STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LAMB,

Defendant-Appellant.

UNPUBLISHED
December 17, 2002

No. 225989
Wayne Circuit Court
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.

This case stems from allegations that, on April 4, 1999, at approximately 1:00 a.m., defendant and his nephew, codefendant Cordale Henry,[1] robbed the Prestige Barbecue restaurant, where Henry 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 the police did not have probable cause to arrest him, the trial court abused its discretion by denying his motion to dismiss. Defendant also argues that the trial court abused its discretion by failing to "reopen the evidentiary hearing" to allow testimony that the warrantless entry into his residence to effectuate his arrest was not consensual. We disagree. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). An abuse of discretion is found only if "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

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

"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.) Even if the police have probable cause to arrest a suspect, they may not enter the suspect's residence to make the arrest without a warrant, absent consent or exigent circumstances. *People v Adams*, 150 Mich App 181, 184; 388 NW2d 254 (1986). However, if a police officer has consent to enter the defendant's home, a subsequent arrest without a warrant supported by probable cause is legal. *People v Smith*, 148 Mich App 16, 22-23; 384 NW2d 68 (1985).

In this case, the record reveals that the police had substantial evidence identifying defendant as either one of the perpetrators or being present at the crime scene. During the evidentiary hearing, an officer investigating the matter testified that a restaurant employee indicated that when she left the restaurant no one was there aside from the four victims, the codefendant, and a man whom the codefendant introduced as his uncle. Seconds after leaving the restaurant, the employee heard noises that sounded like gunshots. The employee identified the codefendant, whom she knew by name, and, although she could not positively identify the second man, she was able to provide a description. The police spoke with one of defendant's relatives, who provided a description of defendant that was similar to the description provided by the employee. The relative also indicated that defendant and the codefendant are related, and that the two are often together. In addition, the codefendant's girlfriend told the police that defendant and the codefendant "hang out together all the time," and also provided a description of defendant that was consistent with the other descriptions. Given this information, the police had probable cause to arrest defendant without a warrant. The trial court did not abuse its discretion by denying defendant's motion to dismiss on this basis.

We also reject defendant's claim that the trial court abused its discretion by refusing to "reopen the evidentiary hearing" to allow the proffered testimony that the police did not have consent to enter his residence to make a warrantless arrest. The record reveals that during the evidentiary hearing one of the arresting officers testified that upon arriving at defendant's residence, a woman answered the door, let them in, and directed them to defendant's room. He testified that the entry was consensual, and that they entered without force. Although the defense did not present any evidence to the contrary, defense counsel indicated that the woman who answered the door would testify that she did not give the police consent. However, the proposed witness did not appear at the hearing. The trial court had previously granted an adjournment of the hearing, at the request of defense counsel who stated that the witness could not miss work. At the conclusion of the hearing, the court denied defendant's motion regarding the issue of consent, "without prejudice," subject to the proposed witness' testimony. On the first day of trial, nearly one month after the hearing, defense counsel moved to "reopen the [evidentiary] hearing," noting that the witness had been subpoenaed to be in court on that day. However, the witness did not appear. On the second day of trial, defense counsel informed the court that the witness' whereabouts were unknown. The trial court ruled that the defense had an ample

opportunity to produce the witness, that a jury had been impaneled and sworn, and that it was time to proceed. Under the circumstances, the trial court did not abuse its discretion by denying defendant's request to stop trial to take additional testimony regarding a pretrial matter, particularly where the proposed witness had not appeared by the second day of trial. Trial courts have a duty to control trial proceedings, with wide powers of discretion in fulfilling this duty. MCL 768.29. This issue does not warrant reversal.

II

Next, defendant argues that the trial court clearly erred by denying his motion to suppress his statement given to the police. Defendant contends that his statement was induced by illegal detention, thirty hours of continuous interrogation, false promises, and the denial of his requests for counsel 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, 44; 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 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 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 the hearing regarding the interrogation and the statement. As noted by the trial court, defendant and the officers presented versions of the facts that "are at opposite ends of the spectrum." The trial court considered the largely contradictory testimony, noting that defendant signed his statement and three constitutional rights forms and, concluding that defendant's account was not credible, determined the statement was voluntary. 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.

Defendant has not demonstrated the trial court's finding of credibility was clearly erroneous. Aside from his claims, defendant did not offer any corroborating evidence that he was subjected to days of continuous interrogation, or that he was induced into making a statement by promises of being released or by the denial of counsel or medical attention. We note that defendant admitted that he signed the constitutional rights forms and the statement, even though he claimed to have made only part of it. There was evidence that defendant had previous experience with the police. 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 state that he was at the scene during 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. The trial court did not clearly err by denying defendant's motion to suppress his statement.

III

Defendant also argues that, because there was insufficient evidence to support the charges, the trial court erred by denying his motion for 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 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).

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. The codefendant 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 the codefendant used his previous relationship with the owner to gain access to the restaurant after closing. A restaurant employee who was familiar with the codefendant, testified that when she left the restaurant, the four victims, the codefendant, and another man, whom the codefendant introduced as his uncle, were the only people at the establishment. Although the employee did not know defendant and could not positively identify him, there was no dispute that he is the codefendant's uncle. In a statement made to the police, defendant admitted that he is the codefendant's uncle and that he was at the establishment 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, the codefendant unexpectedly knocked on her door. The employee's boyfriend, who also knew the codefendant, stepped outside and talked to him very briefly, and the codefendant 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. There was evidence that two types of spent shell casings were recovered, indicating that the gunshots were fired from two different weapons. The pants that defendant was wearing on the night of the incident had gunshot residue on both the left and right front pockets, indicating that he had recently fired a gun. When defendant was arrested he initially gave a false statement to the police, denying that he was at the restaurant. In a subsequent statement, he admitted that he was at the restaurant, but claimed that another individual had committed the crimes. However, no evidence was developed linking another individual to the crimes. We find that 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.

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. There was also evidence that the restaurant's cash register was open and empty. Although a cash drawer still contained small bills of fives and ones, it was 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] The trial court did not err by denying defendant's motion for directed verdict.

IV

Defendant next argues that the trial court abused its discretion by denying his motion for a mistrial as a result of the prosecutor's improper remarks during rebuttal argument. Again we disagree. This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation omitted). Further, with respect to the underlying claims of prosecutorial misconduct, because defendant failed to timely object, this Court reviews those unpreserved issues for plain error that affected the defendant's substantial rights, i.e., that

---

[2] We note that defendant's suggestion that a larceny could not be established here because jewelry and money were left in the restaurant is without merit. Defendant has failed to cite any authority for his 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).

affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We reject defendant's claim that he was entitled to a mistrial because during rebuttal argument the prosecutor asked the jury to be "the[] voices" of the four victims. Although appeals to the jury to sympathize with the victim constitute improper argument, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), the comments at issue occurred during rebuttal, at the end of a lengthy discussion of the evidence, were isolated, and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Further, during his argument, the prosecutor asked the jury to compare all the testimony and physical evidence, and to use common sense when deciding the case. In any event, the court's instructions that the jury should not be influenced by sympathy or prejudice, and that the lawyers' comments are not evidence cured any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

We also reject defendant's claim that the prosecutor shifted the burden of proof by commenting on defense counsel's failure to challenge the credibility of a prosecution witness. A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). However, it is permissible for a prosecutor to observe that evidence against a defendant is undisputed, and, although a defendant has no burden to produce any evidence, once he advances a theory, argument with regard to the inferences created does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

The prosecutor's comments, made during rebuttal argument, were focused on refuting defense counsel's claim made during closing argument that another individual was the actual killer. The prosecutor noted that defense counsel did not challenge the employee's testimony that the other individual was not at the restaurant when she left, and that her testimony was consistent with the other individual's testimony. This argument was not improper. Further, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). The trial court instructed the jury that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the prosecutor's remarks did not deny defendant a fair trial, the trial court did not abuse its discretion by denying his motion for a mistrial.

V

Defendant also raises several arguments, *in propria persona*. Defendant 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*.

During the preliminary examination, a restaurant employee gave testimony consistent with the testimony presented at trial. After being arrested, defendant initially gave a false exculpatory statement, but subsequently admitted that he was at the restaurant during the crimes. 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 his motion to quash the information.

VI

Defendant next argues that the trial court was biased against him, as evidenced by its conduct in shifting the burden of proof to him to prove that the warrantless entry into his residence to effectuate his arrest was consensual. We disagree. Because defendant failed to move for disqualification in the trial court pursuant to MCR 2.003, this Court's review of this unpreserved issue is limited to plain error affecting substantial rights. *Carines, supra*, 460 Mich 763-764. Absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). A judge's opinions that are formed on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id*. at 496. Further, judicial rulings alone

[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).

rarely establish disqualifying bias or prejudice. *Id*. A party who challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id*. at 497.

We believe defendant has mischaracterized the record of the evidentiary hearing. Defendant correctly states that the trial court stated, "the defendant does have the burden of proof on this particular issue." However, our review of the court's complete ruling, in context, clearly shows that the court had concluded that the prosecution had presented sufficient evidence of consent and that the burden, sometimes referred to as the burden to go forward, was *then* on defendant to rebut that evidence. As discussed in part I, the prosecution presented the testimony of one of the arresting officers, who indicated that they had consent to enter the residence. The selective excerpt relied on by defendant plainly concerns his claim that the defense had a witness who would testify that the entry was not consensual. Surely, defendant had the burden of producing witnesses to testify on his behalf to rebut the prosecution's witnesses, and defendant's suggestion to the contrary is unsound. Therefore, the trial court did not improperly shift the burden of proof to defendant to prove that the warrantless entry into his residence was consensual, and it therefore follows that defendant has failed to meet his burden of establishing actual bias on the part of the trial court. *Cain, supra,* 451 Mich 495; *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Defendant has failed to demonstrate a plain error and, thus, reversal is not warranted on this basis.

VII

Defendant also 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. Because defendant failed to timely object, this Court's review of this unpreserved issue is limited to plain error affecting substantial rights. *Carines, supra,* 460 Mich 763-764; *Schutte, supra,* 240 Mich App 720.

We reject defendant's claim that the prosecutor violated *Brady, supra*, by delaying the production of the results of scientific tests performed on the jeans 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. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), 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 App 281-282.

Defendant concedes that the prosecution provided the evidence approximately two weeks before trial and that it was not withheld. More compelling, however, is that the scientific tests revealed that defendant's jeans had gunshot residue on both the left and right front pockets, indicating that he had fired a gun and then placed his hands in his pocket. This evidence was not favorable. 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 contention that the prosecutor presented perjured testimony. 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, reversal is unwarranted. *Herndon, supra,* 246 Mich App 417-418. Our review of the record reveals that defendant has failed to demonstrate the prosecutor knowingly presented false testimony.

Defendant first argues that certain police witnesses were untruthful regarding the amount of money recovered from the crime scene. To support this claim, defendant states 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, there was an unknown amount of money underneath a desk drawer in a back office. Contrary to defendant's claim, 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. In addition, 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 of an officer at a pretrial hearing on the issue of probable cause for his arrest. Defendant claims that, contrary to the testimony, the police could not have used information from defendant's relative or the codefendant's girlfriend to establish probable cause, because both gave statements *after* defendant was arrested. However, contrary to defendant's claim, there is no indication that the statements he offers on appeal represent the first time the police had spoken with either individual. Instead there was evidence that defendant's relative was arrested on the day *before* defendant was arrested. In any event, given the fact that a restaurant employee had positively identified the codefendant, by name, as being at the restaurant seconds before hearing gunshots, it is not implausible that the police would have spoken with her before arresting the defendants. There is no indication that the prosecution presented false testimony or even that the witnesses were untruthful. Defendant has failed to demonstrate plain error and, therefore, reversal is not warranted on this basis.

VIII

In his final claim on appeal, defendant rehashes several arguments, but he also appears to argue that his statement should have been suppressed and his convictions vacated because he was not timely arraigned.[4] Because this issue was not raised and addressed below, it is reviewed for plain error affecting substantial rights. *Carines, supra,* 460 Mich 763-764.

We conclude that the applicable case law renders defendant's claim meritless. This Court has held that, "[a]fter a person is arrested without a warrant, the arresting officer must bring that

[4] Defendant was arrested at midnight on April 6, 1999, his statement was given at 1:30 p.m. on April 7, 1999, and he was arraigned on April 9, 1999.

person before a magistrate for arraignment 'without unnecessary delay.' " *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000), quoting MCL 764.26. However, Michigan law does not require the automatic suppression of a confession given during a prearraignment delay. *Manning, supra* at 638-641. Rather, a statement obtained in connection with a delay in a defendant's arraignment is inadmissible only if the statement was involuntary under the factors listed in *Cipriano, supra,* 431 Mich 334; *Manning, supra* at 638, 643. As we discussed in part II above, considering the totality of the circumstances, we cannot conclude that defendant's statement was induced by the prearraignment delay. Defendant has failed to demonstrate plain error affecting substantial rights and, thus, this issue does not warrant reversal.

Affirmed.

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