

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSTIN ARTHUR MARSHALL,

Defendant-Appellant.

UNPUBLISHED

October 4, 2012

No. 297115

Jackson Circuit Court

LC No. 09-005490-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals of right his jury trial convictions of assault with intent to commit murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 35 to 60 years each for the assault and felon-in-possession convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the nonfatal shooting of Jamaal Hunt during the early morning hours of July 5, 2009, in Jackson, Michigan.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of counsel. Defendant raised this issue in a post-trial motion for a new trial, which the trial court denied after conducting a *Ginther*¹ hearing. "A claim of ineffective assistance of counsel is a mixed question of law and fact." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id.* A

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

finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

The right to counsel guaranteed by the United States and Michigan Constitutions is the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Effective assistance of counsel is presumed and defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009); *Jordan*, 275 Mich App at 667-668. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant argues that defense counsel was ineffective for pursuing "a strategy of defense that was chosen by him, not by the defendant, a strategy that was doomed because of his lack of preparation, investigation, and research and because it was a lie." Defendant further argues that counsel was ineffective for not investigating a claim of self-defense. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.* Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

At the *Ginther* hearing, defendant and defense counsel presented conflicting accounts of their pretrial discussions of the case and possible defense strategies. According to defense counsel, defendant told him that he shot the victim in self-defense during a struggle with the victim over the gun. Counsel, who was retained, testified that he expressed a desire to hire a private investigator and a medical expert to explore the self-defense theory, but defendant did not want to spend any more money and he refused to provide the names of any witnesses or allow counsel to use that defense. Counsel explained that he therefore elected to pursue a strategy of attacking the sufficiency of the evidence and establishing reasonable doubt. According to counsel, even after he informed defendant that a "reasonable doubt" defense only had a 20 to 30 percent chance of success, defendant was still convinced that he could "beat" the charge because he had been acquitted of a previous shooting using that strategy. Conversely, defendant testified that he told defense counsel that the shooting occurred during a struggle between himself and the victim, but denied telling defense counsel what defense theory to pursue, or refusing to allow counsel to pursue a defense of self-defense. According to defendant, defense counsel told him that, based on the preliminary examination testimony, no one could identify him as being there, so he "should go with I wasn't there."

An evaluation of defense counsel's performance depends in part on which version of these competing accounts is credible. The trial court's findings indicate that it credited defense counsel's testimony and found that counsel's defense strategy was objectively reasonable. "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Dendel*, 481 Mich at 130; MCR 2.613(C). The trial court had the opportunity to judge the credibility of defense counsel and defendant, and found that defense counsel's account of the events was credible. The court concluded that defense counsel was not ineffective "for failing to investigate a defense that Defendant refused to let him run."

Although defendant's witnesses at the *Ginther* hearing testified in support of a self-defense theory, defense counsel's testimony indicates that he wanted to pursue a self-defense claim, but that defendant did not want to do so, would not provide the names of witnesses, and would not permit counsel to hire a private investigator to explore that defense. Crediting defense counsel's testimony that defendant refused to cooperate in presenting a self-defense claim, counsel cannot be faulted for not pursuing that defense. Without defendant's cooperation, it would have been implausible to present that defense at trial. Further, considering the conflicting and widely varied testimony elicited at the preliminary examination and at trial, it was not unreasonable for counsel to pursue a "reasonable doubt" strategy. Indeed, although eyewitness Lasonia Wilks identified defendant as the person involved in the altercation, the victim himself maintained that defendant was not present at the scene. Accordingly, giving deference to the trial court's finding that defense counsel was credible, we find no error in the trial court's determination that defense counsel was not ineffective in his choice of defense strategies.

Defendant additionally argues that counsel was ineffective for failing to introduce photographs that could have impeached the credibility of eyewitness testimony. At the *Ginther* hearing, defendant presented three photos taken by his original defense counsel, which allegedly depicted a bush that may have obscured a view of the scene. Although initial defense counsel attached some significance to the photographs, when he attempted to use them to undercut the credibility of an eyewitness at the preliminary examination, his strategy was unsuccessful. The trial court observed the photos and found that they did not clearly demonstrate the existence of a bush, and that any bush that was present would not have discredited the testimony of the eyewitnesses to the point of producing a different outcome at trial. The trial court's findings are not clearly erroneous. Thus, defendant has not demonstrated that counsel's failure to introduce the photographs fell below an objective standard of reasonableness, or that there is a reasonable probability that the result of the trial would have been different if the photos had been introduced.

Defendant next argues that defense counsel was ineffective for failing to move to suppress a photograph of defendant wearing a shirt that matched the description of the shirt worn by the shooter. Defendant argues that the photograph was unlawfully seized because the camera from which it was obtained was not an object within the scope of the search warrant that the police executed at the place where defendant was found. First, we disagree with defendant's contention that the camera was beyond the scope of the search warrant. The warrant broadly authorized the seizure of "any and all evidence related to the shooting of Jamal Hunt." A camera containing a photograph of defendant wearing clothing that matched the description of the shooter was evidence linking defendant to the offense and, therefore, within the scope of the warrant. "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). Further, defense counsel testified that he did not object to the photo because the shirt that defendant was wearing looked like a common shirt that could be found in many closets. The trial court agreed that even if a motion to suppress had been successful, there was no reasonable probability that the outcome of trial would have been different if the photograph had been excluded. Thus, defendant has not demonstrated that he was prejudiced by counsel’s failure to file a motion to suppress.

Defendant also argues that counsel was ineffective for failing to file a motion in limine to exclude evidence of defendant’s prior convictions for impeachment under MRE 609. However, such a motion would have been necessary only if defendant had planned to testify. According to defense counsel, defendant stated that he did not want to testify because he did not feel comfortable speaking in court and he did not feel that he came across well. Because defendant did not testify and defense counsel’s testimony, which the trial court credited, indicates that defendant never planned on testifying, counsel was not ineffective for failing to file a motion in limine. Counsel was not required to make an unnecessary motion. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that defense counsel was ineffective for failing to object to the admission of the victim’s bloody clothing, or to evidence that bullets found during a search of the place where defendant was found appeared to match the shell casings recovered from the crime scene. Defendant also argues that counsel was ineffective for failing to object to the prosecutor’s references to this evidence during closing argument. Defendant argues that this evidence was irrelevant and unduly prejudicial.² We disagree.

“Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. All relevant evidence is admissible, except as otherwise provided by law or court rule. MRE 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

The victim’s clothing was relevant because it showed bullet holes supporting the number of shots that were fired and the location of the victim’s wounds, and showed the degree to which the victim bled. This evidence was probative of the circumstances surrounding the victim’s

² Although defendant challenges the admissibility of this evidence as part of a separate issue on appeal, defense counsel expressly informed the trial court that he had no objection to the admission of the victim’s clothing or the box of bullets found where defendant was staying. By affirmatively approving the admission of this evidence, defense counsel waived any error. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A waiver extinguishes any error, leaving no error to review. *Carter*, 462 Mich at 216; *Ortiz*, 249 Mich App at 311. Accordingly, our review is confined to determining whether defense counsel was ineffective for approving the admission of this evidence.

injuries and the shooter's intent during the assault. Moreover, while the presence of blood on the clothing could be considered prejudicial, it is not so shocking or gruesome that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. Because the clothing was admissible, defense counsel was not ineffective for failing to object to its admission. Defense counsel is not required to make a futile objection. *Ericksen*, 288 Mich App at 205.

Likewise, that the shell casings recovered from the scene matched the caliber and brand of ammunition found at the location where defendant was staying was relevant to connect defendant to the shooting and to show that he was the source of the gun used in the shooting. Moreover, there was no attempt to use the bullets for any purpose other than that for which they were relevant (i.e., to connect defendant to the shooting), so the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Accordingly, the evidence was admissible and defense counsel was not ineffective for failing to object to its admission. *Ericksen*, 288 Mich App at 205.

Further, because the victim's clothing and the bullets were properly admitted into evidence, the prosecutor was free to comment on that evidence during closing argument. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Therefore, defense counsel was not ineffective for failing to object to the prosecutor's statements. *Ericksen*, 288 Mich App at 205.

Defendant next argues that defense counsel was ineffective for failing to request the introduction of a laboratory report that was produced at the end of trial. The report indicated that no fingerprints could be found on the shell casings that were recovered from the crime scene. Contrary to what defendant asserts, this evidence was not exculpatory. It had no tendency either to eliminate defendant as the shooter or to identify someone else as the shooter. We agree with the trial court's statement that the laboratory report "added nothing to the case" because it was "inconclusive as to identity." Because the evidence had no exculpatory value, defendant has not demonstrated that counsel's failure to introduce the report was objectively unreasonable, or that there is a reasonable probability that the result of the proceeding would have been different had the report been presented.

In sum, defendant has not demonstrated that he was denied the effective assistance of counsel. We reject most of defendant's claims for failure to show that counsel's performance fell below an objective standard of reasonableness. To the extent that counsel made some errors, defendant has not demonstrated a reasonable probability that those errors, whether considered singularly or cumulatively, affected the outcome of trial. *Jordan*, 275 Mich App at 667; *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to this issue. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant also vaguely challenges the trial court's decision denying his request to present an attorney as an expert witness at the *Ginther* hearing to testify regarding whether defense counsel's performance adhered to community standards and norms. We review the trial court's decision to exclude this testimony for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion occurs when a trial court selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v*

Yost, 278 Mich App 341, 353; 749 NW2d 753 (2008). Expert testimony is admissible under MRE 702 if the trial court determines that “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” In this case, the testimony was offered at a hearing at which the trial court acted as the trier of fact. The court found that the proposed testimony would not be helpful because it was “well aware of the community standards on this issue.” The trial court appropriately evaluated the admissibility of the proposed testimony under MRE 702. Because the court was familiar with the facts of the case and the legal standards for evaluating an attorney’s performance relative to a claim of ineffective assistance of counsel, its decision to exclude defendant’s proposed expert testimony was within the range of reasonable and principled outcomes and, therefore, was not an abuse of discretion.

II. THE PROSECUTOR’S CONDUCT

Defendant next argues that the prosecutor engaged in misconduct by arguing that the gallery at the court was somehow intimidating the witnesses, and by eliciting testimony that children were living on the block where the shooting occurred and using that fact to argue intent. Because defendant did not object to either instance of alleged misconduct, this issue is unpreserved. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *Id.*

Prosecutors are accorded great latitude regarding their arguments, and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case. *Seals*, 285 Mich App at 22. A prosecutor may argue from the facts that witnesses are worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). This is especially relevant when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes. *Id.* Considered in context, the prosecutor’s arguments addressed matters relating to the weight and credibility of the witnesses’ testimony. The prosecutor commented on the fact that the eyewitnesses’ testimony was equivocal, and that their accounts and recollection of the events varied between the time of their initial interviews with the police, the preliminary examination, and trial. The prosecutor offered reasons for the equivocation, including that the witnesses were required to testify in the presence of a large number of people, which was a matter of record. It was not improper for the prosecutor to comment on matters affecting the credibility of the witnesses, and possible influences on their testimony, to argue that their identification of defendant as the shooter should be believed, as opposed to other times when they did not identify defendant as the shooter. Defendant has not demonstrated a plain error with respect to this unpreserved claim of misconduct.

We also reject defendant’s argument that the prosecutor improperly elicited evidence that children lived in the neighborhood and then improperly commented on that evidence when arguing that by continuing to shoot at the victim “in a residential area where the homes are near each other and where kids reside, only underscores the fact that . . . defendant . . . intended to kill [the victim].” “[M]inimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). “A factfinder can infer a defendant’s intent from his words or from the act, means, or the manner employed to commit the offense.” *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). A jury may infer the intent to kill based on all of

the facts and circumstances, including the use of a dangerous weapon. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). “There is no rule requiring the prosecution to use only the least prejudicial evidence per se to establish facts at issue.” *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). “The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms.” *Dobek*, 274 Mich App at 66.

Here, the prosecutor introduced evidence that children lived in the area where the shooting occurred and that defendant fired shots in the vicinity of people who were gathered. The prosecutor was free to comment on this evidence, and reasonable inferences arising therefrom, to support an argument that defendant’s conduct of firing shots in a residential area showed that he acted with an intent to kill. The strength of that inference was a matter for the jury to decide. Although the fact that children lived in close proximity to the shooting may arouse sympathy, the jury was instructed that it must not let sympathy influence its decision. Because the prosecutor’s argument was not improper and the trial court’s instruction was sufficient to protect defendant’s substantial rights, defendant has not demonstrated a plain error affecting his substantial rights.

III. ISSUES INVOLVING THE JURY

Defendant raises two issues relating to the trial court’s handling of matters involving the jury. Defendant first complains that no record was made of various juror notes or communications between the court and the jury, and that prejudice must be presumed in the absence of a record.

“For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.” *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). One purpose of appellate preservation requirements is to “create a record of the error and its prejudice.” *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Defendant did not raise this issue below, either at trial or in an appropriate post-trial motion. Although the juror notes are a matter of record (they are included in the lower court file), there is no indication in the record that the notes were ever conveyed to the trial court or that any off-the-record communications between the court and the jury ever occurred. Because defendant did not raise this issue below, no record establishing that these alleged events actually occurred was ever created. Thus, this issue is unpreserved and our review is limited to plain error affecting defendant’s substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

The lower court file contains four handwritten notes stapled to the verdict form. The notes appear to be juror notes, questions, and requests. The notes state:

Note 1. Body mike
dash camera
hospital dashcam
911 call

Note 2. Could we back it up to the door knock?

Note 3. Could we see the video of Dr. Khoury?

Note 4. We would like to watch the videotape of Ofc. Scarpino after lunch

As previously indicated, while the notes themselves are a matter of record, there is no indication in the record that the jury ever conveyed these notes to the trial court, or that there were any communications between the court and the jury concerning the notes.

On appeal, defendant relies on MCR 6.414(B), which at the time of trial provided, in pertinent part:

The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

But because there is no indication that the trial court communicated with the jury or with any juror, and defendant has not otherwise established factual support for his belief that any off-the-record communications occurred, defendant has not demonstrated a violation of MCR 6.414(B).

Although defendant also argues that prejudice must be presumed from the absence of a record, the authority he cites, *Valentine v United States*, 488 F3d 325, 334-335 (CA 6, 2007), only holds that a court's communications with a deliberating jury in the absence of counsel may be a critical stage of trial at which a presumption of prejudice may attach. *Valentine* does not state that a presumption of prejudice arises from the absence of a record. Moreover, the court in *Valentine* recognized that not all communications between a court and a jury involve a critical stage of trial at which counsel is required, thereby giving rise to a presumption of prejudice. *Id.* at 335. This is consistent with our Supreme Court's decision in *People v France*, 436 Mich 138; 461 NW2d 621 (1990), which defendant also cites.

In *France*, the Supreme Court explained that communications with a deliberating jury may be classified into three categories, substantive, administrative, or housekeeping. *Id.* at 142-143. The Court stated that substantive communications, which encompass supplemental instruction on the law, carry a presumption of prejudice, even in the absence of an objection. *Id.* at 143. Conversely, administrative communications, which include instructions regarding the availability of certain pieces of evidence, carry no presumption of prejudice and a party's failure to object when made aware of the communication "will be taken as evidence that the administrative instruction was not prejudicial." *Id.*

An examination of the juror notes in this case reveals that each refers to an evidentiary matter. None can be characterized as substantive or inviting a substantive communication. Indeed, defendant acknowledges in his brief that "the requests from the jurors appear to be administrative, not substantive." This acknowledgement weighs against defendant's claim that he is entitled to a presumption of prejudice. More importantly, as explained previously, defendant has not established that any off-the-record communications actually occurred in this

case. Accordingly, defendant has not demonstrated a plain error affecting his substantial rights with respect to this unpreserved issue.

Defendant also argues that reversal is required because the trial court failed to conduct an evidentiary hearing to determine the effect of the jurors' exposure to extraneous comments. The record discloses that the trial court addressed this matter on the record after being informed that some spectators may have yelled something in a hallway where some jurors were present. The trial court determined that the comments were made by spectators associated with a different trial and did not involve a "tampering issue" or "threatening a juror." Therefore, nothing further needed to be done. Although defendant now argues that the trial court should have held a hearing to determine whether the jurors' exposure to the extraneous comments affected their ability to be fair and impartial, defense counsel affirmatively approved the trial court's handling of the situation at trial. Therefore, counsel waived any error. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). A waiver extinguishes any error. *Id.* at 216. Accordingly, there is no error to review.

IV. HABITUAL OFFENDER SENTENCING

Lastly, defendant argues that he was improperly sentenced as a fourth habitual offender. Defendant's argument presents two distinct questions: (1) whether the habitual offender notice was timely filed; and (2) whether the prior convictions listed in the habitual offender notice were properly established. Because defendant never challenged the habitual offender notice in the trial court, and never challenged the accuracy or constitutional validity of the prior convictions listed in the habitual offender notice, this issue is unpreserved. Accordingly, we review these issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 769.12 provides that a person who has been previously convicted of three or more felonies shall be subject to an enhanced sentence if convicted of a subsequent felony. The procedure for seeking sentence enhancement is prescribed in MCL 769.13, which provides, in pertinent part:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

* * *

(4) A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence as provided under section 10, 11, or 12 of this chapter, may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court and by serving a copy of the motion upon the prosecuting attorney in accordance with rules of the supreme court.

(5) The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

* * *

(d) Information contained in a presentence report.

(e) A statement of the defendant.

Defendant argues that the habitual offender notice was not timely filed because it was filed more than 21 days after the district court's return to circuit court, which was made on September 23, 2009. However, the date of the return to circuit court is not one of the specified dates for measuring the timeliness of an habitual offender notice. MCL 769.13(1) sets forth two dates for measuring the timeliness of that notice: (1) "21 days after the defendant's arraignment on the information charging the underlying offense," or (2) "if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." Defendant argues that neither of these events occurred because he was never arraigned in circuit court and he never formally waived arraignment. But if that were the case, then the statutory period for filing an habitual offender notice was never actually triggered and the notice could not be considered untimely. Because it is undisputed that defendant was never arraigned on the underlying information in circuit court, the first time period is not applicable. MCL 769.13(1) clearly contemplates that in the absence of an arraignment, the time period for filing the habitual offender notice is to be measured from the date the information charging the underlying offense is filed. In this case, the underlying information, which was filed on November 2, 2009, included the habitual offender notice. Therefore, we reject defendant's argument that the notice was not timely filed.

Defendant also argues that he was improperly sentenced as an habitual offender because his prior convictions were never properly established. Defendant never challenged the accuracy or validity of his prior convictions in a motion pursuant to MCL 769.13(4). And, even where a conviction is challenged, MCL 769.13(5)(d) and (e) permit the existence of the conviction to be established by information in a presentence report or a statement of the defendant. Defendant's presentence investigation report includes each of the three convictions identified in the habitual offender notice. Defense counsel informed the court at sentencing that he had reviewed the presentence report with defendant and that there were no objections to the report. Further, the conviction information section of the sentencing information report listed "4th or subsequent" in the "Habitual" notation, and listed a score of 30 points for prior record variable (PRV) 2, indicating that defendant has four or more prior low severity felony convictions. MCL 777.52(1)(a). At sentencing, defense counsel agreed with the total score of 70 points for the prior record variables. Under these circumstances, defendant has not demonstrated a plain error. The prior convictions were established by the unchallenged information in the presentence report and defendant's acknowledgment that the prior record variables, which reflected defendant's prior convictions, were properly scored.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot