

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID STADLER,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 245895

Macomb Circuit Court

LC No. 01-001624-FC

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and sentenced to twenty-five to forty years' imprisonment. He appeals as of right. We affirm.

I

Defendant was convicted of engaging in forced sexual penetration with the victim at the victim's home in 1997. According to the victim, defendant's initial contact occurred during a telephone call to the victim's home in which the victim told defendant that he had called the wrong phone number. After the victim hung up, she received a second wrong-number call from defendant. This time, the victim engaged in a conversation with defendant. The victim had several more phone calls with defendant in which she learned that his name was Dave Stadler. During one phone conversation, the victim told defendant that she was going out with some friends to the Hayloft bar. When she was at the bar, defendant approached her, even though she had not described what she looked like. The victim encountered defendant again outside her home, even though she had not told him where she lived. Defendant told the victim that he was visiting a friend in the area. Subsequently, on June 14, 1997, the victim agreed to go to a movie with defendant. After defendant arrived at the victim's home, however, he sexually assaulted her on a couch, and struck her in the eye and bit her breast while doing so.

The victim testified at trial that she immediately showered and cleaned the couch where the sexual assault took place. She threw the clothing that she was wearing at the time of the assault in the garbage. She thereafter told a longtime friend what happened, and the friend convinced her to report the assault to the Sterling Heights police. Although the victim, accompanied by her friend, reported the sexual assault to the police, she did so reluctantly. She said that she did not reveal the whole truth because she did not want to pursue any prosecution.

The police took photographs of the victim's injuries, but closed the case after the victim failed to appear to view a photographic lineup. In March 2001, a Sterling Heights police detective contacted the victim to determine if she was willing to reopen the case. The victim agreed and subsequently identified defendant in a photographic lineup as the person who sexually assaulted her in 1997.

Defendant was charged with CSC I, and the prosecutor filed a notice that defendant was subject to enhanced sentencing as a second habitual offender, MCL 769.10. Although defendant initially pleaded no contest to a reduced charge of assault with intent to do great bodily harm less than murder pursuant to a plea agreement, he subsequently withdrew his plea and was tried and convicted by a jury.

II

Defendant argues that his due process rights were violated because of the delay between the charged offense in June 1997 and his arrest in March 2001. We review the trial court's denial of defendant's motion to dismiss on this ground for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 289; 633 NW2d 376 (2001); *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). The trial court's factual findings are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Tanner*, 255 Mich App 369, 412; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003); *Adams, supra* at 140. But to the extent that a challenge based on prearrest delay implicates constitutional due process rights, appellate review is de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

The Due Process Clause plays a limited role in preventing unjustified prearrest delay, which is evaluated in Michigan under a balancing test to determine if relief is warranted. *Id.* at 109. A defendant must show that the prosecution intended to gain a tactical advantage by delaying formal charges. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). Also, a defendant must show actual and substantial prejudice to his right to a fair trial. *Adams, supra* at 134. If this burden is met, the prosecutor has the burden of persuading the court that the reasons for the delay were sufficient to justify the prejudice. *Id.*

Here, defendant relied on testimony from the preliminary examination, as well as the victim's 1997 police report, in which the assailant was identified only as "Dave" and reflected the victim's unwillingness to prosecute, as support for his motion to dismiss. In denying defendant's motion, the trial court determined that defendant failed to establish either that he was prejudiced by the delay or that the prosecution obtained an advantage. We agree.

The record discloses that defendant failed to establish that any relevant information beneficial to the defense was lost because of the delay. "Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witness, or other lost evidence." *Tanner, supra* at 414. Because we agree with the trial court that there was no evidence to suggest that the delay in filing formal charges was intended to give the prosecution a tactical advantage, the trial court did not abuse its discretion in denying defendant's motion to dismiss.

III

Defendant next argues that the trial court erred in denying his pretrial motion for assistance in locating three potential witnesses without conducting an evidentiary hearing.

We have considered defendant's argument in the context of the trial court's decision at the August 5, 2002, hearing at which it denied defendant's motion under MCL 767.40a for assistance in locating three individuals identified by the victim in her preliminary examination testimony as Tracey, Kelly, and Brian. These three individuals allegedly were present at the Hayloft bar when the victim first met defendant. But to the extent that defendant has not addressed the trial court's further consideration of this matter at the September 30, 2002, hearing regarding discovery matters, or the court's resulting October 2, 2002, order based on this hearing, this issue may be deemed abandoned. The failure to brief the merits of an allegation of error is deemed an abandonment of the issue. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Considering the issue, we note that in *People v Burwick*, 450 Mich 281, 296; 537 NW2d 813 (1995), our Supreme Court observed that MCL 767.40a serves as a component of the discovery rules intended to enhance the fairness of the adversary system. A trial court's decision with respect to discovery matters is reviewed on appeal for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). But the trial court's factual findings will not be reversed unless clearly erroneous. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant has not shown that the trial court abused its discretion when it denied his motion for assistance in locating Tracey and Kelly. The victim did not know the last names of these two individuals and they could not be identified other than as being former clients at an unidentified nail salon where the victim was no longer employed. We reject defendant's claim that Tracey and Kelly were res gestae witnesses. A res gestae witness is a "person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in development of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990), overruled in part on other grounds in *People v Koonce*, 466 Mich 515, 516; 648 NW2d 153 (2002). Here, there is no indication, nor does defendant suggest, that either Tracey or Kelly was with the victim on the date of the charged assault or witnessed some event in the continuum of the assault. Consequently, we conclude that, even if defendant can establish that MCL 767.40a was violated, he has not met his burden of showing that he was prejudiced by the statutory error. Accordingly, this issue does not warrant appellate relief.

IV

Defendant next argues that the trial court abused its discretion when it denied his pretrial motion for discovery. Defendant claims that the trial court should have ordered the prosecutor to disclose other bad acts evidence involving the victim, including evidence of any past false or unfounded accusations that she may have made.

We review the trial court's decision with respect to defendant's discovery motion for an abuse of discretion. *Phillips, supra* at 587. To the extent that constitutional due process issues are implicated, our review is de novo. *Cain, supra* at 108.

We find no basis for defendant's claim that the prosecutor was required to disclose evidence of past false or unfounded accusations made by the victim. The trial court's order states otherwise. Additionally, the trial court did not abuse its discretion to the extent that it denied defendant's request to have the prosecutor disclose unidentified evidence that would qualify for admission under MRE 404(b). The prosecutor did not have a duty to find evidence for defendant that might satisfy MRE 404(b). There is a distinction between the failure to develop evidence and the failure to disclose evidence. See *People v Coy*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003). "The prosecutor's office is not required to undertake discovery on behalf of a defendant." *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991). In this case, defendant is arguing that because the prosecution failed to undertake his discovery, reversal is warranted. We find the opposite to be true, and find no error in the trial court's opinion in this matter.

V

Defendant next argues that his right to due process was violated because the victim destroyed alleged exculpatory evidence and the police failed to collect evidence. Because defendant did not move for dismissal on this ground below, but rather relied on the lack of physical evidence to support his motion to dismiss based on prearrest delay, this issue is not properly preserved. See *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (an objection based on one ground is insufficient to preserve an appellate attack based on a different ground). Therefore, we review this unpreserved issue for plain error. *Carines, supra* at 763.

Defendant has not established a plain constitutional error. The failure of the police to collect and develop evidence tends to injure their case more than the defendant's case because the prosecution has the burden of proof. Defendant argued this fact throughout this trial.

VI

Next, defendant argues that the trial court erred in denying his motion to suppress the victim's in-court identification. We disagree. We find no basis in the record for concluding that the trial court clearly erred in finding that the photographic lineup that the victim viewed in March 2001 was not unduly suggestive. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The time lapse between the June 1997 sexual assault and the March 2001 photographic lineup, while significant, was only one factor to consider in determining whether the photographic lineup was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993); *Hornsby, supra* at 466. There is no per se rule invalidating an identification procedure if a time lapse of more than eighteen months is involved. See *Wilson v Mitchell*, 250 F3d 388 (CA 6, 2001).

Furthermore, the trial court also found that there was an independent basis for the victim's in-court identification. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). Because defendant has failed to address this aspect of the trial court's ruling, we deem this issue abandoned. *Kent, supra* at 210.

Whether the absence of counsel at the photographic lineup and the failure of the police to use a live lineup justified suppression of the victim's in-court identification present distinct questions that were outside the scope of defendant's motion to suppress. Hence, these questions

are unpreserved and we review them for plain error affecting defendant's substantial rights. *Carines, supra* at 763. Because the evidence at the suppression hearing indicated that defendant was not in custody when the photographic lineup was held, Detective McMullen's use of a photographic lineup without the presence of counsel was not plain error. *Kurylczyk, supra* at 302; *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973); see also *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

VII

Defendant next argues that a new trial is required because of instructional error. We disagree.

First, defendant argues that the trial court erred in denying his request for an instruction based on CJI2d 5.12, which would have permitted the jury to infer that the missing witnesses from the Hayloft bar would have testified unfavorably to the prosecution. The Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). "Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand." *Id.*

The trial court correctly denied defendant's request for the missing witness instruction. Had the trial court found that MCL 767.40a(5) was violated, it would have had discretion to sanction the prosecution with some form of the instruction in CJI2d 5.12. See *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003), and *Phillips, supra* at 587. Because there was no statutory error, the trial court's refusal to give a missing witness instruction was proper.

Defendant next argues that the trial court erred by refusing his request for an instruction that a defendant is entitled to have produced at trial all evidence bearing on his guilt or innocence which is within the prosecutor's control. Upon de novo review of this instructional issue, *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003), we disagree. Due process requires that a prosecutor present sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Hence, the instruction given by the trial court regarding the prosecutor's burden of proving each element of the crime beyond a reasonable doubt, which included, in part, a definition that "reasonable doubt is a fair honest doubt growing out of the evidence or lack of evidence," was sufficient to protect defendant's rights. See *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003), and *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

The additional instruction requested by defendant was not an accurate statement of the law, particularly given that the prosecution no longer has a duty to produce res gestae witnesses at trial. See *Burwick supra* at 730-731; cf. *Pearson, supra* at 730-731 (historically, the prosecutor could not pick and choose which witnesses to show the res gestae or whole transaction, but rather was required to produce all witnesses to the alleged crime). Hence, while *Fagan, supra*, supports defendant's broad statement that the prosecution must produce all evidence within its control, examined in the proper context, it affords no basis for finding instructional error. Because the reasonable doubt instruction adequately protected defendant's rights at trial, we find no basis for relief.

Defendant's other two claims of instructional error were not preserved for appeal by timely requests or objections at trial. Upon considering these claims, we find no plain instructional error. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003); *Carines*, *supra* at 763.

The trial court's instruction advising the jury how it was to evaluate evidence of defendant's statements was not plain error, given the victim's testimony about various statements made to her by defendant. The instruction did not improperly suggest that defendant had made some sort of confession or admission to someone other than the victim.

VIII

Defendant next raises several claims of prosecutorial misconduct. In general, issues of prosecutorial misconduct are decided on a case by case basis. *Id.* The test is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). In this case, however, defendant did not object to the prosecutor's remarks at trial. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763; see also *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We reject defendant's claim that reversal is required because the prosecutor used the term "victim" during trial, contrary to her pretrial stipulation that she would not refer to the complaining witness using this term. It is apparent that the prosecutor's use of the word "victim" twice during voir dire questioning of a prospective juror and once during closing argument was inadvertent, and these isolated references did not affect defendant's substantial rights. *Schutte*, *supra* at 721-722.¹

Also, we find no plain error based on the prosecutor's characterization of defendant as a "predatory animal," "animal" and "monster" in her closing and rebuttal arguments. Examined in context, the remarks were directed at defendant's conduct underlying the charged crime, rather than other crimes or bad acts. "Prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996); *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996). Further, the trial court later instructed the jury not to let sympathy or prejudice influence its decision, which was sufficient to cure any prejudice. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

Next, we reject defendant's claim that the prosecutor's rebuttal remark, "She told the police the truth," constituted improper vouching for the victim's credibility. A prosecutor may not vouch for the credibility of a witness, but may argue reasonable inferences from the evidence. *Bahoda*, *supra* at 282; *Schutte*, *supra* at 721-722. "Prosecutorial comments must be

¹ For purposes of this opinion, we have referred to the complaining witness as the victim. This is consistent with MCL 750.520a(p), which provides that a "victim" is the "person alleged to have been subjected to criminal sexual conduct." Further, but for the prosecutor's pretrial stipulation, the evidence clearly supported the prosecutor's characterization of the complaining witness as a victim in closing argument.

read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Id.* at 721. Here, examined in context, while we agree with defendant that this statement should not have been made, it is apparent that the prosecutor was responding to defense counsel’s closing argument that the victim was not truthful to the police. We find no plain error in the prosecutor’s remark.

Next, examined in context, we find no support for defendant’s claim that, by remarking that it took courage for the victim to come into court and testify, the prosecutor improperly suggested that defendant had threatened the victim not to testify and thereby circumvented the presumption of innocence. Also, any perceived appeal to the jury’s sympathy was dispelled by the trial court’s instruction that the jury must not let sympathy or prejudice influence its decision. *Watson, supra* at 592. Further, examined in context, the prosecutor did not ask the jury to convict defendant as part of its civic duty, but rather was relying on evidence regarding the victim’s initial reluctance to prosecute to infer that it took courage for her to come to court to testify. *Bahoda, supra* at 261; *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Thus, defendant has failed to establish any outcome-determinative plain error with respect to the prosecutor’s challenged remark.

Finally, we reject defendant’s claim that the prosecutor improperly asked the jury to convict him out of a sense of civic duty when commenting in closing argument that, “The judge will instruct you that if you believe [the victim] that’s all you need and thank God for that. Because if that was not the case, you and I, in order to protect our own security and safety, would have to walk around with a camera or VCR.” Although the prosecutor’s remark about a camera and VCR was unnecessary, the thrust of her argument was an accurate statement of the law that corroboration of a victim’s testimony is unnecessary. MCL 750.520h. Examined in context, it is apparent that the prosecutor asked the jury to convict defendant based on the evidence, rather than any civic duty. Accordingly, defendant has not met his burden of showing a plain error based on the prosecutor’s conduct. *Schutte, supra*.

IX

Defendant next argues that he was deprived of the effective assistance of counsel. Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *LeBlanc, supra* at 579. Because the trial court held a *Ginther* hearing, we review its factual findings for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different . . .
." *Id.* at 167. [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

As an initial matter, with regard to defendant's claim in his initial brief that defense counsel was ineffective for failing to hire a bite mark expert, because defendant did not pursue this claim at the *Ginther* hearing and does not address this issue in his brief after remand, we deem this issue abandoned. *Kelly*, *supra* at 640-641; *Kent*, *supra* at 210.

Defendant's claim that defense counsel was ineffective for relying on the prosecutor's pretrial representations concerning the efforts made to identify the three individuals from the Hayloft bar, rather than requesting that Detective McMullen testify concerning his investigative efforts, is technically outside the scope of this Court's earlier remand order. But because the trial court received testimony concerning this matter and addressed and decided the issue, we will consider it. This Court is empowered to go beyond properly raised issues and address any issue that, in its opinion, justice requires be addressed and resolved. *Cain*, *supra* at 127.

Nonetheless, consistent with our earlier determination that defendant was not prejudiced by the trial court's failure to give a missing witness instruction, even assuming that such an instruction might have been appropriate in this case as a discovery sanction, we conclude that defendant has only speculation to support his position on appeal that he was prejudiced by defense counsel's failure to have Detective McMullen testify in pretrial proceedings. Hence, even if defense counsel's performance fell below an objective standard of reasonableness, defendant has not shown the requisite prejudice to prevail on a claim of ineffective assistance of counsel, i.e., a reasonable probability that the result of the trial would have been different. *Toma*, *supra* at 302-303.

Next, we find no merit to defendant's claims that defense counsel's failure to object to the jury instruction regarding evidence of his statements (see part VII, *supra*), or to the prosecutor's conduct (see part VIII, *supra*), was objectively unreasonable.

We conclude that the only material questions raised by defendant concerning trial counsel's effectiveness are whether counsel unreasonably decided not to call defendant as a witness or present an alibi defense.

In general, a defendant is entitled to have counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Counsel must make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. *Strickland*, *supra* at 690-691. But decisions regarding whether to call alibi witnesses are presumed to be matters of trial strategy. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and *People v Stevenson*, 60 Mich App 614, 618; 231 NW2d 476 (1975). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, *supra* at 76-77.

Here, giving appropriate deference to the trial court's findings at the *Ginther* hearing, we uphold the trial court's determination that defense counsel's decisions not to pursue an alibi defense or have defendant testify were not objectively unreasonable. The record supports the trial court's finding that defendant consented to these strategic decisions.

Contrary to what defendant asserts, the trial court found, and the record supports, that defense counsel understood that defendant's prior convictions were not admissible under MRE 609. But as the trial court found, defense counsel was reasonably concerned, based on his conversations with defendant, that defendant could not be trusted not to open the door to evidence regarding his character. A defendant's testimony can open the door to cross-examination about a defendant's character or other acts. *Lukity, supra* at 484.

Also, the evidence indicated that defense counsel conducted a reasonable investigation of defendant's proposed alibi defense by discussing the matter with defendant's mother and defendant. Defense counsel's concern that the alibi testimony would be viewed with suspicion, given that only persons having a familial relationship with defendant would provide the testimony, was reasonable. A witness' relationship with a party can affect the witness' credibility. See *People v Layher*, 464 Mich 756, 762-763; 631 NW2d 281 (2001). Neither the photograph of defendant, nor the excerpt of the newspaper article about the fishing derby that defendant submitted at the *Ginther* hearing as supportive of his alibi claim, compel a different result. A failed strategy does not establish ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

X

Defendant next argues that he is entitled to be resentenced because of several sentencing errors. We disagree.

We reject defendant's claim that his Sixth Amendment right to counsel was violated because he was required to proceed at sentencing with unwanted counsel. Because defendant did not argue below, as he now argues on appeal, that he had an absolute Sixth Amendment right to proceed at sentencing with an attorney of his choice, this issue is not preserved. *Asevedo, supra* at 398.

The material preserved question is whether the trial court abused its discretion in denying defense counsel's motion to withdraw and defendant's motion for a continuance of sentencing in order to allow defendant to retain substitute counsel. See *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972); *Kryzstopaniec, supra* at 597-598. Considerations relevant to this question include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, such as an irreconcilable bona fide dispute with counsel, (3) was guilty of negligence, and (4) caused prior adjournments. *Id.* at 597-598. Whether defendant was merely attempting to delay the proceeding and show prejudice are also relevant considerations. *Akins, supra* at 557. After considering all relevant circumstances, we conclude that the trial court did not abuse its discretion by denying defendant's request for an adjournment of sentencing in order to accommodate defendant's desire for new counsel to represent him at sentencing. The trial court's decision was not so contrary to fact and logic that it demonstrates perversity of will, defiance of judgment, or an exercise of passion or bias. *Akins, supra* at 557.

Defendant also challenges the trial court's sentencing decision. The legislative sentencing guidelines do not apply to defendant because he was sentenced for a felony committed before January 1, 1999. MCL 769.34(1). Although the prosecutor filed a pretrial notice that defendant was subject to enhanced sentencing as an habitual offender under MCL 769.10, the decision whether to impose an habitual offender sentence was discretionary with the

trial court, *People v Alexander*, 234 Mich App 665, 674-675; 599 NW2d 749 (1999), and there is no indication that the court sentenced defendant as an habitual offender.

The record discloses that the trial court relied on information in the presentence report to impose a minimum sentence in excess of the recommended minimum sentence range of eight to fifteen years. It found that defendant engaged in predatory behavior in the instant case and had subsequent convictions for other criminal behavior. The trial court also found that defendant had no insight into his behavior and posed a continuous threat. We conclude that the trial court's sentence does not violate the concept of proportionality. Further, because defendant did not object to the factual accuracy of the information in the presentence report, and because defendant has not otherwise shown plain sentencing error in this regard, we reject his claim that he was improperly sentenced on the basis of false or inaccurate information. *People v Lawrence*, 206 Mich App 378, 380; 522 NW2d 654 (1994); see also *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), and *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000). Accordingly, resentencing is not warranted.

Affirmed.

/s/ Stephen L. Borrello

/s/ William B. Murphy

/s/ Janet T. Neff