STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2009
v	No. 280419 Cass Circuit Court
JASON SCOTT RYANS, Defendant-Appellant.	LC No. 07-010080-FH

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a methamphetamine laboratory, MCL 333.7401c(2)(f), operating a laboratory involving hazardous waste, MCL 333.7401c(2)(c), manufacturing methamphetamine, MCL 333.7401(2)(b)(*i*), possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of seven to 40 years for the operating a methamphetamine laboratory, operating a laboratory involving hazardous waste, and manufacturing methamphetamine convictions, 57 months to 20 years for the possession of methamphetamine conviction, and 36 days in jail for the possession of marijuana conviction. He appeals as of right. We vacate defendant's conviction for operating a methamphetamine laboratory, affirm his remaining convictions and sentences, and vacate the trial court's order requiring defendant to reimburse the county for attorney fees and remand for reconsideration of that issue in light of defendant's ability to pay.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his convictions for operating a methamphetamine laboratory, manufacturing methamphetamine, and operating a laboratory involving hazardous waste. We disagree.

"In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Defendant was convicted of operating a methamphetamine laboratory in violation of MCL 333.7401c(1)(a) or (b), which provide:

> (1) A person shall not do any of the following:
>
> (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.
>
> (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.

Defendant was also convicted of manufacturing methamphetamine, the elements of which are "(1) the defendant manufactured a controlled substance, (2) the substance manufactured was methamphetamine, and (3) the defendant knew he was manufacturing methamphetamine." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

According to Officer Eric Gizzi, defendant admitted to having a methamphetamine habit and "cooking" that substance. Methamphetamine was found in defendant's home, and an apparent laboratory that included chemicals and materials necessary to manufacture methamphetamine was discovered in a shed outside his home. Although the substances in the shed were not independently analyzed, defendant informed an officer that anhydrous ammonia was present in a cooler in the shed, and a Drager field-test of the substance was positive for the presence of anhydrous ammonia. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was operating a methamphetamine lab in his shed and that he had manufactured methamphetamine.

Defendant was also convicted of unlawfully generating, treating, storing, or disposing of hazardous waste, contrary to MCL 333.7401c(2)(c). This statute, in subsection (7)(a), incorporates the definition of "hazardous waste" in MCL 324.11103(3), which defines the term, in part:

> [W]aste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible illness or serious incapacitating but reversible illness, or may pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed.

Defendant argues that the field-testing for anhydrous ammonia is insufficient to prove that hazardous waste was unlawfully generated, treated, stored, or disposed. According to the prosecution witnesses, however, defendant admitted "cooking" methamphetamine and a laboratory containing chemicals and materials associated with the manufacture of

methamphetamine was located in defendant's shed. Anhydrous ammonia is one of the ingredients used in that process. Moreover, in addition to the positive Drager test, defendant admitted during questioning that there was anhydrous ammonia in a cooler in the shed. Contrary to defendant's claim, there was ample evidence to enable the jury to find that anhydrous ammonia was being stored in the shed.

The prosecution witnesses explained that highly toxic and hazardous chemicals are used in a methamphetamine laboratory. The various components of methamphetamine production are considered hazardous wastes, and licensed hazardous material cleanup crews must dispose of the materials using special EPA-regulated equipment, because those substances may not be released into the atmosphere. The evidence indicated that defendant did not use any special equipment to dispose of the materials, but rather burned them behind his house. Moreover, defendant was not storing the anhydrous ammonia in an approved container. Accordingly, there was sufficient evidence to support defendant's conviction involving the unlawful storage or disposal of hazardous waste.

II. Jury Instructions

Defendant next argues that the trial court erred by failing to instruct the jury on the distinction between Beth Davis's testimony as an expert witness and as a fact witness, and that defense counsel was ineffective for failing to request such an instruction.

Because defendant did not preserve this issue by requesting the omitted instruction, we review the issue for plain error affecting defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain . . . , (3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice." *Id*.

Defendant principally relies on *United States v Lopez-Medina*, 461 F3d 724 (CA 6, 2006), in which the court explained that while a police officer may testify as both a fact witness and an expert witness, the trial court and the prosecutor should take care to assure that the jury is informed of the dual roles of the officer, so that the jury can give proper weight to each type of testimony. *Id*. at 743. The court stated that there should be either a cautionary instruction regarding a law enforcement agent's dual role, an instruction on how to weigh expert opinion, or a clear demarcation between the expert and fact witness roles. *Id*. at 743-744. The court reasoned that such precaution is necessary because when a police officer testifies in two different capacities in the same case, there is a significant risk that the jury will be confused by the officer's dual role. *Id*. at 744; see also *United States v Thomas*, 74 F3d 676, 683 (CA 6, 1996), abrogated on other grounds by *Morales v American Honda Motor Co, Inc*, 151 F3d 500 (CA 6, 1998). An appropriate instruction is necessary to guard against a jury mistakenly weighing opinion testimony as if the opinion were fact, to inform the jury that it is free to reject the opinions given, and to address the additional risk of bias in forming expert conclusions regarding one's own investigation. *Lopez-Medina*, *supra* at 744.

In this case, even if the failure to instruct the jury on the distinction between Davis's dual roles was plain error, we conclude that defendant's substantial rights were not affected. Davis was not actually qualified as an expert, thereby reducing the risk that the jury might place undue

emphasis on her testimony. Also, the jury was aware that it was free to reject Davis's testimony, because the court instructed the jury that it was free to reject any part of a witness's testimony. Moreover, Davis's testimony was not the sole evidence that defendant was operating a methamphetamine lab in the shed. In addition to Davis, Phillip Small provided expert testimony on this issue and the jury was instructed on how to evaluate that testimony. Furthermore, unlike *Lopez-Medina*, *supra*, this case did not involve multiple errors at trial. For these reasons, defendant has not established that his substantial rights were affected because of the omitted instruction. Accordingly, defendant is not entitled to relief under the plain error rule.

We also disagree with defendant's argument that defense counsel was ineffective for failing to request the omitted instruction. First, defense counsel may have decided not to request an instruction as a matter of trial strategy, to avoid the jury according expert status to Davis's testimony. Defendant has not overcome the presumption of sound strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, defendant's inability to demonstrate prejudice for the reasons explained above also vitiates a claim of ineffective assistance of counsel. *Id.*

III. Double Jeopardy

Defendant argues that his dual convictions for operating a methamphetamine laboratory and operating a laboratory involving hazardous waste violates double jeopardy protections against multiple punishments for the same offense. We agree.

As this Court recently explained in *People v McGee*, 280 Mich App 680, 682-683; ___ NW2d ___ (2008):

> Both the United States and the Michigan Constitutions protect a defendant from being placed twice in jeopardy, or subject to multiple punishments, for the same offense. Judicial examination of the scope of double jeopardy protection under both constitutions is confined to a determination of legislative intent. And the validity of multiple punishments under the Michigan Constitution is determined under the federal *Blockburger*[1] "same elements" standard. If the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. In other words, the test emphasizes the elements of the two crimes. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes[.] [Internal quotations and footnotes omitted.]

In *Meshell*, *supra* at 618, the defendant was convicted of both operating a methamphetamine laboratory and operating a methamphetamine laboratory within 500 feet of a

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

residence. Applying the *Blockburger* "same-elements" test, this Court agreed that the two convictions were for the same offense because each offense did not contain an element that the other did not contain. *Id*. at 631. Rather, the elements of operating a methamphetamine laboratory are encompassed within the elements of operating a methamphetamine laboratory within 500 feet of a residence. *Id*.

In this case, defendant was charged in count I with either using his shed to manufacture methamphetamine or possessing any chemical or laboratory equipment to manufacture methamphetamine. In count II, defendant was charged with either using his shed to manufacture methamphetamine or possessing any chemical or laboratory equipment to manufacture methamphetamine under circumstances involving hazardous waste. In order to convict defendant of count II, the prosecutor was required to establish all elements of count I and to further establish the unlawful generation, treatment, storage, or disposal of hazardous waste. Thus, although count II contains an element not contained in count I (the involvement of hazardous waste), count I does not contain any element that is not contained in count II. Accordingly, the *Blockburger* test is not satisfied and defendant's dual convictions for operating a methamphetamine laboratory and operating a laboratory involving hazardous waste violate his double jeopardy rights. The remedy is to affirm the conviction on the higher charge and vacate the conviction on the lesser charge. *Meshell, supra* at 633-634. Because MCL 333.7401c(2)(c) and (f) provide for the same term of imprisonment for the two offenses, but a lesser fine for a conviction of operating a methamphetamine laboratory, we vacate defendant's conviction and sentence for operating a methamphetamine laboratory.

IV. Attorney Fees

Defendant argues that the trial court erred by ordering him to pay the county $350 as reimbursement for attorney fees without considering his ability to pay. Although the trial court was authorized to order defendant to reimburse the county for the cost of his court-appointed attorney, it was required to consider his ability to pay now and in the future. *People v DeJesus*, 477 Mich 996, 996-997; 725 NW2d 669 (2007); *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). The record does not indicate that the trial court considered defendant's ability to pay before ordering him to pay $350 to reimburse the county for the cost of his attorney. Accordingly, we vacate the order of reimbursement and remand for a decision on attorney fees that considers defendant's ability to pay now and in the future in accordance with *Dunbar*, *supra*.

V. Defendant's Pro Se Brief

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, defendant argues that the failure to attach a copy of the affidavit supporting the issuance of the search warrant to the copy left at the place searched violated MCL 780.654, thereby requiring that all evidence seized be suppressed. We disagree.

Although defendant relies on MCL 780.654, the requirement that a copy of the warrant be left at the scene of the place searched or otherwise given to the premises owner is actually prescribed in MCL 780.655. However, that statute was amended by 2002 PA 112, effective April 22, 2002, to add a provision expressly providing that "[t]he officer is not required to give a copy of the affidavit to that person or to leave a copy of the affidavit at the place from which the

property or thing was taken." Because the search warrant was issued after the effective date of 2002 PA 112, there is no merit to defendant's argument. See *People v Martin*, 271 Mich App 280, 308-309; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

We vacate defendant's conviction for operating a methamphetamine laboratory, affirm his remaining convictions and sentences, and vacate the trial court's order requiring defendant to reimburse the county for attorney fees and remand for reconsideration of that issue in light of defendant's ability to pay now and in the future in accordance with *Dunbar*, *supra*. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly