

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 20, 2014

v

DERRICK ALDEN JOHNSON,
Defendant-Appellant.

No. 310075
Washtenaw Circuit Court
LC No. 08-001534-FC

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant Derrick Alden Johnson appeals as of right his convictions for unlawful imprisonment, MCL 750.349b, assault with intent to commit great bodily harm less than murder, MCL 750.84, and domestic assault, MCL 750.81a(2). We affirm in part, but remand for resentencing.

Defendant represented himself at trial, and was assisted by standby counsel. His convictions arise out of an assault perpetrated on the victim, which occurred over approximately eight hours in the victim's trailer. Defendant first argues that the prosecution presented insufficient evidence to support his unlawful imprisonment conviction. "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). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196.

"Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). The elements of unlawful imprisonment are set forth in MCL 750.349b(1):

- (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
 - (a) The person is restrained by means of a weapon or dangerous instrument.

(b) The restrained person was secretly confined.

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

Regarding the first element of the offense, knowing restraint, the term “restrain” as used in the statute means, in pertinent part, “to forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority.” MCL 750.349b(3)(a). Restraint can be temporary under the statute. MCL 750.349b(3)(a); *People v Railer*, 288 Mich App 213, 218-219; 792 NW2d 776 (2010).

Although MCL 750.349b(1) sets forth alternatives for the second element of the offense, the jury in the case at bar was only instructed on the secret confinement alternative set forth in MCL 750.349b(1)(b). As used in MCL 750.349b(1)(b), the term “secretly confined” means either: (i) “[t]o keep the confinement of the restrained person a secret” or (ii) “[t]o keep the location of the restrained person a secret.” MCL 750.349b(3)(b). In *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994), our Supreme Court interpreted the phrase “secret confinement” and held that:

the essence of “secret confinement” as contemplated by the statute is deprivation of the assistance of others by virtue of the victim’s inability to communicate his predicament. “Secret confinement” is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others.

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational jury to convict defendant of unlawful imprisonment beyond a reasonable doubt. As to the first element of the offense, there was evidence that defendant forcibly restrained the victim because he forced her into her trailer by grabbing her arm and that he continuously assaulted her for a period of several hours. See MCL 750.349b(3)(a). Defendant’s assertion that the victim was not restrained because she could have left the trailer after the assaults ended is meritless. See MCL 750.349b(3)(a); *Railer*, 288 Mich App at 218-219 (restraint can be temporary). Contrary to defendant’s arguments, MCL 750.349b(3)(a) does not require a victim to try to escape whenever she gets the opportunity to do so; rather, the restraint element can be satisfied by a temporary restraint. MCL 750.349b(3)(a); *Railer*, 288 Mich App at 218-219.

As to the second element of the offense, the totality of the circumstances provided sufficient evidence for a rational jury to find that defendant secretly confined the victim. The victim testified that she was afraid to leave or seek help during the assault because she was afraid of retribution by defendant. Fear of retribution by the defendant can demonstrate the victim’s inability to communicate her predicament, which is the essence of secret confinement. See *Jaffray*, 445 Mich at 309. Additionally, there was evidence that defendant attempted to keep the victim’s confinement a secret because the victim testified that defendant grabbed her arm and quickly ushered her into the trailer after she signaled to a neighbor for help, but failed to capture

the neighbor's attention. Moreover, there was evidence from which a rational jury could find that defendant secretly confined the victim because shortly after defendant brought the victim into the trailer, he moved her into the bedroom, which was an area of greater isolation. When viewed in a light most favorable to the prosecution, this evidence was sufficient for a rational jury to find that defendant secretly confined the victim. See *id.* at 310. Further, contrary to defendant's assertions, MCL 750.349b does not predicate a finding of secret confinement on the defendant's use of measures such as gagging the victim, nor does the statute preclude a finding of secret confinement where the victim does not attempt to cry out for help. Rather, secret confinement occurs when the defendant attempts to keep the confinement or location of the confinement a secret, MCL 750.349b(3)(b), which necessarily involves efforts to deprive the victim of the ability to communicate her plight to others, *Jaffray*, 445 Mich at 309; *Railer*, 288 Mich App at 218.

Next, defendant argues that the trial court abused its discretion when it responded to questions posed by the jury during deliberations. The jury twice requested additional instructions on the definition of "secretly confined." Defendant waived this issue because both he and standby counsel stated that they did not have any objections to the supplemental instructions given by the trial court. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011); *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Moreover, we have reviewed defendant's challenges and determined that they lack merit.

Defendant next argues that the trial court abused its discretion when it ordered that he remain shackled during trial. We agree. "Freedom from shackling is an important component of a fair trial." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). See also *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009) ("Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom."). While the right to be free from shackling is not absolute, "a defendant 'may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order.'" *Payne*, 285 Mich App at 186, quoting *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

The record reveals that defendant wore leg irons pursuant to alleged courtroom security policies, and the trial court expressly stated on the record that she shackled defendant without making an individualized determination that the shackles were necessary. This was an abuse of discretion. *Id.* at 186-187. Whether defendant is entitled to reversal because of the trial court's erroneous shackling decision depends on whether he was prejudiced by the shackles. "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Payne*, 285 Mich App at 186, quoting *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Here, there is no evidence on the record that the jury saw defendant's shackles, nor has defendant alleged as much. Thus, defendant cannot demonstrate prejudice. *Id.*

In reaching this conclusion, we decline defendant's invitation to remand for an evidentiary hearing to determine whether any of the jurors saw his shackles.¹ In doing so, we distinguish the case at bar from *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011), where our Supreme Court remanded for an evidentiary hearing on the issue whether the jury saw the defendant's shackles. In *Davenport*, the defendant presented a video that purportedly showed his shackles at trial. *People v Davenport*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2010 (Docket No. 287767), slip op at 2. After this Court denied the defendant's motion to remand, our Supreme Court reversed, concluding that "[t]he defendant should have been permitted to develop the record on the issue of whether his shackling during trial prejudiced his defense." *Davenport*, 488 Mich 1054. Here, in contrast to *Davenport*, there is no indication from the record, nor has defendant alleged as much, that the jury saw or could have seen defendant's shackles. Indeed, the trial court took precautions to ensure that defendant's shackles remained hidden from view, including requiring defendant to remain seated when he questioned witnesses and presented arguments. Additionally, the trial court required defendant to be seated at the witness stand outside the presence of the jury. Thus, we decline to remand for an evidentiary hearing on this matter. We further note that defendant's motion for remand filed with his brief on appeal did not seek remand on this basis, seeking remand only as to sentencing issues.

As an alternative to his request for remand, defendant argues that he can establish prejudice absent proof that the jury saw his shackles. Defendant argues that because he was required to remain seated at trial while the prosecutor and standby counsel were permitted to move freely about the courtroom, he was prejudiced in the minds of the jurors. We do not agree. The trial court mitigated any potential prejudice by instructing the jury that defendant remained seated throughout trial so that he could confer with standby counsel, who sat next to him. We presume that jurors follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Next, defendant argues that the trial court erred when it departed upward from the recommended minimum sentence under the legislative guidelines when it sentenced him for his unlawful imprisonment offense. There are three different standards of review that apply to a trial court's sentencing departure. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

If the trial court departs from the sentencing guidelines, this Court reviews for clear error whether a particular factor articulated by the trial court exists. A

¹ At one point during voir dire, defendant, through stand-by counsel, expressed "concern" that the members of the jury might have seen his shackles despite the shielding around counsel table where he was seated. Counsel did not indicate what members, if any, of the jury were in a position from which they could have seen the shackles. Moreover, the court specifically found that she was "sure [the jurors] didn't see your shackles." Neither defendant nor stand-by counsel asked for an opportunity to demonstrate otherwise.

trial court's determination that a factor is objective and verifiable presents a question of law that this Court reviews de novo. This Court reviews for an abuse of discretion the trial court's conclusion that the factors provide substantial and compelling reasons to depart from the guidelines. The trial court abuses its discretion when its result lies outside the range of principled outcomes. [*People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012) (internal citations omitted).]

“Under the Michigan Sentencing Guidelines, ‘the minimum sentence imposed by a court of this state for a felony enumerated . . . committed on or after January 1, 1999 *shall be within the appropriate sentence range* under the version of those sentencing guidelines in effect on the date the crime was committed.’” *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007), quoting MCL 769.34(2) (emphasis in original; footnote omitted). However, “[a] court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” *Anderson*, 298 Mich App at 183, quoting MCL 769.34(3). In addition to identifying an objective and verifiable reason for its departure,

[t]he trial court may not base a departure “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” [*Smith*, 482 Mich at 300, quoting MCL 769.34(3)(b).]

When a factor is considered under an offense variable, the trial court must, in order to justify its departure, explain why the offense variable was inadequate to account for the defendant's conduct. *Anderson*, 298 Mich App at 186. See also *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002) (emphasis added) (“The court [] may not premise a departure on an offense characteristic or offender characteristic already considered in determining the appropriate guidelines range *unless the court explicitly finds* from the facts of record that the characteristic was given inadequate or disproportionate weight.”).

When it sentenced defendant, the trial court explained that it was departing upward from the recommended minimum sentence under the legislative guidelines. In pertinent part, the trial court explained its departure as follows:

On the unlawful imprisonment case, the Court is going to depart upward from the guidelines for the substantial and compelling reasons that, that the victim not only was victim of the assaults and the crimes for which the defendant has been convicted, but was also someone that may have been the subject of a kidnaping [sic] had the defendant been successful and the fact that the witness intimidation surrounded this case as well, I think that the departure upward is appropriate and, therefore, the sentence of the Court on unlawful imprisonment is a minimum of ten years, up to a maximum of fifteen years in the Department of Corrections with credit for thirteen hundred and twelve days served.

Initially, we note that the factors articulated by the trial court for departure – the assault perpetrated on the victim and defendant’s repeated attempts to obstruct the administration of justice in this case, such as soliciting the victim’s kidnapping in order to prevent her from testifying and intimidating/bribing witnesses – were objective and verifiable because they were external to the mind of the sentencing court and because they were based on testimony produced at trial. See *Anderson*, 298 Mich App at 185. However, we agree with defendant that the factors cited by the trial court were already taken into account under the legislative guidelines, and that the trial court failed to provide any explanation as to why the factors were given disproportionate or inadequate weight by the guidelines. Indeed, the assault perpetrated on the victim was taken into account by the trial court’s scoring of offense variable (OV) 7, MCL 777.37(1)(a). Likewise, defendant’s repeated attempts to interfere with the administration of justice were taken into account by OV 19. In fact, when scoring OV 19, the trial court expressly referenced defendant’s repeated attempts to interfere with the administration of justice. Because the trial court failed to determine whether these factors were given inadequate or disproportionate weight under the guidelines, and because the trial court failed to articulate how these factors affected defendant’s minimum sentence range, we remand for resentencing. *Smith*, 482 Mich at 302-303 n 21 (holding that trial court’s failure to address whether a factor was already taken into account by an offense variable “leaves us unable to ascertain whether [s]he believed the factor was given inadequate weight or whether [s]he failed to recognize that the guidelines consider [that factor].”); *People v Babcock*, 469 Mich 247, 260-261; 666 NW2d 231 (2003). Indeed, “[a] reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.” *Smith*, 482 Mich at 318.

In his Standard 4 brief, defendant raises a host of issues, none of which have merit. Initially, he argues that the trial court’s answers in response to the jury’s requests for supplemental instructions denied him a unanimous jury verdict. He contends that the trial court’s supplemental instructions allowed the jury to convict him without agreeing to a single theory of guilt. We find that defendant waived this issue when he stated that he did not have any objections to the trial court’s supplemental instructions. *Kowalski*, 489 Mich at 504-505; *Chapo*, 283 Mich App at 372-373. Moreover, we have reviewed the issue and determined that the trial court’s supplemental instructions did not deny defendant his right to a unanimous verdict. The trial court’s general unanimity instruction was sufficient because the prosecution did not allege alternative acts as evidence of the actus reus of unlawful imprisonment, and because there was no evidence that the jury was confused or that it disagreed about the factual basis of defendant’s guilt. See *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).

Next, defendant argues in his Standard 4 brief that the trial court erred when it denied his post-trial motion for a directed verdict of acquittal as to unlawful imprisonment, and that the prosecutor committed misconduct at the hearing on his motion for a directed verdict by misstating the victim’s testimony. We reject defendant’s claim of prosecutorial misconduct because the prosecutor’s characterization of the victim’s testimony constituted reasonable inferences drawn from the victim’s testimony. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, we reject defendant’s request for an evidentiary hearing to determine whether the trial court considered the prosecutor’s alleged misstatements of the law

when it ruled on his motion for a directed verdict because defendant fails to establish that the issue is one that must be initially decided by the trial court. See MCR 7.211(C)(1)(a)(i).

Additionally, we reject defendant's claim that the trial court erred when it denied his post-trial motion for a directed verdict on the unlawful imprisonment issue. This Court reviews the denial of a motion for a directed verdict against the same standard as a challenge to the sufficiency of the evidence. See *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). As discussed *supra*, the evidence was sufficient for a rational jury to find defendant guilty of the offense of unlawful imprisonment; therefore, the trial court did not err by denying defendant's post-trial motion for a directed verdict. *Id.* We also reject defendant's claim that the trial court erred in denying his motion because it failed to cite any facts related to whether the victim was secretly confined. The record does not support such a claim. Likewise, we reject defendant's request to remand for an evidentiary hearing for the trial court to articulate the evidence on which it relied to deny the motion for a directed verdict because the development of a factual record is not necessary for appellate consideration of this issue. See MCR 7.211(C)(1)(a)(ii).

We also reject defendant's claim in his Standard 4 brief that the trial court erred when it refused to refer his motion for disqualification of the trial court to the chief judge pursuant to MCR 2.003(D)(3)(a)(i). We find defendant waived the disqualification issue because he failed to submit an affidavit as required by MCR 2.003(D)(2) when he filed his motion for disqualification. *Davis v Chatman*, 292 Mich App 603, 615; 808 NW2d 555 (2011). Moreover, even if the trial court erred by failing to refer the motion for disqualification to the chief judge, we find that the error was harmless because the record does not contain any grounds for disqualification. See *People v Coones*, 216 Mich App 721, 727; 550 NW2d 600 (1996).

We also reject defendant's cursory argument that he was denied his right of self-representation because he was not permitted to file his own motions and that he was forced to file all motions, such as his disqualification motion, through standby counsel. There is no indication on the record that defendant was not allowed to file his own motions. Moreover, although defendant cites an alleged letter from the trial court's judicial coordinator that required him to submit an unrelated motion through standby counsel, we need not consider this letter, which lacks any type of seal or indication that it was sent by the trial court, because it is not part of the lower court record. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Furthermore, we reject defendant's request to remand for an evidentiary hearing to determine why standby counsel did not file the affidavit along with defendant's disqualification motion. There is no indication in the record to support that standby counsel, rather than defendant, was required to file the affidavit, nor is there any evidence that standby counsel possessed the affidavit. Additionally, defendant cannot maintain a claim that standby counsel was ineffective for failing to file the affidavit. See *People v Kevorkian*, 248 Mich App 373, 426-427; 639 NW2d 291 (2001).

Next, defendant's Standard 4 brief alleges several unpreserved instances of prosecutorial misconduct. We find that none of the alleged instances of prosecutorial misconduct occurred. Moreover, even if the prosecutor committed misconduct as alleged by defendant, defendant would not be entitled to relief because a timely request for a curative instruction could have

cured the prejudice, if any, caused by defendant's alleged instances of prosecutorial misconduct. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Next, in his Standard 4 brief, defendant argues that the trial court's supplemental instructions given in response to the jury's questions were inadequate to protect his rights. Having rejected this claim *supra*, we find defendant's claims to be meritless. Furthermore, we reject defendant's claim that he is entitled to reversal because he was denied the ability to perform legal research in relation to the supplemental instructions because there is no evidence in the record that defendant was denied access to anything. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) ("As the appellant [], defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated."). Also, we reject defendant's argument that the trial court abused its discretion by failing to grant a continuance for defendant to read pertinent case law on this issue, and that the trial court's failure to grant a continuance denied defendant his right to present a defense, because defendant never requested a continuance at trial. See *id.* at 764 ("The longstanding rule of this state is that, in the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance.").

Defendant also argues in his Standard 4 brief that he was denied his right of self-representation. A denial of the right of self-representation is structural error requiring automatic reversal. *People v Allan*, 299 Mich App 205, 212; 829 NW2d 319 (2013), citing *McKaskle v Wiggins*, 465 US 168; 104 S Ct 944; 79 L Ed 2d 122 (1984). Defendant's claim stems from standby counsel's cross-examination of the victim. The record reveals that standby counsel cross-examined the victim and that defendant did not object to standby counsel doing so. However, toward the end of standby counsel's cross-examination, defendant interrupted standby counsel and asked the trial court if he could question the victim. Thereafter, the trial court, which, before the victim's testimony, informed defendant that he had to choose whether he or standby counsel would cross-examine the prosecution's witnesses, informed defendant that he had to submit his questions to standby counsel. Standby counsel then conferred with defendant, and resumed her cross-examination of the victim.

A criminal defendant has the right to represent himself under the Michigan and United States Constitutions. *People v Dunigan*, 299 Mich App 579, 587; 831 NW2d 243 (2013). "[A] defendant who represents himself 'must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.'" *Kevorkian*, 248 Mich App at 423, quoting *McKaskle*, 465 US at 174. Because a defendant who represents himself must control the representation, the right to self-representation imposes limits on the extent of standby counsel's participation. *Id.* "Consequently, . . . a defendant who represents himself 'is entitled to preserve actual control over the case he chooses to present to the jury' and [] 'participation by standby counsel [without the defendant's consent] should not be allowed to destroy the jury's perception that the defendant is representing himself.'" *Id.*, quoting *McKaskle*, 465 US at 178.

With regard to both prongs of the *McKaskle* test, i.e., whether the defendant retains control over the representation, and whether the jury perceives that the defendant is representing

himself, the defendant's invitation of standby counsel's performance can render meritless the defendant's claim that he was denied his right of self-representation. *McKaskle*, 465 US at 182. As explained in *McKaskle*,

[p]articipation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable. A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably interfered with the defendant's right to appear in the status of one defending himself. [*Id.*]

Further,

[a] defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced. [*Id.* at 183.]

Defendant argues that he was denied his right of self-representation because standby counsel's cross-examination of the victim deprived him of control over his representation, and because it destroyed the perception that he was representing himself. We do not agree. As to whether defendant controlled the representation, the record reveals that defendant conducted voir dire, raised objections and responded to the prosecution's objections, cross-examined the witnesses of his choosing, and generally had control over the theory of his defense. Additionally, although defendant claims that standby counsel's performance in cross-examining the victim was without his consent, the record reveals that defendant acquiesced in standby counsel's cross-examination. Thus, defendant's claim that standby counsel interfered with his right of self-representation by questioning the victim without his consent must fail. See *id.* at 182 ("A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense."). Further, although defendant eventually objected to standby counsel's performance at cross-examination, he was subsequently allowed to direct her cross-examination by conferring with standby counsel. Therefore, we find no basis to conclude that defendant was denied the ability to control his representation. See *id.* at 181-182.

We also reject defendant's claim that standby counsel's cross-examination of the victim destroyed the perception that defendant was representing himself. The record reveals that defendant initially acquiesced in standby counsel's cross-examination of the victim. Accordingly, any claim that standby counsel destroyed the perception that defendant was representing himself is without merit because

[a] defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be

presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced. [*Id.* at 183.]

Moreover, although defendant eventually expressed dissatisfaction with standby counsel's cross-examination of the victim, and although the trial court required defendant to submit questions to the victim through standby counsel, these isolated incidents did not destroy the perception that defendant represented himself. See *id.* at 185-186 (explaining that infrequent and innocuous interruptions by standby counsel do not destroy the perception that the defendant is representing himself). Indeed, although defendant was not permitted to question the victim on his own, he nevertheless had the opportunity to confer with standby counsel and to direct her to ask the questions of his choosing. And, to the extent his being required to submit questions through standby counsel in this one instance hindered the perception that defendant represented himself, it only did so because defendant changed his mind about who would question the victim, and not because of an active interference with defendant's right of self-representation. See *id.* at 182-183 (explaining that where the defendant's own changes of mind regarding standby counsel's role caused the defendant's *pro se* efforts to be undermined, the defendant's claim that he was denied his right of self-representation is hampered). Accordingly, defendant was not denied his right of self-representation.

Next, defendant argues that he was denied his right of confrontation because the trial court limited his cross-examination of the victim. Although the Confrontation Clause guarantees the opportunity to cross-examine witnesses, see, e.g., *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988), it does not extend to irrelevant topics of cross-examination, *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). Here, some of the matters about which the trial court prevented defendant from inquiring were irrelevant. And, the remaining areas into which the trial court prevented defendant from inquiring were areas into which defendant and standby counsel agreed not to inquire. Additionally, even assuming that the trial court erred by limiting defendant's ability to cross-examine the victim, defendant is not entitled to relief because he failed to make an offer of proof at trial with regard to any additional questions he would have asked the victim, and because he does not specify any such questions on appeal. See *People v Ho*, 231 Mich App 178, 190; 585 NW2d 357 (1998).²

Finally, we reject defendant's argument that the trial court abused its discretion by failing to strike from the presentence investigation report (PSIR), under a heading entitled "Agent's Description of the Offense," an allegation that defendant sexually assaulted the victim. Defendant was acquitted of first-degree criminal sexual conduct (CSC-I) at trial. At sentencing, standby counsel objected to references to the CSC-I charge in the PSIR. The trial court denied

² We also reject defendant's claims that he was denied due process and equal protection because of the trial court and standby counsel's conduct related to the victim's cross-examination because defendant neither develops those arguments nor cites any case law in support of his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

the request because the allegation of the CSC-I charge was “the investigator’s version [of events] and . . . [because of] [an] interpretation of events that this Court also heard.”

“This Court reviews a trial court’s response to a defendant’s challenge to the accuracy of a PSIR for an abuse of discretion.” *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). If a defendant challenges the accuracy of the information contained in the PSIR, the trial court must respond to the challenge. *Id.* at 182. “The court may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *Id.*, quoting *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). If the trial court resolves the defendant’s challenge, it must determine whether the challenged fact was established by a preponderance of the evidence. *People v Waclawski*, 286 Mich App 634, 690; 780 NW2d 321 (2009). Here, although the trial court’s reasons for rejecting defendant’s challenge were somewhat brief, the trial court rejected defendant’s challenge based on the evidence presented. The trial court did not abuse its discretion by doing so because a preponderance of the evidence supported the allegation that defendant sexually assaulted the victim. See *id.*

Affirmed in part, but remanded for resentencing. On remand, the trial court shall either more adequately justify its departure or sentence defendant within guidelines. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro