STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2017
v	No. 335040 Monroe Circuit Court
COREY LEE WEIMER, Defendant-Appellant.	LC No. 15-041785-FH

Before: SAWYER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted of domestic violence – third offense, MCL 750.81(2) and (4), and sentenced to one year in jail and five years' probation. While serving his one-year sentence in jail, defendant was charged with violating his probation by sending letters to his son's mother, Deanna Hensley. At a probation violation hearing, the trial court found by a preponderance of the evidence that defendant violated probation. The trial court sentenced defendant to 32 to 60 months' imprisonment. We affirm.

Defendant first argues that the trial court violated his Sixth Amendment right to confront the witnesses against him when it relied on reports and letters from the Department of Health and Human Services (DHHS) and the probation department to sentence defendant.[1] We disagree.

Because defendant did not object to the use of the reports and letters on confrontation grounds in the lower court, this issue is unpreserved. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011). Ordinarily, this Court reviews a constitutional issue involving the confrontation clause de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). However, unpreserved claims are reviewed for plain error affecting defendant's substantial rights. *Benton*, 294 Mich App at 202. Under the plain error standard, the defendant must demonstrate a "clear or obvious" error that affects his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A defendant's rights are affected when there is "prejudice, i.e., the error affected the outcome of the lower court's proceedings." *Id*. Even if a

[1] The letters and reports were summarized in defendant's presentence investigation report (PSIR). The actual letters and reports were also attached to the PSIR.

defendant satisfies this burden, this Court will reverse only if the plain error led to "the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763-764 (citation and quotation marks omitted).

"The Confrontation Clause provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .'" *People v Spangler*, 285 Mich App 136, 142; 774 NW2d 702 (2009), quoting US Const, Am VI. Therefore, "[t]he Confrontation Clause bars out-of-court statements that are testimonial in nature unless the declarant is unavailable to testify but the defendant had a prior opportunity to cross-examine the declarant." *Spangler*, 285 Mich App at 142, citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "This Court has recognized that the scope of a probation violation hearing is limited and that a probationer's rights at a probation violation hearing are not as broad as the rights afforded to a defendant in a criminal trial." *People v Breeding*, 284 Mich App 471, 480; 772 NW2d 810 (2009). "Probation violation hearings are summary and informal and are not subject to the rules of evidence or of pleading applicable in a criminal trial." *Id*. Moreover, "[t]he scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach." *Id*. Specifically, a defendant is not afforded a Sixth Amendment right to confrontation at a probation revocation proceeding. *Id*. at 482. "Rather, a due process standard applies in determining the admissibility of statements made by the out-of-court declarants at probation violation proceedings, regardless of whether the statements are testimonial or nontestimonial in nature." *Id*. (citations omitted).

Defendant first claims that he should have been afforded an opportunity to call and cross-examine the agents, i.e., the drafters of the reports and letters, at the probation violation hearing because the trial court considered those documents — by way of the presentence investigation report (PSIR) — to render defendant's sentence at the sentencing hearing. To the extent that defendant claims he had a constitutional right to confront the witnesses against him at the probation violation hearing, defendant's argument fails. This Court has clearly held that no such right exists because a probation violation hearing is not a criminal prosecution. See *Breeding*, 284 Mich App at 482. Therefore, defendant did not have a right to cross-examine the drafters of those reports and letters at his probation violation hearing. Nevertheless, pursuant to MCR 6.445(E)(1), probationers are afforded the following rights:

> *Conduct of the Hearing*. The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence. [See also *Breeding*, 284 Mich App at 483.]

Thus, "[f]ederal and state courts that have ruled that *Crawford* does not apply to probation or parole revocation hearings have nevertheless recognized that probationers or parolees in such proceedings must still be afforded a limited due process right to confrontation." *Id*. at 484 (citation omitted).

While defendant is afforded a limited right to confront the witnesses against him, this right could not have applied during the probation revocation proceeding. The DHHS and probation department reports, which were summarized in defendant's PSIR, were not actually used at the probation violation hearing. In fact, the hearing was held on December 3, 2015, but the reports were not drafted until March and May of 2016. Therefore, defendant could not have been denied, at the probation violation hearing, his due process right to confront the witnesses against him pursuant to MCR 6.445(E)(1).

The trial court, however, considered the reports to impose defendant's sentence. Therefore, the question turns on whether defendant had a right to confront the witnesses against him *at the sentencing hearing*. Again, the answer is no. This Court has held that "a sentencing hearing is not a criminal trial," and "the 'right to confront adverse witnesses and to prohibit the introduction of testimonial hearsay without cross-examination does not apply at sentencing.'" *People v Uphaus*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008) (citation omitted). Accordingly, to the extent defendant claims that the use of the reports at sentencing violated his right of confrontation, this argument is without merit.

Defendant also claims he was denied the effective assistance of counsel because his attorney did not object to the use of the reports at the sentencing hearing. We disagree.

To preserve the issue of ineffective assistance of counsel for appeal, a defendant must bring a timely motion for a new trial or move for a *Ginther*[2] hearing in the lower court. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Defendant did not file a motion for a new trial or for a *Ginther* hearing in the trial court, and therefore, this issue is unpreserved. This Court's review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *Id*.

As previously explained, defendant has not established that he was denied his right of confrontation. Any objection on this ground would have been futile. Defense counsel is not ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Therefore, defendant was not denied the effective assistance of counsel.

Lastly, defendant argues that the trial court imposed an unreasonable sentence when it departed from the minimum sentencing guidelines range of 0 to 17 months and sentenced defendant to 32 to 60 months' imprisonment. We disagree.

This Court reviews a trial court's upward departure from a defendant's calculated guidelines range for reasonableness. *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015). Furthermore, "this Court reviews a departure sentence for 'reasonableness' under an

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

abuse-of-discretion standard governed by whether the sentence fulfills the 'principle of proportionality' set forth in *Milbourn*[3] 'and its progeny.'" *People v Masroor*, 313 Mich App 358, 373; 880 NW2d 812 (2015), lv gtd *People v Steanhouse*, 499 Mich 934 (2016), quoting *People v Steanhouse*, 313 Mich App 1, 42-48; 880 NW2d 297 (2015), lv gtd 499 Mich 934 (2016).

When a trial court revokes a defendant's probation, "it may sentence the defendant 'in the same manner and to the same penalty as the court might have done if the probation order had never been made.'" *People v Hendrick*, 472 Mich 555, 562; 697 NW2d 511 (2005), quoting MCL 771.4. In other words, "revocation of probation simply clears the way for a resentencing on the original offense." *Id*. (quotation marks and citation omitted). The legislative sentencing guidelines "apply to all enumerated felonies committed on or after the effective date, whether or not the sentence is imposed after probation revocation." *Id*. at 560. A trial court may consider a defendant's conduct during probation when determining whether an upward departure is justified. *Id*. at 562-563, 565.

Our Supreme Court has held that Michigan's sentencing guidelines are advisory and that a sentencing court is no longer required to articulate substantial and compelling reasons for departing from the guidelines range. *Lockridge*, 498 Mich at 364-365, 391-392, 399. Instead, departure sentences are to be reviewed for reasonableness, and the trial court "must justify the sentence imposed in order to facilitate appellate review." *Id*. at 392 (citation omitted). The Court in *Lockridge*, however, did not articulate "[t]he appropriate procedure for considering the reasonableness of a departure sentence." *Steanhouse*, 313 Mich App at 42. After *Lockridge*, this Court, in *Steanhouse*, implemented the principal of proportionality standard first established in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), to determine whether a departure sentence was reasonable. *Id*. at 46-48. Our Supreme Court provided the following standard in *Milbourn*:

> Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. [*Id*. at 659-660.]

The factors that have been employed under the proportionality standard include: (1) the seriousness of the offense, (2) factors that were inadequately considered by the guidelines, and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. *Steanhouse*, 313 Mich at 46.

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[3] *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990).

When the trial court departed from defendant's minimum sentencing guidelines range, it stated a number of reasons on the record for its departure. While not actually articulating the factors listed in *Steanhouse*, it was clear from the record that the trial court considered the seriousness of the offense, that defendant had engaged in misconduct since the probation violation, had not expressed remorse for his actions, and there was minimal potential for rehabilitation. Importantly, the trial court afforded defendant five additional months since his probation violation to prove to the trial court that imprisonment — a "harsh" sentence as the trial court put it — would not be necessary. However, within that time, defendant failed to pay any of his fees and court costs despite having a job that paid $400 to $700 a week. Additionally, defendant had not submitted his employment verification despite numerous requests, and he provided the trial court with a number of excuses as to why, in the five months leading up to the second sentencing hearing, he could not verify his employment. While the trial court indicated that it was not concerned with whether defendant maintained his innocence to the underlying domestic violence conviction, it was evident that the trial court considered defendant's lack of remorse and willingness to take responsibility for any of his actions. The trial court stated:

> There was clearly a no contact order with [Hensley]. He violated that order a number of times. Simply, then the argument was no I didn't violate it; somebody whited . . . out the thing and you changed it, judge, and even though he signed the original and again, it's kind of a pattern.

Furthermore, the trial court said, "In your circumstances, forgetting [your son] for a second, all of this other stuff is somebody else's fault, including mine because I changed the probation order." The trial court made clear its belief that defendant was not remorseful for his actions and that defendant could be not rehabilitated. More importantly, the trial court considered the PSIR, which included summaries of reports and letters from DHHS and the probation department. Based on that information, the trial court determined that defendant had not improved and the potential for rehabilitation was minimal. The trial court highlighted the fact that defendant was consistently uncooperative and had bullied the DHHS foster care workers, as well as his probation officer. In fact, the personnel from both departments expressed their concerns about even being in the same room as defendant.

The PSIR also indicated that the DHHS foster care worker assigned to defendant's case "summarized [defendant] as a safety hazard and he has made numerous threats of violence and/or retaliation against her and other DHHS staff." Additionally, the trial court made it clear at the January 21, 2016 sentencing hearing that defendant was required to obtain services, including substance abuse and anger management counseling. However, the PSIR further summarized the DHHS report and stated, "As a result of [defendant's] aggressive behavior, bullying and unwillingness to work with service providers, he has been refused as a client by several service providers in Monroe County." The PSIR also indicated that defendant "minimizes his role in this case and he struggles with complying with his probation conditions. He has now refused to talk to this agent and instead is demanding to communicate in writing or record conversations." The trial court specifically questioned defendant regarding this behavior, and defendant said, "I just felt like she was maybe talking down to me . . . ." Finally, the PSIR indicated that the latest DHHS report — drafted a week before the May 26, 2016 sentencing hearing — provided that "defendant continues to be uncooperative and bullying in nature. He has accused the Foster Care Specialist of lying, manipulating, and threatening him and his family. The DHHS worker still

has to meet subject with a safety partner present due to threats of violence, retaliation and recording." Considering defendant's conduct outlined in the PSIR, the trial court's departure sentence was reasonable because the record proved defendant engaged in misconduct after his probation violation, expressed no remorse for his actions, and proved to the trial court that there was no chance of rehabilitation.

As a final point, the trial court also took into account the seriousness of the offense — a proper factor under *Steanhouse*. While defendant claims the probation violation was only a technical violation, he fails to consider that a "revocation of probation simply clears the way for a resentencing on the original offense." *Hendrick*, 472 Mich at 562 (quotation marks and citation omitted). The trial court noted the fact that defendant had six prior misdemeanors with three involving domestic violence against other family members, including Hensley and another son. Therefore, it was proper for the trial court to take into account both the probation violation and the domestic violence conviction.

Despite defendant's claims to the contrary, the trial court thoroughly questioned defendant regarding the PSIR and his behavior since the first sentencing hearing, and even after affording defendant five months and a chance to explain his behavior, the trial court concluded that a departure was "reasonable and proportionate." Defendant's conduct since his probation violation, in relation to the factors outlined in *Steanhouse*, shows that the trial court's sentence was reasonable. Therefore, the trial court did not abuse its discretion when it departed from the guidelines range of 0 to 17 months and imposed a minimum sentence of 32 months' imprisonment.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Michael J. Riordan