

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 20, 2012

v

RITA RENEE CRABTREE,
Defendant-Appellant.

No. 302583
Hillsdale Circuit Court
LC No. 10-342193-FH

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of the manufacture of methamphetamine, MCL 333.7401(2)(b)(i); conspiracy to manufacture methamphetamine, MCL 750.157a; MCL 333.7401(2)(b)(i); possession of methamphetamine, MCL 333.7403(2)(b)(i); and operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f). She was sentenced to 6 years and 6 months to 20 years' imprisonment for the manufacture of methamphetamine, conspiracy to manufacture methamphetamine, and operating or maintaining a methamphetamine laboratory convictions, and 3 to 10 years' imprisonment for possession of methamphetamine. We affirm.

Defendant argues the trial court erred by instructing the jury concerning impeachment by prior conviction or, in the alternative, that defense counsel's failure to object to the jury instruction was ineffective assistance of counsel. We disagree. Our review of the record reveals that the trial court asked if there were objections to the jury instructions, and defense counsel expressed satisfaction with the jury instructions. Accordingly, the challenge to this jury instruction is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant raised his claim of ineffective assistance of counsel for the first time on appeal in a motion to remand for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), which this Court denied. Because no *Ginther* hearing was held, this Court's review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). 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), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). 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." *Toma*, 462 Mich at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). "[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A witness's credibility may be impeached with evidence of prior convictions, but only if the criteria in MRE 609 are satisfied. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides that a witness may be impeached with a prior conviction if the crime contained an element of dishonesty or false statement, or the crime contained an element of theft, the crime was punishable by imprisonment for more than one year, and the court determines that the evidence has significant probative value on the issue of credibility. MRE 609(a). However, a prior conviction for methamphetamine use does not contain an element of dishonesty or a false statement. Accordingly, the parties concede that the trial court erred in instructing the jury regarding the prior conviction.

Despite the trial court's error, defense counsel's decision to request or refrain from requesting a jury instruction is usually a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Here, defense counsel introduced evidence that defendant had a prior adjudication for the misdemeanor use of methamphetamine to provide an explanation of how Hardway coerced defendant into allowing her to use defendant's house to manufacture methamphetamine. The greatest risk of that strategy was that the jury would use the evidence of defendant's prior use of methamphetamine as evidence of defendant's guilt in this case. The trial court's instruction, while erroneous, actually alleviated the risk that the jury would use defendant's prior adjudication for the misdemeanor use of methamphetamine as propensity or substantive evidence of defendant's guilt. Defense counsel may have decided as a matter of trial strategy not to object to the trial court's favorable jury instruction. Regardless, defendant has failed to provide any facts that would show that defense counsel's decision was not trial strategy. *Hoag*, 460 Mich at 6. Accordingly, defendant has not shown that defense counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302.

Next, defendant asserts that the trial court erred in scoring both offense variable (OV) 1, MCL 777.31 (aggravated use of a weapon) at 20 points and also OV 2, MCL 777.32 (lethal potential of weapon possessed or used) at 15 points because defendant's methamphetamine lab was small and there were no victims exposed to a harmful chemical substance. We disagree. Where an issue concerning a trial court's sentencing scoring decision is preserved, the issue is reviewed to "determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Points are scored under OV 1 for an offender's aggravated use of a weapon. MCL 777.31. OV 1 allows the trial court to assign a score of 20 points where "[t]he victim was

subjected or exposed to a . . . harmful chemical substance. . . .” MCL 777.31(1)(b). Each person who was placed in danger of injury or loss of life is a “victim” for the purpose OV 1. MCL 777.31(2)(a). Points are scored under OV 2 for the lethal potential of a weapon possessed or used. MCL 777.32. OV 2 allows the trial court to assign a score of 15 points where “[t]he offender possessed or used a . . . harmful chemical substance” MCL 777.32(1)(a). For the purpose of OV 1 and OV 2, a “harmful chemical substance” means a “solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.” MCL 750.200h(i).

Contrary to defendant’s claim that there were no victims, when the police approached defendant’s home they smelled a strong chemical odor coming from the residence. Because of the strong chemical smell, the Office of Monroe Narcotic Enforcement Team (OMNI III) was required to clean defendant’s residence before it was safe for the police to continue their investigation. There was testimony at trial that the gas created by the chemical reactions in making methamphetamine can be harmful and that flammable solvents are used in manufacturing methamphetamine. The ingredients used for the manufacture of methamphetamine are harmful chemical substances. MCL 750.200h(i). The team members of OMNI III were exposed to harmful chemical substances created by defendant. They were victims for the purpose of scoring OV 1. MCL 777.31(2)(a). Defendant also possessed the harmful chemical substances in the process of manufacturing methamphetamine as required to score OV 2. MCL 777.32(1)(a). There is evidence to support the trial court’s scoring of OV 1 and OV 2. *Hornsby*, 251 Mich App at 468.

Lastly, defendant argues the trial court erred in scoring OV 14, MCL 777.44 (offender’s role) at ten points because she was not a leader in a multiple offender situation. OV 14 allows the trial court to assign a score of ten points where “[t]he offender was a leader in a multiple offender situation.” MCL 777.44(1)(a). In scoring OV 14, “[t]he entire criminal transaction should be considered.” MCL 777.44(2)(a). “A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.” *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

A review of the record reveals that Laurie Hardway, co-defendant, purchased pseudoephedrine and lithium batteries at Walgreens. She testified that defendant instructed her to pick up those ingredients to make the methamphetamine, but defendant had the remaining ingredients. Although defendant asserted that she played no role in the making of the methamphetamine, she testified that Hardway mentioned that she wanted to make the drug at defendant’s residence while the two were in defendant’s car. Despite that knowledge, defendant did not drop Hardway off at another location, but took her back to defendant’s residence. Hardway testified that she and defendant had been manufacturing methamphetamine together for close to a year. Hardway also testified that she knew the ingredients necessary to manufacture methamphetamine but did not know the correct order to add ingredients. Accordingly, the conclusion that defendant was the leader was supported by a preponderance of the evidence. *Osantowski*, 481 Mich at 111. The trial court did not abuse its discretion in scoring OV 14 at ten points because record evidence supports that score. *Hornsby*, 251 Mich App at 468.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood