STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2003
v	No. 242171 Oakland Circuit Court
KEYON S. WALKER, Defendant-Appellant.	LC No. 2001-179173-FH

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree home invasion, MCL 750.110a(2), and domestic violence, MCL 750.81(2). Defendant was sentenced, as a habitual offender,[1] to eight to forty years' imprisonment for the first-degree home invasion conviction and to ninety-three days' imprisonment for the domestic violence conviction. We affirm.

Around 3:55 a.m. on June 3, 2001, several Pontiac police officers were dispatched to the apartment of Demesha Samples[2] at 328 Kent Street, Pontiac, Michigan, pursuant to a 911 call she placed. As police officers were arriving at Samples' apartment, defendant was walking down from the upstairs of the apartment complex towards the parking lot. Officer Charles Janczarek explained that Samples' apartment door had been forced open as the door was "demolished," and torn off the wall.

According to Officer Janczarek, Samples informed him that she got in an argument with defendant, who kept calling, and when she did not answer she heard someone knocking at her

[1] It is unclear as to whether defendant was sentenced as a fourth habitual offender, MCL 769.12, or as a third habitual offender, MCL 769.11. Defendant pleaded guilty to fourth habitual offender, but the trial court, at sentencing, referred to defendant as a third habitual offender. At the sentencing hearing, the trial court sentenced defendant as a third habitual offender, but agreed to modify the records to indicate that he was fourth habitual offender. The trial court did not change the sentence. The judgment of sentence reflects that the sentence was enhanced pursuant to MCL 769.12, the fourth habitual offender statute.

[2] Defendant and Samples have two children together.

door, which became more violent, when she did not answer, to the point it was broken open. Officer Janczarek testified that Samples told him that she locked herself in the bathroom and called 911 because someone had broken into her apartment, and she explained that she heard the door break and knew it was defendant. Officer Janczarek further testified that Samples stated that she heard defendant trying to open the bathroom door with a hanger, and that when he got in he began assaulting her as he slapped and punched her while she was balled up on the floor of the bathroom. Officer Janczarek also testified that Samples indicated that defendant left when she told him the police were on the way. Officer Robert Ludd stated that Samples informed him that her boyfriend had kicked in the door and assaulted her. Officer Ludd further stated that Samples' nightgown was ripped suggesting assault.

Samples made a written statement, which was admitted into evidence, providing that defendant came to her house, knocked down the door of the apartment, broke open the bathroom door, and assaulted her. Samples' 911 tape was also admitted into evidence. Samples acknowledges making the written statement, certain statements to the police officers, and making the 911 call.

At trial, Samples testified that she and defendant were arguing because he was with another female. Samples further testified that she had lost her keys so she forced her apartment door open with her arm, and it was "basically off the hinges." According to Samples, later that night she heard footsteps, so she went to the bathroom and locked herself in knowing it was defendant, and at this time defendant began banging on the door and hollering her name, at which time she called 911. Samples stated that defendant opened the bathroom door with a coat hanger. Samples acknowledged that defendant grabbed and was smacking at her, and that she was curled up in the fetal position blocking him.

Officer Janczarek testified that Samples informed him that defendant had moved out of her apartment in April 2001, did not have a key, and had no personal items in the apartment. Samples testified that defendant was living with her at the Kent Street apartment until June 3, 2001, and that she told the police he was not living there because she was on assisted living, did not want to lose her apartment, and it would be in violation of her lease to have defendant living there. Samples further testified that she told the police things that were not true because she was angry with defendant and wanted to get back at him for being with another woman. Samples also testified that defendant had clothing and personal hygiene items at the apartment. Officer Chad Chandler searched the apartment for clothing or any other evidence that would indicate that defendant was living in the apartment. Officer Chandler testified that no clothing of defendant's, toiletries, or anything with defendant's name was found in Samples' apartment, which indicated that defendant did not live there. Officer Chandler further testified that, during booking, defendant indicated that he lived at 121 South Boulevard.

Defendant argues that he was deprived of due process because hearsay evidence was improperly introduced at trial. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so

palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888, on second remand 242 Mich App 656; 620 NW2d 19 (2000). A preliminary issue of law regarding admissibility based upon construction of a constitutional provision, rule of evidence, court rule or statute is subject to a de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402, *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403, *Sabin*, *supra* at 58. The challenged evidence is clearly relevant, was the most probative evidence of defendant's guilt, and was not substantially outweighed by the danger of unfair prejudice. The question is whether the evidence is inadmissible hearsay.

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 802. Samples' statements to the police officers were properly admitted under the excited utterance exception to the hearsay rule, MRE 803(2), and her 911 call statements were properly admitted under the present sense impression exception to the hearsay rule, MRE 803(1).

In *People v Hendrickson*, 459 Mich 229, 235-238; 586 NW2d 906 (1998) the present sense impression exception to the hearsay rule was explained as follows:

> Pursuant to MRE 803(1), a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is excepted from the rule barring hearsay evidence.
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> * * *
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> The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be "substantially contemporaneous" with the event. *United States v Mitchell*, 145 F3d 572, 576 (CA 3, 1998); [*United States v Campbell*, 782 F Supp 1258, 1260 (ND Ill, 1991)].
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> In this case, the 911 audiotape recording contains the victim's statement that she had just been beaten. The first condition is satisfied because the victim

explained the perceived event, the beating. The second condition is satisfied because the victim personally experienced the beating.

The third condition requires that the statement be substantially contemporaneous with the beating. MRE 803(1) provides that a statement may be admitted if made while "perceiving the event or condition, or immediately thereafter." However, the exception "recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is allowable." FRE 803(1) advisory committee note; *Campbell, supra* at 1260.

* * *

In the case under consideration, the 911 recorded victim's statement was that the beating had just taken place; the defendant was in the process of leaving the house as the victim spoke. If true, the remarks were substantially contemporaneous with the actual beating. Therefore, we find that, in this case . . . the contemporaneous requirement was satisfied.

The victim's statement satisfies the three conditions to constitute a present sense impression, but may it provide its own foundation for admissibility? . . . . We . . . conclude that the sufficiency of the corroboration depends on the particular circumstances of each case. *Id.* at 737.

* * *

Because of our aversion to the "bootstrapping" of hearsay evidence, we concluded that an excited utterance was inadmissible without independent proof, direct or circumstantial, that the underlying event took place. [*People v Burton*,] 433 Mich 268, 282, 294, 445 NW2d 133. . . . We conclude that admission of the recording requires independent evidence that the assault occurred before it may be admitted as a present sense impression.

In the present case, the trial court did not abuse its discretion in finding that Samples' 911 call statements were be admissible under the present sense impression exception because as in *Hendrickson, supra*, Samples was explaining the events of defendant breaking and entering during the 911 call as she was perceiving them, and the statements were substantially contemporaneous to the breaking and entering, as they were made while it was happening.[3] See *id.* at 235-238. There was evidence independent of the 911 call to corroborate that there was a breaking and entering and an assault including the testimony of the police officers, the fact that the door was smashed in, the testimony that defendant broke in the bathroom and was hitting

[3] We note that as in *Hendrickson, supra* at 235 n 2, the 911 tape statement lacks a component of trustworthiness because Samples was alone and made the statement to a dispatcher over the telephone, who was unable to observe and verify accuracy of the statements. However, Samples acknowledges that she made the 911 call, and it was also established that the record of the 911 call was kept in the normal course of police business.

Samples, and the ripped nightgown. See *id*. at 238-239. In addition, Samples acknowledges that she made the 911 call, and she recalls telling the 911 dispatcher that defendant was "beating and kicking on my door."

Our Supreme Court in *People v Smith*, 456 Mich 543; 581 NW2d 654 (1998), explained the excited utterance exception to the hearsay rule as follows:

> MRE 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19.
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> In *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988), this Court cited the two primary requirements for excited utterances: 1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event. . . . [I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection. 5 Weinstein, supra, § 803.04[4], p 803-23.
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> * * *
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> [T]here is no express time limit for excited utterances. "Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum." [5 Weinstein, *supra*, § 803.04[4], p 803-24.] The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. McCormick, Evidence (3d ed), § 297, p 857.

With regard to the statement made by Samples, Officer Janczarek claims that there was approximately three minutes between when he arrived and when he spoke with Samples. Officer Janczarek described Samples as being "excited, she was upset. I could tell she had been crying," as her voice was "cracking." Officer Janczarek also indicated that Samples was bothered and wanted a cigarette. Officer Ludd testified that when he came into contact with Samples it was about two and a half minutes after he arrived, which was as defendant was leaving, and she was "in an excited state," "she was very nervous," and "her face was red." According to Officer Janczarek, Samples also made a written statement eighteen or twenty-three minutes after he arrived, and that she was still upset and agitated at the time she made the written statement. Samples testified she made the written statement two or three minutes after the police arrived.

We conclude that as in *Smith*, *supra*, it was within the trial court's discretion to conclude that Samples' statements to Officers Janczarek and Ludd and her written statement fell under the excited utterance exception, given the testimony regarding Samples physical condition

immediately after the incident. The statements arose out of a startling occasion, and the witnesses that saw Samples immediately or soon after the incident involving defendant (within minutes) testified that she was excited and upset. *Smith, supra*. Both Officers Janczarek and Ludd testified in detail that Samples was excited and upset when they arrived, they spoke with Samples within minutes of arriving, and they arrived as defendant was leaving. Therefore, it can reasonably be inferred that the breaking and entering and assault was the cause of Samples' stress, and that she was still under the influence of the stress when she made the statements. The statements concerned defendant's invasion of Samples' home and the assault of her person, which would qualify as startling events. In addition, the testimony of Officers Janczarek and Ludd and the written statement were consistent and were corroborated by evidence of the broken door and the ripped nightgown, Samples' testimony that defendant was hitting her while she was in the fetal position, and the fact that Samples acknowledges that she made statements, including a written statement, to the police. Samples admits that she told the police officers that defendant "kicked the door in." Samples also testified, at trial, that defendant was hitting her. We find that the trial court did not abuse its discretion in admitting Samples' statements to the police officers under the excited utterance exception to the hearsay rule, MRE 803(2), and her 911 call statements under the present sense impression exception to the hearsay rule, MRE 803(1).

Defendant next argues that his first-degree home invasion conviction was against the great weight of the evidence. We disagree.

The trial court denied defendant's motion for a new trial. On appeal, this Court reviews the trial court's grant or denial of the motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Such a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result by allowing the verdict to stand. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Lemmon*, *supra* at 642-643.

The elements of first-degree home invasion are: (1) that the defendant broke and entered into a dwelling or entered a dwelling without permission; (2) that when the defendant did so, he either intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) that defendant was armed with a dangerous weapon or another person was lawfully in the dwelling. MCL 750.110a(2). The term "without permission" is defined as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c). "To amount to a breaking, some force, no matter how slight, must be used to gain entry." *People v Kedo*, 108 Mich App 310, 318; 310 NW2d 224 (1981). The intent element may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988).

As previously discussed, Samples' statements to the officers and her 911 call statements were admissible under the excited utterance and present sense impression exceptions to the

hearsay rule, and these statements along with statements of the police officers regarding the physical evidence provide ample evidence that defendant was breaking and entering or entering without permission. See MCL 750.110a(2). Defendant's intent can inferred from the nature of the actions. See *Uhl, supra*. Officer Janczarek testified that Samples told him that she was in fear when defendant was beating on the door, and that she locked herself in the bathroom because she was in fear. The actions of defendant caused Samples to call 911. There was evidence that defendant did not live at that residence, i.e., the statements made by Samples and the investigation by Officer Chandler. The statements Samples made to the police officers indicate that defendant broke the door open or at least pushed it open. There is clearly evidence that defendant assaulted Samples. Samples trial testimony alone would support an assault occurred. An assault is defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). Samples trial testimony that defendant was hitting her and gave her a cut on her nose and that she was scared defendant was going to hit her, alone, would support an assault occurred. As to the last element, there appears to be no dispute that when defendant entered, Samples was lawfully in the dwelling.

Defendant argues that the evidence was against the great weight of the evidence because Samples testimony at trial supported defendant's case, casting a reasonable doubt on the evidence. We will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Lemmon, supra* at 642-643. In this case there was conflicting evidence as Samples changed her story, which raises questions of credibility that we generally leave to the factfinder. See *id.* After reviewing the evidence, we find that the verdict is not manifestly against the clear weight of the evidence, and allowing this verdict to stand will not result in a miscarriage of justice. See *Id.* at 642. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.[4]

Next, defendant argues that he was deprived his right to effective assistance of counsel when his trial counsel introduced evidence of his criminal history. We disagree.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

[4] Defendant does not argue that his domestic assault conviction was against the great weight of the evidence. However, we note that his conviction for domestic assault was not against the great weight of the evidence, as there was sufficient evidence supporting a domestic assault, and no evidence that a domestic assault did not occur.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant contends that his trial counsel was ineffective in permitting a defense witness to divulge that defendant had previously been incarcerated. On direct examination, the following colloquial occurred between defense counsel and Samples:

> *Q*. And when you moved to the 328 Kent address, did Mr. Walker move with you to that address?
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> *A*. At the time when I moved he was incarcerated.
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> THE COURT: He was what?
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> THE WITNESS: Incarcerated when I moved.
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> * * *
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> *Q*. And after he was released from incarceration, where did he live?
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> *A*. He paroled from - - to his mother's house in Detroit, and from there he paroled to my house.

Defense counsel did not elicit the response. The answer was not responsive to the question asked by defense counsel. On appeal, defendant contends that even if the answer was nonresponsive, Samples should have been warned against using such prejudicial evidence. But we note that this argument is without merit, as there is no indication on the record that Samples was not warned. *Rodriguez, supra* at 38.

In addition, we note that it could have been trial strategy to introduce evidence that defendant had been incarcerated before. There were some questions and answers suggesting that since Samples was living in subsidized housing, she was not allowed to have anyone live with her or have anyone in the apartment that may be involved in criminal activity. Defense counsel may have been attempting to convey to the jury that defendant lived in the house, but Samples had to keep it private because defendant had previously been incarcerated for criminal activity. If so, this is trial strategy, which we will not second guess. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc, supra* at 579.

Defendant also argues that he was deprived due process when he was permitted to plead to habitual fourth when in fact he was only guilty of habitual third. We disagree. Questions of law and statutory construction are reviewed de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998); *People v Sierb*, 456 Mich 519, 521-522; 581 NW2d 219 (1998).

Defendant has failed to properly preserve this issue for various reasons. Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Thus, a party cannot request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. See *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Defendant pleaded guilty to fourth habitual offender, and now argues on appeal that this was error. Additionally, a motion for withdrawal of a habitual offender plea is a prerequisite to obtaining relief on appeal, absent an error that requires retrial on the underlying offense. *People v Gaines*, 198 Mich App 130, 131-132; 497 NW2d 210 (1993). There is no motion to withdraw the habitual offender plea, and there is no error requiring reversal of the underlying offense.

Moreover, we note that defendant has not given us a record to properly review the issue. Multiple convictions for crimes arising out of a single transaction may only serve as a single conviction for enhancement purposes. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990); *People v Jones*, 171 Mich App 720, 726; 431 NW2d 204 (1988). Prior convictions and sentences need not occur in any particular sequence, so long as each prior conviction arose from a separate incident. *Preuss, supra* at 717.

Defendant has not provided the Presentence Investigation Report (PSIR) for our review. The appellant has the "burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Defendant contends that habitual fourth was improper because his other convictions occurred during a single transaction. The prosecution asserts that, although convicted on the same day, defendant's convictions were separate instances of criminal conduct occurring on three distinct days, and were separate transactions. The prosecution's assertion, that the convictions resulted from three distinct incidents and, thus, can be considered for fourth habitual offender status, is proper under *Preuss, supra*. However, if defendant's assertion is correct, convictions arose from a single transaction, it would be improper to consider defendant habitual fourth. Defendant pleaded to fourth habitual and does not present the PSIR on appeal. No error exists on the record and, in addition, we find that this issue has been abandoned.[5]

[5] Regardless, it appears that the trial court was sentencing defendant as a third habitual offender rather than fourth, based on the transcript and the judgment of sentence. And, any error was harmless as defendant's minimum sentence was within the guidelines range for a Class B offense with defendant's scores without habitual offender enhancement. MCL 777.16f; MCL 777.63

Defendant's final issue on appeal is that he was improperly convicted of first-degree home invasion when the underlying charge was intent to commit a misdemeanor. We disagree. Questions of law and statutory construction are reviewed de novo. *Webb, supra* at 274; *Sierb, supra* at 521-522.

Defendant cites no law for his contention that he was improperly convicted of first-degree home invasion with the underlying charge being an assault and the appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997), nor may he give issues cursory treatment with little or no citation of supporting authority, *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). Defendant cites no authority for his contention and, thus, we need not address the issue. Regardless, defendant's argument is without merit. As noted, hereinbefore, defendant was convicted of first-degree home invasion, which requires that when defendant entered the dwelling he intended to or did commit a felony "or assault" therein. MCL 750.110a(2). The Legislature is presumed to have intended the meaning it plainly expressed. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443(2003). Clearly, the language of the statue includes a felony or an assault. In construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render any part of a statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). There is no statutory requirement that the assault be a felony, and such an interpretation would render use of the assault language surplusage. As such, defendant's contention is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell