

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BART SHERIDAN PETRIKEN,

Defendant-Appellant.

---

UNPUBLISHED

June 23, 2011

No. 296520

Branch Circuit Court

LC No. 09-059268-FH

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Defendant Bart Sheridan Petriken appeals as of right his jury convictions for owning or possessing any chemical or laboratory equipment that he or she knows or has reason to know is to be used to manufacture a controlled substance where that substance is methamphetamine, see MCL 333.7401c(1)(b) and MCL 333.7401c(2)(f), and owning or possessing any chemical or laboratory equipment to manufacture a controlled substance involving the unlawful generation, treatment, storage, or treatment of hazardous waste, see MCL 333.7401c(1)(b) and MCL 333.7401c(2)(c). The trial court sentenced defendant to serve 84 to 240 months in prison for each count with 292 days of credit. Because the prosecution concedes that defendant could not be convicted of both possessing laboratory equipment for the manufacture of methamphetamine and possessing laboratory equipment involving the generation of hazardous waste, we vacate defendant's conviction for possessing laboratory equipment for the manufacture of methamphetamine. However, because there were no errors warranting further relief, we affirm in all other respects.

Police officers went to a disused factory and placed the parking lot under surveillance after receiving a call regarding a two-liter bottle that was discovered concealed in the parking lot. The caller, who had experience with law enforcement, suspected that the bottle was actively being used to manufacture methamphetamine. The officers observed defendant retrieve the bottle from the parking lot and arrested him after a traffic stop. After being advised of his rights, defendant agreed to speak with the officers and told them that he was the person who "batched it up" and that he had returned to the lot to retrieve the bottle. He explained that the first reaction had been unsuccessful, so he left the bottle in the lot for a second reaction. The officers searched defendant's car and found all the necessary components and tools for manufacturing methamphetamine.

We shall first address defendant’s argument that his convictions of both possessing laboratory equipment to manufacture methamphetamine and possessing laboratory equipment involving the unlawful generation of hazardous waste, see MCL 333.7401c(1)(b), MCL 333.7401c(2)(f), and MCL 333.7401c(2)(c), violate the constitutional guarantee against double jeopardy. This Court reviews de novo a double jeopardy challenge as a question of constitutional law. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

“The Double Jeopardy Clause protects against multiple punishments for the same offense in order to protect the defendant from being sentenced to more punishment than the Legislature intended.” *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Where our Legislature has not clearly stated its intention to impose multiple punishments, this Court applies the same elements test stated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), to determine whether multiple punishments for the same conduct are permitted. *Smith*, 478 Mich 316. The test “inquires whether each offense contains an element not contained in the other; if not, they are the “same offense” and double jeopardy bars additional punishment and successive prosecution.” *People v Ford*, 262 Mich App 443, 448; 687 NW2d 119 (2004), quoting *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). A presumption that the Legislature intends multiple punishments arises where two statutes cover the same conduct, but each requires proof of an element the other does not and the opposite presumption arises when the elements of one offense are encompassed in the elements of the other. *Id.*

This Court has held that, under the double jeopardy clauses of our constitution and the federal constitution, a defendant can only be convicted and sentenced under one subdivision of MCL 333.7401c(2). See *Meshell*, 265 Mich App at 633. Here, the prosecutor concedes that defendant could not properly be convicted of both counts under *Meshell*. Given the prosecutor’s concession, we decline to address whether *Meshell* properly applies here.<sup>1</sup> Accordingly, we shall

---

<sup>1</sup> We note that, after the decision in *Meshell*, our Supreme Court disavowed the use of the broad legislative intent test employed—in part—by the Court in *Meshell*. See *Smith*, 478 Mich at 314-316. Rather, in the absence of explicit legislative guidance, the proper test is the same elements test stated in *Blockburger*. *Id.* at 316. And, although the Court in *Meshell* concluded that the offenses at issue there constituted the same offense under the *Blockburger* test, the defendant in *Meshell* was charged with a base offense under MCL 333.7401c(2)(a) and one aggravating circumstance under MCL 333.7401c(2)(b) to (f)—he was not charged with having violated two or more separate provisions under MCL 333.7401c(2)(b) to (f). In order to prove a violation of MCL 333.7401c(2)(c), the prosecutor had to prove the elements for owning or possessing a chemical or laboratory equipment provided under MCL 333.7401(1)(b) and had to prove that the violation involved the “unlawful generation, treatment, storage, or disposal of a hazardous waste.” See MCL 333.7401c(2)(c). In contrast, in order to prove a violation under MCL 333.7401c(2)(f), the prosecutor had to prove the elements provided under MCL 333.7401(1)(b) and that the equipment involved the manufacture of methamphetamine. See MCL 333.7401c(2)(f). Because MCL 333.7401c(2)(c) does not involve proof that the equipment was for the manufacture of methamphetamine and MCL 333.7401c(2)(f) does not involve proof that

vacate defendant's conviction for possessing laboratory equipment for manufacturing methamphetamine. See *id.* at 634.

Defendant next argues that he was denied the right to present a defense when the trial court refused to permit him to call Britney Skalski. This Court reviews a trial court's decision regarding the late endorsement of a witness for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

A criminal defendant has a constitutional right to present a defense. *Id.* at 379. However, the right is not absolute and defendant must still comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* (quotations omitted). The trial court determined that defendant did not comply with MCR 6.201(A)(1), and that defendant's noncompliance would prejudice the prosecution if it permitted Skalski to testify. MCR 6.201(A)(1) requires parties to disclose their witness lists no later than 28 days before trial. Defendant did not submit a witness list.

Skalski's involvement and proposed testimony was a complete surprise to the prosecution. As such, the prosecution had not had an opportunity to investigate the facts surrounding Skalski's involvement or her proposed testimony. Further, defendant first notified the prosecution about this witness after the close of the prosecution's case. Under these circumstances, the trial court correctly determined that it would be patently unfair to permit defendant to call Skalski.

In *People v Lucas*, 193 Mich App 298, 303; 484 NW2d 685 (1992), this Court explained that the "closer to the date of trial the evidence is offered, the more this factor suggests willful misconduct designed to create a tactical advantage and weighs in favor of exclusion." Defendant claimed that Skalski was with him on the day of the alleged crime; thus, defendant knew about her before trial and could have submitted a witness list. Given defendant's early knowledge about this witness, the timing of the request, and the prejudice that would be occasioned to the prosecution, the trial court did not abuse its discretion when it prohibited this witness from testifying. *Yost*, 278 Mich App at 379.

Next, defendant argues that his trial counsel was constitutionally ineffective. In order to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that his or her trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 784 NW2d 899 (2008). Further, the defendant must overcome a strong presumption that his or her trial counsel's decisions were a matter of sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Because the trial court did not hold a hearing on this issue, this Court's inquiry is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

---

the equipment was involved in the generation of hazardous waste, these crimes are not the same offenses under the *Blockburger* test.

Defendant argues trial counsel was ineffective because his counsel failed to adequately investigate possible defenses before trial. Specifically, defendant argues that defense counsel did not ask him about potential witnesses. When defendant's trial counsel requested that the trial court permit Skalski's testimony, counsel stated that she had just been notified about Skalski and that in her previous discussion with defendant, Skalski was not mentioned. It does not appear from the record that counsel failed to investigate possible defenses for defendant. While trial counsel did not file a witness list, counsel did not know about Skalski in time to timely add her name to a witness list if she would have filed one and the trial court did not preclude defendant from presenting his other witness. Further, as soon as counsel discovered the existence of Skalski, she did everything in her power to call the witness. Therefore, defendant has not established that trial counsel's decisions with regard to this witness fell below an objective standard of reasonableness under prevailing professional norms. *Uphaus*, 278 Mich App at 185.

Defendant raises several additional issues in his brief submitted under Standard 4. First, defendant argues that this Court should remand the case to the trial court. Defendant argues remand is necessary in order to develop a factual record regarding whether trial counsel was ineffective and to develop facts regarding whether defendant's apprehension was the result of an informant's tip and a plan to set defendant up. Defendant also argues this Court should remand this case for a hearing under *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). This Court has the discretion to grant a motion to remand. *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993), abrogated in part on other grounds *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

MCR 7.211(C)(1) requires an appellant to move to remand to the trial court within the time provided for filing the appellant's brief. This Court may grant such a motion if the issue is one that should initially be decided by the trial court, or if a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(a)(i)-(ii). Defendant's request for remand is untimely. Nevertheless, defendant argues that remand is necessary to establish that counsel failed to adequately investigate, should have moved for a directed verdict, should have requested an instruction on mere possession of methamphetamine, should have objected to the trial court's comments during trial, and should have clarified certain ambiguous testimony. None of the grounds defendant alleged constitute ineffective assistance of counsel require development of a record to determine whether counsel was ineffective; thus, defendant has not established grounds for a remand. See *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007); MCR 7.211(C)(1)(a).

Defendant's request for remand for a *Walker* hearing is similarly unfounded because the development of an additional factual record is not necessary in order to determine whether defendant's statements to police were involuntary. Before trial, defense counsel requested a *Walker* hearing and the trial court denied counsel's motion. However, on the first day of trial the trial court held a hearing regarding whether defendant's statements were voluntary. The officer who arrested defendant and testified to defendant's statements during trial testified at the hearing, stating that defendant was not physically abused or threatened with any physical harm, and that defendant did not appear to be under the influence of drugs or alcohol. Defendant was read his rights and stated he understood them and wanted to talk to the officer. Remand is not necessary because the issue regarding the voluntariness of defendant's statements was previously considered by the trial court and the record is adequate for appellate review.

Finally, defendant argues that remand is necessary in order to establish whether he was apprehended as a result of a setup and an informant's tip. However, a factual record is not required for appellate consideration of the issue either. MCR 7.211(C)(1)(a)(i)-(ii). During trial the witness who called the police regarding the methamphetamine laboratory was specifically asked whether he received a tip from an informant regarding the methamphetamine and that witness testified that he did not. Thus, defendant has failed to establish a ground for remand.

Next, defendant argues that the trial court was biased in favor of the prosecution. Because defendant did not object to any of the alleged instances of bias, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The defendant must show that an error occurred, the error was plain, and the plain error affected substantial rights, meaning the error affected the outcome of the trial. *Id.* at 763.

Defendant first argues the trial court was biased against him because the trial court believed he was guilty. He bases his argument on a comment made by the trial court during a pretrial hearing regarding the withdrawal of counsel. Defendant stated that he felt he was "entitled to a fair hearing and a fair trial" and that his appointed counsel was not guaranteeing him a fair trial. The trial court told defendant he was entitled to a fair trial, and then stated: "And understand that, when you were out on bond and you started committing other felonies, there's a lot to be considered. So you are right. You have the absolute opportunity for a hearing in every case that you have. And, at the same point in time, if you are found guilty, as well, you will have the same opportunity to have the full punishment, as well. And also the ability to have a not guilty verdict, if that occurs."

Defendant has the burden of showing actual bias or prejudice in order to disqualify a judge. *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988). The comments about which defendant complains do not suggest any bias against defendant on the part of the trial court. Thus, defendant has not established plain error. Further, defendant cannot show his substantial rights were violated by the trial court's pretrial comments. The jury was the ultimate finder of fact in this case. Defendant is not entitled to any relief on this claim.

Defendant also argues that he is entitled to a new trial because the trial court improperly emphasized certain disputed facts. "The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The test to determine whether the trial court's comments were improper is whether the comments "may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992) (citations, internal marks, and emphases omitted).

Defendant argues the trial court improperly emphasized whether the substance found in the two-liter bottle could be considered "hazardous waste." See MCL 333.7401c(2)(c). Defendant argues the trial court emphasized this element by referring to the substance found in the two-liter bottle as a "chemical" and because the trial court implied that the chemical was dangerous. The trial court's comments did not improperly suggest defendant was manufacturing hazardous waste. Under MCL 333.7401c(7)(a), hazardous waste is defined by reference to the definition set forth in MCL 324.11103(3), which requires the waste to "cause or significantly

contribute to an increase in mortality or an increase in serious irreversible illness or serious incapacitating but reversible illness” or “pose a substantial present or potential hazard to human health or the environment . . . .” The trial court’s comments did not equate the substance with hazardous waste and, consequently, could not have influenced the jury to the detriment of defendant’s case. *Conyers*, 194 Mich App at 405.

Defendant also argues the trial court improperly bolstered the prosecution’s expert witness when it responded to an objection by stating: “It is clear that [the witness] has gone through beginning and advanced narcotic school, that he is certified in meth laboratory responder, as well as state certification and site safety officer as it pertains to methamphetamine investigations, hazardous materials, disposal, and safety for all personnel on that.” The trial court’s summary of the witness’s qualifications did not constitute partiality that might have influenced the jury to the detriment of defendant’s case. While the witness did not specifically state that he is certified regarding “hazardous materials, disposal and safety,” that description accurately summarizes the witness’ testimony regarding his certification. Thus, defendant cannot show that the trial court’s comments constituted plain error.

Next, defendant argues that he was denied effective assistance of counsel for numerous reasons. Defendant first argues that trial counsel was ineffective because counsel failed to obtain the telephone records of the witness who called the police about the methamphetamine laboratory for the day of the alleged crime. Defendant argues that the records would have demonstrated that the witness knew based on a tip that defendant was going to pick up the methamphetamine that day. Defendant has not demonstrated that counsel’s decision not to pursue the telephone records was deficient. Any argument as to what those records would show is speculative. Even if the telephone records demonstrated what defendant claims, there is not a reasonable probability that the outcome of trial would have been different. *Uphaus*, 278 Mich App at 185. There was substantial evidence supporting the jury’s guilty verdict, including his own admissions.

Defendant next argues that counsel was ineffective for failing to pursue leads that defendant provided regarding his defense. Defendant argues counsel should have pursued his theory that he was set up and the witness who called the police did so because he was given a tip. However, this claim has no merit because counsel actually did ask the witness whether he received a tip, and the witness testified that he did not. Further, “[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant has not demonstrated that any evidence would support that he was set up and he cannot establish counsel’s decision not to pursue the theory that defendant was apprehended as a result of a tip was objectively unreasonable under prevailing professional norms. Defendant also argues trial counsel did not ask the right questions while cross-examining several witnesses. However, decisions regarding how to question witnesses constitute trial strategy. *Id.* at 39. Defendant has not shown trial counsel was deficient.

Next, defendant argues that trial counsel was ineffective for failing to request a *Walker* hearing on whether the police fabricated defendant’s statements about manufacturing the methamphetamine. This claim has no merit because defense counsel requested a *Walker* hearing. Defendant also argues that trial counsel was ineffective for failing to pursue the fact

that the police fabricated his statements. However, trial counsel questioned the officers about whether defendant actually made the claimed statements and regarding whether defendant was threatened before he talked to the officers. Defendant further argues trial counsel should have cross-examined several witnesses concerning inconsistent statements regarding the appearance of the substance in the two-liter bottle; however, the different descriptions of the substance were addressed during trial and defendant cannot demonstrate that any deficiency in pursuing the matter more thoroughly prejudiced him. *Uphaus*, 278 Mich App at 185.

Defendant argues that his trial counsel was also deficient for failing to object to the chain of custody of the substance that was in the two-liter bottle. However, two different witnesses testified to the chain of custody and the record does not support an objection to the chain of custody would have had merit. Counsel is not required to make frivolous objections or motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant also argues trial counsel was deficient for failing to move for a directed verdict. However, there was sufficient evidence for a rational trier of fact to find that the charged crimes were proved beyond a reasonable doubt; therefore, any motion for a directed verdict would have been meritless. *People v Riley*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). Defendant also argues trial counsel was ineffective because counsel did not emphasize the fact that defendant was beginning rehabilitation. Defendant does not explain how this affected his case. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Next, defendant argues that trial counsel was ineffective for failing to request an instruction on mere possession of methamphetamine, which is a 10-year felony. Trial counsel’s decision to proceed without instruction on the crime of possession in the hope of receiving a verdict of acquittal is a legitimate trial strategy, which we will not second-guess. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

Finally, defendant argues that the cumulative effect of the trial errors denied him due process and a fair trial. We review a claim of cumulative error to determine whether the combination of errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). “In order to reverse on the basis of cumulative error, the effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *People v Unger*, 278 Mich App 210, 261; 749 NW2d 272 (2008) (citation and quotation marks omitted). Defendant has not shown any combination of error that denied him a fair trial, and defendant is therefore not entitled to any relief. *Knapp*, 244 Mich App at 387.

We vacate defendant’s conviction and sentence for possessing laboratory equipment for the manufacture of methamphetamine contrary to MCL 333.7401c(2)(f). We affirm in all other respects.

Affirmed in part and vacated in part.

/s/ Michael J. Talbot  
/s/ Elizabeth L. Gleicher  
/s/ Michael J. Kelly