STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2013
v	No. 310278 Jackson Circuit Court
TRACY LASHAWN RUSSELL, Defendant-Appellant.	LC No. 11-004791-FH

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant Tracy LaShawn Russell appeals by right his convictions for aggravated stalking, MCL 750.411i(2), and larceny in a building, MCL 750.360. On April 25, 2012, the trial court sentenced defendant, as a second habitual offender, MCL 769.10, to 24 to 60 months' imprisonment for his aggravated stalking conviction, and to 230 days' imprisonment for his larceny in a building conviction. We affirm.

I. BASIC FACTS

Defendant's convictions arise out of the theft of jewelry that belonged to the victim, his former girlfriend, and his harassment of the victim after she ended her relationship with defendant. Defendant telephoned the victim repeatedly and sent her scores of text messages after she ended their relationship. The victim felt threatened by some of defendant's text messages, including messages in which defendant told her he would "holler" at her; the victim believed "holler" was defendant's way of saying he was going to hurt her. Defendant also sent the victim a text message in which he told her, "[c]ould put red on that yellow sweatshirt, don't want to make a M with the people in the red truck around. LOL. For blood and he know why, so believe it." At the time she received this message, the victim was wearing a yellow sweatshirt inside her home and had not left home while wearing it. There was also a red truck parked outside her home. The victim believed that this message meant that defendant wanted to harm or kill her. The victim also believed that defendant followed her when she left her home. She obtained a personal protection order (PPO) against defendant on September 8, 2011. Defendant continued to telephone the victim despite being present at the hearing at which a PPO was issued that prevented him from contacting the victim.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that evidence produced at trial was insufficient for a rational jury to find him guilty of aggravated stalking beyond a reasonable doubt. "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). This Court "examine[s] the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine[s] whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Ericksen*, 288 Mich App at 196 (citation omitted).

"Aggravated stalking consists of the crime of 'stalking,' . . . and the presence of an aggravating circumstance specified in MCL 750.411i(2)." *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). Defendant does not contest that he stalked the victim, but argues that the evidence was insufficient for a rational jury to find one of the aggravating circumstances. The different aggravating circumstances found in MCL 750.411i(2) are set forth as alternatives, and the jury need only find one of the alternatives in order to find the defendant guilty of the offense. *Id*. Pertinent to this case, the aggravating circumstances found under MCL 750.411i(2) include:

> (a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.
>
> * * *
>
> (c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim.

The jury was instructed on both MCL 750.411i(2)(a) and (c), and we conclude that the evidence produced at trial was sufficient for a rational jury to convict defendant under either alternative. Regarding MCL 750.411i(2)(a), the evidence was sufficient to convict defendant because the victim testified that she obtained a PPO against defendant that prevented defendant from contacting her, yet defendant telephoned her after the PPO was issued. Regarding MCL 750.411i(2)(c), the evidence was sufficient for a rational jury to find defendant guilty of aggravated stalking beyond a reasonable doubt because the prosecution presented sufficient evidence that defendant made a credible threat to the victim. A "credible threat"

> means a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual. [MCL 750.411i(1)(b).]

Defendant told the victim in a text message that he would make her yellow sweatshirt red. The victim testified that she felt threatened by this text message because she thought defendant meant he would make her bleed. When viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational jury to find that defendant made a credible threat to the victim.

III. OTHER ACTS EVIDENCE

Next, defendant argues that the trial court erred when it admitted other acts evidence. Specifically, defendant argues that the trial court erred by admitting evidence of uncharged acts of stalking that defendant perpetrated against one of his former girlfriends. Defendant argues that the admission of this evidence violates MRE 404(b). We disagree.

We review for an abuse of discretion the trial court's decision to admit the evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). MRE 404(b)(1) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002) (citation omitted). This Court uses the test articulated in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), to determine whether the trial court admitted evidence of other acts under MRE 404(b)(1) for a proper, non-propensity purpose.

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Id.* at 55.]

Under the *VanderVliet* test, the trial court did not abuse its discretion in admitting the evidence of which defendant complains. The evidence was offered for proper purposes under MRE 404(b)(1) because it was offered to show defendant's intent, and that he had a common plan or scheme in stalking the victim and his former girlfriend. See *People v Sabin (After Remand)*, 463 Mich 43, 63-64; 614 NW2d 888 (2000) (common plan or scheme is a proper purpose); *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005) (intent is a proper purpose).

Furthermore, the evidence was relevant for both of these purposes. "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *McGhee*, 268 Mich App at 610 (citation omitted). Regarding the first purpose alleged by the prosecution, defendant's intent, was at issue in the case at bar because defendant pleaded not guilty to the offense, and aggravated stalking requires a "willful course of conduct . . . ." MCL 750.411i(1)(e). See also *McGhee*, 268 Mich App at 610 (a not guilty plea requires the prosecution to prove every element of the offense). Additionally, defendant's intent was at issue because he argued that he did not harass the victim, but was merely trying to reconcile his relationship with her. Moreover, the other acts evidence was highly probative to show defendant's intent in the case at bar. "The more often a defendant acts in a particular manner, the

less likely it is that the defendant acted accidentally or innocently, and conversely, the more likely it is that the defendant's act is intentional." *Id.* at 611 (citation omitted). Here, defendant stalked the victim and his former girlfriend in a similar manner because he repeatedly telephoned, followed, and became upset with both women when he believed they entered into new relationships. The similarity with which defendant acted towards both women makes it more probable that defendant stalked the victim in the case at bar, and that he was not simply acting in an innocent manner because he wanted to resume his relationship with the victim. See *id.* at 611, 613. Likewise, because defendant's uncharged acts were very similar to the charged acts in the case at bar, the uncharged acts were relevant to show a common scheme by defendant. See *Sabin (After Remand)*, 463 Mich at 63.

Regarding the remaining prongs of the *VanderVliet* test, the other acts evidence was admissible because the danger of unfair prejudice did not substantially outweigh the probative value of the other acts evidence, and because the trial court instructed the jury as to how it was to consider the other acts evidence. "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *McGhee*, 268 Mich App at 614. In this case, the evidence was highly probative, and any unfair prejudice caused by the admission of this evidence was cured by two limiting instructions the trial court gave with regard to the evidence. See *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).[1]

IV. BEST EVIDENCE RULE

Next, defendant argues that the trial court erred because it permitted the victim to testify as to the contents of the PPO in violation of the best evidence rule. We disagree.

The best evidence rule, MRE 1002, provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Despite this rule, where a witness has independent knowledge of the contents of a writing, recording, or photograph apart from the writing, recording, or photograph, the witness may offer testimony as to the contents thereof. See, e.g., *Lund v Starz*, 355 Mich 497, 501-502; 94 NW2d 912 (1959). Indeed,

> [w]here the matter to be proved is a substantive fact which exists independently of any writing, although evidenced thereby, and which can be as fully and satisfactorily established by parol as by written evidence, then both classes of evidence are primary and independent, and parol evidence may be admitted regardless of the writing. [*Id.* (citation and quotation marks omitted).]

Here, although the victim testified as to the contents of PPO when she testified that the PPO prevented defendant from contacting her, she had knowledge of the PPO's contents apart from

[1] The prosecution argues that we should find that the evidence was admissible under MCL 768.27b. We decline to do so, however, because the other acts evidence was over 10 years old, and neither party argues that admitting the evidence was "in the interest of justice." See MCL 768.27b(4).

the writing because she was present at the hearing at which the PPO was issued. Accordingly, her testimony as to the contents of the PPO did not violate the best evidence rule.

V. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct during closing argument. We disagree.

Defendant did not object to this issue at trial; this issue is therefore unpreserved and our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under that standard, defendant bears the burden to establish three conditions: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 763. Even if defendant is able to satisfy these three conditions, this Court still has discretion whether to reverse. *Id*. "Reversal is warranted only when the plain, forfeited error resulted in 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.

"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 objects to the following portion of the prosecutor's closing argument:

> Ladies and gentlemen, when you review the evidence here, since – there's no – there's no rebuttal to this evidence, the only thing you can do is test the credibility of the witnesses who brought it to you because there's no contrary evidence.
>
> * * *
>
> There's no – there's no resolution to that [question regarding defendant's guilt] other than guilty as charged. I ask you to consider this evidence, consider the source, consider the fact that there really is no opposition to this evidence, there's nothing to contradict its validity and its impact.

Defendant argues that in making this argument, the prosecutor vouched for the victim's credibility, shifted the burden of proof, and improperly appealed to the sympathy of the jury. We disagree. First, the prosecutor did not impermissibly vouch for the credibility of the victim because he did not imply that he had special knowledge as to her credibility. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Next, the prosecutor did not shift the burden of proof because he merely argued that the incuplatory evidence, which defendant did not refute, was undisputed. This is not improper argument. See *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Additionally, we detect nothing in the argument cited by defendant to conclude that the prosecutor improperly appealed to the sympathy of the jury, as the prosecutor did not blatantly appeal to the jury's sympathy, nor did he use inflammatory language to incite the jury. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Finally, because we find each of defendant's arguments to be meritless, we reject his

accompanying claim that his trial counsel was ineffective for failing to object to the argument. See *Ericksen*, 288 Mich App at 201.

VI. JURY INSTRUCTIONS

Next, defendant argues that the trial court erred by failing to instruct the jury on the definition of "credible threat" found in MCL 750.411i(1)(b). He also argues that the trial court erred by failing to instruct the jury on the term "holler," after the victim testified that she felt threatened when defendant told her he would "holler" at her. We conclude that defendant waived this issue by expressing satisfaction with the jury instructions as given. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009) ("Counsel's affirmative expression of satisfaction with the trial court's jury instruction waived any error." (citation omitted)). Moreover, we reject defendant's accompanying claim for ineffective assistance of counsel. First, defendant abandoned this claim by failing to explain how the trial court's instructions deprived him of a fair trial such that counsel should have objected, and by failing to support his arguments with authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Second, defendant cannot demonstrate prejudice that would warrant relief under a claim of ineffective assistance of counsel because, as already discussed, there was sufficient evidence for the jury to convict him of aggravated stalking on the basis that he violated a PPO. Accordingly, even assuming the trial court erred in instructing the jury with regard to the "credible threat" element, defendant cannot demonstrate prejudice because he cannot demonstrate "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

VII. SENTENCING

Next, defendant challenges the trial court's scoring ten points for offense variable (OV) 4, which addresses psychological injury to a victim. MCL 777.34. Waiver is the "intentional relinquishment or abandonment of a known right," and "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations and quotation marks omitted). In this case, defendant's trial counsel expressly stated that had "no objection to that scoring." By expressly agreeing to the scoring of OV 4, defendant has waived his right to appellate review of this issue and we therefore need not consider it.

Defendant next raises a host of unpreserved sentencing issues. Because these issues are unpreserved, again our review is for plain error affecting substantial rights; to that end, we conclude that defendant is not entitled to relief on any of these issues. *Carines*, 460 Mich at 463. First, defendant, while acknowledging that under Michigan law, a trial court is not required to consider mitigation evidence, argues that the trial court erred by failing to consider mitigating evidence when it sentenced him. However, the trial court is not required to consider such evidence. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). Next, defendant argues that he was entitled to a downward departure from the guidelines range because of his mental illness. A downward departure requires a "substantial and compelling reason" for departing from the guidelines range. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Defendant's argument fails because he does not cite any authority that a mental illness

can justify a downward departure from the guidelines. Moreover, even if he did, the record belies defendant's claim that he suffered from a mental illness.

Defendant also argues that the trial court failed to assess his rehabilitative potential and, as a result, sentenced him based on incomplete information. Although MCR 6.425(A)(1)(e) requires a defendant's PSIR to include a report on the defendant's health, substance abuse history, and mental health history, it does not require the trial court to order an assessment of the defendant's rehabilitative potential in light of these factors. Moreover, contrary to defendant's claims, the PSIR does not indicate that he has any mental health or substance abuse problems, and he did not successfully challenge the information in the PSIR. Consequently, the information contained in defendant's PSIR was accurate and complete, and defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant next argues that the trial court failed to satisfy the articulation requirement when it imposed his sentence. This argument is meritless. The trial court satisfied the articulation requirement because it "expressly relie[d] on the sentencing guidelines in imposing the sentence . . . ." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

Next, defendant asserts without any accompanying argument that his sentence for aggravated stalking was "excessive under both federal constitutional and state law principles." He cites, among other provisions, US Const, Am VIII, and Const 1963, art 1, § 16, so we assume he argues that his sentence was cruel and/or unusual. However, his sentence was within the guidelines range, and a sentence that is within the guidelines range is neither cruel nor unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Additionally, because we rejected each of defendant's claims of error related to his sentence, we also reject his claim that his trial counsel was ineffective for failing to raise these meritless objections. *Ericksen*, 288 Mich App at 201.

VIII. *MIRANDA*

In his Standard 4 Brief, defendant argues that statements he made to Detective Scott Grajewski were erroneously admitted because he was not given his *Miranda* warnings. Grajewski testified at trial that he interviewed defendant, who was a former intern at the Blackman/Leoni Public Safety Department, at the police station, concerning records from a local pawnshop that defendant recently sold jewelry. Defendant told Grajewski that the jewelry belonged to Nicole Russell, his ex-wife. Grajewski did not read defendant his *Miranda* rights before the interview.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A suspect need not be given *Miranda* warnings unless the questioning done by police officers amounts to a custodial interrogation. *People v Steele*, 292 Mich App 308, 316; 806 NW2d 753 (2011). "To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed

that [s]he was not free to leave." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (citation omitted).

Defendant fails to establish a *Miranda* violation because he was not "in custody" at the time of his interview with Grajewski. Defendant was not under arrest at the time of the interview, and he came to the police station willingly after being asked to do so by Grajewski. Furthermore, defendant was familiar with Grajewski and the police from his time as an intern with the public safety department. Under the totality of these circumstances, we cannot conclude that defendant was "in custody" for purposes of *Miranda*. Thus, his statements to Grajewski were not admitted in error.

IX. DISCOVERY

Also, in his Standard 4 Brief, defendant alleges that the prosecution committed discovery violations. In particular, he focuses on the prosecution's failure to provide him, within 21 days of his request, a copy of the search warrant and affidavit, the prosecution's witness list, and a copy of the complaint and police report.

We review de novo a defendant's claim that he was denied due process because of a discovery violation. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). Moreover, "[t]his Court reviews a trial court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion." *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010).

Defendant filed a discovery request for the above items on November 28, 2011. After attempts to secure the requested items by meeting with the prosecutor failed, defendant raised the matter at a January 24, 2012, pretrial hearing. At the hearing, it was established that defendant already had the complaint and police report; it is unclear from the record when defendant received them. Following the hearing, the prosecutor sent defendant the witness list and invited defendant to come to his office to secure the warrant and affidavit.

"There is no general constitutional right to discovery in a criminal case . . . ." *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011) (citation and quotation marks omitted). Nevertheless, pursuant to MCR 6.201, the prosecutor has a duty, upon request, to disclose to the defendant certain information in its possession within 21 days. MCR 6.201(F). Pertinent to defendant's claims, MCR 6.201(A)(1) requires a party, upon request, to disclose to the other the names of all expert and lay witnesses the party may call at trial. Also pertinent to defendant's claims, MCR 6.201(B)(2) requires the prosecuting attorney to disclose to the defendant, upon request, any police report concerning the case. The prosecuting attorney must also, upon request, disclose to the defendant "any affidavit, warrant, and return pertaining to a search or seizure in connection with the case . . . ." MCR 6.201(B)(4).

Defendant made his discovery request on November 28, 2011, and he did not receive the requested items until approximately January of 2012. The prosecution's compliance was outside of the 21 day period set forth in MCR 6.201(F). However, at trial, defendant did not request any form of relief because of the discovery violations. Therefore, he is not entitled to relief on appeal under an abuse of discretion standard. As this Court has previously held, "[i]t cannot be

said that the trial court erred by failing to exercise [its] discretion when [it] was never requested to do so." *People v Hearn*, 159 Mich App 275, 284; 406 NW2d 211 (1987). Indeed, "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Furthermore, we reject defendant's claim that his trial counsel was ineffective for failing to request dismissal of the charges. In order to be entitled to relief where a discovery violation occurs, a defendant must demonstrate that he or she was prejudiced by the violation. See *Rose*, 289 Mich App at 525-526. Here, any request by defendant to have the charges dismissed because of these minor discovery violations would have been meritless. Defendant received each of the items by approximately January of 2012; trial was not scheduled until March 5, 2012. Trial counsel had over a month to prepare for trial after the prosecution disclosed each of the items. Additionally, none of the items were used against defendant at trial. Further, defendant fails to identify anything his trial counsel could have done differently if he had the items in December of 2011 when they were required to be disclosed under MCR 6.201(F). Given that defendant cannot identify prejudice, any request by his trial counsel to have the case dismissed would have been meritless. *Id.* at 526-528. This Court will not find that trial counsel was ineffective for failing to raise a meritless objection. *Ericksen*, 288 Mich App at 201.

X. AMENDED INFORMATION AND OTHER ISSUES IN THE STANDARD 4 BRIEF

Next, in his Standard 4 Brief, defendant argues that the trial court erred by granting the prosecution's motion to amend the date of the information to include defendant's conduct after the preliminary examination. Defendant initially objected to the amendment, but withdrew that objection after receiving discovery on the matter. After withdrawing the objection, defendant expressed his approval of the amendment. By doing so, defendant waived appellate consideration of this issue. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Defendant also raises a host of additional issues in his Standard 4 Brief that were not in his statement of questions presented. Thus, we need not address them. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011). Nevertheless, we have evaluated the issues and determined that they lack merit.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens