S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2013
v MELVIN LEON CORNELL, Defendant-Appellant.	No. 306825 Oakland Circuit Court LC No. 2011-235463-FH

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant, Melvin Leon Cornell, appeals as of right his jury trial conviction of unarmed robbery, MCL 750.530. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 9 to 40 years' imprisonment. We affirm.

I. BASIC FACTS

On January 18, 2011, at approximately 8:00 a.m., Lindore Hebert was the victim of an unarmed robbery while purchasing groceries at the Kroger store at Evergreen and 12 Mile Road in Southfield, Michigan. Hebert was completing his purchase at a self-scan or U-Scan station in the checkout area of the store. While placing his bagged groceries back into his cart, Hebert was struck from behind in the neck and pushed. While off balance, Hebert fell to the floor and the perpetrator removed Hebert's wallet from his right rear pant pocket. While Hebert did not see the perpetrator's face, he described the individual as a black male with a shaved head and wearing a gray jacket. Other employees at the Kroger, however, produced testimony that indicated that defendant was the perpetrator.

James Binns had just completed his evening shift at Kroger when defendant approached him in the store to inquire what time the store's pharmacy would open. At trial, Binns indicated that during this interaction he was close to defendant and able to look him in the eye. When approached by defendant in the store, Binns was seated in the area of the pharmacy and chatting with his co-worker, Brandon Lindsay. A short time later, Binns was outside the store when he observed defendant run out of the store. Binns testified that defendant was wearing an over-sized gray coat. When shown a photographic lineup containing defendant's photograph, Binns immediately identified defendant and indicated the certainty of his identification both at the preliminary examination and at trial. Binns indicated that the store was not particularly busy at

the time of these events and that no one else in the store at this time was similar to defendant in dress or appearance.

Lindsay confirmed that defendant approached the pharmacy area while he was conversing with Binns. Lindsay indicated that he earlier observed defendant walking around the store with a variety of groceries in his hands and that defendant appeared suspicious as his eyes were red and he was scratching himself. Lindsay also positively identified defendant in the photographic lineup.

Deloic Thomas was a Kroger employee who was working the U-scan area of the store when the events occurred. Thomas indicated that she observed defendant trying to use a bridge card[1] at one of the U-Scan stations. Thomas testified that defendant requested assistance with scanning his bridge card. After defendant handed Thomas the bridge card, she returned to her station and observed defendant approach Hebert and jump him from behind. Hebert and defendant wrestled, and then defendant ran to the door with Hebert's wallet. Although Thomas did not provide a 100 percent identification of defendant from the photo array, she indicated that defendant's photograph was the closest to her recollection of the perpetrator. But at trial, Thomas positively identified defendant as the person she observed at the store.

Francine Edward, another Kroger employee, observed defendant "hanging around" unusual areas of the store, such as by the employee time clock area near the pharmacy on the morning of the robbery. Defendant requested that Edward open a register, and she instead directed him to the U-Scan area. Although Edward did not witness the robbery, after hearing a co-worker yell "Stop him! Stop him! He took that man's wallet!", she chased defendant out of the store. Edward asserted that the individual she chased was the same person that she had interacted with earlier that morning in the store. When shown the photographic lineup by the police, Edward eliminated four of the six photographs shown. Defendant's photograph was one of the two photographs she did not eliminate.

At trial, defendant argued that an unidentified person had taken his bridge card and left it at the store and that, in any event, the eyewitness identifications were not credible. The jury was not persuaded and found him guilty of unarmed robbery.

II. ANALYSIS

A. BRIEF ON APPEAL

1. SUFFICIENCY OF THE EVIDENCE

Defendant first contends that insufficient evidence of his identity as the perpetrator was produced at trial to sustain his conviction. This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary

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[1] The bridge card only had a defendant's name on it and not a photograph.

conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id*. at 196. Determinations pertaining to the credibility of witnesses are within the purview of the jury. "As the trier of fact, the jury is the final judge of credibility." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

There is no reasonable dispute that an unarmed robbery occurred. Instead, defendant argues on appeal that there was insufficient evidence to identify him as the perpetrator. An essential element of any criminal prosecution is the establishment of the identity of the defendant as the perpetrator of the crime at issue. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be proven by direct testimony or by circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). And "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 2d 158 (2002). Further, as noted by this Court, "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew. Moreover, this Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis*, 241 Mich App 697, 700; 612 NW2d 381 (2000) (citations omitted).

There existed sufficient identification evidence for a reasonable jury to conclude that the prosecution proved beyond a reasonable doubt that defendant was the perpetrator of this unarmed robbery. Although Hebert did not see the face of his assailant, he described him as a black male with a shaved head and wearing a gray jacket. Binns had the opportunity to view defendant in close proximity earlier that morning. Binns described defendant as wearing an over-sized gray coat and stated that the store was not particularly busy during the time of this incident and that defendant's manner of appearance and dress was sufficiently unique to distinguish him from other individuals present in the store. Binns observed defendant running out of the store and, in part, identified defendant as the same individual he had interacted with moments earlier based on his attire. Binns immediately, and with absolute certainty, identified defendant's photograph in the photographic array presented by the police.

Similarly, Lindsay had the opportunity to observe defendant when he approached Binns in the pharmacy area of the store. Lindsay earlier had seen defendant walking in the store while holding groceries in his hands and had sufficient opportunity to view defendant to form an opinion regarding the suspicious nature of his appearance. Lindsay's identification of defendant in the photographic lineup was also positive and without hesitation.

Two other employees, Edward and Thomas, also had the opportunity, shortly before the robbery, to observe defendant in the store and to have interactions with him in close physical proximity. While Edward did not observe the robbery, after being alerted to the incident, she chased an individual running out of the store that she asserted was the same person she had interacted with earlier that morning. Edward identified this individual as defendant. Thomas had direct contact with defendant when he requested assistance with a bridge card at the U-Scan station. While in the process of assisting defendant, she observed him approach Hebert, jump him from behind, and then run out of the store while in possession of Hebert's wallet. Thomas asserted that she maintained a very specific recollection of defendant's eyes.

In reviewing the record, the descriptions provided by all of the witnesses were consistent with defendant's actual physical characteristics. The height range, weight, and shaved haircut described by the witnesses matched defendant's physical attributes. All of the witnesses described the same manner of dress by the perpetrator within the store and of the individual seen running from the store after the robbery.

In addition, defendant's bridge card was left at the store, placing him at the scene at the time of the events. Although defendant contends that someone else left the bridge card behind, there was no evidence to suggest that this was the case. "Even [when] relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable [fact-finder] in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

To the extent defendant implies an issue regarding his in-court identification at trial by the witnesses, this Court has considered the following factors in determining whether an independent basis exists for the admission of in-court identifications:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*Davis*, 241 Mich App at 702-703.]

Defendant was observed by four different witnesses in close physical proximity within the store immediately before and during the robbery. At least two of the witnesses identified defendant as the perpetrator with absolute certainty in a photographic lineup, while the remaining two witnesses indicated substantial certainty that defendant's photograph was close in resembling their recollection of the perpetrator's appearance. Descriptions provided to police by the witnesses were consistent with defendant's actual physical attributes. There was no evidence to suggest that any of the witnesses was under any disability or impediment to engage in an accurate observation of defendant. Therefore, it was reasonable for the jury, as the finder of fact, to find the testimony of these witnesses to be credible and to reject defendant's contention that he did not attempt to use his bridge card in the store on that day. Consequently, sufficient evidence exists to sustain defendant's conviction.

2. CRUEL AND UNUSUAL PUNISHMENT

Next, although defendant acknowledges that his sentence is within the applicable sentencing guidelines range based on his status as a fourth habitual offender, he asserts that the sentence imposed constitutes cruel and unusual punishment. We disagree.

Defendant did not object to the trial court's scoring of the guidelines or raise the constitutional challenge he now asserts. As such, the issue is unpreserved and reviewed for plain error. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, as does the Michigan Constitution. US Const, Am VIII; Const 1963, art 1, § 16. Defendant acknowledges that his minimum sentence of nine years (108 months) falls within the guidelines range of 36 months to 142 months. Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). But "a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citations omitted). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Defendant asserts that his minimum sentence of nine years' imprisonment is nonetheless cruel and unusual punishment because of the purported insufficiency of the identification evidence used for his conviction and because the trial court allegedly failed to consider "his age [52] [and] his need for both mental health and substance abuse treatment."

Defendant fails to provide any legally recognized reason for this Court to determine that the sentence imposed constitutes cruel and unusual punishment. First, the purported insufficiency of the evidence has no bearing on whether a sentence is proportional. *Powell*, 278 Mich App at 323. Regardless, we have already concluded above that the evidence was sufficient to sustain defendant's conviction. Second, a defendant's age is not an unusual circumstance sufficient to overcome the presumption of proportionality, especially in this instance when the defendant is simply middle-aged. See *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Third, there is no legal authority to support defendant's contention that a trial court is required to consider mitigating factors when sentencing a defendant. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011); *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000). Moreover, the record does not support this contention. The record demonstrates that the trial court had access to the presentence investigation report (PSIR), which contained information pertinent to defendant's history including his substance abuse, educational achievements, health, family relationships, and extensive criminal history at the time of sentencing. There is nothing to suggest that the trial court did not consider the information contained therein.

Defendant also implies error regarding the failure of the trial court to consider the time he spent in jail in the imposition of his current sentence. However, "the fact that defendant's sentence must be served consecutively to the remaining portion of his parole-related sentence is insufficient to overcome the presumptive proportionality of his sentence for his offense." *Powell*, 278 Mich App at 324. Furthermore, this Court has determined that Michigan's sentencing credit statute, MCL 769.11b, "does not . . . entitle a defendant to credit for time served before sentencing if he is incarcerated for an offense other than that for which he is

ultimately convicted, or for unrelated reasons." *People v Seiders*, 262 Mich App 702, 705-706; 686 NW2d 821 (2004) (citation omitted). Thus, contrary to defendant's assertion, it would have been improper for the trial court to consider any credit or reduction of sentence regarding the time defendant spent in jail for his current conviction as that was already accounted for in the sentence to be served for his parole violation.

B. STANDARD 4 BRIEF

In his Standard 4 brief, defendant raises a multitude of additional contentions of error. However, we conclude that none has any merit.

1. COMPLAINT/INFORMATION

Defendant first contends that the district court abused its discretion when it issued a warrant premised on an alleged defective complaint that did not establish probable cause for his arrest. The sufficiency of a complaint comprises a constitutional question that this Court reviews de novo. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). A circuit court's ruling on a motion to quash the information and a district court's decision to bind over a defendant are reviewed for an abuse of discretion. *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000).

Further, "[w]hile defendant argues that the trial court committed error by failing to quash the information, where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for directed verdict." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution to 'determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'" *Id.* (citation omitted). The standard for review of a directed verdict is the same as used for the sufficiency of the evidence. *Id.* Having rejected defendant's claim of insufficient evidence, we have determined that a rational trier of fact could have found that the elements of the charged crime of unarmed robbery and defendant's identity as the perpetrator of the offense were proved beyond a reasonable doubt. Therefore, defendant's challenge to the sufficiency of the information fails.

Finally, we note that defendant's argument is premised on the assertion that the complaint was deficient because Detective Lanzon, who signed the complaint as the complaining witness, lacked personal knowledge of the events surrounding the crime. But such an allegation is without merit. Neither MCR 6.101 nor MCL 764.1a, which govern complaints, requires that the complaint be signed by either an eyewitness or a person with personal knowledge. Instead, factual allegations contained in the complaint "may be based upon personal knowledge, information and belief, or both." MCL 764.1a(3). Thus, the signature of the detective is sufficient to meet the criteria.

2. WITNESS LIST

Defendant next contends the prosecutor breached his duty to list Binns, Lindsay, and Edward, as potential witnesses at the time of filing the information. To preserve an assertion that the prosecutor has failed to comply with MCL 767.40a, a defendant must move for a new trial or

a post-trial evidentiary hearing. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Because this issue was not properly raised before or addressed by the trial court, it is unpreserved and this Court reviews only for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant asserts that the prosecutor failed to identify witnesses that would testify at trial in conjunction with the filing of the information. A review of the record demonstrates that defendant is simply mistaken. According to the register of actions, the general information was filed with the court on February 15, 2011. The second page of that document provides two witness lists, in accordance with MCL 767.40a(1) and MCL 767.40a(3), and lists the individuals alleged by defendant to have been improperly omitted. At the arraignment, defendant's counsel acknowledged receipt of a copy of the information. The witness lists contained in the information, as provided to defendant, fulfilled the prosecutor's statutory responsibility regarding the identification of witnesses. The prosecutor provided defendant a witness list that conformed to the requirements of both MCL 767.40a(1) and (3) and was not required, therefore, to re-submit the same list before trial as there had been no change or significant amendment. To the extent defendant implies that the prosecutor had a duty to disclose and/or call all of the listed witnesses before the preliminary examination, as noted by the trial court, no such obligation exists.

3. INDEPENDENT BASIS FOR BINN'S IDENTIFICATION

Defendant also contends the district court abused its discretion in determining that an independent basis existed for Binns's in-court identification of defendant at the preliminary examination. Defendant failed to preserve this argument on appeal by objecting to the identification testimony at the preliminary examination or requesting an evidentiary hearing. MRE 103(a)(1); *People v Lee*, 391 Mich 618, 626-627; 218 NW2d 655 (1974). Because the issue is unpreserved, defendant must establish the existence of plain error affecting his substantial rights. *Carines*, 460 Mich at 764-767.

Defendant asserts that the in-court identification of him by Binns at the preliminary examination lacked an independent basis because the earlier photographic lineup provided to Binns was impermissibly suggestive. "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If an identification procedure is "impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for the in-court identification can be established." *Id*. at 542-543. The fairness or suggestiveness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). As noted earlier, the following factors have been identified for courts to consider when determining whether an independent basis exists for the admission of an in-court identification:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the

> criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*Davis*, 241 Mich App at 702-703.]

Contrary to defendant's assertion, there was a sufficient independent basis to support the admissibility of Binns's in-court identification of defendant. On the day of the robbery, Binns was present in Kroger and interacted on a face-to-face basis with defendant, albeit briefly. According to Binns, defendant's clothing was distinctive. There is no question regarding Binns's ability to clearly observe defendant as they were within the store. Shortly thereafter, Binns observed a black male, dressed in an over-sized gray coat, running from the store. Defendant asserts that Binns was shown the photographic array within only two days of the robbery. Binns immediately, and definitively, identified defendant from the array. Based on the totality of the circumstances, the identification procedure was not impermissibly suggestive and did not result in a substantial likelihood of misidentification. As such, defendant failed to establish any plain error.

4. PHOTOGRAPHIC LINEUP

In a slightly different context within his Standard 4 brief, defendant argues that the photographic lineup was impermissibly suggestive and violated his right to due process. This Court reviews for clear error a trial court's ruling whether to admit identification evidence. *Kurylczyk*, 443 Mich at 303. Clear error is found to exist only when this Court is left with a definite and firm conviction that a mistaken has occurred. *Id.*

To sustain a due process challenge to an identification lineup, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.* at 302. "[I]mproper suggestion in photographic identification procedures may arise when the witness is shown . . . a group of people in which one person is singled out in some way." *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). "[T]he remedy for an unduly suggestive identification procedure is suppression of the in-court identification unless there is an independent basis for its admission." *Davis*, 241 Mich App at 702.

A photographic array is not deemed to be suggestive if "it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Kurylczyk*, 443 Mich at 304 (quotations omitted). "[D]ifferences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others pictured in a photographic lineup have not been found to render a lineup impermissibly suggestive." *Id.* at 304-305. Here, a review of the photographic arrays reveals that they indeed were fairly representative of "defendant's physical features and thus sufficient to reasonably test the identification." Defendant's contention that the photographs were labeled with identifying information is simply mistaken. The photographic array shown to the witnesses contained only six photographs, with defendant's photograph in

position two of the array, and sequential numbering of the photographs for the witnesses to indicate which photograph was selected. This procedure is typical and cannot, by any stretch of the imagination, be construed as suggestive. Defendant's assertion that the photographs contained in the array did not indicate height or weight is not pertinent. The concern in presenting the photographs is to identify a suspect, and hence, the focus is primarily on facial features.

5. RIGHT TO COUNSEL AT PHOTOGRAPHIC LINEUPS

Defendant also asserts that he was improperly denied counsel when the photographic lineup was conducted. Because his assertion of a right to counsel during the photographic lineup is unpreserved, it is reviewed for plain error affecting defendant's substantial rights. See *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009).

The Sixth Amendment right to counsel "attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 609; 684 NW2d 267 (2004). Adversarial judicial criminal proceedings are identified as those which include formal charges, preliminary hearings, indictments, informations, or arraignments. *Id*. at 607. Defendant acknowledges that no adversarial judicial criminal proceeding had been initiated and that he was not in custody when the photographic lineup was conducted. Consequently, defendant's Sixth Amendment right to counsel had not yet attached when the photographic lineup was conducted. See *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986).

This Court has recognized, however, that "[a] defendant is entitled to counsel at a precustodial investigatory photographic lineup only when the circumstances underlying the investigation and the lineup are 'unusual.'" *Lee*, 243 Mich App at 182. Unusual circumstances have been defined to exist "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant," *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994), as differentiated from an ongoing investigation where the police are merely exerting an effort to contextualize the evidence and information and determine the identity of the perpetrator, *Lee*, 243 Mich App at 182-183.

While defendant contends that he was entitled to legal representation at this juncture because he was the focus of the police investigation into this crime, it should be noted that our Supreme Court has discredited the "focus test." *Kurylczyk*, 443 Mich at 300-302. Specifically, the Court opined:

> At the early stage of an investigation of an unsolved crime, investigators cannot predict whether a witness will recognize a particular suspect as the perpetrator of that crime. Thus, it is impossible to know whether a photographic array will help to "build a case against the defendant" or will "extinguish a case against an innocent bystander." Often, the distinction between those two courses of action is apparent only after an eyewitness has made, or failed to make, an identification. For this reason, we agree with the unanimous decision in *Lee* that counsel is not required at precustodial, investigatory photographic lineups like the one that was used in this case . . . . [*Id*. at 302 (citations omitted).]

Defendant was not in custody at the time the photographic lineup was developed and conducted and no "unusual circumstances" existed. The witnesses provided a general description of the perpetrator. Although defendant's bridge card was a significant piece of evidence, consistent with his own assertion at trial, the police initially had no means of verifying that the person using the bridge card was actually its owner. Police were unable to identify defendant as the perpetrator until they could successfully link him to the description provided by the witnesses and the use of the bridge card at the time of the robbery. At that point in the investigation the purpose of the "photographic identification" was to "tie[] all the information together." *Lee*, 243 Mich App at 183. Therefore, use of the photographic lineup was proper and did not violate defendant's right to counsel.

6. QUASH INFORMATION/DISMISS CHARGE

In his Standard 4 brief, defendant next contends the trial court erred when it denied his motions to quash the information and to dismiss the charges. This Court reviews a circuit court's decision to grant or deny a motion to quash charges de novo to determine if the district court abused its discretion in binding over the defendant for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002) (citation omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "[A] magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict." *Id.*

Defendant's contentions of error are without merit. Defendant conflates the court rule pertaining to criminal complaints, MCR 6.101, with that providing guidance regarding the content of a criminal information, MCR 6.112. Defendant's assertion that the complaint was not signed until after his arraignment is unavailing, because MCR 6.101(B) only requires that "[t]he complaint must be signed and sworn to before a judicial officer or court clerk." It does not specify a deadline or time frame for such signature. In comparison, MCR 6.112(C) requires that a "prosecutor must file the information or indictment on or before the date set for the arraignment." Defendant was arraigned on February 15, 2011, which coincides with the date stamp on the information in the lower court file. Any suggestion regarding the lack of timeliness regarding either of these documents is not sustainable.

Further, sufficient evidence was proffered at the preliminary examination to demonstrate the necessary elements of the crime charged and defendant's identification as the perpetrator for the bindover decision. Defendant ignores that "the level of proof at the preliminary examination stage does not require positive proof of guilt, but only some evidence of each element" of the charged crime. *People v Oliver*, 170 Mich App 38, 44; 427 NW2d 898 (1988), mod 433 Mich 862 (1989). The elements of unarmed robbery were demonstrated when Hebert testified that he was struck from behind and pushed with sufficient force to lose his balance and his wallet was removed from his pocket. MCL 750.530(1). Defendant's identification as the perpetrator was established from the testimony of Binns, who indicated the following: he interacted with defendant in the store shortly before the robbery, he saw an individual matching defendant's appearance running from the store immediately after the crime, and he identified defendant in a photographic lineup provided by the police. It was not necessary that Binns actually witness the robbery itself. Circumstantial evidence is sufficient. See *People v Kern*, 6 Mich App 406, 409-

410; 149 NW2d 216 (1967). Moreover, because sufficient evidence was presented at trial to sustain defendant's conviction, any alleged errors or deficiencies asserted by defendant at the preliminary examination are deemed harmless. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

Further, defendant's arrest before the issuance of a warrant does not comprise error. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Cohen*, 294 Mich App at 75. The complaint in this matter was dated January 29, 2011. By that time, the police had identified defendant as the perpetrator through his bridge card left at the scene and his identification by witnesses in a photographic lineup. This information was sufficient to warrant a belief that defendant had robbed Hebert for the effectuation of an arrest, despite the absence of a warrant.

7. LACK OF PSYCHIATRIC EVALUATION

Defendant further contends that he was denied a fair trial because the trial proceeded without having first procured a psychiatric evaluation or first conducted a competency hearing. Defendant was scheduled for an evaluation by the Forensic Center before trial but specifically waived the examination by his indication at a pretrial hearing that he was no longer interested in securing such a review and specifically requesting cancelation of his appointment. "[W]aiver is the intentional relinquishment or abandonment of a known right. A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right." *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) (citations and quotation marks omitted). "[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). "To hold otherwise would allow defendant to harbor error as an appellate parachute." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Defendant had the opportunity to participate in a psychiatric evaluation but affirmatively waived that opportunity. He cannot now, on appeal, assert that the trial court's action of granting his request to cancel the Forensic Center evaluation constitutes error. See *McCray*, 210 Mich App at 14.

8. TIMELY TRANSCRIPTS

Defendant next asserts that his conviction should be vacated because the court reporter did not timely produce copies of the requested transcripts for appeal. A claim is not preserved if it is not raised before, addressed by or decided by the trial court. *Carines*, 460 Mich at 763; *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). The issue is not preserved as defendant did not file a motion or seek any intervention regarding the production of the requested transcripts and only raised this allegation for the first time in defendant's Standard 4 brief.

The following is the chronology of pertinent dates regarding defendant's appeal and request for the production of transcripts. The judgment of sentence was filed on August 18, 2011. A claim of appeal and order appointing attorney was filed on October 28, 2011, requesting the preparation of defendant's sentencing and jury trial transcripts. On November 3,

2011, another claim of appeal and order appointing counsel was filed, which requested the preparation of the motion transcript from the hearing conducted July 13, 2011. The court reporter filed a certificate of ordering transcripts on appeal on November 7, 2011. On November 5, 2011, a third claim of appeal and order appointing counsel was filed requesting the production of five additional transcripts for the four pretrial hearings conducted from March 1, 2011, through May 31, 2011, and a copy of the transcript of defendant's arraignment. Both volumes of the jury trial transcripts and the sentencing transcript were filed with the lower court on January 27, 2012. A copy of the hearing transcript of July 13, 2011, was filed on February 8, 2012. The arraignment transcript and remaining pretrial transcripts were filed on April 9, 2012. Hence, in just over a five-month period, all of the transcripts were ordered and delivered.

First, defendant's reliance on MCR 7.210(B)(3)(b)(iv) is misplaced because it refers only to time frames for the provision of transcripts in interlocutory appeals. Defendant's appeal is a claim of right, and no commensurate provision of the court rule dictates the time frame for production of transcripts for an appeal of right. Second, MCR 8.108[2] is irrelevant as it merely "prescribes the duties of court reporters and recorders, the procedure for certifying them, the effect of noncertification, objections to certification, and display requirements." Defendant alleges the court reporter violated MCR 8.108(E), which indicates that a "court reporter . . . shall furnish without delay . . . a transcript of the records taken by him or her . . . to any party on request." The dates on which the transcripts were ordered and filed with the court indicates a lapse of only three to five months, which cannot be construed as a significant delay.

Defendant has not demonstrated that he suffered any burdensome delay in this matter regarding the consideration of his appeal. Defendant does not suggest that the merits of his appeal have been impacted by the asserted delay in receipt of the requested transcripts. Even if a delay in appellate review were deemed to have occurred, such a delay "does not automatically entitle a defendant to a new trial." *People v Missouri*, 100 Mich App 310, 325; 299 NW2d 346 (1980). Rather, "[t]he remedy for dilatory review is review itself." *Id.*

9. WITNESS'S PRIOR STATEMENT

Defendant next argues that the trial court erred when it refused to admit into evidence the victim's inconsistent written statement to police. Preserved evidentiary issues are reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Specifically, defendant argues that the trial court erred in refusing to admit into evidence Hebert's written statement to police, which defendant asserts is inconsistent with his testimony at the preliminary examination and at trial. Specifically, defendant contends that Hebert's prior written statement indicated that his wallet was taken before Hebert was knocked to the ground, but his later testimony indicated that his wallet was taken from his person while he was falling. At trial, on cross-examination, Hebert indicated that he was struck and pushed first and that his wallet was taken "during that time." At trial, defense counsel read to Hebert, on cross-examination, his statement from the police report and suggested a discrepancy in his recollection

[2] Recently amended by 2012 Michigan Court Order 0028.

of how the event transpired. Defense counsel sought introduction of the statement into evidence. The prosecutor asserted the statement was not inconsistent and, therefore, not admissible. Defense counsel argued that the sequence of events was important as removal of the wallet first constituted merely a pick pocketing offense, whereas if the assault occurred first it would comprise unarmed robbery. The trial court deemed the sequence irrelevant, based on the undisputed testimony that an assault occurred.

MRE 613(b) provides that extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is allowed to explain or deny the statement and an adverse party is given an opportunity to examine it. In *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007), the Michigan Supreme Court explained the process to admit evidence under MRE 613(b):

> Before attempting to impeach a witness by offering extrinsic evidence of a prior inconsistent statement, a litigant must lay a proper foundation in accordance with the court rule. To do so, the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. However, "extrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." [Citations omitted; omission in original.]

Defense counsel read to Hebert his statement to police and questioned him regarding his recitation of the sequence of events. Any inconsistency regarding the sequence of events as recalled by Hebert is functionally irrelevant. Hebert never varied in his assertion of what behaviors occurred during the robbery, only whether his wallet was taken at the onset of the behaviors or simultaneous with their occurrence. As such, Hebert's statement is not inconsistent.

Even if deemed inconsistent, the alleged discrepancy regarding Hebert's recollection of events is minimal and is immaterial as MCL 750.530 provides:

> (1) A person who, *in the course of committing a larceny* of any money or other property that may be the subject of a larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years. [Emphasis added.]

In turn, MCL 750.530(2) defines "*in the course of committing a larceny*" as including "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or *in flight or attempted flight after the commission of the larceny*, or in an attempt to retain possession of the property." (Emphasis added.) Based on the statutory definition of the crime charged, the sequence of events is immaterial because force or violence was used by defendant "in the course of committing a larceny."

Moreover, defense counsel read to Hebert his statement to police and questioned him regarding alleged inconsistencies between the statement and his subsequent testimony. This was done in the presence of the jury and afforded defendant an opportunity to try to impeach Hebert and challenge his credibility. Because defendant was afforded the ability to impeach Hebert with his statement to police and the statement was provided verbally to the jury, any alleged error in precluding the admission of the written statement into evidence was harmless.

10. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant concludes the issues in his Standard 4 brief by asserting a multitude of claims regarding the ineffective assistance of counsel and contending that the cumulative effect of these errors deprived him of a fair trial. Defendant failed to preserve this issue because he did not raise a claim of ineffective assistance of counsel in the lower court by moving for a new trial or requesting an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Unpreserved claims of ineffective assistance of counsel are "limited to mistakes apparent from the record." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, a defendant must show that

> (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. [*People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).]

Addressing defendant's contentions involving counsel's failure to challenge the information, complaint, and warrant and counsel's failure to object to Binns's testimony at trial, defendant has failed to demonstrate that counsel was ineffective. There is no record evidence to support defendant's various allegations regarding deficiencies in the information, complaint, or warrant. Plus, the record demonstrates that Binns was included on the prosecutor's witness list, which obviates defendant's main contention with the propriety of Binns's testimony. Counsel is not deemed to be ineffective for failing to raise meritless arguments or futile objections. *Ericksen*, 288 Mich App at 201.

Defendant further asserts that counsel was ineffective for failing to provide citation to legal authority in his motions to quash and to suppress in the lower court. A review of the record indicates that counsel did cite to court rules and statutory law in the motion to dismiss and referenced the Fourteenth Amendment in the brief filed in support of the motion to quash. As such, defendant's contention is not accurate. Even if counsel's performance could be construed as deficient based on the failure to cite to additional legal authority in these documents, there is no evidence to suggest that defendant did not receive a full and complete hearing on the issues raised by defense counsel in the trial court. Based on the lack of factual support for many of

defendant's contentions in these motions, it is unlikely that the citation to additional legal authority would have resulted in a different outcome.

Defendant alleges that counsel was ineffective for the delay caused while awaiting a psychiatric evaluation by the Forensic Center and for permitting trial to proceed without having procured such an evaluation. As noted previously, however, defendant has waived this issue by his indication to the trial court that he did not want the evaluation to proceed, despite the fact that it had been arranged. "[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error." *McCray*, 210 Mich App at 14. "To hold otherwise would allow defendant to harbor error as an appellate parachute." *Fetterley*, 229 Mich App at 520. Defendant also faults his counsel for a failure to investigate or interview the psychologist at the Oakland County Jail or to produce records from the jail pertaining to his mental health history and prescription for psychotropic medication at the time of the crime. Defendant provides no documentary or record evidence to support these contentions and offers no explanation for his refusal to participate in the Forensic Center psychiatric evaluation that was procured. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted). There is no evidence to suggest, despite defendant's post-hoc assertions, that he was not competent to stand trial or that he was legally insane at the time of the event. Once again, counsel is not deemed to be ineffective for failing to raise meritless arguments or futile objections. *Ericksen*, 288 Mich App at 201.

Defendant also contends that counsel was ineffective for failing to produce certain witnesses at the preliminary examination, for failing to obtain character and expert witnesses to provide testimony at trial regarding defendant's mental health history, and for failing to subpoena the supervisor of the Kroger store to testify at trial regarding the poor quality of the surveillance video. We disagree.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *Id*. In general, the failure to call a witness can constitute ineffective assistance of counsel only when it "deprives the defendant of a substantial defense." *Id.* A substantial defense is defined as "one that might have made a difference in the outcome at trial." *People v Kelly*, 186 Mich App 524, 526–527; 465 NW2d 569 (1990).

There is no merit to defendant's claim of ineffective assistance of counsel related to counsel's failure to call all of the prosecution's endorsed witnesses at the preliminary examination. First, defendant confuses the purpose of the preliminary examination and the burden of proof necessary for a bindover decision with the standard of proof required at trial. Second, defendant fails to explain how the prosecution's witnesses would have been of any assistance to him at the preliminary examination stage. Defendant provides no citation to the record or any affidavits or documents regarding the possible testimony of these witnesses to establish "the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In addition, it is well recognized that "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which [this Court] will not second-guess with the benefit of hindsight."

People v Dixon, 263 Mich App 393, 398; 688 NW2d 308 (2004) (internal quotation marks and citations omitted).

Similarly, defendant has provided no information regarding his mental health history and merely speculates, without support or detail, that an expert witness could have offered useful or relevant testimony. As such, defendant has failed to demonstrate "that the retention of an independent expert would have altered the outcome of the lower court proceedings." *Payne*, 285 Mich App at 190.

Next, defendant asserts that counsel was ineffective for failing to secure the testimony of the Kroger supervisor for trial regarding the poor quality of the store's surveillance videotape. However, he offers no explanation of how additional testimony by a Kroger supervisor would have assisted his defense, and any such explanation is not apparent from the record. Accordingly, this claim necessarily fails.

Defendant further argues that counsel was ineffective for failing to seek a continuance of his sentencing in order to secure a psychiatric report. In the PSIR, defendant acknowledged a history of substance abuse but denied a psychiatric history. In conjunction with defendant's interview for the preparation of the PSIR, it was indicated that "defendant admitted to a history of drug abuse, with the more recent drug of choice being Vicodin. He states that he was taking at least four pills a day prior to his arrest." There is no indication in the PSIR of defendant's use of any prescription psychotropic medications other than those prescribed for someone else. At sentencing, defendant acknowledged the opportunity to review the PSIR and his only concerns involved the inclusion of two crimes, which he asserted did not result in convictions. Consequently, there is nothing to suggest that counsel was ineffective for failing to delay sentencing to procure a psychiatric report, when there is no record substantiating that defendant had a documented history of mental illness. Defense counsel is not deemed to be ineffective for failing to raise meritless arguments or futile objections. *Ericksen*, 288 Mich App at 201. In addition, at sentencing, defendant acknowledged the professional performance of his trial counsel when he stated "Yes, he did a pretty decent job," in response to the trial court's comment, "He did a really good job in trial."

Lastly, defendant contends that the cumulative effect of the deficiencies in performance demonstrated by his trial counsel necessitate reversal of his conviction. For cumulative error to be found, "the effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Only actual errors may be aggregated when considering the cumulative effect of errors. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because defendant has failed to demonstrate that his trial counsel was ineffective, there is no error to accumulate. When no errors are found, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens