

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONDRA' TERRELL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 302371

Genesee Circuit Court

LC No. 08-024094-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a bench trial, of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was tried with co-defendants Geoffrey Lawson¹ and Cortez Bailey. Defendant was sentenced to life in prison for felony murder, 15 to 30 years for armed robbery and conspiracy to commit armed robbery, and 2 years for felony-firearm. For the reasons stated in this opinion, we affirm.

On September 21, 2008, Saba's Mini Mart was robbed and the clerk, Monir Alyatim, was shot and killed. The surveillance footage presented to the jury shows three men entering the store shortly after 11:00 p.m. The first subject to appear is wearing dark pants and a dark hooded sweatshirt with the hood up. Shortly thereafter, a second subject is seen running up to the front counter. The second subject jumps on the counter, puts his arm over the bulletproof glass, and points a handgun in the direction of the clerk. While the second subject is on the counter, a third subject is seen inside the store holding a pistol grip shotgun. The clerk is seen emptying the registers and handing the money to the second subject. After taking the money, the second subject shoots the clerk and flees the scene with the other subjects. Defendant, Lawson, and Bailey were eventually identified as being involved in the robbery and murder. Lawson was

¹ This case is being submitted with *People v Lawson* (Docket No. 302128). Following a jury trial, Lawson was convicted of first-degree felony murder, armed robbery, conspiracy to commit armed robbery, and felony-firearm.

identified as the person who shot the clerk, while defendant was identified as the suspect holding the pistol grip shotgun.

On appeal, defendant argues that there was insufficient evidence presented to convict him of felony murder. We review this constitutional challenge de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “When reviewing a claim that the evidence presented was insufficient to support the defendant’s conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime.” *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

Defendant was found guilty of aiding and abetting the murder. Under an aiding and abetting theory, the prosecutor must present sufficient evidence to prove that a defendant:

(1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

Defendant’s specific contention is that there is no evidence that he possessed the requisite intent to murder. That is, there is no evidence that he aided in the armed robbery with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, malice can be inferred when the defendant sets into a motion a series of events likely to cause death or great bodily harm, *People v Bulls*, 262 Mich App 618, 626; 687 NW2d 159 (2004), and by the use of a dangerous weapon. *Id.* at 627. Both defendant and Lawson were armed during the robbery. Defendant paced around the store with a shotgun while Lawson pointed a handgun at the clerk. Although there is no evidence that defendant knew Lawson would kill the clerk, the evidence did show that by being armed during a robbery defendant “‘intended to do an act in obvious disregard of life endangering consequences,’ thus evidencing his malicious intent[.]” *Id.* (citations omitted). Therefore, there was sufficient evidence presented to convict defendant of felony murder.

Next, defendant argues in his Standard 4 brief that the district court abused its discretion when it bound him over to the circuit court based on evidence not in the possession of the prosecutor.² However, defendant does not identify the evidence he is referring to, nor how the prosecutor’s “non-possession” of the evidence rendered his bindover improper. Nor does

² “This Court reviews for an abuse of discretion both a district court’s decision to bind a defendant over for trial and a trial court’s decision on a motion to quash an information.” *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

defendant explain how or why the district court abused its discretion. Instead, defendant's entire discussion is simply a recitation of various standards of review as they relate to bindovers. We will not rationalize defendant's argument in his stead. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). The issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant also argues that the trial court abused its discretion when it allowed the prosecutor to introduce into evidence the preliminary examination testimony of two witnesses because they were deemed unavailable to testify when the prosecutor failed to demonstrate that she exercised due diligences to produce the absent witnesses. Defendant also opines that he was denied his constitutional right of confrontation. However, after the prosecutor made a showing of unavailability, the court asked defense counsel if he had any objection to the use of the prior testimony. Defense counsel's negative response means the issue is waived. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Accordingly, our review is limited to whether defendant was denied the effective assistance of counsel because counsel failed to object to the evidence.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted).

The Sixth Amendment to the United States Constitution, and § 20 of article 1 of the Michigan Constitution of 1963, grant an accused the right "to be confronted with the witnesses against him." *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998) (quotations omitted). However, the constitutional right to confront ones witnesses is not "violated by the use of preliminary examination testimony as substantive evidence at trial . . . if the prosecution had exercised both due diligence to produce the absent witnesses and that the testimony bore satisfactory indicia of reliability." *Id.* at 682-683 (footnotes omitted). Consistent with this principle, MCL 768.26 allows the prosecution to use preliminary examination testimony "whenever the witness giving such testimony can not, for any reason, be produced at the trial[.]"

MRE 804(b)(1) provides the following hearsay exception for an unavailable witness's prior testimony:

Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Under MRE 804(a)(5), a witness is "unavailable" if the witness "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." The test for due diligence is whether the prosecutor "made a diligent good-faith effort in its attempt to locate a

witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.” *Bean*, 457 Mich at 684.

Assuming without deciding that counsel could have raised a legitimate objection, his failure to do so was not objectively unreasonable. Defendant was identified as being involved in the armed robbery and murder by two witnesses appearing at trial. One testified that he saw the surveillance video and that the suspect with the shotgun was wearing the same ball cap that defendant was wearing just minutes before the robbery. The other testified that she saw defendant outside her house shortly before the robbery, and that he was holding a shotgun. The witness also testified that defendant asked her if she was “keeping her mouth shut” the day after the robbery. In light of this evidence, defense counsel made the strategic decision to focus on whether defendant had the requisite intent to be convicted of felony murder. We will not second-guess counsel regarding matters of trial strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Moreover, even if we set aside the challenged preliminary examination testimony, defendant cannot show a reasonable probability that the outcome would have been different had counsel objected.³

Defendant also argues that several instances of misconduct by the prosecutor combined to deny him of his right to a fair trial. He again references his challenge to the admission of the preliminary examination testimony of two unavailable witnesses. Additionally, he argues that he was prevented from preparing an adequate defense because the prosecution failed to turn over a video of his post-arrest police interview until one week before trial, and a witness’s statement until the day of trial.

As discussed above, the issue of the preliminary examination testimony was waived. *Aldrich*, 246 Mich App at 111. In regard to his post-arrest interview, defendant filed a motion to suppress his statement after the prosecutor was unable to locate the video. However, the video was found and the interview was subsequently turned over. Although defendant argues that the delay prevented him from preparing a defense, he fails to explain how the delay prejudiced him. Further, when the video and a transcript prepared of its contents was offered into evidence, defense counsel again responded in the negative to the court’s inquiry about any objections, thereby waiving the issue for appeal. *Id.*

As for the witness statement cited, defendant fails to identify the witness. Therefore, we are unable to conclude whether any error occurred. The argument has been abandoned. See *Harris*, 261 Mich App at 50.

Finally, defendant argues that the cumulative effect of all the errors and misconduct previously addressed denied him of his right to a fair trial. While the cumulative effect of several minor instances of error can warrant reversal although the individual errors would not,

³ Defendant also argues that trial counsel was ineffective because counsel failed to file a motion to suppress and a brief in support of the motion, but a review of the lower court record shows the documents were filed.

People v McLaughlin, 258 Mich App 635, 649; 672 NW2d 860 (2003), the principle requires that error occurred. As discussed above, defendant's claims of error are without merit.

Affirmed.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan