

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY JOHN GIBSON,

Defendant-Appellant.

UNPUBLISHED

September 22, 2009

No. 285486

Monroe Circuit Court

LC No. 07-036029-FC

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct (multiple variables), MCL 750.520b(1)(f). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 37 to 70 years' imprisonment for the first-degree criminal sexual conduct conviction. We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing for the reasons explained herein.

I. Prosecutorial Misconduct

Defendant first argues that the prosecutor violated defendant's constitutional rights when she argued that defendant, who elected to testify at trial, was the only witness with a motive to lie. We disagree. Defendant failed to articulate a timely and specific objection to an allegedly improper statement in order to preserve a claim of prosecutorial misconduct. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

An unpreserved allegation of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant must demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). A plain error affects a defendant's substantial rights when the error results in outcome determinative prejudice. *Id.* Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines*, *supra* at 763.

As a general rule, “prosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, prosecutors are “free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *Id.* A prosecutor is not required to present her arguments using only the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Moreover, it does not constitute prosecutorial misconduct where the prosecutor argues from the facts that the defendant is unworthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant asserts that it was improper for the prosecutor to argue during closing argument that defendant was the only witness with a motive to lie. Defendant argues that these comments constitute an impingement upon his right to testify because a testifying defendant is necessarily motivated to lie in order to avoid conviction. However, when we view the prosecutor’s closing argument in context and in light of defendant’s arguments, the prosecutor’s comments do not rise to the level of prosecutorial misconduct. “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

Here, the prosecutor argued that the victim, D.F., had no motive to lie regarding her allegation that defendant had sexually assaulted her. Specifically, the prosecutor relied upon the evidence provided by Emma Linzy, a sexual assault nurse examiner, regarding the procedures used to collect evidence following an alleged sexual assault, and argued that if D.F. had fabricated her claim that she did not consent, it was likely that D.F. would have terminated her examination when the procedure became uncomfortable. However, the prosecutor argued further, because D.F. continued to undergo the sexual assault examination, which involved pulling her pubic hair, a vaginal examination and an anal swab, she had no motive to fabricate her testimony.

Conversely, defendant, during closing argument, argued that D.F. could have been motivated to fabricate:

This is what happened. They had consensual sex in the park, that’s all it was. It was no more or no less, and somehow this woman ended up on this treadmill because of what happened. At the hospital her boyfriend’s saying, well, you know, you’re all upset, you better go down and do this. Maybe she just didn’t want to tell her boyfriend what she had done. Maybe she thought it was gonna impact the surgery she was having the next day. I don’t know, she didn’t say, but it – it was consensual sex, that’s what it was.

Under these circumstances, the issue for the jury to decide was whether defendant’s DNA was present in D.F. as the result of consensual sex, or as the result of criminal sexual conduct. The prosecutor argued, from the evidence, that because D.F. had no reason to fabricate her allegation, defendant was the only witness that was motivated to lie. On the other hand, defendant contested the prosecutor’s contention that defendant was the only person that was motivated to lie when he argued that D.F. did, in fact, have a motive to fabricate. In other words, while the prosecutor argued that defendant had a reason to fabricate his testimony based upon the evidence relating to the detection of his DNA in D.F., and D.F. had no reason to fabricate, defendant argued that D.F. did, in fact have a reason to lie.

We further observe that even if the prosecutor's comments were arguably improper, defendant cannot demonstrate plain error affecting substantial rights. *Launsbury, supra* at 361. The trial court, following closing arguments, properly instructed the jury that it must decide the case solely on the basis of the evidence, and that the attorneys' closing arguments, as well as the fact that defendant was charged with a crime, were not evidence. With regard to the credibility of the witnesses, the trial court instructed the jury to consider whether each witness had "any special reason to tell the truth or any special reason to lie[.]" Generally, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the prosecutor did not commit misconduct when she argued that defendant was the only witness that was motivated to lie, and because even if the comment were improper, it was presumed to have been cured by the trial court's jury instructions, defendant's argument lacks merit. *Launsbury, supra* at 361. Accordingly, defendant has forfeited this assignment of error, and is not entitled to relief on this basis.

II. Defendant's Right to Counsel

Defendant next argues that the government violated defendant's Sixth Amendment right to counsel when it used a prisoner, acting as a governmental agent, to elicit and record incriminating statements by defendant without the benefit of counsel, after judicial proceedings had been formally initiated against defendant. We agree that defendant's Sixth Amendment right to counsel was violated; however, because defendant cannot demonstrate that the error affected his substantial rights, his argument fails.

This Court reviews an unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763. The issue of whether a person is a government agent is a mixed question of law and fact. *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004).

A defendant's right to counsel under the Sixth Amendment attaches when adversary judicial proceedings are initiated. *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). The United States Supreme Court has held that under the Sixth Amendment, governmental agents are prohibited from using incriminating statements that are deliberately elicited from the accused outside the presence, or absent the waiver, of counsel after the initiation of judicial proceedings. *Illinois v Perkins*, 496 US 292, 299-300; 110 S Ct 2394; 110 L Ed 2d 243 (1990). In Michigan, the right to counsel "attaches only at or after the initiation of adversary judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment." *People v Cheatham*, 453 Mich 1, 9 n 8; 551 NW2d 355 (1996), quoting *People v Wright*, 441 Mich 140, 173; 490 NW2d 351 (1992).

Defendant here was charged with first-degree criminal sexual conduct on December 6, 2006. Inmate Scott Rice testified that on April 30, 2007, he reported details relating to his jailhouse conversations with defendant to Detective Brett Ansel. Thereafter, Rice agreed to surreptitiously wear a recording device in order to intercept statements made by defendant to Rice, relating to the criminal sexual conduct charge, and defendant's attempt to solicit Rice to murder D.F. Defendant's Sixth Amendment right to counsel was violated because Ansel solicited incriminating statements from defendant through Rice, in the absence of counsel, after defendant had been formally charged with criminal sexual conduct and defendant's Sixth Amendment right to counsel attached. *Perkins, supra* at 294-295, 299; *Cheatham, supra* at 9 n

8. Furthermore, to the extent that Rice agreed to wear a recording device in order to deliberately elicit incriminating statements made by defendant, Rice was acting as a governmental agent. *McRae, supra* at 710.

However, although error exists in the government's attempt to procure incriminating statements in the absence of counsel, defendant cannot demonstrate that this error, assuming that the error was plain, affected his substantial rights. *Carines, supra* at 763. There was substantial evidence against defendant, including D.F.'s testimony, her identification of defendant as her assailant and DNA evidence. The audioteape recorded with the cooperation of Rice was not admitted at trial, and, as such, we observe that the recording of the conversation in and of itself does not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 763. We further observe that defendant does not argue, nor does the record show, that the recording of the conversation resulted in the conviction of an actually innocent defendant. *Id.* Moreover, the record does not show that the government's use of Rice to procure incriminating statements from defendant in the absence of counsel affected the outcome of the case. *Pipes, supra* at 279. Accordingly, we conclude that because defendant cannot demonstrate plain error affecting his substantial rights, defendant's argument fails.

III. Ansel's Testimony

Defendant next argues that the prosecutor committed misconduct by recalling Ansel as a rebuttal witness following defendant's testimony, and elicited testimony from Ansel regarding Rice's allegations that defendant solicited Rice to murder D.F., and using the testimony during her closing argument. Defendant further argues that this evidence was inadmissible because it failed to directly address evidence raised by defendant. We conclude that although the admission of this testimony was in error, the error did not affect defendant's substantial rights.

In order to preserve an evidentiary issue for appellate review, the party contesting the admission of the evidence is required to object at trial and specify the identical ground for objection that he asserts on appeal. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Here, defendant did object to the prosecutor's questions to Ansel regarding the contents of the tape recording obtained through Rice's cooperation on the bases that the recorded conversations were hearsay within hearsay, and the best evidence rule mandated production of the tapes themselves. Defendant failed to object to Ansel's testimony on the basis that it was improper rebuttal testimony because it addressed evidence not raised by the defense. Accordingly, although defendant's objections were timely, they did not specify the same ground for challenge that defendant now seeks on appeal; accordingly, defendant's prosecutorial misconduct and evidentiary arguments are not preserved on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *Unger, supra* at 234-235; *Knox, supra* at 508. Where a challenge to a trial court's decision to admit or exclude evidence is not preserved, this Court reviews the admissibility of the evidence for plain error affecting the defendant's substantial rights. *Carines, supra* at 763-764.

Our Supreme Court has delineated that rebuttal evidence is admissible in order to "contradict, repel, explain or disprove evidence produced by the other party and tending directly

to weaken or impeach the same.” *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The *Figgures* Court further observed:

[T]he test of whether rebuttal evidence is properly admitted is not whether the evidence could have been offered in the prosecutor’s case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as the evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor’s case in chief. [*Figgures, supra* at 399 (citations omitted).]

Here, defendant argues that Ansel’s rebuttal testimony was improper because defendant did not testify, on either direct or cross-examination, regarding Rice’s allegation that defendant solicited him to murder D.F. Defendant testified as follows:

Q. Have you threatened Scottie Rice or caused Scottie Rice to be threatened?

A. I never said a word as far as threading – threatening anybody. I’ve never sent nobody to Scottie. I haven’t talked to Scottie, I haven’t wrote to Scottie, I haven’t said – I haven’t seen Scottie since this altercation.

Rather than simply testifying that he heard an audiotape of defendant and Rice talking, which would have contradicted defendant’s testimony, Ansel testified to the specifics of the conversation, including the fact that defendant solicited Rice to murder D.F. This testimony constituted improper rebuttal because it went beyond being responsive to the issue of whether defendant had spoken to Rice and included additional information that was not necessary to impeach defendant’s prior testimony.

Nonetheless, given the compelling evidence in this case, the plain error in the admission of this rebuttal testimony did not affect defendant’s substantial rights. *Carines, supra* at 763. As previously mentioned, D.F.’s testimony, her identification of defendant as her assailant, and DNA evidence provided ample evidence that defendant committed this crime.

IV. Fourth Habitual Offender

Defendant next argues that he was improperly sentenced as a fourth habitual offender because he had only been convicted of two offenses when he committed the instant offense, and therefore, should have been sentenced as a third habitual offender. We agree.

This Court reviews an unpreserved sentencing issue for plain error affecting defendant’s substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Statutory construction presents an issue of law that this Court reviews de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

Our Supreme Court has recognized that “a sentence is invalid if it is based on inaccurate information.” *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). A defendant is entitled to resentencing where his sentence is based upon inaccurate information. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). The primary goal of statutory interpretation is to

ascertain and effectuate the Legislature's intent. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). When construing a statute, this Court first examines the language of the statute. *Id.* Where the language of the statute is clear and unambiguous, further construction is unnecessary and unwarranted, and the statute will be applied as written. *Id.*

MCL 769.12(1) provides, in pertinent part:

If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows . . .

MCL 777.21(3) states:

(3) If the offender is being sentenced under section 10, 11 or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended sentence range determined under part 6 for the underlying offense as follows:

- (a) If the offender is being sentenced for a second felony, 25%.
- (b) If the offender is being sentenced for a third felony, 50%.
- (c) If the offender is being sentenced for a fourth or subsequent felony, 100%.

Here, the Supplemental Felony Information provided as follows, in pertinent part:

Take notice that the defendant was previously convicted of three or more felonies or attempts to commit felonies in that on or about 07/16/1999, he or she was convicted of the offense of Breaking and Entering A Building With Intent in violation of MCL 750.110, in the 38th Circuit Court for Monroe County, State of Michigan.

And on or about 05/27/2004, he or she was convicted of the offense of Controlled Substance-Possession (Narc/Cocaine) <25 Grams in violation of MCL 333.74032A5; in the 38th Circuit Court for Monroe County, State of Michigan.

And on or about 10/13/2005, he or she was convicted of the offense of Police Officer-Assaulting/Resisting/Obstructing in violation of MCL 750.81D1; in the 38th Circuit Court for Monroe County, State of Michigan.

And on or about 08/31/2006, he or she was convicted of the offense of Police Officer-Assaulting/Resisting/Obstructing in violation of MCL 750.81D1; in the 38th Circuit Court for Monroe County, State of Michigan.

Therefore, defendant is subject to the penalties provided by MCL 769.12 [769.12]

PENALTY: Life if primary offense has penalty of 5 years or more; 15 Years or less if primary offense has penalty under 5 years.

The sexual assault for which defendant was convicted and sentenced occurred on November 28, 2004. We observe that defendant had been convicted of two felonies (Breaking and Entering a Building with Intent to Commit a Felony Therein, and Possession of Less Than 25 Grams of Cocaine), when he committed the charged offense, and under the plain language of MCL 769.12(1), defendant was subject to sentencing enhancement as a third habitual offender, and not as a fourth habitual offender. The language of MCL 769.12(1) requires that for purposes of enhancement, the convictions must precede the commission of the subsequent offense. MCL 769.12.

Defendant's sentencing guidelines range, as scored, was 225 to 750 months. This guidelines range reflects an enhancement under MCL 769.12(1) and MCL 777.21(3)(c) of 100 percent, which was calculated on the basis of defendant's status as a fourth habitual offender. Recalculating defendant's maximum minimum sentence to reflect his correct status as a third habitual offender, defendant's sentencing guidelines range would become 225 to 562.5 months' imprisonment, representing a 50 percent enhancement. MCL 769.12(1); MCL 777.21(3)(2). Thus, defendant's sentence falls within the guidelines ranges as they were originally scored and the corrected guidelines. However, because defendant's guidelines range changed, and because defendant was sentenced on the basis of inaccurate information, i.e., the incorrect habitual offender notice, defendant is entitled to be resentenced. *Francisco, supra* at 88.

V. Scoring of Offense Variables

Defendant next challenges the trial court's decisions regarding the scoring of three offense variables ("OV") for defendant's sentencing guidelines. We agree that the trial court erred when it assessed 15 points for OV 19, for the reasons explained more fully below; however, we reject defendant's remaining challenges to the scoring of the sentencing guidelines because record evidence supported the scoring decisions. This Court reviews a trial court's scoring decision under the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). The construction and application of the sentencing guidelines presents a question of law, which is reviewed de novo by this Court. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). However, defendant failed to preserve his challenges to the scoring decisions relating to OV 3 and OV 10. This Court reviews unpreserved sentencing issues for plain error affecting defendant's substantial rights. *McLaughlin, supra* at 670.

Ten points are allocated under MCL 777.33(1)(d) (OV 3) where "[b]odily injury requiring medical treatment occurred to a victim." Five points are scored pursuant to MCL 777.33(1)(e) where "[b]odily injury not requiring medical treatment occurred to a victim." This Court will affirm a scoring decision, provided that there is any evidence in the record supporting the decision. *Hornsby, supra* at 468.

Here, there was record evidence that D.F. sustained an injury requiring medical treatment. Linzy testified that D.F. was given prophylactic medication to prevent transmission of sexually transmitted diseases. Because “any evidence in the record” will support a scoring decision, and because D.F. was provided with prophylactic medication in response to the sexual assault, which constitutes D.F.’s injury, the trial court properly assessed ten points for OV 3.

Under MCL 777.40(1)(a) (OV 10), 15 points are allocated where “[p]redatory conduct was involved.” Where the defendant exploited a victim who was intoxicated, the trial court properly assesses five points under MCL 777.40(1)(b). In turn, MCL 777.40(3)(a) defines “predatory conduct” as “preoffense conduct directed at a victim for the primary purpose of victimization.” In *People v Witherspoon*, 257 Mich App 329, 335-336; 670 NW2d 434 (2003), this Court explained that for purposes of scoring OV 10, the determination of whether predatory conduct was involved, the timing and location of a sexual assault can indicate predatory conduct. Specifically, in *Witherspoon*, this Court observed that, “it could be inferred from the evidence that the defendant *watched* his victim and *waited* for an opportunity to be alone with her in an isolated location. *Id.* at 336. (Emphasis in original.) The *Witherspoon* Court concluded that because there was evidence that the defendant watched the victim and waited for an opportunity to commit the sexual assault, the trial court did not err in assessing 15 points for predatory conduct under OV 10. *Id.*

Here, D.F. testified that after defendant initially observed her from across the street, defendant grabbed her and forcefully accompanied her to an isolated location in order to perpetrate the sexual assault on D.F. The timing and location of the sexual assault is indicative of predatory conduct, and there is evidence in the record that defendant committed the act during the night, and asported D.F. to an isolated location in order to facilitate his assault against D.F. Accordingly, the trial court did not err in determining that defendant engaged in predatory conduct for the purposes of scoring 15 points for OV 10, and defendant’s argument to the contrary lacks merit. *Hornsby*, *supra* at 468.

Defendant next challenges the trial court’s assessment of 15 points for OV 19 under MCL 777.49. MCL 777.49 provides, in pertinent part:

Offense variable 19 is threat to the security of a penal institution or interference with the administration of justice. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice . . . 15 points.

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice . . . 10 points.

Defendant argues that although there is some evidence in the record that defendant solicited Rice to murder D.F., the complaining witness, because defendant merely attempted to

interfere with the administration of justice, and did not directly threaten or use force against D.F., or actually use Rice as force or the threat of force as a conduit, to interfere or attempt to interfere with the administration of justice, the trial court should have assessed ten points for OV 19. We agree that the trial court should have scored OV 19 at ten points. Here, there is no evidence that defendant used force or directly threatened D.F. in order to dissuade her from testifying. However, on the basis of evidence that defendant attempted to hire Rice to kill D.F., defendant should have been assessed ten points under OV 19. MCL 777.49(c).

When defendant's sentencing guidelines are corrected, defendant's OV score drops from 90 to 85. MCL 777.62. Defendant's corrected sentencing guidelines score does not result in a change of defendant's offense variable level, which remains at Level V (80-99 points), and defendant's sentence, as a third habitual offender, of 444 months' imprisonment falls within the range set forth under the sentencing guidelines. However, because defendant was erroneously sentenced as a fourth habitual offender, and because he is entitled to be sentenced on the basis of accurate information, he is entitled to resentencing, and the trial court should note on remand that defendant's sentencing guidelines score has dropped from 90 to 85, and fashion an appropriate sentence in its discretion. *Hornsby, supra* at 468.

VI. Ineffective Assistance of Counsel

Lastly, defendant argues that he received the ineffective assistance of counsel. We agree to the extent that counsel was ineffective in failing to recognize that the Supplemental Felony Information was incorrect when it notified defendant that he was subject to sentencing enhancement as a fourth habitual offender, but we conclude, for the reasons explained herein, that defendant's remaining claims lack merit. Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*¹ hearing before the trial court; therefore, his ineffective assistance of counsel claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Davis, supra* at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.*

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* Additionally, in order to show

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

prejudice, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors. *Id.* at 302-303. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant presents three grounds for his ineffective assistance of counsel claim. Defendant first argues that he received the ineffective assistance of counsel because counsel failed to object to the incorrect habitual offender notice, and, as a result, defendant received a longer sentence than that to which he was entitled. We agree that a reasonable attorney under the circumstances should have discovered and raised the issue relating to the habitual offender notice prior to sentencing. *Toma, supra* at 302; *Solmonson, supra* at 663. Because defendant had been convicted of two, instead of four, prior felonies before he committed the instant offense, as a third habitual offender rather than a fourth habitual offender, there was a reasonable probability that the outcome of defendant's sentencing would have been different but for counsel's failure to object. *Toma, supra* at 302. For the reasons explained above, we vacate defendant's sentence and remand for resentencing as a third habitual offender.

Defendant next argues that he received the ineffective assistance of counsel because counsel failed to object to defendant's sentencing guidelines scores. We disagree. As explained herein, defendant did fail to object to the trial court's scoring decisions relating to OV 3 and OV 10. However, because there was evidence in the record to support the trial court's scoring decisions, had defense counsel objected, such an objection would have been futile. Failing to advance a meritless argument or raise a futile objection does not constitute the ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). With respect to defendant's argument relating to OV 19, we observe that counsel did in fact object to the trial court's decision to assess 15 points. The trial court did err when it scored 15 points under OV 19. We agree with defendant that OV 19 should have been scored at ten points.

However, because counsel did in fact object to the trial court's assessment of 15 points under OV 19, defendant cannot demonstrate either that counsel performed in an objectively unreasonable manner, or show a reasonable probability that the trial court would have assessed ten points under OV 19 but for counsel's failure to object. *Toma, supra* at 302; *Solmonson, supra* at 663. Accordingly, defendant is not entitled to relief with respect to his claim that he received the ineffective assistance of counsel when his attorney failed to object to the scoring of his sentencing guidelines. *Id.*

Defendant next argues that he received the ineffective assistance of counsel because counsel failed to articulate the proper objection to Ansel's rebuttal testimony. However, as explained herein, the trial court did not err in admitting Ansel's rebuttal testimony because it tended to disprove defendant's assertion that he had no contact with Rice since defendant's encounter with D.F., and the prosecutor did not commit misconduct in presenting the testimony or relying upon it during closing argument. Accordingly, if defendant had objected on the basis that Ansel's testimony constituted improper rebuttal testimony, because it directly addressed evidence presented by defendant, the objection would have been properly overruled. *Figures*,

supra at 399. Accordingly, because counsel does not render ineffective assistance when counsel fails to raise a futile objection, defendant is not entitled to relief on this ground. *Snider, supra* at 425. In summary, because defendant did receive the ineffective assistance of counsel to the extent that counsel failed to object to the incorrect habitual offender notice, defendant is entitled to resentencing; however, defendant's remaining arguments relating to ineffective assistance of counsel fail.

We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing for the reasons explained herein. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens