STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2012
V	No. 298796 Oakland Circuit Court
HARVEY LEE PRESTON, Defendant-Appellant.	LC No. 2009-225701-FC

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of carjacking, MCL 750.529a, first-degree home invasion, MCL 750.110a(2), unarmed robbery, MCL 750.530, and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(c) (sexual contact during the commission of another felony). He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 30 to 60 years for the carjacking conviction, 15 to 30 years for the home invasion conviction, and 15 to 22-½ years each for the unarmed robbery and criminal sexual conduct convictions. Because the evidence was sufficient to support defendant's convictions, the victim's identification of defendant was properly admitted at trial, defendant's convictions rendered harmless any identification error that may have occurred at his preliminary examination, defendant was not denied his right to a speedy trial, he has failed to demonstrate plain error with respect to venue and the composition of the jury venire, he is not entitled to resentencing, the prosecutor did not commit misconduct, defendant was not denied the effective assistance of counsel, and the trial court did not abuse its discretion in conducting the proceedings, we affirm.

Defendant's convictions stem from a November 6, 2008, criminal episode during which a perpetrator invaded the victim's Troy home, robbed her of her money and jewelry, sexually assaulted her, and carjacked her vehicle. Immediately after the incident, the victim viewed numerous photos but did not identify any of the individuals as the perpetrator. In January 2009, defendant was apprehended in Northville Township after having fled from the victim's vehicle. Defendant's photograph was included in a new lineup, and the victim identified him as the perpetrator with 80 percent certainty. After hearing defendant's voice at his August 2009 preliminary examination, the victim was 100 percent certain that defendant was the person who committed the crimes. Defendant's theory of defense at trial was misidentification, and he argued that the victim's identification of him was inconsistent and not credible.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution presented insufficient evidence to establish his identity as the perpetrator. When ascertaining whether sufficient evidence was presented to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Identity is an essential element in a criminal prosecution, *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), and the prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. *Nowack*, 462 Mich at 400; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve, and this Court will not resolve that issue anew. *Id*.

In this case, the victim viewed nine different photographic lineups, consisting of 54 individuals, and never identified anyone other than defendant as the perpetrator. She identified defendant with 80 percent certainty from his photograph and with 100 percent certainty after hearing his voice at the preliminary examination. She testified that although defendant held her from behind throughout the incident, she had two opportunities to observe him. She was able to see him when she initially encountered him in the foyer of her home. She described defendant as an African-American male about 5'9" tall and "not much taller than [her], "stocky, well built . . . about 220, 230" pounds, and wearing blue jeans, latex gloves, and a hooded sweatshirt with the hood up. The victim had a second opportunity to observe defendant and got a "very good glance" of him for 45 to 60 seconds through some bi-fold doors when defendant put her in a closet. By that time, the sun provided greater illumination and defendant's hood was positioned in a manner that allowed the victim to see his entire facial profile, including his hairline.

From her observations, the victim was able to provide details of the perpetrator's facial features, including the shape of his nose and mouth, his skin tone, his rounded eyebrows, his untrimmed goatee-type whiskers, and his thinner sideburns. The investigating detective testified that when he observed defendant, his immediate reaction was that he fit the description that the victim had given. The victim also testified that defendant spoke to her frequently during the incident, thereby providing numerous opportunities for her to become familiar with his voice. The victim testified that defendant had made at least 18 statements to her throughout the ordeal. Moreover, aside from the victim's identification of defendant, defendant's possession of the victim's vehicle provided circumstantial evidence linking him to the charged crimes.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to conclude that defendant was the perpetrator beyond a reasonable doubt. Defendant's challenges to the weight and credibility of the victim's identification testimony were matters for the jury to decide and do not affect the sufficiency of the evidence. *People v Scotts*, 80 Mich

App 1, 9; 263 NW2d 272 (1977). This Court will not interfere with the jury's role of determining issues of weight and credibility. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Rather, we are required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Nowack*, 462 Mich at 400. Thus, the evidence was sufficient to support defendant's convictions.

II. IN-COURT IDENTIFICATION

Defendant next argues that the trial court erred by admitting the victim's in-court identification of him at trial because the pretrial photographic lineup procedure was improper and the victim's identification of defendant at the preliminary examination was unduly suggestive. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

A. RIGHT TO COUNSEL AT THE PHOTOGRAPHIC LINEUP

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 include formal charges, preliminary hearings, indictments, informations, or arraignments. *Id.* at 607. Here, defendant acknowledged in the trial court that no adversarial judicial criminal proceeding had been initiated in this case before the photographic lineup was conducted. Although defendant was in custody, he was being held on unrelated charges that occurred in Northville Township in January 2009. Consequently, defendant's Sixth Amendment right to counsel had not yet attached when the photographic lineup was conducted.[1] See *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986).

B. SUGGESTIVE PRETRIAL IDENTIFICATION

Defendant also argues that the victim's identification of him at the preliminary examination was impermissibly suggestive because he was brought into the courtroom wearing orange jail clothing and was the only person in the courtroom who was a jail prisoner. "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

[1] The record also indicates that defendant was given the opportunity to participate in three different corporeal lineups, but changed his appearance for one and refused to participate in the other two. The detective conducted the photographic lineup only after the three failed attempts to perform a corporeal lineup. Defendant does not argue that conducting a photographic lineup in this circumstance was improper.

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). Courts should consider the following factors 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.]

It is not necessary that all factors be accorded equal weight. *People v Kachar*, 400 Mich 78, 97; 252 NW2d 807 (1977).

To the extent that defendant's jail garb and his location at the defense table at the preliminary examination were unduly suggestive, the record clearly establishes an independent basis for the victim's in-court identification of defendant at trial. At the time of the preliminary examination, the victim had already identified defendant from his photograph. As previously indicated, the victim had an opportunity to observe defendant from three to four feet away as he stood in her foyer after breaking into her house. From her observation, she was able to describe defendant's height, weight, clothing, and skin tone. The victim had a second opportunity to observe defendant for 45 to 60 seconds while in the foyer closet. Although defendant was wearing a hood, there was nothing covering his face. The victim got a "very good glance" of defendant's facial profile, including his hairline. The victim saw that defendant's eyebrows were rounded and that he had goatee-type whiskers, a mustache, and thinner sideburns. She identified defendant's photograph with 80 percent certainty two months after the incident and never identified anyone other than defendant as the perpetrator. The victim explained that her certainty increased to 100 percent at the preliminary examination, not because of defendant's appearance, but rather from hearing his voice. The victim had numerous opportunities to hear defendant's voice during the criminal episode. The victim testified that she was certain of her identification, and there was no doubt in her mind that defendant was the perpetrator. Although defendant asserts that the victim did not provide any special identifying characteristics, he has not identified any unusual characteristics about his appearance that the victim should have noticed. Because the record clearly establishes that there was an independent basis for the victim's in-court identification, the trial court did not clearly err by admitting her in-court identification of defendant at trial.

III. MOTION TO QUASH THE INFORMATION

Defendant next argues that the trial court abused its discretion by binding him over for trial because he was denied counsel at the photographic lineup and the victim's identification of

him at the preliminary examination was unduly suggestive. Generally, a circuit court's ruling regarding a motion to quash an information and the district court's decision to bind a defendant over to the circuit court are reviewed to determine whether the district court abused its discretion. *People v Waltonen*, 272 Mich App 678, 683; 728 NW2d 881 (2006). The presentation of sufficient evidence to convict a defendant at trial, however, renders harmless any erroneous bindover decision. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). Defendant's argument fails because, as previously discussed, sufficient evidence of identity was presented at trial to support his convictions. There is no indication that defendant was otherwise prejudiced by the claimed error. See *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). Accordingly, defendant's argument fails.

IV. RIGHT TO A SPEEDY TRIAL

Defendant next argues that he was denied his right to a speedy trial. Because defendant did not preserve this issue for our review by formally demanding a speedy trial below, our review of this issue is limited to plain error affecting his substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

Both the United States and Michigan Constitutions guarantee criminal defendants the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Patton*, 285 Mich App 229, 235 n 4; 775 NW2d 610 (2009). "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (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." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (quotation marks and citations omitted).

In this case, the length of the delay does not favor a finding that a speedy trial violation occurred. The delay period commences upon the defendant's arrest. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Defendant was arrested in this case[2] on January 28, 2009, and trial began on April 22, 2010. Because the total time between defendant's arrest and trial was less than 18 months, defendant must establish that he was prejudiced by the delay. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Defendant's failure to do so precludes relief.

"There are two types of prejudice: prejudice to the person and prejudice to the defense." *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997). With respect to the former, defendant has not established that his incarceration during the delay prejudiced his person. Although defendant asserts that he suffered from anxiety, depression, stress, and mental anguish because of his confinement in jail, anxiety alone is insufficient to establish a violation of the right to a speedy trial. *Id.* at 462. In any event, prejudice to the defense is the more significant concern when assessing a speedy trial claim. *Williams*, 475 Mich at 264.

[2] Although defendant claims that he was arrested on January 5, 2009, that arrest was for Wayne County charges stemming from his actions in Northville Township on the day that he was apprehended.

Prejudice to the defense must meaningfully impair a defendant's ability to defend against the charges to the extent that the outcome of the proceeding will likely be affected. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). Here, there is no indication that the delay adversely affected defendant's ability to defend against the charges. Defendant argues that he "suffered the natural loss of the recollection of events as a result of the lengthy delay," and "lost valuable witnesses." General allegations of prejudice, however, such as the unspecified loss of evidence or memory, are insufficient to show that his defense was affected. *Gilmore*, 222 Mich App at 462; see also *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987). Defendant has not identified the witnesses that were lost or the specific beneficial testimony that they could have provided. In sum, defendant has failed to show that any potential witness favorable to his defense or any other exculpatory evidence was lost due to the delay in bringing him to trial. Consequently, he has failed to establish prejudice to his defense, and his right to a speedy trial was not violated.

V. CHANGE OF VENUE

Defendant next argues that the trial court erred by failing to order a change of venue based on inflammatory pretrial publicity and community prejudice. Because defendant failed to preserve this issue for our review by moving for a change of venue in the trial court, our review is limited to plain error affecting his substantial rights. *Kowalski*, 489 Mich at 505.

As a general rule, a defendant must be tried in the county where the crime is committed. MCL 600.8312(1); *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). Trial courts are under no obligation to change sua sponte the venue of a criminal defendant's trial to another county. *Id*. at 254 n 12. A trial court may change venue to another county, however, upon good cause shown and in special circumstances when it is in the interests of justice to do so. MCL 762.7; *Unger*, 278 Mich App at 254. Pretrial publicity, standing alone, is insufficient to justify a change of venue. *People v Jendrzejewski*, 455 Mich 495, 502; 566 NW2d 530 (1997); *People v Harvey*, 167 Mich App 734, 741; 423 NW2d 335 (1988). But "it may be appropriate to change the venue of a criminal trial when widespread media coverage and community interest have led to actual prejudice against the defendant." *Unger*, 278 Mich App at 254. The defendant has the burden of demonstrating the presence of strong community feeling or a pattern of prejudice that rendered it probable that the publicity resulted in actual bias against him. *Harvey*, 167 Mich App at 741-742.

Initially, we note that defendant has improperly expanded the record by submitting with his brief on appeal media information that was not submitted in the trial court. A party may not expand the record on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000); *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009). Even if that information is considered, however, it does not show that the media coverage was anything other than non-sensational, factual coverage. Moreover, a review of the jury voir dire shows that no juror had any preexisting knowledge of the parties or the case. After reading the information, the trial stated the following:

> Ladies and gentlemen, you've heard the charges that were set forth in the Information. Does anybody recognize those alleged incidents in any way? If you do, raise your hand, please. No hands. You've heard the names of potential

> witnesses and the names of the defendant, the attorneys involved. Does anybody recognize those names or the faces the of [sic] the people seated here at counsel table? Just raise your hand if you do. No hands going up, all right.

Because there is no record evidence of any inflammatory pretrial media coverage and none of the jurors were aware of the case, defendant has failed to demonstrate plain error involving the failure to change venue.

VI. JURY COMPOSITION

Defendant, an African-American, argues that he was denied due process and equal protection because only one African-American juror served on his jury, which was not representative of a fair cross-section of the community. Because defendant did not challenge the jury array in the trial court, this issue is unpreserved and our review is limited to plain error affecting his substantial rights. *Kowalski*, 489 Mich at 505.

A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community. *Taylor v Louisiana*, 419 US 522, 537-538; 95 S Ct 692; 42 L Ed 2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, defendant has the burden of proving the following:

> "(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." [*People v Bryant*, 491 Mich 575, 581-582; ___ NW2d ___ (2012), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

As an African-American, defendant is a member of a "distinct group" for purposes of the fair cross-section requirement. Defendant has failed, however, to set forth any basis for concluding that there was a systematic exclusion of African-Americans in Oakland County's jury-selection process, and there is no indication that African-Americans were underrepresented in his jury venire. This Court will not search for a factual basis to sustain or reject a defendant's position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Consequently, defendant has failed to establish plain error regarding the composition of his jury array.

VII. THE SCORING OF OFFENSE VARIABLES 4, 7, AND 8

Defendant next argues that he is entitled to resentencing because the trial court erroneously scored offense variables (OVs) 4, 7, and 8. We review a trial court's scoring of the sentencing guidelines to determine whether the court "properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010) (quotation marks and citation omitted). When challenged, a sentencing factor need be proven by only a preponderance of the evidence. *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). The trial court may rely on reasonable inferences arising from the record evidence to support the scoring of an offense variable. See *People v Haacke*, 217 Mich App 434, 436; 553 NW2d 15 (1996).

A. OV 4

MCL 777.34(1)(a) directs that 10 points be scored for OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." "The court need not find that the victim actually sought professional treatment, MCL 777.34(2), and the victim's expression of fearfulness is enough to satisfy the statute." *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). In this case, defendant broke into the home of the victim, a 57-year-old woman who lived alone. The victim testified that she was fearful during the criminal episode, which lasted approximately an hour. During the ordeal, defendant kept a strong "vice grip" on the victim. He sexually assaulted her twice and, after one instance, proceeded to squeeze her neck, making it difficult for her to breathe. Defendant took the victim into the basement where she feared being strangled with a vacuum cleaner cord that was on the floor. While in the basement, defendant cautioned that the victim was "going to make this hard," and subsequently punched her in the mouth and head. The victim testified that she felt even greater fear months later when she heard defendant's voice at his preliminary examination. This evidence adequately supports the trial court's 10-point score for OV 4.

B. OV 7

MCL 777.37(1)(a) directs sentencing courts to score 50 points for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." After invading the victim's home, defendant grabbed her from behind and scuffled with her until he gained control. Although the victim freely gave defendant her money, jewelry, wallet, and car keys during the ordeal, defendant kept her in a strong vice grip for nearly an hour as he walked behind her throughout the house, cautioning her not to look at his face. Defendant attempted to remove her panties, stating that she would be unlikely to flee the house without panties, and sexually assaulted her twice. During one of the sexual assaults, defendant pushed the victim facedown across the bed while keeping his left arm around her upper body, fell on top of her, and pushed his groin against her buttocks approximately 25 times before letting out a sigh. Defendant then slid his left arm up and used both arms to choke her. As the victim fought to gain air, they fell on the floor and defendant continued to maintain a strong grip on her with his left hand. Defendant subsequently ordered the victim into a closet, and she wrote him a check. Thereafter, he regained his hold on her and, as they headed to the basement, defendant rubbed her vaginal area over her clothing while stating, "That must feel good." While in the basement, defendant indicated that he was going to bind the victim's hands with a vacuum cleaner cord, stated that she was "going to make this hard," and punched her twice. As they walked upstairs, he called her a "feisty bitch." The events culminated with defendant taking the victim's vehicle, along with her cell phone and only landline telephone, as the victim waited in the basement for defendant to leave her house. The victim suffered bruising on her lip, the side of her head, and the inside of her mouth as a result of defendant punching her, and chafing marks on her neck as a result of being choked. Thus, defendant's conduct and treatment of the victim went beyond compelling her to comply with his directives, since she did so freely, and were designed to substantially increase the fear and anxiety that she suffered during the offense. MCL 777.37(1)(a). Consequently, the trial court did not abuse its discretion by scoring 50 points for OV 7.

C. OV 8

Fifteen points should be scored for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger[.]" MCL 777.38(1)(a). Otherwise, OV 8 is to be scored zero points. MCL 777.38(1)(b). Asportation involves movement of the victim in furtherance of the crime that is not incidental. *People v Spanke*, 254 Mich App 642, 647–648; 658 NW2d 504 (2003). In scoring OV 8 at 15 points, the trial court stated:

> Well again, I found that he did move her to secluded areas of the home and I do think that that does amount to asportation to areas of greater danger because of the reduced likelihood of detection of the criminal activity so I think OV8 is properly scored 15 points.

The evidence presented at trial showed that defendant moved the victim throughout the upstairs, down to the basement, and back upstairs. To permit a 15-point score for OV 8 based on this movement, the basement must have constituted a place or situation "of greater danger" than the upstairs. This Court has held that a victim is asported to a place or situation of greater danger when she is moved away from the presence or observation of others. *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009). In this case, however, the movement was incidental to the commission of the crimes and did not constitute asportation. The victim lived alone and she and defendant were the only people in the house. Before going into the basement, she turned over the cash from her purse, her jewelry, and a check for $1,000. When they arrived in the basement, defendant looked around and stated, "This is sh*t." After a brief scuffle, they returned upstairs, where defendant demanded the victim's car keys and wallet. The evidence indicates that defendant went into the basement to search for additional valuables to steal. Moreover, defendant's movement of the victim did not move her away from the presence of others, to a place where it was less likely that she would be observed, or place her in any greater danger. Thus, the trial court erred by scoring 15 points for OV 8.

Notwithstanding the erroneous scoring of OV 8, defendant is not entitled to resentencing. If OV 8 is correctly scored zero points, defendant's total OV score would decrease from 135 to 120 points. This scoring adjustment does not affect defendant's placement at OV Level VI (100+ points), and does not alter his appropriate sentencing guidelines range. See MCL 777.62. Because the scoring error does not affect the appropriate guidelines range, defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

VIII. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor violated his right against self-incrimination by eliciting testimony from law enforcement officers that he refused to participate in a corporeal lineup. We reject this unpreserved claim. Fifth Amendment rights are testimonial only, and requiring an accused to participate in a lineup does not violate or implicate those rights. *United States v Wade*, 388 US 218, 221-222; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *People v Benson*, 180 Mich App 433, 437; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). "[T]hus, evidence of the refusal to appear in the lineup did not violate defendant's right against self-incrimination." See *id.* Consequently, defendant's right against self-incrimination

was not implicated, and the prosecutor's questions did not amount to plain error. *Kowalski*, 489 Mich at 505.

IX. DEFENDANT'S STANDARD 4 BRIEF

A. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues in his Standard 4 brief on appeal that he was denied the effective assistance of counsel at trial. Because he did not preserve this issue for our review by moving for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffective assistance of counsel, a defendant first must show that counsel's performance fell below an objective standard of reasonableness. "In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." Second, he must establish that there existed a reasonable probability of a different result but for counsel's deficient performance. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant bears the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

1. LACK OF A PRETRIAL CONFERENCE AND INVESTIGATION

The record fails to support defendant's assertions that no pretrial hearing occurred and that defense counsel did not investigate the case during the "pretrial period." The record indicates that defendant had three pretrial hearings. Moreover, defense counsel's remarks, requests, and arguments throughout the pretrial period demonstrate that he was very familiar with the case and prepared to proceed. Indeed, defendant fails to indicate what information defense counsel should have discovered that would have made a difference at trial. Thus, he has failed to show that counsel's performance was deficient.

2. STIPULATION TO THE ADMISSIBILITY OF A COMPOSITE SKETCH

Defendant also argues that trial counsel was ineffective for stipulating to the admission of a "photo fit" composite sketch of defendant. Counsel's decisions regarding the evidence to present and how to argue the evidence are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In seeking the admission of one composite sketch ("sketch A"), defense counsel argued that it was relevant because it was "very different" from the victim's description of the perpetrator and her testimony at trial. The prosecutor objected to the admission of sketch A, but eventually indicated that if sketch A was admitted, then the other sketch ("sketch B") should also be admitted, and defense counsel agreed. During trial, defense counsel used sketch A to argue that the victim's identification of defendant was inconsistent and not credible. Defendant has not overcome the strong presumption that counsel stipulated to the admission of sketch B to secure the admission of sketch A as a matter of trial strategy. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843

(1999). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Further, the prosecutor announced his intention to seek the admission of sketch B, and defendant has not identified a basis on which sketch B could have been excluded from evidence.

3. PREJUDICIAL CLOSING ARGUMENT

Finally, the record fails to support defendant's assertion that defense counsel stated during closing argument, "I am for the plaintiff." To the contrary, the record establishes that, throughout closing argument, defense counsel consistently and vigorously argued a theory of misidentification and also asserted that there was no physical evidence linking defendant to the crimes. Thus, defendant has failed to establish the factual predicate for his claim. *Hoag*, 460 Mich at 6.

B. THE PROSECUTOR'S CONDUCT

Defendant next argues in his Standard 4 brief on appeal that the prosecutor's conduct denied him a fair trial. Because he did not object to the prosecutor's conduct below, our review of these unpreserved claims of error are limited to plain error affecting defendant's substantial rights. *Kowalski*, 489 Mich at 505. We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

1. FAILURE TO TIMELY FILE AN HABITUAL OFFENDER NOTICE

Defendant asserts that the prosecutor failed to file an habitual offender notice before trial, and thus left him with no notice of the possible consequences of conviction. MCL 769.13 requires the prosecution to file a notice of intent to seek enhancement of a defendant's sentence and serve notice on the defendant and his attorney. The record indicates that the prosecutor filed the required notice of intent more than one year before defendant's trial. Thus, the record fails to support defendant's claim of error.

2. THE PROSECUTOR'S REMARKS

The record also fails to support defendant's assertion that the prosecutor remarked during closing argument that defendant did not have to take the stand to testify. Rather, defense counsel made such a statement, which was correct and accurately stated the law.

Defendant also argues that the prosecutor impermissibly commented on his guilt by making the following statement:

> What about that incident in Northville Township, ladies and gentlemen? What about that that [sic] identifies the defendant as being the perpetrator of this crime? Number one, of the one person out of the 54, lo and behold the only person she selects is the person who was driving her car from Northville. Is that a coincidence? Is this a coincidence? You know, these are just amazing coincidences or the defendant, *Mr. Harvey Lee Preston is one of the most*

> *unluckiest men on the face of the earth*. Just one out of 54 is amazing, but how about selecting the only person who had been arrested driving her car which had been stolen from his [sic] house? That's not a coincidence. [Emphasis added.]

Although prosecutors may not express a personal opinion about a defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), they are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). A prosecutor may argue the evidence and all reasonable inferences arising from the evidence as it relates to his theory of the case, and need not phrase his argument in the blandest possible terms. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Viewed in context, the prosecutor's remark was a permissible argument that countered defendant's claim that the victim had misidentified him, that he was not the person who broke into her home, and that he fled the police only because he was in a stolen vehicle. The prosecutor's argument, which urged the jurors to use their common sense in evaluating the evidence, was responsive to the defense theories presented at trial and, viewed in context, was not improper.

Further, a timely objection could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. Even without an objection, the trial court instructed the jury that the attorneys' statements and arguments were not evidence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. Those instructions were sufficient to protect defendant's substantial rights. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant is not entitled to a new trial based on the prosecutor's remarks.

3. INCOMPLETE JURY INSTRUCTIONS

Defendant also argues that the prosecution was relieved of its burden of proof because the trial court's jury instructions omitted essential elements of each offense. Defendant does not indicate the elements that he believes were omitted, however, thereby failing to establish a factual basis for his claim. Moreover, he fails to cite any applicable legal basis in support of his argument. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Accordingly, we reject this claim of error.

C. THE TRIAL COURT'S CONDUCT

Defendant next argues in his Standard 4 brief on appeal that the trial court abused its discretion throughout the proceedings. Because defendant failed to preserve his claims of error by objecting below, our review is limited to plain error affecting his substantial rights. *Kowalski*, 489 Mich at 505.

1. DEFENDANT'S HABITUAL STATUS

The record fails to support defendant's claim that the trial court asked defendant at sentencing if he knew what "habitual" meant and then allowed the prosecutor to "read" defendant's prior felony conviction. There is no indication in the record that the trial court

inquired about defendant's knowledge of the term "habitual." The only discussion of defendant's prior felony conviction occurred when the prosecutor corrected defendant's criminal history as listed in the presentence report. Thus, defendant's argument lacks merit.

2. SENTENCING GUIDELINES

The record also fails to support defendant's claim that the trial court upwardly departed from the sentencing guidelines range without stating substantial and compelling reasons for the departure. The record clearly shows that the trial court sentenced defendant within the appropriate sentencing guidelines range. Thus, this argument is baseless.

3. ADMISSION OF EVIDENCE

Defendant next argues that the trial court "was unfair by having Docket # 09-2133-01 out of Wayne County be evidence" in this case because "it is insufficient evidence" for Oakland County, a different jurisdiction. Defendant provides no citation to the record indicating at what point during the trial the trial court admitted Docket No. 09-2133-01, and, if the evidence was admitted, defendant has failed to indicate how he was prejudiced by it. As previously indicated, a defendant may not simply announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Kelly*, 231 Mich App at 640-641.

4. ERRONEOUS JURY INSTRUCTIONS

Finally, defendant asserts that the trial court invited the jury to discuss the case before deliberations began. Again, defendant fails to identify any record support for his claim. Rather, the record shows that the trial court instructed the jury as follows:

> Speaking of communications about the case, I want to also instruct you not to talk to anybody about this case until I send you to the jury room and then of course you should be deliberating with your fellow jurors about the case . . . . Don't talk to your fellow jurors about the case either because again we don't want you to have started the process of deliberation. If you start talking about well what do you think of that witness' testimony or how come that question wasn't asked, anything like that's already started focusing on certain matters and you're focusing your fellow juror on certain matters and that's not to happen until you've heard all the evidence, my instruction on the law and you're all sitting down together as a group in the jury room and it's when you start to process information and that's when it's okay to start asking the questions what did you think of that witness' testimony. That's the very stuff of deliberations, but not before then, so

please again don't talk to anybody about this case . . . .

Accordingly, defendant's argument lacks merit.

Affirmed.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane M. Beckering