

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 4, 2013

v

HERBERT JAMAL WITHERSPOON,  
Defendant-Appellant.

No. 302711  
Macomb Circuit Court  
LC No. 2008-005143-FC

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

PER CURIAM.

Defendant appeals by leave granted his jury-trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), kidnapping, MCL 750.349, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, 285 months to 40 years for the kidnapping conviction, and 10 to 20 years for the first-degree home invasion conviction. He was also sentenced to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence to link him to the crimes. We disagree.

Claims of insufficient evidence in a criminal case are reviewed de novo and in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

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

the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

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.

The elements of felony-firearm are: (1) the defendant carried or possessed a firearm (2) during the course of a felony or an attempted felony. *People v Duncan*, 462 Mich 47, 49 n 3; 610 NW2d 551 (2000).

A conviction under an aiding and abetting theory requires proof that (1) the crime charged was committed by the defendant or another, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the crime to occur or had knowledge that the principal intended to commit the crime at the time that the defendant gave aid or encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). Aiding and abetting is not a separate offense, but merely a theory of prosecution. *Id.* Any person who aids and abets the commission of a crime may be prosecuted, tried, and punished as if he or she had directly committed the offense. MCL 767.39.

The medical examiner testified that one of the victims, Rico White, was shot six times from close range in the back of the head. The investigating officers testified that the back door of one of the victim's homes had been broken down and that the house was ransacked. One of the victims testified that the assailants broke into her house and held her family against their will. She also testified that the kidnappers had at least three guns. The prosecution presented evidence to establish that defendant had a preconceived plan to kidnap the family. It would have been reasonable for the jury to infer that all of the kidnappers were armed, including defendant. Furthermore, officers recovered ammunition and an apparent "to-do" list that referenced obtaining guns from a room where defendant stayed. This evidence, together with the reasonable inferences arising therefrom, was sufficient to prove the commission of the crimes of murder, kidnapping, first-degree home invasion, and felony-firearm beyond a reasonable doubt.

But defendant argues that the prosecution failed to offer sufficient proof regarding one additional element—namely, his identity as one of the perpetrators. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Circumstantial evidence and reasonable inferences may be used to prove a defendant's identity. See *Bennett*, 290 Mich App at 472.

There was substantial circumstantial evidence linking defendant to the crimes. Text messages recovered from defendant's phone referred to each of the kidnappers by number. Further, under an aiding and abetting theory, the prosecution did not have to show that defendant was directly involved as a principal. MCL 767.39. The fact that the medical examiner did not testify regarding who actually fired the fatal shots is immaterial. Similarly, it is of little consequence that there was no DNA evidence linking defendant to the crimes, especially in view of the fact that one of the victims testified that the assailants were wearing gloves.

Moreover, there was a strong connection between White's murder and the items found in defendant's bedroom and minivan. The prosecution presented evidence that defendant was staying in a bedroom at his father's duplex at the time of the search. Most of the items were discovered in this bedroom. In addition, defendant was actually in the bedroom when the officers executed the warrant. In sum, police officers found (1) a magazine and ammunition from a .40-caliber handgun; (2) a list stating "pistol from aunt," "pistol from Reece," and "w[ipe] van out"; (3) duct tape in the blue minivan driven by defendant; (4) pawn receipts indicating the sale of jewelry; and (5) various cell phones. Reasonable jurors could have concluded that these items were connected to the crimes. White was shot with .40-caliber bullets. One of the victims testified that she was put into, and dropped off, in a dark-colored van. She was also missing some of her jewelry after the attack. Defendant's father testified inconsistently regarding whether the bullets belonged to him or defendant.

The facts that the murder weapon was never recovered and that defendant did not confess to the crimes did not negate the circumstantial and physical evidence that linked defendant to the offenses. The prosecution presented evidence that spent rounds of .40-caliber ammunition found near White's body matched the ammunition found in defendant's room at the duplex. The prosecution's expert testified that it was not likely that other ammunition in the geographic area would have had the same markings. We conclude that the prosecution presented sufficient circumstantial evidence to prove defendant's identity as one of the perpetrators of the crimes beyond a reasonable doubt.

## II

Defendant also argues that the trial court should have suppressed the evidence obtained from the duplex and the minivan because the officers obtained the evidence in violation of the United States and Michigan Constitutions. We disagree.

We will not reverse a trial court's factual findings with regard to a motion to suppress evidence unless they were clearly erroneous. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). We review de novo the trial court's ultimate decision on a motion to suppress. *Id.*

The right to be free from unreasonable searches and seizures is guaranteed by the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). A search that exceeds the scope of the warrant is invalid unless an exception applies. *People v Martin*, 271 Mich App 280, 306-307; 721 NW2d 815 (2006). Generally, if evidence is unconstitutionally seized, it must be excluded from trial. *People v Hyde*, 285 Mich App 428, 439; 775 NW2d 833 (2009).

Police officers may conduct a protective sweep of a residence after arresting a suspect if the officers have a reasonable belief that there may be individuals that pose a danger to them. *People v Gonzalez*, 256 Mich App 212, 233; 663 NW2d 499 (2003). The plain-view exception allows an officer to seize objects within his or her plain view. *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). The plain view doctrine requires (1) that the police are lawfully present in the otherwise-protected area and (2) that the evidence, which is in plain view, is clearly incriminatory or contraband. *Id.*

Both the DNA warrant and the later-issued search warrant for the duplex were properly obtained, valid warrants. Defendant argues that both warrants were invalid because the DNA warrant lacked a witness's signature and the search warrant for the duplex lacked a date. This argument is without merit. When the error on a warrant is "ministerial" or "hypertechnical," the evidence seized should not be suppressed. *People v Myers*, 163 Mich App 120, 123; 413 NW2d 749 (1987). The missing witness's signature was a hypertechnical error. Furthermore, the search warrant did have a date; it was just the wrong date. Here, the good-faith exception to the exclusionary rule applies because the officers relied upon the search warrant in good faith, even though it was dated June 6, 2008, rather than June 5, 2008. See *People v Goldston*, 470 Mich 523, 528-531; 682 NW2d 479 (2004).<sup>1</sup>

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<sup>1</sup> Even if the second search warrant was not valid, the evidence that the officers discovered in plain view during their protective sweep of the duplex could have been immediately seized. One of the officers testified that defendant was in the bedroom when they entered the duplex and that he noticed an open box containing ammunition. This evidence was in plain view, the officers were legally in the bedroom, and it was immediately apparent that the evidence might have been connected to White's murder. See *Galloway*, 259 Mich App at 639.

Furthermore, the trial court did not find, as defendant claims, that the officers opened dresser drawers and boxes in the bedroom before the search warrant was obtained. The trial judge simply stated that there was evidence presented to this effect. However, the judge went on to state that “there was significant credible evidence that established the search and seizure of evidence did not occur until after the search warrant [for the duplex] was obtained.” In other words, the trial court weighed the evidence and determined that the officers did not conduct the search prior to obtaining the search warrant for the duplex, despite testimony to the contrary. This finding was not clearly erroneous. See *Waclawski*, 286 Mich App at 693. The trial court did not err by denying defendant’s motion to suppress the evidence.

### III

Defendant next argues that his right against self-incrimination was violated when a detective testified that defendant had refused to sign his constitutional rights form, answer questions about the crimes, and answer further questions about the ammunition found in his room. We disagree.

This unpreserved claim of constitutional error is reviewed for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “As a general rule, if a person remains silent after being arrested and given *Miranda*<sup>2</sup> warnings, that silence may not be used as evidence against that person.” *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). Prosecutorial reference to a defendant’s post-*Miranda* silence typically violates the defendant’s due process rights. *Id.* at 212-213; *People v Rice (On Remand)*, 235 Mich App 429, 436; 597 NW2d 843 (1999).

Defendant argues that his right against self-incrimination was violated when a detective testified about his silence during his interrogation. This argument lacks merit. Defendant does not argue on appeal that he did not waive his right to remain silent. Indeed, the detective testified that defendant waived his *Miranda* rights prior to the interrogation. Defendant then made several statements during the interrogation relating to the crimes. He stated that he disliked White and that the ammunition found in the duplex was given to him. Defendant continued to answer questions that did not relate to the crimes. He stated that he was tired when the detective asked him about the crimes. He did not invoke his right to silence during the interview. Nor did he ask the officers to stop questioning him. Quite simply, there was no evidence to establish that defendant revoked his earlier waiver at any time during the interview. See *Rice*, 235 Mich App at 436; see also *People v McReavy*, 436 Mich 197, 219-220; 462 NW2d 1 (1990). Absent an affirmative and unequivocal invocation of defendant’s right to remain silent following his *Miranda* waiver, defendant cannot claim that his right to remain silent was infringed by the detective’s testimony concerning his failure to answer certain questions. *People v Davis*, 191 Mich App 29, 36-37; 477 NW2d 438 (1991). Admission of the detective’s testimony did not constitute plain error that affected defendant’s substantial rights.

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

#### IV

Defendant also argues that his right to a speedy trial was violated. Again, we disagree. We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763. The right to a speedy trial is guaranteed to criminal defendants by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). In order to determine whether a defendant has been denied a speedy trial, a court must weigh (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *Id.* at 261-262.

When the total delay is less than 18 months, the burden is on the defendant to show prejudice, *Waclawski*, 286 Mich App at 665, but when a delay is more than 18 months, the delay is presumptively prejudicial and the burden shifts to the prosecutor to show a lack of prejudice, *Williams*, 475 Mich at 262.

In evaluating the reasons for the total delay, each individual delay is attributed to either the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Any unexplained delays are attributed to the prosecutor. *Waclawski*, 286 Mich App at 666. Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but are only given minimal weight. *Id.*

Defendant was arrested in September 2008.<sup>3</sup> Defendant's trial took place from January 26, 2010, through January 29, 2010. Even if defendant was arrested at the beginning of September 2008, his trial was completed approximately 17 months after his arrest. Therefore, defendant has the burden of proving that he was prejudiced by the delay. *Waclawski*, 286 Mich App at 665.

First, defendant failed to assert his right to a speedy trial in the trial court. Second, many of the delays were caused by defendant's own motions and evidentiary hearings. Third, defendant failed to show that he was prejudiced by the delay. He claims that he lost exculpatory evidence, valuable witnesses, and personal memory of the events. He also alleges that he suffered from anxiety, depression, stress, and mental anguish. However, defendant fails to state what evidence, witnesses, and memories were lost that would have helped his defense. His claim of prejudice to his person is similarly without merit. See *Williams*, 475 Mich at 264. There is simply no evidence that defendant's opportunity for a fair trial was jeopardized by the delay. See *People v Chism*, 390 Mich 104, 115; 211 NW2d 193 (1973). We perceive no plain error affecting defendant's substantial rights.

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<sup>3</sup> Defendant erroneously asserts in his brief on appeal that he was arrested in June 2008. Contrary to this assertion, the record evidence clearly shows that defendant was arrested in September 2008.

## V

Defendant contends that his jury was not drawn from a fair cross-section of the community. We disagree. This unpreserved claim of constitutional error is reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

The Sixth Amendment guarantees a criminal defendant the right to be tried by an impartial jury drawn from a fair cross-section of the community. *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). In order to establish a violation of this right, the defendant must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). A defendant is not entitled to a petit jury of any particular composition. *Bryant*, 491 Mich at 596 n 47.

African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. *Id.* at 598. Therefore, defendant has satisfied the first prong of the *Duren* test.

But defendant has failed to show that African-Americans were substantially underrepresented in the jury venire. Defendant claims that his jury pool was comprised of about four African-Americans, or eight percent of the venire. However, defendant does not attempt to establish by any statistical data that African-Americans were underrepresented in the pool. See *Bryant*, 491 Mich at 599-600. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Furthermore, even if defendant could satisfy this second prong, he fails to show any proof of *systematic* exclusion.<sup>4</sup> Defendant has failed to show that the jury venire was not composed of a fair cross-section of the community.

## VI

Defendant further argues that his First and Sixth Amendment rights were violated when the trial court “cleared the courtroom” before jury selection began. Defendant failed to object to the trial court's alleged closure of the courtroom. Therefore, this claim is reviewed for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 664; 821 NW2d 288 (2012); *Carines*, 460 Mich at 763.

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<sup>4</sup> Systematic exclusion cannot be shown by one or two disproportionate venires. *People v Hubbard*, 217 Mich App 459, 481; 552 NW2d 493 (1996), overruled on other grounds by *Bryant*, 491 Mich 575 (2012); see also *Ford v Seabold*, 841 F2d 677, 685 (CA 6, 1988). Defendant simply announces his belief that the jury selection process in Macomb County systematically excludes African-Americans, but gives no indication of how this alleged systematic exclusion is accomplished or how the system may be otherwise unfair.

“It is . . . ‘well settled’ that the Sixth Amendment right to a public trial extends to voir dire.” *Vaughn*, 491 Mich at 665, quoting *Presley v Georgia*, 558 US 209, 213; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010). Assuming that the trial court actually “cleared the courtroom” as defendant asserts, this action surely constituted plain error as no overriding interest was advanced for the closure in this case. See *Vaughn*, 491 Mich at 665. Nevertheless, a review of the trial transcripts shows that the voir dire process was fair and unimpaired by any irregularities that would subject it to doubt or call it into question. Accordingly, we cannot conclude that any plain error in this regard “‘seriously affected the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 668-669, quoting *Carines*, 460 Mich at 774. Nor do we conclude, given the record before us, that the error resulted in the conviction of a defendant who was “‘actually innocent.’” *Id.* Defendant is not entitled to relief on the basis of this forfeited claim of error.

Nor did the trial court violate defendant’s First Amendment rights. When asserted by the accused, the right to public voir dire is based solely in the Sixth Amendment, not the First Amendment. *Vaughn*, 491 Mich at 652. It is true that members of the public have a First Amendment right to attend criminal trials, including voir dire. *Id.*; see also *Presley*, 558 US at 212. However, the defendant has no First Amendment right to a public trial.

## VII

Lastly, defendant contends that his Sixth Amendment right to confront the witnesses against him was violated when the trial court allowed transcribed, telephonic testimony from the preliminary examination to be read into evidence at trial. Although this is arguably the most significant issue raised by defendant on appeal, we are compelled to conclude that defendant waived his Sixth Amendment right of confrontation through the actions of his trial attorney.

One of the victims in this case, Samantha Wright, was allowed to testify via telephone at defendant’s preliminary examination. Wright’s transcribed preliminary examination testimony was then 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, defense counsel fully consented to the use of Wright’s preliminary examination testimony at trial. 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 preliminary examination testimony at defendant’s trial. *People v Witherspoon*, unpublished order of the Court of Appeals, entered March 16, 2012 (Docket Nos. 300875 & 302711).<sup>5</sup> We directed the trial court to take testimony and make findings of fact with regard to several specific questions. *Id.*

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<sup>5</sup> Our remand order of March 16, 2012, also pertained to the case against defendant’s cousin, Kenneth Ray Witherspoon, Jr. (Kenneth), who was tried separately before the Macomb Circuit Court and convicted of similar offenses. Although our remand order consolidated the cases

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 defendant's preliminary examination; (2) Wright had been properly sworn before giving her telephonic testimony at the preliminary examination; (3) there existed "good cause" under MCR 6.006(B) to allow Wright to testify via telephone at the preliminary examination;<sup>6</sup> (4) defendant's counsel had a full and adequate opportunity to cross-examine Wright over the telephone at the preliminary examination; (5) despite a material witness warrant that had issued for Wright on December 21, 2009, Wright stopped communicating with the police and prosecution and failed to appear for defendant's trial; (6) defendant's trial attorney did not object to the use of Wright's transcribed testimony at trial and even participated in reading portions of the testimony to the jury; and (7) defendant's trial attorney believed that using Wright's preliminary examination testimony would not prejudice defendant because the predominant issue in the case was identification and Wright had never identified defendant in her testimony.

In general, we review de novo whether a defendant's right of confrontation has been violated. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). 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.

In *Buie*, our Supreme Court recently held that a criminal defendant's Sixth Amendment right of confrontation can 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. The trial court in *Buie* had permitted two witnesses for the prosecution, a doctor and a forensic expert, to testify at the defendant's trial by way of two-way, interactive videoconferencing. *Id.* at 297-298. Although the defendant, himself, did not affirmatively consent to the use of the video testimony, the defendant's attorney expressly approved the use of the video testimony and did not object to allowing the witnesses to testify without being physically present at trial. *Id.* at 298, 300-303.

Our Supreme Court agreed with the trial judge's factual finding, following an evidentiary hearing, that the defendant had not objected on the record to the use of the video testimony or otherwise expressed his personal dissatisfaction with the procedure. *Id.* at 302-303, 317-318.

against defendant and Kenneth for purposes of the trial court's evidentiary hearing, their appeals otherwise remain separate. Kenneth's substantive issues on appeal will be addressed in a separate opinion of this Court in Docket No. 300875.

<sup>6</sup> To the extent that defendant argues Wright should not have been permitted to testify via telephone at his 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 do not disturb the trial court's determination that there existed "good cause" to permit Wright to testify via telephone at the preliminary examination. See *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

The *Buie* Court also agreed with the trial judge's finding that defense counsel's approval of the videoconferencing procedure had constituted reasonable trial strategy, especially in light of the fact that the defendant had introduced no proofs at the evidentiary hearing to rebut this presumption.<sup>7</sup> *Id.* at 317-318. Accordingly, the *Buie* Court concluded, trial counsel's approval of the videoconferencing procedure had effectively waived the defendant's Sixth Amendment right of confrontation, thereby extinguishing any error. *Id.* at 318.

The issues presented in the instant case are similar to those presented in *Buie*. In the case at bar, the trial court found that defense counsel did not object to the use of Wright's preliminary examination testimony and that counsel participated in the presentation of the transcribed testimony by reading portions of it to the jury. Given the proofs presented at the evidentiary hearing, we perceive no clear error in either of these findings. Indeed, defense counsel's participation by reading portions of Wright's transcribed preliminary examination testimony to the jury was equivalent to his express approval of the practice.

We acknowledge that defense counsel testified at the evidentiary hearing that his acquiescence in the admission of Wright's transcribed preliminary testimony was "certainly not a trial strategy[.]" However, counsel also testified that the matter of using Wright's transcribed testimony was a "bump[ in] the road that we felt we had to deal with," and that it was his understanding that Wright's transcribed testimony would inevitably be admitted into evidence at defendant's trial. In other words, while defense counsel's acquiescence in the admission of Wright's transcribed preliminary examination testimony may not have been be strategic as such, there is no question that counsel made a conscious decision not to object to the admission of the testimony and to participate in presenting it to the jury. Given that the primary issue at trial was the identity of the assailants, and that Wright never identified defendant as one of her attackers, we cannot conclude that defense counsel's conscious choice to acquiesce in the admission of Wright's transcribed testimony was unreasonable. See MCR 7.215(A)(6) (permitting this Court to "draw inferences of fact"); see also *Gerals v Munson Healthcare*, 259 Mich App 225, 233-234; 673 NW2d 792 (2003) (determining that an attorney's action was unreasonable "under the circumstances"), overruled on other grounds by *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007).

Finally, as explained earlier, defendant did not personally object on the record or otherwise indicate his disagreement with the use of Wright's preliminary examination testimony at trial. Even if defendant privately expressed his dissatisfaction off the record, this was not sufficient to prevent or override counsel's waiver of his confrontation right at trial. "[A]ny objection a defendant may have must be made on the record." *Id.* 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:

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<sup>7</sup> There is a "strong presumption" that defense counsel's actions constitute reasonable trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

[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 expressly approved the use of Wright's preliminary examination testimony at trial and defendant did not object on the record. In addition, there has been no showing that defense counsel's actions were unreasonable. Accordingly, as in *Buie*, we are compelled to conclude that defendant waived his Sixth Amendment right of confrontation through the actions of trial counsel.

Of course, a defendant who waives his or her Sixth Amendment right of confrontation through the actions of counsel may seek relief by establishing that his or her attorney rendered ineffective assistance. *Id.* at 315 n 13. As mentioned earlier, the primary issue at trial was the identity of the assailants. Wright never identified defendant as one of the assailants during her preliminary examination testimony. We have already concluded that defense counsel's decision to acquiesce in the admission of Wright's transcribed testimony was not unreasonable. But even assuming *arguendo* that counsel acquiescence in the admission of the transcribed testimony fell below objective standards of reasonableness, defendant could not demonstrate a "reasonable probability that, but for the deficiency, the factfinder would not have convicted [him]." *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). Given that Wright never identified defendant as one of the perpetrators of the crimes, it would be impossible for defendant to establish that counsel's acquiescence in the admission of Wright's testimony resulted in actual prejudice. See *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Affirmed.

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