STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2014
v	No. 309405 Berrien Circuit Court
STEPHAN PAUL HARDY, Defendant-Appellant.	LC Nos. 2011-003421-FH; 2011-003561-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

In lower court No. 2011-003421-FH, defendant appeals by right his convictions of manufacturing methamphetamine, MCL 333.7401(2)(b)(*i*), and operating a methamphetamine laboratory, MCL 333.7401c(1)(a) and (2)(f). In lower court No. 2011-003561-FH, defendant appeals by right his convictions of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*iv*), and possession of marijuana, MCL 333.7403(2)(d). We affirm in part, but remand for correction of the Presentence Investigation Report (PSIR) and the Sentencing Information Report (SIR).

Defendant first argues that his trial counsel was ineffective for failing to challenge an allegedly biased juror for cause. An ineffective assistance of counsel claim is a mixed question of law and fact. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). This Court reviews questions of law de novo, and it reviews the trial court's findings of fact, if any, for clear error. *Id.* A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if "counsel's performance fell below an objective standard of reasonableness, . . .[and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994) (citation omitted). To show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's decisions regarding selecting a jury are generally matters of trial strategy that will not be evaluated with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001).

During voir dire, one of the jurors informed the trial court that he had assisted police officers with the investigation of an unrelated breaking and entering. The trial court asked whether the juror's involvement would affect his ability to sit as a fair and impartial juror, and

the juror responded, "I feel I'd be sensitive to police officers." Neither the trial court, the prosecutor, nor defense counsel asked additional questions of the juror, and the juror remained on the jury and deliberated on the verdict. Defendant contends that his trial counsel was ineffective for failing to challenge this juror for cause.

"[A] criminal defendant has a constitutional right to be tried by an impartial jury." *People v Miller*, 482 Mich 540, 560; 759 NW2d 850 (2008), citing US Const, Am VI; Const 1963, art 1, § 20. A prospective juror may be challenged for cause and excused on the basis of bias for or against a party, or if the prospective juror shows a state of mind that will prevent the prospective juror from rendering a just verdict. MCR 2.511(D); *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). Jurors are presumed to be impartial, and the defendant bears the burden of establishing "that the juror was not impartial or at least that the juror's impartiality was in reasonable doubt." *Miller*, 482 Mich at 550.

Defendant cannot overcome the presumption that his trial counsel's decision not to challenge the juror was the product of reasonable trial strategy. The juror's statement that he would "be sensitive to police officers" is ambiguous enough to allow for more than one interpretation, so it does not patently evidence bias for or against police officers or that the juror had opinions that would prevent him from reaching a fair and honest verdict. Furthermore, the trial court instructed the jury that it was to assess the testimony of police officers in the same manner as it evaluated the testimony of any other witness. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant cannot demonstrate that his trial counsel's decision not to raise a for-cause challenge was anything but the product of sound trial strategy. As explained in *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008), we give particular deference to trial counsel's decisions during jury selection because some of "the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions." Because appellate judges generally do not have access to this information, we will usually not find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. *Id*. Moreover, "[a] lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *People v Robinson*, 154 Mich App 92, 95, 397 NW2d 229 (1986).

Next, defendant argues that his trial counsel was ineffective for failing to prevent witnesses from testifying that defendant had previously been incarcerated. Defendant's convictions in lower court No. 2011-003421-FH arose after police officers found two methamphetamine laboratories and mail bearing defendant's name in an automobile that was registered to defendant's parents. Officers found the automobile at the scene of an alleged breaking and entering. Defendant initially reported that the automobile was stolen. Two weeks after the incident, defendant spoke with Lieutenant Greg Sanders and informed Sanders that he had been fishing on the day the automobile had been discovered, but he was evasive with about when he had gone fishing. The prosecutor asked Sanders, who knew what time the automobile had been discovered, if he confronted defendant with the fact that the automobile had been discovered early in the morning. During the course of his answer Sanders testified that defendant stated "his parents had given him a station wagon after he had gotten out of jail."

In addition, Marcus Reese, defendant's alibi witness, testified that defendant dated Reese's sister, who used methamphetamine. On cross-examination, Reese testified that defendant did not use methamphetamine with his sister because defendant was incarcerated at the time his sister used the drug. Defendant argues that his trial counsel was ineffective for failing to object to Sanders's and Reese's testimony.

Prosecutors and police witnesses have a special obligation to avoid areas of testimony that may unfairly prejudice a defendant. *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978). But an isolated or inadvertent reference to a defendant's prior criminal activities will not warrant reversal. *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). Where inadmissible evidence such as the fact that the defendant has previously been incarcerated is brought before the jury, reversal is not required where the inadmissible testimony was not the result of a deliberate attempt by the prosecutor to elicit such testimony. See *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Further, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

We decline to find that defendant's trial counsel was ineffective for failing to object to Sanders's and Reese's testimony that defendant had previously been incarcerated. Although trial counsel failed to object, we find that his failure to do so constituted reasonable trial strategy because an objection may simply draw attention to the improper comment. *Unger*, 278 Mich App at 242. Moreover, even assuming that trial counsel should have objected, defendant cannot establish prejudice from Sanders's and Reese's nonresponsive answers. Although Sanders and Reese mentioned defendant's previous incarceration, their comments were brief, and neither witness explained why defendant had been incarcerated. These brief, nonresponsive answers did not prejudice defendant. See *Truong (After Remand)*, 218 Mich App at 336; *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995) (declining to reverse because of unsolicited testimony about the defendant's prior, unrelated offense); *Haywood*, 209 Mich App at 228.[1]

Next, defendant argues that trial counsel was ineffective for failing to object to instances where defendant himself testified that he had previously been incarcerated. We decline to grant relief on this claim because defendant's conduct caused the error. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004) ("Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error."). 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).

Defendant next contends that his trial counsel was ineffective for failing to object to Sanders's testimony that defendant felt guilty during his interview. During his interview with Sanders, defendant implied that Michael Culver used his automobile the day the methamphetamine laboratories were discovered, and that Culver was responsible for them. Defendant told Sanders that he made a mistake by associating with Culver and explained that his

[1] We already rejected defendant's motion to remand for an evidentiary hearing on this issue, and we see no reason to reconsider our decision.

mother told him that he had been making bad choices with regard to his friends and associates. Later, the prosecutor asked Sanders what his reaction to this conversation was, and he answered, "My impression was he felt guilty."

MRE 701 permits lay witnesses to provide testimony in the form of an opinion if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." But "'a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense.'" *People v Fomby*, 300 Mich App 46, 53; 831 NW2d 887 (2013)(citation omitted). Here, Sanders did not express an opinion as to defendant's guilt regarding the charged crime. Rather, Sanders expressed his opinion that defendant felt guilty about his mother's disappointment concerning his choice of friends and associates. This was not improper. See *People v McReavy*, 436 Mich 197, 203; 462 NW2d 1 (1990) (a police officer may comment on a defendant's demeanor during an interview). We distinguish this case from two cases defendant cites, *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended in part on other grounds 450 Mich 1212 (1995)(holding an expert witness may not opine as to whether the defendant is guilty), and *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985)(finding error where the prosecutor asked the defendant, "[s]o you're guilty of the crime?"). The case at bar is distinguishable from both *Peterson* and *Bragdon* because Sanders was not asked to opine whether defendant was guilty of the charged offenses. Because Sanders's testimony was not objectionable, counsel was not ineffective for failing to raise a meritless objection. *Unger*, 278 Mich App at 256.

We note that while the prosecutor, in rebuttal closing argument, suggested that Sanders' testimony supported that defendant felt guilty about the crime, counsel was not ineffective for failing to object. The prejudice, if any, caused by this unpreserved error could have been cured by a curative instruction. *Unger*, 278 Mich App at 235 ("Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements . . .."). Additionally, the jury was instructed that the attorneys' arguments were not evidence, and "[i]t is well established that jurors are presumed to follow their instructions." *Graves*, 458 Mich at 486.

Defendant also argues that Sanders impermissibly commented on his credibility. Sanders testified that defendant answered questions quickly and sometimes did not wait for Sanders to finish asking a question before he answered. On cross-examination, defendant's trial counsel asked Sanders about defendant's quick answers, inquiring whether they were prompted by defendant's knowledge before the interview that the police wanted to speak with him. In response, Sanders testified that he believed defendant's answers were rehearsed. Contrary to defendant's assertions, Sanders did not comment on defendant's credibility during the interview. Rather, he commented on defendant's behavior and demeanor; this was not improper. *McReavy*, 436 Mich at 203. Trial counsel was not ineffective for failing to raise a meritless objection to Sanders's testimony. *Unger*, 278 Mich App at 256. Moreover, we note that defendant is not entitled to relief regardless because the record reveals that his counsel invited Sanders's comment. See *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003) ("Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished.").

Next, defendant argues that his trial counsel was ineffective for failing to impeach Brooke Krueger, a prosecution witness, with the details of her plea agreement. In exchange for

her testimony, Krueger had a methamphetamine possession charge reduced to a charge for use of methamphetamine, and the charge would be dismissed if she successfully completed the terms of her probation. The record reveals that the details of Krueger's no contest plea were placed before the jury. Nevertheless, citing Krueger's testimony from a plea hearing transcript that is not part of the lower court record, defendant argues that his trial counsel should have impeached Krueger with additional information, specifically that her no contest plea was motivated by her concern about the effect of a guilty plea on a pending family court matter.

We disagree. Because no *Ginther*[2] hearing was held, our review is limited to the record. *Jordan*, 275 Mich App at 667. Thus, we need not consider the transcript. Even if we do so, defendant's trial counsel was not ineffective because decisions regarding how to question witnesses are presumed to be matters of trial strategy to which we defer. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Here, information regarding Krueger's plea deal was before the jury; Trial counsel then used this information to argue that Krueger was not worthy of belief; thus, defendant has not overcome the presumption that his counsel's impeachment strategy was reasonable. Counsel's failure to impeach Krueger with additional information related to the entry of her plea did not render his performance objectively unreasonable. *Jordan*, 275 Mich App at 667; *People v Traylor*, 245 Mich App 460, 465; 628 NW2d 120 (2001).[3]

Next, defendant argues that the prosecutor improperly commented on his pre-arrest silence. Defendant did not preserve this issue at trial, so our review is for outcome determinative plain error. *Unger*, 278 Mich App at 235. Police officers discovered defendant's automobile on July 1, 2011. Defendant initially reported the automobile as being stolen, but he did not contact the police again until he spoke with Sanders on July 15, 2011. In closing argument, the prosecutor argued that "if [defendant] really had nothing to do with this, and he really wanted to be on top of this situation, he'd have picked up the phone or driven down there and said, hey, here I am, I had nothing to do with this, here I am."

The Fifth Amendment of the United States Constitution provides: "No person shall . . . be compelled in any criminal case to be a witness against himself . . .." In *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005), the Court opined:

> A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[4] warnings have been given. A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred before any police contact.

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

[3] We also reject defendant's renewed request for an evidentiary hearing on this issue. We have already rejected this request, and there is no reason to reconsider our decision.

[4] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> [A] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true. [Internal quotation marks and citation omitted.]

The prosecutor did not act improperly or violate defendant's right to remain silent because he did not comment on defendant's silence in the face of accusation. What actually occurred is that the prosecutor commented on defendant's silence before police contacted him. Furthermore, the prosecutor's comments were not improper because under the circumstances, it would have been natural for defendant to contact the police if his version of the events were true. So defendant's silence before the police spoke with him was noteworthy. Because any objection to the prosecutor's argument would have been meritless, we reject defendant's accompanying claim of ineffective assistance of counsel. *Unger*, 278 Mich App at 256. In rejecting defendant's claim, we disagree that *Combs v Coyle*, 205 F 3d 269 (CA 6, 2000), supports his position. First, *Combs* is not binding on this Court. See *People v Jackson*, 292 Mich App 583, 595 n 3; 808 NW2d 541 (2011). Moreover, *Combs*, 205 F 3d at 283-284, in which the Sixth Circuit held that the prosecutor could not use evidence of a defendant's pre-arrest silence in the face of non-custodial questioning by police officers as substantive evidence of his guilt, is distinguishable from the case at bar. Here, defendant's pre-arrest silence was not in response to non-custodial questioning, nor was it used as substantive evidence of his guilt.

Defendant next argues that the trial court erred when it scored offense variable (OV) 14, MCL 777.44, when it calculated his recommended minimum guidelines range in lower court file No. 2011-003421-FH. Defendant preserved this issue by raising it at sentencing. *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013). We review the trial court's factual findings for clear error, and we review de novo whether the facts as found are adequate to satisfy the scoring conditions of the offense variables. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Defendant disputes that sufficient evidence supported the trial court's assessment that he was a "leader in a multiple offender situation." MCL 777.44(1)(a). Contrary to defendant's assertions, the trial court did not clearly err when it found that there were multiple offenders involved in defendant's methamphetamine offenses because Reese's fingerprints were found on defendant's automobile; there was testimony that Reese manufactured methamphetamine, and there was testimony that defendant controlled the automobile and was involved in the manufacturing of the methamphetamine. Moreover, the preponderance of the evidence supports the trial court's scoring of OV 14 at ten points because the evidence established that defendant was the leader in this multiple offender situation. Indeed, the methamphetamine laboratories were found in defendant's automobile, and Krueger testified that defendant told her that the methamphetamine laboratories were his. These facts were sufficient to satisfy the trial court's scoring of OV 14. *Hardy*, 494 Mich at 438-439.

Although we reject defendant's challenge to the scoring of OV 14, we agree that remand is required to correct the PSIR. At sentencing, the trial court ordered that a juvenile adjudication for larceny be removed from the PSIR and SIR. Despite the trial court's order, the PSIR and SIR were not corrected; consequently, we remand with instructions to correct both the PSIR and SIR. See *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009); MCL 771.14(6).

Next, defendant raises several meritless issues in his Standard 4 Brief. He contends that the circuit court lacked jurisdiction over him in both lower court Nos. 2011-003421-FH and 2011-003561-FH because the district court, following his preliminary examination, failed to file a "certified" return with the circuit court. He also argues that the circuit court failed to obtain jurisdiction over him because the complaint in lower court No. 2011-003421-FH did not contain factual assertions to support a finding of reasonable cause to believe he committed the charged offenses. Although he did not raise these issues below, "[a] tribunal's lack of jurisdiction may be raised at any time." *People v Erwin*, 212 Mich App 55, 64; 536 NW2d 818 (1995).

After a preliminary examination regarding all charged offenses, the district court found that there was reasonable cause to believe that defendant committed the offenses and filed a signed return with the circuit court in each case. The filing of the return vested the circuit court with jurisdiction over defendant. *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). We reject defendant's claim without citation to authority that the circuit court is deprived of jurisdiction when a return is not "certified." Moreover, defendant fails to cite any authority that a signed return does not meet the certification requirement of MCL 766.15(1).

We also reject defendant's contention that the complaint in lower court No. 2011-003421-FH was invalid, thereby depriving the trial court of jurisdiction. Contrary to defendant's assertions, the complaint in the case at bar was valid because it contained sufficient factual allegations from which a magistrate could find reasonable cause to believe that an offense had been committed and that defendant committed the offense. See *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). The complaint alleged that two methamphetamine laboratories were found in an automobile and that the automobile contained letters bearing defendant's name. This was enough to establish reasonable cause that the offenses had been committed and that defendant committed the offenses. See MCL 764.1a(2)(a).

We also reject defendant's claim that the trial court was biased because the same judge who presided over the preliminary examination also presided over trial. Proving that a judge conducted a prior proceeding against the same defendant does not establish bias for purposes of judicial disqualification. *People v White*, 411 Mich 366, 386; 308 NW2d 128 (1981). And, although defendant argues that the trial court's evidentiary rulings demonstrated bias, defendant fails to cite any allegedly biased rulings. Furthermore, judicial rulings do not themselves demonstrate bias unless based on deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. *Jackson*, 292 Mich App at 598.

Additionally, we reject defendant's argument that he is entitled to reversal because the trial court failed to develop a factual record with regard to his request for substitute appointed counsel. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *Traylor*, 245 Mich App at 462. At a pretrial hearing, defendant's trial counsel informed the trial court that defendant wished to have substitute trial counsel appointed. After numerous interruptions by defendant, the trial court informed defendant that he needed to discuss the matter with trial counsel. When a defendant contends his appointed attorney is not adequate, diligent, or is uninterested, the trial court should hear the defendant's claim, and, if there is a factual dispute, take testimony and state its findings and conclusion on the record. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011). But a conviction will not be set aside where the trial court fails to conduct a hearing if the record does not show that the

attorney assigned to represent the defendant was in fact inattentive to his or her responsibilities. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). Although the trial court did not conduct an inquiry into defendant's request, he is not entitled to relief because the record does not reveal that his trial counsel was inattentive to his responsibilities or that he was otherwise inadequate or uninterested. Defendant fails to allege any specific reasons why his trial counsel was inadequate, and this Court does not have a duty to search for a factual basis for defendant's claims. *Traylor*, 245 Mich App at 464. A generalized expression of dissatisfaction or lack of confidence in counsel is insufficient cause to require appointment of substitute counsel. *Id*. at 463; *Strickland*, 293 Mich App at 398. So, on this record, defendant has not demonstrated the trial court abused its discretion.

Defendant argues in a supplemental brief that scoring Michigan's sentencing guidelines on the basis of judicial fact-finding to determine a minimum sentence range to aid the exercise of judicial discretion in setting the minimum term of an indeterminate sentence violates his right to due process and his right under the Sixth Amendment to a jury determination of any fact that increases his maximum sentence and any fact establishing a mandatory minimum sentence. *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). We disagree. "We review de novo questions of constitutional law." *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

The Supreme Court held in *Apprendi* that the Sixth and Fourteenth Amendments of the United States Constitution limited the ability of judges to increase the maximum punishment of individuals convicted of crimes on the basis of judicial fact-finding. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490. Our Supreme Court has rejected challenges to Michigan's sentencing guidelines based on *Apprendi* and its progeny, primarily because Michigan's sentencing guidelines operate within a statutory maximum fixed by law and a jury's verdict or a defendant's plea. See *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *Harper*, 479 Mich at 644-645.

> Under Michigan's sentencing scheme, the maximum sentence that a trial court may impose on the basis of the jury's verdict is the statutory maximum. MCL 769.8(1). . . . As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. [*People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).]

In *Alleyne*, the Supreme Court applied the *Apprendi* rule for the first time to facts necessary to impose a *mandatory minimum* sentence, overruling *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002). *Alleyne v United States*, 570 US ___; 133 S Ct 2155. The Court reasoned that a mandatory minimum sentence established the floor of a sentencing range and that it was "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id*., 133 S Ct at 2160. But Michigan's sentencing guidelines do not establish mandatory minimum sentences. Rather, they delineate a recommended range for a minimum sentence from which a sentencing judge may depart by stating a substantial and compelling reason on the record. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Although *Alleyne* applied the rule of *Apprendi* to fact-finding necessary to

impose a *mandatory minimum* sentence, it plainly stated that its ruling "does not mean that any fact that influences judicial discretion must be found by a jury. "We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." *Alleyne*, 133 S Ct 2163. Judicial fact-finding in utilizing Michigan's sentencing guidelines as an aid to the exercise of judicial discretion in the setting of a minimum sentence of an indeterminate sentence the maximum of which is established by statute and by a jury's verdict or the defendant's plea does not violate due process or the Sixth Amendment's right to a jury trial. *Id*.; *Drohan*, 475 Mich at 164; *People v Herron*, ___ Mich App ___; ___ NW2d ___, 2013.

We affirm but remand for correction of the PSIR and SIR. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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BECKERING, J. (*concurring*).

For the reasons set forth in my concurring opinion in *People v Lockridge*, __ Mich App __; __ NW2d __ (Docket No. 310649, issued February 13, 2014), I concur in result only with regard to the majority opinion's disposition of defendant's argument regarding the impact of *Alleyne v United States*, __ US __; 133 S Ct 2151; 186 L Ed2d 314 (2013). We are bound to follow this Court's ruling in *People v Herron*, __ Mich App __; __ NW2d __ (Docket No. 309320, issued December 12, 2013). I concur with the majority opinion in all other respects.

/s/ Jane M. Beckering