

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 4, 2013

v

KENNETH RAY WITHERSPOON, JR.,
Defendant-Appellant.

No. 300875
Macomb Circuit Court
LC No. 2009-001114-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), kidnapping, MCL 750.349, and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, 285 months to 50 years for the kidnapping conviction, and 10 to 20 years for the first-degree home invasion conviction. We affirm.

I

Defendant argues that the trial court erred by admitting DNA evidence without the proper foundation. Defendant also argues that the DNA laboratory report constituted inadmissible hearsay and that its admission violated his Sixth Amendment right of confrontation. He further asserts that his trial attorney rendered ineffective assistance of counsel by stipulating to the admission of the DNA laboratory report. We do not agree.

Defense counsel stipulated to the DNA evidence and did not object to the admission of the DNA laboratory report. Accordingly, defendant waived any claims of nonconstitutional evidentiary error concerning the admission of this DNA evidence. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Moreover, defendant also waived his Sixth Amendment right of confrontation as it related to the DNA laboratory report. Our Supreme Court has recently held that a criminal defendant's Sixth Amendment right of confrontation may be waived by trial counsel as long as counsel's actions constitute reasonable trial strategy, which is presumed, and the defendant does not object on the record. *People v Buie*, 491 Mich 294, 315; 817 NW2d 33 (2012). We believe defense counsel's stipulation to admit the DNA laboratory report could have constituted a conscious choice of trial strategy. We repeat that reasonable trial strategy is presumed. *Id.*

Defense counsel surely knew that the findings contained in the testimonial laboratory report could only be admitted at trial if the prosecution called as a witness the analyst who actually conducted the testing and prepared the report.¹ But this would not have been difficult for the prosecution to do; the laboratory report's admission was, accordingly, something akin to a foregone conclusion. Faced with the inevitability of unfavorable testimony from an expert laboratory analyst, trial counsel decided to stipulate to the report's admission. This allowed the defense to portray an air of confidence before the jury while at the same time preventing an additional prosecution witness from actually testifying in court. See *State v Davis*, 116 Ohio St 3d 404, 450-451; 880 NE2d 31 (2008). We cannot say that this strategic decision to stipulate to the admission of the DNA laboratory report was unreasonable. See *People v Garcia*, 51 Mich App 109, 114-115; 214 NW2d 544 (1974).

Furthermore, defendant did not object on the record or otherwise indicate his disagreement with defense counsel's stipulation to the admission of the laboratory report. Even if defendant had privately expressed his dissatisfaction off the record, this would not have been sufficient to prevent or override counsel's waiver of defendant's right of confrontation. "[A]ny objection a defendant may have must be made on the record." *Buie*, 491 Mich at 311; see also *People v Murray*, 52 Mich 288, 290-291; 17 NW 843 (1883). As our Supreme Court explained in *Buie*, 491 Mich at 313:

[A]llowing a defendant to object to defense counsel's consent off the record provides a defendant with "an appellate parachute." Under such a rule, a defendant might acquiesce in or even expressly agree with defense counsel's waiver outside of court and then claim to have objected behind closed doors, or even in his own mind, when he does not enjoy the outcome he desires.

In sum, defense counsel strategically stipulated to the admission of the DNA laboratory report and defendant did not object on the record. We therefore conclude that defendant, through the actions of counsel, waived his Sixth Amendment right of confrontation as it related to the admission of the DNA laboratory report.

Of course, a defendant who waives his or her Sixth Amendment right of confrontation though the actions of counsel may seek relief by establishing that his or her attorney rendered constitutionally ineffective assistance. *Id.* at 315 n 13. But we cannot conclude that defendant's trial attorney rendered ineffective assistance of counsel by stipulating to the admission of the laboratory report in this case. As explained previously, counsel's stipulation prevented an additional prosecution witness from actually appearing before the jury. See *Davis*, 116 Ohio St 3d at 450-451. Moreover, counsel knew that the same inculpatory DNA evidence could have

¹ An inculpatory laboratory report prepared by a nontestifying analyst for use in a future criminal prosecution certainly constitutes testimonial hearsay within the meaning of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and its progeny. *Melendez-Diaz v Massachusetts*, 557 US 305, 311; 129 S Ct 2527; 174 L Ed 2d 314 (2009); *People v Dendel (On Second Remand)*, 289 Mich App 445, 468; 797 NW2d 645 (2010); *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009).

been introduced through the testimony of Ann Chamberlain, M.S., an independent DNA expert who had been appointed for the defense prior to trial. At the time defendant's attorney requested Chamberlain's appointment, Chamberlain had not yet conducted any testing and counsel obviously could not have known the substance of her findings. But Chamberlain ultimately found that defendant's DNA was present in at least one of the white work gloves recovered from the Ford Expedition, thereby corroborating the prosecution's laboratory report. When an independent expert is appointed at public expense, that expert must make his or her findings available to both parties and may be called as a witness by either party. MRE 706(a). Accordingly, even if the laboratory report had been excluded, DNA evidence linking defendant to the crimes still could have been introduced by the prosecution through Chamberlain's testimony.

Defense counsel certainly knew this. Thus, rather than hiding from his own expert or trying to exclude the laboratory report, he strategically decided to attempt to minimize the effect of the DNA evidence by focusing on another finding that Chamberlain had made. In particular, Chamberlain had also found DNA from an unknown, second source inside the white work glove. Relying on Chamberlain's finding in this regard, defense counsel stated during his closing argument that he had "never disputed that those gloves contained [defendant]'s DNA" and that "the science is the science . . . can't change it." Instead, defense counsel passionately argued that because the gloves contained DNA from a second source, "two people" must have worn the gloves, and this created reasonable doubt as to defendant's guilt.²

As any defense attorney would have, defendant's counsel surely hoped that Chamberlain's independent findings would wholly refute the prosecution's laboratory report. He could not have known that Chamberlain's testing would ultimately confirm the presence of defendant's DNA inside the gloves. Faced with these "significant evidentiary problems," *People v La Vearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), counsel chose the best defense that was available—he chose to focus on Chamberlain's finding of a second DNA source and to argue that this unknown, second person must have been responsible for the crimes. "Nothing in the materials before us suggests that counsel was 'deficient' in making this choice[.]" *Id.*

By stipulating to the admission of the laboratory report, defense counsel was merely conceding the inevitable, freeing him to strategically attack the DNA evidence by arguing that there was a second source of the DNA inside the gloves. See *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

² Defense counsel repeatedly argued before the jury that, given Chamberlain's findings and testimony, two different people must have worn the gloves, thereby creating reasonable doubt as to defendant's guilt. Defense counsel specifically argued, among other things, that "there is a secondary source of DNA on those gloves. And based on that fact, and that fact alone, [defendant] must be found not guilty because that is reasonable doubt. . . . You can't ignore the fact that there is somebody else's DNA . . . in those gloves."

II

Defendant next argues that the trial court erred by denying his motion for a directed verdict of acquittal because the only evidence connecting him the crimes was the DNA found inside the gloves. We disagree.

We review de novo the trial court's ruling on a motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "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 in order to 'determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'" *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), quoting *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

The elements of first-degree premeditated murder are (1) the intentional killing of a human (2) with premeditation and deliberation. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Premeditation and deliberation can be shown by, among other things, the circumstances of the killing itself. *People v Moorner*, 262 Mich App 64, 77-78; 683 NW2d 736 (2004).

The elements of kidnapping are set forth in MCL 750.349(1), which provides:

A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:

- (a) Hold that person for ransom or reward.
- (b) Use that person as a shield or hostage.
- (c) Engage in criminal sexual penetration or criminal sexual contact with that person.
- (d) Take that person outside of this state.
- (e) Hold that person in involuntary servitude.

The elements of first-degree home invasion are set forth in MCL 750.110a(2), which provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

We conclude that the prosecution presented sufficient evidence to permit the jury to find beyond a reasonable doubt that the crimes were committed. The prosecution presented the preliminary examination testimony of a victim, Samantha Wright, in which Wright testified that four gloved men broke into her house and tied her up, as well as tying up her fiancé Rico White and her son.³ At least three of the men were armed. The men then forced the family into a Ford Expedition and took them to another location. Viewed in a light most favorable to the prosecution, *Gillis*, 474 Mich at 113, this evidence was sufficient to establish the elements of kidnapping and first-degree home invasion.

In addition, the police and medical examiner testified that they discovered White's body in a vacant lot in Detroit. White had been shot six times in the back of the head. The evidence established that the shots were in rapid succession and occurred over a short period of time while the shooter was standing behind the victim. This was sufficient to establish the elements of first-degree premeditated murder. See *People v Ramsey*, 89 Mich App 260, 266-267 n 4; 280 NW2d 840 (1979).

Defendant suggests that even if there was sufficient evidence to prove the commission of the crimes, there was not sufficient evidence to prove his identity as one of the perpetrators. The identity of the defendant is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Contrary to defendant's assertion, the prosecution presented DNA evidence and cell phone records that linked him to the crimes. As discussed previously, defendant's DNA was present inside the white work gloves recovered from the Ford Expedition. These gloves had White's blood on them. Moreover, the cell phone records indicated that, at the time of the killing, defendant was near the location where White's body was later discovered. The phone records also established that, during the time the crime was taking place, defendant uncharacteristically did not make any cell phone calls. We conclude that there was sufficient evidence of defendant's identity to permit the jury to find beyond a reasonable doubt that he was one of the perpetrators of the crimes. See *Aldrich*, 246 Mich App at 122; see also *People v Lee*, 243 Mich App 163, 168-169; 622 NW2d 71 (2000).

III

Defendant argues that the prosecutor committed misconduct. He also argues that he was deprived of the effective assistance of counsel when his attorney failed to object to the alleged prosecutorial misconduct. We disagree.

³ Wright had testified via telephone at the preliminary examination of defendant's cousin, Herbert Jamal Witherspoon, who was tried separately before the Macomb Circuit Court and convicted of similar offenses. Wright's transcribed testimony from Herbert's preliminary examination was read into evidence at defendant's trial. The use of Wright's preliminary examination testimony at defendant's trial is discussed more fully in part VIII of this opinion.

We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). “[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's opportunity for a fair trial is endangered when the prosecutor comments on issues broader than the guilt of innocence of the accused. *Id.* A prosecutor's statements must be read as a whole and should be evaluated in light of the evidence presented at trial. *Brown*, 279 Mich App at 135.

“Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial.” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). “Moreover, the prosecution is not required to state inferences and conclusions in the blandest possible terms.” *Id.* at 239. A prosecutor may argue from the facts in evidence that a certain witness is worthy or unworthy of belief. *Dobek*, 274 Mich App at 67.

The prosecutor did not commit misconduct during his closing argument. Defendant argues that the prosecutor made false statements about the presence of a second DNA source. The prosecutor stated during his closing argument that there was no other DNA source or, if the jury believed there was a second source, the DNA attributable to this second source was in such a small amount that it could not have been left by anyone complicit in the shooting. To be sure, Chamberlain testified that there was a small amount of DNA from a second, unknown source present inside the gloves. In contrast, however, the evidence presented by the prosecution indicated that there was no second DNA source. Prosecutors are “generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *Unger*, 278 Mich App at 236. Given the evidence presented by the prosecution, it was not unreasonable for the prosecutor to argue that there was no second DNA source or, if there was, the trace amount of DNA attributable to this second source was negligible.

Similarly, the prosecutor's cross-examination of Chamberlain did not constitute prosecutorial misconduct. Defendant argues that the prosecutor committed misconduct by violating the rules of evidence and badgering Chamberlain. It is true that the prosecutor asked Chamberlain about the reason for her dismissal from the Michigan State Police and her dislike of her former coworkers. But these matters were relevant to Chamberlain's potential bias. Evidence of bias is almost always relevant and is proper impeachment material. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). Additionally, defense counsel had already asked Chamberlain about her dismissal on direct examination. Therefore, it was proper for the prosecutor to question Chamberlain about her dismissal on cross-examination.⁴ *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976).

⁴ Although the prosecutor's questions concerning a paternity test that Chamberlain had performed for a friend while working for the Michigan State Police may have been irrelevant, the questions did not amount to outcome-determinative plain error. In fact, Chamberlain testified that she was given an award for developing a new protocol for fetal testing following the paternity test in question.

Nor can we conclude that defendant's trial attorney rendered ineffective assistance of counsel by failing to object to the prosecutor's questioning of Chamberlain and his allegedly inappropriate remarks during closing argument. We have found no prosecutorial misconduct on the record before us and "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

IV

Defendant argues that the trial court improperly assessed 10 points for offense variable (OV) 4, MCL 777.34. He also contends that his trial attorney rendered ineffective assistance of counsel by failing to object to the trial court's scoring of OV 4. We disagree.

We review unpreserved claims of sentencing error for plain error affecting the defendant's substantial rights. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004).

OV 4 addresses "psychological injury to a victim." MCL 777.34(1). The trial court should assess 10 points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). In determining whether serious psychological injury occurred, "the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

Defendant's total OV score was 265 points and his total prior record variable (PRV) score was 37 points. This placed defendant in cell D-VI on the sentencing grid for class A offenses.⁵ MCL 777.62. However, even if ten fewer points had been assessed for OV 4, resulting in a revised total OV score of 255 points, defendant still would have fallen within cell D-VI on the sentencing grid for class A offenses. MCL 777.62. A scoring error that does not affect the appropriate guidelines range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Moreover, because defendant received a mandatory sentence of life in prison without parole for his conviction of first-degree premeditated murder, MCL 750.316(1), any issue concerning the scoring of the offense variables with regard to defendant's other convictions is moot. *People v Poole*, 218 Mich App 702, 719; 555 NW2d 485 (1996); *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Even assuming arguendo that the trial court erred by determining that Wright suffered serious psychological injury requiring treatment, defendant is not entitled to resentencing.⁶

V

⁵ Kidnapping is a class A offense. MCL 777.16q. First-degree home invasion is a class B offense. MCL 777.16f. The trial court properly scored the guidelines for the more serious of these two offenses.

⁶ Nor did defense counsel render ineffective assistance by failing to object to the trial court's assessment of 10 points for OV 4. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201.

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant contends that the trial court violated his Sixth Amendment right to a trial by jury by scoring the offense variables on the basis of factors that were not proven to the trier of fact beyond a reasonable doubt. Our Supreme Court has repeatedly held that Michigan's indeterminate sentencing scheme is unaffected by *Blakely* principles. *People v McCuller*, 479 Mich 672, 689-690; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). This is because the maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *McCuller*, 479 Mich at 684-685. For purposes of the sentencing guidelines, "[a] trial court determines the . . . variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Although defendant suggests that "there is no difference in principle between determinate and indeterminate sentencing schemes," we are bound to follow our Supreme Court's decisions in *Drohan*, *McCuller*, and their progeny. *People v Crockran*, 292 Mich App 253, 256-257; 808 NW2d 499 (2011).

VI

Defendant further contends that the trial court failed to take into account certain factors and committed various other errors when imposing his sentences for kidnapping and first-degree home invasion. We do not agree.

If a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10).

Defendant first argues that his sentences for kidnapping and first-degree home invasion were disproportionate to the severity of the offenses and also cruel and unusual. A sentence that falls within the appropriate range under the statutory sentencing guidelines is not disproportionate. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002); see also *People v Babcock*, 244 Mich App 64, 77-78; 624 NW2d 479 (2000). Similarly, a sentence that falls within the appropriate guidelines range is not cruel or unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Defendant also takes issue with the *maximum* sentence of 50 years imposed for his kidnapping conviction. The kidnapping statute provides in relevant part that "[a] person who commits the crime of kidnapping is guilty of a felony punishable by imprisonment for life or any term of years . . ." MCL 750.349(3). Pursuant to MCL 769.9(2), "[i]n all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years." Thus, because kidnapping is an offense to which the sentencing guidelines apply, MCL 777.16q, the minimum sentence must be determined by reference to the sentencing guidelines, MCL 769.34(2), but the maximum sentence is set by the trial court in its discretion, MCL 769.9(2). We perceive no abuse of discretion in the trial court's decision to impose a 50-year maximum sentence for defendant's kidnapping conviction.

Defendant further argues that the trial court relied on inaccurate or incomplete information when sentencing him, did not consider all mitigating evidence when imposing his sentences, and failed to determine his rehabilitative potential under MCR 6.425(A)(1). However, the trial court stated that it was using “complete and detailed information” and was “satisfied that [the] information [was] reliable, reasonably up-to-date and competent for sentencing purposes.” We find no error in these statements. Additionally, we reiterate that any issue concerning the accuracy of defendant’s sentences for kidnapping and first-degree home invasion is moot in light of defendant’s mandatory sentence of life in prison without parole. *Poole*, 218 Mich App at 719; *Watkins*, 209 Mich App at 5. Defendant is not entitled to resentencing.⁷

VII

Defendant argues that the trial court erred by failing to hold a hearing to determine if he had the present and future ability to reimburse the state for his attorney fees and expert witness fees. He also argues that his attorney rendered ineffective assistance of counsel by failing to object to the trial court’s failure to hold such a hearing. We disagree.

In *People v Jackson*, 483 Mich 271, 292-293; 769 NW2d 630 (2009), our Supreme Court held:

[O]nce enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant’s ability to pay. The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*.

In other words, a determination of the defendant’s ability to pay is not required under *Jackson* until payment is actually due.

Defendant argues that *Jackson* should be overruled. However, this Court cannot overrule a decision of the Michigan Supreme Court. *Crockran*, 292 Mich App at 256-257. “[O]nly the Supreme Court has the authority to overrule its own decisions.” *Id.* at 256. Accordingly, this Court cannot grant defendant the relief he seeks. Because this argument is meritless, defense counsel was not ineffective for failing to object. See *Ericksen*, 288 Mich App at 201.

VIII

⁷ Contrary to defendant’s assertion on appeal, his trial attorney did not render ineffective assistance of counsel by failing to object to his sentences on constitutional grounds. We have found no constitutional infirmities in any of defendant’s sentences. Moreover, even if the trial court had erred, defendant would not be entitled to relief in view of his mandatory sentence of life in prison without parole. *Poole*, 218 Mich App at 719; *Watkins*, 209 Mich App at 5. Thus, any objection by defense counsel would have been futile. *Ericksen*, 288 Mich App at 201.

In his supplemental brief filed after the trial court's evidentiary hearing, defendant argues that his Sixth Amendment right of confrontation was violated when the trial court admitted the transcribed preliminary examination testimony of Samantha Wright as substantive evidence for the prosecution at his trial. Defendant also argues that he did not waive his Sixth Amendment right of confrontation with regard to this matter and that trial counsel rendered ineffective assistance by failing to object to the admission of Wright's preliminary examination testimony. We are compelled to conclude that defendant waived his right of confrontation through the actions of trial counsel.

Wright had testified via telephone at the preliminary examination of defendant's cousin, Herbert Jamal Witherspoon (Herbert). Wright's transcribed testimony from Herbert's preliminary examination was read to the jury at defendant's trial, as substantive evidence for the prosecution. It is undisputed that defendant's trial attorney did not object to this. In fact, counsel stipulated to the admission of Wright's transcribed testimony from Herbert's preliminary examination. Defendant, himself, did not object on the record or otherwise indicate any disagreement with the use of Wright's transcribed testimony.

After oral argument in this case, we remanded the matter to the trial court for an evidentiary hearing concerning the use of Wright's transcribed testimony from Herbert's preliminary examination. *People v Witherspoon*, unpublished order of the Court of Appeals, entered March 16, 2012 (Docket Nos. 300875 & 302711).⁸ We directed the trial court to take testimony and make findings of fact with regard to several specific questions. *Id.*

Following the evidentiary hearing, at which defendant's attorney and several other witnesses testified, the trial court issued a thorough opinion and order responding to our inquiries. The trial judge made several well-supported findings of fact, including: (1) it was actually Wright who had testified via telephone at Herbert's preliminary examination; (2) Wright had been properly sworn before giving her telephonic testimony at Herbert's preliminary examination; (3) there existed "good cause" under MCR 6.006(B) to allow Wright to testify via telephone at Herbert's preliminary examination;⁹ (4) Herbert's attorney had a full and adequate opportunity to cross-examine Wright over the telephone at the preliminary examination; (5) counsel stipulated to the use of Wright's testimony from Herbert's preliminary examination at

⁸ Although our remand order consolidated the cases against defendant and Herbert for purposes of the trial court's evidentiary hearing, their appeals otherwise remain separate. Herbert's substantive issues on appeal will be addressed in a separate opinion of this Court in Docket No. 302711.

⁹ To the extent that defendant argues Wright should not have been permitted to testify via telephone at Herbert's preliminary examination, we note that the trial court found that the requirements of MCR 6.006(B) had been satisfied. Pursuant to MCR 6.006(B), a district court is permitted to take telephonic testimony at a preliminary examination (1) from an expert witness, or (2) from any witness who is in another location upon a showing of good cause. We will not disturb the trial court's discretionary decision that there existed "good cause" to permit Wright to testify via telephone at Herbert's preliminary examination. See *Buie*, 491 Mich at 319-320.

defendant's trial; and (7) counsel believed that using Wright's testimony from Herbert's preliminary examination would not prejudice defendant because Wright had never identified him in her testimony.

In general, we review de novo whether a defendant's right of confrontation has been violated. *Buie*, 491 Mich at 304. However, unpreserved claims of constitutional error are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763. We review for clear error the trial court's findings of fact following an evidentiary hearing. *Buie*, 491 Mich at 304.

As noted earlier, our Supreme Court has recently held that a criminal defendant's Sixth Amendment right of confrontation may be waived by trial counsel as long as counsel's actions constitute reasonable trial strategy, which is presumed, and the defendant does not object on the record. *Id.* at 315.

It is undisputed that defense counsel stipulated to the use of Wright's testimony from Herbert's preliminary examination at defendant's trial. Indeed, he did so strategically. As defense counsel explained at the evidentiary hearing, although the primary issue at trial was the identity of the assailants, Wright had never identified defendant as one the perpetrators of the crimes. Thus, counsel determined that the use of Wright's transcribed testimony from Herbert's preliminary examination would not prejudice his client and he stipulated to its admission. While we acknowledge that another attorney might have handled this situation differently, see *Garcia*, 51 Mich App at 115, no proofs were offered at the evidentiary hearing to rebut the presumption that counsel acted strategically and reasonably, see *Buie*, 491 Mich at 317-318.

In addition, defendant did not personally object on the record to the use of Wright's transcribed testimony. As noted earlier, "any objection a defendant may have must be made on the record." *Id.* at 311. This requirement prevents a defendant from harboring an off-the-record objection as "an appellate parachute." *Id.*

In sum, defense counsel stipulated to the use of Wright's transcribed testimony from Herbert's preliminary examination at defendant's trial, defendant did not personally object to this on the record, and counsel's decision was strategic in nature. Accordingly, as in *Buie*, we conclude that defendant waived his Sixth Amendment right of confrontation through the actions of trial counsel.

As explained previously, a defendant who waives his or her Sixth Amendment right of confrontation though the actions of counsel may seek relief by establishing that his or her attorney rendered ineffective assistance. *Id.* at 315 n 13. However, we perceive no ineffective assistance of counsel with respect to this issue. Although the trial court's evidentiary hearing in this case was not specifically ordered or conducted pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), it nonetheless had the essential characteristics of a *Ginther* hearing. Defendant's trial attorney testified concerning his motivations and reasons for the specific actions he took at trial. In particular, he testified that because Wright had never identified his client as one of the assailants, he did not believe it would be prejudicial to admit Wright's transcribed testimony from Herbert's preliminary examination. Defense counsel also testified that he believed it would be less emotional for the jury if Wright did not appear in person at trial.

It is not unreasonable for a defense attorney to stipulate to certain evidence in order to prevent a damaging witness from personally appearing before the jury. See *Davis*, 116 Ohio St 3d at 450-451. Given counsel's testimony at the evidentiary hearing, it is clear that he made a reasonable, strategic decision to stipulate to the admission of Wright's transcribed testimony at defendant's trial. In general, "this Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). As noted earlier, "[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Matuszak*, 263 Mich App at 61.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly