STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2005
v	Nos. 252872; 253861 Kent Circuit Court
DAVID RONALD ECKMYRE, Defendant-Appellant.	LC No. 03-002380-FH

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

A jury convicted defendant David Ronald Eckmyre of second-degree criminal sexual conduct[1] perpetuated upon defendant's then fourteen-year-old stepdaughter. The trial court sentenced defendant to five years probation, the first year of which was to be served in jail. Briefly after defendant's release from jail, defendant violated the terms of his probation by engaging in assaultive behavior and the trial court therefore revoked defendant's probation[2] and sentenced him to a term of two to fifteen years in prison. Defendant appeals his conviction and sentence, and we affirm.

I. JURY INSTRUCTIONS

On appeal, defendant contends that the trial court's failure to strictly adhere to the standard criminal jury instructions deprived him of his right to a fair trial. However, because defense counsel stated that he had no objection, and was in fact "satisfied" with the jury instructions, defendant waived appellate review regarding jury instructions. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002); see also *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (a party who waives a known right cannot seek appellate review). And, in a related claim, defendant also says that his trial counsel was ineffective in failing to object to the instructions as given. Because the jury instructions as a whole fairly presented the issues to the jury and sufficiently protected the rights of defendant, *People v Aldrich*, 246 Mich App 101;

[1] MCL 750.520c(1)(b).

[2] On appeal, defendant challenges both the revocation of his probation and the trial court's sentence imposed after revocation.

631 NW2d 67 (2001), defendant cannot demonstrate the prejudice necessary to establish that his trial counsel was ineffective for failing to object to the jury instruction. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); see also *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997) (defense counsel is not required to raise a meritless objection). Accordingly, we reject this argument.

II. EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

Defendant asserts that the trial court abused its discretion when, pursuant to MRE 404(b), it admitted evidence of several digital images retrieved from diskettes found among defendant's possessions, as well as testimony from the victim's mother that she saw defendant standing outside the victim's bedroom, with his pants down, masturbating while the victim slept. Defendant asserts that the challenged evidence was not admissible for any proper purpose under MRE 404(b), and was both irrelevant and substantially more prejudicial than probative. Though the prosecution gave notice of its intent to seek the admission of this evidence pursuant to MRE 404(b), and the trial court considered the evidence under MRE 404(b), we conclude that the parties and the trial court misapprehend the nature of this evidence, and thus mischaracterized this as "404(b)" evidence.

As the Michigan Supreme Court made clear in *People v Vandervliet*, 444 Mich 52, 64; 508 NW2d 114 (1993) modified 445 Mich 1205 (1994), "if the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated[.]":

> "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence." [*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Evidence of related events "'is admissible when [the acts are] so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Id.* Here, the images from the diskettes depicted a number of "young girls" in pornographic or otherwise provocative poses, each of which had been entitled with the name of either the victim, her younger sister, or the teenage daughter of defendant's former girlfriend, followed by a sexually explicit term or phrase. Here, the challenged evidence did not concern independent, unrelated acts or matters concerning defendant's character. Instead, this highly probative evidence simply showed defendant's perverse sexual interest in the victim that he ultimately sexually molested. This evidence is clearly relevant and does not implicate "other bad acts" or "propensity" evidence: instead, the challenged evidence is in the nature of evidence that is preparatory to the charged crime. Therefore, this is evidence that should not be analyzed under MRE 404(b), but instead should be analyzed under our court rules regarding relevancy, MRE 401 and MRE 403.

Accordingly, though under a different rationale, we hold that the trial court properly admitted this evidence.

III. PROSECUTORIAL MISCONDUCT

Defendant also argues that he was denied a fair trial because of prosecutorial misconduct during opening and closing arguments. Having failed to raise any objection below, defendant failed to preserve this issue for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We review claims of prosecutorial misconduct by examining the challenged remarks in context, to determine if the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). And, if a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). And, to avoid forfeiture of the issue, defendant must demonstrate that the misconduct constitutes plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Carines*, *supra* at 763-764; *Schutte*, *supra* at 720. Here, a careful review of the record shows that the prosecutor's comments were an appropriate response to defendant's theories, not misconduct. Therefore, we reject defendant's claim of prosecutorial misconduct.

IV. REVOCATION OF PROBATION

Defendant also argues, disingenuously, that a condition of his probation was improperly imposed because it was ambiguous and bore no relationship to his rehabilitation. See *People v Miller*, 182 Mich App 711, 713; 452 NW2d 890 (1990). As noted above, the trial court revoked defendant's probation for a violation of this challenged condition, and because of the assaultive nature of the crime, the condition of probation that required defendant to refrain from engaging in assaultive conduct was rationally related to the offense and the offender. *Id*. Moreover, the express condition that defendant "not engage in any assaultive, abusive, threatening, or intimidating behavior," is simply unambiguous and should therefore be clear to a reasonable person.

V. SENTENCING GUIDELINES

Defendant says that he is entitled to resentencing in this matter on a number of grounds. Defendant cites *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to support his contention that because there was no evidence presented at trial to show that the victim was "vulnerable" or that defendant "exploited" a vulnerable victim, the trial court denied defendant his Sixth Amendment right to trial by jury when it scored Offense Variable (OV) 10 at ten points. See MCL 777.40. However, our Supreme Court has stated that *Blakely*, which reviewed the state of Washington's determinate sentencing scheme, does not apply to Michigan's indeterminate sentencing system. See *People v Claypool*, 470 Mich 715, 730, n 14;

684 NW2d 278 (2004).[3] Accordingly, defendant is not entitled to be resentenced on the basis that his sentence violates the Sixth Amendment of the United States Constitution.

Defendant also says that the trial court erred by exceeding the minimum range, without articulating substantial and compelling reasons for the upward departure. When a probation order is revoked, the trial court may sentence the defendant to the same penalty as it might have imposed had the order of probation never been entered. MCL 771.4. Here, the guidelines range is zero to seventeen months, and the minimum sentence of two years exceeded this range. Clearly, a trial judge may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and articulates those reasons on the record. *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Yet, an upward departure from the prescribed range may not be based on factors already considered in determining the guidelines range unless the court finds, based on facts in the record, that the factors were given inadequate weight. MCL 769.34(3); *People v Hendrick*, 261 Mich App 673; 683 NW2d 218 (2000). Nonetheless, "when resentencing a defendant after revoking his probation, the trial court may consider the seriousness and severity of the circumstances surrounding the probation violation in determining whether there is a substantial and compelling reason to depart from the guidelines." *Hendrick*, *supra* at 683. Contrary to defendant's assertion, the trial court here expressly took such factors into consideration and determined that defendant's "reckless" conduct[4] while on probation

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[3] We recognize that since our Supreme Court's decision in *Claypool*, the United States Supreme Court has extended the holding of *Blakely* to the Federal Sentencing Guidelines promulgated pursuant to the Sentencing Reform Act of 1984, 18 USC 3551, *et seq*. See *United States v Booker*, ___ US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005) (holding that the federal sentencing guidelines violate the Sixth Amendment right to a jury trial because they require judges to find facts that increase a defendant's sentence beyond what could be imposed based solely on the jury's verdict). However, like the statutory scheme at issue in *Blakely*, the Sentencing Reform Act of 1984 establishes a determinate sentencing scheme. Consequently, *Booker* has no effect on our Supreme Court's reasoning in *Claypool, supra*. In any event, because the sentence at issue here constitutes a departure from the guidelines range based on findings by the trial court at a probation violation hearing, the Sixth Amendment right to trial by jury is not implicated. See MCL 771.4; see also MCR 6.445(E).

[4] On November 20, 2003, the day of defendant's release from jail, his ex-wife, who is also the victim's mother, picked defendant up from jail and allowed him to stay in her home. The next day, defendant's ex-wife drove defendant to a friend's house to borrow money to return to New Jersey (where defendant had been living when arrested for the instant crime) to retrieve his van. Defendant's friend was not able to loan defendant enough money, so defendant's ex-wife offered to drive defendant to the home of one of defendant's ex-girlfriends, who had apparently offered to loan defendant the money. Defendant did not want to borrow money from this person, so his ex-wife offered defendant three choices: stay at his friend's house, borrow the money from the ex-girlfriend, or be dropped off at the police station. Defendant did not choose any of these options and instead asked to be taken "home" to his ex-wife's house. However, she did not want defendant there because her daughters were supposed to spend the weekend at her house, so she started driving along US-131, a busy highway, toward defendant's ex-girlfriend's house. The two began arguing, and defendant demanded to be taken "home." After defendant's ex-wife drove past the exit for her home, defendant grabbed the steering wheel, and when the car reached the next exit, he turned the wheel, causing the car to move suddenly across three busy lanes of

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constituted "substantial and compelling" reasons warranting a departure from the guidelines range.

Defendant also contends that he is entitled to resentencing because the court neglected to obtain an updated presentence report before resentencing him. Defendant failed to raise this issue below and thus it has not been preserved for appeal. Therefore, review is limited to plain error affecting defendant's substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000). A presentence report is required upon conviction of a felony where an indeterminate sentence is to be imposed. MCL 771.14(1). The purpose of requiring a presentence report in such circumstances is to guide the sentencing court to a more informed and just sentence. See *People v Fisher*, 442 Mich 560, 577; 503 NW2d 50 (1993). A defendant cannot waive preparation of the report. *People v Hemphill*, 439 Mich 576, 581; 487 NW2d 152 (1992). However, when a defendant is resentenced, a completely new report is not necessary; a supplemental report updating the original report is sufficient. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). Moreover, the defendant may waive preparation of an updated report if the original presentence report is not "manifestly outdated." *Hemphill*, *supra* at 582. Defendant asserts, and the prosecutor does not dispute, that defendant was sentenced following revocation of his probation without an updated presentence report. Defendant has thus shown plain error. See MCR 6.445(G). However, because defendant has failed to show that the original presentence report was "manifestly outdated," we hold that defendant has not shown that his substantial rights were adversely affected.[5]

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper

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traffic and onto the exit ramp, where defendant reached his leg over and placed his foot on the brake. Defendant's ex-wife drove to the next intersection and demanded that defendant get out of the car. Defendant did not get out of the car, and his ex-wife began honking her horn in the hope of inducing someone to help her. When defendant grabbed her hands to prevent her from using the horn, she resorted to using her forehead. Eventually defendant got out of the car, and his ex-wife drove to a pay phone and called the police.

[5] Indeed, because defendant was incarcerated for violating his probation only days after his release from jail, it is doubtful that such a showing could be made.