

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 20, 2014

v

BRYAN ZALA-CHAPMAN HOWE,

Defendant-Appellant.

No. 313143
Marquette Circuit Court
LC No. 12-050377-FH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of operating or maintaining a laboratory involving methamphetamine, MCL 333.7401c(2)(f), and conspiracy to operate or maintain a laboratory involving methamphetamine, MCL 750.157a; MCL 333.7401c(2)(f). He was sentenced to 7 to 20 years imprisonment for both convictions, sentences to run concurrently with credit for 129 days served. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On December 1, 2011, defendant arrived at Marquette General Hospital with severe and suspicious burns. After a brief investigation, the police located what appeared to be a methamphetamine laboratory in Aaron Armatti's house. Further investigation led the police to believe that there had been a conspiracy to manufacture methamphetamine and that defendant had been actively involved. At trial, there was testimony from defendant's ex-girlfriend, Bridgett Black, that her role had been to obtain pseudoephedrine.¹ She was apparently told by defendant exactly what to obtain, but the first time she purchased the drug, she obtained the wrong kind or the wrong dose and defendant yelled at her. Black's testimony was corroborated by the testimony of Vickie Lara, an upstairs tenant, who also purchased pseudoephedrine. Because she obtained the wrong type or amount of medication, Black went with Richard Hill, another conspirator, to purchase more. Before they left the house, defendant allegedly told Hill

¹ Pseudoephedrine is an ingredient found in certain over-the-counter cold medicines that can be used in the production of methamphetamine. In this case, Black testified that she was sent to purchase Sudafed.

to purchase other ingredients necessary to manufacture methamphetamine, including lithium batteries, fuel, and an ice pack. While they were away, Armatti, the owner of the house, claimed he saw defendant cleaning pseudoephedrine pills in the sink. When they returned, Armatti claimed he saw Hill and defendant in the kitchen and that defendant was putting pills into a Gatorade bottle.

Armatti claimed that awhile later he heard Hill shouting “Get in the shower. Get in the shower.” Armatti said he saw flames in the living room and that there were “little round fires, like, probably 10, 15 in the kitchen.” He said he put out the fires in the living room with a blanket, and that the kitchen was “just blazing hot” and the fire was “blue from chemicals.” Defendant ran outside on fire and rolled in the snow twice before searching for his car and driving himself and Black to the hospital.

Defendant’s theory of the case was that he was in the wrong place at the wrong time. He asserted that he fell asleep on the couch after using morphine, woke up once and took more morphine, woke up a second time and walked into the kitchen just in time to see Armatti flipping a bottle. Then there was an explosion that set him on fire. Defendant testified that he believed the other persons present while methamphetamine was being cooked decided to blame him because they believed he would die from his injuries.

II. EVIDENTIARY ISSUES AND PROSECUTORIAL MISCONDUCT

Defendant raises several claims of evidentiary error and prosecutorial misconduct related to the prosecution’s solicitation of testimony concerning the manufacture of methamphetamine. We review a trial court’s evidentiary decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

“[T]he test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). “A defendant’s opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused.” *Id.* at 63-64. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor’s remarks in context. *Id.* “[P]rosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Such arguments are condemned because they inject issues into the trial that are broader than a defendant’s guilt or innocence of the charges, and because they encourage the jurors to suspend their own powers of judgment. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

A. DANGEROUSNESS OF METHAMPHETAMINE LABORATORIES

Defendant first argues that the prosecutor solicited inadmissible, inflammatory, and irrelevant information relating to the dangerousness of methamphetamine laboratories. This argument is unpreserved because defendant did not object to its admission at trial. We review unpreserved errors for plain error affecting defendant’s substantial rights. *People v Brown*, 279

Mich App 116, 134; 755 NW2d 664 (2008). However, defendant has given only cursory treatment to this argument in his brief. Indeed, defendant fails to even direct this Court's attention to the testimony that he believes was improper. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "Such cursory treatment constitutes abandonment of the issue." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). We therefore decline to address this issue as abandoned.²

B. CIVIC DUTY ARGUMENT

Defendant also argues that testimony regarding the severity of the methamphetamine problem was an instance of prosecutorial misconduct because it constituted an impermissible civic duty argument. Moreover, he also asserts that the testimony was irrelevant. We disagree. We review this issue for plain error affecting defendant's substantial rights. *Brown*, 279 Mich App at 134.

In this case, the prosecution's expert witness, Sergeant Detective Ron Koski, testified that he had dealt with over 65 methamphetamine laboratories in the Upper Peninsula, for at least 46 of which he was the person in charge. He also testified that even though there was no lye found in this case, that did not mean it was impossible to make methamphetamine because people can bring lye with them in a baggie or Tupperware container. Further, he explained that the entire methamphetamine cook can be placed in a backpack. Finally, he testified that whether someone would "shake" or "burp" the bottle containing methamphetamine ingredients depends on the person and the reaction he or she is getting with the bottle. He then noted that some people put the bottle in their trunk in order to get a reaction and that if you shake it too much you can have a violent reaction. During closing argument, the prosecution did not reiterate this testimony or base any arguments off of it. Further, it is clear that this testimony was solicited in order to (1) determine Koski's qualifications as an expert, (2) in order to explain why the absence of lye at the house was not fatal to the case, and (3) to explain why a person might shake a bottle in the methamphetamine manufacturing process. The testimony, without any argument urging the jury

² Assuming that defendant refers to testimony concerning the hazardous byproducts that may be left behind after cooking methamphetamine, we note that such testimony was relevant to provide a background for Sergeant Koski's involvement and subsequent testimony. Moreover, it was also relevant in order to explain to the jury why the physical evidence collected at the scene was not admitted during the trial, and why the police did not attempt to obtain fingerprints from any physical evidence from the scene. A prosecutor may offer all relevant evidence, not otherwise excluded, to prove his case, and a plea of not guilty places all elements of a criminal offense at issue. *People v Mills*, 450 Mich 61, 70-71; 537 NW2d 909, mod on other grounds 450 Mich 61 (1995). Further, prosecutorial misconduct cannot be premised on the prosecutor's good faith introduction of relevant admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Accordingly, because the evidence was relevant, it was admissible, and there was no prosecutorial misconduct.

to convict defendant based on their fears and prejudices, does not constitute an impermissible civic duty argument. *Abraham*, 256 Mich App at 273.

Moreover, the testimony was relevant and therefore admissible, subject to the MRE 403 balancing test. MRE 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. In this case, the solicited testimony was relevant as to the witness’s qualifications to give an expert opinion relating to methamphetamine. It was also relevant as to whether a methamphetamine cook was even in progress considering that lye is an essential ingredient and no lye was found during the police investigation. Finally, it was relevant because the prosecution theory was that the bottle containing the methamphetamine ingredients was being shaken when there was a reaction and the bottle breached and burned defendant.

C. SOLICITATION OF HEARSAY

Defendant also argues that the prosecutor solicited impermissible hearsay testimony about the methamphetamine laboratory methodology. Furthermore, he claims that the testimony contained an inadmissible opinion, failed to comply with MRE 404(b) (other acts evidence), and failed to comply with the requirements of MRE 403. Although defendant cites the allegedly deficient testimony, he provides only cursory treatment of this issue. Accordingly, this issue has been abandoned on appeal. *Kelly*, 231 Mich App at 640-641.

Further, we find no plain error affecting substantial rights in the admission of Koski’s testimony. Defendant alleges that the following statement by Sergeant Koski contained inadmissible hearsay:

Most cooks do have some sort of recipe that they follow. And, like, if you put too much lye in and you change the pH the wrong way, sometimes that will ruin the cook.

I’ve been told if you put too many lithium battery strips in it, it makes it – the cook too hot and too furious, and the ammonia gas isn’t right so the molecule doesn’t change in the same manner it should, you put too much of a tree spike or not enough of a tree spike in there. So there is a recipe and that could cause it one way or another, the different reactions.

Some people give the bottle a shake to get the reaction going because they’re in a hurry. So there is different things would cause that. Whether they clean the bottle out, if it wasn’t dry and you have water molecules inside the bottom. Because all it takes is a little drop of water to react with that lithium and it is going to arc.

Koski’s statements were not offered for the truth of the matter asserted; the purpose of the statement was merely to explain the basis for Sergeant Koski’s opinion that there was no precise recipe for cooking methamphetamine. The statements thus were not hearsay. MRE 801(c). Further, MRE 703 permits the facts or data on which an expert bases his or her opinion to be

admitted into evidence. MRE 404(b) is simply inapplicable to the above-cited testimony, which does not relate to evidence of other acts.

Finally, the evidence is relevant insofar as it explains the basis for Sergeant Koski's expert opinion that there is no precise recipe for manufacturing methamphetamine. It had a tendency to make it more probable than not that he knew what he was talking about. The credibility of a witness is a fact of consequence. See *Mills*, 450 Mich at 69, 72-74. Additionally we do not find the admission of general evidence about how methamphetamine is manufactured to be unfairly prejudicial under MRE 403.

Because the testimony was not improper when submitted to the jury, we hold that the prosecution did not commit misconduct when it sought the admission of the testimony. See *Dobek*, 274 Mich App at 70 (holding that if a prosecutor attempts to admit evidence in good faith he or she is not committing misconduct).

III. DEFENSE WITNESS'S PRIOR CONVICTION

Defendant argues that the evidence that Hill, a defense witness, was convicted of the same offense as that for which defendant was on trial was improperly admitted. We disagree. This issue is unpreserved and review is for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

An accomplice's conviction following a trial is not admissible against defendant at defendant's separate trial. *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982). However, in this case, defense counsel initially solicited Hill's testimony that he was convicted of the same offenses of which defendant was charged. Further, on cross-examination, the prosecutor did not seek to elicit information regarding Hill's conviction. Instead, Hill volunteered the information in response to an unrelated question. Under these circumstances, we decline to grant defendant a new trial. See *People v Bart*, 220 Mich App 1, 15; 558 NW2d 449 (1996) ("Counsel may not harbor error to be used as an appellate parachute in the event of jury failure.") Moreover, a party is not entitled to appellate relief on the basis of an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).³

IV. RIGHT TO PRESENT A DEFENSE

Defendant next argues, in essence, that he was denied the right to present a defense when the trial court prohibited cross-examination of Lara on an issue affecting her credibility. We disagree.

This issue was preserved by a timely objection. *Metamora Water Serv, Inc*, 276 Mich App at 382. We review for abuse of discretion the trial court's evidentiary decisions. *Lukity*,

³ Defendant's claim that his trial counsel was ineffective for soliciting this testimony is addressed in Section VII, *infra*.

460 Mich at 488. A court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes. *Orr*, 275 Mich App at 588-589.

The United States Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.” *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 LE 2d 636 (1986) (internal quotation marks and citation omitted). Few rights are more fundamental than the right of a criminal defendant to present evidence in his own defense. *Unger*, 278 Mich App at 249-300. However, “the right to present a complete defense may, in appropriate cases, bow to accommodate other legitimate interest in the criminal trial process,” including Michigan’s “legitimate interest in promulgating and implementing . . . rules concerning the conduct of trials.” *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012) (internal quotation marks and citations omitted). Because our Supreme Court has broad latitude under the Constitution to establish rules excluding evidence from criminal trials, a criminal 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.* at 473-474 (internal quotation marks and citations omitted). Moreover, “Michigan[‘s] Rules of Evidence do not infringe a defendant’s constitutional right to present a defense unless they are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Id.* at 474, quoting *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998), quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987). If a criminal defendant fails to present any argument that a particular rule of evidence is “arbitrary” or “disproportionate to the purpose it is designed to serve” either in general or as applied to the facts in his or her case, then the failure to properly address the merits of the assertion constitutes abandonment of the issue. *King*, 297 Mich App at 474. Here, defendant has not presented any argument that a particular rule is “arbitrary” or “disproportionate to the purpose it is designed to serve” either in general or as applied to the facts in his case. Therefore, defendant has abandoned any claim that the Michigan Rules of Evidence themselves denied him the right to present a defense.

Regarding whether the trial court abused its discretion in its application of the rules of evidence, we note that, as a general rule, all relevant evidence is admissible. MRE 402. Relevant evidence is evidence that has “any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence.” MRE 401. “A witness’s bias is always relevant.” *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). A criminal defendant is also “entitled to have the jury consider any fact that may have influenced the witness’ testimony.” *Id.* (quoting *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995)). However, “the trial court has wide discretion regarding admissibility of bias during cross-examination under MRE 611.” *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001). And relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403.

In this case, the trial court sustained a prosecution objection by ruling “I think it is – its relevancy is exceeded by the consumption of time on, I think, a fairly minor point.” Although the court did not provide a detailed analysis, it is apparent from the ruling that the court (1) found the information relevant and (2) found that its probative value was exceeded by the “consumption” or waste of time involved in pursuing a minor issue. Defendant does not explain

how the trial court's ruling was an abuse of discretion. Viewed in context, it is apparent that the testimony regarded an alleged hearsay statement by the police chief in regards to the disposition of Armatti's case and that the statement was only relevant to Lara's credibility. Lara's credibility was already called into question because she received immunity in exchange for her testimony. Further, her credibility was also attacked on cross-examination by testimony regarding her use of controlled substances and alcohol. She was also impeached regarding statements she previously made to the police. Accordingly, the probative value of the additional testimony affecting her credibility was further diminished. It is unclear how much time would have actually been spent on this line of questioning. However, "[a] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *McGhee*, 268 Mich App at 614. Accordingly, we conclude that the trial court's decision was not an abuse of discretion.

Furthermore even if it was improperly excluded, "the exclusion of admissible evidence is subject to a harmless error analysis." *Id.* at 638. Lara's testimony was relevant as to whether she had a reason to fabricate testimony against defendant. However, as noted, her credibility was already impeached by her agreement to testify in exchange for immunity, her drug and alcohol use, and her prior statements. Moreover, the only statements in Lara's testimony that directly linked defendant to the charged offense were that defendant screamed at Black for buying the wrong Sudafed and that defendant told Black exactly what kind of Sudafed to purchase. Even if the jury discounted Lara's testimony, there was still substantial evidence that defendant was involved in the charged offense. Black testified that she was yelled at for purchasing the wrong type of Sudafed and that it was defendant and Hill who yelled at her. Armatti also testified that defendant yelled at Black that she had purchased the "wrong stuff." Further, Black and Armatti both testified that defendant was involved in a conversation about making methamphetamine. Armatti testified that defendant told Hill what ingredients to obtain when he went with Black to obtain more Sudafed. Further, Armatti testified that he saw defendant cleaning pills in the kitchen. He also testified that when Hill returned from Marquette, Hill and defendant were in the kitchen together in front of the sink. Finally, Armatti testified that he saw defendant adding pills to the Gatorade bottle. Accordingly, even if Lara's testimony was discredited, there was sufficient from which a rational jury could have found defendant guilty beyond a reasonable doubt, rendering any error harmless. *Id.*

V. JURY INSTRUCTIONS

Defendant also argues that the trial court erred by refusing to instruct the jury on CJI2d, the addict-informant witness jury instruction, and CJI2d 8.5, the mere presence jury instruction. We disagree.

"To preserve an instructional issue for appeal, a party must object to the instruction before the jury deliberates." *Gonzalez*, 256 Mich App at 225; see also MCR 2.512(C). Defendant requested the addict-informant witness jury instruction and the trial court denied the request. Thus, defendant's challenge regarding the addict-informant witness instruction is properly preserved. However, the request for the mere presence instruction was only included in defendant's proposed jury instructions, and was not requested on the record when the trial court asked if there were "any objections to the final instructions as proposed [which excluded the mere presence instruction], or requests for any deletion or additional instructions." Accordingly, defendant's arguments regarding the mere presence instruction are unpreserved.

“Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.” *Dobek*, 274 Mich App at 82. However, an unpreserved instructional error is reviewed for plain error affecting defendant’s substantial rights. *Gonzalez*, 256 Mich App at 225. “A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her.” *Dobek*, 274 Mich App at 82. “Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence.” *Id.* “Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury.” *Id.*

The addict-informant witness instruction should be given only if the uncorroborated testimony of an addict informant is the sole evidence linking the defendant to the offense. *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994); see also use notes for CJI2d 5.7. It should not be given if the witness is not an addict, *People v Jackson*, 292 Mich App 583, 602; 808 NW2d 541 (2011), or if the witness is not an “informant” within the meaning of CJI2d 5.7. *McKenzie*, 206 Mich App at 432. Black’s Law Dictionary (9th ed), p 849, defines an “informant” as “[o]ne who informs against another; esp., one who confidentially supplies information to the police about a crime, sometimes in exchange for a reward or special treatment.” In this case, there was evidence that multiple witnesses were drug users and addicts, but there was no evidence suggesting that they were also informants. Also, although the primary testimony connecting defendant to the charged offenses was the testimony of witnesses who were admitted drug addicts, each witness’s testimony was corroborated, at least in part, by the testimony of the other witnesses. Further, the prosecution witnesses’ testimony was also corroborated by photographs of the physical evidence at the scene and by the burns defendant received. Accordingly, under the circumstances, we conclude that the instruction was not applicable and the trial court did not err by failing to give it.

Next, the jury instruction on “mere presence” provides:

Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it [CJI2d 8.5.]

The language of CJI2d 8.5 indicates that the instruction applies to situations where the prosecution intends to proceed on an aiding and abetting theory. See *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999) (A defendant’s “[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime.”). The instruction may also be appropriate where defendant is charged with constructive possession of contraband. *People v Echavarria*, 233 Mich App 356, 370; 592 NW2d 7373 (1999). In this case, the prosecution sought to show that defendant actually committed the charged offenses and did not present an aiding and abetting theory to the jury; nor was defendant accused of constructive possession of contraband. Accordingly, the instruction was not proper.

Moreover, even if the “mere presence” instruction could have been given in the instant case, the trial court’s instructions on the elements of the offense adequately ensured that the jury

did not convict defendant because of his mere presence in Armatti's house. The court instructed that in order to convict defendant of operating or maintaining a laboratory involving methamphetamine, the prosecution had to prove beyond a reasonable doubt:

First, that the defendant . . . used a building, in this case a house. Now, that's an element of this crime charged. Now, you could find that [defendant] used the Armatti house as a place to take a nap, or you could find that he used it as a place to watch television, or you could find that he used it as a place to try to get Suboxone, which is a drug that is used to get you off some other drugs, or you could find that he used the house as a place to shoot up morphine. But that's not what he's charged with.

What you do have to find, as the first element of this house that he used it, the house, for some purpose.

And that leads us to the second element that [defendant] used the house as a location to manufacture or attempt to manufacture a controlled substance.

And the third element is that [defendant] knew the controlled substance he was manufacturing or attempting to manufacture was methamphetamine.

From these instructions, it is clear that if the jury found that defendant was merely present it could not properly convict him. Instead, the jury had to find that defendant was actively involved in the charged offense. Further, regarding the conspiracy to operate or maintain a laboratory involving methamphetamine charge, the court instructed the jury that the prosecution had to establish beyond a reasonable doubt:

Again, the first element that the defendant . . . used the house at 235 Elm Street in Gwinn;

And, secondly, that [defendant] and someone else – in this case, I believe, the prosecutor is alleging that someone else is Richard Hill and/or Aaron Armatti, or others unknown, but [defendant] and someone else knowingly agreed to use that house as a location to manufacture or attempt to manufacture methamphetamine. So there has to be a knowing agreement that we're going to use this place to manufacture methamphetamine.

The third element is that the defendant . . . specifically intended to commit or help commit that crime; that I, use of this house as a location for the manufacture or attempted manufacture of methamphetamine;

And, finally, fourth, that this agreement took place on or about December 1, 2011.

* * *

A finding that the defendant was merely with other people who were members of a conspiracy is not enough, by itself, to prove the defendant was also a member.

* * *

It's not necessary for all members to know each other; that is, that you could have members of a conspiracy that don't know each other, didn't know each other from the past. Or it's not necessary that they know all the details about how the crime will be committed. But it must be shown beyond a reasonable doubt that the defendant agreed to commit the crime and intended to commit or help commit it.

From these instructions, it is clear that if the jury found that defendant was merely present at a location with other members of the conspiracy it could not properly convict him. Instead, the jury had to find that defendant was actively involved in the charged offense. Thus, because the instructions sufficiently protected defendant's rights and fairly presented the issues to the jury, reversal is not warranted even if the trial court should have given the jury the instruction on mere presence. *Dobek*, 274 Mich App at 82.

VI. SENTENCING

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 3 and OV 14. We disagree. This issue is preserved by a timely objection. *Metamora Water Serv, Inc*, 276 Mich App at 382. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

OV 3 addresses physical injury to the victim. MCL 777.33. The existence of a victim is a "necessary condition" to scoring points under OV 3. *People v Laidler*, 491 Mich 339, 344; 817 NW2d 517 (2012). Defendant asks this Court to interpret OV 3 so that an offender cannot be his or her own "victim" within the meaning of the statute. The term "victim" is not defined in the statute. In *Laidler*, our Supreme Court cited with approval a definition from *Random House Webster's College Dictionary* (1997) in which a "victim" is "a person who suffers from a destructive or injurious action or agency[.]" *Id.* at 347-348. The Court concluded that for the purposes of OV 3, a "victim" is "any person who is harmed by the defendant's criminal actions." *Id.* at 348; see also *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003) (holding that "the term 'victim' includes any person harmed by the criminal actions of the charged party."). In *Laidler*, our Supreme Court, in response to the dissent, acknowledged that under the definition of "victim" utilized by the majority an offender could be scored points for his own injury. *Laidler*, 491 Mich at 352. The Court reasoned that the result did not render the definition "unreasonable or untenable" because:

One purpose of criminal punishment is to hold individuals accountable for the fullest range of social harms they cause, and it is consistent with this purpose to consider *all* physical harms caused by the perpetrator. The state has a generalized interest in minimizing physical harms to all persons, and, all else being equal, the commission of a crime that results in physical harm, even when the harm is to the

perpetrator himself, might be deemed more serious than the commission of the same crime that does not result in such harm. Although it would not be unreasonable for the Legislature to exclude harms caused to the perpetrator in the scoring of the offense variables, it is also not unreasonable to hold a perpetrator accountable for those harms [*Id.* at 352-353.]

Accordingly, this we hold that defendant can be considered a “victim” for purposes of scoring OV 3.

Furthermore, “[i]n multiple offender cases, if 1 offender is assessed points for . . . physical injury, all offenders shall be assessed the same number of points.” MCL 777.33(2)(a). In this case, there were multiple perpetrators. Co-perpetrator Hill had already been scored 25 points for an injury to a victim under OV 3. “‘Shall’ is a mandatory term, not a permissive one.” *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006). Thus, once points were assessed for Hill, the trial court was required to also score the same number of points for defendant. In *People v Morson*, 471 Mich 248, 261; 685 NW2d 203 (2004), our Supreme Court held that unless there is a clear argument that the score assessed to the first sentenced offender was erroneous, the sentencing court must assess the same number of points for the offender first sentenced and the offender that is sentenced subsequently. Defendant does not argue that the score assessed to Hill was erroneous. In other words, he does not argue that his injuries were not a life threatening or permanent incapacitating injury; instead, he argues that the record in his case is insufficient to support a twenty-five point score. Twenty-five points must be assessed under OV 3 if a “life threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1)(c). In this case, there was overwhelming evidence that a life threatening or permanent incapacitating injury occurred. Defendant’s own testimony supports the score. Defendant explained that he was burned on “[a]ll my – my chest, back, arms, backs of my hands, pretty much everywhere. There’s a little patch of skin, here, that’s mine. Well, I mean, it’s all my skin, but it’s all – they harvested it all from my legs, my back. The middle of my back was fine, but my sides – my sides were burnt and my chest, my neck.” He also testified that he had “major surgery and then . . . was recovering from major surgery.” He then testified that he believed the other witnesses “decided to blame the dead guy. They’re, like, everybody thought I was dying. My doctors thought I was dying. So they’re, like, let’s blame him, he’s dying anyways.” Defendant further testified that he recalled going to through the hospital doors, maybe talking for a few minutes, and then briefly waking up at the University of Michigan Hospital in Ann Arbor, Michigan on January 28 or January 29 of 2012. He then woke up again in early February of 2012. He testified that he was placed in a medically-induced coma. Accordingly it was more likely than not that a life-threatening or permanent incapacitating injury occurred in this case. The court did not err in scoring OV 3 in this case.

We also find that the trial court not err in scoring OV 14. OV 14 addresses the offender’s role. MCL 777.44(1). Ten points must be assessed if the “offender was a leader in a multiple offender situation.” MCL 777.44(1)(a). The statute expressly provides that the “entire criminal transaction should be considered when scoring” OV 14. MCL 777.44(2)(a). It also provides that if there are three or more offenders then more than one offender can be assessed points for being a leader. MCL 777.44(2)(b). The evidence from trial supports the trial court’s scoring decision. Lara, Black, and Armatti all testified that defendant yelled at Black for purchasing the wrong Sudafed. Lara testified that defendant told Black exactly what to purchase at the store. Armatti

testified that defendant gave Hill a list of ingredients to obtain while at the store. Further, Armatti testified that defendant was washing the pills and that he put pills into the Gatorade bottle. Based on this evidence, there was a preponderance of the evidence in support of the trial court's decision to score defendant as a leader in a multiple offender situation.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant finally argues that he received ineffective assistance of counsel in regards to most of the issues he has raised on appeal. Defendant moved this Court to remand for an evidentiary hearing on the issue of his counsel's effectiveness. This Court denied the motion. See *People v Howe*, unpublished order of the Court of Appeals, issued April 15, 2013 (Docket No. 313143). Our review of this claim is thus limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Here, defendant claims that his trial counsel was ineffective for failing to object to Armatti's testimony that he had met defendant in jail. Defendant does not cite any specific authority or facts in support of his claim. Furthermore, defendant does not even point to the location in the record where defendant's prior incarceration was even mentioned. This Court's review of the record indicates that Armatti implied that defendant was incarcerated with him on a prior occasion. However, counsel's decision to not object (and therefore draw the jury's attention) to an isolated reference can be trial strategy. See *Bahoda*, 448 Mich at 287 n 54. Further, in light of the other evidence of defendant's guilt, defendant has not demonstrated that he was prejudiced by Armatti's comments. *Armstrong*, 490 Mich at 289-290.

Defendant also argues that defense trial counsel was ineffective for failing to object to the allegedly irrelevant, impermissible hearsay evidence about the methamphetamine laboratory methodology. Because we conclude that the testimony was relevant, and admissible, we therefore conclude that defense counsel was not ineffective for failing to advocate a meritless position. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant next argues that defense trial counsel was ineffective for soliciting testimony that Hill had been convicted of the same charge as that with which defendant was charged. However, the solicitation of testimony regarding Hill's conviction was clearly a matter of trial strategy. Defense counsel apparently wanted to demonstrate that Hill was a more credible witness because, unlike the prosecution witnesses, he was not receiving anything in return for his testimony. "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quoting *Unger*, 278 Mich App at 242-243.)

That a strategy does not work does not render counsel ineffective. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Defendant's remaining arguments appear to be wholly without merit or even minimal support on the record. He asserts that "[i]neffective assistance of counsel is raised in Issues . . . III, IV, and V" in his brief on appeal. However, defendant's Issues III, IV, and V do not actually contain an argument addressing ineffective assistance of counsel and it is not clear how it could be argued that defense counsel's actions were ineffective in relation to those issues, which concern the trial court's denial of further cross-examination of Lara, jury instructions that the trial court did not give to the jury, and the trial court's decision to score OV 3 and OV 14, which defense counsel objected to and preserved for appeal. Thus, in each of those instances, defense counsel acted diligently as an objectively reasonable defense attorney should. We therefore find defendant's argument with regard to these issues to be devoid of arguable legal merit.

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra