STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 311756 Marquette Circuit Court
RICHARD MATHEW HILL, Defendant-Appellant.	LC No. 11-049973-FH

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of conspiracy to use a building to manufacture methamphetamine, MCL 333.7401c. Defendant was sentenced to 4 years and 6 months to 20 years. We affirm.

I. FACTUAL BACKGROUND

Defendant was living with Aaron Armatti at the time of the incident. Bridget Black and Brian Howe arrived at Armatti's house while defendant was there, and the topic of making methamphetamine was raised. According to Black, the men "[a]s a group, they wanted to do it." Vickie Lara, the fiancée of defendant's father, then joined the group. Because the men needed someone with photo identification to buy Sudafed, Black and Lara agreed to go to the store to purchase it. According to Lara, defendant asked her to purchase the Sudafed, and she did it to please him. Black and Lara purchased Sudafed and Gatorade.

When they returned to the house, defendant and the others informed them that they purchased the wrong kind of Sudafed. Black testified that "they said I had to go to Marquette with [defendant] and buy more Sudafed, while he purchased other things needed." Black purchased more Sudafed, and defendant bought an ice pack. Neither Black nor Lara testified to being involved in the actual making of the methamphetamine, but they both witnessed the aftermath. Lara heard a whistle and pop and when she came downstairs to investigate, she saw defendant holding a bucket. According to Lara, defendant told her to go upstairs and that everything would be ok. Black testified that she had gone to her friend's house a half a block away and after about an hour, defendant came running into the friend's house and said "we blew up." When Black ran outside, she saw that Howe was badly burned.

Armatti, Howe, and defendant testified to differing versions of the incident. According to Armatti, defendant and Howe instructed Black and Lara to buy the Sudafed. While Armatti was aware that they planned to cook methamphetamine, he did not realize they intended to do it at his house. Armatti claimed that he took some morphine and fell asleep on the couch, and woke up when he heard a whistle and a pop. He saw that his curtains were on fire and there was a meth lab in his garage.

Howe, on the other hand, testified that it was Armatti who went to the store and bought various contents, including buckets. Howe testified that Black and Armatti discussed making methamphetamine and that he never heard defendant talking with them about it. Howe also claimed that Black injected him with morphine, instead of Suboxone,[1] and he was "pretty messed up." When Howe woke up, he asked where Black was, and defendant said he would go and get her. Howe then went into the kitchen and saw Armatti shaking a bottle, which blew up and sprayed all over Howe. Howe testified that he was covered in flames and went to the hospital where he was placed in a medically-induced coma.

Defendant testified that Armatti asked Black and Lara to buy the Sudafed. Defendant claimed that he did not hear any discussions about making methamphetamine and he only drove Black to Marquette because she was in no condition to drive. He also claimed that the ice pack he purchased was for his back. After returning to Armatti's house, defendant realized that Armatti was planning to make methamphetamine and defendant started to pack his bag because he wanted no part of it. Defendant testified that he eventually heard a bang, and when he ran downstairs, he saw that Howe was on fire.

A Forsyth Township Police sergeant testified that when he arrived at Armatti's house, there was a metallic odor in the kitchen and a white pasty substance on the floor and walls. He observed a Gatorade bottle in the trash that was melted on the top and ruptured on the bottom. He also observed a torn ice pack, remnants of a lithium strip from a lithium battery, and two blister packs from what looked like to be pseudoephedrine.

The jury found defendant guilty of conspiracy to use a building to manufacture methamphetamine, MCL 333.7401c. He was sentenced to 4 years and 6 months to 20 years. Defendant now appeals on several grounds.

II. INSUFFICIENT EVIDENCE

A. Standard of Review

Defendant first argues that there was insufficient evidence to sustain his conviction for conspiracy to use a building to manufacture methamphetamine, MCL 333.7401c. "Due process

[1] Howe testified that Suboxone is a drug that supposedly blocks the effects of morphine, so a person does not crave it.

requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). "We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We review the evidence in the light most favorable to the prosecution and resolve all conflicts of the evidence in favor of the prosecution. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010); *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). We also will not second-guess a jury's determinations regarding the weight or credibility of the evidence. *Unger*, 278 Mich App at 222.

B. Analysis

"A conspiracy is mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means." *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). It is a specific intent crime, requiring "both the intent to combine with others and the intent to accomplish the illegal objective." *Id.* at 392-393.

On appeal, defendant argues that there was insufficient evidence of a prior agreement to use the house for making methamphetamine. Yet, "[d]irect proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (quotation marks and citation omitted). In the instant case, Black testified that after arriving at Armatti's house, the men "[a]s a group" wanted to make methamphetamine and needed someone with a photo identification to purchase the Sudafed. Black and Lara agreed to help by going to the store to purchase the Sudafed. Lara specified that it was defendant who asked her to buy the Sudafed.

From this testimony, a reasonable jury could have concluded that at least two people agreed, either expressly or implicitly, to combine actions and manufacture the methamphetamine at the house, which is an illegal act. *Cotton*, 191 Mich App at 392. Furthermore, the "conduct of the parties" in attempting to manufacture the methamphetamine in the house is evidence that they conspired to use the house to manufacture methamphetamine. *Jackson*, 292 Mich App at 588. While defendant offers many arguments for why Black, Lara, and Armatti were not credible witnesses, we will not second-guess the jury's credibility decisions on appeal. *Unger*, 278 Mich App at 222. Further, though defendant highlights evidence that seemingly conflicts with testimony of a conspiracy, we resolve all conflicts in the evidence in favor of the prosecution. *Id.*; *Tennyson*, 487 Mich at 735.

Based on all of the evidence presented, a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt of conspiracy to use a building to manufacture methamphetamine.

III. FELONY INFORMATION

A. Standard of Review

Defendant next argues that because he was not bound over on the amended felony information and the charge of conspiracy to manufacture methamphetamine, the trial court lacked jurisdiction and a new trial is required. Because defendant did not raise this issue below, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

In the felony complaint defendant was charged with one count of manufacturing methamphetamine, in violation of MCL 333.7401(2)(b)(i). After the preliminary examination, the prosecution filed an amended felony information, charging defendant with one count of conspiracy to use a building that he knew or had reason to know was to be used to manufacture methamphetamine, in violation of MCL 750.157a and MCL 333.7401c(2)(f). Defendant claims that his right to due process was violated because he lacked notice of the charges against him. We disagree.

The Michigan Court Rules provide that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H); see also *People v Russell,* 266 Mich App 307, 317; 703 NW2d 107 (2005) ("[a] trial court may amend the information at any time during the trial."). Defendant, however, argues that he lacked notice of the charges against him and that going to trial based on the amended felony information was fundamentally unfair.

Yet, defendant had ample opportunity before trial to prepare his case, as the amended information was filed over four months before the first day of trial. Moreover, the record demonstrates that defendant was fully aware of the charges against him. Defendant used the specific wording of the amended information to his advantage at trial, arguing that he was not charged with manufacturing methamphetamine and only with conspiring to use the house to manufacture methamphetamine. Thus, defendant's argument that he was somehow unable to prepare a defense is contrary to his conduct at trial. Furthermore, even knowing of the amended felony information, defendant did not raise any objections before or at trial. To allow defendant now on appeal to raise this issue and suggest that reversal is required violates the long-standing principle that "defendants cannot harbor error as an appellate parachute." *People v Pipes*, 475 Mich 267, 278 n 39; 715 NW2d 290 (2006) (quotation marks and citation omitted).

Because the amended information adequately informed defendant of the charge against him and allowed him to tailor his defense accordingly, there was no unfair surprise or prejudice, and reversal is not required. MCR 6.112(H); see also *People v Hunt*, 442 Mich 359, 365; 501 NW2d 151 (1993) (emphasis omitted) ("where the elements of [the offense] were shown and the defendant has not suggested anything that his attorney would have done differently, we are

unpersuaded that there was unfair surprise, inadequate notice, or an insufficient opportunity to defend against the accusations lodged against him.").[2]

IV. PROSECUTORIAL MISCONDUCT

A. Standard of Review

Next, defendant contends that the prosecution engaged in several instances of misconduct. Defendant objected during closing argument to the prosecution referring to defendant and witnesses as drug addicts and the prosecution's comment that defendant and Howe did not want to take the fall because they believed Armatti played a role in the crime. "Concerning preserved issues of prosecutorial misconduct, this Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

However, defendant failed to raise any objections to the remaining alleged errors. Thus, our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

B. Analysis

Generally, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutors are "accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks, citation, and brackets omitted). "To determine if a prosecutor's comments were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

Prosecutors are permitted to use emotional language and are not restricted to "the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). They also remain "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Bahoda*, 448 Mich at 282 (quotation marks, citation, and brackets omitted). Moreover, if "a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that

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[2] Also, contrary to defendant's arguments based on MCL 766.13 and MCL 767.42, reversal is not required. Here, "there is no claim that counsel's questioning or strategy at the preliminary examination would have been any different had he known of the" conspiracy charge, *People v Fortson*, 202 Mich App 13, 17; 507 NW2d 763 (1993), and the "testimony at a preliminary examination supported the additional charge[.]" *People v McGee*, 258 Mich App 683, 695; 672 NW2d 191 (2003).

the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Unger*, 278 Mich App at 237.

Defendant first argues that the prosecution improperly elicited testimony regarding his arrest. The investigating officer testified that he did not speak with defendant until "probably a week after" the incident because authorities were unable to locate him. The officer testified further that he received some information that defendant was considering leaving town about eight days after the incident, and was arrested shortly thereafter. While defendant argues that this evidence was irrelevant and unfairly prejudicial, the Michigan Supreme Court has held that "[i]t is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Defendant also fails to establish that the prejudicial effect of this testimony substantially outweighed its probative value, especially in light of the relatively brief evidence on this topic. Moreover, as defendant failed to object, we find there is no indication that his substantial rights were affected.

Defendant also argues that the prosecution engaged in misconduct during closing argument when it referenced that defendant was a drug user. Yet, this comment was based on evidence admitted at trial. While defendant denied that he had used or cooked methamphetamine before, his ex-wife testified that she had seen him use methamphetamine in the past. Because the prosecutor's comments were based on evidence admitted at trial, there was no error. *Bahoda*, 448 Mich at 282.[3]

Moreover, even assuming, *arguendo*, that the remaining comments were improper, reversal is not required. The jury was instructed that the prosecution's comments were not evidence, and a jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Furthermore, defendant failed to object to any of the prosecution's statements, and "because a timely objection and curative instruction could have alleviated any prejudicial effect" of these statements, "we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Unger*, 278 Mich App at 237.[4]

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[3] Furthermore, any argument concerning the substantive admission of this evidence has been abandoned as defendant failed to brief this issue adequately on appeal. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (An appellant may not simply announce an error and leave it to this Court to elaborate and support his position).

[4] Defendant argues that the prosecutor erred in stating that defendant and witnesses looked like meth abusers and that it was a "nasty way to make a drug." We do not find that such fleeting comments rise to the level of denying defendant a fair trial. *Dobek*, 274 Mich App at 63. Moreover, defendant offered no objections to these statements and is not permitted to use them as an appellate parachute. See *Pipes*, 475 Mich at 278 n 39.

V. SENTENCING

A. Standard of Review

Defendant argues that the trial court erred in scoring Offense Variables (OVs) 3 and 9 and is therefore entitled to resentencing. As the Michigan Supreme Court recently clarified in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), the trial court's factual determinations must be supported by a preponderance of the evidence and will be reviewed for clear error. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). Further, whether the facts "are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438 (footnotes omitted).

B. Analysis

First, defendant contends that the trial court improperly scored OV 3 at 25 points. Pursuant to MCL 777.33, a score of 25 points is justified for "[l]ife threatening or permanent incapacitating injury [that] occurred to a victim." In the instant case, Brian Howe suffered severe burns as a result of the manufacturing of methamphetamine. Defendant, however, contends that Howe was not an innocent third-party or the intended target, so should not have been considered under OV 3.

Contrary to defendant's argument, the Michigan Supreme Court has held that "a coperpetrator is properly considered a 'victim' for purposes of OV 3 when he or she is harmed by the criminal actions of the charged party, in this case defendant." *People v Laidler*, 491 Mich 339, 353; 817 NW2d 517 (2012). Therefore, we agree with the trial court that OV 3 does not require that the "victim" be an innocent third-party. Furthermore, while defendant argues that he did not intend to injure Howe, nothing in MCL 777.33 requires a finding of intent. See also *Laidler*, 491 Mich at 352-353 (recognizing that the state "has a generalized interest in minimizing physical harms to all persons. . . even when the harm is to the perpetrator himself[.]").

Defendant also challenges the scoring of OV 3 and OV 9 based on *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009).[5] Defendant contends that pursuant to *McGraw*, a defendant generally must be sentenced based on the sentencing offense alone, not the entire criminal transaction. Yet, contrary to defendant's assertions, the scoring of OV 3 and OV 9 did not run afoul of *McGraw*. The trial court in the instant case limited itself to consideration of the sentencing offense alone, which was the conspiracy to use a building to manufacture methamphetamine that resulted in the explosion that caused the injuries. What defendant's

[5] Pursuant to MCL 777.39(1)(c), a score of 10 points for OV 9 is justified when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss."

argument overlooks is that although the crime of conspiracy is complete when the illegal agreement is reached, the conspiracy "continues until the common enterprise has been fully completed, abandoned, or terminated." *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993). Thus, there is no evidence that the trial court considered evidence beyond the sentencing offense, and resentencing is not required.

VI. CONCLUSION

There was sufficient evidence presented to sustain defendant's conviction for conspiracy to use a building to manufacture methamphetamine, MCL 333.7401c. Moreover, defendant has failed to demonstrate that the prosecution's filing of the amended felony information or behavior at trial requires reversal. Lastly, we find that the trial court properly scored OV 3 and 9, and resentencing is not required. We have reviewed any remaining arguments in defendant's brief and find them to be without merit. We affirm.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly