STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2007
v	No. 273540 Shiawassee Circuit Court
JOHN STRICKER BRADFORD, JR., Defendant-Appellant.	LC No. 06-003883-FH

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of owning or possessing any chemical or laboratory equipment for the purpose of manufacturing a controlled substance involving hazardous waste, MCL 333.7401c(1)(b) and (2)(c), operating or maintaining a methamphetamine laboratory, MCL 333.7401c(1)(a) and (2)(f), possession of methamphetamine, MCL 333.7403(2)(b)(i), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and transporting or possessing anhydrous ammonia in a container not approved by law, MCL 750.502d. He was sentenced to concurrent prison terms of 51 to 240 months for the hazardous waste laboratory and methamphetamine laboratory convictions, 14 to 120 months for the possession of methamphetamine conviction, and 193 days for the possession of cocaine and transporting or possessing anhydrous ammonia convictions. He appeals as of right. We affirm.

Defendant first argues that his convictions of operating or maintaining a laboratory involving hazardous waste and operating or maintaining a methamphetamine laboratory arose out of the same criminal transaction and thus violate his state and federal protections against double jeopardy.

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004) (footnotes omitted). The Double Jeopardy Clause of both constitutions protects against (1) a second prosecution for the same offense following either acquittal or conviction and (2) multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). In *Smith, id.* at 315-316, our Supreme Court held that the term "same offense" in the context of the "multiple punishments" strand of our double

jeopardy jurisprudence has the same meaning as that term connotes in the "successive prosecutions" strand of our jurisprudence. Thus, in the absence of a clear legislative intent to impose multiple punishments, courts must apply the *Blockburger*[1] "same elements" test to determine whether multiple punishments are constitutionally permitted. *Id.* at 316. Under the "same elements" test, multiple punishments are permissible as long as each of the crimes for which a defendant is convicted contains an element that the other does not. *Id.* at 296, 316-319. Multiple punishments are authorized if each statutory provision requires proof of an additional fact that the other does not. *Id.* at 307.

Defendant's argument is premised on an erroneous understanding of the charges against him. Although he contends that both of his convictions under §§ 7401c(2)(c) and (f) were premised on § 7401c(1)(a), only count II was premised on that subsection. Count I was premised on § 7401c(1)(b). Section 7401c provides, in pertinent part:

> (1) A person shall not do any of the following:
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> (a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.
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> (b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.
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> * * *
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> (2) A person who violates this section is guilty of a felony punishable as follows:
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> (a) Except as provided in subdivisions (b) to (f), by imprisonment for not more than 10 years or a fine of not more than $100,000.00, or both.
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> * * *
>
> (c) If the violation involves the unlawful generation, treatment, storage, or disposal of a hazardous waste, by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both.
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> * * *

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

(f) If the violation involves or is intended to involve the manufacture of a substance described in section 7214(c)(ii),[2] by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

Count I of the amended felony information alleged that defendant owned or possessed a chemical or laboratory equipment that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine, and the violation involved the unlawful generation, treatment, storage, or disposal of a hazardous waste. Thus, although defendant was convicted and sentenced under § 7401c(2)(c) because his conduct involved the aggravating factor of a hazardous waste, count I was premised on § 7401c(1)(b). Count II of the amended felony information alleged that defendant owned, possessed, or used a vehicle, building, structure, place, or area that he knew or had reason to know was to be used or intended to be used as a location to manufacture methamphetamine. Defendant was convicted under § 7401c(2)(f) rather than § 7401c(2)(a) because the fact that the controlled substance at issue was methamphetamine constituted an aggravating factor. As this Court recognized in *People v Meshell*, 265 Mich App 616, 632; 696 NW2d 754 (2005), "the Legislature intended that a defendant be convicted and sentenced under MCL 333.7401c(2)(a) . . . *except as* provided in MCL 333.7401c(2)(b) to (f)." (Emphasis in original.) This Court directed that if subsections (b) through (f) apply, "the defendant should be convicted and sentenced under the appropriate subdivision." *Id.*

Accordingly, defendant's convictions of violating § 7401c(2)(c) and § 7401c(2)(f) were not both premised on his operating or maintaining a methamphetamine laboratory as provided in § 7401c(1)(a). Therefore, defendant's reliance on *Meshell* is misplaced. In that case, the defendant argued that his convictions of both operating a methamphetamine laboratory, § 7401c(1)(a) and (2)(a), and operating a methamphetamine laboratory within 500 feet of a residence, § 7401c(1)(a) and (2)(d), violated his protections against double jeopardy. Applying the *Blockburger* "same-elements" test, this Court held that the offenses constituted the same offense because each offense did not contain an element that the other did not contain. *Meshell, supra* at 631. This Court stated that the elements of operating a methamphetamine laboratory were encompassed within the elements of operating or maintaining a methamphetamine laboratory within 500 feet of a residence.[3] *Id.*

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[2] Section 7214(c) provides, in relevant part:

> Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having potential for abuse associated with a stimulant effect on the nervous system:
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> * * *
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> (ii) Any substance which contains any quantity of methamphetamine, including its salts, stereoisomers, and salts of stereoisomers.

[3] This Court also examined whether the defendant's convictions violated the Michigan legislative intent test for analyzing double jeopardy challenges. *Meshell, supra* at 631-632. Because our (continued…)

Here, the elements of defendant's convictions under either § 7401c(2)(c) or § 7401c(2)(f) were not encompassed within the other, and each offense contained an element that the other did not. In order to convict defendant of count I, the prosecutor was required to show (1) that defendant owned or possessed any chemical or laboratory equipment (2) that he knew or had reason to know was to be used for the purpose of manufacturing a controlled substance. Section 7401c(1)(b). As an additional aggravating element, the prosecutor was required to prove that the violation involved the unlawful generation, treatment, storage, or disposal of a hazardous waste. Section 7401c(2)(c). Regarding count II, premised on § 7401c(2)(f), the prosecutor was required to prove that (1) defendant owned, possessed, or used a vehicle, building, structure, place, or area (2) that he knew or had reason to know was to be used as a location to manufacture methamphetamine. Section 7401c(1)(a); see also *Meshell, supra* at 623-624. Thus, count I required the ownership or possession of a chemical or laboratory equipment while count II contained no such element. Similarly, count II required the ownership, possession, or use of a location for manufacturing a controlled substance while count I did not. Accordingly, applying the *Blockburger* "same-elements" test, defendant's convictions under both §§ 7401c(2)(c) and (f) did not violate his double jeopardy protections.

Defendant next argues that the prosecutor presented insufficient evidence to support his convictions. When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational finder of fact could conclude that every element of the crime charged was proven beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury's verdict. *Id.* at 400. Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id.*

Defendant argues that the evidence was insufficient to support a conviction for count I, but his argument is based on his misunderstanding of that charge as previously discussed. In any event, the prosecutor presented sufficient evidence to support defendant's conviction.

Viewed in a light most favorable to the prosecution and drawing all reasonable inferences in support of the jury's verdict, the evidence showed that defendant either owned or possessed the "Rooto," gloves, tubing, funnels, propane tanks, and gas generator made from the pink water bottle. Michigan law has recognized that possession may be actual or constructive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). In addition, it may be joint or exclusive. *Meshell, supra* at 622. A defendant's mere presence where a certain item is found, however, is insufficient to establish possession. *Id.* Rather, there must exist an additional connection between the defendant and the item. *Id.* "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the [item]." *Id.*[4]

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Supreme Court in *Smith, supra* at 315, repudiated that test in favor of the *Blockburger* "same-elements" test, we confine our analysis to the "same-elements" test.

[4] Although *Meshell, supra* at 622, involved controlled substances, the principles pertaining to possession of controlled substances are analogous to those pertaining to possession of

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Here, the totality of circumstances showed a sufficient nexus between defendant and the equipment necessary to manufacture methamphetamine. Christina Cooper testified that defendant resided at the house except when he was in jail and that because he did not work, he was there most of the time. He kept his belongings in the master bedroom that he shared with Brenda Ackles or in the garage. In the master bedroom, there was a safe that contained various drug-related items, such as scales, jewelry bags for packaging drugs, jewelry bags containing methamphetamine, and a baggie containing cocaine. The jewelry bags were printed with pictures of dice, dolphins, hearts, scorpions, and dollar signs. When defendant was arrested on January 18, 2005, Sergeant Jon Cecil found in his possession four baggies with pictures of red dice or blue stars on them, each containing methamphetamine. Therefore, the same type of jewelry bags found in the safe were found in defendant's possession approximately six months earlier. This evidence tended to establish a sufficient nexus between defendant and the methamphetamine components found on the premises.

In addition, there existed a sufficient nexus between defendant and the methamphetamine components found in the car. Defendant was previously arrested while driving the car and had methamphetamine in his possession at that time. The methamphetamine was found in a tin with the name "John" engraved on it. Ackles permitted defendant to use her car, and he was sometimes gone for days at a time. Thus, it would not be unusual for defendant to keep some of his belongings in the car. Accordingly, there existed a sufficient nexus between defendant and the propane tanks, lithium batteries, and other methamphetamine-related laboratory components found in the car.

In addition, the circumstantial evidence and reasonable inferences drawn therefrom showed that defendant knew or had reason to know that the Rooto and laboratory equipment was to be used for the purpose of manufacturing methamphetamine. *Nowack, supra* at 399-400. Before he arrested defendant, Detective-Sergeant Kevin Pettigrew received information that defendant was operating a methamphetamine laboratory in the basement of the home. Although police officers did not recover any methamphetamine components from the basement, they recovered all the ingredients necessary to manufacture methamphetamine from the rest of the premises, with the exception of ephedrine. Detective-Lieutenant Gretchen Voltz opined that the blister packs recovered from the burn barrel or burn pile previously contained ephedrine. She further testified that it appeared from her training and experience and the items recovered from the residence that the location was being used to manufacture anhydrous ammonia methamphetamine and that this type of methamphetamine had been manufactured there recently. Defendant was familiar with methamphetamine and had been arrested previously with jewelry bags of methamphetamine similar to those found in the safe. Further, Pettigrew testified that the generator recovered from the burn barrel contained hazardous waste, and Voltz testified that the cracked lithium batteries were considered hazardous waste. Thus, the evidence was sufficient to support defendant's conviction under count I.

Likewise, the evidence was sufficient to support defendant's remaining convictions. Regarding count II, premised on § 7401c(2)(f), the prosecutor was required to prove that (1)

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components used to manufacture methamphetamine. We can discern no basis to distinguish between the two categories of items.

defendant owned, possessed, or used a vehicle, building, structure, place, or area (2) that he knew or had reason to know was to be used as a location to manufacture methamphetamine. Section 7401c(1)(a); see also *Meshell, supra* at 623-624. For the same reasons previously discussed, the circumstantial evidence and reasonable inferences drawn therefrom showed that defendant used the residence to manufacture methamphetamine.

In addition, counts III and IV involved defendant's possession of methamphetamine and cocaine, respectively. To prove possession of a controlled substance, the prosecutor must show the exercise of dominion or a right of control over the drug with knowledge of the drug's presence and character. *Meshell, supra* at 621. Here, the totality of the evidence showed that defendant possessed the methamphetamine and cocaine found in the safe. Both substances were previously found in defendant's possession, and the baggies containing methamphetamine at that time were the same type as those found in the safe. Contrary to defendant's argument, it does not appear that he was merely present at a location where controlled substances were discovered.

Finally, the evidence was sufficient for a reasonable juror to conclude that defendant transported or possessed anhydrous ammonia in a container other than that approved by law. MCL 750.502d provides:

> (1) A person who transports or possesses anhydrous ammonia in a container other than a container approved by law, or who unlawfully tampers with a container approved by law, is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.
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> (2) As used in this section, "container approved by law" means a container that was manufactured to satisfy the requirements for the storage and handling of anhydrous ammonia pursuant to R 408.17801 of the Michigan administrative code or its successor rule.

For the reasons previously discussed, the evidence showed that defendant constructively, if not actively, possessed the propane tanks found in the car. Although Ackles testified that the tanks belonged to her, the jury was free to disbelieve her testimony. In fact, she testified that there were three or four propane tanks in the car while police officers recovered only two tanks from the car. Both tanks had altered valves and testing of the valve on the larger tank revealed the presence of anhydrous ammonia. Both Pettigrew and Voltz testified that the tank was not authorized to carry anhydrous ammonia. Accordingly, the evidence was sufficient to support defendant's conviction of count V.

Defendant next argues that § 7401c(1)(a) is unconstitutionally vague on its face and as applied. We disagree. Because defendant failed to preserve this issue for appellate review, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that § 7401c(1)(a) is unconstitutionally vague because (1) the meaning of the term "use" is unclear and does not provide fair notice of what is proscribed, (2) the statute gives the trier of fact unfettered discretion to decide what uses are prohibited, and (3) the statute is overbroad, makes constitutionally protected conduct unlawful, and impinges on the First Amendment right of association. We reject defendant's arguments.

When presented with a vagueness challenge, this Court examines the entire text of the statute and accords words their plain and ordinary meanings. *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004). "To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* We hold that the plain language of the statute satisfies this requirement. To be convicted under § 7401c(1)(a), a person must own, possess, or use a location and either know or have reason to know that the location is to be used to manufacture a controlled substance such as methamphetamine. *Random House Webster's College Dictionary* (2001) defines "use" as "to employ for some purpose; put into service," and "to avail oneself of; apply to one's own purposes." Thus, defendant's argument that merely occupying or visiting a location violates the statute is unavailing. Rather, a person must use a location for his or her own purposes and either know or have reason to know that the location is to be used to manufacture a controlled substance. The statute therefore gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Sands, supra* at 161.

In addition, in determining whether a statute gives the trier of fact unfettered discretion to decide what is prohibited, courts examine whether it provides standards for enforcing and administering the laws in order to ensure that enforcement is not arbitrary or discriminatory. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 469; 688 NW2d 523 (2004). The plain language of § 7401c(1)(a) provides sufficient guidance to ensure that enforcement of the law is not arbitrary or discriminatory. A defendant cannot be convicted of violating the statute unless his actions or conduct satisfy the plain language of the statute. Thus, the unambiguous text of the statute ensures that enforcement is not arbitrary or discriminatory.

Further, § 7401c(1)(a) does not impinge on the First Amendment freedom of association by making constitutionally protected conduct unlawful. "When a statute purporting to regulate both speech and conduct is challenged, the 'overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *People v Rogers*, 249 Mich App 77, 96; 641 NW2d 595 (2001), quoting *Broadrick v Oklahoma*, 413 US 601, 615; 93 S Ct 2908; 37 L Ed 2d 830 (1973). Merely because one can conceive of an impermissible application of a statute, however, is not sufficient to render it susceptible to an overbreadth challenge. *Id.* "Rather, 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.'" *Id.*, quoting *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 801; 104 S Ct 2118; 80 L Ed 2d 772 (1984).

Here, there exists no realistic danger that § 7401c(1)(a) will significantly compromise recognized First Amendment protections of persons not before the Court. Although defendant contends that a family member merely visiting a location where a relative is using drugs may be convicted under the statute, the plain language of the statute does not provide for such a circumstance. Judged in relation to the statute's plainly legitimate sweep, any overbreadth of the statute is neither real nor substantial. *Rogers, supra* at 96.

Moreover, § 7401c(1)(a) is not unconstitutional as applied to defendant. As discussed previously, there was sufficient evidence to support defendant's conviction premised on § 7401c(1)(a). The circumstantial evidence and reasonable inferences drawn therefrom show that defendant knew of the existence of the methamphetamine laboratory on the premises and was in fact directly involved in the manufacture of methamphetamine at that location. The

evidence does not show that defendant was merely present in Ackles's home. Accordingly, defendant has failed to establish a plain error affecting his substantial rights.

Defendant next argues that the erroneous admission of other acts evidence under MRE 404(b) denied him a fair trial. We disagree. We review the admission of other acts evidence at trial for an abuse of discretion. *People v Johnigan*, 265 Mich App 463, 466-467; 696 NW2d 724 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., for a purpose other than showing character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

The trial court properly admitted Sergeant Cecil's testimony for the purpose of showing a common scheme, plan, or system. Cecil testified that when he stopped defendant in Ackles's vehicle on January 18, 2005, defendant had in his possession methamphetamine in four baggies with pictures of red dice or blue stars on them. The baggies were the same as those found in the safe, and Pettigrew testified that that type of baggie is commonly used for selling methamphetamine or cocaine. Along with the baggies in the safe were scales and various metal containers. Thus, the evidence tended to show a common scheme, plan, or system of manufacturing methamphetamine for the purpose of selling it. Although the other acts evidence was different in some respects from the evidence pertaining to the instant charges, there need not exist an impermissibly high level of similarity between proffered other acts evidence and the charged acts as long as the evidence is probative of something other than the defendant's character or propensity to commit the charged offense. *Knox, supra* at 511.

The other acts evidence was also relevant to show defendant's knowledge of the baggies containing methamphetamine in the safe because he had possessed such baggies previously. Knowledge is a permissible purpose under MRE 404(b)(1). In addition, because defendant possessed cocaine during the previous traffic stop, Cecil's testimony was also relevant to show that he had knowledge of the cocaine found in the safe. Whether defendant possessed the methamphetamine and cocaine found in the safe was the ultimate issue to be determined regarding Counts III and IV, respectively.

Further, the fact that defendant was driving the same vehicle as that involved in the instant case when he was arrested previously shows his knowledge of the contents of the vehicle, including the propane tanks with altered valves, gloves, wooden spoons, and cracked and intact lithium batteries. The evidence showed that the vehicle's contents were necessary in manufacturing methamphetamine. Thus, defendant's knowledge of the vehicle's contents was relevant.

Finally, the danger of unfair prejudice did not substantially outweigh the probative value of the other acts evidence. The evidence was relevant to show defendant's scheme, plan, or system, as well as his knowledge, and was relevant to rebut his theory of defense that he was merely at the wrong place at the wrong time. Thus, the evidence was not marginally probative, but was probative of the ultimate issues, i.e., whether defendant committed the offenses alleged. See *People v Sabin (After Remand)*, 463 Mich 43, 71; 614 NW2d 888 (2000). Any prejudice to defendant cannot be deemed unfair. Further, the trial court gave multiple limiting instructions directing the jury not to consider the evidence as showing that defendant is a bad person or that he is likely to commit crimes. Such an instruction generally protects a defendant's right to a fair trial. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Accordingly, the trial court did not abuse its discretion by admitting the other acts evidence under MRE 404(b).

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto