STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 306696 Jackson Circuit Court
JOHN WILLIAM BURLEW, Defendant-Appellant.	LC No. 10-006286-FH

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant John William Burlew appeals by right his convictions for possession of chemical or laboratory equipment intended to be used for the purpose of manufacturing methamphetamine in the presence of a minor, second offense, MCL 333.7401c(2)(b); MCL 333.7413(2), manufacturing methamphetamine, MCL 333.7401(2)(b)(i), and possessing methamphetamine with intent to deliver, MCL 333.7401(2)(b)(i). The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to serve 15 to 40 years in prison for each conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first challenges the sufficiency of the evidence supporting his convictions. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

With regard to his conviction for possessing methamphetamine with the intent to deliver, defendant argues that there was insufficient evidence from which the jury could find that he intended to deliver the methamphetamine found in his car. See *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005) (stating that the prosecution must prove that the defendant knowingly possessed the substance and intended to deliver it). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted).

The evidence showed that the amount of methamphetamine recovered in powdered form was only .10 grams and in a single baggie. Thus, the quantity was not such that a reasonable jury could conclude that defendant had the intent to deliver from the amount possessed alone. See *People v Peterson*, 63 Mich App 538, 548; 234 NW2d 692 (1975). However, there was also evidence that defendant had meth oil that could be used to yield additional methamphetamine. Trooper Steven Temelko testified that "meth oil" is considered a finished methamphetamine product that can be injected. Police officers also recovered another jar of liquid which appeared depleted and which Temelko stated was likely meth oil that had already been "gassed out." Defendant also had 108 pseudoephedrine pills, enough to manufacture an additional four grams of methamphetamine. Defendant admitted that he owned the items in the car's trunk and passenger compartment and acknowledged selling methamphetamine. Taken in this context, and give the extent of his operations and materials, a reasonable jury could find that defendant intended to deliver the methamphetamine products. See *Williams*, 268 Mich App at 423.

Defendant also argues that there was insufficient evidence that he manufactured methamphetamine on the specific day at issue. See *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005) (listing the elements of manufacturing methamphetamine). However, it is not necessary to prove the exact date that defendant manufactured the methamphetamine. *Ringo v Richardson*, 88 Mich App 684, 692; 278 NW2d 717 (1979); see also MCL 767.51; MCL 767.45(1)(b). And, in any event, there was evidence that defendant manufactured methamphetamine on or about December 6, 2010.

Police officers received a tip about a mobile methamphetamine laboratory operating out of a green Ford Escort and they observed defendant get in the car with his girlfriend and child. The officers stopped defendant and discovered that the car contained all the materials necessary for the operation of a mobile methamphetamine laboratory; they found: 108 pseudoephedrine tablets, butane, lithium batteries, two liter bottles, which could be used as reaction vessels, fertilizer, lye, a water source, tubing, and salt. Testimony established that the materials recovered were consistent with the "one pot" method, also known as the "shake and bake" method, and defendant admitted to previously making methamphetamine in this way. Consistent with the "one pot" method, officers also recovered powder methamphetamine in its finished form, meth oil, and old meth oil that had apparently already been gassed off. Given the presence of the meth oil, which had not yet been gassed off, Temelko opined that the "cook" took place fairly recently. In addition, there was testimony that officers at the scene recognized a strong chemical odor in the car, indicative of methamphetamine production. From this evidence, it was reasonable for the jury to infer that defendant manufactured methamphetamine on or about December 6, 2010. *Roper*, 286 Mich App at 83.

The fact that others were in his car also does not fatally undermine the inference that he manufactured the methamphetamine. Defendant admitted that the items in the trunk and passenger compartment were his and, from this, the jury could conclude that defendant was the party responsible for the methamphetamine production. Additionally, defendant's argument that Temelko was unqualified to offer an opinion about how recently the cook occurred is without merit. The trial court admitted Temelko as an expert in methamphetamine manufacturing and distribution. And, for that reason, he could properly testify about the "one pot" production method and to describe how quickly manufacturers typically turn meth oil into powder. There is also no merit to defendant's claim that the evidence is insufficient because the quantity of

powder recovered was not, in his opinion, consistent with a recent cook. Because the powder methamphetamine was found in the context of a mobile methamphetamine laboratory, it would be reasonable to infer that it was produced by defendant, regardless of the quantity. More importantly, defendant's argument ignores that production of "meth oil" also constitutes a violation of MCL 333.7401(2)(b)(i). See MCL 333.7214(c)(ii).

Defendant also challenges the sufficiency of the evidence supporting his conviction under MCL 333.7401c(2)(b) on the basis that the chemical and laboratory equipment were not in the presence of a minor. Under MCL 333.7401c(1)(b), a person may not "[o]wn 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 [methamphetamine]." If the violation is committed in the "presence of a minor," it is punishable by imprisonment for not more than 20 years. MCL 333.7401c(2)(b).

Generally, "presence" refers to "the state or fact of being in a particular place and time" or "close physical proximity coupled with awareness." Black's Law Dictionary (9th ed). Presence also refers to "immediate vicinity; proximity." *Random House Webster's College Dictionary* (1997). Here, defendant had a baby in the backseat of the car; the fact that the baby was not in the trunk did not alter the fact that the baby was plainly in the "immediate vicinity" of the chemicals and laboratory materials found in the trunk. In particular, the infant, chemicals, and the laboratory equipment were present in the car at the same time, and he was exposed to the noxious smell that permeated the car and his clothing. Therefore, there was sufficient evidence to support this conviction.

Defendant nevertheless argues that this Court should limit the term presence, as used in MCL 333.7401c(2)(b), to mean accessible to the child. But, even if we were to give the term presence such a contrived meaning, it would not avail defendant; the evidence showed that some items for methamphetamine production were recovered from the passenger compartment of the car. Thus, even under defendant's preferred interpretation, there was sufficient evidence to support his conviction.

Defendant also challenges the constitutionality of the MCL 333.7401c(2)(b) on the basis that it violates due process by punishing conduct which does not necessarily create a risk of harm. However, he did not include this claim of error in his question presented and, we decline to consider it. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Moreover, where a defendant's conduct falls within the "constitutional scope" of a statute, he cannot argue it is unconstitutional on the basis of a hypothetical situation. *People v Malone*, 287 Mich App 648, 658-659; 792 NW2d 7 (2010). Here, Temelko testified that there was a risk of the chemicals involved coming into contact with each other and creating dangerous fumes, a risk that would be even more dangerous because the chemicals were contained with a confined space. He also testified that many of the items were open in the trunk and that the whole car, including the baby, reeked of a distinctive chemical smell. Several of the officers also testified that the child appeared to be having breathing difficulties. Because defendant created the very risk he claims the statute requires, he cannot argue that it is unconstitutional because the statute might encompass conduct that did not create such a risk. *Id.*

Defendant next argues that the police officers unlawfully stopped him and, for that reason, the trial court should have suppressed the evidence found in the car. Defendant did not preserve this claim of error by moving for the suppression of the evidence before or during trial. *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). Therefore, we shall review this claim for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Evidence seized during an unlawful search is generally inadmissible. *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003). Defendant argues that the officers in his case unlawfully stopped the car and seized him.[1] An officer may make an investigatory stop when he or she has a "reasonable, articulable suspicion that criminal activity is afoot." *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). In this case, the officers did not make an investigatory stop. Rather, the officers lawfully stopped the car on the basis of traffic violations. *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996). Officers saw that the car had a cracked windshield and plates that were registered to a different car. On the basis of these violations, the officers had probable cause to stop the car. *Arizona v Johnson*, 555 US 323, 327; 129 S Ct 781; 172 L Ed 2d 694 (2009). Once stopped, "as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk," officers could lawfully order defendant to get out of the car. *Brendlin v California*, 551 US 249, 258; 127 S Ct 2400; 168 L Ed 2d 132 (2007).

The officers could legally arrest defendant after he got out of the car. As defendant got out, two officers noticed a small plastic baggie containing a white powder consistent with methamphetamine. The officers saw the suspected methamphetamine on the passenger side of the car where defendant had been sitting. In addition, before defendant got out, two officers saw defendant acting as though he was trying to hide something. An officer testified that he could see defendant "fumbling, putting something underneath his seat or making movements underneath his seat." On the basis of this evidence, we conclude that defendant had possession of the suspected methamphetamine. See *People v Green*, 228 Mich App 684, 696; 580 NW2d 444 (1998). And, because possession of methamphetamine is a crime, MCL 333.7403(2)(i), the officers could lawfully arrest defendant. *Virginia v Moore*, 553 US 164, 176; 128 S Ct 1598; 170 L Ed 2d 559 (2008). Insofar as defendant argues that it was necessary for the officers to field test the white powder before he could be arrested, his claim is without merit; the possession of "suspected" drugs is sufficient to establish probable cause to believe a felony has been committed. *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003).

[1] The prosecution challenges defendant's standing to challenge the constitutionality of the stop and search. However, because a passenger is "seized" during a stop, defendant has standing to challenge it. *Brendlin v California*, 551 US 249, 258; 127 S Ct 2400; 168 L Ed 2d 132 (2007). Defendant also challenges the legality of the search. However, as a passenger who has not asserted a possessory or property interest in the car, defendant lacked standing to challenge that search. *People v Earl*, 297 Mich App 104; 822 NW2d 271, 274 (2012).

Defendant also claims that he is entitled to a new trial because the prosecutor engaged in misconduct. Because defendant's trial lawyer did not object, we shall review the claim for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The test for prosecutorial misconduct is whether the prosecutor's acts or remarks denied defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). However, the prosecution may jeopardize defendant's right to a fair trial by interjecting issues broader than defendant's guilt or innocence. *Dobek*, 274 Mich App at 63-64.

Here, defendant claims that the prosecutor committed misconduct in the opening statement by stating that defendant was a "bad parent":

> When you're a parent your one job, above anything else in this world, is to keep your child safe. And that child means everything to you, and you, day after day, do everything you can within your personal level to make sure that nothing happens to that child. This is what a parent does.
>
> This man is not a parent. And the reason why I can say that, because on December 6th, 2010 he placed his eight month old son in the back of a vehicle surrounded with laboratory equipment and dangerous chemicals. He placed his son in the back of a mobile meth lab.

The prosecutor returned to this theme in closing:

> When I started off this trial this morning the first thing I said to you was what a parent needs to do to become a parent, and I think you'd agree with me at this point in time after all you've heard, the confessions made by the defendant, what Trooper Temelko told you from that stand, what this man did is unconscionable.

The prosecutor's remarks concerning a parent's proper role and the conclusion that defendant was not a true "parent" were better left unsaid. See *People v Allen*, 351 Mich 535, 544; 88 NW2d 433 (1958). Nevertheless, the argument was minimally related to the prosecutor's contention that the evidence would show and did show that defendant placed his child in harm's way—and in violation of the specific statute at issue—by placing him in a car with a mobile methamphetamine lab. And, taken in context, we cannot conclude that the remarks were so intemperate as to deprive defendant of a fair trial. *Bahoda*, 448 Mich at 267.

Finally, we conclude that whatever prejudice these remarks may have occasioned was cured by the trial court's instructions that the lawyers' arguments and questions were not evidence. Additionally, the jurors were instructed that they could "not let sympathy or prejudice influence [their] decision." These instructions cured any minimal prejudice. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant also argues that it was improper for the prosecutor to ask questions relating to the baby's presence in the car to establish that defendant was a "bad parent." After reviewing the questions, we conclude that the questions constituted a good-faith attempt to elicit relevant evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). The

prosecution's questions relating to the child's age, whether he was in the car, whether the police had contact with the child and noticed if he smelled of methamphetamine chemicals, and the location of the infant's belongings in the car all addressed whether there was a "minor" in the "presence" of methamphetamine chemicals and laboratory equipment. Questions concerning the child's name, gender, and the involvement of child protective services were also necessary to provide the jury with the "complete story" surrounding the stop and search. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). It would have been "perplexing" for the jury to learn that a wheezing infant had been found in a mobile methamphetamine laboratory without learning what became of the child. See *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001). Defendant also challenges questions relating to the temperature outside and how long the child sat in the vehicle after the stop. These questions were asked to provide a foundation for Temelko's explanation as to why he placed the baby into his own car (with the heat on) and why he had reason to notice that the child continued to smell even after being removed from the car. The questions were not improper. *Id.*

There was no prosecutorial misconduct warranting relief.

Defendant also claims that the trial court engaged in misconduct that warrants relief by asking improper questions. Because defendant's lawyer did not object to the questions, we shall review this claim of error for plain error. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). The trial court could "interrogate witnesses, whether called by itself or by a party." MRE 614(b). However, the trial court had to be careful to frame its questions so as not to "pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "[T]he trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (citations omitted).

Here, the trial court's questions involving issues such as the child's age and how he was "situated" in the vehicle bore directly on the issue of whether a minor was in the presence of methamphetamine chemicals and laboratory equipment. Similarly, questions about whether the items recovered were legal to own and their "significance" when found together were important for clarifying that the materials themselves are legal, but it is the possession of the items together that led Temelko to believe it was a mobile methamphetamine laboratory. Accordingly, these were proper questions. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Some of the trial court's other questions did not bear directly on the charges before the jury, but were germane to establishing the complete story. See *Sholl*, 453 Mich at 741-742. Similarly, questions relating to fumes and some of the dangers of methamphetamine were useful to explaining the police investigation techniques and the laboratory procedures followed by the expert to analyze the samples from the car.

We agree, however, that the trial court went too far when it asked about the nature of methamphetamine and the dangers that it presents to society as a whole. These questions may have given the jury the impression that it had a "civic duty" to convict persons like defendant in order to protect society. Though inappropriate, the questions did not directly suggest that the trial court had an opinion about defendant's guilt or otherwise suggest that the court was partial. See *Conyers*, 194 Mich App at 405. Moreover, the trial court instructed the jury that its questions were not evidence and that it was "not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case you must pay no attention to that opinion. You are the only judges of the facts and you should decide this case from the evidence." This instruction cured any prejudice caused by the improper questioning.

Defendant also asserts that he was entitled to a jury instruction on Temelko's "dual role" as both an expert and a fact witness. By approving the jury instructions, defendant waived review. *People v Kowalski*, 489 Mich 488, 503-505 n 28; 803 NW2d 200 (2011). Waiver extinguishes any error and there is no claim for this Court to review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nevertheless, the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

In *United States v Lopez-Medina*, 461 F3d 724, 743 (CA 6, 2006), the Sixth Circuit stated that, where a witness testified in two capacities, an instruction on a witness' "dual roles" is appropriate. The court was concerned that an expert acting in a dual role might have a bias in the case, and that a jury might not understand that it could reject the expert opinion. *Id.* at 744. In this case, unlike the facts in *Lopez-Medina*, the jury was properly instructed on how to evaluate expert testimony and particularly informed that it could reject Temelko's expert testimony. In addition, the court told the jury how to evaluate general witness testimony and to judge the testimony by officers using the same standards used to evaluate the testimony of other witnesses. Taken as a whole, the instructions alleviated the risks of "dual role" testimony that were identified in *Lopez-Medina*.

Lastly, defendant argues that he was denied the effective assistance of counsel. Where, as in this case, the trial court does not hold an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To establish the ineffective assistance of counsel, defendant bears the burden of demonstrating: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011) (citation omitted). The effective assistance of counsel is presumed, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999), and defendant bears a heavy burden of proving the challenged action was not sound trial strategy, *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

In this case, defendant claims that counsel was ineffective for (1) failing to move for the suppression of the evidence found in the search, (2) failing to object to prosecutorial misconduct, (3) failing to object to judicial impartiality, and (4) failing to request a "dual role" instruction relating to Temelko's testimony. As we have already explained, the search was legal and a motion to suppress would have been futile; therefore, it cannot support defendant's claim of ineffective assistance. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). With regard to the remaining claims, as we have already explained, the underlying conduct was either not objectionable or did not give rise to prejudice warranting a new trial. Accordingly, we conclude that defendant has not established that there is a reasonable probability that, but for his trial lawyer's acts or omissions, the outcome would have been different. *Meissner*, 294 Mich App at 459.

There were no errors warranting relief.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly