STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2014
v KOLIE LANAR MCADOO, Defendant-Appellant.	No. 313880 Macomb Circuit Court LC No. 2012-000656-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KOLIE LANAR MCADOO, Defendant-Appellant.	No. 313881 Macomb Circuit Court LC No. 2012-003414-FH

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of safe breaking, MCL 750.531; two counts of breaking and entering a building with intent, MCL 750.110; and two counts of possession of burglar's tools, MCL 750.116.[1] The trial court, applying a fourth-offense habitual offender enhancement, MCL 769.12, sentenced defendant to three terms of 10 to 20 years' imprisonment for safe breaking, for one of the breaking-and-entering convictions, and for one of the possession convictions. The trial court sentenced defendant to six to 20 years' imprisonment for the remaining breaking-and-entering and possession convictions. We affirm defendant's convictions in both cases and his sentences in Docket No. 313880. We remand for resentencing in Docket No. 313881.

[1] The prosecution filed two cases but they were heard by a single jury.

This case involves the forced break-ins at two different businesses, on the same road, on December 19, 2011.

Defendant first argues that incriminating statements he made to police should not have been admitted at trial because they resulted from an illegal arrest.

Defendant filed a motion for a hearing under *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), arguing that the police did not have probable cause to arrest and the statements were the fruit of the poisonous tree. However, defendant requested that a new attorney be appointed to represent him, and the new attorney did not pursue the motion. The attorney asked Detroit Police Officer Derrick Mason on cross-examination whether he had probable cause to arrest defendant, but never argued lack of probable cause. Defense counsel objected to the admission of any statements defendant made "unless he was under arrest" because he was not given a *Miranda*[2] warning; however, the attorney did not argue that the officers lacked probable cause to arrest. Because this issue was not pursued in the trial court, it was not preserved for review. See *People v Green*, 260 Mich App 392, 395-396; 677 NW2d 363 (2004), overruled in part on other grounds by *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006). Indeed, an objection on a different ground generally does not preserve an issue for appellate review. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

This Court reviews unpreserved constitutional issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).[3]

The Fourth Amendment of the United States Constitution protects persons from unreasonable search and seizure. *Dunaway v New York*, 442 US 200, 207; 99 S Ct 2248; 60 L Ed 2d 824 (1979). An officer may arrest a suspect without a warrant if he has probable cause, which is reasonable cause to believe a felony was committed and that the person committed it. MCL 764.15(1)(d); *Cohen*, 294 Mich App at 74-75. The prosecution has the burden of establishing probable cause. *People v Davenport*, 99 Mich App 687, 691; 299 NW2d 368 (1980).

Defendant argues that the officers did not have probable cause to arrest him and instead arrested him to investigate whether he was involved in the crimes that night. The analysis regarding whether there was probable cause to arrest defendant is complicated by the arresting officer's testimony. When defense counsel asked whether he had probable cause to arrest defendant, Mason replied, "Not to arrest, but to investigate." However, it was not clear whether Mason was referring only to the moment when he and his partner saw defendant, or after they spoke to him and discovered a crowbar sitting on the grass directly behind him, which was the point at which they detained him in the police car. The attorneys and the trial court did not seek clarification, and a fair reading of the transcript implies that Mason was referring to the point when he initially *saw* defendant.

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

[3] We note, however, that we would find no basis for reversal even if this issue were to be deemed preserved.

The arresting officers clearly had probable cause to believe crimes had been committed that night. They also had reasonable cause to believe that the breaking and entering for which there was surveillance video was likely related to the additional breaking-and-entering crimes that occurred on the same road in their jurisdiction, closer to where defendant was found. The arresting officers testified that defendant's clothing matched the suspect's. While the description of a black male with dark clothing was not particularly unique, a hat that could be pulled over his face was an additional detail creating suspicion, along with defendant's stories about why he was sitting on the ledge by a vacant building just before 6:00 a.m. Moreover, the crowbar sitting behind defendant was an essential element creating reasonable cause to believe that defendant was involved in the breaking-and-entering crimes. When the crowbar was discovered, the officers had reasonable cause to believe that a felony had been committed and that defendant committed it; therefore, the arrest was lawful. See *Cohen*, 294 Mich App at 74-75.

Defendant next argues that a detective's testimony about a fingerprint found at another breaking-and-entering scene was hearsay and violated defendant's constitutional right to confront the witnesses against him. He further argues that if his counsel invited the testimony, the attorney rendered ineffective assistance.

This Court reviews for an abuse of discretion a trial court's decision whether to admit evidence. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). We review de novo related questions of constitutional law. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). We review an ineffective-assistance issue to determine whether the attorney's performance fell below an objective level of reasonableness and the defendant was denied a fair trial as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To obtain relief, a defendant must establish a reasonable probability that counsel's error affected the outcome of the proceedings. *Id*. at 302-303.

The accused in any state or federal criminal prosecution has the right to be confronted with the witnesses against him. *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). This prevents the use of *ex parte* examinations as evidence. *Id*. at 50. Testimonial statements of witnesses who do not appear at trial are not admissible, unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine. *Crawford*, 541 US at 52-54. In *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the Court emphasized that it is the testimonial nature of a statement that determines whether the Confrontation Clause applies.

Forensic-analysis findings made by and laboratory reports prepared by people are considered testimonial, and the Confrontation Clause therefore applies. *Melendez-Diaz v Massachusetts*, 557 US 305, 307, 311; 129 S Ct 2527; 174 L Ed 2d 314 (2009); *People v Dinardo*, 290 Mich App 280, 290; 801 NW2d 73 (2010). In *People v Jambor*, 273 Mich App 477, 487-488; 729 NW2d 569 (2007), this Court found that fingerprint cards were not testimonial because they included no subjective statements; however, this Court distinguished the cards from any testimony that the fingerprints matched the defendant's.

We conclude that the testimony that defendant's fingerprints were found at another scene was based on "testimonial" information. While fingerprint comparison might be essentially automated, there remains an element of subjective analysis, see *id*. at 487-488, and here, the

witness in question simply indicated that he received the information from the prosecutor's office; in other words, the witness did not undertake the analysis himself.[4]

The trial court held that defendant opened the door to the testimony when his counsel asked whether the detective knew there were other incidents of breaking and entering between 3:43 a.m. and 5:43 a.m. and implied that defendant could not have been in all those businesses in one night without a car.[5] When defense counsel asks a witness about acts that might otherwise be inadmissible under MRE 404(b), this opens the door to additional questions by the prosecution regarding the same issue. See *People v Horn*, 279 Mich App 31, 35; 755 NW2d 212 (2008).

Defendant, however, argues that his questions could not "open the door" to testimony that violated his rights under the Confrontation Clause. In *People v Fackelman*, 489 Mich 515, 544-545; 802 NW2d 552, (2011), the Court held that admissibility under the rules of evidence does not override the protections of the Confrontation Clause and the defendant did not open the door to all questions about a psychiatric evaluation when his expert mentioned the existence of the report. The Court's decision in *Fackelman* indicates that a broad question regarding other acts does not open the door to testimony whose admission into evidence would otherwise violate the right to confrontation. Therefore, the trial court erred in allowing this evidence.

However, a harmless-error analysis applies. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). The question is whether it is apparent beyond a reasonable doubt that a jury would have found the defendant guilty in the absence of the error. *Id*. at 347. We find the error to be harmless. The evidence against defendant—including his being found with a crowbar within reach and his statements ("How did you guys find out it was me? I had a mask on . . . [a]re you guys going to charge me with all six businesses[?]")—was overwhelming. Given the harmless nature of the error, defendant cannot establish ineffective assistance of counsel. *Toma*, 462 Mich at 302-303.

Defendant next argues that additional evidence of uncharged break-ins should not have been admitted. To preserve this issue for appeal, defendant must have objected to the evidence

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[4] The prosecution argues on appeal that the evidence was not testimonial because it was not used to prove that defendant committed the crime at the scene of the fingerprint but instead was used to prove his location that night. The Confrontation Clause does not prevent the use of testimonial statements for purposes other than to establish the truth of the matter asserted (for example, impeachment purposes). *Crawford*, 541 US at 59 n 9. However, it is difficult to make a distinction between showing defendant committed the crime and showing that he was at a crime location that night. There is no suggestion that the prosecution was attempting to impeach any witness or explain why the detective took certain actions. Rather, the testimony was used to contradict the defense's implication that, because so many businesses were broken into on that street that night and defendant apparently had no car, he could not have been the perpetrator.

[5] Although the prosecution had filed a prior-acts notice and the trial court had granted the motion, the notice was limited to a breaking and entering that occurred on a different date.

on the same ground in the trial court. See MRE 103(a)(1). Defense counsel objected only to the fingerprint testimony, arguing that defendant had a right to cross-examination. This Court reviews unpreserved issues for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

When the prosecution seeks to admit evidence of other crimes, the evidence is admissible only when (1) it is offered to show something other than character or propensity, MRE 404(b)(1); (2) it is relevant under MRE 402; and (3) the probative value is not substantially outweighed by unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Under MRE 404(b)(1), evidence of other acts is not admissible to prove a defendant's character. However, it may be admissible for other purposes, including to prove "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." MRE 404(b)(1). The prosecution must provide pretrial notice of the general nature of the evidence and the rationale for admitting it. MRE 404(b)(2). The prosecution must explain how the evidence is relevant to a cited purpose. *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007). To be admitted as evidence of a common scheme, the acts must have common features beyond the commission of the same crime, sufficient to establish the existence of a common plan, although the plan need not be distinctive or unusual. *People v Sabin*, 463 Mich 43, 65-66; 614 NW2d 888 (2000).

The prosecution filed a prior-acts notice and the trial court granted the motion; however, the notice was limited to a breaking and entering that occurred on a different date. The prosecution argues on appeal that the evidence was admissible as part of the res gestae of the charged offense, because it was essential for the jury to hear the complete story. However, the prosecution does not sufficiently explain how evidence of other breaking-and-entering crimes that night was essential to the understanding of the circumstances of the charged crimes. Nevertheless, as addressed above, when defense counsel asks a witness about acts that might otherwise be inadmissible under MRE 404(b), this opens the door to additional questions by the prosecution regarding the same issues. See *Horn*, 279 Mich App at 35. Unlike the fingerprint issue, this issue does not involve the complication of the Confrontation Clause. It is clear that the prosecution could ask additional questions about the other breaking-and-entering crimes that occurred that night after defense counsel asked whether the detective was aware of the crimes. This included the number of break-ins—which was exactly what defense counsel asked about, in his effort to show that defendant, without a car, could not have committed them. We find no basis for reversal.

Defendant next argues that testimony by a tool-mark expert should not have been admitted and that his attorney rendered ineffective assistance by failing to object to the testimony. As noted, this Court reviews unpreserved issues for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

For expert testimony to be admissible under MRE 702, it must be helpful to the trier of fact, *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (2005), and express conclusions based on reliable principles and methods, *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 381 (2004). Additionally, the probative value cannot be substantially outweighed by the risk of unfair prejudice or confusion. *People v Dobek*, 274 Mich App 58, 97; 732 NW2d 546 (2007).

The parties do not cite any published cases in this state specifically addressing the reliability of tool-mark identification similar to that used in the present case. Defendant submits on appeal an affidavit from a law and criminal-justice professor who opines that tool-mark identification should not be admissible because it does not lead to reliable conclusions. However, this Court's review is limited to the lower-court record. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000). Defendant did not present this affidavit or raise these arguments regarding the reliability of tool-mark evidence in the trial court. His counsel did not object to the trial court's qualifying Lieutenant Brian Bergeron as an expert in tool marks.

Lieutenant Bergeron testified regarding the process he used to analyze the tool marks, as well as his qualifications. He testified further that he documented his analysis and that a second examiner agreed with his assessment. This appears to comport with the generally accepted guidelines for tool mark identification. See *United States v Willock*, 696 F Supp 2d at 536, 569-570 (D Md, 2010). Bergeron testified that, in his opinion, the marks at the wig shop were made by the pry bar in question. Bergeron did not use phrasing overemphasizing his certainty. Under the circumstances, we find no plain error. We also find no ineffective assistance of counsel. Indeed, defendant has not shown a reasonable probability that the trial court would have excluded the evidence if counsel had raised an objection.

Defendant next argues that his attorney rendered ineffective assistance by failing to object to the joinder of two separate cases; he contends that this failure violated his right to a speedy trial. As noted, this Court reviews a claim of ineffective assistance of counsel to determine whether the attorney's performance fell below an objective level of reasonableness and the defendant was denied a fair trial as a result. *Toma*, 462 Mich at 302. The specific issue whether joiner or severance was appropriate is a mixed question of law and fact. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). The trial court's findings of fact are reviewed for clear error and underlying issues of law are reviewed de novo. *Id*.

Two or more informations or indictments may be joined for a single trial. MCR 6.120(A) and (B). If the defendant moves for severance, the trial court must sever for separate trials any offenses that are not related. MCR 6.120(C). Related offenses are those based on the same conduct or transaction, a series of connected acts, or a series of acts that were part of a single scheme or plan. MCR 6.120(B)(1). Simply being of the same or similar character or for the same general purpose of making money illegally does not make offenses sufficiently related. *Williams*, 483 Mich at 235, 235 n 10. However, in *People v Collins*, 298 Mich App 458, 469-470; 828 NW2d 392 (2012), this Court found that multiple drug deliveries were connected acts and, therefore, a motion to sever would have been futile. Here, two break-ins at businesses in the same night on the same street constituted a series of acts that were part of the same scheme or plan; therefore, they were related. See MCR 6.120(B)(1).

Defendant, however, cites the statement in *Wildman v Johnson*, 261 F3d 832, 840-841 (CA 9, 2001), that joinder violates due process when it allows otherwise inadmissible evidence or when a strong evidentiary case is joined with a weaker one. Whether the evidence of each charge would be admissible in a trial on the other charges is an important consideration, because otherwise joinder would prejudice the defendant. *Williams*, 483 Mich at 237. Here, evidence of both crimes would have been admissible as part of the same scheme or plan under MRE 404(b).

Defendant suggests that the evidence in one crime was weaker than that in the other. Long John Silver had video evidence of the perpetrator's clothing matching that of defendant, while the wig shop had tool-mark identification. The direct evidence in the case involving Long John Silver was arguably stronger; however, not significantly so. Further, there was evidence, admissible in both cases, that defendant was sitting at a nearby vacant lot with a crowbar just after the wig shop break-in, and defendant's statements to police were further strong evidence of his guilt.

We conclude that trial counsel was not ineffective because any efforts to sever would have failed. See *Collins*, 298 Mich App at 470.

Defendant also argues that he was prejudiced by the joinder because it delayed the trial on the first charges and gave him insufficient time to prepare for the second charges. Defendants have a state and federal constitutional right to a speedy trial. *People v Waclawski*, 286 Mich App 634, 665; 780 NW2d 321 (2009). The courts use a balancing test, which considers the reasons for the delay, the length of the delay, the prejudice to the defendant, and the defendant's assertion of the right. *People v Lown*, 488 Mich 242, 261-262; 749 NW2d 9 (2011); *Waclawski*, 286 Mich App at 665.

On April 30, 2012, pretrial proceedings were adjourned because defendant wanted a new attorney. On May 16, 2012, the proceedings had to be adjourned because defendant was unavailable. On June 1, 2012, his attorney requested adjournment, in part to determine what type of evidentiary hearing his client wanted him to bring; it is not revealed in the record why he never brought that hearing. On June 28, 2012, defendant indicated that he retained a new attorney, but on July 2, 2012, his appointed attorney returned and argued a motion to quash. The complaint in the second case was signed on June 17, 2012, and the warrant was authorized on July 2, 2012. At the September 10, 2012, status conference, the trial court adjourned the pretrial and set an October 12, 2012, trial date. At the September 18, 2012, pretrial, the trial court said that the district-court examination on the new charges was moved up from October 2, 2012, to September 25, 2012, and both matters would proceed to trial on October 10, 2012.

The only part of these delays that might have been attributable to the new charges rather than defendant's motions and changes in representation occurred between July 2012 and October 2012. Defendant has not shown any prejudice from this delay. Defendant also argues that his counsel did not have time to prepare to defend against the second set of charges. The only new preparation counsel could have made was in regard to the tool-mark identification evidence. As discussed above, however, it was unlikely the trial court would have found the evidence inadmissible and defendant has not shown how further preparation would have aided the case. We find no basis for reversal.

Defendant next argues that he was denied due process of law by the loss or destruction of some of the clothing that he was wearing upon arrest. Defense counsel asked witnesses about the location of the jacket and pants during trial; however, he did not claim that defendant was denied due process by the loss or destruction of evidence. This Court reviews unpreserved constitutional issues for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Loss or destruction of evidence before it is requested by defense counsel requires reversal only when it was done intentionally or in bad faith. *People v Jones*, 301 Mich App 566, 580;

837 NW2d 7 (2013); *People v Wallace*, 102 Mich App 386, 392; 301 NW2d 540 (1980). The defendant has the burden of showing that evidence was exculpatory or the police lost or destroyed the evidence in bad faith. *Jones*, 301 Mich App at 581.

Police witnesses testified that the clothing deemed relevant to the investigation because of its uniqueness was preserved. According to testimony, defendant was allowed to keep his pants and jacket during his initial detention, and these items were apparently later lost in the piles of personal items taken from inmates. There is no indication that the evidence would have been exculpatory and insufficient evidence of bad faith by the police to warrant a reversal.

Defendant next argues that the prosecutor committed misconduct by denigrating defense counsel. This issue is unpreserved and is therefore reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Issues of prosecutorial misconduct are decided case by case. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). The prosecutor's remarks must be considered in context and in light of the defense arguments and the evidence. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). A prosecutor may argue the evidence and all reasonable inferences from the evidence. *Id*. This Court reverses based on a prosecutor's comments and questions only when a defendant was denied a fair trial. *People v Abraham*, 256 Mich App at 265, 272; 662 NW2d 836 (2003).

Defendant argues that he was denied a fair trial because the prosecutor stated in his closing argument that the defense wanted the jury to believe that everything was "coincidence" and then said, "He wants you to buy that garbage. If you buy that garbage, then I ask you to consider purchasing this invisible house I have for sale. It's on the beach."

The prosecutor cannot personally attack the defense attorney, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or argue that defense counsel was intentionally trying to mislead the jury, *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). However, the prosecutor can attack the credibility of a defense theory. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

Defendant compares this case to *People v Wise*, 134 Mich App 82, 100-102; 351 NW2d 255 (1984), in which this Court found impermissible the prosecutor's argument that defense counsel was "not a very candid person" who "intentionally misled" the jury and, if he was believed, "the patients are in charge of the hospital." Defendant also compares the present case to *People v Dalessandro*, 165 Mich App 569, 579; 419 NW2d 609 (1988), in which the prosecutor called the defense a "sham," a "bunch of lies," and "damnable lies."

We note, however, that a prosecutor is not required to use the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The prosecutor in the present case did not directly denigrate defense counsel or call him a liar; rather, the prosecutor argued that the defense of coincidence was not believable and was "garbage." Under the circumstances, we find no plain error. Further, had defendant objected, the trial court might have issued a warning or curative instruction. See *McLaughlin*, 258 Mich App at 647.

Defendant next argues that he must be resentenced because the trial court improperly amended the judgments of sentence to reflect a fourth-offense habitual offender enhancement. Factual findings at sentencing are reviewed for clear error. *People v Bowling*, 299 Mich App 552, 560; 830 NW2d 800 (2013). However, this Court reviews de novo questions of law, including issues of statutory interpretation and constitutional law. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Defendant argues that the trial court could not amend the judgments of sentence without at least holding a hearing regarding his fourth-offense habitual offender status. The sentencing-information report indicated that defendant was a fourth-offense habitual offender. During the sentencing hearing, defense counsel and defendant agreed that the report was factually accurate and sought no corrections. Defense counsel argued, however, that defendant insisted he was not given adequate notice of his habitual-offender status and felt it should not be used in sentencing.

The trial court did not expressly address the notice issue, which is addressed *infra*. The court also did not expressly state that it was sentencing defendant as a fourth-offense habitual offender; however, the court implied by its silence on the issue that it was adopting the recommendations in the sentencing-information report. Indeed, the sentences the trial court imposed were appropriate only if defendant was an habitual offender. The court's failure to note the habitual-offender status on the initial judgments of sentence was clearly a clerical error.

A trial court may correct a clerical mistake or omission at any time on its own initiative under MCR 6.435(A), and there is no requirement that a hearing be held. *People v Howell*, 300 Mich App 638, 649; 834 NW2d 923 (2013). The defendant's due-process rights are not violated when the correction is necessary and the trial court does not have the discretion to do otherwise. *Id*. at 649-650. In the present case, the actual sentences were not changed; rather, the court corrected a clerical error (the omission of the habitual-offender enhancement) that had accidentally made the sentences invalid. No error is apparent.

However, defendant argues that he must be resentenced because, in one of the cases, the prosecutor failed to file a notice of intent to seek an habitual-offender enhancement. The prosecution has conceded that there was no notice filed in the second case and concedes that resentencing is required. The case must be remanded for resentencing regarding the convictions in LC No. 2012-003414-FH. See *People v Barber*, 466 Mich 877; 661 NW2d 578 (2002), and *People v Williams*, 462 Mich 882; 617 NW2d 330 (2000). Defendant must be sentenced for those convictions without an habitual-offender enhancement.

Defendant next argues that, in the other case, LC No. 2012-000656-FC, he did not timely receive notice of the prosecution's intent to seek an habitual-offender enhancement.

A prosecuting attorney can seek sentencing enhancement under the habitual-offender statutes by filing written notice within 21 days after arraignment or, if arraignment is waived, within 21 days after the information is filed. MCL 769.13(1). The lower-court record contains a fourth-offense habitual offender notice dated March 1, 2012. Defendant's circuit-court arraignment occurred on March 5, 2012. At the arraignment, defendant's attorney noted that he was going to request a possible deviation because of new habitual-offender rules affecting

defendant as a fourth-offense habitual offender. Accordingly, there is no indication that defendant did not receive the habitual-offender notice. Indeed, we note that he did not claim lack of notice when the trial court's advice before trial included the information that he was a fourth-offense habitual offender. Under the circumstances, we find no basis for a remand.

Defendant's convictions are affirmed in both cases and his sentences are affirmed in Docket No. 313880, but we remand for resentencing in Docket No. 313881. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter