# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>ANTHONY J. CREWS,<br><br>Defendant-Appellant. | FOR PUBLICATION<br>February 5, 2013<br>9:00 a.m.<br><br>No. 305830<br>Monroe Circuit Court<br>LC No. 08–036958–FH |

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's order denying his motion for resentencing. Because the trial court's calculation of defendant's minimum sentence range under the legislative sentencing guidelines was accurate, we affirm.

Defendant pleaded guilty to one count of second-degree home invasion, MCL 750.110a(3) on August 22, 2008. Defendant was sentenced on September 18, 2008. At the hearing, the trial court found that defendant's minimum sentence range was 50 to 100 months, and sentenced defendant to 75 to 180 months' imprisonment. Defendant did not challenge the information in his presentence investigation report (PSIR) or the scoring of the legislative sentencing guidelines at the hearing; however, on May 7, 2009, he filed a delayed application for leave to appeal to this Court. This Court denied the motion, and defendant filed an application for leave to appeal to the Michigan Supreme Court, which also denied leave to appeal.

On August 16, 2010, defendant filed a motion for a *Ginther*[1] hearing and for resentencing in the trial court. The trial court denied defendant's motion for a *Ginther* hearing, but granted his motion for resentencing. A resentencing hearing was held on January 6, 2011, at which the parties stipulated that offense variable (OV) 12 was improperly scored. Defendant did not challenge the scoring of his prior record variables (PRVs) or any of the other OVs at the hearing. Defendant's minimum sentence range was recalculated to be 36 to 71 months. The trial court noted that it still felt its original sentence was appropriate, and sentenced defendant to 71 to 180 months' imprisonment.

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

On June 30, 2011, defendant filed another motion for resentencing, and the trial court held a hearing on the motion on July 22, 2011.[2] At the hearing, defendant argued that he had received ineffective assistance of counsel at his previous sentencing hearings and that there were several scoring errors in regard to the calculation of his minimum sentence range under the legislative guidelines, including errors in the scoring of PRV 1, PRV 2, and PRV 5. Specifically, defendant argued that PRV 1 was improperly scored because his Ohio burglary convictions do not correspond to any Michigan felony, and accordingly, cannot be used as prior high severity offenses under PRV 1. Defendant further argued that one of the convictions on which his PRV 2 score was based "does not exist," and that at least one of the offenses relied on for the PRV 5 score was not a crime that can be scored under PRV 5.

In a written order, the trial court denied defendant's request for resentencing, finding that defendant failed to demonstrate ineffective assistance of counsel or any error in regard to the score assessed for PRV 1 or PRV 5. However, the trial court ordered that defendant's PSIR be corrected in regard to PRV 2 and OV 11.[3] Thereafter, defendant filed a delayed application for leave to appeal the trial court's order, and this Court granted defendant's application. Defendant now appeals by leave granted the trial court's July 22, 2011 order denying his June 30, 2011 motion for resentencing. On appeal, defendant argues that the trial court erred by scoring 50 points under PRV 1 and by scoring ten points under PRV 5. Defendant also claims ineffective assistance of counsel in regard to defense counsel's failure to object to the scoring of PRV 1 and PRV 5.

## I. STANDARD OF REVIEW

"This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). We will uphold a scoring decision if there is any evidence to support it. *Id.* "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate

[2] The trial court noted that defendant's characterization of his motion as one for resentencing was incorrect because defendant previously filed a motion for resentencing. The trial court noted that defendant's motion should have been categorized as a motion for postjudgment relief pursuant to MCR 6.500. However, the trial court addressed the merits of defendant's arguments and denied relief on that basis.

[3] The prosecutor agreed that PRV 2 should have been scored at five points; however, the change did not affect defendant's minimum sentencing guidelines range. In regard to OV 11, the trial court noted that the parties misspoke on the record at the earlier hearing and stipulated to the assessment of five points for OV 12, not OV 11; thus, the five points assessed for OV 11 should be removed and assessed under OV 12 instead. This change similarly did not affect defendant's minimum sentencing guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

information was relied on in determining the sentence." *Id.*; MCL 769.34(10). The interpretation of the statutory sentencing guidelines is a question of law that we review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001); *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

Resolution of defendant's arguments on appeal requires statutory interpretation. We interpret statutes "to give effect to the intent of the Legislature as expressed by the statute's actual language" and "to enforce the statute's clear and unambiguous language without judicial construction." *People v Wood*, 276 Mich App 669, 671; 741 NW2d 574 (2007). A dictionary may be consulted to determine the meaning of a word that has not acquired a unique meaning at law. *Id.*

## II. PRIOR RECORD VARIABLE 1

In regard to PRV 1, defendant argues that 50 points should not have been scored because his Ohio convictions for burglary constitute prior low severity felony convictions, and thus, should have been scored under PRV 2.

The purpose of Michigan's legislative sentencing guidelines is "to insure that sentencing decisions are based on a consistent set of legally relevant factors and that such factors are assigned equal importance for all offenders." *People v Whitney*, 205 Mich App 435, 436; 517 NW2d 814 (1994). Thus, the sentencing guidelines factors "exist to insure that sentencing factors are weighted equally for all offenders." *Id.* at 437. Relevant here, the sentencing guidelines provide instructions for scoring a defendant's prior convictions, and the guidelines differentiate between prior high severity and prior low severity felony convictions. PRV 1 and PRV 2 consider prior felony convictions; PRV 1 is scored for prior high severity felony convictions, and PRV 2 is scored for prior low severity felony convictions. MCL 777.51; MCL 777.52.

In order for a felony conviction under another state's law to constitute a prior high severity felony conviction for purposes of PRV 1, a defendant must have violated a crime in another state that corresponds to a crime listed in class M2, A, B, C, or D or a crime that is punishable by ten years' imprisonment or more. MCL 777.51(2).[4] A felony conviction under

[4] MCL 777.51(2) provides:

> As used in this section, "prior high severity felony conviction" means a conviction or any of the following, if the conviction was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class M2, A, B, C, or D.
>
> (b) A felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D.

another state's law constitutes a prior low severity felony conviction for purposes of PRV 2 if the defendant violated a crime in another state that corresponds to a crime listed in class E, F, G, or H, or if the crime is not listed in any crime class, and is punishable by a maximum term of imprisonment that is less than ten years. MCL 777.52(2).[5] Thus, it is clear that by distinguishing high and low severity felony convictions the Legislature intended to provide sentencing courts with a mechanism for matching criminal conduct prohibited by other states with similar conduct prohibited by Michigan statutes, with the focus on the type of conduct and harm that each respective statute seeks to prevent and punish.

In this case, defendant was previously twice convicted of second-degree burglary in Ohio in violation of ORC 2911.12(A)(2). Second-degree burglary is a felony under Ohio law, and second-degree felonies in Ohio are punishable by a maximum of eight years' imprisonment. ORC 2929.14(A)(2).[6] Under MCL 777.51(2)(d), crimes punishable by a maximum term of imprisonment of ten years or more need not correspond to any crime, and constitute prior high severity felony convictions on the basis of the possible sentence alone. However, because the maximum sentence for ORC 2911.12(A)(2) is eight years, MCL 777.51(2)(d) is not applicable in this case, and the requirements of MCL 777.51(2)(b) must be satisfied. Consequently, for defendant's two prior Ohio burglary convictions to be considered prior high severity felony

---

> (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.
>
> (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

[5] MCL 777.52(2) provides:

> (2) As used in this section, "prior low severity felony conviction" means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class E, F, G, or H.
>
> (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.
>
> (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.
>
> (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

[6] Defendant's PSIR indicates he was sentenced to two years' imprisonment for each burglary conviction.

convictions under PRV 1, ORC 2911.12(A)(2) must "correspond" to a Michigan crime listed in offense class M2, A, B, C, or D. MCL 777.51(2)(b).

MCL 777.51 does not define "corresponding," and this Court has never interpreted the term.[7] Thus, the precise meaning of "corresponding" is an issue of first impression. Any term not defined by the statute "should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *People v Lange*, 251 Mich App 247, 253; 650 NW2d 691 (2002). *Random House Webster's College Dictionary* (1992) defines "corresponding" as "to be in agreement or conformity; match" and also as "to be similar or analogous."

Under the first definition of "corresponding," MCL 777.51(2)(b) would require a felony under a law of the United States or another state to "to be in agreement or conformity" with or to "match" a crime listed in offense class M2, A, B, C, or D in order for the conviction to be scored under PRV 1. However, reading the definition further, a "similar or analogous" crime is also sufficient. Considering the context of the term corresponds, *Lange*, 251 Mich App at 253, we conclude that this second definition of "corresponds," defining it as "similar or analogous" is the appropriate plain and ordinary definition to apply in this case. Different states often have analogous laws describing essentially the same crime(s), while the specific statutory language used to define those crimes often differs from state to state. Requiring that the offenses match or agree almost exactly would contravene the apparent intent of the Legislature, which is to permit scoring of all convictions for offenses in the listed classes, and any analogous offenses committed in another state. Clearly, the goal of the "corresponds" requirement is to insure that out of state crimes and in-state crimes that seek to prevent the same harm are scored in the same category. Thus, the Legislature could not have intended that minor differences between the wording of a Michigan criminal statute and its analog in a different state would result in the out-of-state conviction not being counted as a prior offense if the two statutes address the same type of conduct. As such, in the context of MCL 777.51(2)(b), "corresponding" would be more appropriately construed as being "similar or analogous." "Analogous" is defined as "corresponding in some particular" and "similar" is defined as "having qualities in common." *Random House Webster's College Dictionary* (1992). In light of this definition of "corresponds," the precise issue before us is whether ORC 2911.12(A)(2), which is the second-degree felony of burglary in Ohio, is similar or analogous to a Michigan crime in a high severity crime class.

ORC 2911.12(A)(2) provides:

(A) No person, by force, stealth, or deception, shall do any of the following:

* * *

[7] Similarly, MCL 777.52, MCL 777.53, and MCL 777.54, which mirror MCL 777.51 and respectively address the scoring of PRV 2, PRV 3 and PRV 4, do not define the term "corresponding."

> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

Initially, we note that Michigan's home invasion statute and Ohio's burglary statute seek to prohibit the same type of conduct generally, and thus, broadly correspond to each other. However, MCL 777.51(2)(b) clearly requires that the Ohio offense correspond "to *a* crime listed in offense class M2, A, B, C, or D" in order to be scored as a prior high severity felony conviction under PRV 1. (Emphasis added). Thus, the fact that Ohio's burglary statute seeks to protect against the same type of harm as Michigan's home invasion statute is not sufficient to score defendant's prior Ohio conviction under PRV 1 because defendant's conviction must correspond to a specific Michigan crime in the appropriate class.

Under Michigan law, home invasion is divided into three degrees. First-degree home invasion, MCL 750.110a(2), is a class B offense; second-degree home invasion, MCL 750.110a(3) is a class C offense; and third-degree home invasion, MCL 750.110a(4), is a class E offense. MCL 777.16f. All three degrees of home invasion share two common elements: (1) breaking and entering or entering without permission; and (2) that the entered structure be a dwelling. MCL 750.110a. Dwelling is defined as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a).

We begin by observing that the two elements shared by all three degrees of home invasion under Michigan's statute correspond to elements of ORC 2911.12(A)(2). First, the element of breaking and entering or entering without permission clearly corresponds to the Ohio element requiring trespass by force, stealth, or deception. Next, Michigan's dwelling element that addresses the type of structure being entered corresponds to the Ohio requirement that the trespass occur in "an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present." ORC 2911.12(A)(2). The dwelling element in the Michigan statute corresponds to Ohio's requirements because in Michigan, "the intent of the inhabitant to use a structure as a place of abode is the primary factor" used to determine whether a structure constitutes a dwelling within the context of MCL 750.110a. *People v Powell*, 278 Mich App 318, 321; 750 NW2d 607 (2008). "The owner's temporary absence, the duration of any absence, or a structure's habitability will not automatically preclude a structure from being considered a dwelling for purposes of the home-invasion statute." *Id.* at 322. Ohio's statutory definition of "occupied structure," ORC 2909.01(C),[8] is analogous to Michigan's definition of "dwelling" in this context.

[8] ORC 2909.01(C) provides in pertinent part:

In addition to these common elements that are indistinguishable, the Ohio statute at issue requires that the offender act "with purpose to commit . . . any criminal offense." ORC 2911.12(A)(2). Under Michigan's statutory scheme, this element is expressed differently in the three degrees of home invasion. First-degree home invasion requires that either the offender be armed with a dangerous weapon or that another person be lawfully present in the dwelling. MCL 750.110a(2). Second-degree home invasion in Michigan requires only that the offender possess the intent to commit a felony, larceny, or assault or actually commit a felony, larceny or assault while inside the dwelling. MCL 750.110a(3). Finally, third-degree home invasion, in addition to the common elements, requires only the intent to commit a misdemeanor or the actual commission of a misdemeanor while inside the dwelling. MCL 750.110a(4).[9] Thus, the remaining question is which, if any, intent element of Michigan's three degrees of home invasion corresponds to the intent element of ORC 2911.12(A)(2).

At the outset, we eliminate first-degree home invasion as a Michigan statute to which ORC 2911.12(A)(2) corresponds because first-degree home invasion is clearly meant to prohibit a greater type of harm than that which ORC 2911.12(A)(2) seeks to prevent. Next, we note that the only difference between second and third-degree home invasion is the intent element.

---

> "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:
>
> (1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.
>
> (2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.
>
> (3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.
>
> (4) At the time, any person is present or likely to be present in it.

[9] Ohio, like Michigan, separates the crime of burglary, its analog to home invasion, into degrees. Ohio's statutory scheme recognizes four degrees of the crime. Like first-degree home invasion in Michigan, "aggravated burglary" in Ohio includes the elements of the lesser burglary degrees but also requires that another person be present at the time, and that the offender inflict, attempt, or threaten to inflict physical harm on another or that the offender have a deadly weapon on their person or under their control. The likelihood of the presence of another individual and criminal intent differentiates the second, third, and fourth degrees. Second-degree burglary requires that a person be present or likely be present; whereas third-degree burglary requires only trespass into an occupied structure with the intent to commit any criminal offense regardless of whether another person is likely to be present. The fourth-degree felony is titled "trespass in a habitation when a person is present or likely to be present," and does not require that the offender have any intent to commit a criminal offense. ORC 2911.12.

Second-degree home invasion requires intent to commit a felony, larceny or assault; whereas, third-degree home invasion requires only intent to commit a misdemeanor. By comparison, ORC 2911.12(A)(2) does not distinguish between felonies and misdemeanors or by the type of offense committed; it requires only an intent to commit "any criminal offense." Thus, a person guilty of violating ORC 2911.12(A)(2) would be guilty of either second-degree home invasion or third-degree home invasion depending on the nature of the intended criminal offense.

While we recognize that this is a close question under these circumstances, we conclude that ORC 2911.12(A)(2) corresponds to second-degree home invasion, MCL 750.110a(3). A person who intends to commit "any criminal offense" may in fact intend to commit a felony, larceny, or assault; thus, at least some of the offenders found guilty of violating ORC 2911.12(A)(2) would be guilty of violating MCL 750.110a(3). In order to be scored under PRV 1, an out of state felony must only "correspond" to a crime in a listed offense class. The plain meaning of "correspond" does not require statutes to mirror each other under all circumstances; rather, it requires only that statutes be analogous or similar, meaning that they have "qualities in common." *Random House Webster's College Dictionary* (1992). Here, while exact matching is not required, almost all of the elements of ORC 2911.12(A)(2) and MCL 750.110a(3) do in fact match. Further, the one element of ORC 2911.12(A)(2) that does not exactly match MCL 750.110a(3) still encompasses all offenders who intend to commit a felony, larceny, or assault as required by MCL 750.110a(3). The only difference is ORC 2911.12(A)(2) also encompasses offenders who intend to commit other crimes. Thus, we conclude that the statutes are sufficiently similar to satisfy the plain meaning of the term "correspond" as required for scoring under PRV 1.

## III. PRIOR RECORD VARIABLE 5

Next, defendant argues that PRV 5 was improperly scored because he does not have the required number of prior misdemeanor convictions and prior misdemeanor juvenile adjudications that were offenses "against a person or property, a controlled substance offense, or a weapon offense" as required by MCL 777.55(2)(a).

Ten points should be scored under PRV 5 when "[t]he offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1)(c). Qualifying convictions or adjudications from other states constitute prior misdemeanor convictions. MCL 777.55(3). A conviction or adjudication should only be counted if "it is an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a).

According to defendant's PSIR, he had two California juvenile adjudications, an assault in August 1999 and a petty theft in 2001. As an adult in Ohio, defendant was convicted of possession or illegal use of drug paraphernalia in July 2002; and he was twice convicted of disorderly conduct (September 2002 and January 2008). The PSIR also indicates that defendant pleaded to the crime of "attempt to commit an offense"; this plea stemmed from a charge of possession or use of drugs. The trial court did not specify which of defendant's previous offenses it relied on to score PRV 5, but it did state that defendant "was correctly scored ten points as in the end it will be seen that he had 3 or 4 qualifying convictions or adjudications. If

one were to ignore the contest over the conviction for 'drug paraphernalia,' he would still have three qualifying offenses under PRV 5."

The juvenile adjudication for assault is an offense against a person and the juvenile adjudication for petty theft is an offense against property; thus, these offenses were properly scored under PRV 5. However, the information contained in the PSIR indicates that defendant's disorderly conduct convictions are not offenses "against a person or property, a controlled substance offense, or a weapon offense," and accordingly, cannot be scored under PRV 5. Thus, in order for ten points to be properly assessed, either defendant's possession of drug paraphernalia conviction or defendant's attempt conviction must qualify as a prior misdemeanor conviction under PRV 5.

Defendant first argues that his Ohio conviction for attempt cannot be scored under PRV 5 because it is not a controlled substance offense conviction. Specifically, defendant argues that his conviction is for attempt only, and that because he was not actually convicted of the originally charged drug crime, his attempt conviction does not constitute "an offense against a person or property, a controlled substance offense, or a weapon offense." MCL 777.55(2)(a). We disagree.

Defendant pleaded to attempt in violation of ORC 2923.02(A), which provides that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." ORC 2923.02(E)(1) sets forth the penalties for the offense of attempt to commit an offense. The penalty for attempt in Ohio is tied to the underlying crime that was attempted. Pertinent to this case, ORC 2923.02(E)(1) provides:

> An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses or the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

Thus, Ohio's attempt statute specifically ties an attempt conviction to the crime attempted, contrary to defendant's argument that his attempt conviction should be completely severed from the original substance abuse charge.

Defendant's PSIR clearly indicates that the original charge leading to his attempt plea was a controlled substance offense. Thus, the trial court did not err by classifying the attempt conviction as a controlled substance offense. We must uphold a scoring decision if there is any evidence to support it. *Steele*, 283 Mich App at 490. The attempt conviction constitutes the third qualifying prior misdemeanor. Ten points should be scored under PRV 5 when a defendant has at least three qualifying prior misdemeanor convictions or misdemeanor juvenile adjudications.

MCL 777.55(1)(c). Thus, the trial court did not err by scoring ten points under PRV 5 because defendant has at least three qualifying prior misdemeanors.[10]

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he received ineffective assistance of counsel at his first two sentencing hearings because his attorney failed to object to the scoring of PRV 1 and PRV 5. While defendant raised this issue in his motion for resentencing, no evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel; accordingly, our review of defendant's claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In regard to defense counsel's failure to object to the scoring of PRV 1, in order to object, defense counsel would have had to argue against scoring defendant's prior Ohio burglary convictions under PRV 1 on the basis of unclear, undefined statutory language without any Michigan case law to provide guidance on the issue. Under these circumstances, we conclude that defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness. Defense counsel "cannot be deemed deficient for failing to advance a novel legal argument." *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Moreover, PRV 1 was finally objected to at the final resentencing hearing, albeit by new defense counsel, and the trial court rejected defendant's theory and held that PRV 1 was properly scored. Accordingly, while a successful objection to PRV 1 would have changed defendant's minimum sentencing guidelines range, defendant has failed to demonstrate that any earlier objection to the scoring of PRV 1 would have been successful in light of the fact that the trial court rejected such an objection when it was raised. Thus, defendant has failed to demonstrate prejudice.

In regard to PRV 5, defendant has failed to demonstrate that counsel's performance was deficient because as discussed *supra*, PRV 5 was properly scored. Defense counsel is not ineffective for failing to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

---

[10] Defendant also argues that his drug paraphernalia conviction does not constitute a controlled substance offense, and accordingly, could not be counted under PRV 5. While we acknowledge that this is a much closer question, we need not address this argument because only three prior misdemeanors are necessary for a score of ten points under PRV 5. Accordingly, any error by the trial court in relying on defendant's drug paraphernalia conviction would not affect defendant's ultimate PRV 5 score, and thus, not affect his minimum sentence range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *Francisco*, 474 Mich at 89-91.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering