

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 18, 2014

v

RICHARD DENNING COOK,

Defendant-Appellant.

No. 312092
Mason Circuit Court
LC No. 10-002321-FC

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob and steal being armed, MCL 750.89; first-degree home invasion, MCL 750.110a(2); receiving and concealing a stolen firearm, MCL 750.535b(2); and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 14 to 50 years for assault with intent to rob and steal being armed, 12 to 20 years for first-degree home invasion, six to ten years for receiving and concealing a stolen firearm, and two years for each of defendants' three counts of felony-firearm. Defendant appeals as of right. We affirm.

Initially, defendant raises a series of ineffective assistance of counsel arguments. The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the trial court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Our review of this unpreserved issue is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first argues that his trial counsel was ineffective for failing to ask questions during voir dire and to exercise any preemptory challenges. However, "an attorney's decisions relating to the selection of jurors generally involve matters of trial strategy." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Further, "[t]he purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). Here, the trial

court and the prosecutor both asked all of the prospective jurors extensive questions. Enough information was elicited during voir dire to develop “a rational basis for excluding those who are not impartial from the jury.” *Id.* Defendant fails to show that defense counsel’s performance fell below an objective standard of reasonableness, *Toma*, 462 Mich at 302, or that his decisions were anything other than sound trial strategy, *Johnson*, 245 Mich App at 259. Additionally, defendant does not provide any support for his suggestion that defense counsel’s conduct during voir dire resulted in the seating of a biased juror and defense counsel’s request to exclude one of the jurors for cause was granted.

Defendant additionally argues that his defense counsel was ineffective for waiving an opening statement. However, “the waiver of an opening statement involves ‘a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.’” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Defendant provides no argument to support that defense counsel’s waiver of the opening argument fell below an objective standard of reasonableness or that the waiver prejudiced defendant. “The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.” *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). However, it makes sense that defendant’s counsel may waive opening statement so as not to give away his theory of the case.

Defendant also argues that defense counsel was ineffective for waiving an objection to the admission of defendant’s video interrogation that showed defendant in handcuffs. Decisions regarding what evidence to present are presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defense counsel wanted the entire video interview to be played so that the jurors would have the full context of defendant’s statements. Defense counsel used the context of defendant’s statements to bolster defendant’s credibility and made a clear record that he had discussed this matter fully with defendant. Thus, there was a logical trial strategy for the admission of the full video interview, and we refuse to second-guess that strategy on appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Additionally, defendant provides no argument regarding how defendant was prejudiced by the jury seeing him in handcuffs during his interview with the police.

Defendant next argues that defense counsel was ineffective for coercing defendant into waiving a 180-day rule motion and a speedy trial. However, the record does not support defendant’s allegations and defendant provides no discussion or citation to authority in support of his position. This issue is abandoned. *McPherson*, 263 Mich App at 136.

Defendant finally argues that defense counsel was ineffective because he was unprepared for trial. However, defendant bases his preparedness argument on defense counsel’s failure to conduct voir dire, failure to use a preemptory challenge, not giving an opening statement, and his erroneous claims related to the 180-day rule and a speedy trial, such as that his defense counsel requested an adjournment in July, 2011 and coerced him to give up his rights. As discussed *supra*, defense counsel’s actions in regard to voir dire, preemptory challenges, and the opening statement all appear to have been trial strategy. Also, counsel stated on the record on July 12, 2011, that he was prepared to go to trial on August 17, 18, and 19. Additionally, this claim of ineffective assistance of counsel does not take into consideration the procedural history of this

case; namely that trial counsel had previously moved to remand to the district court to conduct a preliminary examination after defendant's first attorney had waived it. Three additional charges were dismissed after the preliminary examination was held. Moreover, when claiming ineffective assistance because of a defense counsel's unpreparedness, a defendant is required to show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant's only suggestion of prejudice was the possible seating of a biased juror. However, there is no evidence that would support that there was a biased juror in this case. In conclusion, defendant's arguments fail to show that defense counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by defense counsel's representation. *Toma*, 462 Mich at 302.¹

Defendant also argues that the trial court erred in scoring offense variable (OV) 14, MCL 777.44 (offender's role), at ten points. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). OV 14 allows the trial court to assign a score of ten points where "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). In scoring OV 14, the entire criminal transaction should be considered. MCL 777.44(2)(a). If three or more offenders were involved, more than one offender may be determined to have been a leader. MCL 777.44(2)(b).

Defendant correctly notes that the evidence showed that his friends came up with the idea to rob the victim and planned the robbery. However, it was defendant's idea to get the gun from his father's house, and once he was inside the victim's house he pointed the gun at the victim and told the victim to "[g]et down on the floor. Give me your money." And, the victim testified that one of defendant's friends echoed everything that defendant said while they were in the victim's home. In *People v Gibbs*, 299 Mich App 473, 494; 830 NW2d 821 (2013), this Court found that the defendant's status as the only member of a group with a gun during a robbery and the fact that the defendant did most of the talking during a robbery were pieces of evidence that support a finding that the defendant was a leader. Thus, the trial court's inference that defendant was a leader was reasonable, *Gibbs*, 299 Mich App at 494, and supported by a preponderance of the evidence. The trial court did not clearly err in finding that defendant was a leader and scoring OV 14 at ten points. *Hardy*, 494 Mich at 438.

Defendant also raises issues in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None warrant reversal.

Defendant first argues that his sentence of six to ten years' imprisonment for receiving and concealing a stolen firearm exceeded the appropriate sentencing guidelines range and

¹ At one point during his brief, defendant also argues that defense counsel abandoned the case and refused to actively participate in the trial following an adverse pretrial motion concerning a duress defense. However, defendant provides no citation for that argument, and the record does not reveal any point where defendant raised a duress defense. Defendant fails to meet his burden of "establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

constituted an improper departure from the sentencing guidelines. However, in *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005), we held that where, as is the case here, a trial court sentences a defendant to concurrent sentences, the Michigan Legislature intended that a presentence investigation report would only be prepared for “the highest crime class felony conviction and would no longer be prepared for each of the defendant’s multiple convictions.” The *Mack* Court also held that convictions that are not the highest crime class felony need not be sentenced within the sentencing guidelines range that would have been delineated if the convictions had been scored under the guidelines. *Id.* at 125-129.

Defendant’s assault with intent to rob and steal being armed conviction is a class A offense. MCL 777.16d. Defendant’s receiving and concealing a stolen firearm conviction is a class E offense. MCL 777.16z. The trial court was not required to prepare a sentencing information report for defendant’s receiving and concealing a stolen firearm conviction. *Mack*, 265 Mich App at 127-128. Nor did the trial court abuse its discretion in sentencing defendant outside the guidelines range that would have been delineated if the receiving and concealing a stolen firearm conviction had been separately scored under the guidelines because the trial court could exceed those guidelines without articulating substantial and compelling reasons for the departure under *Mack*, 265 Mich App at 125-129.

Defendant also argues that there was insufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant first asserts that there was insufficient evidence to support his assault with intent to rob and steal being armed conviction because there was no force or violence used and the victim testified that he was not afraid when defendant pointed the gun at him. However, in *People v Davis*, 277 Mich App 676, 685-688; 747 NW2d 555 (2008), vacated in part on other grounds 482 Mich 978 (2008), we clarified that a victim’s subjective experience of fear is not required and that assault occurs where a reasonable person would have apprehended an immediate battery. Defendant’s act of threatening the victim with a gun was sufficient to constitute an assault with force and violence. See *Id.* at 678, 687-688.

Second, defendant asserts that there was insufficient evidence supporting his receiving and concealing a stolen firearm conviction because defendant’s father testified that defendant did not steal the gun. However, defendant himself testified that he took his father’s gun without permission. Defendant later used the gun during the incident. Accordingly, defendant’s own testimony showed that he received the stolen gun. And, while defendant’s father’s testimony conflicts with defendant’s admissions, we must resolve the conflict in favor of the prosecution on appeal. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

Defendant further argues that there was no evidence that defendant had “the requisite intent” to commit assault with intent to rob and steal being armed or receiving and concealing a stolen firearm. However, defendant testified that once inside the victim’s house he pointed the

gun at the victim and told the victim to “[g]et down on the floor. Give me your money.” The jurors could infer defendant’s intent from defendant’s own words. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Thus, there was sufficient evidence of defendant’s intent regarding assault with intent to rob and steal being armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

Regarding the receiving and concealing a stolen firearm conviction, that crime required that defendant receive a stolen firearm while knowing that the firearm was stolen. *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). Because the elements of receiving and concealing a stolen firearm do not require a specific criminal intent, defendant was required only to purposefully or voluntarily perform the elements of that wrongful act. *People v Abramski*, 257 Mich App 71, 72-73; 665 NW2d 501 (2003). There is no indication in the record that defendant did not voluntarily perform the actions that comprised the elements of receiving and concealing a stolen firearm. Therefore, there was sufficient evidence for a rational trier of fact to find that defendant had “the requisite intent” to commit assault with intent to rob and steal being armed and receiving and concealing a stolen firearm. *Wolfe*, 440 Mich at 515-516.

Finally, defendant argues that there was insufficient evidence elicited at his preliminary examination of his intent in regard to assault with intent to rob and steal being armed and receiving and concealing a stolen firearm to support a bindover on those charges. However, “the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless.” *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck