

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 26, 2013

v

DARREN LEE VINCENT,

Defendant-Appellant.

No. 312274
Cheboygan Circuit Court
LC No. 11-004437-FC

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

PER CURIAM.

Defendant was convicted by a jury of operating or maintaining a methamphetamine laboratory in the presence of a minor, MCL 333.7401c(2)(b); operating or maintaining a methamphetamine laboratory involving hazardous waste, MCL 333.7401c(2)(c); operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f); possession of methamphetamine, MCL 333.7403(2)(b)(i); and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced to concurrent prison terms of 4 to 20 years for each of the convictions for operating or maintaining a methamphetamine laboratory, and 2 to 10 years for possession, and one year in jail for maintaining a drug house. Defendant appeals by right. We affirm.

This matter arose when police officers accompanied a Department of Human Services (DHS) employee to a residence to investigate a report that a six-year-old child had consumed xylene¹ at the residence and a four-year-old child might have also been present. The residence was surrounded by a mowed lawn, and beyond the lawn was a “field” with tall grass. There was no answer at the residence, but a pile of boxes was visible at the boundary between the lawn and the field and extending well into the tall grass area, described variously as between 20 to 60 feet away from the residence. At least one of the boxes was open, and inside appeared to be bottles, some of which had “off-gas mechanisms.” The officers recognized that the items they saw could be used for methamphetamine production, so one officer secured the residence while the other obtained a search warrant. Neighbors stated that children were usually present at the residence during weekdays, and there was evidence inside the residence that children lived there.

¹ Xylene is a toxic aromatic hydrocarbon liquid that is frequently used as a solvent or as a cleaning agent, but it can also be used in the production of methamphetamine.

According to pseudoephedrine purchase logs, defendant had recently purchased a substantial amount of pseudoephedrine, a drug that can be used as an ingredient in manufacturing methamphetamine.

A number of other components, ingredients, and apparent byproducts for the manufacture of methamphetamine were discovered around the residence, some of which tested positive for methamphetamine. Many of the items constituted hazardous waste. The interior of the residence, while “in complete disarray,” contained only one item associated with drug use: a glass pipe of the sort described as suitable for smoking marijuana. The pipe was not tested. There was no evidence that methamphetamine had been produced inside the residence. However, there was no way to test one way or the other whether methamphetamine had been produced inside or outside the residence. Officers indicated that the evidence was consistent with a “one-pot method” of producing methamphetamine, the advantage of which was mobility. They observed that the methamphetamine could have been produced anywhere, although it would be unusual and unlikely to produce it in a remote location and then leave it in the yard. Furthermore, the detritus left over from methamphetamine production would typically be dumped or placed in the trash outside.

Defendant first argues that the search warrant was issued on the basis of information obtained through an illegal search; specifically, that the officers searched the pile of boxes in violation of the Fourth Amendment because the boxes were within the curtilage of his residence. We disagree. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). “We review for clear error a trial court’s findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress.” *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). However, an appellate court reviews de novo whether an area is within the curtilage of the home. See *United States v Johnson*, 256 F3d 895, 912 (CA 9, 2001).

The Fourth Amendment applies when a person has a reasonable expectation of privacy in the searched area. See *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967). That area extends to the curtilage of a home but not “open fields.” *United States v Dunn*, 480 US 294, 300; 107 S Ct 1134; 94 L Ed 2d 326 (1987); *Oliver v United States*, 466 US 170, 183-184; 104 S Ct 1735; 80 L Ed 2d 214 (1984). Whether an area is within the curtilage depends on its proximity to the home, whether the area is enclosed, the usage of the area, and the extent to which the resident has undertaken to shield the area from casual observation. *Dunn*, 480 US at 301. Any observation made by an officer while standing in an open field does not constitute an illegal search. *Id.* at 304-305.

The boxes here were visible from the porch but located in an unprotected and unenclosed area accessible to the public and mostly outside the mowed lawn. The boxes were clearly outside the curtilage of the home, and defendant therefore had no reasonable expectation of privacy in them. Because the officers did not conduct a Fourth Amendment search when viewing the contents of the open boxes, the search warrant was not issued on the basis of an illegal search.

Defendant next argues that his three sentences for crimes based on MCL 333.7401c(2), as well as his sentence for maintaining a drug house, MCL 333.7405(1)(d), violated the prohibition against double jeopardy. We disagree.

The federal and state constitutions prohibit a person from being placed in double jeopardy, which includes multiple punishments for the same offense. *People v Franklin*, 298 Mich App 539, 546; 828 NW2d 61 (2012). To determine whether multiple punishments are barred by the constitutional prohibition against double jeopardy, courts should apply the test set forth in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007). Under *Blockburger*, multiple punishments for the same criminal act violate the prohibition against double jeopardy unless each statute requires proof of a fact that the other statute does not. *Id.* at 305. In *Smith*, our Supreme Court overruled a Michigan-specific test for double jeopardy, as well as “preceding decisions that are predicated on the same error of law . . .” *Id.* at 315-316.

Convictions of operating or maintaining a laboratory for the manufacture of a controlled substance within 500 feet of a residence, MCL 333.7401c(2)(d), and operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), do not violate the prohibition against double jeopardy. *People v Routley*, 485 Mich 1075; 777 NW2d 160 (2010). We note that MCL 333.7401c(1) does not specifically refer to methamphetamine. Our Supreme Court explained that MCL 333.7401c(2)(d) prohibits a controlled substance laboratory within 500 feet of a residence, whereas MCL 333.7401c(2)(f) prohibits a laboratory involved in the manufacture of methamphetamine in particular. *Routley*, 485 Mich at 1075-1076. Thus, “each offense requires proof that the other does not.” *Id.* Similarly, MCL 333.7401c(2)(b) requires the unique element that “the violation is committed in the presence of a minor,” and MCL 333.7401c(2)(c) requires the unique element that the violation involves hazardous waste.² Furthermore, the prohibition against keeping a drug house punishes keeping, selling, or using controlled substances at a location, MCL 333.7405(1)(d), as distinct from manufacturing controlled substances. Each statute requires proof of a fact that all of the other statutes do not, so no violation of the prohibition against double jeopardy occurred.

Defendant next argues that he received ineffective assistance of counsel because counsel did not file the motion to suppress before the motion deadline. We disagree. Irrespective of whether counsel in fact missed a deadline, the court actually heard and decided the motion. Any alleged deficiency in performance by a trial attorney must, inter alia, have some likely effect on the outcome of the proceedings. See *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688

² Some older case law has suggested that MCL 333.7401c(2)(a) might conflict with the remaining subparts of MCL 333.7401c(2) under a double jeopardy analysis. See *People v Meshell*, 265 Mich App 616, 630-634; 696 NW2d 754 (2005). However, *Meshell* was decided under an older version of the statute, see *Routley*, 485 Mich at 1075, and relied in part on the “Michigan legislative-intent test”, *Meshell*, 265 Mich App at 631, which is no longer good law pursuant to *Smith*, 478 Mich at 315. Furthermore, (2)(a) is a general provision explicitly set apart from (2)(b) to (f), and defendant was not convicted of violating that subpart.

(2002). Clearly, if counsel missed a deadline, defendant did not suffer as a result. Defendant contends that the harm was that the jury heard inadmissible evidence, but because the trial court correctly denied the motion, nothing the jury heard was inadmissible. We are unable to identify any possible effect counsel's alleged deficiency could have had on the outcome, so we cannot conclude that defendant received ineffective assistance of counsel.

In his Standard 4 brief, defendant argues that the prosecution did not submit sufficient evidence to sustain his convictions. We disagree. A claim of insufficient evidence is reviewed *de novo*. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “[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, amended on other grounds 441 Mich 1201 (1992). Even circumstantial evidence must be viewed in the light most favorable to the prosecution and the trier of fact's inferences must be deferred to. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution need not prove a negative by explicitly refuting every possible factual scenario under which a defendant could be innocent. *Id.* at 424-425.

Defendant does not dispute the presence of methamphetamine, methamphetamine-related hazardous waste, or minors at his residence. There is no doubt that he owned or possessed the residence. Rather, he argues that there was no evidence that he was personally involved in any of the methamphetamine manufacture; someone else could have simply deposited the items around his residence. The identity of the defendant as the perpetrator of the crime is a fact that must be proven beyond a reasonable doubt. See *People v Davis*, 241 Mich App 697, 699-700; 617 NW2d 381 (2000). He also argues that there was no evidence any manufacturing took place inside his residence or that any children were present at the time the methamphetamine was manufactured. We agree that there is no *direct* evidence. Defendant did not admit to any such facts, and neither defendant nor any children were personally observed by the police officers who investigated the scene during that investigation. However, we conclude that the circumstantial evidence was sufficient for the jury to find all elements of the convicted offenses proven beyond a reasonable doubt.

Although there was no direct evidence that any methamphetamine was manufactured inside the residence, MCL 333.7401c(1)(a) merely requires ownership or possession of an *area* that a charged defendant knows or has reason to know is to be used as a location to manufacture methamphetamine. The yard of the residence would certainly suffice. Although there was evidence that the specific manufacturing process found was portable and could be moved elsewhere, it would be unusual and unlikely to dump it in a yard; furthermore, all of the components were discovered in defendant's yard or its vicinity, and there was evidence that the manufacturing process had been incomplete when it was terminated. Furthermore, the components were not in a portable state when discovered. Consequently, there was substantial circumstantial evidence from which the jury could have found beyond a reasonable doubt that methamphetamine was manufactured either in the residence or in the residence's yard, both of which defendant either owned or possessed. The substantial quantity of pseudoephedrine defendant purchased the previous day, and the empty pseudoephedrine packages found at the residence, suggests that defendant was either personally involved in the manufacture of the

methamphetamine or at least had reason to be aware of it. Consequently, the evidence was sufficient to establish the baseline requirements of MCL 333.7401c(1)(a).

Regarding the additional element of the presence of a minor under MCL 333.7401c(2)(b), there was evidence that children were living in the house generally. Furthermore, there was evidence that children were usually there during weekdays, and the methamphetamine would have been manufactured on a weekday. Although there are numerous legitimate uses for xylene, the evidence indicated that none of those legitimate uses presented themselves at the premises. There was no evidence that the alleged consumption of xylene by a child occurred during the charged manufacture of methamphetamine, but any such consumption suggests little care was taken to isolate any children from such manufacture. There was no child present when officers searched the premises, but the person or persons who manufactured the methamphetamine were also not present. It is of course *possible* that for some reason the children were absent at the time the methamphetamine was manufactured, contrary to their usual schedule according to neighbors. However, we find the evidence, when viewed in the light most favorable to the prosecution, sufficient for the jury to infer beyond a reasonable doubt that children were present when the methamphetamine was manufactured.

Regarding the additional element of producing hazardous waste under MCL 333.7401c(2)(c), “hazardous waste” is defined by MCL 324.11103(3), pursuant to MCL 333.7401c(7)(a). It includes materials that, inter alia, “may pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed.” There was evidence that still-reactive lithium³ was found, as well as some “sludge”, that was identified as a substance that could not even be tested in a laboratory because attempting to do so would damage equipment. The evidence was more than sufficient to find beyond a reasonable doubt that hazardous waste was generated by the methamphetamine production.

Regarding the additional element of producing methamphetamine specifically under MCL 333.7401(c)(2)(f), as discussed, there was no dispute that methamphetamine was in fact the substance being manufactured. Defendant’s various convictions under MCL 333.7401c were supported by sufficient evidence.

“[T]he elements of possession under MCL 333.7403(1) are limited to knowing or intentional possession of a controlled substance.” *People v Hartuniewicz*, 294 Mich App 237, 245; 816 NW2d 442 (2011). The prosecution must show that the defendant had “dominion or right of control over the drug with knowledge of its presence and character.” *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (citations and quotation marks omitted). The defendant may have either actual or constructive possession over the drug, and possession may be joint as well. *Wolfe*, 440 Mich at 520. When the evidence shows that the defendant had control over the premises where the drugs were found, the defendant may have constructive possession over the drugs. See *id.* at 520-522; see also *People v Nunez*, 242 Mich

³ Lithium is a corrosive and highly reactive alkali metal that is itself flammable and produces flammable hydrogen gas and caustic lithium hydroxide when exposed to moisture.

App 610, 615-616; 619 NW2d 550 (2000). Further, when the evidence shows that the drugs were seized in a state of production, the defendant may have knowledge of the character of the drugs. See *People v Meshell*, 265 Mich App 616, 623; 696 NW2d 754 (2005). Defendant's provision of a major ingredient in the production of methamphetamine, and the presence of all the components and ingredients at his residence, show knowledge and at least constructive possession. That the possession may have been joint with his girlfriend, who also lived at the residence, does not preclude defendant's possession. We find the evidence sufficient to support a finding beyond a reasonable doubt that defendant intentionally or knowingly possessed methamphetamine.

Under MCL 333.7405(1)(d), a person “[s]hall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.” Defendant correctly points out that maintaining a drug house requires more than a single, isolated instance of using, keeping, or selling controlled substances. *People v Thompson*, 477 Mich 146, 152-158; 730 NW2d 708 (2007). However, defendant misinterprets the statute as calling for him personally to have used, kept, or sold the controlled substances. The plain language of the statute requires that the premises be put to such use, and that the charged defendant keep or maintain the premises for such use, but not that the charged defendant must have engaged in any such use. Furthermore, while the premises must be used for controlled substance purposes, the plain language of the statute does not necessarily require the use, keeping, or sale to have occurred inside the structure. The structure could, for example, be “frequented by persons using controlled substances . . . for the purpose of using controlled substances” as a restroom facility for the convenience of using controlled substances immediately outside.

In any event, defendant appears to misunderstand the significance of circumstantial evidence. As discussed, the elements of an offense may be established by circumstantial evidence and inferences therefrom. The only limitation is that there may not be “a total want of evidence upon any essential point.” *People v Howard*, 50 Mich 239, 242-243; 15 NW 101 (1883). No such complete dearth of evidence was present here. The house was in the kind of disarray characteristic of long-standing drug use. There was evidence that multiple “cooks” had

been involved in the methamphetamine manufacture. There was evidence that on a *prior* occasion, a child had consumed one of the ingredients involved in manufacturing methamphetamine. Given that the remaining methamphetamine in the equipment was apparently being disposed of, we would agree that there is no evidence of methamphetamine being “kept,” and likewise there is no indication that methamphetamine was sold from the residence. However, the evidence is sufficient for the jury to infer beyond a reasonable doubt that the residence was frequented by users of controlled substances for the purpose of using those controlled substances.

Affirmed.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Amy Ronayne Krause