Order

Michigan Supreme Court
Lansing, Michigan

June 6, 2025

Megan K. Cavanagh,
Chief Justice

167790 & (70)(72)

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Noah P. Hood,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 167790
COA: 362506
Berrien CC: 2021-003480-FH

ANTOINE WILLIE-LEZELL MYERS,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the September 19, 2024 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(I)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals to allow the defendant to file a supplemental brief regarding whether, in light of *People v Lockridge*, 498 Mich 358 (2015), a court can double an individual's sentencing guidelines pursuant to MCL 333.7413(1). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to remand is DENIED. The motion for peremptory relief or remand and to supplement application for leave to appeal is GRANTED, in part, to permit the defendant to file a supplemental brief in the Court of Appeals, and is DENIED in all other respects.

WELCH, J. (*concurring in part and dissenting in part*).

A jury convicted defendant Antoine Willie-Lezell Myers of a variety of drug and firearm offenses. During jury selection, the trial court denied defendant's request to dismiss a juror for cause. Defendant made that request after the juror informed the trial court that he was friends with one of the prosecution's witnesses. Because I believe that defendant raises important questions regarding juror bias, and because I believe that our caselaw on juror bias is underdeveloped, I would have heard arguments on this issue. Accordingly, I respectfully dissent from the Court's order insofar as it denies leave to appeal on the issue of juror bias.

I. BACKGROUND

Defendant based his for-cause challenge upon Juror 31's relationship with Detective Cory Peek. Peek was a prosecution witness who testified at trial regarding forensic

downloads that he performed on defendant's cell phone. During jury selection, Juror 31 told the trial court that he was "friends with" Peek. Juror 31 explained that he was the pastor at Peek's church, that he socialized with Peek at church, and that Peek served on the church's volunteer security team. When asked about the nature of the friendship, Juror 31 emphasized that the two were "pretty good friends." Although Juror 31 maintained that he could remain impartial, when the trial court asked whether he would give Peek more credibility than other witnesses, Juror 31 responded, "Well, I know him, but I can listen to evidence and—and not form an opinion based on just me knowing him."

Defense counsel challenged Juror 31 for cause, arguing that the pastor-congregant relationship involves a level of intimacy, trust, and familiarity that is inappropriate for a juror to have with a witness. In response to that challenge, the trial court questioned Juror 31, who once again stated that he could remain impartial. The trial court denied defendant's challenge, and the jury went on to convict defendant as described above. On appeal, the Court of Appeals rejected defendant's arguments regarding Juror 31 and affirmed defendant's convictions. *People v Myers*, unpublished per curiam opinion of the Court of Appeals, issued September 19, 2024 (Docket No. 362506).

II. DISCUSSION

Defendant argues that the trial court committed reversible error when it declined to dismiss Juror 31 for cause. Because defendant challenged Juror 31 for cause during jury selection, the issue is preserved for appellate review. See *People v Eccles*, 260 Mich App 379, 385 (2004). We review de novo legal questions related to jury selection. See *People v Fletcher*, 260 Mich App 531, 554 (2004). Similarly, we review de novo whether the trial court applied constitutional standards correctly. See *People v Clark*, 330 Mich App 392, 415 (2019).

A defendant has a constitutional right to be tried by an impartial jury. See *People v Miller*, 482 Mich 540, 547 (2008), citing US Const, Am VI, and Const 1963, art 1, § 20. A trial court should dismiss a prospective juror who "is biased for or against a party or attorney[.]" MCR 2.511(E)(2). See also MCR 6.412(A) (applying MCR 2.511 to criminal trials). A "trial court is without discretion to retain [a juror] who must be excused for cause" on the basis of bias. *Eccles*, 260 Mich App at 383.

Courts presume that jurors are impartial, and a defendant bears the burden to demonstrate "that the juror's impartiality is in reasonable doubt." *Miller*, 482 Mich at 550. The presumption of impartiality notwithstanding, this Court has provided scant guidance as to when a juror should be dismissed for bias under MCR 2.511(E)(2). The seminal case regarding juror bias appears to be *Miller*, but *Miller* considered whether a juror was biased because he was a convicted felon; it did not discuss relationships between jurors and witnesses. See *id*. at 552.

A survey of caselaw from other jurisdictions suggests that there is little uniformity on this issue. See, e.g., *People v Stanford*, 14 NYS3d 560, 564 (2015) (dismissal is required when a relationship between a juror and a witness is likely to preclude objectivity, even if the juror proclaims an ability to remain impartial); *Williams v State*, 891 NE2d 621, 629 (Ind App, 2008) (dismissal is not required when a juror discloses a casual relationship with a witness and asserts an ability to remain impartial); *Commonwealth v Golphin*, 161 A3d 1009, 1024 n 6; 2017 PA Super 137 (2017) (dismissal is required when a juror has a close enough relationship with a party that the trial court should presume the likelihood of prejudice); *United States v Rhodes*, 177 F3d 963, 965-966 (CA 11, 1999) (dismissal is not required when a juror demonstrates an ability to be objective despite a familial relationship with a witness). Regardless of the legal standards that other jurisdictions apply, I cannot find a case that considers a juror's relationship with a witness that is comparable to Juror 31's relationship with Peek. That is to say, I cannot find a case in which a juror has a relationship with a witness that resembles a "pretty good" friendship and a pastor-congregant relationship.

The Court of Appeals rejected defendant's arguments regarding Juror 31. In so doing, the panel relied upon Juror 31's statement that he could be impartial and the fact that Juror 31's interaction with Peek was limited to church. The panel also noted that there is no legal support for defendant's contention that a pastor-congregant relationship between a juror and a witness necessitates dismissal.

I question the Court of Appeals' analysis. First, in my view, the fact that Juror 31's interactions with Peek were limited to his time at church is not dispositive. Regular attendance (and in this case, volunteerism) at a house of worship can involve social interactions akin to those that occur outside of the walls of the building. And for many congregants, the relationship with a religious leader can be close, even if interactions occur only at the house of worship. In this case, the church was an important enough social setting to establish a "pretty good" friendship between Juror 31 and Peek.[1] Second, although the panel observed correctly that there is no caselaw supporting defendant's argument that a pastor-congregant relationship between a juror and a witness necessitates dismissal, there also appears to be no legal support in the opposite direction.

Because this Court has provided little guidance with respect to juror bias under MCR 2.511(E)(2) and defendant preserved the issue, I believe that this case would have been a good vehicle for us to provide trial courts with further guidance. Accordingly,

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[1] One wonders, for example, whether the panel would have viewed the matter differently if Juror 31 and Peek met three times a month after work in a group setting.

although I concur in the Court's order in all other respects, I respectfully dissent from the Court's order declining to hear arguments regarding this jurisprudentially significant issue.

ZAHRA, J., would deny leave to appeal.

HOOD, J., did not participate.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 6, 2025

Clerk

a0603

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE WILLIE-LEZELL MYERS,

Defendant-Appellant.

UNPUBLISHED
September 19, 2024

No. 362506
Berrien Circuit Court
LC No. 2021-003480-FH

Before: MURRAY, P.J., and BORRELLO and MARIANI, JJ.

PER CURIAM.

Defendant, Antoine Willie-Lezell Myers, appeals by right his jury convictions of two counts of possessing methamphetamine—one count for methamphetamine found in a home and one count for methamphetamine found on him—with the intent to deliver the methamphetamine, MCL 333.7401(2)(b)(*i*); knowingly keeping a building for keeping or selling controlled substances (maintaining a drug house), MCL 333.7405(1)(d); knowingly keeping a vehicle for keeping or selling controlled substances (maintaining a drug vehicle), MCL 333.7405(1)(d); possessing a firearm while ineligible to do so (felon-in-possession of a firearm), MCL 750.224f(1); possessing ammunition while ineligible to do so (felon-in-possession of ammo), MCL 750.224f(3); and three counts of carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, one each for the underlying felonies of possession of methamphetamine in the home with the intent to distribute, felon-in-possession of a firearm, and felon-in-possession of ammo.[1] The trial court sentenced Myers as a second-offense habitual offender, MCL 769.10, to serve 180 months to 40 years in prison for his first conviction of possessing methamphetamine with the intent to distribute, to serve 120 months to 40 years in prison for his second conviction of possessing methamphetamine with the intent to distribute, to serve 30 months to 4 years in prison for each of his convictions of maintaining a drug house and maintaining a drug vehicle, to serve 28 months to 7 years in prison for each of his convictions of being a felon-in-possession, and to

[1] The jury found Myers not guilty of felony-firearm related to his possession of methamphetamine with the intent to distribute arising from the methamphetamine found on his person.

serve 2 years in prison for each of his felony-firearm convictions. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Officers assigned to the Southwest Enforcement Team (SWET) conducted surveillance on Myers for several months due to suspicions of drug trafficking. They discovered that Myers was associated with three residences, including two on Kay Drive. Jennifer Pruiett, the mother of one of Myers's children, lived in one of the homes on Kay Drive with her son. SWET officers arranged for a confidential informant to buy methamphetamine from Myers, and surveillance confirmed multiple times that Myers visited Pruiett's residence before delivering the drugs.

In October 2021, the SWET officers waited for Myers to leave Pruiett's home. They arranged to have him pulled over by uniformed officers. During the traffic stop, a baggie containing about 4.5 grams of methamphetamine that had been cut with dimethyl sulfone was found on Myers. Following this, the SWET officers searched Myers, his Nissan Juke, Pruiett's home, and another home associated with Myers. The officers found a large bag of pure crystal methamphetamine weighing 197.6 grams in a kitchen drawer at Pruiett's home. A scale with methamphetamine residue, empty and full capsules of dimethyl sulfone, and baggies for packaging the methamphetamine were also found in the same area.

In a bedroom, officers found a loaded handgun stashed on a hutch, along with prescription bottles for medications prescribed to Myers and ammunition. Mail addressed to Myers at a different residence, as well as clothing and footwear consistent with an adult male, were also found in Pruiett's home.

Based on this evidence, Myers was charged with the offenses noted. Subsequently, at trial, the defense argued that the methamphetamine found on Myers was for personal use and not for distribution. They also claimed that the evidence showed that Pruiett possessed and controlled the methamphetamine found in her home. The defense told the jury that the items found in Pruiett's bedroom indicated that she owned the handgun. They argued that based on these reasons, the jury had to find Myers not guilty. However, the jury did not believe Myers's explanation for the evidence and found Myers guilty.

Myers then appealed the verdict in this Court raising a myriad of issues.

II. JURY SELECTION

We begin by discussing Myers's arguments that the trial court made a mistake by not excusing Juror 31 for cause, after the juror disclosed that he knew a witness, Detective Cory Peek. Myers also contends that the trial court should not have dismissed four potential jurors based on *People v Eccles*, 260 Mich App 379; 677 NW2d 76 (2004), which he argues was wrongly decided.

A. PRESERVATION

A defendant must raise claims of error involving the impaneling of the jury in the trial court in order to preserve the claim for appellate review. *Eccles*, 260 Mich App at 385. Here, defense counsel challenged Juror 31 for cause; specifically, he argued that the pastor/congregant relationship with a witness created a "trust relationship" that was inappropriate for a juror and a witness. That argument was sufficient to preserve a claim of error involving the trial court's

decision whether to dismiss that witness for cause. See *id*. However, defense counsel did not object when the prosecutor sought to dismiss four jurors—Jurors 8, 10, 23, and 29—for cause premised on the decision in *Eccles*. Therefore, Myers did not preserve any claim of error with regard to the dismissal of those jurors. See *id*. Indeed, the record discloses that defense counsel stated he had no objection to these excusals. Expressing satisfaction with the jury constitutes waiver of objection to the jury, as impaneled. *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988). See also *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001) (explaining that "[i]n *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), the prosecutor conceded that the trial court's jury instructions violated a court rule, but argued that the defendant waived the issue when defense counsel expressed satisfaction with the trial court's refusal of a jury request and its subsequent instruction to the jury," and "[t]he Supreme Court agreed … not[ing] the soundness of the rule requiring preservation of issues for appeal by notation on the record, and then reiterat[ing] the long-held rule that counsel may not harbor error as an appellate parachute") (cleaned up).

B. STANDARD OF REVIEW

This Court reviews de novo whether the trial court properly applied the law applicable to jury selection. *People v Fletcher*, 260 Mich App 531, 554; 679 NW2d 127 (2004). This Court also reviews de novo whether the trial court properly applied constitutional standards. *People v Clark*, 330 Mich App 392, 415; 948 NW2d 604 (2019). This Court reviews the factual findings underlying the trial court's application of the law for clear error. *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). A finding is clearly erroneous when this Court is left with the definite and firm conviction that the trial court made a mistake. *Id*. This Court reviews a trial court's handling of voir dire for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994) (opinion by MALLETT, J.). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Clark*, 330 Mich App at 415.

The defendant's challenge to Jurors 8, 10, 23, and 29 is considered waived. However, even if we were to decide that the defense lawyer did not waive the issue and only forfeited it, the defendant would not be entitled to have the verdict overturned. This Court examines unpreserved claims of error, including unpreserved claims of constitutional error, for plain, outcome-determinative error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant bears the burden to demonstrate that the trial court committed a clear or obvious error and that the error affected the outcome of the lower court proceeding. *Id*. Even if the defendant demonstrates a plain, outcome-determinative error, the reviewing court may only exercise its discretion to provide relief when the error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's actual innocence. *Id*.

C. JUROR 31

Myers had the right to be tried by an impartial jury. See *People v Rose*, 289 Mich App 499, 529; 808 NW2d 301 (2010). It is a ground to exclude a prospective juror for cause if the juror

"is biased for or against a party or attorney." MCR 2.511(E)(2);[2] see also MCR 6.412(A) (stating that MCR 2.510 and MCR 2.511 govern the procedures for selecting a jury in a criminal trial). The purpose of voir dire is to elicit enough information about the prospective jurors to develop a rational basis for excluding those who are not impartial. *People v Haynes*, 338 Mich App 392, 411; 980 NW2d 66 (2021). Jurors are, however, presumed to be impartial, until the contrary is shown. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). The burden is on the defendant to demonstrate that a juror was not impartial or, at the least, that the juror's impartiality was in reasonable doubt. *Id*. A prospective juror should be excused for cause when he or she has a demonstrated bias for or against a party, when he or she has a state of mind that will prevent him or her from rendering a just verdict, or when he or she has opinions that would improperly influence the jury's verdict. *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). If a trial court finds that a prospective juror falls within one of the parameters for dismissing the juror for cause under MCR 2.511(E), then the trial court must excuse the juror. *Eccles*, 260 Mich App at 383.

During jury selection, the parties agreed to remove a juror, and the trial court selected Juror 31 to take the removed juror's place. When asked if he had any additional information to share, Juror 31 mentioned that he was friends with a witness, Detective Peek. Juror 31 explained that Detective Peek attended the church where he served as a pastor and that they saw each other around three times a month. He described their relationship as "pretty good friends" but clarified that they did not socialize outside of church. The trial court then asked Juror 31 about his ability to be impartial:

> *The Court*: Okay. And do you think you would treat the testimony of Mr. Peek different than other witnesses because you know him?
>
> *Prospective Juror*: No.
>
> *The Court*: Would it affect your ability to sit and try this case fairly and impartially?
>
> *Prospective Juror*: No.
>
> *The Court*: Do you think you're going to give him more credibility as a witness than other witnesses because you know him and you're friends with him?
>
> *Prospective Juror*: Well, I know him, but I can listen to evidence and—and not[3] form an opinion based on just me knowing him.

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[2] This provision was formerly MCR 2.511(D)(2). Our Supreme Court renumbered this court rule effective January 1, 2024. See 512 Mich cxxii-cxxiii. Because the rule is unchanged in substance, we cite the current rule.

[3] An original, uncorrected transcript omitted the word "not" from this sentence. The transcript was subsequently corrected.

Following defense counsel's challenge to Juror 31 for cause, the trial court conducted further inquiries into the relationship between Juror 31 and Detective Peek. Juror 31 clarified that his interaction with Detective Peek was strictly limited to church, where Detective Peek was part of the security team. When asked if he would treat Detective Peek's testimony the same as any other witness, Juror 31 replied, "Sure." Furthermore, he explicitly stated that he would not give Detective Peek's testimony any additional weight. Based on these responses, the trial court concluded that Juror 31 was not eligible for dismissal for cause, and we ascribe no error to this decision. See *Miller*, 482 Mich at 550. Juror 31 repeatedly denied that he would judge Detective Peek's testimony any different from any other witness. The trial court accepted these assurances, and this Court defers to a trial court's superior ability to judge the impartiality of a prospective juror. See *Williams*, 241 Mich App at 522. Accordingly, defendant is not entitled to relief on this issue.[4]

D. EXCUSING JURORS WITH PREVIOUS CRIMINAL CHARGES

Myers contends that the trial court made a clear error by excusing Jurors 8, 10, 23, and 29, based on their past criminal charges in Berrien County. He argues that this decision, relying on this Court's decision in *Eccles*, warrants a new trial.

The record demonstrates that the prosecutor moved to excuse four witnesses under *Eccles*, but without providing much detail. Defense counsel mentioned having no objection to those dismissals. There was more information available regarding Juror 8 as he expressed a dislike for police officers, stating that he had negative experiences with them, including being strip searched in parking lots and blackmailed. When asked if these experiences would affect his ability to be impartial, he responded, "Maybe."

In *Eccles*, this Court examined whether the trial court improperly excused several jurors under what was then MCR 2.511(D)(11). Specifically, the prosecutor challenged each juror for cause because each had been charged by the Oakland County Prosecutor's office with a misdemeanor criminal charge in the past. As stated in *Eccles*, our Supreme Court provided through our court rules that it was grounds to challenge a prospective juror for cause when the prospective juror "is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution." *Eccles*, 260 Mich App at 381 (quoting former MCR 2.511(D)(11)); see MCR 2.511(E)(10) (containing language identical to the quoted language in Eccles from former MCR 2.511(D)(11). Referencing a legal treatise, this Court in *Eccles* noted that the grounds identified under MCR 2.511 fell into two categories: one category involved persons who were not qualified to act as a juror and the other involved jurors who had an impaired ability to render a fair and impartial verdict. This Court determined that a prospective juror who had been the subject of a criminal prosecution fell into the latter category.

[4]Defendant's contention that Juror 31's prior congregant/pastor relationship with Detective Peek necessarily warrants Juror 31's dismissal lacks legal support. Creating a new rule of law based solely on this relationship, especially when the prospective juror consistently asserted his ability to be fair and the trial court found him to be credible in that regard, is unwarranted.

Here, the parties failed to develop a record as to the prior experiences the four jurors had with the prosecutor's office. As such, it is unclear whether they had criminal convictions, or were simply charged with criminal offenses. It is also unclear whether the charges involved the same prosecutor's office. Given this record, Myers has not shown that the trial court plainly erred when it applied *Eccles* to exclude the four jurors. Moreover, the trial court was required to apply that decision. See MCR 7.215(C)(2). Although Myers asks this Court to initiate proceedings to invoke a conflict panel, see MCR 7.215(J)(2), Myers has not identified a basis for challenging the decision in *Eccles*. We decline his invitation to do so.

Contrary to Myers's contention, there is no conflict between MCL 600.1307a(1) and MCR 2.511(E). MCL 600.1307a(1) identifies the criteria that a person must meet in order to qualify as a juror; it does not mandate that a person who meets those criteria must be allowed to serve as a juror. Instead, it establishes the minimum requirements for service on a jury. MCR 2.511(E), by contrast, establishes when a person may be excused from serving for cause. A party may, for example, challenge for cause a prospective juror who "is biased for or against a party or attorney." MCR 2.511(E)(2). The court rule also identifies several relationships that give rise to a presumption of bias. See, e.g., MCR 2.511(E)(8) (stating that a party may challenge a prospective juror for cause when he or she is "related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys"); see also *Eccles*, 260 Mich App at 383 (recognizing that the relationships identified under the court rule are the equivalent to establishing bias or prejudice at common law). One such relationship involves jurors who have been involved in litigation with a party. This rule has existed since the adoption of the General Court Rules of 1963. See GCR 1963, 511.4(11).[5]

Notably, the court rule does not prohibit all persons who have ever been charged with a crime, but not convicted, or convicted of a misdemeanor from serving as a juror—it precludes a person from serving if that person had been accused of a crime by the challenging party or had accused the challenging party of a crime. Stated another way, the prosecutive juror must have "complained of" or been "accused by" the same office involved in the case at hand and the charges must have involved criminal charges. See *People v Raisanen*, 114 Mich App 840, 847-848; 319 NW2d 693 (1982) (interpreting GCR 1963, 511.4(11) and stating that it is not enough to show that a potential juror has been charged with a traffic offense; the prosecutor must show that the offense rose to the level of a crime and was brought by the same prosecutor's office). As such, a prospective juror who had been involved in a criminal proceeding in another county, in another state, or at the federal level, would not be precluded from serving under MCL 2.511(E)(10). Because the court rule does not purport to serve as a general qualification on jury service, it does not conflict with MCL 600.1307a(1) and does not implicate the separation of powers. See *McDougall*, 461 Mich at 24 (stating that the first inquiry is to determine whether there is a conflict between the statute and the court rule).

[5] According to the official comments to the General Court Rules, GCR 1963, 511.4(11) was patterned after Iowa Rule of Civil Procedure 187(f)(5), and was part of a list of relationships that gave rise to an inference of actual bias. See GCR 1963, 511.4, official comments, reprinted in, 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), GCR 511.4, p 461.

Contrary to Myers's claims, the court rule does not give the prosecuting attorney unfettered discretion to choose which persons who fall under MCR 2.511(E)(10) must be excluded. Instead, the court rules specifically require that all prospective jurors who meet a ground for challenging the juror under MCR 2.511(E) *should* be excused and, on the motion of either party, *must* be excused: "If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel." MCR 6.412(D)(2). For that reason, the defendant also has the right to exclude such persons from the jury. Additionally, in *Eccles*, this Court acknowledged that a defendant might be entitled to relief if the defendant could demonstrate that the application of MCR 2.511(E)(10) resulted in the systematic exclusion of jurors on the basis of race, or when it could be shown that the prosecuting attorney misused the rule to exclude jurors on the basis of race. This Court simply concluded that, on the record before it, the defendant had not established a plain error involving those grounds for relief. *Eccles*, 260 Mich App at 385-388. Similarly, in this case, Myers failed to develop the record to establish that the prosecutor's request to excuse the four jurors for cause under the court rule involved improper considerations or otherwise deprived Myers of a jury composed of a fair cross-section of the community. See *id*. Consequently, Myers has not shown that the trial court's application of the decision in *Eccles* violated his rights.

Myers also asserts that the court rule should not lightly be interpreted to modify the common law applicable to determining when a person should be excused for cause. However, it is obvious to even a casual legal observer that our Supreme Court has the authority to modify the common law of this state. See *People v Woolfolk*, 497 Mich 23, 25-26; 857 NW2d 524 (2014). Moreover, the court rule is not ambiguous—it provides that a prospective juror who has the requisite relationship with the challenging party—in this case, the prosecutor—should be excused for cause. As such, to the extent that the rule could be said to have changed the common law, the Court in *Eccles* did not err by applying the plain language of the rule.

Myers also suggests that the application of *Eccles* to allow the automatic exclusion of jurors amounts to a constitutional violation that is not subject to harmless error. He characterizes such a violation as a structural error. However, Myers has not shown that the decision in *Eccles* violated either the Michigan Constitution or the Constitution of the United States, and there is no indication that the trial court misapplied *Eccles*. Accordingly, defendant is not entitled to relief on this issue.

III. SEARCH WARRANT

A. STANDARD OF REVIEW

Myers also argues that the trial court erred when it denied his motion to suppress the evidence discovered during the search of Pruiett's residence.

Review of a magistrate's decision regarding probable cause is neither de novo, nor for an abuse of discretion; moreover, it includes substantial deference to the magistrate's decision:

> Appellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard. Instead, this Court need only ask whether a reasonably cautious person could have concluded that there was

> a substantial basis for the finding of probable cause. Because of the strong preference for searches conducted pursuant to a search warrant, a magistrate's decision regarding probable cause should be paid great deference. Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place. Finally, this Court reviews a trial court's factual findings in a ruling on a motion to suppress for clear error, but reviews de novo a trial court's interpretation of the law or the application of a constitutional standard to uncontested facts. [*People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006) (quotation marks, citations, and alterations omitted).]

B. ANALYSIS

A search warrant must be supported by probable cause to justify the search. US Const, Am IV; Const 1963, art 1, § 11. Probable cause exists when there is a substantial basis for a magistrate's inference that there is a fair probability that contraband or evidence will be found in a particular place. See *People v Franklin*, 500 Mich 92, 101; 894 NW2d 561 (2017), quoting *Gates*, 462 US at 238. "[T]he search warrant and underlying affidavit must be read in a commonsense and realistic manner to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause." *Martin*, 271 Mich App at 298, citing *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). An affiant submitting an affidavit in support of a search warrant must aver facts within his or her knowledge. The affiant may not assert mere conclusions or beliefs. Rather, the affiant must state facts that justify the drawing of inferences. *Martin*, 271 Mich App at 298.

On October 14, 2021, Detective Nicholas VonKoenig of SWET applied for a search warrant. He requested permission to search 1577 Kay Drive, as well as Myers's Nissan Juke. To support his request, he provided his own affidavit. In the affidavit, Detective VonKoenig stated that he was assigned to SWET and had been investigating Myers as a suspected distributor of methamphetamine. He also mentioned that he had established a confidential informant who had purchased crystal methamphetamine from Myers on multiple occasions. Detective VonKoenig also stated that he field-tested the suspected methamphetamine after each deal, and it tested positive for methamphetamine every time.

Detective VonKoenig claimed that he had been monitoring Myers's Nissan Juke using electronic surveillance and had observed Myers using the vehicle for several months. According to the detective, Myers was associated with three addresses: 1577 Kay Drive, 1596 Kay Drive, and an address in Van Buren County. The detective stated that electronic surveillance indicated that Myers visited the Kay Drive residences just before conducting methamphetamine sales to a confidential informant. The informant confirmed that Myers was the driver and delivered the methamphetamine. Additionally, SWET officers reported observing Myers entering 1577 Kay Drive on multiple occasions just before engaging in methamphetamine transactions. Detective Fucci also reported witnessing Myers leave 1577 Kay Drive on September 9, 2021, and lock the residence. The detective also mentioned that a confidential informant made two controlled purchases within the last 20 days, and on both occasions, Myers visited Kay Drive before

delivering the methamphetamine. On the last occasion, officers observed Myers entering 1577 Kay Drive just before making the deal. Furthermore, Detective VonKoenig referred to a credible source who claimed to have bought large quantities of crystal methamphetamine from Myers and stated that Myers had a "stash [house] or lived close to Sarret Nature Center." Based on his familiarity with that area of Berrien County, the detective believed that the reference was to a house on Kay Drive. Finally, Detective VonKoenig reported that on October 13, 2021, physical surveillance showed Myers parking at 1596 Kay Drive, walking over to 1577 Kay Drive, and going inside. Myers later left 1577 Kay Drive and conducted a "hand-to-hand deal in Benton Township."

When analyzing Detective VonKoenigs statements logically, it can be inferred that Myers had been involved in a series of methamphetamine sales over a period of time. *Martin*, 271 Mich App at 298. Myers argues that VonKoenig failed to provide specific dates for the controlled buys. However, VonKoenig did not need to give the dates for each controlled buy to establish the pattern. He mentioned that a confidential informant bought drugs from Myers 10 times and handed over the drugs to officers over time. Additionally, he stated that the drugs tested positive for methamphetamine. These statements were enough to lead a reasonable person to believe that Myers was involved in the sale of methamphetamine. The mere fact that VonKoenig referred to numerous drug sales without providing dates for those sales also did not render the information stale. As our Supreme Court has stated, a staleness inquiry "looks at the life cycle of the evidence sought, given the totality of the circumstances, that includes the criminal, the thing seized, the place to be searched, and, most significantly, the character of the criminal activities under investigation." *Russo*, 439 Mich at 605. VonKoenig's averments established that Myers had been engaged in an ongoing pattern of selling methamphetamine through deliveries. Moreover, VonKoenig averred that Myers was seen making a hand-to-hand sale on the day before VonKoenig requested the warrant. Considering the averments in the context of an ongoing sales operation with deliveries, it was reasonable to assume that Myers continued to be involved in methamphetamine sales right up to the moment of the search warrant request. It was also reasonable to infer that Myers had to replenish his inventory and store it somewhere in order to facilitate his sales. Accordingly, Myers's claims that the drug sales were stale and did not implicate a residence are meritless.

Myers's claim that the affidavit did not provide enough of a connection between 1577 Kay Drive and the reported criminal activity to justify a search of that residence is unfounded. Detective VonKoenig identified electronic surveillance evidence that showed Myers often visited the area of Kay Drive and frequently went there briefly before delivering methamphetamine. Officers also saw Myers entering 1577 Kay Drive just before making a delivery, and one officer witnessed him locking the home. These statements allowed the inference that Myers had easy access to 1577 Kay Drive. Moreover, a cautious person could infer that Myers made short visits to 1577 Kay Drive just before delivering methamphetamine, possibly to retrieve something from the home for the transaction—this inference was supported by information from a credible source indicating that Myers used one of the homes on Kay Drive as a "stash" house. Considering all the evidence, a reasonable magistrate could conclude that there was a substantial basis for inferring a strong likelihood that methamphetamine, or other evidence related to its processing, storage, or sale, would be found at 1577 Kay Drive.

On this record it is clear that the trial court properly denied Myers's request.

IV. EVIDENTIARY ERROR

A. PRESERVATION

Myers next argues that the trial court abused its discretion when it prevented defense counsel from asking a detective about Pruiett's drug use and prevented defense counsel from eliciting testimony that the SWET officers did not find any drug evidence at the other residence associated with Myers.

To preserve these claims of error, Myers had to raise the claim of error in the trial court and had to specify the same ground for objection on appeal that he asserted in the trial court. See *Clark*, 330 Mich App at 414. At trial, defense counsel attempted to examine Detective VonKoenig about the search of Myers's home in South Haven. The prosecutor objected to the relevance of that search, and the trial court sustained the objection. Defense counsel also asked Detective Evan Hauger whether drug addicts sometimes sell drugs to fund their habit, and Detective Hauger stated that that was common. Defense counsel then asked whether Detective Hauger knew Pruiett to be a methamphetamine user. The prosecutor objected on the ground of relevance, and the trial court sustained the objection.

Defense counsel's efforts were sufficient to preserve a claim that the trial court erred when it determined that these lines of questioning were not relevant. See *id*. Defense counsel did not, however, argue in the trial court that the trial court's decisions deprived the defense of its constitutional right to present a defense. Accordingly, Myers did not preserve a claim that the trial court deprived him of his constitutional right to present a defense. See *id*.

B. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to allow testimony for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). This Court, however, reviews de novo whether the trial court properly applied the rules of evidence and the applicable constitutional standards. *People v McFarlane*, 325 Mich App 507, 517; 926 NW2d 339 (2018). To the extent that these claims are not preserved, this Court reviews the claims for plain, outcome-determinative error. See *Carines*, 460 Mich at 763.

C. ANALYSIS

Myers had a constitutionally guaranteed right to present a defense. See *Yost*, 278 Mich App at 379. Nevertheless, the right to present a defense is not absolute: "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). So long as a rule of evidence is not arbitrary or disproportionate to the purpose that it was designed to serve, it does not abridge an accused's right to present a defense. See *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008); see also *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987). The rules of evidence governing relevance are not arbitrary or disproportionate. See *Unger*, 278 Mich App at 250-251. Accordingly, the right to present a

defense only extends to relevant and admissible evidence. *People v Solloway*, 316 Mich App 174, 198; 891 NW2d 255 (2016).

Here, Myers defended himself against the charge of possessing 197.6 grams of pure crystal methamphetamine found at 1577 Kay Drive by arguing that the evidence failed to establish he had possession and control of the methamphetamine. Instead, he suggested that Pruiett was the one who had possession and control of the methamphetamine. Myers tried to support his position by asking Detective Hauger whether Pruiett was a methamphetamine user, but the trial court sustained the prosecutor's objection based on relevance. Relevant evidence is evidence that has "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.[6] The record does not disclose whether Detective Hauger had any personal knowledge of Pruiett's drug use.[7] Nevertheless, he did testify that drug users commonly support their habits by selling drugs. As such, had the defense been able to present evidence that Pruiett was a user of methamphetamine, that evidence would have allowed the jury to infer that she might have supported that habit by selling methamphetamine. Assuming that Detective Hauger had personal knowledge about Pruiett's drug use, that testimony would have been relevant and admissible. See MRE 401; MRE 402. Accordingly, the trial court abused its discretion when it sustained the prosecution's objection on grounds of relevance. See *Yost*, 278 Mich App at 353.

The same is true about the trial court's decision to sustain the prosecutor's objection to defense counsel's attempt to elicit testimony from Detective VonKoenig about the results of the search of Myers's other residence. Although there is no record evidence of the results of that search, assuming that Detective VonKoenig would have testified that there was no evidence of drug use or drug sales found at the residence, that testimony would have been relevant. The jury could have inferred that, had Myers been a drug addict or a drug dealer, officers might have found drug paraphernalia or evidence of drug dealing at his other residence. For that reason, the evidence that nothing was found at his other residence might have been interpreted by the jury as evidence that it was less probable that Myers was a drug addict or a drug dealer. For that reason, it was relevant and admissible. See MRE 401; MRE 402. The trial court abused its discretion when it sustained the objection solely on relevance. See *Yost*, 278 Mich App at 353.

However, these evidentiary errors by the trial court were harmless beyond a reasonable doubt. The text messages found on Myers's Android phone were evidence that Myers was involved in an extensive drug trade. In his messages, Myers's solicited business and even offered

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[6] The Supreme Court amended the Michigan Rules of Evidence on September 20, 2023, effective January 1, 2024. See ADM File No. 2021-10, 512 Mich lxiii (2023). We cite the version in effect at the time of trial.

[7] Myers attempts to expand the record on appeal by submitting an "offer of proof" in which his appellate lawyer asserted that Myers's defense lawyer "believed the police did not find anything material" during the search of Myers's home and "believed" that Pruiett had "been charged with drug crimes." This appeal is limited to the record. See MCR 7.210(A). Myers cannot expand the record on appeal to include his trial lawyer's beliefs. See *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013).

a Labor Day sale. The messages established that he was not in the business of selling small quantities either—he solicited purchasers to buy a half ounce to an ounce at a time. One exchange of messages involved negotiations for two ounces of drugs. Detective Shawn Yech of the Berrien County Sheriff's Department testified about the going rate for various types of street drugs, and Myers's messages were consistent with methamphetamine sales. Detective Yech also noted that drug dealers frequently have two phones—one for personal use and another just for drug dealing. Myers was found with a high-end phone that had nothing but personal information on it and a low-end Android phone that was filled with messages related to the illegal sale of narcotics. All the evidence pointed to Myers as a dealer in methamphetamine, not a mere user.

Police officers found evidence that Myers used 1577 Kay Drive for his home and his drug business. They discovered clothing and footwear consistent with an adult male, as well as prescription bottles and official correspondence addressed to Myers, even though he officially lived elsewhere. Testimony indicated that Myers was seen entering and leaving the residence as if he had authority to do so. Additionally, there was evidence that Myers would often stop at 1577 Kay Drive before completing a drug transaction.

The evidence regarding the drugs found at one of his residences strongly indicates that Myers's methamphetamine was intended for distribution and sale. Officers discovered 197.6 grams of high-purity crystal methamphetamine in a kitchen drawer shortly after Myers was observed leaving 1577 Kay Drive. The bag of pure methamphetamine was found near a scale on the kitchen counter, which had methamphetamine residue and residue from a cutting agent used to dilute the methamphetamine. Unused cutting agent was also found near the scale. When Myers was stopped in a traffic stop after leaving 1577 Kay Drive, officers found 4.5 grams of methamphetamine on him. This methamphetamine had been mixed with the same cutting agent found at 1577 Kay Drive. The evidence strongly suggests that Myers obtained the methamphetamine found on his person from the larger stash at 1577 Kay Drive, and then mixed it with the cutting agent before leaving.

Myers's lawyer argued that Pruiett was the actual drug dealer and suggested that she sold the 4.5 grams of cut methamphetamine to Myers. However, Myers's text messages showed that he was the main force behind the sales and the one profiting from them. He had a motive to cut the methamphetamine to increase his profits, and a reasonable jury could easily conclude that the drugs found on his person were intended for delivery to someone else.

Furthermore, as the prosecutor rightly points out, even if Pruiett was involved, the evidence indicated that her involvement was secondary to Myers's and was joint with Myers. The law recognizes that multiple persons can jointly possess and control property. See *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992).

While it is clear that the trial court erred by not allowing the evidence—or lack of evidence—found at the other home associated with Myers, or allowing the officer to testify about whether he had any personal knowledge of Pruiett's drug use, even if the trial court had not so clearly erred and the defense could have elicited the testimony that it desired, those errors were harmless in light of the overwhelming evidence of Myers's guilt. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Indeed, even if these errors could be said to have risen to

the level of a preserved constitutional error, the errors would be harmless beyond a reasonable doubt. See *Carines*, 460 Mich at 774.

Accordingly, Myers has not identified any evidentiary errors that warrant relief.

V. DRUG PROFILE

A. STANDARD OF REVIEW

Myers next argues that the trial court plainly erred when it allowed Detective Yech to offer improper drug-profile testimony and that defense counsel provided ineffective assistance by failing to object to the improper drug-profile testimony.

This Court reviews the claim of trial-court error for plain, outcome-determinative error. See *Carines*, 460 Mich at 763.

Whether defense counsel provided ineffective assistance at trial involves a mixed question of fact and law. *People v Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (2012). This Court reviews de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial. *Id*. at 19-20. Because the trial court did not hold an evidentiary hearing on this claim of error, there are no factual findings to which this Court must defer, and this Court's review is for mistakes that are apparent on the record alone. See *id*. at 20.[8]

B. ANALYSIS

Although police officers frequently use drug-profile evidence in order to identify potential drug dealers during an investigation, such evidence is not admissible as substantive evidence of guilt:

> Drug profile evidence has been described as an informal compilation of characteristics often displayed by those trafficking in drugs. A profile is simply an investigative technique. It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity. Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale. Such evidence is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity. In other words, these characteristics may not necessarily be connected to or inherently part of the drug trade, so that these characteristics could apply equally to innocent individuals as well as to drug dealers. It is for this reason that the majority of courts have held that drug profile evidence is

[8] Defendant filed a motion to remand for an evidentiary hearing, but this Court does not find such a hearing is necessary to properly dispose of defendant's claims.

> inadmissible as substantive evidence of guilt, because proof of crime based wholly or mainly on these innocuous characteristics could potentially convict innocent people. [*People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999) (quotation marks and citations omitted).]

An expert on illegal drug trafficking, however, may testify about the "significance of items seized and the circumstances obtaining during the investigation of criminal activity." *Id*. at 53. For example, an expert may testify that the sheer quantity of the drugs, along with other characteristics, indicated that the drugs were intended for sale. *Id*. at 54. An expert goes too far when the expert offers a profile of a typical drug dealer and then opines that the defendant is guilty because he or she fits the profile. *Id*. For example, the expert goes too far when the expert compares the defendant's characteristics to the profile in a way that implies guilt. *Id*. at 57.

Myers concedes on appeal that Detective Yech was qualified to offer expert testimony on illegal drug transactions. Myers only contests whether Detective Yech crossed the line by offering drug-profile testimony as substantive evidence of Myers's guilt. However, the record does not demonstrate that the prosecutor asked Detective Yech to inform the jury about the common characteristics of a drug dealer and then compare the profile to the characteristics associated with Myers. Rather, the prosecutor asked Detective Yech questions about specific items and how those items might be used in the drug trade. The prosecutor also asked Detective Yech about the values of certain street drugs and the terms used in the drug trade. Stated another way, the prosecutor asked questions that helped the jury "understand the implications of the evidence" but did not "propose to answer the question of defendant's guilt by itself." *Id*. at 60.

Detective Yech did testify that the amounts of methamphetamine found at the house and on Myers's person suggested, in his view, the intent to distribute, but Detective Yech could opine—on the basis of the totality of the facts—that the drugs were intended for distribution. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).

Notably, Detective Yech did not offer an opinion about any other element of the offenses at issue and did not opine that Myers must have been a drug dealer on the basis of profile evidence. Moreover, as for the issue of intent, the trial court instructed the jury that it did not have to believe Detective Yech's opinion; it instructed the jury to think "carefully about the reasons and facts they gave for their opinion, and whether those facts are true." Consequently, the trial court did not plainly err when it allowed Detective Yech to offer an opinion about whether the methamphetamine was intended for distribution. See *Carines*, 460 Mich at 763. In sum, the complained of evidence Myers raises in his appeal was introduced for informing the jury how methamphetamine is cut, packaged and distributed. Our review of the record indicates that the trial court did not commit plain error in allowing this testimony. See *Carines*, 460 Mich at 763.

Finally, in order to establish ineffective assistance of counsel, Myers must demonstrate that defense counsel's failure to object to Detective Yech's testimony fell below an objective standard of reasonableness under prevailing professional norms and that, but for that error, there is a reasonable probability that the outcome would have been different. See *Gioglio*, 296 Mich App at 22, citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because Detective Yech's testimony amounted to proper expert opinion on legitimate

drug-profile evidence, defense counsel cannot be faulted for failing to object to his testimony. See *Clark*, 330 Mich App at 426.

Myers has not demonstrated plain error involving Detective Yech's testimony, and he has not shown that defense counsel's decision not to object fell below an objective standard of reasonableness under prevailing professional norms. Accordingly, he is not entitled to relief on this issue.

VI. CRUEL OR UNUSUAL PUNISHMENT

A. PRESERVATION AND STANDARD OF REVIEW

Next, Myers argues that his sentences amounted to cruel or unusual punishment.

To preserve a claim that his sentence was cruel or unusual, Myers had to raise that issue in the trial court. See *People v Burkett*, 337 Mich App 631, 635; 976 NW2d 864 (2021). Myers moved to correct his sentence in the trial court on the same ground that he now raises on appeal. The trial court considered the motion and rejected Myers's argument. Myers preserved this claim of error for appellate review. See *id*. This Court reviews de novo whether a trial court properly applied the constitutional standards. *Id*.

B. ANALYSIS

Both the Michigan and United States Constitutions protect persons convicted of crimes from certain classes of punishments:

> The Michigan Constitution prohibits cruel *or* unusual punishment, whereas the United States Constitution prohibits cruel and unusual punishment. If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution. Under the Michigan Constitution, the prohibition against cruel or unusual punishment includes a prohibition on grossly disproportionate sentences. [*Burkett*, 337 Mich App at 636 (quotation marks, citations, and alterations omitted).]

This Court reviews whether a sentence is grossly disproportionate by examining four factors:

> (1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation. [*People v Lymon*, 342 Mich App 46, 82; 993 NW2d 24 (2022), reversed on other grounds, *People v Lymon*, ___Mich ___ (2024; ___NW2d ___(2024).]

The Legislature provided that persons who commit second or subsequent drug offenses may be "imprisoned for a term not more than twice the term otherwise authorized . . . ." MCL 333.7413(1). This Court has upheld a mandatory life sentence for a conviction of possession with the intent to distribute by certain first and subsequent offenders on the basis of the harms caused by the illegal drug trade. See *People v Poole*, 218 Mich App 702, 715-717; 555 NW2d 485 (1996). Although Myers argues that his offenses were not harmful, unlawful delivery of illegal drugs is a "significantly more serious offense than mere possession," which warrants imposing a lengthier sentence. *People v Fluker*, 442 Mich 891, 892; 498 NW2d 431 (1993).

Here, the jury convicted Myers of possessing more than 197 grams of methamphetamine with the intent to distribute it, of possessing 4.5 grams of methamphetamine with the intent to distribute it, and of maintaining a drug house and drug vehicle. The circumstances suggested that Myers distributed methamphetamine across a large area and to numerous customers. These circumstances are precisely the kind of escalating drug offense that the Legislature addressed with MCL 333.7413(1).

Myers complains that the trial court was only able to double the range of his sentences because Myers committed a marijuana-possession offense in the past; he feels aggrieved by that because marijuana possession is no longer subject to penalty under Michigan law and so this case—in his view—did not truly involve a repeat offense. Myers's previous convictions were for possession rather than possession with the intent to distribute, but the convictions nevertheless involved a clear disregard for the law banning certain drugs.[9] Additionally, the Legislature has provided that—even if a defendant gets his or her conviction set aside—a trial court may properly consider the set-aside conviction for purposes of charging a crime as a subsequent offense: "A conviction that is set aside . . . may be considered a prior conviction by court, law enforcement agency, prosecuting attorney, or the attorney general, as applicable, for purposes of charging a crime as a second or subsequent offense or for sentencing" under the habitual-offender statutes. MCL 780.622(9).

The Legislature's decision to allow consideration of a conviction that was set aside for purposes of charging a person for a subsequent offense or for habitual-offender sentencing reflects a clear policy choice in favor of allowing sentencing enhancements on the basis of crimes involving marijuana. Moreover, Myers ignores the fact that his previous convictions reflected that he was unwilling to conform his behavior to the law governing illegal drugs over a span of years and that he continued to flout the law with his current offenses, which involve a far more serious drug and drug sales.[10] The current enhancements are not to punish Myers for conduct that is no longer illegal; it was to punish the repeated failure to conform his behavior to the requirements of

[9] It also bears noting that not all possession of marijuana has been decriminalized under Michigan law. See, e.g., MCL 333.27955.

[10] Although the trial court relied on one such offense, Myers's record shows that he was convicted of possessing marijuana on four separate occasions before the offenses at issue, among numerous other offenses.

the laws governing illegal drugs. Myers's recidivism involving drugs is a valid consideration when sentencing. See *Poole*, 218 Mich App at 715-717. As such, his claim that his current offenses do not really involve repeat behavior is meritless, and, for similar reasons, his reliance on the fact that many states have moved away from punishing marijuana possession is inapposite.

Myers suggests that the enhancement is also grossly disproportionate because, under the enhancement provided by MCL 769.12, he would only have his sentencing ranges doubled if he had committed three previous felonies, not just one misdemeanor. Stated another way, he claims that it was disproportionate to treat a single misdemeanor conviction of possession of marijuana as the functional equivalent of having committed three felonies. It is true that Myers would not be subject to a habitual-offender enhancement under MCL 769.12 unless he had been previously convicted of three or more felonies, but it is also true that a single criminal episode can give rise to three felonies for purposes of applying MCL 769.12. See *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008).

Myers finally argues that doubling his sentencing ranges on the basis of a marijuana conviction does not serve penological goals. The trial court could properly consider several penological goals: punishment, deterrence, rehabilitation, and the protection of the public, among others. See *People v Barnes*, 332 Mich App 494, 507; 957 NW2d 62 (2020). In rejecting Myers's claims that his sentences were cruel or unusual, the trial court identified several penological goals that were served by the sentencing enhancement: it noted that Myers had numerous prior convictions and was found guilty of possessing almost a half-pound of methamphetamine, which was arguably more dangerous and lethal than the cocaine involved in those cases that previously imposed mandatory penalties of life in prison. The court clarified that it doubled Myers's minimum sentencing range, not on the basis of the fact that he had marijuana, but because he had demonstrated an "inability to adhere his behavior to that which the law demands." Indeed, the court felt that Myers's new convictions represented a "marked escalation of his criminal activity." The court also rejected Myers's claim that doubling his sentencing range would do little to rehabilitate him; the court stated that, in effect, Myers was arguing that giving him a lesser sentence would encourage rehabilitation. The court disagreed and felt that the severity of his current crimes warranted a longer sentence. The trial court's observations reflect that it properly considered the competing penological goals when exercising its discretion to enhance Myers's sentencing ranges on the basis of his prior drug conviction.

Myers has not shown that his sentences amounted to cruel or unusual punishment.

Affirmed.

/s/ Christopher M. Murray
/s/ Stephen L. Borrello
/s/ Philip P. Mariani