

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK KELLY RHODUS,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 262241

Monroe Circuit Court

LC No. 04-033719-FH

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of manufacturing methamphetamine (meth), MCL 333.7401(2)(b)(i), operating or maintaining a meth lab, MCL 333.7401c(2)(a), and possession of meth, MCL 333.7403(2)(b)(i). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 10 to 40 years' imprisonment on the manufacturing and operating or maintaining a meth lab convictions and 10 to 20 years' imprisonment on the possession conviction. We affirm defendant's convictions and sentences, but remand to the trial court for reconsideration of its order imposing on defendant the obligation to reimburse the county for his attorney fees.

Defendant's convictions arise from the discovery of a meth lab in the apartment he shared with his girlfriend, Megan McCartney. Defendant's father, Donald Lee Rhodus, had been staying with defendant and McCartney for an extended period of time and was also convicted on various offenses related to the discovery of the meth lab.

Defendant first contends that the prosecution presented insufficient evidence to support his convictions. Specifically, defendant contends that the prosecution cannot prove that he was involved in these crimes because the meth lab was discovered in the guestroom occupied by Donald Rhodus. Defendant also challenges the credibility of the testimony provided by McCartney and the officer in charge of the investigation. We disagree.

When reviewing a claim that insufficient evidence was presented to support a defendant's conviction, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences arising

from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

Accepting all of the evidence as true and properly admitted, the prosecution presented sufficient evidence to support defendant’s convictions for all three offenses. First, the prosecution presented sufficient evidence that defendant “possessed” meth. “A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive.” *Wolfe, supra* at 519-520. Moreover, possession does not require ownership, and “may be joint, with more than one person actually or constructively possessing a controlled substance.” *Id.* at 520. To establish constructive possession, the prosecution must show that defendant had the right to exercise control of the controlled substance and knew that it was present. *Id.*

Although no drugs were found on defendant’s person at the time of his arrest, the police found meth in several locations around the apartment’s guestroom. Further, although defendant’s name was not on the lease, he was the primary financial provider in the home. McCartney testified that defendant was allowed entry into the locked guestroom whenever he knocked and that defendant had provided meth for her to sell to the confidential informant on one occasion. Furthermore, the detective in charge of the investigation testified that defendant admitted upon his arrest that he was a “meth cook” and had assisted his father in constructing the meth lab. Contrary to defendant’s assertion, the fact that most of the evidence was found in the guestroom then occupied by his father did not negate his ability to possess the narcotics. Rather, the evidence was sufficient to establish joint possession of the meth and meth lab. At a minimum, the evidence supports a finding that defendant constructively possessed meth.

Defendant challenges the evidentiary support for his convictions on the basis of the questionable credibility of McCartney and the officer to whom he confessed. But the determination of witness credibility is the sole province of the jury. *Wolfe, supra* at 514-515. “[U]nless it can be said that directly contradictory testimony was so far impeached that it ‘was deprived of all probative value or that the jury could not believe it’ or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury’s determination.” *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (citations omitted). Such is not the situation here. Accordingly, we may not interfere with the jury’s determination.

Defendant also contends that the trial court improperly denied his motion for a bill of particulars. We review the trial court’s denial of defendant’s motion for a bill of particulars for an abuse of discretion. *People v Rosen*, 136 Mich App 745, 761; 358 NW2d 584 (1984). Even though defendant waived his right to a preliminary examination, the need for a bill of particulars was obviated in this case by the discovery provided to defendant and the information he already had. Defendant’s pretrial motions demonstrated that he was aware of the evidence to support a finding of guilt on all three charges. Defendant has failed to establish any prejudice from the lack of a bill of particulars. *Id.*

Defendant further contends that the trial court should have suppressed the statement he made to the officer in charge of the investigation. The trial court conducted a *Walker* hearing, *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), and determined that defendant voluntarily, knowingly, and intelligently waived his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We review a trial court’s findings of fact at a

suppression hearing for clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). However, we review the application of constitutional law and the trial court's ultimate ruling on the motion to suppress de novo. *Id.* at 629-630.

Whether a defendant's waiver is voluntary is dependant on the absence of police coercion. *Id.* at 635. In determining whether a defendant's waiver was knowing and intelligent, the court must determine the defendant's level of understanding without consideration of police conduct. A defendant need only understand the general tenor of his or her rights and not the ramifications of waiving those rights. *Id.* at 636-637. "Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." *Id.* at 629.

The detective who questioned defendant testified that defendant was asleep when the raid team entered, but that defendant was not questioned for a half hour. During that time, defendant expressed concern that he did not want his girlfriend, McCartney, to get arrested. On the way to the detective's patrol car, defendant made several "unsolicited comments" and attempted to avoid being charged in this case. Defendant indicated that he "was fifth or sixth level meth cook" and offered to educate the police on the methods of manufacturing the drug. The officer then read defendant his *Miranda* rights from a preprinted card. Defendant asked to see the card and read his rights silently to himself. Defendant subsequently admitted that he had built the meth lab in his apartment with his father but only made meth for personal consumption. Defendant also admitted that he had previously sold meth but only in Missouri. The detective indicated that he did not include these statements in the police report in order to protect defendant's confidentiality in the event he became an informant.

Defendant, on the other hand, testified that he was very tired during this interaction. He asserted that he had been sleeping for more than 30 hours at the time of his arrest. Defendant claimed that he had been awake for 31 full days and consumed large quantities of meth during the period before he finally fell asleep. Defendant further testified that he did not recall being read his *Miranda* rights or making any statement to the police. As noted in *Daoud, supra* at 629, the credibility of defendant's assertion was a matter for the trial court. The court determined from the conflicting testimony that defendant voluntarily, knowingly, and intelligently waived his right, and we have no reason to disturb that finding.

Defendant next contends that the trial court improperly allowed the prosecutor to elicit expert testimony from a lay witness and that the prosecutor engaged in misconduct by doing so. We disagree. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, we review the issue de novo. *Id.* We review claims of prosecutorial misconduct on a case-by-case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Over defendant's continuing objections, the trial court allowed the prosecutor to elicit testimony from a police officer that certain untested substances taken from the meth lab were identical in appearance to other substances that tested positive for meth, cocaine, and pseudoephedrine. It is undisputed that the officer was not qualified as an expert in this case. Therefore, the admissibility of the challenged testimony depends on MRE 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is 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.

In *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod 433 Mich 862 (1989), this Court found that a police officer may provide lay opinion testimony regarding topics within his or her personal knowledge as long as it is not overly scientific or technical. The *Oliver* Court continued this Court's liberal application of MRE 701 "in order to help develop a clearer understanding of facts for the trier of facts." *Id.* at 50. This Court later reaffirmed *Oliver* in *People v Daniel*, 207 Mich App 478; 523 NW2d 830 (1994). In *Daniel*, this Court admitted the lay opinion testimony of a police officer that had not been qualified as an expert in drug enforcement. *Id.* at 57. That officer was allowed to testify that he believed the defendant to be involved in narcotics trafficking because he observed motor vehicles park in front of the defendant's apartment on four separate occasions. The defendant ran to each vehicle as it stopped and "lean[ed] inside the window for ten to fifteen seconds." *Id.* This Court found that the officer's opinion was rationally based on his perception of events and was helpful to the jury in making their determination. *Id.*

At the time of the current search, the testifying officer had only been involved with the narcotics unit for six weeks and had never been involved with the raid of a meth lab. The officer, however, had five years prior experience as a police officer, and by the time of defendant's trial, he had additional experience with the narcotics unit. While this officer was not as experienced as the officers in *Oliver* and *Daniel* at the time of the raid, the detective's testimony regarding the appearance of the discovered substances was "rationally based on [his] perception." MRE 701. The testifying officer was in charge of labeling the various substances, collecting samples, and transporting those samples to the forensics lab. Given his contact with the various substances, the detective could form reasonable opinions that certain substances looked similar to others, including those substances that tested positive for controlled substances. The officer could make this comparison without any specialized training. This testimony was helpful to the jury as it provided a "clear understanding" regarding why the officers found the large number of various substances to be incriminating. Moreover, any potential error in the admission of this testimony did not affect the outcome of this case given that the prosecution later presented an expert witness that provided identical testimony.

We also disagree with defendant's assertion that he received ineffective assistance of counsel. Defendant first contends that the trial court improperly denied his motion for a *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), before denying his motion for a new trial on this ground. Defendant then challenges defense counsel's failure to follow up on plea negotiations with the prosecution and failure to seek the suppression of the evidence found in his apartment based on the inadequacy of the search warrant.

We review a trial court's determination regarding a motion for new trial for an abuse of discretion. *People v Cress (After Remand)*, 468 Mich 678, 691; 664 NW2d 174 (2003). Absent a *Ginther* hearing, our "review of the relevant facts is limited to mistakes apparent on the record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *Id.* at 140; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To establish ineffective

assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *Id.* at 599-600.

Absent a *Ginther* hearing, there is very little record information to analyze defendant's challenge that he was unable to enter into a plea agreement with the prosecution because his replacement counsel failed to follow up on an agreement being negotiated by his originally appointed counsel. The only mention that any plea negotiation had possibly occurred comes from defendant. Defendant cannot show that the prosecution was willing to enter into a plea agreement with him or that the prosecution gave defendant false information regarding his possible sentences. We note that the prosecution's "enhancement" of defendant's potential sentences after the alleged plea arrangement fell through was not inexplicable. With no plea entered, the prosecution was free to charge defendant as a third, rather than as a second habitual offender. The prosecution was also free to seek the amendment of the information to ensure that the charges coincided with the evidence. Defendant was ultimately tried and convicted. Accordingly, defendant has not established he was prejudiced by counsel's actions and that we need not remand for a *Ginther* hearing.

Moreover, defense counsel had no grounds to seek the suppression of the evidence based on a purported inadequacy in the search warrant because the warrant was supported by probable cause. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). First, investigating officers witnessed McCartney twice leave the apartment to sell meth and cocaine to the confidential informant. Those buys standing alone amount to probable cause to issue a warrant. See *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995) (in which this Court found two controlled buys sufficient to support a search warrant for a residence). Second, the confidential informant told officers that defendant and his father were manufacturing meth in the apartment and that he could arrange a sale through McCartney. The officers verified the fact that the informant could arrange a sale through McCartney when she actually met the informant and sold him meth and cocaine. Accordingly, the officers had reason to believe that the informant was also correct in asserting that defendant and his father were manufacturing meth in the apartment. See *id.* Because the two controlled buys formed sufficient probable cause to issue a search warrant and were included in the affidavit, defendant's contention that the officer omitted pertinent information from the search warrant affidavit is without merit. Moreover, contrary to defendant's assertion on appeal, there is no indication in the record that the testifying officer left the scene in the middle of the search to belatedly secure the search warrant.

Defendant further challenges defense counsel's failure to object when the prosecutor elicited information from the search warrant return through the testimony of a police officer. Although this evidence might have been cumulative, it was relatively minor compared to the bulk of the testimony. Accordingly, the evidence was not overly prejudicial and an objection by defense counsel, even if sustained, would not have effected the outcome of the trial. As neither potential error would require reversal, remand for a *Ginther* hearing is unnecessary.

Next, defendant asserts that the prosecutor improperly denigrated defense counsel, misstated the standard of proving guilt beyond a reasonable doubt, gave a faulty example of circumstantial evidence, and allegedly denigrated defense counsel. We agree that the prosecutor improperly criticized defense counsel in front of the jury for "wasting time" by raising objections to the evidence; however, the trial court sustained defendant's objection and instructed the jury

to disregard the prosecutor's comment. Moreover, the trial court cured any potential error by instructing the jury at the close of trial that the comments and questions of the attorneys are not evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

Furthermore, while the prosecutor gave a rather inartful explanation of the reasonable doubt standard during voir dire and opening statement, the trial court later gave the jury the standard jury instruction in this regard. See CJI2d 3.2. Finally, we note that appellate counsel is grasping at straws by challenging the prosecutor's example of circumstantial evidence. The example was identical to that provided in the standard jury instructions. See CJI2d 4.3(2).

Defendant raises several challenges to his sentences for these convictions. Defendant contends that the trial court improperly based his scores for offense variable (OV) 13, OV 14, and OV 15 on facts not found by a jury in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). But our Supreme Court has already determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant also contends that the sentencing court erred in the scoring of the above-challenged variables. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We must uphold the sentencing court's decision where there is "any evidence" to support that score. *Id.*

Defendant challenges the sentencing court's assessment of ten points in relation to OV 13, arguing there was no evidence he was involved in "an organized criminal group." The term "organized criminal group" is not defined in the statute; however, the Legislature provided the following guidance:

The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense. [MCL 777.43(2)(b).]

The evidence supports the sentencing court's score in this regard. When arrested, defendant admitted that he had constructed the meth lab with his father and to manufacturing meth. McCartney testified that the trio went shopping as many as four times each week to purchase the supplies to manufacture meth. Also according to McCartney, defendant and his father manufactured the meth in the guestroom while she delivered the meth to purchasers. Although the "organization" was small and relatively unsophisticated, the trio did join together to manufacture and sell meth.

Defendant further contends that the sentencing court erroneously assessed points for OV 14 because the evidence tends to establish that Donald Rhodus, rather than defendant, was the leader in this situation. A court may score ten points for a defendant's leadership role in a multiple offender situation. MCL 777.44(1)(a). Because three individuals were charged in this situation, the court could find that more than one offender was a leader. MCL 777.44(2)(b). McCartney testified that defendant had access to the guestroom after Donald Rhodus installed the locking door handle. She also indicated that defendant and his father spent a lot of time in

that room. It is undisputed that the meth lab was constructed in the guestroom. Moreover, defendant admitted to police that he was a “fifth or sixth level meth cook.” Accordingly, the evidence supports a finding that both defendant and his father were leaders in this situation.

Finally, defendant challenges the sentencing court’s scoring of OV 15 arguing that there is no evidence that he engaged in drug trafficking. As defined in the statute, “trafficking” is “the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution.” MCL 777.45(2)(c). We also agree with the sentencing court’s scoring of this variable. While there is no evidence in this case that defendant ever sold drugs directly to a purchaser, defendant provided meth to McCartney to deliver to others. Because defendant supplied drugs to one individual who further distributed those drugs, defendant’s conduct amounted to “trafficking” as defined in the statute.

In his pro per brief, defendant contends that he was entitled to shorter sentences than Donald Rhodus because he was only an aider and abettor to the charged offenses. But the prosecution presented sufficient evidence to convict defendant as a principal in this case. Moreover, it has long been established that an aider and abettor may be sentenced to the same term as the principal. *People v Shepherd*, 63 Mich App 316, 319; 234 NW2d 502 (1975). Furthermore, contrary to defendant’s assertion, the prosecution properly charged defendant as a third habitual offender. A defendant may be sentenced as a third habitual offender if he or she has been previously convicted of two or more felonies or attempts to commit felonies. MCL 769.11. The statute applies to all felonies unless specifically exempted. *People v Bewersdorf*, 438 Mich 55, 69; 475 NW2d 231 (1991). No exception applies to this case because defendant was not convicted of a “major controlled substance” offense. MCL 769.11(1)(c); MCL 761.2.

Defendant next contends that the sentencing court improperly exceeded the minimum sentencing guidelines range for his conviction operating or maintaining a meth lab. Defendant argues the court erroneously sentenced him for a violation of MCL 333.7401c(2)(f), a Class B offense, rather than MCL 333.7401c(2)(a), a Class D offense. Defendant also contends that his maximum sentence was greater than that allowed under MCL 769.11(1)(a). We disagree.

The penalty for violating MCL 333.7401c(1), operating or maintaining a drug lab, is set forth in MCL 333.7401c(2)(a). That subsection states: “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.” Subsection f, MCL 333.7401c(2)(f), provides: “If the violation involves or is intended to involve the manufacture of a substance described in section 7214(c)(ii), by imprisonment for not more than 20 years or a fine of not more than \$25,000.00, or both.” Section 7214(c)(ii), MCL 333.7241c(ii), includes “[a]ny substance which contains any quantity of methamphetamine, including its salts, stereoisomers, and salts of stereoisomers.” The trial court permitted the prosecutor to amend the information before trial to reflect that defendant’s punishment for this charge, if convicted, would be the punishment outlined in subsection (2)(f), a Class B controlled substance offense. MCL 777.13m. Thus, because defendant was charged and convicted of operating or maintaining a methamphetamine lab, the appropriate sentence guidelines crime class is B. As a third habitual offender, defendant’s minimum sentencing guidelines range was 78 to 195 months’ imprisonment, MCL 777.63, and defendant’s maximum term of imprisonment was 40 years, MCL 769.11(1)(a). Because defendant’s sentence of 10 to 40 years’ imprisonment clearly falls within the appropriate guidelines range, we must affirm. MCL 769.34(10).

We reject defendant's contention that the sentencing court improperly departed upward from the minimum guidelines range on his sentence for possession of meth. Violation of MCL 333.7403(2)(b)(i) is a Class D felony under MCL 777.13m. The sentence the trial court imposed was concurrent with and equal to or less than a lawful sentence imposed that was within the guidelines recommended range for a higher class felony. Error warranting reversal did not occur. MCL 771.14(2)(e); *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005).

Defendant also raises several challenges to the accuracy of his PSIR for the first time on appeal. Defendant contends that he could have challenged those inaccuracies in a timely fashion had he been given adequate time to review the PSIR before sentencing and had defense counsel reviewed the information. We agree that defendant lost the opportunity to attack the accuracy of the challenged information on appeal by not objecting at the sentencing hearing. MCR 6.429(C); MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Moreover, defendant is not prejudiced by his inability to challenge the accuracy of the PSIR. The accuracy of the dates of his prior convictions, the unchecked box regarding defendant's bond status that was otherwise accurately reported, the misspelling of defendant's daughter's name, and the fact that he received a certification from a company that constructs manufactured homes, would not affect defendant's sentences. Furthermore, defendant's gang involvement could not be corrected in this case. Defendant already denied any prior gang involvement and the information that he had previously been involved in two different gangs was included in a PSIR produced in 1999.

Defendant's final challenge is that the sentencing court improperly entered an order requiring him to reimburse the county for his attorney fees without first determining his financial ability to do so. This Court in *People v Nowicki*, 213 Mich App 383, 388; 539 NW2d 590 (1995), held that a defendant may be required to reimburse the county for the cost of his court-appointed attorney. In *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), the defendant complained that the trial court failed to assess his ability to pay his attorney fees before entering an order imposing those costs. *Id.* at 252. This Court opined:

The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's foreseeable ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id.* at 254-255 (citations omitted).]

Because defendant did not object to the imposition of attorney fees, the sentencing court was not required to make formal findings of fact regarding defendant's financial situation. However, the sentencing court failed to indicate whether it had even considered defendant's financial ability to pay. The court failed to mention the employment and financial sections of defendant's presentence investigation report and made no mention of defendant's potential future ability to pay. Accordingly, the sentencing court plainly erred by failing to address even the most minimal considerations required by *Dunbar, supra*.

But, this Court noted in *Dunbar* that although a defendant may not be forced to reimburse the county for his attorney fees while he remains indigent, a reimbursement order may still be entered and stayed during indigency. "[I]n most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment." *Id.* at 256. In this case, defendant was required to immediately commence repayment and was assessed a late fee on June 9, 2005, for failure to repay these attorney fees. Accordingly, we must vacate the order of reimbursement and remand to the sentencing court for reconsideration in light of defendant's ability to reimburse the county for his legal fees.

In his pro per brief, defendant also challenges the prosecution's failure to comply with the trial court's order requiring discovery in this case. Defendant never objected to the prosecution's alleged noncompliance in the trial court. Moreover, there is no indication in the record that the prosecution failed to produce evidence or prohibited defense counsel from reviewing any of the requested discovery items.

Defendant also contends that the trial court erred by denying his request to subpoena the landlord of the apartment and the confidential informant. Defendant did request to subpoena the landlord to establish that the apartment was leased to McCartney. While the trial court indicated that this testimony would be unnecessary given McCartney's admission that she alone was named on the lease, the court did not deny defendant's motion to subpoena that witness. Moreover, defendant did subpoena a witness named "Gerald Henderson" who could possibly be the confidential informant referred to as "Jerry." The trial court allowed defendant to subpoena that witness even though it failed to inform the prosecution of its intent to do so. Because the trial court did not deny defendant's request, defendant's challenge completely lacks merit.

In his pro per brief, defendant argues that the prosecution should have charged him with attempt to manufacture meth under MCL 750.92, rather than the completed offense. Defendant further contends that the trial court should have sua sponte given the attempt instruction to the jury and that defense counsel was ineffective for failing to request that instruction. We review unpreserved, nonconstitutional challenges for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To the extent that defendant challenges defense counsel's performance in this regard, our review "is limited to mistakes apparent on the record." *Riley, supra* at 139. "We review a prosecutor's charging determination under an 'abuse of power' standard to determine if the prosecutor acted contrary to the Constitution or law." *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005).

Attempt is a separate substantive offense from the completed offense. *People v Johnson*, 195 Mich App 571, 575; 491 NW2d 622 (1992). It is a cognate lesser offense, rather than a necessarily included lesser offense. *Id.* at 574, citing *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982). A trial court may not instruct the jury regarding uncharged, cognate lesser

offenses. *People v Cornell*, 466 Mich 335, 354-355; 646 NW2d 127 (2002). Therefore, the trial court could not sua sponte give an instruction regarding attempt to manufacture meth, and the court would be required to deny such a request made by defense counsel. Furthermore, we find the prosecutor did not abuse his charging discretion in this case. The prosecutor has “broad charging discretion” and may “bring any charges supported by the evidence.” *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Here, the prosecutor presented sufficient evidence to establish that defendant had manufactured meth, rather than just attempted to do so. Accordingly, the prosecutor was not required to charge defendant with attempt.

Finally, defendant contends that the trial court repeatedly denied his request to conduct an evidentiary hearing regarding the admissibility of the evidence against him and to determine what evidence the prosecution possessed against him. We first note that defendant waived his right to a preliminary examination and, therefore, waived his right to a hearing at which the prosecution would be required to present sufficient evidence to establish probable cause to believe the charged crimes occurred and that defendant committed them. Furthermore, review of the evidence was made available to defendant through discovery. Additionally, the trial court conducted a *Walker* hearing to consider defendant’s motion to suppress his statement to the police. The trial court also considered defendant’s motion in limine to exclude certain physical evidence at the final pretrial conference. Contrary to defendant’s assertion on appeal, there is no indication in the record that the trial court repeatedly postponed, and ultimately failed to conduct, an evidentiary hearing related to any other matter.

We affirm defendant’s convictions and sentences, but we vacate the trial court’s order requiring defendant to reimburse the county for his legal fees and remand to the trial court for reconsideration of that issue consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot