the incident had gunshot residue in the right and left sleeve cuffs, the upper right and left front panels, and the right and left front pockets, consistent with defendant having fired a weapon. Finally, when defendant was arrested, he initially gave an exculpatory false statement to the police, denying that he was at the restaurant on the night in question. In a subsequent statement, he admitted that he was present, but claimed that another individual had committed the crimes. However, no evidence was developed linking another individual to the crime. In sum, this evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to conclude that the elements of premeditated murder were proved beyond a reasonable doubt.

B. Felony Murder

The elements of first-degree felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice, and (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(1)(b). *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). Defendant challenges the third element.

"[L]arceny of any kind" is among the felonies enumerated in MCL 750.316. "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). An attempt consists of the intent to do an act or to bring about consequences that would amount to a crime, and an act in furtherance of that intent that goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude that the victims were killed during the commission, or attempted commission, of a larceny. On the day of the incident, the restaurant was very busy because it was a holiday weekend. The owner only kept enough money in the cash register to make change for customers, and kept the rest of the money, including any large bills, on his person. However, when the victims were discovered, the owner was lying facedown on the floor, and his left pants pocket was turned inside out, with only a dime on his person. The restaurant's cash register was open and empty. Although a cash drawer still contained small bills of fives and ones, it was located under the service counter out of plain view. This evidence, viewed in a light most favorable to the prosecution, is sufficient to sustain defendant's conviction for felony murder, including the predicate felony of larceny.[2]

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[2] We note that defendant's suggestion that a larceny could not be established here because jewelry and money were left in the restaurant. However, defendant has failed to cite any
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C. Armed Robbery

Defendant also argues that there was insufficient evidence of armed robbery because, like larceny, there was no evidence that he stole any goods or property from the victims. "The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001) (citation and internal quotations omitted). Armed robbery is distinguished from the crime of larceny by the use of a weapon and force, violence or intimidation. *People v Bart (On Remand)*, 220 Mich App 1, 14; 558 NW2d 449 (1996). The evidence viewed in a light most favorable to the prosecution is sufficient for a jury to infer that the restaurant owner was robbed. Two guns were used during the commission of the crimes. This evidence, viewed in a light most favorable to the prosecution, is sufficient to sustain defendant's conviction for armed robbery. Accordingly, the trial court did not err by denying defendant's motion for directed verdict.

II

Next, defendant argues that the trial court clearly erred by denying his motion to suppress his statement made to the police. Defendant contends that his statement was induced by several hours of continuous interrogation, threats, racial slurs, and the denial of food and medical attention. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). This Court reviews a trial court's findings of fact for clear error when reviewing a motion to suppress evidence, however, we review the trial court's ultimate decision on the motion to suppress de novo. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves the reviewing court "with a definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Howard, supra*, 226 Mich App 538. The prosecutor must establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645. In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court set

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authority for a claim that every valuable item must be taken before a larceny is established, and this Court will not search for authority to sustain a party's position. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

No single factor is conclusive. *Id.*; *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

We conclude that the trial court did not clearly err by finding that defendant gave his statement voluntarily. Defendant, as well as the officers who took his statement, testified at a hearing regarding the interrogation and the statement. The trial court considered the largely contradictory testimony of defendant and the police witnesses and, concluding that defendant's account was not credible, determined that the statement was voluntary. As previously indicated, this Court will defer to the "trial court's superior ability to view the evidence and witnesses." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997); see also *Sexton (After Remand)*, *supra*, 461 Mich 752.

Moreover, defendant has not demonstrated that the trial court's finding of credibility was clearly erroneous. Aside from his claims, defendant has not offered any corroborating evidence that he was subjected to days of continuous interrogation, or that he was induced into making a statement by threats or the denial of food or medical attention. Although defendant was arrested several hours before giving his statement, there is no evidence that the delay, or anything that occurred during that time forced him to indicate that he was at the restaurant during the commission of the crimes, or otherwise prohibited him from acting of his own free will. See, e.g., *People v McKinney*, 251 Mich App 205; 650 NW2d 353 (2002). Viewing the totality of the circumstances, the record does not leave us with a firm and definite conviction that a mistake has been made. We find that the trial court did not clearly err by denying defendant's motion to suppress his statement.

III

Defendant next claims that the trial court denied his right to present a defense by prohibiting defense counsel from "re-crossing" a prosecution witness after the codefendant's counsel brought out facts that were not in evidence. In specific, defendant notes that although there was no testimony that the witness saw him go back inside the restaurant, the following occurred during the codefendant's counsel's cross-examination of the witness:

Q. All right. In fact, you testified before that—that—that he wasn't even there when [the restaurant owner] and [defendant] went back into the restaurant, right?

A. Right, right.

Although defendant postures this issue as one concerning a prohibition of cross-examination, it concerns the appropriateness of the codefendant's counsel's question and the witness' testimony, to which defense counsel failed to timely object. This Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After a careful review of the record, we conclude that reversal is not warranted. Although the question assumed facts not in evidence, the substance of the exchange was merely a follow-up to the witness' testimony that she did not see the codefendant's location when she left the restaurant. Before the question, the witness had testified that when she left the restaurant defendant and the restaurant owner were standing outside of the front door. Moreover, defendant does not explain how this exchange affected the outcome of trial. Given the witness' testimony that she heard gunshots seconds after leaving defendant and the codefendant at the scene with the victims, it is unlikely that the colloquy was outcome-determinative. Accordingly, defendant has failed to demonstrate plain error affecting substantial rights and, thus, reversal is not warranted.

IV

Defendant also raises several arguments, *in propria persona*. Defendant argues that he is entitled to a new trial because a prosecution witness' pretrial identification was impermissibly tainted when, although she could not identify him at the lineup, an officer impermissibly "instructed" her to say that he "looks like" the person who was at the restaurant, and, thus, there was no independent basis for her in-court identification. We disagree. Because this issue was not preserved for review, this Court's review is limited to plain error affecting substantial rights. *Carines*, *supra*, 460 Mich 763-764.

Despite defendant's claim of police misconduct there is simply insufficient development of the circumstances surrounding the lineup to conclude that there was police misconduct. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims[.]" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted and internal quotation omitted). Further, although pretrial identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process, *People v Anderson*, 389 Mich 155, 168-169; 205 NW2d 461 (1973), and *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), the record contains no indication that any unduly suggestive identification procedures occurred here. Even if the pretrial identification procedure could be considered impermissibly tainted, the record establishes that there was an independent basis to admit the witness' in-court identification of defendant. *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In determining whether an independent basis exists, the factors to be considered include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the criminal during the crime; (3) the length of time between the crime

and the disputed identification; (4) the witness' level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Kachar, supra,* at 95-97.

Here, the relevant factors clearly predominate in favor of an independent basis for the witness' in-court identification. Remarkably, in making this argument, defendant simply ignores the fact that the witness knew him before the night in question. Based on the witness' trial testimony, her identification was based on her knowledge of defendant from working with him at the restaurant during the previous summer. Defendant worked in the restaurant for approximately a month and she had seen him at least twenty times. She knew his name, as well as his nickname. She did not make any pretrial misidentifications, and positively identified defendant during trial as being at the restaurant on the night in question. The witness had ample opportunity to observe defendant at the restaurant and even conversed with him. The witness asked defendant about the man with him, and defendant told her he was his uncle. Defendant also assisted the witness in getting her bike through the front door of the restaurant. Although the witness did not identify defendant with certainty at the lineup, she indicated that she was hysterical, upset and that defendant looked different. In light of the testimony, we find there was a sufficient independent basis to admit the witness' in-court identification of defendant at trial. Because defendant has failed to demonstrate a plain error, reversal is not warranted on this basis.

V

Defendant next argues that the his convictions must be reversed because the police did not have probable cause to arrest him where there was nothing linking him to the crime scene, aside from an identification by a prosecution witness who was "instructed" by the police to identify him during a lineup. We disagree. Because defendant failed to raise this issue below, this Court reviews this unpreserved claim for plain error affecting substantial rights. *Carines, supra*, 460 Mich 763-764.

"A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998); MCL 764.15(c). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Further, although "mere presence, even with knowledge that a criminal offense is about to be or is being committed, is not enough to support a conviction of a person as an aider or abettor . . . such presence is enough to establish probable cause justifying an arrest." *People v DeGraffenreid*, 19 Mich App 702, 708 fn 2; 173 NW2d 317 (1969) (citations omitted.)

Here, the record reveals that the police had substantial evidence identifying defendant as being either one of the perpetrators or present at the crime scene. A prosecution witness knew defendant by his name and nickname due to a prior work relationship. The witness conversed with defendant on the night of the incident. When she left the restaurant, after closing, the victims, defendant and his uncle were the only people still there, which was only seconds before she heard gunshots. Approximately five minutes later she called the restaurant and there was no

answer. During this time defendant unexpectedly arrived at her house. After briefly speaking with the witness' boyfriend, who also knew defendant by nickname, defendant got into a car and left. Later that morning, the four victims were found murdered in the restaurant. Given this information, the police had probable cause to arrest defendant without a warrant. Accordingly, defendant has failed to demonstrate plain error and, thus, reversal is not warranted on this basis.

VI

Defendant next argues that the prosecutor engaged in misconduct by withholding evidence, thereby violating the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and by presenting false testimony to secure a conviction. We disagree. This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine if the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Truong (After Remand), supra*, 218 Mich App 336. When a defendant fails to object to misconduct by the prosecutor, the issue is reviewed for plain error affecting substantial rights. *Carines, supra*, 460 Mich 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To the extent defendant claims that his right to due process was violated by the prosecutor's failure to disclose exculpatory evidence, defendant presents a constitutional question subject to de novo review. *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998).

We reject defendant's claim that the prosecutor violated *Brady, supra*, by delaying the production of the scientific tests performed on the jacket he was wearing on the night of the incident. A criminal defendant has a due process right of access to information possessed by the prosecution. *Lester, supra*, 232 Mich App 281, citing *Brady, supra.* "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Lester, supra* 232 Mich 281-282.

Defendant concedes that the prosecution provided the evidence approximately two weeks before trial and, therefore, it was not withheld. More compelling is that the scientific tests revealed that defendant's jacket had higher than usual gunshot residue on both sleeve cuffs, the upper right and left front panel, and both front pockets, indicating that he had fired a gun or handled a gun that had been fired. Although defendant speculates and makes general observations concerning how the belated receipt of the information may have affected his defense strategy and the outcome of his case, he makes no specific claims regarding the actual effect of the late production of the test results. Defendant has failed to establish a *Brady* violation.

We also reject defendant's claim that the prosecutor presented perjured testimony. Defendant did not raise this issue during trial and, thus, this claim is reviewed for plain error affecting substantial rights. *Carines, supra*, 460 Mich 763-764. The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *Lester, supra*, 232 Mich App 276. However, absent proof that the prosecution knew that the trial testimony was false, there was no due process violation and

reversal is unwarranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001). Defendant has failed to demonstrate the prosecutor knowingly presented false testimony.

Defendant argues that the police witnesses were untruthful regarding the amount of money recovered from the crime scene. To support this claim, defendant notes that at the preliminary examination, an officer testified that approximately $35.50 was recovered from the crime scene, but, during trial, a different officer testified that in addition to the $35.50 recovered, there was an unknown amount of currency underneath a desk drawer in a back office. However, contrary to defendant's claims, the officers' testimony concerning the amount of money found at the scene, being the area where the bodies were found, is consistent. Further, through defense counsel's cross-examination of the officer at trial, the jury was apprised that additional money was found in a back room of the restaurant. Defendant has not established a *Brady* violation where he has failed to persuasively argue that evidence of additional money found in a back office of the restaurant underneath a desk is favorable, or that such a disclosure would have changed the outcome of the proceedings.

Defendant also argues that the prosecutor presented the false testimony or identification of a prosecution witness, who testified that a police officer told her that she could say defendant "looks like" the person in the restaurant during a lineup. Yet, the police witness denied instructing the witness in that manner. Contrary to defendant's allegation, there is no indication that the prosecutor was attempting to mislead the jury or conceal the details of the lineup, nor does the record support defendant's claim that the witnesses gave false testimony. Further, although the testimony regarding the events of the lineup differed, defendant has failed to demonstrate anything more than a discrepancy, which relates to credibility. See *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Moreover, given the fact that the prosecution witness knew defendant and could identify him based on their prior work relationship, it is unlikely that any discrepancy concerning the events surrounding the lineup affected the outcome of the trial. Accordingly, because there is no tangible indication that the prosecutor engaged in any misconduct, defendant has failed to demonstrate plain error. Therefore, reversal is not warranted on this basis.

VII

Defendant also argues that the circuit court erred by denying his motion to quash the information. We disagree. This Court reviews a circuit court's decision to deny a motion to quash de novo to determine if the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). When reviewing a magistrate's decision to bind over a defendant for trial, the circuit court must consider the entire record of the preliminary examination and it may not substitute its judgment for that of the magistrate. *Id*. A district court's determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony. MCL 766.13; MCR 6.110(E); *Reigle*, *supra*, 223 Mich App 37. "Probable cause exists where the court finds a reasonable ground of suspicion,

supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Orzame*, *supra*, 224 Mich App 558, citing MCL 766.13, MCR 6.110(E). Although there must be evidence of each element of the crime charged, or evidence from which the elements may be inferred, the prosecutor is not required to prove each element beyond a reasonable doubt. *People v Selwa*, 214 Mich App 451, 457; 543 NW2d 321 (1995). Where the evidence is conflicting, or otherwise raises a reasonable doubt with respect to the defendant's guilt, the defendant should be bound over for trial for resolution of the issue by the trier of fact. *Id*.

Here, during the preliminary examination, a restaurant employee gave testimony consistent with the testimony presented at trial. In his own statement, defendant admitted that he was at the establishment on the evening in question. Our review of the record reveals that the testimony provided competent evidence to support an inference that defendant committed the crimes charged.[3] Accordingly, the trial court did not err by denying defendant's motion to quash the information.

VIII

Defendant's final claim is that he is entitled to a new trial because defense counsel was ineffective. We disagree. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

We reject defendant's claim that defense counsel was ineffective for arguing that defendant was merely present, as opposed to arguing that he was not at the restaurant that

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[3] We note that even if there was an evidentiary deficiency at defendant's preliminary examination, it does not necessarily follow that his convictions must be reversed. In *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990), our Supreme Court held that "an evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *Id*. at 601. Here, because defendant received a fair trial and has not demonstrated any prejudice, reversal would not be required even had the evidence presented at the preliminary examination been insufficient. *Id*.; *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

evening. Given the evidence in this case, defense counsel's decision to argue that defendant was merely present was clearly a matter of sound trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*. Moreover, in light of the evidence presented at trial, it is unlikely that, but for defense counsel's decision, the outcome would have been different. *Effinger*, *supra*, 212 Mich App 69.

We also reject defendant's remaining claims of ineffective assistance of counsel. As discussed in part IV, there was a sufficient independent basis for the witness' in-court identification of defendant and any objection would have been futile. Counsel is not required to make a frivolous objection, or advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Further, as discussed in part V, there was probable cause to arrest defendant and likewise, any challenge in this regard would have been futile. Finally, as discussed in part VI, because defendant failed to show that the prosecutor's conduct denied him a fair trial, he has likewise failed to establish that defense counsel's failure to object prejudiced him. Defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to lodge objections, the result of the proceedings would have been different. *Effinger*, *supra*, 212 Mich App 69. Defendant is not entitled to a new trial on this basis.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio