STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID KARL STREETER,

Defendant-Appellant.

UNPUBLISHED
September 16, 2004

No. 246479
Muskegon Circuit Court
LC No. 01-046567-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

A jury convicted defendant of operating or maintaining a laboratory involving hazardous waste,[1] manufacturing methamphetamine,[2] and conspiracy to manufacture methamphetamine.[3] The trial court sentenced defendant as a fourth habitual offender to twenty to seventy-five years' in prison for each conviction, with the sentences for operating or maintaining a laboratory and manufacturing methamphetamine to be served consecutively to each other. Additionally, all three sentences are to be served consecutive to sentences for which defendant was on parole at the time he committed these offenses. Defendant appeals his convictions and sentences, and we affirm.

I. Facts and Procedural History

On August 23, 2001, police pulled a car driven by defendant over for reasons unrelated to the crimes for which he was convicted. A drug dog alerted when circling the vehicle, and the police searched the vehicle. The police found equipment and supplies commonly used to manufacture methamphetamine in the automobile. Additionally, defendant was in possession of $800, and his companion, Daniel Simila, was in possession of $4,360. There was also $602 in cash in the center console of the vehicle.

[1] MCL 333.7401c(2)(c).

[2] MCL 333.7401(2)(b)(i).

[3] MCL 750.157a and MCL 333.7401(2)(b)(i).

The police arrested defendant and took him into custody. While in custody, he told officers about a one-thousand-gallon anhydrous ammonia tank hidden in the woods behind a home on Schow Road in Muskegon. A close family friend of Simila's mother owned the house. The police secured a search warrant for that property, and officers from the West Michigan Enforcement Team ("WMET") executed the warrant. WMET saw a large-scale methamphetamine lab in the woods behind the home, and called the Michigan State Police Methamphetamine Team to dismantle the laboratory and ensure that the hazardous waste from the manufacturing process was disposed of properly. Police seized three separate containers of manufactured powder methamphetamine, along with some liquid methamphetamine. Police also seized equipment and supplies necessary to "cook" or manufacture the methamphetamine, including the anhydrous ammonia tank. The three separate containers of powdered methamphetamine weighed 339.93 grams, 158.25 grams, and 354.26 grams, respectively.

Police also obtained search warrants for the home of defendant's mother, for Simila's residence on West Forest Street, and for the separate homes of Justin Eskildsen's mother and father. At the home of defendant's mother, officers recovered two jugs of muriatic acid, funnels containing methamphetamine, coffee filters with white residue in them, boxes of antihistamines, and plastic tubing. All of these items are used in the manufacturing of methamphetamine. Police also recovered a grocery bag containing a substance, which was later confirmed to contain methamphetamine. Several items related to the manufacture of methamphetamine were also seized from the homes of Eskildsen's father and mother and from Simila's residence, including a log of drug debts.

Eskildsen, who pleaded guilty to charges stemming from the activities at Schow Road, testified that he met defendant in the summer of 2001. Eskildsen testified that defendant showed him how to manufacture methamphetamine. Eskildsen, defendant, and Simila all purchased necessary items to manufacture the substance, and they made it together on at least twelve occasions at different locations, including four times at the Schow Road location. For his participation, defendant gave Eskildsen some of the methamphetamine and some cash. Eskildsen testified that he went with defendant to the home of defendant's mother many times. They stored methamphetamine equipment and supplies in her garage. On the night that defendant and Simila were arrested, Simila telephoned Eskildsen, who was at the Schow Road property making a batch of methamphetamine. The trio had made the batch earlier that evening. Simila told Eskildsen that they were being pulled over by the police. Eskildsen took some items from the Schow Road property and immediately left. After taking the items to his father's house, he drove to the West Forest Street house where Simila lived and where defendant kept a bedroom containing his possessions. Eskildsen woke the girlfriends of defendant and Simila and told them to clean out the house. He helped them move methamphetamine equipment to his car, and later took it to his father's house.

Simila also pleaded guilty to charges stemming from the activities at Schow Road. Like Eskildsen, Simila testified that defendant taught him how to make methamphetamine. They made it approximately ten times at the Schow Road address, but Eskildsen was not always present. Usually, defendant sold the finished methamphetamine and gave Simila a share of the money. On one occasion, however, defendant provided Simila with one-half of a batch of methamphetamine in exchange for a car. Simila admitted that, on the day of his arrest, he went out to Schow Road with defendant. Eskildsen, who was also present, assisted them in making a

batch of methamphetamine. Eskildsen was left to keep watch over the batch when defendant and Simila departed.

After defendant's arrest, he telephoned Lewis Dorman and asked Dorman to go to his apartment and retrieve his guns, his safe, and his clothes. Defendant was afraid the police may raid the house and confiscate his things. Dorman went to the West Forest house and emptied the contents of defendant's bedroom. He took everything he saw that belonged to defendant, including the safe, guns, needles, tools, syringes, and zip-lock baggies.

Several police officers testified that, when defendant was interviewed after the execution of the search warrants, he admitted that he was involved in the production of methamphetamine. Defendant told the officers that he learned how to cook methamphetamine from a former girlfriend. Defendant also admitted that he took equipment to the Schow Road property for the purpose of manufacturing methamphetamine and that he made methamphetamine on Schow Road with both Simila and Eskildsen. Defendant acknowledged that he, Eskildsen, and Simila made the methamphetamine found on August 23, 2001. Further, he admitted that he stored items related to methamphetamine production at his mother's home.

However, at trial defendant testified that he did not know how to make methamphetamine, that he could not have taught others how to make it, that he only went to the Schow Road house twice, and that he did not know that Simila and Eskildsen were making methamphetamine. Defendant testified that he received a car from Simila as payment for replacing a window in Simila's house, not as part of a drug deal. He also testified that he called Dorman after the arrest because he was worried that his girlfriend would go to Simila's home looking for him. Defendant wanted Dorman to inform his girlfriend about what was happening. Defendant also testified that he did not have a bedroom at Simila's West Forest Street house and had no personal items there, except for some tools.

II. Conspiracy

Defendant argues that the evidence presented at trial was insufficient to support his conviction for conspiracy. Specifically, he argues that there was no evidence of a prior agreement to manufacture methamphetamine, that there was no planning or aforethought, and that the manufacturing of methamphetamine "just happened." When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A conspiracy is a mutual agreement or understanding between two or more people to commit a criminal act. *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). The unlawful agreement is the "gist" of the crime of conspiracy. *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001). The agreement may be express or implied. *Cotton, supra.*

> Being a specific-intent crime, conspiracy requires both the intent to combine with others and the intent to accomplish the illegal objective. The essence of a conspiracy is the agreement itself. Nevertheless, direct proof of agreement is not required, nor is proof of a formal agreement necessary. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be proven by circumstantial evidence or may be based on inference. [*Id.* at 392-393 (citations omitted).]

Here, there was sufficient evidence that defendant intended to combine with others to accomplish the illegal objective of manufacturing methamphetamine. There was evidence that defendant asked Simila, "do you want to learn how to make meth and we can make money?" Simila answered, "sure, let's do this." Thereafter, defendant taught Eskildsen and Simila how to manufacture methamphetamine. All of them stole or purchased items necessary to manufacture methamphetamine, and together, they transported equipment and supplies to Schow Road for that purpose. They believed Schow Road was a "secret place." On numerous occasions, they manufactured methamphetamine together at that location. On August 23, 2001, they met each other at Simila's house, brought supplies out to the Schow Road site, and worked together to make a batch of methamphetamine. There was also evidence that the trio generally shared either the finished product or profits from the sale of that product. The manufacturing of methamphetamine did not "just happen." Based on the circumstances, acts and conduct, a rational trier of fact could have found beyond a reasonable doubt that defendant, Simila and Eskildsen reached an agreement to work together to manufacture methamphetamine and share in the resulting profit.

III. Motion for Mistrial

Defendant says that the trial court erred when it denied his motion for a mistrial after a prosecution witness testified that cocaine and a gun were recovered from defendant's house. On appeal, defendant argues that the evidence was inadmissible, irrelevant, unfairly prejudicial and inflammatory. The denial of a motion for a mistrial is reviewed for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *Id.*, citing *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). The admission of evidence is generally reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

At trial, the prosecutor asked Michigan State Police Lieutenant John Porter what he had discussed with defendant in an interview on August 24, 2001. Porter provided a lengthy reply during which he related that they had discussed Schow Road. Porter then volunteered that defendant was also questioned about some property that was removed from his house, specifically "cocaine and a gun." The prosecutor immediately indicated that he only wanted to talk about the Schow Road investigation. There was no objection by defense counsel. The prosecutor then apparently misspoke and asked whether defendant admitted to cooking "cocaine" at the Schow Road property. When defense counsel objected, the prosecutor stated, "Excuse me. Cooking methamphetamine at the Schow Road property. I misspoke. Excuse me." Defense counsel indicated that it was "okay," and he specifically agreed in front of the jury that the prosecutor had properly corrected himself. Later, outside of the jury's presence, defense counsel moved for a mistrial, which the trial court denied. The trial court offered to provide a

curative instruction to the jury, but defense counsel did not request an instruction. We find no abuse of discretion in the trial court's denial of the motion.

Without regard to whether Porter's testimony was relevant and admissible, there was no irregularity in the admission of the evidence that prejudiced defendant such that he was denied a fair trial. Generally, a nonresponsive, volunteered answer to a proper question is not a ground for granting a mistrial. *People v Griffin,* 235 Mich App 27, 36; 597 NW2d 176 (1999); *Haywood, supra.* In this case, the prosecutor's questions, which preceded the question that led to the challenged testimony, were related to the investigation at Schow Road. The prosecutor clearly wanted to elicit information about defendant's confessions with regard to the activities at Schow Road. When Porter volunteered that he and defendant also discussed property removed from his house, including the cocaine and gun, the prosecutor steered him back to the Schow Road investigation. Neither Porter nor the prosecutor returned to the subject of what was recovered from defendant's bedroom. The volunteered testimony and inadvertent misstatement by the prosecutor were isolated incidents, which do not mandate a mistrial. See *People v Ortiz-Kehoe,* 237 Mich App 508, 515-516; 603 NW2d 802 (1999). Moreover, the evidence was not used to unfairly portray defendant in a bad light or to prejudice his case. We note that testimony about defendant's connection to cocaine and guns was raised at trial apart from Porter's testimony. During defendant's cross-examination of Simila, Simila mentioned, without objection, that he and defendant had "coke" in the car when they were stopped on August 23, 2001. Further, there was evidence that cocaine was seized from the home of Eskildsen's father, where items from West Forest Street and Schow Road had been moved. And, Dorman testified that defendant, after his arrest, asked Dorman to go to his house and retrieve his safe, *guns,* and clothes. Dorman did so. Thus, the fact that Porter mentioned cocaine and a gun was not so prejudicial that it deprived defendant of a fair trial. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV. Relevancy

Defendant also claims that the prosecutor elicited and introduced other irrelevant evidence, specifically evidence of defendant's Nextel telephone bill, other evidence seized from Eskildsen's car, evidence seized from the home of Eskildsen's father, and certain items seized from Simila's house. "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. All relevant evidence is admissible. MRE 402.

We disagree that the challenged evidence was irrelevant. Defendant's telephone bill, which covered the time period of June through July 2001, was relevant. Defendant attempted to distance himself from both Eskildsen and Simila. He maintained that he did not have any agreement or involvement with them in their methamphetamine manufacturing operation. The evidence that defendant's telephone bill was found in Eskildsen's car supported the prosecutor's theory that the relationship was greater than defendant wanted the jury to believe. It also corroborated Eskildsen's testimony that he used his car to move items belonging to defendant. We note that, at trial, defendant testified that he met Eskildsen in mid-June 2001. Thereafter, he took Eskildsen to his mother's house on a couple of occasions to discuss yard work. It never worked out that Eskildsen could do the work because he "always needed rides," and defendant

had to transport him. The fact that the Nextel bill was in Eskildsen's car belies defendant's description of their relationship. It was relevant evidence. MRE 401.

Similarly, the evidence seized from Eskildsen's car and his father's house was also relevant. After Simila telephoned Eskildsen on August 23, 2001, Eskildsen removed incriminating items from both Schow Road and West Forest Street. He testified that he transported those items to his father's house. The evidence seized from Eskildsen's car and his father's house related to the production of methamphetamine. It was relevant to the charged conspiracy by virtue of Eskildsen's testimony. As such, the evidence was relevant. MRE 401.

Finally, evidence of receipts for supplies related to the production of methamphetamine and a log, listing drug debts, which were in plain view in the living room of Simila's house, was relevant evidence. There was evidence that defendant maintained a bedroom at the same house, kept personal items there, and sometimes slept there. The evidence of the receipts and drug log in plain view at that residence had a tendency to confirm that defendant was aware of, and participated in, the methamphetamine activities with Simila, who lived at that address. MRE 401.

In addition to arguing that the challenged evidence was irrelevant, defendant generally argues that it was inadmissible under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or if it would result in confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable. *People v Mills,* 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The defendant has a heavy burden of showing that the trial court abused its discretion by declining to exclude testimony on the ground that it would cause unfair prejudice. MRE 403; See *People v Houston,* 261 Mich App 463, 467; 683 NW2d 192 (2004). Here, defendant fails to explain or rationalize why the challenged evidence was unfairly prejudicial. Thus, defendant has not only failed to meet his burden, *Houston, supra,* but the issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

V. Shifting of Burden of Proof

Defendant maintains that the prosecutor improperly shifted the burden of proof to him during cross-examination and closing argument. Over objection, the trial court allowed the prosecutor to question defendant about whether he had any evidence to show the ownership of his Lincoln automobile, whether he had documentation to prove the ownership of the West Forest Street property, and why his former girlfriend was not called as a witness to corroborate his testimony that he did not go to Iowa to learn to make methamphetamine. In his closing argument, the prosecutor argued that defendant's explanation for the large sum of money in his possession at the time of his arrest was not corroborated. We review preserved issues of alleged prosecutorial misconduct by evaluating the prosecutor's conduct in context to determine if the defendant was denied a fair and impartial trial. *People v McLaughlin,* 258 Mich App 635, 644-645; 672 NW2d 860 (2003).

A prosecutor's comments that infringe on a defendant's right not to testify constitute error. *People v Fields,* 450 Mich 94, 115; 538 NW2d 356 (1995). When a defendant advances

an alternate theory, however, the prosecutor's comments on his failure to call corroborating witnesses or produce corroborating evidence does not shift the burden of proof. *Id.* at 111-112. See also *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999) (cross-examination of the defendant's wife about failing to provide a blood sample to exonerate the defendant did not improperly shift the burden of proof, but was proper because it challenged the credibility of testimonial evidence elicited by the defense in support of its theory of the case). The argument that corroborating witnesses or evidence have not been produced merely points out the weakness in the defendant's case. *Fields, supra* at 112. Unless the prosecutor's comments burden the defendant's right not to testify, or unless they allocate any burden to defendant to disprove an element of the offense, they are not improper. *Id.* at 112-113. In *People v Gant*, 48 Mich App 5, 9-10; 209 NW2d 874 (1973), this Court ruled that "[w]hile defendant is free to offer to the jury a defense supported only by his testimony, the nonproduction of other evidence, known and available to defendant, provides the jury with yet another fact for use to test his credibility." *Id.* It is well settled that "a prosecutor is permitted to comment on a defendant's failure to produce 'corroborating' witnesses whenever the defendant takes the stand and testifies on his own behalf." *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981).

Here, the challenged cross-examination questions and closing argument comments did not impermissibly shift the burden of proof. Defendant was not called upon to prove his innocence or disprove any of the elements that the prosecutor was required to prove. The prosecution still carried the burden of proof with respect to every element of the crime. The prosecutor's questions and comments pointed out the weaknesses in defendant's version of events by pointing out that his version was not corroborated even though witnesses and evidence may be available for that purpose. Defendant was not denied a fair trial.

VI. Prosecutorial Misconduct

Defendant asserts that the prosecutor's conduct at trial exceeded the bounds of propriety because he vouched for police witnesses and argued that defendant was not believable. Defendant failed to object to the challenged comments. "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines, supra* at 752-753, 764.

In his closing argument, defendant argued that the police and prosecutor were overzealous, that the police decided to make defendant a target of their investigation and the prosecutor endorsed this decision, and that the police subsequently went after defendant with "unbelievable zeal." Defendant also argued that there was a huge amount of evidence, but very little of it was connected to defendant. Counsel for defendant credited defendant's version of events and argued that defendant's connection to Schow Road was "light" and was not criminal. Defense counsel additionally argued that defendant's alleged admissions were the product of officers twisting his words or misunderstanding them.

At the end of his subsequent rebuttal argument, the prosecutor stated:

> What's going on here? His story is falling apart and it doesn't make sense. It doesn't make common sense, does it. It's an act of desperation. He did the best he could after he'd read all the police reports and listened to all the evidence.

> The evidence has shown that the police acted professionally in this investigation. They went after the people involved and some of these people were arrested and convicted and came before you and told you their stories. They [the police] went back to the Defendant and confronted him and he confessed to these crimes.
>
> There is no personal vendetta. There is no target. There is no animosity. This is a job. People of the State of Michigan have brought before you all the evidence put together by this narcotics team run by the Michigan State Police through the participation of multiple agencies. They've done a good job doing it. The evidence shows that. And the People's position is that the job they did and the evidence that's been presented to you proves beyond a reasonable doubt. . . .

The prosecutor's comments must be considered in light of defense counsel's arguments. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). While a prosecutor may not vouch for the credibility of a witness by implying that the prosecutor has some special knowledge that the witness is testifying truthfully, *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002), he may comment about and suggest reasonable inferences from the evidence presented at trial. *Vaughn*, *supra*. The prosecutor may also argue from the facts that a witness is not worthy of belief and may even characterize a witness, or the defendant, as a liar. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Weatherspoon*, 171 Mich App 549, 558; 431 NW2d 75 (1988). After examining the prosecutor's comments in context, we conclude that they were not improper. The prosecutor permissibly advanced a sound rebuttal argument based on the evidence and inferences. The argument challenged defendant's assertions that the investigation and motives of the police were questionable. The prosecutor did not improperly vouch for the police and their investigation, nor did he suggest that he had special knowledge about, or personally believed, in their credibility. Moreover, the prosecutor's remarks challenged defendant's credibility based on defendant's admission that he read all of the police reports and listened to all of the evidence before testifying. Therefore, we hold that there was no error requiring reversal.

VII. Sentencing

Defendant raises several issues with respect to his sentencing. Defendant says that the trial court erred in scoring offense variable 13 (OV 13), MCL 777.43, at ten points. We review the scoring of a sentencing guidelines variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003), lv pending. A scoring decision is not clearly erroneous if the record contains any evidence in support of the scoring decision. *Id.*

OV 13 is scored at ten points if the "offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group." MCL 777.43(1)(d).

> The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense. [MCL 777.43(2)(b).]

Here, the record supports a score of ten points for OV 13. There was evidence that defendant, Simila, Eskildsen, and possibly several others worked together to manufacture methamphetamine at several different locations. After stealing the large anhydrous ammonia tank, members of the group moved it to Schow Road. Defendant, Simila, and Eskildsen all contributed to buying or stealing equipment or supplies necessary to produce methamphetamine. They manufactured it together more than ten times, and stored supplies and equipment at various locations. The group was organized, with defendant selling and sharing the profits or sharing the methamphetamine product after it was made. When defendant and Simila were arrested, Eskildsen and Dorman went to work removing items from the West Forest residence, where defendant and Simila were known to stay. Given the existence of record evidence to support the scoring decision, the trial court's scoring decision is not clearly erroneous.

Defendant argues that his sentences are disproportionate and represent an abuse of sentencing discretion. He argues that MCL 769.34(10), which precludes review of sentences within the recommended minimum sentence range under the legislative guidelines, is unconstitutional and should not preclude this Court from reviewing the proportionality of his sentence. Specifically, he asserts that the provision violates the separation of powers and due process considerations. Defendant's constitutional argument is not properly raised before this Court. In his statement of the question presented, defendant raises the issue of the proportionality of his sentence, but he does not raise any issue with the respect to the constitutionality of MCL 769.34(10). Where a defendant fails to raise an issue in the statement of questions presented, review is inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, defendant's arguments have no merit.

In *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003), the defendant argued that MCL 769.34(10) was unconstitutional because it violated the principle of the separation of powers. The Court rejected that argument, reasoning that the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. *Id.* at 434-435. Const 1963, art 4, § 45 provides the Legislature with that authority. *Id.*, citing *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001). The Court held that the Legislature's comprehensive sentencing reforms, including detailed guidelines for appellate review of sentences, were constitutional. *Id.*

MCL 769.34(10) provides that if a minimum sentence is within the appropriate guidelines sentence range, this Court must affirm that sentence "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the sentence." Defendant concedes that his sentences are within the sentencing guidelines range, and we find no merit in defendant's claim that there was a scoring error. Therefore, we must affirm defendant's sentences without review of the proportionality of those sentences. MCL 769.34(10).

We note that, in a cursory argument, defendant also claims that MCL 769.34(10) violates Const 1963, art 1, § 20, which provides that a defendant has an appeal as a matter of right. Defendant cites no authority to support his position that § 20 provides him with the right to seek appellate review of the proportionality of his sentence or that MCL 769.34(10) interferes with his constitutional right to an appeal as of right. Indeed, we note that defendant was permitted an appeal by right. Where a defendant fails to explain or rationalize his position, or cite authority to support his position, the issue is abandoned. *Kelly, supra*.

Finally, defendant argues that his consecutive sentences of twenty to seventy-five years' imprisonment constitute cruel and unusual punishment and violate *People v Moore*, 432 Mich 311, 325-326; 439 NW2d 684 (1989). In *Moore*, the Court held that it was impossible for the defendant to serve the imposed sentence of one hundred to two hundred years' imprisonment. Thus, remand for resentencing was required. *Id.* Defendant's argument here is without merit. This Court rejected a similar argument that a sentence that conformed to the guidelines nevertheless was cruel and unusual punishment. See *McLaughlin*, *supra* at 670-671. Because defendant's sentences are within the minimum sentence range under the legislative guidelines, we are required to affirm his sentences. MCL 769.34(10); *Garza, supra.*[4]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

[4] Defendant filed a supplemental brief in which he argues that several factual finding used by the trial court at sentencing were decided not by the jury, but by the trial court in violation of *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 453 (2004). However, our Supreme Court has already stated that *Blakely*, which reviewed the state of Washington's determinate sentencing scheme, does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Accordingly, we decline to further address the issues raised by defendant in his supplemental brief.