STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2020
v	No. 348324 Clare Circuit Court
SAMUEL POLEN IV, Defendant-Appellant.	LC No. 18-005783-FH

Before: BORRELLO, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Defendant, Samuel Polen IV, was convicted by a jury of operating or maintaining a methamphetamine laboratory, MCL 333.7401c(1); MCL 333.7401c(2)(f), second or subsequent offense, MCL 333.7413(1); possession of methamphetamine, MCL 333.7403(2)(b)(*i*), second or subsequent offense, MCL 333.7413(1); and use of methamphetamine, MCL 333.7404(2)(a), second or subsequent offense, MCL 333.7413(1). Defendant was sentenced to serve 10 to 40 years for operating or maintaining a methamphetamine laboratory, 46 months to 20 years for possession of methamphetamine, and 13 to 24 months for use of methamphetamine. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm.

I. BACKGROUND

On January 6, 2018, at approximately 3:20 a.m., a Clare County deputy arrived at the intersection of Mannsiding Road and Clare Avenue, where a Mercury Cougar was parked in the center of the intersection. When the deputy went to the car window, he saw two men; both unconscious. The driver, Mark Caplan, had his head down and was not moving and had his foot on the clutch. The vehicle was still running, and it was in first gear. When Caplan was removed from the vehicle, he began struggling with the deputy. Defendant, who was a passenger, woke up when the responding deputy was trying to secure Caplan. According to the responding deputy, when defendant awoke, his speech was slurred, his eyes were bloodshot, and he appeared to be sleeping while standing up. The deputy also noted that defendant was swaying and he looked like he was under the influence of drugs. When told to empty his pockets, the deputy observed defendant pick something out of his pocket and throw it to the ground. When another deputy

arrived at the scene, the responding deputy searched the car, finding, among other items, a duffle bag containing four sets of pipe cutters, funnels, coffee filters, a pill grinder, Coleman fuel, and bottles with rubber tubing, which had a chemical smell. A small lockbox was also found, containing 25-cent pieces and a small plastic baggie of white powder. Officers also found a scale, needles, a shoestring, cold packs, sodium hydroxide, a grinder with a white powdered substance that was later determined to be Sudafed, and a mason jar containing oil that tested positive for methamphetamine. Defendant's blood was drawn and tested positive for methamphetamine, amphetamine, methadone, and tramadol.

Defendant was convicted and sentenced as indicated above. This appeal ensued.[1]

II. ANALYSIS

In his appeal, defendant argues that he should not have been found guilty of either use of methamphetamine or operating or maintaining of methamphetamine lab because the evidence only proved that he went to a bar with Caplan and had no knowledge of the relationship between Caplan and the owner of the vehicle, or the vehicle's contents. Further, defendant argues, police did not fingerprint the items found in the vehicle, and there was no testimony at trial that defendant was manufacturing methamphetamine. Thus, defendant argues, on this record, there was insufficient evidence to sustain his convictions.

We review de novo a defendant's challenge to the sufficiency of the evidence to support his or her conviction. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). "In examining the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecut[ion] to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citation omitted). "Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense . . . ." *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). That is, "[i]f sufficient evidence is not introduced, a directed verdict or judgment of acquittal should be entered." *Id*.

In this case, defendant was convicted of operating or maintaining a methamphetamine laboratory in violation of MCL 333.7401c(1), which provides, in relevant part:

> (1) A person shall not do any of the following:
>
> (a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

[1] The Clare County prosecutor did not to file a brief with this Court.

> (b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

" 'Laboratory equipment' means any equipment, device, or container used or intended to be used in the process of manufacturing a controlled substance, counterfeit substance, or controlled substance analogue." MCL 333.7401c(7)(b). Operating or maintaining a methamphetamine laboratory requires (1) ownership, possession, or use of a vehicle, building, structure, place, or area (2) that the defendant knew or had reason to know was to be used as a location for manufacturing methamphetamine. See *People v Meshell*, 265 Mich App 616, 623-624; 696 NW2d 754, 758 (2005).

For defendant to have been found guilty of using methamphetamine, the State had to prove that defendant violated MCL 333.7404, which states, in relevant part:

> (1) A person shall not use a controlled substance or controlled substance analogue unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 as a narcotic drug or a drug described in section 7212(1)(h) or 7214(a)(*iv*) or (c)(*ii*) is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

Here, viewing the evidence in the light most favorable to the prosecution, *Reese*, 491 Mich at 139, we note that record evidence disclosed the vehicle was filled with chemicals and laboratory equipment used to manufacture methamphetamine. As previously stated in this opinion, police testified they found numerous items in the vehicle that are used to manufacture methamphetamine. To reiterate, police found sodium hydroxide inside the black duffle bag that was found inside the car, along with "four sets" of "pipe cutters," funnels, coffee filters, and "a pill grinder." There was a mason jar with meth oil that had partly crystalized, because, according to police testimony, "the meth is in a liquid form." The meth oil that was found in the vehicle was tested, and according to police, "it did indicate a positive for methamphetamine." Also, in the duffle bag, police found cold packs, which testimony revealed is used as ammonium nitrate for the manufacturing of methamphetamine. The responding deputy testified that the items found in the duffle bag are "the stuff that I've been informed and trained on identifies as a possible meth lab, or methamphetamine lab."

Defendant argues this evidence was insufficient to prove him guilty of any charges because at trial, the State failed to prove that he had any knowledge that any of the chemicals or lab equipment were present in the vehicle; or that he had actual possession of any of these items. Defendant's arguments do not comport with established case law.

This Court has held: "A person need not have physical possession of a controlled substance to be found guilty of possessing it." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). That is, "proof of constructive possession will suffice. Moreover, possession need not be exclusive and may be joint, with more than one person actually or constructively possessing a controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995) (citations omitted.) The element of possession "requires a showing of dominion or right of control over the drug with knowledge of its presence and character." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (quotation marks and citations omitted). However, "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Further, "the defendant's mere presence where the controlled substance was found is not sufficient to establish possession; rather, an additional connection between the defendant and the controlled substance must be established." *Meshell*, 265 Mich App at 622. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance." *Id*.

Although defendant's mere presence in the vehicle where methamphetamine and the chemicals and lab equipment used in the manufacture of methamphetamine were found was not sufficient to establish possession, the totality of the circumstances indicates a sufficient nexus between defendant, methamphetamine and the chemicals and lab equipment used in the manufacture of methamphetamine. When the responding deputy initially arrived at the vehicle, he found the vehicle running, in the middle of an intersection, with defendant and another male occupant unconscious. Officers testified there was a chemical odor emanating from the vehicle, and when defendant emerged from the vehicle he appeared to be under the influence of drugs. Defendant told police that his blood would test positive for the presence of methamphetamine, which it did. Evidence existed that defendant had access to the entire vehicle, and that the duffel bag containing several chemicals and methamphetamine lab equipment was within defendant's reach inside the vehicle. Directly behind defendant's seat, police found a small lockbox safe. Inside the safe police found, among other items, a small plastic baggie with a white powdery substance, a scale needles and a shoestring. Defendant's blood tested positive for methamphetamine.

Given that possession can be joint, "with more than one person actually or constructively possessing a controlled substance," *Konrad*, 449 Mich at 271, the jury "could infer that defendant had knowledge of the presence of the controlled substance" in the vehicle, *Meshell* 265 Mich App at 622, as well as knowledge of the chemicals and lab equipment. Hence, viewing the evidence in the light most favorable to the prosecution, *Reese*, 491 Mich at 139, the State presented legally sufficient evidence that defendant had possession of the materials necessary to manufacture methamphetamine, contrary to MCL 333.7401c(1), and also, legally sufficient evidence that defendant used methamphetamine, contrary to MCL 333.7404. Accordingly, defendant is not entitled to relief on his contention that the State failed to produce legally sufficient evidence to conviction him.

Defendant additionally argues that his sentence of 10 to 40 years in prison is unreasonable and disproportionate. "[A] sentence is reasonable under [*People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015)] if it adheres to the principle of proportionality set forth in [*People v Milbourn*, 435 Mich 630, 657-658; 461 NW2d 1 (1990)]." *People v Walden*, 319 Mich App 344,

351; 901 NW2d 142 (2017). *Milbourn*'s principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at 352 (quotation marks and citation omitted). "[A] departure sentence may be imposed when the trial court determines that the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime." *People v Steanhouse (On Remand)*, 322 Mich App 233, 238; 911 NW2d 253 (2017), rev'd in part on other grounds ___ Mich ___; 933 Mich 276 (2019) (quotation marks and citation omitted).

Here, defendant's 10-year minimum sentence is within the properly calculated guidelines range. A sentence within the guidelines range is "presumptively proportionate." *People v Odom*, 327 Mich App 297, 315; 933 NW2d 719 (2019). This Court is required to review a defendant's sentence for reasonableness only if the trial court imposed a departure sentence. *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). "When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), citing MCL 769.34(10) ("If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall* affirm that sentence and *shall* not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."). (Emphasis added.)

"In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Lee*, 243 Mich App at 187. We cannot glean from defendant's arguments any unusual circumstances in this case that would render defendant's presumptively proportionate sentence disproportionate. Defendant does not allege that the trial court relied on inaccurate information or that there was an error in scoring offense variables or any prior record variables. Accordingly, we must affirm defendant's sentence. *Schrauben*, 314 Mich App at 196.

Defendant also argues that the trial court erred by requiring him to pay $1,900 in court-appointed attorney costs and by garnishing his prison account for this purpose. Defendant argues that he has a constitutional right to have the trial court conduct an ability-to-pay assessment because the trial court is enforcing its order for defendant to pay attorney fees.

The United State Constitution does not require "that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship." *Fuller v Oregon*, 417 US 40, 53-54; 94 S Ct 2116; 40 L Ed 2d 642 (1974). That is, "*Fuller* expressly noted that, despite pretrial indigency, a criminal defendant is not forever immune from being required to pay the state for the cost of his court-appointed attorney, assuming he eventually gains the ability to pay." *People v Jackson*, 483 Mich 271, 289; 769 NW2d 630 (2009). When "a trial court attempts to enforce its imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency." *Jackson*, 483 Mich at 292. "Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun." *Id*. "The operative question for any such evaluation will be whether a defendant is indigent and

unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id*. at 293.

MCL 769.1*l* provides as follows:

> If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in section 1k and the department of corrections receives an order from the court on a form prescribed by the state court administrative office, the department of corrections shall deduct 50% of the funds received by the prisoner in a month over $50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds $100.00, or the entire amount if the prisoner is paroled, is transferred to community programs, or is discharged on the maximum sentence. The department of corrections shall give an order of restitution under section 20h of the corrections code of 1953, 1953 PA 232, MCL 791.220h, or the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, priority over an order received under this section.

"[I]f a prisoner believes that his unique individual financial circumstances rebut § 1*l*'*s* presumption of nonindigency, he may petition the court to reduce or eliminate the amount that the remittance order requires him to pay." *Jackson*, 483 Mich at 296. "However, because we adjudge a prisoner's indigency at the time of enforcement on the basis of manifest hardship and because a prisoner is being provided all significant life necessities by the state, we caution that the imprisoned defendant bears a heavy burden of establishing his extraordinary financial circumstances." *Id*.

Additionally, our Supreme Court stated, "While we do not attempt to lay out an extensive formal structure by which trial courts are to review these claims, we do direct that they be guided by MCL 771.3(6)(b), which controls the similar situation in which a probationer seeks remission of costs owed." *Id*. MCL 771.3(6)(b) states as follows:

> A probationer who is required to pay costs under subsection (1)(g) or (2)(c) and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

Accordingly, "when reviewing a prisoner's claim, lower courts must receive the prisoner's petition and any proofs of his unique and extraordinary financial circumstances." *Jackson*, 483 Mich at 296. Additionally, "the lower courts should only hold that a prisoner's individual circumstances warrant amending or reducing the remittance order when, in its discretion, it determines that enforcement would work a manifest hardship on the prisoner or his immediate family. The trial courts are under no obligation to hold any formal proceedings." *Id*. at 296-297. Therefore, trial courts "are only required to amend the remittance order when § 1*l*'*s* presumption of nonindigency is rebutted with evidence that enforcement would impose a manifest hardship on the prisoner or his immediate family." *Id*. at 297. "Beyond these basic parameters, we leave it to

the trial courts, in their sound discretion, to decide how to adjudicate a prisoner's claim that his individual circumstances rebut § 1*l's* presumption of nonindigency." *Id*.

Here, defendant has not presented a petition or proofs of his unique and extraordinary financial circumstances that would necessitate a finding by the trial court "that enforcement would work a manifest hardship on the [him] or his immediate family." *Jackson*, 483 Mich at 296-297. Defendant's brief on appeal simply states: "[t]he $1,900 in attorney fees are currently being taken out of defendant's prison account. As such, defendant contests the order for payment of $1,900 in appointed attorney fees because he is indigent and has no present ability to pay fees which are being taken out of his prison account." Prior to the trial court conducting an inquiry into defendant's ability to pay, defendant must demonstrate, as required by MCL 771.3(6)(b), "[t]hat payment of the amount due will impose a manifest hardship on the [prisoner] or his or her immediate family…" Having failed to meet the "heavy burden of establishing his extraordinary financial circumstances," *Jackson*, 483 Mich at 296, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron