

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 9, 2014

v

JARED ALLAN BLAHA,

Defendant-Appellant.

No. 318364
Grand Traverse Circuit Court
LC No. 13-011558-FH

Before: MARKEY, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), conspiracy to manufacture methamphetamine, MCL 333.7401(2)(b)(i), and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 51 months to 20 years for the maintaining a methamphetamine laboratory conviction, three to 20 years for the conspiracy to manufacture methamphetamine conviction, and two to three years for the maintaining a drug house conviction. We affirm.

This case arises from a methamphetamine raid conducted by the Traverse Narcotics Team (TNT) at the Shadowland Motel in Traverse City in December 2012. The TNT received some information from Jamie Norkowski and Shane Brown that defendant and Sheila Nelson were manufacturing methamphetamine in room 246 at the motel. Acting upon that information, the TNT conducted surveillance of the motel and witnessed Lonna Fisk and Brandon Wabanimkee leave the motel room, buy pseudoephedrine at Rite-Aid, and then return to the room. The TNT obtained a search warrant and discovered remnants of a methamphetamine laboratory and Nelson's purse. Although the room was in defendant's name, defendant and Nelson were not present during the raid. Subsequently, charges were brought against defendant, Nelson, Fisk, and Wabanimkee, as codefendants. Defendant raises issues in a brief filed by appellate counsel, as well as in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

I. APPELLATE BRIEF ISSUES

A. IRRELEVANT EVIDENCE

First, defendant argues in his appellate brief filed by counsel that the trial court erroneously admitted evidence regarding the search of a dumpster located by 7-Eleven across the street from the motel because it was irrelevant, and thus, violated his due process rights. Defendant did not object to the challenged evidence at trial, or assert below that his due process rights had been violated by admittance of the challenged evidence, and therefore, our review of this unpreserved issue is for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

To be admissible, evidence must be relevant. MRE 402. “ ‘Relevant evidence’ means evidence having 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. Relevance has two components: materiality and probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). “Materiality is the requirement that the proffered evidence be related to ‘any fact that is of consequence’ to the action.” *Id.* “A fact that is ‘of consequence’ to the action is a material fact.” *Id.* at 389. “ ‘Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.’ ” *Id.*, quoting McCormick, *Evidence* (4th ed), § 185, p 773. It is well established that when a defendant pleads not guilty, the elements of the criminal offense are always “in issue” because the prosecution carries the burden to prove every element beyond a reasonable doubt. *Id.*

Evidence found in the dumpster near the 7-Eleven was material, as it was offered to prove elements of the charged offense, operating or maintaining a methamphetamine laboratory. The Tom's grocery bag found in the dumpster, which was near the motel, contained elements of a “one pot” methamphetamine laboratory, including empty pseudoephedrine packs, lithium strips, and batteries that had been cut open. Detective Randy Graham testified that it is common for people operating methamphetamine laboratories to discard items in nearby dumpsters. Also inside the bag was ramen noodle packaging and cat food. Ramen noodles in similar packaging were found inside room 246, and Nelson testified that she and defendant fed and took care of the stray cat that lived at the motel. Norkowski also testified that one morning, defendant left to get salt at Tom's grocery store, and there was also evidence that defendant frequented the 7-Eleven near the motel. The proffered evidence was linked to room 246 and defendant and was offered to establish the operation of a methamphetamine laboratory in room 246. Therefore, it was material.

Further, “The probative force inquiry asks whether the proffered evidence tends ‘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.’ ” *Crawford*, 458 Mich at 389-390. “The threshold is minimal: ‘any’ tendency is sufficient probative force.” *Id.* at 390, citing MRE 401.

As discussed, given the relationship the proffered evidence had to room 246 and defendant, it tends to make the fact that defendant was operating a methamphetamine laboratory more probable. Any tendency is sufficient, and therefore, the evidence had probative value. Because the evidence was relevant, defendant's due process rights were not violated by its admission.

B. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that there was insufficient evidence to convict him beyond a reasonable doubt of all the charges.¹ We review de novo claims of insufficient evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003), aff'd by 472 Mich 446 (2005). Accordingly, this Court must examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Ericksen*, 288 Mich App at 196. All evidentiary conflicts must be resolved in favor of the prosecution, and this Court "will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger (On Remand)*, 278 Mich App 210, 222; 749 NW2d 272 (2008). "Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt." *Ericksen*, 288 Mich App at 196. Further, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Defendant was convicted of operating or maintaining a methamphetamine laboratory in violation of MCL 333.7401c, which states, in relevant part, that a person "shall not do any of the following:

(a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

(b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.

We conclude that the evidence was sufficient to support a finding that defendant possessed a place, area, chemicals, or laboratory equipment that he knew was to be used to manufacture methamphetamine. Norkowski and Brown both witnessed defendant and Nelson

¹ Defendant also raises this argument in his supplemental brief.

making methamphetamine and smoking it. Fisk also testified that she smoked what she later believed to be methamphetamine with defendant and Nelson. The process Norkowski described of defendant and Nelson removing the lithium from the batteries, mixing the chemicals in pop bottles, venting the bottles, spraying the mixture with non-iodized salt, and blow drying the crystals, was consistent with Detective Daniel King's testimony of how methamphetamine is made using the "one pot" method. Further, Nelson admitted that she and defendant made methamphetamine in room 246 approximately six times. Although she testified she was the one who mostly made it, she admitted that defendant helped shake the bottles, and on the night Norkowski and Brown stayed, they witnessed defendant making his own batches of the drug and being just as involved in the process as Nelson. Both Nelson and defendant also admitted that the room was in defendant's name and that they both were staying there. Norkowski also testified that she saw the motel "slip," which had defendant's name on it.

Although none of the items in the motel tested positive for methamphetamine, defendant was not required to have actual possession. Constructive possession, based on the totality of the circumstances, may be enough. *People v Cohen*, 294 Mich App 70, 76-77; 816 NW2d 474 (2011). According to the police officers who testified, the items found in the motel room were all indicative of a methamphetamine laboratory. The police officers found tin foil boats, commonly used to smoke methamphetamine, as well as drain cleaner, cold packs, traces of ammonium, a 6-inch piece of tubing, pop bottles, coffee filters, and a bottle cap with a hole, which are all things used in the production of methamphetamine using the "one pot" method. Additionally, in a nearby dumpster, a Tom's grocery bag containing cut batteries, lithium strips, and empty pseudoephedrine packs was found. These are also items used in the production of methamphetamine. Also in the bag were ramen noodle packaging and cat food. Ramen noodles in similar packaging were found inside room 246, and Nelson testified that she and defendant fed and took care of the stray cat that lived at the motel, and the police officers found a litter box in the room. Norkowski also testified that one morning, defendant left to get salt at Tom's grocery store, and there was also evidence that defendant frequented the 7-Eleven near the motel. This evidence creates a sufficient nexus between defendant and methamphetamine. See *id.*

Finally, to the extent defendant argues that the witnesses' testimony was insufficient to convict him because they were not believable given that they received plea deals to testify, credibility of the witnesses is for the jury to decide, and this Court "will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222.

Defendant was also convicted of maintaining a drug house, MCL 333.7405(1)(d), which provides that a person

(d) Shall 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.

Our Supreme Court has held that "keep or maintain" as used in MCL 333.7405(1)(d) requires proof of continuity—something more than a single, isolated instance of the proscribed conduct.

People v Thompson, 477 Mich 146, 155-156; 730 NW2d 708 (2007). In interpreting MCL 333.7405(1)(d), the Court adopted the following reasoning of the Alaska Court of Appeals in *Dawson v State*, 894 P2d 672 (Alas App, 1995):

The state need not prove that the property was used for the exclusive purpose of keeping or distributing controlled substances, but such use must be a substantial purpose of the users of the property, and the use must be continuous to some degree; incidental use of the property for keeping or distributing drugs or a single, isolated occurrence of drug-related activity will not suffice. The purpose [for] which a person uses property and whether such use is continuous are issues of fact to be decided on the totality of the evidence of each case; the state is not required to prove more than a single specific incident involving the keeping or distribution of drugs if other evidence of continuity exists. [*Id.* at 678-679. See also *Thompson*, 477 Mich at 156.]

Our Supreme Court stated that “continuous to some degree” would be satisfied by evidence of “intermittent use.” *Thompson*, 477 Mich at 157. Accordingly, to prove defendant was guilty of maintaining a drug house beyond a reasonable doubt, the prosecution was required to show that the proscribed conduct was a substantial purpose of the use of property and was continuous to some degree.

We conclude that there was sufficient evidence that the manufacture and use of methamphetamine was a substantial purpose of the use of the motel room and was continuous. The room was in defendant’s name and he admitted that he paid for it and stayed there. Nelson testified that she and defendant had been living at the motel since October, and in the two months they were there, she admitted that they made methamphetamine six times. Norkowski testified to the cumbersome manufacturing process she witnessed that continuously went on for the two days she stayed in the room. Brown also witnessed defendant and Nelson smoke methamphetamine. On a separate occasion, Fisk testified that she smoked methamphetamine with defendant and Nelson, and it was clearly readily available at that time. Although defendant argues that the room was his primary residence, and drug use was incidental, the various items found in the room do not suggest that drug use was incidental. The ingredients and apparatus used to manufacture and use methamphetamine found scattered throughout the room suggest that methamphetamine was manufactured and used in the room and that the operation was ongoing and was a substantial purpose of the use of the property. Viewing all of these facts in a light most favorable to the prosecution, a rational trier of fact could conclude that manufacturing and using methamphetamine was a substantial purpose of defendant’s use of the property and was “continuous to some degree.” *Thompson*, 477 Mich at 157.

Lastly, defendant argues that there was insufficient evidence that he manufactured or delivered methamphetamine. However, defendant was actually charged with conspiracy to manufacture, not deliver, methamphetamine. Therefore, because defendant argues that he did not actually deliver or manufacture methamphetamine, and does not actually argue that there was insufficient evidence to support a conviction for conspiracy to manufacture methamphetamine,

we consider this issue abandoned. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990) (“ ‘Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.’ ”).²

II. SUPPLEMENTAL BRIEF ISSUES

A. JUDICIAL MISCONDUCT

Defendant first argues in his supplemental brief that the trial court committed judicial misconduct in various ways. We review this unpreserved issue for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 764.

First, defendant asserts the trial judge repeatedly played the role of the prosecutor, and the trial judge’s questions were improper and denied him a fair trial. “The court may interrogate witnesses, whether called by itself or by a party,” MRE 614(b), particularly “to clarify testimony or elicit additional relevant information.” *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).

The first set of alleged errors involves interruptions by the trial court of various witnesses’ testimony. A review of the record reveals that these interruptions were simply to clarify the questions or answers and were proper under MRE 614(b). The questions were not intimidating, argumentative, prejudicial, unfair, or partial, and did not unduly influence the jury, *Conyers*, 194 Mich App at 405, or “pierce the veil of judicial impartiality,” *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Rather, they likely aided the jury in understanding the testimony.

The second set of alleged errors involves questions asked at the conclusion of various witnesses’ testimony. However, it is clear from the record that these are all juror questions, which were proper under MCR 2.513(I).

Defendant also challenges the trial court’s questioning of Detective Ian Pegan-Naylor outside the presence of the jury. However, because his proposed testimony involved potential hearsay, the trial court asked the prosecution to make an offer of proof, which was proper pursuant to MRE 103(a)(2) and (b). See also *Orlich v Buxton*, 22 Mich App 96, 100; 177 NW2d 184 (1970) (stating that the function of an offer of proof is to provide “an adequate basis for the

² We note that there was sufficient evidence to convict defendant of conspiracy to manufacture methamphetamine. Defendant’s and Nelson’s acts show a mutual understanding to manufacture methamphetamine, a criminal act. *People v Cotton*, 191 Mich App 377, 392; 478 NW2d 681 (1991). Specifically, witnesses saw defendant and Nelson making methamphetamine in room 246. Nelson herself testified that she and defendant made methamphetamine for their own personal use, and Norkowski testified that Nelson informed her they were making methamphetamine one evening to sell for money. Ingredients and apparatus used to manufacture methamphetamine were found in the room, which defendant admitted to renting.

trial judge to pass on the objection and for the appellate courts to evaluate a claim that he ruled incorrectly”). Accordingly, the trial court did not err by questioning the detective in this regard.

Second, defendant argues that the trial judge committed judicial misconduct by making a ruling without understanding the law and by asking defense counsel to come up with a curative instruction. Defendant does not challenge the trial court’s substantive ruling or the lack of curative instruction given. Rather, defendant asserts that the trial court violated Canon 2(B) by stating that he did not understand the law, by asking defense counsel to come up with a curative instruction, and by stating that the jury does not remember testimony past 5:00 p.m. Although defendant never moved to disqualify the trial judge, he seems to argue on appeal that these are grounds for disqualification. A judge may be disqualified if he “failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.” MCR 2.003(C)(1)(b)(ii). Canon 2(B) provides,

A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person’s race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

Defendant has not shown how the trial judge failed to adhere to the appearance of impropriety standard. Although the trial judge stated that he did not understand the law, it appeared to be an off-hand remark in which he was simply indicating the complexity of MRE 404(b). Simply because a legal concept may be difficult for a judge to understand, does not mean he does not respect and observe the law, as defendant argues. Additionally, the trial court denied defendant’s motion for a new trial, and was clearly struggling with whether a curative instruction would do more harm than good so it gave defense counsel an opportunity to provide a curative instruction if he wished to do so. Because counsel generally would request such an instruction, the trial court was merely extending the opportunity. This does not set forth an appearance of impropriety. Finally, the trial court’s remark regarding the jury not listening after 5:00 p.m. also did not set forth an appearance of impropriety or suggest that the trial court did not respect and observe the law. The trial court was merely observing that by the end of the day, the jury is not as attentive. Accordingly, defendant has failed to establish grounds for disqualification.

Third, defendant argues that the trial court erred by admitting photographs that Officer Cody Kastl admitted he did not take, and thus, had no knowledge if they were accurate. This argument is without merit, as the trial court did not admit the photographs that Kastl did not take; they were admitted through another witness.

Fourth, defendant argues that the trial court erred by allowing Detective King to testify as an expert when he was not qualified. Because defense counsel agreed to the qualification of King under MRE 702, this issue is waived for appellate review. See *People v Buie*, 491 Mich 294, 305; 817 NW2d 33 (2012) (noting that a waiver is the intentional relinquishment of a known right, which may be effected by counsel as long as it is not a certain fundamental right).

Finally, defendant argues that the trial court erred by allowing improper rebuttal testimony that was also hearsay. Defendant challenges the testimony of Detective Pegan-Naylor regarding a conversation he had with Norkowski and Brown and what they told him regarding defendant's and Nelson's drug use at the motel. However, this testimony was elicited during the prosecution's case-in-chief, and was not rebuttal testimony. Thus, to the extent defendant argues that the testimony was improper rebuttal testimony, this argument is without merit. Additionally, defendant merely asserts that the testimony is hearsay, without actually citing the hearsay rule or explaining how the testimony was in fact hearsay. Thus, we consider this argument abandoned. *Traylor*, 245 Mich App at 464.

In sum, defendant has failed to demonstrate judicial misconduct.

B. PROSECUTORIAL MISCONDUCT

Defendant also argues that the prosecutor committed misconduct. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted or "if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of defendant's innocence." *Id.* at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

First, defendant argues that the prosecutor and the police acted in bad faith by destroying evidence that was not hazardous, such as drain cleaner, coffee filters, pop bottles, and batteries. When a defendant argues that dismissal is warranted based on destruction of evidence, the defendant bears the burden to show that the police acted in bad faith. *People v Jones*, 301 Mich App 566, 581; 837 NW2d 7 (2013). Several police officers testified that it is Drug Enforcement Agency and Michigan State Police protocol to destroy all evidence related to the production of methamphetamine, including anything that may have come in contact with chemicals. Because drain cleaner, coffee filters, pop bottles, and batteries, are all things that are commonly used in the production of methamphetamine, it is protocol to destroy them. A showing that evidence was destroyed in the course of a routine procedure generally contravenes a finding of bad faith. *United States v Garza*, 435 F3d 73, 76 (CA 1 2006). Accordingly, defendant has not demonstrated bad faith.

Next, defendant argues that the prosecutor violated discovery by introducing new evidence and a witness at trial.³ MCR 6.201(A)(1) and (6) make it mandatory, upon request, for a party to provide the other party with “the names and addresses of all lay and expert witnesses whom the party may call at trial” and “a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial.”

Defendant first asserts that exhibits 3 through 13 were photographs that were not disclosed prior to trial. Defendant counsel stated on the record that there was no discussion between the attorneys about the exhibits and he did not see the exhibits until the morning of trial. However, it is unclear whether defense counsel had not seen the photographs at all or whether he had just not seen the prosecution’s numbered exhibits. When asked whether the photographs were okay, defense counsel stated that he was not concerned about 3 through 13. Based on this representation, there is no indication that the prosecutor violated the discovery rule.

Defendant next asserts that the prosecutor did not disclose defendant’s NPLEX logs, a national database for pseudoephedrine purchases. Assuming that defense counsel was not provided the logs, defendant is still unable to show prosecutorial misconduct. There is no indication that the nondisclosure was intentional, as the prosecutor provided an email to the court showing that defense counsel only requested logs for Norkowski and Brown. Additionally, defendant cannot demonstrate prejudice for the failure to disclose. Presumably, defendant was aware of pseudoephedrine purchases he made, and could not be surprised by that evidence.

Defendant also asserts that the prosecutor introduced a late witness, the housekeeper, Rhianna Kenney. However, defense counsel acknowledged that she was listed in the police report and on the prosecution’s April 12th witness list. Defense counsel admitted he knew about her, and implied there was no prejudice from the fact that she was not on the original witness list provided months earlier. Counsel’s only concern was with the substance of her testimony, which the parties agreed would be limited. Thus, defendant has failed to show error in this regard.

Finally, defendant argues that the prosecution committed misconduct by arguing facts not in evidence when it tried to tie defendant to a cat, ramen noodles, and a dumpster. However, the prosecution was merely arguing reasonable inferences from the evidence, which it was permitted to do. *Dobek*, 274 Mich App at 66. Nelson testified that she and defendant cared for stray cat by feeding it and providing a litter box in the room. The Tom’s grocery bag found in the dumpster contained cat food and ramen noodle packaging. Ramen noodles were found in the motel room. There was also evidence that defendant shopped at Tom’s grocery store and frequented the 7-Eleven where the dumpster was located.

³ Defendant also argues that the prosecutor did not supply defense counsel with return warrant paperwork at the preliminary examination. However, this Court was not provided with a transcript of the preliminary examination, so there is no way to review this claim of error. Given that it was defendant’s responsibility to provide the transcript, MCR 7.210(B)(1)(a), this Court need not consider this issue.

Accordingly, defendant has not established prosecutorial misconduct warranting a new trial.

C. CHARACTER EVIDENCE

Defendant also argues that the trial court erred by limiting defense counsel's inquiry into Brown's prior convictions. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

Contrary to defendant's argument, the trial court did not prevent defense counsel from questioning Brown about his plea deal. Rather, it prevented defense counsel from asking Brown about his two prior convictions, which were properly excluded under MRE 609(c) for falling outside the ten-year period. Defense counsel was able to cross-examine Brown on the details of his plea and what charges had been dropped in exchange for his testimony.

Defendant argues that the convictions should have been admitted under MRE 404(b). However, defendant sought to admit the convictions to show Brown's motivation for testifying, which is relevant to credibility. *People v McIntire*, 232 Mich App 71, 102; 591 NW2d 131 (1998). MRE 609 governs the use of convictions for attacking credibility, whereas MRE 404(b) addresses evidence of other crimes to show motive, intent, opportunity, etc, and thus, was not the applicable rule.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that his counsel was ineffective. Our review is "limited to mistakes apparent from the record." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).⁴ "The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *Id.*

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *Vaughn*, 491 Mich at 669.

⁴ Defendant requested an evidentiary hearing in a conclusory manner, but this Court denied the motion to remand because a development of the factual record was not necessary. *People v Blaha*, unpublished order of the Court of Appeals, entered June 25, 2014 (Docket No. 318364).

Defendant first argues that defense counsel's statement during closing argument, "His problem in this case is the maintaining a drug house because that is, you keep or maintain a place frequented by people for using narcotics or drugs," implied defendant was guilty. However, when read in context, defense counsel's statement did not imply guilt. Rather, it appears that defense counsel was acknowledging a weakness in the case. While this may not have been the best strategy, he went on to urge the jury to look at the evidence and acquit defendant. Even if error, the brief statement was not outcome determinative. The jury was instructed to decide the case based only on the evidence and that the attorneys' arguments were not evidence. Therefore, defendant has not established ineffective assistance of counsel in this regard.

Defendant next argues that counsel was ineffective for not objecting to the admission of a police report. Defendant cites exhibit 14. However, exhibit 14 was not a police report; rather it was a photograph of pop bottles seized in the motel room. Defense counsel referenced the police report while discussing exhibit 14, but there is no indication the report was ever admitted. Accordingly, this argument is without merit.

Defendant also argues that counsel was ineffective by allowing the CD of defendant's interview to be admitted when he was unsure whether it was accurate. However, the record indicates that defense counsel did his due diligence by making sure that the CD was accurate. Before the prosecutor played the CD, defense counsel challenged it to make sure it was identical to the copy he received. Defendant has not shown how counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, when he did not further challenge the admittance of the CD and relied on the prosecution's representation that it was an identical copy.

Finally, defendant asserts that defense counsel was ineffective for urging him to take a plea deal. However, defense counsel has a duty to advise the defendant of any plea deals and the consequences of available choices. *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). Therefore, defendant has failed to show how counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.

E. EXTRADITION

Defendant next argues that he was illegally extradited from Indiana to Michigan. However, because defendant submitted to jurisdiction in Michigan when he pleaded not guilty at the arraignment on April 4, 2013, his challenge to his extradition is untimely. *People v Duck*, 147 Mich App 534, 540-541; 383 NW2d 245, 248 (1985) ("Challenges to extradition proceedings must be made in the asylum state. Opposition to such extradition comes too late upon submission to the jurisdiction of the charging state."). Further, the United States Supreme Court has recognized that it is an "established rule that illegal arrest or detention does not void a subsequent conviction." *Gerstein v Pugh*, 420 US 103, 119, 95 S Ct 854, 43 L Ed 2d 54 (1975), citing *Frisbie v Collins*, 342 US 519, 72 S Ct 509, 96 L Ed 541 (1952); *Ker v Illinois*, 119 US 436, 7 S Ct 225, 30 L Ed 421 (1886). "[D]ue process of law is satisfied when one present in court is convicted of [a] crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." *Frisbie*, 342 US at 522. Accordingly, due process was satisfied when defendant was fairly apprized of the charges against him and received a fair trial.

F. BIND OVER

Defendant also argues that there was insufficient evidence to bind him over for trial. We are unable to review this issue, as the transcript of the preliminary examination is not available for our review. Because defendant, as appellant, is responsible for securing the filing of the transcripts, MCR 7.210(B)(1)(a), this Court need not consider this issue. See MCR 7.212(C)(7) (“Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court.”). See also *People v Dunigan*, 299 Mich App 579, 587; 831 NW2d 243 (2013) (stating that this Court generally refuses to consider issues for which an appellant has failed to provide a transcript).

G. PROBABLE CAUSE FOR SEARCH AND ARREST WARRANTS

Defendant further argues that the search and arrest warrants lacked probable cause. Defendant did file a motion to suppress, but only as to evidence seized from room 246. Defendant did not challenge the arrest or search warrant based on probable cause and did not move to suppress evidence found in the dumpster. Therefore, we review this unpreserved issue for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 764.

First, defendant argues that the arrest warrant lacked probable cause because the informants were incredible because they took plea deals and the evidence did not link defendant to a crime. Defendant also argues that the search warrant lacked probable cause because the informants were incredible.

Both the United States and Michigan Constitutions “guarantee the right of persons to be secure against unreasonable searches and seizures.” *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), citing US Const, Am IV; Const 1963, art 1, § 11. To comply with this requirement, the police officers must have a search warrant to conduct a search, or their conduct must fall within one of the narrow exceptions to a search warrant. *Id.* at 418. A search warrant must be based on probable cause to be valid. *Id.* at 417. “Probable cause to issue a search warrant exists where there is a ‘substantial basis’ for inferring a ‘fair probability’ that contraband or evidence of a crime will be found in a particular place.” *Kazmierczak*, 461 Mich at 417-418.

MCL 780.653 provides the requirements for finding probable cause:

The magistrate’s finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

(a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.

Personal knowledge “should be derived from the information provided or material facts.” *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). However, “[p]ersonal knowledge can be inferred from the stated facts.” *People v Martin*, 271 Mich App 280, 302; 721 NW2d 815 (2006), *aff’d* 482 Mich 851 (2008), citing *Stumpf*, 196 Mich App at 223.

Additionally, “there must be some basis for concluding either that the informant was credible or that his information in the particular instance was reliable.” *People v Fuller*, 106 Mich App 263, 265; 307 NW2d 467 (1981).

Defendant does not identify how Norkowski and Brown, the informants, were unreliable, other than to assert that they took plea deals in this case. The affidavit for the search warrant contains detailed information regarding what Norkowski and Brown observed in the motel with defendant and Nelson. Based on the affiant, Detective Pegan-Naylor’s training and experience, the items Norkowski and Brown described were consistent with methamphetamine production. Pegan-Naylor learned from the NPLEX logs that Nelson had attempted to purchase pseudoephedrine 15 different times between August and November. After receiving the information from Norkowski and Brown, the police surveilled the motel and saw a female exit the motel, room 246, and drive to Rite-Aid to purchase pseudoephedrine. Given Norkowski and Brown’s detailed observations, and Pegan-Naylor’s follow-up investigation, the facts indicate that the two informants had personal knowledge and there is no indication this knowledge was unreliable. These same facts also form a substantial basis for inferring a fair probability that evidence of methamphetamine would be found in room 246 at the motel. Accordingly, defendant has failed to show that the search and arrest warrants lacked probable cause.

Second, defendant argues that the search warrant was invalid because the prosecutor did not sign it. However, defendant cites no authority requiring the search warrant to be signed by the prosecutor, and thus, we consider this issue abandoned. *Traylor*, 245 Mich App at 464.⁵

Third, defendant argues that the dumpster was not on the search warrant and any items seized from the dumpster, and related photographs, were inadmissible. However, defendant fails to recognize that a search warrant is not needed to search public trash “because society is not prepared to recognize the resident’s expectation of privacy in the trash bags as objectively reasonable.” *In re Forfeiture of \$10,780*, 181 Mich App 761, 764-765; 450 NW2d 93 (1989). See also *California v Greenwood*, 486 US 35, 39-41; 108 S Ct 1625; 100 L Ed 2d 30 (1988).⁶

H. COERCED STATEMENTS

Defendant next argues that the trial court erred by admitting a CD of his interview with the police because his statements were coerced. We review this unpreserved issue for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 764.

⁵ Notably, the affidavit is only required to be signed by the affiant, and for a valid warrant to issue, a neutral and detached magistrate must sign it. *People v Waclawski*, 286 Mich App 634, 698; 780 NW2d 321 (2009); *People v Locklear*, 177 Mich App 331, 335; 441 NW2d 73 (1989).

⁶ Defendant also asserts that the trial court and prosecutor committed misconduct by admitting evidence seized from the dumpster, and that defense counsel was ineffective for failing to object to the admission of this evidence. However, given that the evidence was not illegally seized, these arguments are without merit.

To the extent defendant argues that the CD should not have been admitted because it had deletions, this argument is without merit. Not only is this issue waived because defendant agreed to and requested the deletions, see *Carines*, 460 Mich at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (defining “waiver” as the “‘intentional relinquishment or abandonment of a known right’ ”), but also the deletions were necessary to prevent the jury from hearing evidence of his prior convictions, which would have potentially been prejudicial to defendant.

Further, the only support defendant provides for his assertion that his statements were coerced is the fact that Detective Pegan-Naylor told him that the police officers discovered methamphetamine in the motel room, when they did not. Defendant does not show how this is coercion. He does not argue that the statements he gave were not made voluntarily or that he did not intelligently or knowingly waive his rights. *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998). He also did not argue that he was threatened or abused. *Id.* Pegan-Naylor testified that the interview took place in the jail in a private, attorney-client room that had two windows and was well-lit. He testified that defendant was advised of his rights, and defendant signed the Miranda card acknowledging such. Defendant was not in handcuffs and Pegan-Naylor testified that there were no attempts to use coercion, violence, or threats to get defendant to talk. Because the tape of the interview has not been provided to this Court, on this record there is no indication that defendant’s statements were coerced.

I. CONFLICT OF INTEREST

Defendant next argues that it is a conflict of interest for prosecutor Noelle Moggenberg to file the brief on appeal in this case when her husband was one of the detectives. However, Noelle Moggenberg did not file the appellate brief for plaintiff in this case. It was filed by Christopher Forsyth, assistant prosecutor, on behalf of Robert Cooney, the Grand Traverse County Prosecutor.

Defendant also asserts that Forsyth failed to sign papers, but does not specifically identify these papers. His statement that Forsyth failed to sign police reports, warrants, and unfiled papers required by law is insufficient. Again, this Court will not search for authority to sustain or reject defendant’s position. *Traylor*, 245 Mich App at 464.

J. PERJURED TESTIMONY

Defendant also argues that several witnesses gave perjured testimony. We review this unpreserved issue for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 764.

Defendant has failed to identify any specific instances of perjured testimony. Defendant asserts Norkowski and Brown must have lied because they received plea deals to testify. Defendant does not cite any case law stating that it is illegal to receive a plea deal in exchange for testimony. In fact, it is well established that such deals are permitted. See, e.g., *Gray v City of Galesburg*, 71 Mich App 161, 167; 247 NW2d 338 (1976) (stating that “public rights may, in the discretion of prosecutors or other officials, be exchanged for public benefits, as often occurs in plea bargaining or in the granting of immunity to an accomplice in exchange for his

testimony”). The remaining instances of alleged perjured testimony cited by defendant amount to nothing more than inconsistencies in the witnesses’ testimony, which does not amount to perjury. Defendant’s argument is based solely on his position that the testimony of the witnesses was contradictory or simply not worthy of belief. Credibility of the witnesses is for the jury to decide. *Unger*, 278 Mich App at 222.

K. CUMULATIVE ERROR

Finally, defendant argues that that the cumulative impact of the above claimed errors denied him a fair trial. The cumulative effect of several minor errors may warrant reversal where the individual errors would not. “However, 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.’ ” *Ackerman*, 257 Mich App at 454, quoting *People v Knapp*, 244 Mich App. 361, 388; 624 NW2d 227 (2001). Having identified no errors, defendant has failed to establish his cumulative effect argument.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Donald S. Owens