

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND EDWARD BOATWRIGHT,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2005

No. 254005

Wayne Circuit Court

LC No. 03-012992

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of five to fifteen years. He appeals as of right. We affirm and remand for correction of the judgment of sentence.

The issues raised on appeal are all related to the sentence imposed. Defendant argues that three of the sentencing guidelines variables were incorrectly scored and led to a higher sentencing guidelines range. These scoring issues are not properly preserved because they were not raised before appeal. MCL 769.34(10); MCR 6.429(C). However, because defendant argues that the scoring errors resulted in a sentence outside the appropriate guidelines range, they may be reviewed for plain error that affected his substantial rights. *People v Kimble*, 470 Mich 305, 310-314; 684 NW2d 669 (2004).

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).

Defendant first argues that prior record variable (PRV) 1, MCL 777.51, should not have been scored at twenty-five points. PRV 1 is scored at twenty-five points if a defendant has one prior, high-severity felony conviction. Defendant argues that he has no prior high-severity convictions. He fails to explain, rationalize, or support his position, but instead leaves it to this Court to review his numerous past felony convictions and categorize them in an attempt to determine whether PRV 1 should have been scored at twenty-five points. A defendant may not merely announce a position and leave it to this Court to discover and rationalize the basis for that

position, nor may he give cursory treatment to an issue with little or no citation of authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant next argues that offense variable (OV) 7, MCL 777.37, should not have been scored at fifty points. OV 7 is scored at fifty points if a victim is treated with terrorism, sadism, torture, or excessive brutality. MCL 777.37(1)(a). “Terrorism” is defined as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.” MCL 777.37(2)(a); *Hornsby, supra* at 468. In this case, after the victim reentered his car in an attempt to get away, defendant obtained an object and used it to smash the driver’s window. Defendant subsequently threatened to kill the victim, indicating that he was a killer and just “did” fifteen years. The victim knew defendant was previously incarcerated, although it is unknown whether the victim knew the nature of defendant’s previous conviction. After defendant made his threatening statements, he repeatedly stabbed the victim, who was trapped in the vehicle and could not get away. If given an opportunity, the trial court could have determined from the record that defendant’s verbal threats were designed to substantially increase the victim’s fear and anxiety during the assault. Moreover, the trial court could also have determined that the victim was treated with excessive brutality. Defendant returned to the victim’s car after beating the victim, choking him, and trying to gouge out his eyes. He thereafter repeatedly stabbed the victim. While the victim’s injuries were determined to be superficial, an officer responding to the scene described the victim as being soaked in blood from top to bottom and behaving as if he was in shock. The victim was taken to a hospital, received medical care, and was monitored to ensure that he did not suffer any organ damage. Because there was evidence on the record to support the score of fifty points, we affirm the scoring decision. *Id.* Defendant has not demonstrated a clear or obvious error. *Kimble, supra*.

Finally, defendant argues that OV 13, MCL 777.43, was improperly scored at twenty-five points when it should have been scored at ten points. Twenty-five points is scored for OV 13 where the offense is part of a pattern of felonious criminal activity involving three or more crimes *against a person*. MCL 777.43(1)(b). In scoring OV 13, all crimes within a five-year period are counted, including the sentencing offense, regardless of whether the offenses resulted in a conviction. MCL 777.43(2). The prosecution appears to concede that there is no evidence that defendant committed three crimes *against a person* within any five-year period. Moreover, the record, including the presentence investigation report (PSIR), does not indicate that defendant committed three crimes against a person in any five-year period. OV 13 is scored at ten points where the offense is part of a pattern of felonious criminal activity involving a combination of three or more crimes *against a person or property*. MCL 777.43(1)(c). Defendant concedes that his criminal record places him within this category.

The error in scoring OV 13 at twenty-five points instead of ten points, however, does not require resentencing. Defendant cannot show that the error affected his substantial rights. *Kimble, supra*. A reduction of fifteen points in defendant’s total offense variable score, a change from one hundred points to eighty-five points, would not change the sentencing guidelines range of thirty-four to eighty-three months. MCL 777.65; MCL 777.21(3). Defendant’s minimum sentence of sixty months is well within the appropriate guidelines range regardless of whether OV 13 was incorrectly scored at twenty-five points. Thus, resentencing is not required. *People v Mutchie*, 251 Mich App 273, 274; 650 NW2d 733 (2002).

Defendant also argues that his counsel was ineffective for failing to object to the scoring of PRV 1, OV 7, and OV 13. Our review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*<sup>1</sup> hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). With respect to PRV 1, defendant has not demonstrated that the scoring decision was erroneous. Thus, he has failed to meet his burden to show that counsel's failure to object was unreasonable. *Id.* Additionally, because evidence existed to support the scoring of OV 7 at fifty points, defendant has not demonstrated that counsel's conduct in failing to object to the scoring of OV 7 was unreasonable. Counsel is not required to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Finally, even if counsel should have objected to the scoring of OV 13, the error did not affect the outcome of sentencing. Defendant was sentenced within the appropriate guidelines range and defendant's claim of ineffective assistance of counsel therefore fails. *Id.*

Finally, defendant argues that even if he is not entitled to resentencing, his judgment of sentence must be corrected to reflect that he was "convicted" of being an habitual offender, second offense, MCL 769.10.<sup>2</sup> But Michigan's habitual offender statutes are merely sentence enhancement mechanisms and not substantive crimes. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996). See also *People v Anderson*, 210 Mich App 295, 297-298; 532 NW2d 918 (1995). Nevertheless, remand is warranted to correct the judgment of sentence to specify that defendant's sentence was enhanced under MCL 769.10.<sup>3</sup>

Affirmed and remanded for correction of the judgment of sentence. Jurisdiction is not retained.

/s/ Henry William Saad  
/s/ E. Thomas Fitzgerald  
/s/ Michael R. Smolenski

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

<sup>2</sup> Although the prosecutor could have sought enhancement under MCL 769.12 in light of defendant's four prior felony convictions, the felony information provided notice only that the prosecution sought enhancement as a second habitual offender under MCL 769.10. The error was not recognized by the prosecutor in a timely manner.

<sup>3</sup> Defendant's judgment of sentence clearly reflects that his sentence was "enhanced," but it does not identify the basis for the enhancement, i.e., defendant's status as an habitual offender, second offense, MCL 769.10.