

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 14, 2011

v

NANNETTE LAREE HERNANDEZ,
Defendant-Appellant.

Nos. 297054; 300338
Berrien Circuit Court
LC No. 2009-003280-FH

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

In these consolidated actions, defendant appeals as of right her convictions for two counts of using a computer to commit a crime, MCL 752.796 and 752.797(3)(d), two counts of false pretenses, MCL 750.218(1) and (4)(a), and two counts of uttering and publishing, MCL 750.249, and the sentence imposed after she pleaded guilty to a probation violation. We affirm, but remand for correction of the presentence investigation report (PSIR).

Defendant's convictions arose from her attempts to sell a sailboat she did not own on the online auction site eBay®, and her alleged falsification and alteration of a bill of sale and cashier's check she posted on eBay® in order to represent that she owned the sailboat. Defendant first argues that her counsel was ineffective. To prevail on this argument, defendant must show that her trial counsel's representation fell below an objective standard of reasonableness under professional norms, that but for her counsel's error there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Given that there was no *Ginther*¹ hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant first argues that counsel was ineffective in failing to obtain expert analysis of defendant's two computers and an external hard drive. Defendant contends that this hardware

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

housed emails that would have supported her theory of the case. Defendant further contends that an examination of the hardware would have shown that she did not alter the cashier's check. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990) (citations omitted). However, "defendant has the burden of establishing the factual predicate for [her] claim of ineffective assistance of counsel" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not explained how an inspection of the hardware could have substantiated her claims about the emails or the cashier's check. Accordingly, defendant's ineffective assistance argument regarding this claim of error is without merit.

Defendant also argues that trial counsel was ineffective in failing to object to the retention of Juror No. 48. The juror indicated during voir dire that she did not know any of the witnesses in the case. On the second day of trial, however, the juror learned that she actually knew one witness. The juror also acknowledged that she had spoken to the witness during a break on that day. To the extent that defendant is arguing that Juror No. 48 was biased, the argument is without merit. In *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), overruled in part *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008), this Court held that "when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question *or* (2) that the juror was properly excusable for cause." (Emphasis added.) In *Miller*, 482 Mich at 561, the Supreme Court held:

To the extent that in *Daoust* the Court of Appeals broadly states in dicta that a new trial is *always* required whenever a juror would have been excusable for cause, *Daoust* is wrong and overruled. As discussed earlier, the proper inquiry is whether the defendant was denied his right to an impartial jury. If he was not, there is no need for a new trial.

The record demonstrates that the juror was acquainted with the witness during the previous t-ball season only. The juror swore that she would not allow her limited knowledge of the witness to affect her assessment of the evidence. When the juror briefly spoke to the witness, they did not discuss the case. Thus, counsel's decision not to object to retention of the juror was reasonable. Even if the juror had been excusable for cause and counsel should have objected to her remaining on the jury, there was no evidence that defendant was denied her right to a fair and impartial jury, or that the result of the proceedings would have been different if the juror had been excused. Moreover, we find no merit in defendant's argument that the juror could not follow the trial court's instructions. The juror stated under oath that she did not realize that she knew the witness until she saw her during the break. There is no indication in the record that the juror knew the witness was involved in the trial when the juror first spoke to the witness. Defendant has failed to demonstrate ineffective assistance of counsel regarding this claim of error.

Defendant also argues that trial counsel was ineffective for failing to object to the trial court's sentencing mistakes. Defendant was sentenced, in part, to probation and incarceration at the Kalamazoo Probation Enhancement Program (KPEP). However, defendant pleaded guilty to violating her probation for inappropriately touching a KPEP staff member and being discharged for that reason. At the probation violation hearing, the trial court revoked defendant's probation

and sentenced her, in relevant part, to 1 to 15 years' imprisonment for her convictions of uttering and publishing.² Defendant asserts that counsel failed to insist on an updated PSIR and failed to confirm that the changes to the original PSIR the court ordered at sentencing were actually made. "At a resentencing, the trial court is obligated to utilize a reasonably updated presentence investigation report." *People v Hemphill*, 439 Mich 576, 578-579; 487 NW2d 152 (1992) (citation omitted). "A five-month-old report was found not to have been properly used where there were significant allegations that the defendant's circumstances had changed during the interim." *Id.* at 581, citing *People v Crook*, 123 Mich App 500, 503; 333 NW2d 317 (1983). A PSIR of a specific age may not be "inherently defective." *Crook*, 123 Mich App at 503. A defendant may waive preparation of an updated report if the original report is not "manifestly outdated." *Hemphill*, 439 Mich at 582.

The trial court appears not to have considered an updated PSIR before sentencing defendant following revocation of her probation. However, defendant has not argued or demonstrated any specific change in her circumstances since the original sentencing. The mere passage of time cannot render the report "inherently defective." *Crook*, 123 Mich App at 503. Defendant has not shown prejudice resulting from counsel's failure to insist that the trial court use a current PSIR, and thus, she has not demonstrated ineffective assistance based on this error.

Defendant next points out that at the original sentencing hearing, the trial court ordered changes to be made to the PSIR. Defendant maintains that counsel failed to ensure that these changes were made. The changes included that defendant continued to maintain that she thought she owned the sailboat, that defendant denied that she was asked for verification of her college degrees, and that defendant denied violating the court's orders concerning internet transactions. However, the trial court did not consider these changes in sentencing defendant for violating probation. Rather, the court considered defendant's conduct during probation. Defendant has not shown how the outcome of her sentencing for the probation violations would have been different had these changes been included in the PSIR. She has therefore failed to demonstrate ineffective assistance regarding this claim of error.

Defendant also argues that defense counsel was ineffective because the Offense Variables (OVs) were "argued and changed at sentencing," and the PSIR "does not reflect these changes." Because defendant fails to offer any further argument or explanation on this issue, we deem the issue abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment . . .").

Defendant argues that counsel was also ineffective by failing to object to the court's violation of MCR 6.445(F)(2). The rule provides that before accepting a guilty plea to a probation violation, the court must "advise the probationer of the maximum possible jail or

² The sentence was later amended to 1 to 14 years' imprisonment.

prison sentence for the offense.” MCR 6.445(F)(2). The court incorrectly advised defendant that the maximum possible sentence for uttering and publishing is 15 years, rather than the actual 14 years. See MCL 750.249. We note that the information and the amended information in this case indicated that the maximum penalty for uttering and publishing was 14 years. Thus, defendant should have been aware of the maximum possible sentence, and she has failed to show prejudice resulting from counsel’s failure to object. Similarly, although defendant argues that the court violated MCR 6.425(E)(1)(d) by stating that her maximum sentence was 15 years’ imprisonment, the amended judgment of sentence shows that the trial court ultimately imposed only a 14-year maximum sentence. Generally, a judgment or order is effective when reduced to written form. See *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). Defendant has failed to demonstrate ineffective assistance based on these claims of error.

Defendant also argues that she is entitled to resentencing because of the trial court’s various sentencing mistakes. We review unpreserved errors for plain error affecting a defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The trial court apparently did not use an updated PSIR at the probation violation hearing. However, as we previously discussed, defendant has not shown that the original PSIR was manifestly outdated. Likewise, defendant has not shown prejudice from the trial court’s misstatement of the maximum sentence for uttering and publishing, or the court’s statement at resentencing that defendant was sentenced to a maximum of 15 years’ imprisonment. Therefore, any error did not affect defendant’s substantial rights, and she is not entitled to resentencing. However, the court ordered several changes to the PSIR as discussed above, and we cannot confirm that these changes have been included in the PSIR. Plaintiff acknowledges that this Court may order the trial court to correct the PSIR to reflect the changes described in the sentencing transcript.

Affirmed, but remanded for the administrative task of correcting the PSIR as needed. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Peter D. O’Connell

/s/ Donald S. Owens