STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v	No. 273576 Kalamazoo Circuit Court
EMMETT ALONZO JONES, Defendant-Appellant.	LC No. 06-001308-FH

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced as a fourth habitual offender, MCL 769.12, to 142 months to 40 years' imprisonment. He appeals as of right. We affirm defendant's conviction and prison sentence, but vacate the trial court's order requiring defendant to reimburse the county for attorney fees and remand for reconsideration of that issue in light of defendant's financial ability to pay and for correction of the presentence report.

I. Background

Defendant's conviction arises from the robbery of a Wal-Mart store in Kalamazoo during the early morning hours of May 14, 2006. The evidence at trial indicated that defendant and another man tried to steal two LCD televisions and that defendant assaulted two Wal-Mart employees who intervened. Defendant and his accomplice escaped in a van driven by a third person. Their vehicle was identified and stopped shortly thereafter, with one of the stolen televisions inside. All three occupants were arrested.

II. Pretrial Motions

Defendant challenges the trial court's denial of certain pretrial motions. Defendant argues, through appellate counsel, that the trial court erred in denying his motion to suppress the identification testimony of the two Wal-Mart employees who intervened in the offense. Defendant also argues, in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, that the trial court erred in denying his motion to quash the information.

This Court reviews a trial court's decision on a motion to quash for an abuse of discretion. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). An abuse of discretion occurs when the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court will not reverse a trial court's decision to admit identification evidence unless it was clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

A. Motion to Quash

Defendant argues that his case should have been dismissed because the preliminary examination was not timely held. MCL 766.4 provides that a defendant is entitled to have a preliminary examination within 14 days of his arraignment. Although defendant was initially arrested on May 14, 2006, the case was dismissed without prejudice on May 25, 2006. A warrant was reissued the same day, without defendant having been released from custody. Defendant was arraigned on the second warrant on May 26, 2006, and his preliminary examination was held on June 7, 2006. To the extent that defendant argues that he had to be released and rebooked in order to have been effectively rearrested, he cites no authority for this position. Regardless, it is undisputed that the preliminary examination was held within 14 days of defendant's May 26, 2006, arraignment. Therefore, the trial court did not abuse its discretion in denying defendant's motion to quash.[1]

B. Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress the identification testimony of the two Wal-Mart employees. He asserts that these witnesses were subjected to an impermissible identification procedure when they viewed him just before the preliminary examination. We disagree.

To establish that an identification procedure denied a defendant due process, the defendant must show that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). We conclude that the circumstances under which the witnesses viewed defendant before the preliminary examination did not constitute an identification procedure and, therefore, the trial court did not clearly err in denying defendant's motion to suppress.

While waiting in a foyer outside the courtroom before the preliminary examination, both witnesses briefly observed defendant as he was being escorted from the jail to the courtroom. However, no one told them that defendant would be passing by or asked them if he was their assailant. Further, there was no evidence that anyone from either the prosecutor's office or the police arranged for defendant to pass by the witnesses. On the contrary, the evidence indicated

[1] We also note that even if the preliminary examination was untimely, the error was harmless. *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990)(applying harmless-error rule to miscues relative to preliminary examinations).

that witnesses usually did not see a defendant led into the courtroom from the jail because defendants usually used a doorway at the opposite end of a U-shaped hallway. Because there was no evidence that the situation was orchestrated by the prosecutor or the police for identification purposes, the trial court did not err in denying defendant's motion to suppress. See *Libbett*, *supra* at 361.

C. Hearing Judge

Defendant also argues that Chief Judge Johnson was without authority to make dispositive rulings on his motion to quash and motion to suppress because he was not the assigned judge and there had been no reassignment. Ordinarily, absent a proper reassignment, only the assigned judge may make dispositive rulings regarding a case. *Schell v Baker Furniture Co*, 461 Mich 502, 515; 607 NW2d 358 (2000). However, MCR 8.111(C) expressly provides that "[t]he chief judge may also designate a judge to act temporarily until a case is reassigned or during a temporary absence of a judge to whom a case has been assigned." Thus, the court rule explicitly allows a chief judge to act when the assigned judge is temporarily absent. In this case, the assigned judge was temporarily absent because of illness. Therefore, the chief judge was authorized to act in his absence.

III. Discovery

Defendant argues that the prosecutor committed flagrant discovery violations by failing to provide him with all requested police reports, witness statements, witness contact information, and LEIN information or criminal histories of the witnesses well in advance of trial. He argues that the trial court erred in denying his motion for a mistrial based on the violations. We disagree.

This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). A defendant has no constitutional right to discovery in criminal cases. *People v Elston*, 462 Mich 751; 758; 614 NW2d 595 (2000). All discoverable materials, except exculpatory material, must be requested. MCR 6.201; *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

In this case, defendant never requested the witnesses' criminal histories under MCR 6.201(A)(5) and the material was not exculpatory. Moreover, our Supreme Court has indicated that a trial court cannot order a prosecutor to disclose the LEIN records of lay witnesses that are not in his possession. *People v Elkhoja*, 467 Mich 916; 658 NW2d 153 (2003). Thus, there was no discovery violation regarding the failure to provide LEIN information. Defendant does not identify what witness statements were not timely provided and, therefore, has abandoned review of this claim. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Regarding the redacted witness contact information, MCR 6.201(A)(1) provides that, upon request, a prosecutor must provide the defendant with

> the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial.

Here, defendant never requested the addresses of the prosecution's witnesses. He requested the police reports from which the addresses and phone numbers were redacted, but never objected to receiving the redacted reports. Because the witness contact information was not itself exculpatory, there was no discovery violation regarding the failure to provide the witness contact information absent a request.

Contrary to what defendant argues, his right of confrontation was not infringed by the prosecutor's failure to disclose the witness contact information. A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The right requires that the witness testify under oath, at trial, subject to cross-examination, and within the view of the jury to permit an evaluation of demeanor. *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001). Defendant fails to identify any particular witness he believes he was denied the right to confront, except for Sergeant Vanderwiere. However, because Sergeant Vanderwiere testified, there was no Confrontation Clause violation. Moreover, the names in the police reports were not redacted.

Regarding the police reports, a prosecutor must disclose to a defendant, upon request, any police report concerning the case. MCR 6.201(B)(2). A prosecutor also has a continuing duty to disclose additional information without further request. MCR 6.201(H). Defendant was informed as early as July 7, 2006, when the trial court granted his request to represent himself, that the prosecution's office had an open-file policy and that he could photocopy any documents contained in the file. Defendant does not indicate which reports he believes he did not timely receive, except for Sergeant Vanderwiere's report. The record shows that as the prosecutor received supplemental reports, he promptly tendered them to defendant. With regard to Sergeant Vanderwiere's report, the prosecutor stated that he was unaware of the report before trial and received it for the first time on the morning of the fourth day of trial. He immediately gave a copy to defendant. Defendant did not present any evidence contradicting the prosecutor's claim. Therefore, defendant failed to establish a discovery violation.

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on the alleged discovery violations.

IV. Self-Representation

Defendant argues that he did not voluntarily waive his right to counsel and, therefore, the trial court erred in allowing him to represent himself at trial. We disagree.

A criminal defendant has a constitutional right to represent himself. US Const, Am VI; Const 1963, art 1, § 13. When presented with a defendant's request for self-representation,

> a trial court must make three findings before granting a defendant's waiver request. First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business. [*People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004).]

The trial court must also comply with MCR 6.005(D)(1). When assessing the validity of a defendant's waiver of the right to counsel, this Court reviews the record de novo to determine whether the trial court's factual findings regarding the waiver were clearly erroneous. *Williams, supra* at 642.

Defendant does not contend that his waiver was not made knowingly or intelligently, or in compliance with MCR 6.005(D)(1). Rather, his argument focuses on whether he unequivocally and voluntarily waived his right to counsel. Defendant asserts that his request to represent himself was essentially coerced because he was indigent and had no faith in the Kalamazoo Public Defender's Office. He maintains that he wanted an attorney, but not one from the Kalamazoo Public Defender's Office because of his prior experiences with that office.

When defense counsel moved to withdraw at defendant's circuit court arraignment, defendant indicated that he did not want to represent himself. More than two weeks later, however, at the hearing on defense counsel's motion to withdraw, defendant indicated that he wanted to represent himself. Defendant had ample opportunity to consider his choices and make a decision, and he stated numerous times during the hearing that he wanted to represent himself. Even after the trial court explained that although defendant was not entitled to an attorney of his choice, he was entitled to adequate representation, defendant repeated his request to represent himself, stating, "Yes, I voluntarily give up my right to a court-appointed counsel. And I choose to represent myself." The trial court did not clearly err in finding that defendant's request for self-representation was unequivocal. *People v Dennany*, 445 Mich 412, 443-444; 519 NW2d 128 (1994).[2]

Defendant's argument regarding coercion relates to the voluntariness of his waiver. In *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976), our Supreme Court adopted the waiver of counsel requirements and reasoning set forth in *Faretta v California*, 422 US 806, 835; 95 S Ct 2525; 45 L Ed 2d 562 (1975).[3] *Faretta* involved a situation similar to this one. The defendant did not want to be represented by a public defender because he believed they were overloaded with work. *Id.* at 807. The *Faretta* Court held that because the record showed that the defendant was literate, competent, voluntarily exercised his free will, and unequivocally requested to represent himself, the trial court erred in refusing to honor the defendant's request for self-representation. *Id*. at 835-836.

Similarly, in *People v Longuemire*, 77 Mich App 17, 19-21; 257 NW2d 273 (1977), the defendant had appointed counsel. He did not want that attorney, but the trial court refused to

[2] At the motion hearing, the trial court was extremely exhaustive in questioning and informing defendant regarding self-representation. Defendant claimed that he had twice before represented himself in criminal cases, once successfully, and that he had spent many years as a clerk in a prison law library educating himself and assisting prisoners with their legal issues. On the first day of trial, the court again went over the matter of self-representation with defendant, and defendant confirmed that he wished to represent himself.

[3] Reliance on *Faretta* has continued throughout the years. See, e.g., *People v Russell*, 471 Mich 182; 684 NW2d 745 (2004); *Dennany, supra* at 412.

appoint substitute counsel. Therefore, the defendant elected to represent himself, but stated that he felt forced to make his decision based on the trial court's refusal to appoint new counsel. This Court held that the defendant validly waived his right to counsel.

> We find that the requirements set out in *People v Anderson, supra*, were met here. (1) While the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself rather than accept the public defender was unequivocal and unconditional. . . . (2) The trial court made defendant aware and the record shows that the defendant was acutely aware of the dangers and disabilities of proceeding as his own attorney. His choice was an undesired one in the sense that he would have preferred not to proceed with the trial at all, but faced with the alternatives available to him his decision to proceed as his own attorney was a voluntary choice made with his eyes wide open. The record does not contradict the trial court's determination that the defendant asserted his right of self-representation knowingly, intelligently and voluntarily. This finding is also supported by defendant's history of personal involvement with the criminal justice system. *Johnson v Zerbst*, 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938). (3) It does not appear that the trial court was unduly inconvenienced, burdened or disrupted by defendant's pro se representation. [*Id*. at 22-23.]

Here, defendant's past negative experiences with the Kalamazoo Public Defender's Office did not make his decision to represent himself any less voluntary. Defendant was indigent. An indigent defendant receiving counsel at public expense is not entitled to an attorney of his choice. *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003). The trial court informed defendant that he was entitled to competent counsel, but not one of his choice. The trial court did not foreclose substitute counsel if appointed counsel was not adequate. In the face of this advice, defendant chose to represent himself. While he may have felt that he had good reason to be concerned, it was a choice he made. Defendant explained that he did not want to delay the trial any longer and believed that representing himself would be best "instead of having to go through any other attorney about what I want to do." On this record, the trial court did not clearly err in finding that defendant voluntarily waived his right to counsel.

V. Right to Compulsory Process

In his Standard 4 brief, defendant argues that the prosecutor violated his duty to produce at trial or disclose the whereabouts of a witness, Derrick Williams. Because defendant did not object to Williams's absence at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

There is no support in the record for defendant's claim that the prosecutor was aware that Williams was being held in jail. Further, absent a request, the prosecutor was not obligated to provide assistance in locating Williams. MCL 767.40a(5) provides:

> The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process

> upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs.

Defendant never made a written request for assistance. Thus, the prosecutor did not violate his statutory duty.

Even if the prosecutor's statement, "We'll see what we can do," can be viewed as an offer to provide assistance, defendant has failed to establish that his substantial rights were affected. Williams was also charged in this offense. Defendant's bald assertion that Williams could have provided exculpatory testimony is not supported by any affidavit or other offer of proof, nor has defendant presented any evidence that Williams was willing to testify and waive his Fifth Amendment right against self-incrimination. Accordingly, we reject this claim of error.

VI. Right of Access to the Courts

Defendant also argues in his Standard 4 brief that the trial court abused its discretion by denying defendant's motion for a mistrial based on the court's failure to provide defendant with a copy of the standard criminal jury instructions manual, which defendant argues infringed on his constitutional right of access to the courts. We disagree.

A defendant's constitutional right of access to the courts is satisfied by an offer of assistance of counsel. Thus, the trial court was under no obligation to provide defendant with a copy of the standard criminal jury instructions. *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1996) (state satisfied its constitutional obligation by offering the defendant assistance of counsel, which he declined, and once the state satisfied the obligation, it was not required to provide the defendant with law library access to further his propria persona defense). Defendant acknowledges this, but asserts that the trial court promised to provide a copy of the manual and, therefore, was obligated to do so.

It appears from the record that the trial court misunderstood defendant's request, believing that defendant had requested a copy of the prosecutor's proposed instructions, which the trial court provided as promised. To the extent there was a misunderstanding concerning the nature of the request, defendant is not entitled to relief. Defendant chose to represent himself, waiving the assistance of counsel. The trial court allowed him an assistant to aide in his defense. Even after the trial court determined at the end of the third day of trial which jury instructions would be given, defendant still had the means to independently obtain the manual and review it before the jury was instructed the following day. Because defendant was not "deprived of all avenues of meaningful access to the court," *People v Mack*, 190 Mich App 7, 24; 475 NW2d 830 (1991), his due process rights were not violated. The trial court did not abuse its discretion in denying defendant's request for a mistrial on this basis.

VII. Prosecutorial Misconduct

Defendant further argues in his Standard 4 brief that improper remarks by the prosecutor denied him a fair trial. We disagree.

We review de novo claims of prosecutorial misconduct. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). "Claims of prosecutorial misconduct are reviewed on a case-by-case basis. A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005) (citations omitted).

During rebuttal closing argument, the prosecutor stated:

> Now he also raised some issues about, well, what about, you know, you didn't hear from all these other people, you didn't hear from the other two co-defendants. Well, the only thing that you can really—well, the other two co-defendants have nothing to do with Mr. Jones's trial, however,--and the burden of proof is always on the People to prove beyond a reasonable doubt that Mr. Jones did this. And we have done that with the evidence that we have shown.
>
> However, we are not the only people that have the power of subpoena. We are not the only people who can bring people into this courtroom to testify. You've seen that. He produced two witnesses. He listed Johnny Little, one of the co-defendants as a witness.

The trial court instructed the prosecutor not to comment on Little.[4] The prosecutor added, "He had the right to bring witnesses in if he chose to do that." Defendant argues that the prosecutor's comments were improper because they implied that Little's and Williams's testimony would have been unfavorable to him. Viewed in context, however, the prosecutor was merely responding to defendant's earlier argument that the absence of Williams and Little presented a "problem." Further, the prosecutor was not commenting on whether any testimony by these witnesses would be favorable or unfavorable, but only explaining that the absence of these witnesses did not affect the prosecution's burden of proof. Under the circumstances, the prosecutor's remarks were not improper.[5]

VIII. Jury Instructions

Defendant also argues in his Standard 4 brief that the trial court's jury instructions on aiding and abetting were inaccurate. We disagree.

This Court reviews de novo claims of instructional error, but it reviews a trial court's decision regarding the applicability of an instruction for an abuse of discretion. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions

[4] Defendant subpoenaed Little to testify, but he refused, invoking his Fifth Amendment right against self-incrimination.

[5] We note that the prosecutor was careful to preface his remarks by properly emphasizing that the burden of proof is always on the state to prove its case beyond a reasonable doubt.

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).

"The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law." *Id*. Defendant was charged with unarmed robbery as either a principal or an aider and abettor.

> A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. [*People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999) (citations omitted).]

Under an aiding and abetting theory, a defendant is equally liable for the offense he intended to commit, "as well as the natural and probable consequences of that offense." *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006). "Under the natural and probable consequences theory, '[t]here can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it.'" *Id*., quoting *People v Knapp*, 26 Mich 112, 114 (1872).

In this case, immediately after instructing the jury on the elements of robbery, the trial court stated:

> This instruction is on aiding and abetting. In this case the defendant is charged with committing a robbery or intentionally assisting someone else in committing it. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.
>
> To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the alleged crime was actually committed, either by the defendant or by someone else. It does not matter whether anyone else has been convicted of the crime.
>
> Second, that before or during the crime the defendant did something to assist in the commission of the crime.
>
> Third, that the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.

The trial court's initial reference to someone assisting in "a" crime was made in the context of explaining the general concept of aiding and abetting. The trial court's instructions regarding the elements of aiding and abetting, including defendant's intent, clearly referred to the

"alleged" offense, in this case robbery. Viewed as a whole, the trial court's jury instructions properly conveyed the applicable law and sufficiently protected defendant's rights.

To the extent that defendant argues that an aiding and abetting instruction was not appropriate in this case, we disagree. An instruction on aiding and abetting is appropriate when there is evidence that more than one person was involved in committing the crime and the defendant's role in the crime might have been less than direct participation. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). The evidence in this case indicated that at least two persons were involved in the offense, a man pushing a shopping cart with the stolen televisions and the assailant. In light of this evidence, the trial court did not abuse its discretion by instructing the jury on aiding and abetting.

IX. Sentencing

A. Accuracy of the Presentence Investigation Report

Defendant objected at sentencing to a multitude of alleged inaccuracies in the criminal history section of his presentence investigation report (PSIR). He now argues that the trial court failed to adequately resolve his challenges, requiring resentencing.

This Court reviews a sentencing court's response to claims of inaccuracies in a PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A trial court has several options when addressing challenges to the accuracy of the PSIR.

> The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), overruled on other grounds *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information. *Newcomb, supra* at 427. Should the court choose the last option, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988). If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections. *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990). [*Spanke, supra* at 648-649.]

We disagree with defendant's argument that the trial court was required to hold an evidentiary hearing to resolve his challenges to item nos. 3-7, 10, 11, 15, and 16, in his criminal history section. Those challenges involved defendant's unsupported claims that the PSIR did not accurately describe some of the offenses of which defendant was convicted, and that some of the convictions were obtained without the benefit of counsel or a valid waiver of counsel.

Information in a PSIR is presumed to be accurate. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). "[I]t is incumbent on a defendant to first mount an effective challenge to invoke his right to a hearing on a contested fact at sentencing and, thus, the need for an evidentiary hearing with a finding by the trial court based upon the preponderance of

evidence." *Id*., citing *People v Ewing*, 435 Mich 443, 472; 458 NW2d 880 (1990), and *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987). Whether the "effective challenge" requirement "is satisfied with a flat denial of an adverse factual assertion, or whether an affirmative factual showing is required, will depend upon the nature of the disputed matter." *Callon, supra* at 334, quoting *Walker, supra* at 267-268.

Defendant presented no evidence below to support his assertions that the challenged convictions were either not accurately described or were invalid because they were obtained without the benefit of counsel. To obtain an evidentiary hearing to determine the validity of a counselless conviction, a defendant is required to either present prima facie proof that a previous conviction violated *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (such as a docket entry or transcript showing the absence of counsel) or evidence that he requested these records from the court imposing the disputed prior conviction, but that the court either refused to provide the records or failed to respond. *People v Carpentier*, 446 Mich 19, 32-35; 521 NW2d 195 (1994). Because defendant did not provide the necessary evidence, the trial court did not err in denying his request for an evidentiary hearing. Moreover, the trial court did not foreclose defendant from correcting the alleged inaccuracies. The court advised defendant that if he presented evidence supporting his claims, it would correct the PSIR and grant other sentencing relief as appropriate. Defendant did not do so, nor has he done so on appeal.

Defendant also argues that the trial court failed to resolve his challenge regarding item no. 9. Defendant's only complaint with item no. 9 was that the conviction arose from the same criminal transaction as the conviction listed in item no. 1 and, therefore, the two convictions should not be counted separately for sentencing enhancement purposes. However, the record discloses that defendant had ample felony convictions to establish his habitual offender status and he did not dispute his status as a fourth habitual offender. Moreover, defendant did not challenge the factual accuracy of the information listed for item nos. 1 and 9, and the PSIR accurately indicated that the convictions arose from the same offense date. Therefore, we find no error.

We agree with defendant, however, that the trial court erred when it failed to strike from the PSIR the charges for which a nolle prosequi was entered, which were listed as items nos. 8, 12, 14, 17-20, and 22. The trial court determined that this information was not relevant to its sentencing decision. When a court disregards information as irrelevant, it must strike the information from the PSIR. MCL 771.14(6); *Spanke, supra* at 649. Additionally, the prosecutor concedes that defendant is also entitled to have item no. 21 deleted from the PSIR because the trial court agreed to disregard the information. Accordingly, we remand for correction of the presentence report to delete the information in item nos. 8, 12, 14, and 17-22.

B. Proportionality and Constitutionality of Sentence

Defendant argues that the trial court failed to state with specificity how his sentence was calculated or explain why it is proportionate to the offense and offender. He also argues that the trial court erred by failing to order an assessment under MCR 6.425(A) and that a downward departure from the appropriate guidelines range was warranted on the basis of his strong family support and substance abuse issues. Additionally, he asserts that his sentence is disproportionate, amounted to cruel and unusual punishment, and was determined in violation of *Blakely v*

Washington, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We find no merit to these issues.

The trial court sentenced defendant within the appropriate guidelines range and it is clear from the trial court's remarks that it relied on the guidelines to determine defendant's sentence. The trial court's reliance on the guidelines when sentencing defendant within the guidelines range satisfied the articulation requirement. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

We reject defendant's argument that the PSIR failed to accurately reflect his rehabilitative potential because it did not reflect that he had a substance abuse problem that could be addressed with treatment or include an assessment prescribed by MCR 6.425(A)(5). At sentencing, defendant explicitly denied having a substance abuse problem and was successful in his attempt to correct the PSIR in this regard. Accordingly, defendant waived any claim of error on this basis.[6] *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Although defendant also argues that a lesser sentence would have been more appropriate because of his family support, his alleged reduced mental capacity at the time of the offense, and other alleged mitigating factors, this Court must affirm a sentence within the appropriate guidelines range unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Here, defendant has failed to establish either a scoring error or reliance on inaccurate information. Therefore, we must affirm his sentence.

We also find no merit to defendant's argument that his sentence amounts to cruel and unusual punishment. Defendant's sentence within the guidelines is presumptively proportionate, *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000), and a proportionate sentence is not cruel and unusual, *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Considering defendant's lengthy criminal history, he has not overcome the presumption of proportionality.

Finally, defendant's reliance on *Blakely*, *supra*, to argue that the trial court impermissibly engaged in judicial fact-finding at sentencing is misplaced. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006). Although defendant argues that *Drohan* was wrongly decided, this Court is bound to follow decisions of our Supreme Court. *People v Hall*, 249 Mich App 262, 271; 643 NW2d 253 (2002).

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[6] Moreover, contrary to what defendant asserts, the trial court was not required to order an assessment of defendant's rehabilitative potential under MCR 6.425(A)(5). This rule only states that a PSIR must include, if appropriate, a defendant's medical and substance abuse history and a current psychological or psychiatric report if indicated. The PSIR noted defendant's medical and substance abuse history and stated that defendant had not been diagnosed with any mental issues. Thus, it complied with MCR 6.425(A)(5).

C. Attorney Fees and Costs

Lastly, in his Standard 4 brief, defendant argues that the trial court erred in ordering him to pay $1,208 in court costs and attorney fees.[7]

A defendant may be required to reimburse the county for the cost of a court-appointed attorney, but the court must order a fee that bears a relationship to the defendant's current and foreseeable ability to pay. *People v Dunbar*, 264 Mich App 240, 251, 254-255; 690 NW2d 476 (2004). The record in this case is devoid of any indication that the trial court considered defendant's ability to pay before assessing attorney fees. Therefore, the prosecution concedes, and we agree, that this case must be remanded for reconsideration of attorney fees in light of defendant's foreseeable ability to pay. Accordingly, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for reconsideration of this issue. On remand, if the trial court determines that reimbursement is appropriate, it must state the amount and repayment terms in a separate order. *Id.* at 256.[8]

Defendant cites no authority for the proposition that the trial court also had to consider his ability to pay before imposing statutory costs,[9] and *Dunbar* indicates that a court need not consider a defendant's ability to pay when imposing fines and costs, which are part of the defendant's penalty. *Id*. at 255. Thus, we do not disturb the trial court's assessment of costs.

Affirmed in part and remanded for correction of defendant's presentence investigation report and reconsideration of the amount of attorney fees for which defendant should be required to reimburse the county in light of his ability to pay. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering

[7] Defendant was initially represented by appointed counsel in pretrial proceedings, including the preliminary examination.

[8] As noted in *Dunbar*, *supra* at 255 n 14, "[j]ust as an evidentiary hearing is not required at the trial level, one is not required on remand. The court may obtain updated financial information from the probation department."

[9] The authority cited by defendant, MCL 780.767 and *People v Grant*, 455 Mich 221; 565 NW2d 389 (1997), deal with restitution under the Crime Victim's Rights Act, which is not applicable here.