STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2013
v	No. 310676 St. Joseph Circuit Court
DERRICK ALLEN MYERS, Defendant-Appellant.	LC No. 11-017501-FH

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f). Defendant was sentenced to 40 months to 20 years. We affirm.

I. FACTUAL BACKGROUND

Defendant and Ronnie Miller were at Jeremy Malone's home in Sturgis when defendant offered to pay Miller $40 to buy pseudoephedrine pills. Miller and Malone both suspected that the pills would be used to manufacture methamphetamine, as the actual cost of a box of pills only was $6 or $7. Miller agreed to purchase the pills.

When defendant and Miller returned to Malone's home the next day, Miller gave the box of pseudoephedrine pills to defendant. Defendant then requested a ride to an unspecified location by Maystead Road. After several intervening stops, Malone sat in the front passenger seat of Miller's compact sedan and defendant got into the rear seat of the car. Both Malone and Miller saw defendant carry a small, zip-up cooler into the car.

Although he was driving, Miller did not have a valid driver's license and his vehicle license plate had the wrong registration sticker. Sturgis Police Sergeant Ryan Banaszak saw Miller's car and activated his emergency lights to affect a traffic stop. Upon seeing the police lights, Malone helped defendant pull the rear seat down to access the trunk, and defendant placed the cooler inside. Miller and Malone both noticed that defendant was acting extremely frantic and that he placed something underneath the front passenger seat. Sergeant Banaszak could see into the car's passenger compartment and observed the driver look back, the rear passenger duck down, and the front passenger turn around and reach backward, all of which was suspicious.

After Miller's car was pulled over, another police officer arrived and began searching the vehicle. The officer discovered a bottle underneath the front passenger seat, which Sergeant Banaszak recognized as an active, bubbling, "one pot" methamphetamine lab.[1] Sergeant Damon Knapp was called to the scene, and he removed the methamphetamine lab from underneath the front passenger's seat. At first, he attempted to remove it from the front, but realized there was an obstruction and that the bottle had to be removed from the backseat of the vehicle. Thus, he explained that the bottle could only have been placed under the seat from the back of the car, where defendant sat.

Sergeant Banaszak located the cooler in the trunk, which was accessible from the rear of the passenger compartment. He knew from his training and experience that people involved in cooking methamphetamine often kept the necessary supplies in coolers. Sergeant Knapp opened the cooler and discovered various items, including: a bottle of Liquid Fire, lighter fluid, coffee filters, and a canister of rock salt. Trevor Slater, an expert in the field of methamphetamine labs, testified that materials needed in a one-pot methamphetamine lab include a bottle, simple lighter fluid, ammonium nitrate, lithium metal, sodium hydroxide, and pseudoephedrine.

Defendant was subsequently arrested and both Malone and Miller testified at the trial. While Miller testified in exchange for a plea bargain, Malone claimed he received nothing in exchange for his testimony. Defendant was convicted of operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f). Defendant now appeals and argues that there was insufficient evidence to sustain his conviction, there was prosecutorial misconduct, he was denied the effective assistance of counsel, and the trial court improperly scored Offense Variable (OV) 14.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

On appeal, defendant argues that the evidence was insufficient to support his conviction. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). We review the evidence in a light most favorable to the prosecution and draw all reasonable inferences in favor of the jury's verdict. *Id.* at 399-400. We also do not reassess credibility decisions on appeal. *Id.* at 400.

B. Analysis

Defendant was convicted of MCL 333.7401c(1), which provides, in relevant part, that a "person shall not":

[1] Testimony at trial established that the methamphetamine lab was formed in a plastic bottle, which was hot to touch. The bottle was bloated with gases, which caused condensation to form on the top of the bottle and was indicative of an active lab.

> (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 is defined as "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).

Possession may be actual or constructive and it may be joint or exclusive. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992). Possession "requires a showing of dominion or right of control over the drug with knowledge of its presence and character." *People v Meshell*, 265 Mich App 616, 621; 696 NW2d 754 (2005) (quotation marks and citation omitted). Furthermore, "possession may be proved by circumstantial evidence and reasonable inferences drawn from this evidence." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (quotation marks and citation omitted).

There was sufficient evidence that defendant exercised dominion and control over the bottle and the cooler, which contained chemicals and laboratory equipment used to manufacture methamphetamine. Miller and Malone testified that defendant brought the cooler into the car. Thus, defendant physically possessed the cooler. The police searched the cooler and found it full of equipment and chemicals used in methamphetamine manufacturing. Miller and Malone also testified that when the police executed the traffic stop, defendant placed an object under the front passenger seat. The officers subsequently located the bottle under the seat, and identified it as an active methamphetamine lab. Sergeant Knapp's testimony further demonstrated that due to the configuration of the seats, the bottle could only have been placed under the seat from where defendant was seated. This evidence established that defendant exercised dominion and control over the active lab and the cooler and its contents, which is sufficient to establish that he constructively possessed those items. *Meshell*, 265 Mich App at 621.

There also was sufficient evidence that defendant knew or had reason to know that the methamphetamine lab and cooler in his possession were being used for the purpose of manufacturing a controlled substance. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal 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). In the instant case, not only was there evidence that defendant was periodically holding the active methamphetamine lab, he also hid it under the front seat when the police arrived, evidenced by the testimony of Miller, Malone, and Sergeant Knapp. Furthermore, defendant specifically requested that Miller buy the pseudoephedrine pills, and overpaid him to the extent that both Miller and Malone suspected that the pills would in some way be used to manufacture methamphetamine. Hence, a reasonable jury could have found from this evidence that defendant acted with knowledge.

Furthermore, even if defendant's theory that Malone had the bottle in his possession and put it under his seat was plausible, "the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may

provide." *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002) (quotation marks and citation omitted). Defendant, however, contends that the testimony of Miller and Malone is tenuous at best because they received reduced charges. Yet, even if true, receiving a favorable plea in exchange for testimony goes to credibility, and "this Court scrupulously leave[s] questions of credibility to the trier of fact to resolve[.]" *People v Ericksen*, 288 Mich App 192, 197; 793 NW2d 120 (2010). Therefore, we find that a reasonable jury could have found beyond reasonable doubt that defendant was guilty of operating or maintaining a laboratory involving methamphetamine.

III. PROSECUTORIAL MISCONDUCT

A. Preservation & Standard of Review

Next, defendant argues that the prosecution engaged in misconduct during rebuttal argument when it communicated a personal belief that defendant was lying. "[D]efendant failed to preserve this issue by making a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "'Further, this Court cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect.'" *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627, 635 (2010) (brackets omitted), quoting *Callon*, 256 Mich App at 329-330.

B. Analysis

Generally, prosecutors are given wide latitude in their statements and conduct and are free to argue the evidence and all reasonable inferences drawn from such evidence. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). A prosecutor is permitted to "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). This Court reviews a prosecutor's remarks in context and evaluates them "in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

In the instant case, defendant challenges the prosecutor's comments in rebuttal argument. The prosecutor first referenced testimony from Malone and Miller about defendant requesting a ride to Maystead Road. The prosecution then stated that, while defendant wanted the jury to believe that he was an innocent bystander, "defendants do lie. Criminals do lie. And that's why you are here, and that's why I'm here, and that's why we have our system of justice to determine what happened."

In context, the prosecutor's statement was proper. First, the prosecutor did not actually refer to defendant as a liar, but only commented that some defendants do lie and that it was the

jury's responsibility to determine the truth. Moreover, in the context of the prosecutor's preceding statements, he was arguing that based on the evidence at trial, i.e. testimony from Malone and Miller, defendant's version of events was not credible. A prosecutor is permitted to argue that based on the facts presented a trial, a defendant is not worthy of belief and is not credible. *Howard*, 226 Mich App at 548. Further, this was in rebuttal, and the prosecutor was responding to defendant's closing argument wherein defense counsel repeatedly argued that Malone's and Miller's testimony should not be credited. Thus, "[t]aken in context, these statements were a fair comment on the evidence and were responsive to defendant's arguments." *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Accordingly, there is no error.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that by failing to object to the prosecutor's statement, defense counsel provided ineffective assistance of counsel. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). Because defendant has not established that the prosecutor engaged in any improper conduct, any objection would have been futile, and "[d]efense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Thus, defendant has failed to demonstrate that he was denied the effective assistance of counsel.

V. OFFENSE VARIABLE 14

A. Standard of Review

Lastly, defendant argues that the trial court erred in scoring OV 14. "This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error. A scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012) (emphasis in original) (quotation marks and citation omitted).

B. Analysis

"A trial court appropriately assesses 10 points for OV 14 when the defendant was a leader in a multiple-offender situation. The entire criminal episode must be evaluated to determine whether a defendant was a leader." *Lockett*, 295 Mich App at 184 (internal citation omitted). Furthermore, when the criminal activity involved three or more people, there can be more than one leader. MCL 777.44(2)(b). This Court recently noted that while the word 'leader' is not defined in the statute, "the dictionary defines a 'leader' as one who is a 'guiding or directing head' of a group." *People v Jones*, __Mich App__; __NW2d__ (Docket No. 307184, issued January 24, 2013) (slip op at 2), quoting *Random House Webster's College Dictionary* (1997).

Because there was sufficient evidence supporting the trial court's determination that defendant was a leader, OV 14 was scored appropriately. Miller's and Malone's testimony

demonstrate that defendant initiated the criminal activity by requesting that Miller purchase pseudoephedrine pills in exchange for money. They also testified that defendant requested a ride to an unspecified location. It also was defendant who transported and controlled the cooler, and it was defendant who was found in the back seat of the car with sole access to the active methamphetamine lab. Thus, the trial court's finding that defendant acted as a leader for purposes of scoring OV 14 was supported by evidence. *Lockett*, 295 Mich App at 182. There is no error requiring resentencing.

VI. CONCLUSION

Defendant's conviction was supported by sufficient evidence. Defendant also failed to demonstrate that there was prosecutorial misconduct or that he was denied the effective assistance of counsel. Lastly, defendant has failed to demonstrate error in scoring OV 14. We affirm.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan