STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN JAMES WELCH,

Defendant-Appellant.

UNPUBLISHED
April 13, 2023

No. 358372
Muskegon Circuit Court
LC No. 19-003698-FH

Before: SHAPIRO, P.J., and REDFORD and YATES, JJ.

PER CURIAM.

Defendant, Franklin James Welch, appeals his conviction for possession of a controlled substance (methamphetamine)—second offense, MCL 333.7403(2)(b)(*i*); MCL 333.7413(1), and his sentence of 18 months to 12 years in prison. Defendant contends that he was unlawfully seized and interrogated in violation of constitutionally protected rights, that the prosecutor impermissibly increased the charges against him in retaliation for his decision to go to trial, that he was sentenced on inaccurate information, and that he received ineffective assistance of counsel. We affirm both the conviction and the sentence, but we must remand the case for correction of the judgment.

I. FACTUAL BACKGROUND

In March 2019, Muskegon County Sheriff's Deputy James Ottinger was patrolling the area of the Clear Springs Nature Preserve. He pulled into the preserve and wound through the woods toward a small parking lot, where he noticed two pickup trucks, including one that was driven by defendant. Defendant immediately drove out of the parking lot, passing the deputy who was going in the opposite direction. The deputy then turned around and followed defendant's truck as it left the nature preserve. The deputy noticed that the center, high-mount, stop lamp in the back window of defendant's truck was not working, so the deputy made a traffic stop. During the stop, defendant informed the deputy that his driver's license was suspended, which prompted the deputy to instruct defendant to get out of his truck. While the deputy conducted a pat-down search for weapons, he saw the passenger in defendant's truck moving around suspiciously. The deputy placed defendant in handcuffs and put him in the patrol car. The deputy then returned to the passenger in defendant's truck, spoke to the passenger, ordered him out of the truck, and put him in handcuffs. Performing

a search of the truck to determine the reason for the passenger's suspicious movements, the deputy found marijuana, a scale, needles, and plastic baggies.

Deputy Ottinger testified that he thereafter returned to his patrol car and said to defendant: "Look at [sic]. I found some things in the truck. You know, I suspect you got some . . . narcotics somewhere." According to the deputy, defendant then "produced a small vial, a bottle out of his pocket which he—which I removed from the pocket." The deputy then advised defendant of his *Miranda*[1] rights and drove him to the Muskegon County Jail for processing. After arriving at the jail, the deputy asked defendant whether he had anything else on him, and defendant stated that he did not. Deputies searched defendant in the jail's search area and found a plastic baggy containing methamphetamine in one of the pockets of defendant's jeans.

Defendant was charged with one count of possession of methamphetamine and/or ecstasy, MCL 333.7403(2)(b)(*i*). After unsuccessful efforts to negotiate a plea agreement, the prosecution amended the charging document to add a count of driving with a suspended license and a count of bringing a controlled substance into a jail. The prosecutor eventually chose to drop the charge of driving with a suspended license. A jury convicted defendant of possession of methamphetamine, but acquitted defendant of bringing a controlled substance into the jail. At the sentencing hearing, defense counsel indicated that he had reviewed the presentence investigation report (PSIR) with defendant and had no additions or corrections. The trial court then sentenced defendant to serve a prison term of 18 months to 12 years. After filing this appeal, defendant moved unsuccessfully in the trial court for a new trial or resentencing, presenting the same issues he now raises on appeal.

II. LEGAL ANALYSIS

Defendant asserts that he was seized and interrogated in contravention of his constitutional rights, that the prosecutor increased the charges against him in retaliation for his decision to go to trial, that he was sentenced on the basis of inaccurate information, and that he received ineffective assistance of counsel. We shall address each of these arguments in turn.

A. FOURTH AMENDMENT

Defendant contends that the Michigan Vehicle Code, MCL 257.1 *et seq*., does not require that the center, high-mount, stop lamp on the back window of a truck must be in working order. Therefore, defendant asserts that the trial court erred when it determined that Deputy Ottinger had probable cause to make a traffic stop on the basis that the stop lamp on defendant's truck was not working. We disagree. The issue was first raised in a motion for a new trial. "We review de novo issues of constitutional law, and we review for an abuse of discretion a trial court's decision on a motion for a new trial." *People v Craig*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 357896); slip op at 4. "A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable outcomes." *Id.* (quotation marks and citation omitted).

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v North*

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

Carolina, 574 US 54, 60; 135 S Ct 530; 190 L Ed 2d 475 (2014); see also *People v Williams*, 236 Mich App 610, 612 n 1; 601 NW2d 138 (1999). The United States Constitution and the Michigan Constitution protect against unreasonable seizures. US Const, Am IV; Const 1963, art 1, § 11. To "effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *Williams*, 236 Mich App at 612. "[O]n reasonable grounds shown, a police officer may stop and inspect a motor vehicle for an equipment violation." *Id*.

One such equipment violation that affords reasonable grounds for a stop is defined in MCL 257.697(b). See MCL 257.683(2). Under MCL 257.697(b), "[w]hen a vehicle is equipped with a stop lamp or other signal lamps, the lamp or lamps shall at all times be maintained in good working condition." If statutory language is unambiguous, courts "presume the Legislature intended the meaning that it plainly expressed." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). When interpreting a statute, " 'every word should be given meaning, and [this Court] should avoid a construction that would render any part of the statute surplusage or nugatory.' " *Id*.

Here, it is undisputed that the center, high-mount, stop lamp on defendant's pickup truck was not working. At issue is whether the light's failure to activate violated MCL 257.697(b), thus providing probable cause to make the traffic stop. The language of MCL 257.697(b) requires that, when a vehicle is equipped with a stop lamp, the lamp must be "in good working condition." This language clearly states that any stop lamps on the vehicle must be in good working condition. The requirement applies to all stop lamps,[2] and nothing in the language of MCL 257.697(b) excludes from this requirement stop lamps in excess of the minimum number a vehicle must have pursuant to MCL 257.697b. This reading not only comports with the unambiguous language of the statute, but also advances the purpose of the Vehicle Code, "which is to promote traffic safety." *People v Williams*, 236 Mich App 610, 614; 601 NW2d 138 (1999). When a vehicle's design includes more than one lamp, "they are intended, in part, to function together to enhance safety." *Id*. at 615. As a result, because defendant's nonfunctioning light was not in good working condition, the fact that

[2] The Michigan Vehicle Code uses the phrases "rear lamp," MCL 257.686(1), "tail lamp," MCL 257.686(2), and "stop lamp," MCL 257.697(a)(1). Under MCL 257.686(2), "[e]ither a tail lamp or a separate lamp shall be constructed and placed so as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear." Under MCL 257.686(1), "[a] motor vehicle . . . shall be equipped with at least 1 rear lamp mounted on the rear, which, when lighted as required by this act, shall emit a red light plainly visible from a distance of 500 feet to the rear." Under MCL 257.697(a)(1), a vehicle must be equipped with a "stop lamp on the rear which shall emit a red or amber light and which shall be actuated upon application of the service or foot brake and which may but need not be incorporated with a tail lamp." According to these statutes, a "rear lamp" and a "stop lamp" are located on the rear of a vehicle and both emit a red light, while a "tail lamp" emits a white light designed to illuminate the rear registration plate. "Tail lamp" cannot be used interchangeably with either "stop lamp" or "rear lamp." Thus, MCL 257.686(2), which imposes requirements for "[a] tail lamp or tail lamps, together with any separate lamp for illuminating the rear registration plate," has no bearing upon the requirements of a "rear lamp" or a "stop lamp."

one of the stop lamps on defendant's truck was not working violated the Vehicle Code and afforded Deputy Ottinger probable cause to make a traffic stop. And because the trial court properly found that there was probable cause to make the traffic stop, defendant was not seized in violation of the Fourth Amendment.

B. FIFTH AMENDMENT

Defendant insists that Deputy Ottinger violated the Fifth Amendment by subjecting him to custodial interrogation without the benefit of *Miranda* warnings. When defendant raised this issue in his motion for a new trial, the trial court found that defendant was in custody, but that *Miranda* warnings were not required because no interrogation occurred. The trial court noted that defendant adopted the facts as Deputy Ottinger described them, i.e., that the deputy told defendant what was found in the truck and explained that he suspected defendant had some narcotics somewhere.[3] The trial court decided that that did not amount to interrogation because defendant failed to show that Deputy Ottinger's words "compelled [defendant] to incriminate himself and that the deputy should have known they would." This issue was initially presented in defendant's motion for a new trial. "We review de novo issues of constitutional law, and we review for an abuse of discretion a trial court's decision on a motion for a new trial." *Craig*, ___ Mich App at ___; slip op at 4. An abuse of discretion occurs when a trial court "selects an outcome that falls outside the range of reasonable outcomes." *Id*. (quotation marks and citation omitted).

The Fifth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V. During custodial interrogation, advising a suspect of *Miranda* rights is essential to protect the suspect's "constitutional privilege against self-incrimination." *People v White*, 493 Mich 187, 194; 828 NW2d 329 (2013). Determining whether a suspect is in custody requires the courts to "look at the totality of the circumstances, with the key question being whether the defendant reasonably believed that he [or she] was not free to leave." *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). The issue of custody is undisputed in this case.[4] Interrogation refers to "express questioning or its functional equivalent." *White*, 493 Mich at 193, quoting *Rhode Island v Innis* 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). The "functional equivalent" of direct questioning means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

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[3] Defendant's motion for a new trial, as well as the prosecutor's response, relied solely on Deputy Ottinger's testimonial description of this segment of his interaction with defendant. On appeal, both parties again rely solely on this testimony. This Court notes that video footage from Deputy Ottinger's patrol car captured audio of the interaction. Because neither party discussed the dash-camera footage in either motion practice in the lower court or in a brief on appeal, this Court will likewise not consider the dash-camera footage and will rely solely on Deputy Ottinger's testimony.

[4] The record clearly supports the trial court's determination that defendant was in custody. Indeed, Deputy Ottinger testified that he handcuffed defendant during the traffic stop and placed defendant in the back seat of his patrol car. From that point forward, defendant remained cuffed and under the deputy's control, thereby unable to do what he wanted to do. Additionally, the prosecutor does not contest on appeal that defendant was in custody.

should know are reasonably likely to elicit an incriminating response." *Innis*, 446 US at 301. The issue of interrogation is very much in dispute in this case.

In determining whether police conduct was the functional equivalent of direct questioning, relevant considerations include: whether there was any evidence suggesting the police were aware that respondent was peculiarly susceptible to an appeal to his conscience or unusually disoriented or upset at the time; the length of the conversation and whether there was a "lengthy harangue" in the presence of the defendant; and whether the comments were particularly evocative. *White*, 493 Mich at 197, quoting *Innis*, 446 US at 302-303. Our Supreme Court has noted that "courts have generally rejected claims . . . that disclosure of . . . inculpatory evidence possessed by the police, without more, constitutes 'interrogation[.]' " *White*, 493 Mich at 207. To fall within the *Miranda* doctrine, interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Innis*, 446 US at 300.

Defendant claims that he was subject to interrogation. Both parties' arguments rely on the following description of the encounter provided by Deputy Ottinger at trial:

> *Q*. Okay. Did you go and talk to [defendant] then about that?
>
> *A*. I did. I went back and said: Look at [sic]. I found some things in the truck. You know, I suspect you got some meth somewhere - - or not meth. Excuse me. Some narcotics somewhere. And then [defendant] produced a small vial, a bottle out of his pocket which he - - which I removed from the pocket.
>
> *Q*. Okay. So what exactly did he say, do you recall?
>
> *A*. He said he had some meth in his pocket.

Defendant contends that Deputy Ottinger posed direct questions about whether defendant possessed controlled substances, and defendant answered those questions affirmatively, either by words, gestures, or both. But defendant has not identified any direct question that the deputy asked him. In the absence of evidence of any direct question, defendant must establish that the deputy's statements were the functional equivalent of questioning.

Significantly, none of the factors discussed in *White* is present here. See *White*, 493 Mich at 197. Nothing in the record suggests that the deputy was aware of a particular susceptibility that defendant had. The deputy made one brief remark in defendant's presence, not a lengthy harangue. And defendant has not established that the deputy's remark was "particularly evocative." See *id*. When considering whether an exchange was the functional equivalent of questioning, the focus is on what defendant would have perceived from the statement in context, not the deputy's subjective intent. See *id*. The declaration, "[y]ou know, I suspect you got some . . . narcotics somewhere," neither invited nor required a response. Defendant has not established that Deputy Ottinger should have known that his words or actions were "reasonably likely to elicit an incriminating response." *Innis*, 446 US at 301. Additionally, merely informing defendant of inculpatory evidence, by itself, does not constitute an interrogation. *White*, 493 Mich at 208. Defendant does not articulate how the facts of this case reflected "a measure of compulsion above and beyond that inherent in custody itself" so as to bring the deputy's comment within the *Miranda* rule. See *Innis*, 446 US at 300. As

a result, the trial court did not err in concluding that defendant was not interrogated. Consequently, the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

C. PROSECUTORIAL VINDICTIVENESS

Defendant argues that the prosecution violated his right to due process by moving to amend the charging document to add charges in retaliation for defendant's refusal to accept a plea offer. Allegations of prosecutorial vindictiveness necessarily implicate due-process concerns, see *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996), and we review constitutional questions de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"The prosecution is given broad charging discretion." *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor may pursue any charges that are supported by the evidence, *id*., and may amend the information "before, during, or after trial" with permission from the trial court. MCR 6.112(H). Nevertheless, constitutional limits circumscribe the exercise of a prosecutor's discretion. See *Bordenkircher v Hayes*, 434 US 357, 365; 98 S Ct 663; 54 L Ed 2d 604 (1978). Prosecutors who violate a defendant's due-process rights by punishing the defendant for asserting a protected statutory or constitutional right commit "prosecutorial vindictiveness." *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). Prosecutorial vindictiveness may either be actual or presumed. "Actual vindictiveness will be found only where objective evidence of an expressed hostility or threat suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right." *Id*. at 36 (quotation marks omitted). "The mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor's charging discretion." *Id*. On the other hand, presumed vindictiveness may arise "only in cases in which a reasonable likelihood of vindictiveness exists." *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d (1982). And in plea bargaining, "there is no such element of punishment or retaliation so long as the accused is free to accept or to reject the prosecution's offer." *Bordenkircher*, 434 US at 363; see also *People v Jones*, 252 Mich App 1, 8; 650 NW2d 717 (2002) ("the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is not sufficient to warrant *presuming* that subsequent changes in the charging decision are vindictive and therefore violative of due process"); *People v Watts*, 149 Mich App 502, 508-511; 386 NW2d 565 (1986) (there is no presumption of prosecutorial vindictiveness when additional charges are brought before trial, even if a prosecutor states that a count may be added if a defendant refuses a plea offer).

The facts here do not warrant a presumption of prosecutorial vindictiveness. The charges the prosecutor sought to add were supported by evidence. Deputy Ottinger testified that defendant admitted his license had been suspended, and the deputy also testified that methamphetamine was discovered in defendant's pockets when defendant was in the search area at the county jail. "The prosecutor has the discretion to bring any charges supported by the evidence." *Nichols*, 262 Mich App at 415. The mere fact that the additional charges were filed after defendant refused to plead guilty and forced the prosecution to prove its case is "not sufficient to warrant presuming that the subsequent changes in the charging decision are vindictive and therefore violative of due process." *Jones*, 252 Mich App at 8 (quotation marks and citation omitted). A presumption of vindictiveness is especially ill-suited to a case like this, where the charges were added in the give-and-take of plea negotiations. *Bordenkircher*, 434 US at 363. To be sure, defendant rejected the initial plea offer from the prosecution, but the record reveals that plea negotiations continued right up until it was

time to pick a jury. On the first day of trial, the trial judge asked defendant if he wanted to accept the deal previously offered by the prosecution. Defendant would not agree to any plea that carried the potential for jail time, and the trial court was not willing to agree to rule out the possibility of incarceration. Therefore, the circumstances do not warrant a presumption of vindictiveness.

Notwithstanding the lack of actual or presumed vindictiveness, defendant asserts that the prosecution added the charges without claiming that additional evidence had been discovered or that the law had changed and without explaining the delay in adding the charges. Defendant does not cite any legal authority requiring the prosecution to provide any such claims or explanations, particularly when the facts underlying the charges were so well-known. As already indicated, a prosecutor has broad discretion to add any charges supported by the evidence. *Nichols*, 262 Mich App at 415. Defendant argues for a presumption of prosecutorial vindictiveness because the added charges would have added 10 points to his prior record variable (PRV) score, thereby resulting in additional punishment. But if the evidence supported the added charges, the fact that conviction on those charges would have increased defendant's punishment does not warrant a presumption of vindictiveness. As a result, the addition of the charges for driving with a suspended license and bringing contraband into the jail neither justified a presumption of prosecutorial vindictiveness nor violated defendant's constitutional right to due process.[5]

D. SCORING ERRORS AT SENTENCING

Defendant contends that the trial court erred in assessing 30 points for PRV 2 and 10 points for offense variable (OV) 19. We review issues regarding the interpretation and the application of the legislative sentencing guidelines de novo. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). A trial court's factual findings are reviewed only for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Clear error exists when this Court is left with a definite and firm conviction that an error occurred. *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012).

A trial court assesses points for PRV 2 by determining how many "prior low severity felony convictions" the offender has. MCL 777.52(1). A prior low-severity felony conviction is defined as a conviction entered before the commission of the sentencing offense with an offense class of E, F, G, or H. See MCL 777.52(2). If the offender has four or more prior low-severity convictions, the court must assign 30 points for PRV 2. See MCL 777.52(1)(a). If the offender has three prior low-severity felony convictions, the court must assign 20 points for PRV 2. MCL 777.52(1)(b). There is no dispute that defendant has at least three low-severity felony convictions, but defendant challenges the treatment of a 2006 conviction for "Possession of Marijuana-Double Penalty, (Class G)" as a low-severity felony for purposes of scoring PRV 2.

Under the Public Health Code, MCL 333.1101 *et seq*., any person who possesses marijuana "is guilty of a misdemeanor punishable by imprisonment of not more than 1 year or a fine of not more than $2,000.00, or both." MCL 333.7403(2)(d). These penalties may be doubled for second

[5] Defendant was not convicted of either added charge. He was acquitted of one added charge and the prosecutor dismissed the other charge. Consequently, even if the addition of those two charges amounted to prosecutorial misconduct, defendant's remedy is unclear.

or subsequent convictions. MCL 333.7413(1). Although defendant's PSIR states that defendant's 2006 conviction of marijuana possession—second offense is a Class G felony, this offense—MCL 333.7403(2)(d)—is not listed as a felony under MCL 777.13m, which lists the felonies in MCL 333.7340 to MCL 333.7417 to which the sentencing guidelines apply. In addition, the definition of a "felony" set forth in MCL 761.1(f), upon which the trial court relied, applies only to the code of criminal procedure. MCL 761.1 (indicating that the subsequent definitions are for words "[a]s used in this act"). Further, our Supreme Court held in *People v Wyrick*, 474 Mich 947 (2005),[6] that the Public Health Code expressly designated the possession of marijuana as a misdemeanor, MCL 333.7403(2)(d), and "[t]he sentence-enhancement statutes do not create new offenses; they merely authorize trial courts to increase the length of time that a defendant must serve." *Wyrick*, 474 Mich at 947.

The trial court erred by treating defendant's second conviction for marijuana possession as a low-severity felony for purposes of scoring PRV 2. Nevertheless, relief is not warranted because subtracting 10 points from defendant's PRV score would not affect his PRV level. Defendant's PRV score of 62 points assigned him to Level E, which ranges from 50 to 74 points. MCL 777.65. Subtracting 10 points would result in a PRV score of 52 points, which still would put defendant at PRV Level E. When "a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Defendant contends that the trial court erred by scoring 10 points for OV 19. We disagree. OV 19 addresses threats to the security of a penal institution or interference with the administration of justice or the rendering of emergency services. MCL 777.49(1). OV 19 is properly scored at 10 points when the offender interferes with or attempts to interfere with the administration of justice. MCL 777.49(1)(c). The plain meaning of the term "interfere with the administration of justice" for the purpose of OV 19 is to "oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013).

Here, the trial court assessed 10 points for OV 19. Defendant challenged that scoring in a motion for a new trial, which the trial court denied. The trial court rejected defendant's allegation that the erasure of data from defendant's phone was the only possible basis for assessing 10 points for OV 19. Instead, the trial court stated that this OV scoring was also supported by the fact that, when Deputy Ottinger asked defendant if he had anything else on him as they entered the jail, defendant lied and said that he did not.

Defendant does not dispute that his response to Deputy Ottinger's question was untrue, but he claims that his response was immaterial because he was going to be searched at some point as part of the booking process at the jail. Therefore, defendant concludes that it would be impossible for his response to interfere with the administration of justice in that situation. Defendant provides

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[6] *Wyrick* is a Supreme Court order, not an opinion. "Supreme Court orders that include a decision with an understandable rationale establish binding precedent." *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). See also *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1994) (a Supreme Court order is binding if it constitutes a final disposition of an application and contains a "concise statement of the applicable facts and reasons for the decision").

no authority to support the proposition that lying to a law-enforcement officer cannot be considered interfering with the administration of justice—or an attempt to interfere with the administration of justice—because that attempt was rendered futile by some subsequent occurrence. Under the plain language of the statute, 10 points should be scored for OV 19 if defendant just attempts to interfere with the administration of justice. This is a clear indication that the scoring was meant to apply to situations in which a defendant tries unsuccessfully to interfere with the administration of justice. Defendant attempted to interfere with the administration of justice by lying to Deputy Ottinger, so the trial court did not err when it assessed 10 points for OV 19.

Defendant also argues that it was improper for the trial court to search the record for support for the scoring of OV 19 when defendant did not have an opportunity to be heard. Defendant then furnishes explanations for why he lied, including that the question could have been ambiguous or defendant did not hear it correctly. Defendant suggests that this "after-the-fact justification" was inappropriate. Defendant cites no authority to support the proposition that the trial court could not consider evidence that was properly before it in scoring the offense variables because neither party addressed that evidence. This argument is, therefore, unpersuasive.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel. Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *LeBlanc*, 465 Mich at 579. This Court reviews a trial court's factual findings for clear error and its constitutional determinations de novo. *Id*. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Anderson*, 284 Mich App 11, 13 (2009); 772 NW2d 792 (2009) (quotation marks and citation omitted). The trial court denied defendant's motion for a new trial, and there was no evidentiary hearing on the matter. As a result, our review is limited to errors apparent on the record. See *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The defendant "must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant first contends that defense counsel rendered ineffective assistance by failing to challenge the lawfulness of the traffic stop on the basis that failure of the center, high-mount, stop lamp on his truck to activate did not violate the Vehicle Code. As we have ruled, the plain language of MCL 257.697(b) requires all stop lamps on a motor vehicle to be "in good working condition."

The center, high-mount, stop lamp on defendant's truck was not working, so Deputy Ottinger was authorized to make the traffic stop. See *Williams*, 236 Mich App at 612. Therefore, any challenge to the traffic stop on the grounds raised by defendant in his appeal would have been futile. Defense counsel is not required to advance a meritless argument, so defense counsel was not ineffective for failing to raise this issue. *Ericksen*, 288 Mich App at 201

Defendant next insists that defense counsel rendered ineffective assistance by failing to file a pretrial motion alleging a violation of defendant's Fifth Amendment rights. In this section of his brief, defendant appears to conflate two independent arguments involving the Fifth Amendment. Defendant refers to the conversation he had with Deputy Ottinger that occurred while defendant was in the deputy's police car. Defendant previously characterized that conversation as improper custodial interrogation without *Miranda* warnings. Additionally, defendant cites pages 172 to 185 of the trial transcript, where a different Fifth Amendment issue was discussed. As we have ruled, defendant has not demonstrated that he was subjected to custodial interrogation without *Miranda* warnings, so he cannot show that a pretrial motion would have been meritorious. Thus, defendant has failed to establish that defense counsel was ineffective for not filing such a motion. *Ericksen*, 288 Mich App at 201. Additionally, by referring to the other alleged Fifth Amendment violation only in the most cursory manner, defendant has failed to provide a factual predicate for his claim of ineffective assistance of counsel on that issue. See *Hoag*, 460 Mich at 6.

Next, defendant concedes that defense counsel opposed the prosecutor's motion to amend the information, but asserts that defense counsel performed ineffectively by failing to oppose the motion on grounds of prosecutorial vindictiveness. As we have already ruled, the facts of this case do not warrant any presumption of prosecutorial vindictiveness, so defense counsel did not render ineffective assistance by failing to advance that argument. See *Ericksen*, 288 Mich App at 201.

Finally, defendant argues that defense counsel rendered ineffective assistance by failing to challenge the trial court's scoring of PRV 2 and OV 19. As we have already ruled, defendant has not established that the trial court erred in scoring OV 19. In addition, although the trial court did err in scoring PRV 2, defendant has not shown that error prejudiced him. See *Strickland*, 466 US at 694. Thus, resentencing based on ineffective assistance of counsel is unwarranted. See *id*.

F. CORRECTION OF JUDGMENT OF SENTENCE

We note that the judgment of sentence indicates that the trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, but defendant was not so sentenced. According to the PSIR, defendant was not sentenced as a habitual offender, and the trial court adopted the PSIR recommendation during the sentencing hearing. Defendant is entitled to an accurate judgment of sentence, so we remand this case for the limited purpose of correcting the judgment of sentence to remove all references to the third-offense habitual offender enhancement. See MCR 6.435(A).

Defendant's conviction and sentence are affirmed. The case is remanded for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ James Robert Redford
/s/ Christopher P. Yates