STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 303248 Ionia Circuit Court
LEON DUANE BRIDINGER, Defendant-Appellant.	LC No. 2010-014870-FH

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for third-degree home invasion, MCL 750.110a(4). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 4 to 20 years' imprisonment for his conviction. We affirm.

Defendant's conviction arises out of his entry into the home of his stepsister at approximately 1:30 a.m. on or about August 20, 2010. Once inside his stepsister's home, defendant, who was naked, attempted to enter the bed in which his stepsister was sleeping. Defendant's stepsister recognized defendant on the night of the incident and found his wallet at her house. The stepsister testified at trial that defendant intended to climb into her bed, but "[n]ot to sleep. I guarantee it." The jury convicted defendant of third-degree home invasion, predicated on his commission of the underlying misdemeanor offense of indecent exposure inside his stepsister's home.

Defendant first challenges the sufficiency of the evidence presented at trial. "We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196. "Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010).

In pertinent part, MCL 750.110a(4)(a) provides that a person is guilty of third-degree home invasion if he:

> Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or 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 misdemeanor.

Defendant was convicted under MCL 750.110a(4)(a) for committing the underlying misdemeanor offense of indecent exposure while he entered, was present in, or exited his stepsister's home. Defendant does not challenge whether the evidence was sufficient to establish that he committed a breaking and entering;[1] he only challenges whether he committed the underlying misdemeanor of indecent exposure while present in, exiting, or entering his stepsister's home.

Pursuant to MCL 750.335a(1), a person is guilty of indecent exposure if he "knowingly make[s] any open or indecent exposure of his or her person or of the person of another." This Court has held that the use of the word "or" in MCL 750.335a(1) "reveals that the plain language of the statute provides that one may be guilty of open exposure or indecent exposure, as it prohibits two different types of conduct." *People v Neal*, 266 Mich App 654, 656; 702 NW2d 696 (2005). An exposure need not be made in a public place in order to be an open or indecent exposure. *Id.* at 663. Indeed, an open exposure can be "'conduct consisting of a display of . . . the human anatomy under circumstances which created a substantial risk that someone might be offended.'" *Id.*, quoting *People v Huffman*, 266 Mich App 354, 360; 702 NW2d 621 (2005). A person need not observe the exposure in order for the exposure to be open. *People v Vronko*, 228 Mich App 649, 657; 579 NW2d 138 (1998). Instead, the exposure simply needs to create a "substantial risk" that someone might see it and be offended. *Neal*, 266 Mich App at 663 (quotation marks omitted). Similarly, an indecent exposure need not be observed, but unlike an open exposure, an indecent exposure must occur in a public place if it is not observed by another. *Id.* at 662; *People v Williams*, 256 Mich App 576, 582; 664 NW2d 811 (2003).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational jury to find that defendant committed the underlying misdemeanor of indecent exposure. Defendant broke into his stepsister's home late at night, without her permission, and, while naked, attempted to enter her bed. Given that the stepsister was in bed at the time defendant attempted to enter the bed, a rational jury could find that defendant committed an open exposure because his entry into the bed created a substantial risk that the stepsister would see him, and be offended. See *Neal*, 266 Mich App at 663 (an exposure is open if the victim would reasonably have been expected to observe the exposure).

Defendant disagrees that his exposure was open, as he contends that he did not attempt to call attention to his naked body because he attempted to slip into bed quietly and unnoticed. However, the offense only requires that the defendant create a substantial risk of being seen, see *id.*, and defendant cannot credibly argue that his stepsister would not be expected to see him

[1] For good reason, as the evidence was sufficient to find defendant committed a breaking and entering.

when he attempted to enter the same bed she was occupying. This is particularly so because the stepsister testified that defendant did not appear to intend to sleep when he entered the bed. Moreover, the evidence was sufficient for a rational jury to find that defendant committed an indecent and open exposure because the stepsister was offended by the exposure, and because a reasonable person would have been offended by her stepbrother's uninvited, nude, late-night entry into her bed. See *id.* (finding an open and indecent exposure where: (1) a reasonable person would have been offended and the victim was actually offended and (2) a knowing and intentional exposure was made and such an "exposure is likely to be an offense against generally accepted standards of decency in a community"). See also *Ericksen*, 288 Mich App at 196.

Next, defendant argues that the trial court erred when it instructed the jury on the elements of indecent exposure. Our review is for plain error affecting substantial rights because defendant did not raise the issue before the trial court. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"Jury instructions must clearly present the case and the applicable law to the jury." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *Id.* "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

A person is guilty of indecent exposure when he "knowingly make[s] any open or indecent exposure of his or her person or of the person of another." MCL 750.335a(1). In this case, the trial court instructed the jury as follows with regard to indecent exposure:

> To prove this charge [indecent exposure], the Prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant exposed his genitals, pubic area, or buttocks.
>
> Second, that the defendant knew that he was exposing his genitals, pubic area, or buttocks.

Defendant argues that the trial court should have instructed the jury in accordance with CJI2d 20.33, which includes additional language with regard to the open or indecent nature of the exposure:

> [Third / Fourth], that the defendant did this in a place under circumstances in which another person might reasonably have been expected to observe it and which created a substantial risk that someone might be offended or in a place where such exposure is likely to be an offense against your community's generally accepted standards of decency and morality. In determining this, you must think about the nature of the act and all of the circumstances surrounding the act.

Although this Court is not bound by the standard criminal jury instructions, *People v Williams*, 288 Mich App 67, 76 n 6; 792 NW2d 384 (2010), we will assume that the trial court erred when it omitted an instruction on the element of open or indecent exposure. Operating under that assumption, we still hold that defendant is not entitled to relief because the evidence with regard to whether defendant's exposure was open or indecent was overwhelming. See *People v Kowalski*, 489 Mich 488, 506; 803 NW2d 200 (2011) ("If the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings."). As discussed, there was overwhelming evidence that defendant committed an indecent exposure when he attempted to enter his stepsister's bed while he was naked. Thus, defendant cannot demonstrate prejudice from the trial court's plain error, if any error occurred. See *id.*; *People v Schaefer*, 473 Mich 418, 443-444; 703 NW2d 774 (2005), overruled in part on other grounds by *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006).

In addition to challenging the jury instructions, defendant argues that his trial counsel was ineffective for failing to object to the trial court's instructions on indecent exposure. A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if "counsel's performance fell below an objective standard of reasonableness, . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because defendant cannot establish that he was prejudiced by the trial court's error, if any, he is not entitled to relief on his accompanying claim for ineffective assistance of counsel. *Id.*

Defendant has also raised numerous issues in his Standard 4 Brief, each of which is without merit. He first alleges several errors related to the information in this case. He appears to contend that the trial court erred when it permitted the prosecution to amend the information to include his habitual offender status and to add a charge of indecent exposure. He also makes a contradictory argument that his conviction should be reversed because the information only charged him with third-degree home invasion predicated on the commission of indecent exposure, and not with indecent exposure. Lastly, he argues that the original information was not timely. Defendant did not raise these issues at a time when the errors, if any, could have been corrected, so our review is for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006); *Carines*, 460 Mich at 763-764.

Defendant has not identified an error with regard to the amendment of the information. "Both MCL 767.76 and MCR 6.112(H) authorize a trial court to amend an information before, during, or after trial." *People v McGee*, 258 Mich App 683, 686; 672 NW2d 191 (2003). In the original information, the prosecution charged defendant with third-degree home invasion, predicated on his commission of indecent exposure while entering, present in, or exiting his stepsister's home. Defendant was arraigned on September 15, 2010. On September 21, 2010, the prosecution amended the information to include notice that defendant was being charged as a fourth habitual offender pursuant to MCL 769.12. MCL 769.13(1) provides that

> [i]n a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's

> arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

Here, the amended information charging him as a fourth habitual offender was filed well within the 21-day-period set forth in MCL 769.13(1). Moreover, contrary to defendant's position, the prosecution never amended the information to add a charge of indecent exposure.

Next, defendant argues that the prosecution was required to charge him with both third-degree home invasion and the underlying misdemeanor of indecent exposure, and that the prosecution's failure to do so warrants reversal. Not only has defendant abandoned this issue by failing to develop the argument or cite authority in support thereof, *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998), defendant is incorrect on the merits. Where a defendant is charged with an offense that includes as an element another underlying offense, the defendant need not be charged with and convicted of the underlying offense. See *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009).

Lastly, concerning the information, defendant argues that the original information, which was not dated or signed, was not timely filed. However, MCR 6.112(C) provides that "[t]he prosecutor must file the information or indictment on or before the date set for the arraignment[,]" and the trial court stated at defendant's arraignment that, "I do have the information in the file which is home invasion 3rd." Thus, there was no violation of MCR 6.112(C). And, even assuming a violation of MCR 6.112(C) occurred, defendant is not entitled to relief because he was not prejudiced by an untimely information as he had notice of the charges pursuant to the complaint and subsequent amendments to the information. *People v Cain*, 299 Mich App 27, 53-54; 829 NW2d 37 (2012).

Defendant next raises several challenges to the complaint that was filed in this case. He contends that his stepsister, the complainant, was required to sign the complaint. There is no authority that a complaint must be signed by the complainant; rather, a complaint must simply be signed and sworn to the magistrate. See MCL 764.1a(1) (providing, in pertinent part, that "[t]he complaint shall be sworn to before a magistrate or clerk"); MCR 6.101(B) ("The complaint must be signed and sworn to before a judicial officer or court clerk."). The complaint in this case was valid because it was signed and sworn, it stated the substance of the accusations against defendant, and it cited the name and statutory citation of the offense. See MCL 764.1a(1); MCL 764.1d; MCR 6.101(A); MCR 6.101(B).

We also reject defendant's claim that the complaint was invalid because whoever signed it relied on hearsay statements from the stepsister. The primary purpose of a complaint is to allow the magistrate to determine whether there was probable cause for the issuance of an arrest warrant. MCL 764.1a(1); *People v Higuera*, 244 Mich App 429, 443; 625 NW2d 444 (2001). "A finding of probable cause may be based on *hearsay evidence* and rely on factual allegations in the complaint . . . ." MCR 6.102(B) (emphasis added). Defendant's argument to the contrary is meritless.

Next, defendant argues that the trial court abused its discretion by denying his trial counsel's request for an adjournment. The record reveals that defendant's trial counsel requested

an adjournment before trial, citing an illness. The trial court, citing counsel's late request for the adjournment, agreed to grant the adjournment, but only if trial counsel obtained a note from a doctor verifying the illness or if trial counsel agreed to pay a fee. Faced with these conditions, trial counsel opted to proceed with trial. By proceeding with trial and withdrawing his request for an adjournment, trial counsel waived his request. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001) (withdrawing an objection waives a defendant's claim of error on appeal). Moreover, the trial court did not actually deny trial counsel's request for an adjournment. Rather, the trial court conditioned the grant of an adjournment on trial counsel's procurement of a doctor's note or on being assessed a fee. Pursuant to MCR 2.503(D)(2), the trial court may impose costs or other conditions upon the grant of an adjournment. Furthermore, defendant fails to identify any manner in which trial counsel was unprepared for trial, and our review of the record reveals that trial counsel was prepared for trial, as he raised objections, cross-examined witnesses, and raised arguments on behalf of defendant.[2]

Defendant also challenges his sentence, in particular the trial court's scoring of Prior Record Variables (PRV) 2, 4, and 5, and Offense Variables (OV) 4, 10, and 13. Defendant preserved his challenges to PRV 4, OV 10, and OV 13 by raising these challenges at sentencing or in a motion for resentencing. *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013). Defendant's remaining challenges to PRVs 2 and 5 and to OV 4 are unpreserved, and we review those challenges for plain error affecting substantial rights. *Carines*, 460 Mich at 764. With regard to defendant's preserved challenges, we review the trial court's factual determinations for clear error, and we review de novo the trial court's application of the facts to the law. *People v Hardy*, 494 Mich 430, 438-439; 835 NW2d 340 (2013).

Initially, we reject as moot defendant's challenge to OV 13. The trial court originally scored ten points under OV 13, but in a motion for resentencing agreed that the offense variable should be scored at zero points. Because the trial court corrected the error, this issue is moot. *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009).

We also reject defendant's challenges to PRV 5 and OVs 4 and 10. Concerning PRV 5, the trial court scored 20 points because it found defendant had seven or more prior misdemeanor convictions or misdemeanor juvenile adjudications. Concerning misdemeanor offenses that can be scored under PRV 5, MCL 777.55(2) directs the sentencing court to

> (a) Except as provided in subdivision (b), count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. Do not count a prior conviction used to enhance the sentencing offense to a felony.

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[2] In rejecting defendant's argument, we do not consider the affidavit allegedly detailing trial counsel's illness that was attached to defendant's Standard 4 Brief because the affidavit was neither notarized nor a part of the record. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236-237; 713 NW2d 269 (2005); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

> (b) Count all prior misdemeanor convictions and prior misdemeanor juvenile adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. Do not count a prior conviction used to enhance the sentencing offense to a felony.

In this case, defendant's Presentence Investigation Report (PSIR), reveals a total of 21 misdemeanor convictions. Of those, defendant has four misdemeanor convictions for operating a motor vehicle while intoxicated, MCL 257.625(1), each of which can be scored under PRV 5. See MCL 777.55(2)(b). Additionally, defendant has two domestic assault misdemeanors that can be considered crimes against a person. In addition, defendant's PSIR indicates a conviction for third-degree retail fraud, MCL 750.356d(4); this is a misdemeanor that can be scored under PRV 5. See *People v Endres*, 269 Mich App 414, 420; 711 NW2d 398 (2006). In light of these seven misdemeanor convictions, the trial court did not err when it scored 20 points under PRV 5. See MCL 777.55(1).

Defendant's challenges to the scoring of OV 4 at ten points for serious psychological injury to the victim also fails. Under OV 4, the victim does not need to seek treatment in order to justify the trial court's scoring decision. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). Indeed, an expression of fear by the victim is sufficient to support the trial court's scoring under OV 4. *Id.* Here, the trial court did not err by scoring ten points under OV 4 because a preponderance of the evidence on the record supports the score. The victim was afraid during the incident, and she had trouble sleeping after the incident. See *id.*

Next, we reject defendant's challenge to the scoring of OV 10. The trial court scored five points under OV 10 because it found that the victim was a vulnerable victim. Even if we assumed without deciding that the trial court erred, defendant is not entitled to resentencing because the erroneous scoring of five points under OV 10 does not affect defendant's recommended minimum sentence range under the legislative guidelines. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required."). Indeed, with five points being scored for OV 10, defendant's OV score is 15, placing him in Offense Variable Level II under MCL 777.66 for the Class E offense of third-degree home invasion. Without five points being scored for OV 10, defendant's OV score is 10, which would still place defendant in Offense Variable Level II under MCL 777.66. Thus, even assuming that the trial court erred in scoring OV 10, defendant is not entitled to relief.

The trial court did err when it scored PRV 2 and PRV 4, but defendant is not entitled to resentencing because these errors do not affect his recommended minimum sentence range. *Francisco*, 474 Mich at 89 n 8. PRV 2 instructs the trial court to score a defendant's "prior low severity felony conviction[s]," meaning a conviction for "[a] crime listed in offense class E, F, G, or H." MCL 777.52(2)(a). Here, the trial court scored PRV 2 at 30 points, finding that defendant committed four or more prior low severity felonies. See MCL 777.52(1)(a). This scoring was clearly erroneous where the record reveals that defendant only had three prior low severity felony convictions. The PSIR erroneously classified defendant's prior felony conviction for breaking and entering a building with the intent to commit a felony or larceny, MCL 750.110,

as a Class E offense and, thus, a low severity offense under PRV 2. However, breaking and entering a building with the intent to commit a larceny or felony is a Class D offense, MCL 777.16f, and should be scored as a prior high severity felony under PRV 1, rather than as a prior low severity felony under PRV 2. Accordingly, the trial court should have only scored 20 points under PRV 2. See MCL 777.52(1)(b).

The trial court also erred when it scored PRV 4. PRV 4 directs the trial court to score points for a defendant's prior low severity juvenile adjudications. MCL 777.54(1). Here, the trial court scored two points under PRV 4, finding that defendant had one prior low severity juvenile adjudication. See MCL 777.54(1)(e). In pertinent part, a prior low severity juvenile adjudication is:

> a juvenile adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class E, F, G, or H. [MCL 777.54(2).]

Defendant's sentencing information report (SIR), indicates only one juvenile adjudication, soliciting, which is a misdemeanor for a first offense, see MCL 750.448 and MCL 750.451(1), and thus not a crime listed in offense class E, F, G, or H. Thus, the trial court erred by scoring two points under PRV 4.

Despite the trial court's scoring errors, defendant is not entitled to resentencing. Defendant's PRV score was 87, placing defendant in Prior Record Variable Level F, and his OV score, as noted above, placed defendant in Offense Variable Level II. This combination produces a recommended minimum sentence range of 12 to 24 months' imprisonment. MCL 777.66. Because of defendant's status as a fourth habitual offender, the upper limit of his recommended minimum guidelines range may be increased by 100 percent, or, in this case, to 48 months' imprisonment. See MCL 777.21(3)(c). This recommended minimum sentence range does not change when the aforementioned erroneously scored PRV's are corrected and defendant's PRV score decreases from 87 to 75, because a PRV score of 75 or more places a defendant in Prior Record Variable Level F. See MCL 777.66. Accordingly, defendant is not entitled to resentencing. *Francisco*, 474 Mich at 89 n 8.[3]

Defendant also raises issues in his Standard 4 brief related to the admission at trial of a CD recording of telephone calls he made to his mother from jail. Defendant waived these issues by withdrawing an objection to the CD on grounds other than those now raised and then agreeing

[3] With regard to sentencing, defendant argues that he was denied his right to be present at the post-conviction hearing at which his motion for resentencing was heard. However, defendant does not have the right to be present at a hearing on a motion for resentencing where, as here, he was not actually resentenced. *People v Mouat*, 194 Mich App 482, 487; 487 NW2d 494 (1992); *People v Strunk*, 172 Mich App 208, 211; 431 NW2d 223 (1988).

that the CD was admissible. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Moreover, we have reviewed the arguments and found them to lack merit.

Additionally, concerning the CD, defendant appears to challenge the accuracy of a transcript submitted to this Court as part of the record. This challenge is also waived because defendant stipulated to the accuracy of the CD pursuant to MCR 7.210(A)(4). *People v Eisen*, 296 Mich App 326, 328-329; 820 NW2d 229 (2012) ("A stipulation constitutes a waiver of any alleged error, so there is no error for us to review.").[4]

Next, defendant raises several meritless issues related to the jury instructions. He first argues that the trial court should not have instructed the jury on indecent exposure because he was never charged with the offense. Jury instructions, however, "must include all elements of the charged offenses." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Here, it was proper for the trial court to instruct the jury on indecent exposure because it was an element of the charged offense of third-degree home invasion. See *id.* The jury was also properly given an instruction on indecent exposure because indecent exposure was an underlying offense to the home invasion offense.

Additionally, with regard to jury instructions, defendant argues that the trial court should not have accepted the prosecution's requested jury instructions on indecent exposure because he contends that the prosecution's request was untimely. In a September 15, 2010 scheduling order, the trial court ordered the parties to submit their requested jury instructions "[a]t least fourteen (14) days before [the] jury trial . . . ." The alternate dates set for trial were November 10, 2010, or January 5, 2011. The prosecution filed its requested jury instructions, including its request for the instruction on indecent exposure, on October 27, 2010; this filing was timely under the trial court's scheduling order.

Next, defendant argues that his trial counsel was ineffective for failing to object to the errors he alleged in his Standard 4 Brief. However, counsel is not ineffective for failing to advance a meritless argument. *Ericksen*, 288 Mich App at 201. Further, although defendant's trial counsel should have objected to the erroneous scoring of PRVs 2 and 4, defendant is not entitled to relief on his ineffective assistance of counsel claim because the scoring errors did not prejudice defendant. See *Pickens*, 446 Mich at 309.

Defendant also argues that his trial counsel was ineffective because he was unprepared for trial. In making this argument, defendant cites trial counsel's alleged illness. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d

[4] Defendant also argues that the arrest warrant in this case was invalid. He abandoned this argument by failing to develop it. *Kelly*, 231 Mich App at 640-641. Moreover, we have reviewed the record and concluded that there are no errors with regard to the arrest warrant.

80 (1990). Here, defendant's argument fails because defendant cannot demonstrate that trial counsel's alleged lack of preparation affected his performance at trial.[5]

Finally, defendant argues that the cumulative effect of each of the alleged errors cited in his Standard 4 Brief denied him his right to a fair trial. Because defendant failed to identify any errors that occurred at trial, his assertion is meritless. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999) (holding that where no errors occur, "a cumulative effect of errors is incapable of being found").

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[5] Contrary to defendant's argument, the prosecutor did not commit misconduct nor deny him his right to a fair trial. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant abandoned this argument by failing to cite any instances of alleged misconduct. *Kelly*, 231 Mich App at 640-641. Moreover, our review of the record did not reveal that defendant was denied his right to a fair trial.