STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2014
v	No. 314612 Montcalm Circuit Court
CHRISTOPHER WILCOX, Defendant-Appellant.	LC No. 2012-016332-FH

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for owning or possessing any chemical or laboratory equipment that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine in the presence of a minor, MCL 333.7401c(2)(b), and owning or possessing any chemical or laboratory equipment that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine, MCL 333.7401c(1)(b); MCL 333.7401c(2)(a). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 12 to 30 years' imprisonment for each offense. For the reasons explained in this opinion, we affirm.

Defendant first challenges the sufficiency of the evidence supporting his convictions. We review the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).[1]

[1] On appeal, defendant mistakenly contends that, because the prosecution's case relied heavily on circumstantial evidence, he could only be convicted if an inference of criminality arose from the circumstantial evidence with "impelling certainty." This is not the law in Michigan. Instead, our review is the same whether the evidence is direct or circumstantial, *People v Nowack*, 462

Contrary to defendant's arguments on appeal, it is not the role of this Court to reevaluate the credibility of the evidence in order to ascertain whether the prosecution presented enough "credible" evidence to support defendant's convictions. See *Wolfe*, 440 Mich at 515. Rather, "[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *Harrison*, 283 Mich App at 378.

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to support defendant's convictions. In particular, pursuant to MCL 333.7401c(1)(b), it is a criminal act for a person to (1) own or possess, (2) any chemical or any laboratory equipment, (3) that the person knows or has reason to know is to be used for the purpose of manufacturing methamphetamine. See also MCL 333.7214(c)(*ii*). In this case, by his own admission, defendant had been using methamphetamine for several months, and there was evidence that he had repeatedly paid his stepson to purchase Sudafed for him during that time. One evening in November of 2011, defendant spent several hours late at night in his basement with a friend before leaving the home in the middle of the night. When his wife awoke the following morning she smelled an "unusual" odor in the home, reminiscent of paint or paint thinner. Upon investigating the basement the following day, defendant's wife discovered a water bottle containing a cloudy substance and a coffee filter, prompting her to notify the police. Responding police officers familiar with methamphetamine laboratories identified the unusual smell in the home as indicative of methamphetamine manufacturing, tests on the water bottle revealed the presence of pseudoephedrine, and the coffee filter was consistent with the pseudoephedrine extraction phase of manufacturing methamphetamine. Defendant's workbench area in the basement contained numerous additional items for the production of methamphetamine, including cans of Xylene, rubber or plastic tubing, coffee filters, and an ammonia nitrate cold pack, muriatic acid, and glass jars. Taken together, this evidence provided sufficient support for defendant's conviction pursuant to MCL 333.7401c(1)(b).

Further, according to MCL 333.7401c(2)(b), heightened penalties apply for violation of MCL 333.7401c(1)(b) when "the violation is committed in the presence of a minor." A "minor" refers to an individual under the age of 18. MCL 333.7401c(7)(d). In defendant's case, there was sufficient evidence to establish that his violation of MCL 333.7401c(1)(b) occurred in the presence of his five-year-old daughter who resided in the home where he kept his methamphetamine materials and who was home during the time the materials were in the basement, including times when the noxious smell permeated the home.[2] In sum, there was sufficient evidence for a rational trier of fact to find defendant guilty of his two convictions beyond a reasonable doubt.

Mich 392, 400; 614 NW2d 78 (2000), and the prosecution could rely on circumstantial evidence without the necessity of proving its case with "impelling certainty" or disproving every reasonable theory consistent with defendant's innocence. See *id.*; *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

[2] Contrary to defendant's arguments, the prosecution was not required to show that defendant intended to manufacture methamphetamine in the minor's presence; it was enough that the minor was present while defendant possessed the items which he knew or should have known were to be used for production. See MCL 333.7401c(1)(b); MCL 333.7401c(2)(b).

Defendant also asserts on appeal that the trial court violated his due process right to a fair trial in several ways.[3] In particular, defendant first contends that the trial court violated due process by admitting the opinion testimony of two police officers related to whether the items discovered in the basement were indicative of a methamphetamine laboratory without first assessing the admissibility of the testimony under MRE 702. Relevant to defendant's argument, MRE 702 establishes the prerequisites for the admission of expert testimony involving "scientific, technical, or other specialized knowledge." A court considering the admission of testimony under MRE 702 acts as a gatekeeper, and in this capacity must ensure that "the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012).

In this regard, one of the police officers, Lieutenant Steven Rau, was qualified as an expert by the trial court in matters of "how Meth is made, recognizing the different methods, the ingredients, equipment and components related." Defendant not only failed to object to the introduction of Lieutenant Rau's testimony as an expert regarding these issues, he affirmatively abandoned any such claim when his counsel expressly stated that he had "no objection" to the officer's qualification as an expert in this area. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). See also *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004) ("[A] party may waive any claim of error [under MRE 702] by failing to call this gatekeeping obligation to the court's attention . . . ."). Having waived any error in relation to the introduction of Lieutenant Rau's expert opinion on this topic, defendant cannot now complain that admission of Lieutenant Rau's testimony within his area of expertise violated MRE 702. And, indeed, Lieutenant Rau appeared eminently qualified to offer opinions on the topic given his substantial training and experience in investigating methamphetamine laboratories, including training at the U.S. Drug Enforcement Agency's Clandestine Laboratory School, and his experience investigating such laboratories in his role as the District Meth Coordinator for the Central Michigan Enforcement Team. We discern no error in the admission of his opinion.[4]

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[3] Although defendant attempts to frame these issues as constitutional matters, not all errors are constitutional in nature, *People v Blackmon*, 280 Mich App 253, 260; 761 NW2d 172 (2008), and we see no constitutional error in the admission of the evidence at issue.

[4] Relying on MRE 702, defendant also challenges Lieutenant Rau's testimony on the characteristics of a methamphetamine user, an area in which Lieutenant Rau was not specifically qualified as an expert by the trial court. Any challenge to this testimony by defendant is unpreserved and reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Considering Lieutenant Rau's area of expertise, it seems apparent from the record that he would be qualified to describe basic behaviors of a typical methamphetamine user, and admission of his testimony on this topic was not plain error. Moreover, even assuming some error occurred, reversal is not required because Lieutenant Rau's testimony—offered to demonstrate defendant's behaviors were consistent with methamphetamine use—was cumulative

The second police officer to whose opinion testimony defendant now objects was Deputy Sheriff Donald Wittkopp. Defendant failed to object to Deputy Wittkopp's opinion testimony at trial. Accordingly, defendant's arguments are unpreserved and reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764. Contrary to defendant's arguments, the trial court did not need to consider the admissibility of Deputy Wittkopp's testimony pursuant to MRE 702 because Deputy Wittkopp offered his opinion as lay witness, subject to MRE 701. See *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008) (recognizing that a lay witness need not be qualified under MRE 702). Under MRE 701, a lay witness may offer opinions or inferences "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." For example, police officers may offer lay opinions under MRE 701 that are rationally based on their perceptions and experiences, provided those opinions are not overly dependent on scientific, technical, or other specialized knowledge. See, e.g., *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994); *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod 433 Mich 862 (1989). In this case, Deputy Wittkopp, who had some past experience with other methamphetamine sites, opined that the proximity of the items gathered together in the basement was an indication that they were components of a methamphetamine laboratory. He did not, however, claim that his opinion was supported by any specialized, technical, or scientific knowledge. Because his testimony was rationally based on his perceptions of the items in the basement, and helpful to a clear understanding of his testimony and the determination of facts at issue, it was admissible pursuant to MRE 701.

Relying on MRE 404(b), defendant next contends that the trial court violated due process by admitting evidence that defendant's stepson and a friend of his stepson purchased Sudafed for defendant five times during the months of July through October 2011. Defendant objected to the introduction of this evidence at trial, meaning his claim is preserved and we review the trial court's decision to admit the evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In a related argument, defendant challenges Deputy Wittkopp's testimony that defendant told Deputy Wittkopp that he had smoked methamphetamine since June of 2011, and that Deputy Wittkopp had learned from defendant's wife that she suspected defendant of manufacturing methamphetamine. Defendant failed to object to this testimony at trial, meaning his claim is unpreserved and reviewed for plain error. *Carines*, 460 Mich at 763-764.

In our judgment, on the facts of this case, defendant's methamphetamine use, his arrangements for the purchase of Sudafed, and his wife's report to the police about her suspicions regarding defendant's activities constituted part of the res gestae of the offense because they explained the circumstances of defendant's crime, providing the jury with the "complete story" surrounding the police investigation as well as the items discovered in the basement and their likely significance. See *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (recognizing the jury is entitled to hear the "complete story"); *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010) (concluding background information relating to investigation

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of defendant's own admission that he had been using methamphetamine. Defendant has not shown that the admission of this cumulative evidence affected the outcome of the trial. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

was admissible to allow the jury to examine the full transaction). As part of the res gestae of the offense, the evidence was admissible without regard to MRE 404(b). See *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

In any event, even if the admissibility of the evidence is considered pursuant to MRE 404(b), the trial court did not abuse its discretion in admitting evidence regarding the purchase of Sudafed, and there was no plain error in the admission of testimony regarding defendant's methamphetamine use.[5] MRE 404(b)(l) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

When evaluating the admission of evidence under MRE 404(b), it must be offered for a proper purpose, i.e. one other than a character or propensity theory, it must be relevant under MRE 402, it must satisfy MRE 403, and, if requested, a limiting jury instruction may be given. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).

In this case, both the evidence of defendant's methamphetamine use and the purchase of Sudafed were offered for a proper purpose. That defendant had been surreptitiously obtaining Sudafed and using methamphetamine tended to show that defendant had knowledge of the ingredients needed to manufacture methamphetamine, that he intended its production, that he had a motive for its production, and that, of those individuals in the home with access to the basement, defendant was the owner and possessor of the items in question. This evidence was relevant as defined in MRE 401 because it had a tendency to make it more probable that defendant possessed the methamphetamine related items and that he did so with knowledge that those items were to be used for the production of methamphetamine. As relevant evidence, it was generally admissible pursuant to MRE 402. Moreover, the evidence's probative value was not substantially outweighed by the danger of unfair prejudice so as to require exclusion under MRE 403. The evidence's probative value was high, particularly given the difficulty in proving defendant's state of mind, *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005),

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[5] Testimony that defendant's wife reported her "suspicions" regarding defendant's methamphetamine production, without description of any acts she may have witnessed, does not constitute evidence of "other acts" and thus defendant's contention that it must be excluded under MRE 404(b) is without merit. To the extent defendant asserts in passing that her remarks as testified to by Deputy Wittkopp involved hearsay, the testimony was offered to explain why police searched defendant's house and, as such, it was not hearsay. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) ("[A] statement offered to show why police officers acted as they did is not hearsay.").

and any resulting prejudice to defendant was not so unduly prejudicial so as to require exclusion. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Lastly, the trial court helped mitigate any prejudicial effect by giving a limiting instruction on the use of other acts evidence. See *People v Orr*, 275 Mich App 587, 593; 739 NW2d 385 (2007). Thus, defendant's MRE 404(b) arguments are without merit.

Defendant's final due process argument relates to his assertion that the trial court improperly instructed the jury in regard to the meaning of the term "presence" as used in MCL 333.7401c(2)(b). At trial, defendant objected to the court's instruction on "presence," arguing that it did not accord with the plain meaning of the term. To the extent defendant now challenges the trial court's instruction on this basis, his argument is preserved. See *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). Our review of instructional error is de novo. *McGhee*, 268 Mich App at 606. The trial court is charged with clearly instructing the jury on the case and applicable law, including instructions on the elements, material issues, defenses, and theories. *Id.* However, we review instructions in their entirety, and "an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502.

In this case, the term "presence" relates to the heightened penalties imposed by MCL 333.7401c(2)(b) when violation of MCL 333.7401c(1)(b) "is committed in the presence of a minor." Understanding what "presence" means in this context requires statutory interpretation. When interpreting statutes, our primary goal is to discern and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). To ascertain the Legislature's intent, we begin with review of the words in the statute, affording undefined terms their plan and ordinary meaning. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). A dictionary may be consulted to determine the meaning of a term. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). Words must also be interpreted on the basis of the context in which they are used. *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010). When, as in this case, we interpret the Public Health Code, MCL 333.1101 *et seq*., we are mindful that its provisions "shall be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2).

The word "presence" is not defined in the statute at issue. Considering dictionary definitions, the term "presence" generally refers to "the state or fact of being present," or "immediate vicinity; proximity." *Random House Webster's College Dictionary* (1992). In turn, the word "present" denotes "being with one or others or in the specified or understood place." *Random House Webster's College Dictionary* (1992). In short, "presence" may be defined as the state or fact of being in a specified or understood place, or immediate vicinity or proximity. See also Black's Law Dictionary (9th ed. 2009) (defining "presence" as "[t]he state or fact of being in a particular place and time" or a "close physical proximity coupled with awareness").

At trial, the trial court instructed the jury that the phrase "in the presence of a minor" "means that the minor was present in the building, structure, place or area at the time the defendant owned or possessed the chemical or laboratory equipment, and that the defendant knew a minor was present." Considering the meaning of the term "presence" as used in MCL 333.7401c(2)(b), we are persuaded that the instruction given by the trial court fairly presented

the issues to be tried and adequately protected defendant's rights. That is, contrary to defendant's arguments, the plain meaning of the term "presence" is not narrowly limited to the minor's "immediate vicinity." Rather, as the trial court recognized, it also refers to being in a specified place, in this case the house, structure, place or area where the methamphetamine related items were discovered. The trial court's instruction thus comported with the plain meaning of the term "presence" and fairly presented the issues to be tried. There was no error.

On appeal, defendant raises additional, unpreserved arguments regarding the trial court's definition of presence. Because these arguments are unpreserved, our review is for plain error. *Carines*, 460 Mich at 763-764. In particular, defendant argues that the trial court's challenged jury instruction violated the rule of lenity. "The 'rule of lenity' provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The statute at issue in this case is not unclear and, in any event, the rule of lenity does not apply to the interpretation of the Public Health Code which must, as noted, be "liberally construed for the protection of the health, safety, and welfare of the people of this state." *People v Johnson*, 302 Mich App 450, 462; 838 NW2d 889 (2013). Further, we reject defendant's contention that the trial court's jury instruction violated the separation of powers doctrine. As discussed, the trial court's instruction comported with the plain meaning of the statute, thereby effectuating the Legislature's intent. See generally *Thompson*, 477 Mich at 151. Defendant has not shown plain error in relation to these unpreserved claims of instructional error.

Defendant also raises several claims of prosecutorial misconduct. By failing to offer a timely and specific objection to any of the alleged instances of prosecutorial misconduct, defendant failed to preserve his claims for review. We review these unpreserved arguments for plain error. *Carines*, 460 Mich at 763-764. Claims of prosecutorial misconduct are reviewed case by case, with the prosecutor's remarks evaluated in the context of the entire record. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Although a prosecutor may not argue facts not in evidence or misstate the law, the prosecutor is free to argue the evidence and all reasonable inferences. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 275-276; 662 NW2d 836 (2003). Further, a prosecutorial misconduct claim may not be predicated on a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Lastly, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

In this case, defendant argues that the prosecutor improperly introduced a series of irrelevant and prejudicial pieces of information at trial, including evidence that defendant's wife suspected he may have been using drugs and that she feared defendant because he was not himself during that time. Defendant also challenge the prosecution's introduction of testimony from Deputy Wittkopp that defendant's wife had shared her concerns with police, and additionally told police that her son had purchased Sudafed for defendant and that she suspected defendant of manufacturing methamphetamine. Defendant also again challenges the introduction of evidence relating to his use of methamphetamine, including his own admissions and testimony from Lieutenant Rau regarding the characteristics of a methamphetamine user. But, on the facts of this case, this evidence was relevant and admissible. See MRE 402. Thus, the prosecution's good-faith introduction of this evidence did not constitute misconduct. *Noble*,

238 Mich App at 660. To the extent defendant's wife responded with hearsay when she testified that her son told her about the purchase of Sudafed for defendant, her hearsay reply was unresponsive, and not a basis for a finding of prosecutorial misconduct. See *People v Williams*, 114 Mich App 186, 199; 318 NW2d 671 (1982).

Defendant also argues the prosecutor argued facts not in evidence by indicating that the cloudy liquid in the water bottle could be used as a drink, which defendant now argues was its sole use, *or* for the purposes of making more methamphetamine. The prosecutor's argument, however, was a reasonable inference from Lieutenant Rau's testimony to the effect that the appearance of the water bottle and coffee filter was consistent the pseudoephedrine extraction phase of manufacturing methamphetamine. Accordingly, the prosecutor did not argue facts not in evidence when she stated that the water bottle could have been used for two purposes. See *Bahoda*, 448 Mich at 282. Further, any prejudice was cured by the trial court's instruction that the lawyer's statements were not evidence. See *Abraham*, 256 Mich App at 276.

Defendant also argues that the prosecutor misstated the law. Specifically, defendant argues that the prosecutor incorrectly indicated during closing arguments that she needed only to prove that defendant knew that the chemical or laboratory equipment *could* be used to manufacture methamphetamine. Even if the prosecutor's remarks did not exactly follow the statutory language of MCL 333.7401c(1)(b), any prejudice was alleviated by the trial court's proper instruction on the issue and its instruction to the effect that the jury must take their instructions on the law from the court, not the lawyers. See *Abraham*, 256 Mich App at 276. Defendant also argues that the prosecutor misstated the law when she indicated that the presence of defendant's five-year-old daughter in the house was sufficient to show the presence of a minor. However, the prosecutor's remarks coincided with the trial court's instruction which was, as discussed, a proper recitation of the law. Defendant has not shown plain error.[6]

In a Standard 4 brief, defendant raises several additional arguments, which we have reviewed and find to be without merit. Specifically, defendant first asserts that the felony complaint's conclusory assertions did not provide probable cause for an arrest, and that, as a result, the lower court lacked jurisdiction. Even if the complaint failed to provide details for the basis of the allegations contained therein, any such deficiency did not deprive the trial court of jurisdiction, and defendant is, therefore, not entitled to relief. *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974); see also *Frisbie v Collins*, 342 US 519, 522; 72 S Ct 509; 96 L Ed 541 (1952).

Also in his Standard 4 brief, defendant maintains he was deprived of the effective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed questions of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant's claims are unpreserved, our review is limited to mistakes apparent on the record.

[6] Defendant also argues that the cumulative effect of the prosecutor's errors warrant reversal. However, because defendant has not demonstrated the occurrence of multiple instances of prosecutorial misconduct, there can be no cumulative effect and defendant's argument is without merit. *People v Eisen*, 296 Mich App 326, 335; 820 NW2d 229 (2012).

People v Rodriguez, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303 (citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first contends that counsel should have objected to Deputy Wittkopp's testimony regarding his statement because it was inadmissible insofar as it involved an "editorialized" version of defendant's statement to police. In making his argument, defendant relies on *People v McGillen*, 392 Mich 251, 263; 220 NW2d 677 (1974), wherein the Court indicated that a police officer's "editorialized version" of a statement may not be admitted against a defendant. However, defendant misapplies *McGillen*, which in substance held the paraphrased statements at issue inadmissible because there had been a *Miranda*[7] violation. We have since explained that the editorialized nature of the officer's testimony in *McGillen* went only to the question of his credibility, and we have rejected the notion that statements are inadmissible where they involve a paraphrased, rather than an exact, account. See *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984). Accordingly, in this case, any objection by counsel on these grounds would have been futile, and counsel will not be held ineffective for failing to making a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Further, given the substantial evidence of defendant's guilt, defendant has not shown a reasonable probability of a different result. *Toma*, 462 Mich at 302-303.

Defendant also maintains counsel was ineffective for failing to file a motion in limine or to object to testimony from Lieutenant Rau that there was a valid search warrant for defendant's arrest. The testimony at issue was offered in relation to Lieutenant Rau's explanation of how police came to be at the house, and it did not indicate the nature of the offense for which the warrant had been issued. On these facts, defendant has not overcome the presumption that the decision not to object was a matter of trial strategy, designed not to draw the jury's attention to the information. See *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). In addition, defendant fails to provide any legal support for the proposition that defense counsel was ineffective for failing to file a motion in limine in circumstances such as these, where there was no indication that the challenged information would be testified to at trial. Defendant thus fails to show that defense counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302-303. Moreover, there was significant evidence supporting defendant's convictions and defendant has failed to show a reasonable probability that, but for defense counsel's failure to object to Lieutenant Rau's testimony, the result of the proceeding would have been different. *Id.*

[7] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant also challenges defense counsel's failure to object to the trial court's instructions on the elements of the offense. In particular, defendant notes that in relation to both of defendant's convictions, the trial included a superfluous reference to "was to be used," stating "defendant did own or possess any chemical or laboratory equipment that he knew or had reason to know *was to be used* or *was to be used* for the purpose of manufacturing Methamphetamine."[8] The second reference to "was to be used" may have been potentially confusing if the instruction were read in isolation. However, read as a whole, the jury instructions clearly instructed the jury of defendant's charges, including a proper recitation of the requirement that he own or possess "chemical or laboratory equipment that he knew or had reason to know was to be used to manufacture Methamphetamine." In these circumstances, even if imperfect, the extra reference to "was to be used" did not rise to the level of error as, on the whole, the instructions fairly presented the issues. *Kowalski*, 489 Mich at 501-502. Thus, counsel's decision not to object did not fall below an objective level of reasonableness. Moreover, the verdict form is considered part of the jury instructions and, in this case, the verdict form appropriately listed the details of the offenses, thereby mitigating any prejudice. See *Eisen*, 296 Mich App at 330-331. Given the significant evidence of defendant's guilt and the appropriate language on the verdict form, defendant has also not shown that, but for counsel's failure to object, there was a reasonable probability of a different outcome. *Id.* On this record, defendant has not shown the ineffective assistance of counsel. *Toma*, 462 Mich at 302-303.

Defendant also contends that counsel performed ineffectively by failing to move for a new trial based on the assertion that the verdict was against the great weight of the evidence. The test to determine whether a verdict is against the great weight of the evidence is whether "the evidence preponderates heavily against the verdict so that it would be a serious miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Considering the record and the substantial evidence of defendant's guilt, a motion for a new trial on this basis would have been futile, and counsel is not ineffective for failing to make a futile motion. See *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

Lastly, defendant argues that the prosecutor committed misconduct by inviting testimony from Lieutenant Rau about a warrant, or alternatively, that, if the testimony is viewed as nonresponsive to the prosecution's questioning, Lieutenant Rau, as a police officer, had a duty to refrain from offering unfairly prejudicial testimony and the trial court should have excluded the testimony under MRE 404(b). Defendant's claims are unpreserved and reviewed for plain error. *Carines*, 460 Mich at 763-764. Considering the exchange at issue, the prosecution's good-faith effort to admit evidence does not constitute prosecutorial misconduct. *Noble*, 238 Mich App at 660. Moreover, even assuming some error in the introduction of this evidence, defendant has not made the requisite showing of prejudice to warrant relief under the plain error standard. The reference to the warrant was brief, and did not identify any details relating to the warrant. Contrary to defendant's claims on appeal, it certainly did not communicate to the jury that he was a "career criminal." In the face of the substantial evidence of defendant's guilt, any error in

[8] There is no explanation provided in the lower court record for the extra reference to "was to be used."

the brief, rather vague reference to a warrant did not affect the outcome of the proceedings. Defendant has not shown plain error and he is not entitled to relief.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck