

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 18, 2016

v

RAYMOND ANTHONY LETT,  
  
Defendant-Appellant.

No. 328156  
Kalamazoo Circuit Court  
LC No. 2015-000157-FH

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Before: SHAPIRO, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant, Raymond Anthony Lett, appeals as of right his jury trial conviction of owning, operating or maintaining a laboratory involving methamphetamine (possessing chemical or laboratory equipment), MCL 333.7401c(2)(f). The trial court sentenced defendant, as a habitual fourth offender, MCL 769.12, to six to thirty years' imprisonment. We affirm in part and remand in part.

After noting an increase in pseudoephedrine sales at a local Meijer store by local people known by police to be involved in methamphetamines, police set up an investigation outside the store to watch the real time log of purchases of pseudoephedrine and then observe those individuals exit the store.<sup>1</sup> On December 30, 2014, defendant was logged in as purchasing pseudoephedrine at the Meijer pharmacy and then observed meeting another person who had also just purchased pseudoephedrine at the store, Donnel Jackson, outside of the store. Defendant and Jackson then entered a vehicle where two other men were waiting and defendant got into the driver's seat and drove away. Police Officers Aaron Ham and Brannon Pierman followed defendant's vehicle to observe whether they would make more pseudoephedrine purchases at other stores. Eventually, defendant committed a civil infraction, and Officer Pierman conducted a traffic stop. Defendant exited the vehicle and handed Officer Ham a box of pseudoephedrine medicine. Officer Ham testified that during the traffic stop defendant admitted to purchasing pseudoephedrine for one of the men in the backseat of the vehicle. When asked what the man would do with the pseudoephedrine, defendant told Officer Ham that the man

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<sup>1</sup> A database, called N-plex, provides real time purchase logs for pseudoephedrine based products and is available to police officers.

would likely make methamphetamine with it. According to Officer Ham, defendant told him that he had purchased pseudoephedrine for the man once before and was paid \$20 for it. Defendant, at trial, denied making these statements.

On appeal, defendant first argues that he was denied a fair trial by the improper admission of drug profile testimony by Officer Ham. We review unpreserved claims of evidentiary error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Drug profile evidence is “an informal compilation of characteristics often displayed by those trafficking in drugs.” *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999) (citation and quotation marks omitted). It is an investigative technique that simply lists characteristics that in the eyes of law enforcement are indicative of criminal involvement. *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). This form of evidence is inherently prejudicial because it may suggest that innocent activities indicate criminal activities. *Murray*, 234 Mich App at 53. Therefore, drug profile evidence is only admissible when the following factors are met: (1) it is offered for the proper purpose of providing background information or modus operandi evidence; (2) “the profile, without more, should not normally enable a jury to infer the defendant’s guilt[;]” (3) the trial court should provide a limiting instruction about the appropriate use of the profile evidence; (4) the witness should not express an opinion about the defendant’s guilt based on the profile or “expressly compare the defendant’s characteristics to the profile in such a way that guilt is necessarily implied.” *Id.* at 56-58.

In this case, Officer Ham’s testimony about the profile of “smurfing” followed by his opinion that defendant was likely engaged in smurfing was likely improper drug profile evidence. Officer Ham expressly compared defendant’s actions to those of the drug profile, there was no proper purpose offered for the evidence, and the jury was not instructed that it was only to consider the evidence for the proper purposes. *Murray*, 234 Mich App at 56. Therefore, the evidence could be viewed as improperly admitted as substantive evidence of defendant’s guilt. *Murray*, 234 Mich App at 53.

Nevertheless, defendant has failed to demonstrate that this error was outcome determinative. Because defendant bears the burden of demonstrating that the error affected the outcome of the trial, *Carines*, 460 Mich at 763, and defendant completely failed to argue that the drug profile testimony affected the outcome of his trial, defendant has failed to meet his burden under the plain error standard. Moreover, the jury necessarily found defendant’s claim that he did not confess to buying the pseudoephedrine for the purpose of another to make methamphetamine incredible when it convicted defendant. “It is the province of the jury to . . . assess the credibility of witnesses.” *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Therefore, defendant has not demonstrated that any error in the admission of the drug profile testimony was outcome determinative. *Carines*, 460 Mich at 763.

Next, defendant alleges that he is entitled to sentencing relief under *People v Lockridge*, 498 Mich 358, 389-392; 870 NW2d 502 (2015). The prosecution agrees, and we do as well. Defendant preserved this issue by moving for a remand for resentencing, *People v Terrell*, 312 Mich App 450, 464 n 40; 879 NW2d 294 (2015), so we review the issue for harmless error, *People v Stokes*, 312 Mich App 181, 198; 877 NW2d 752 (2015). In *Lockridge*, 498 Mich at

389-392, our Supreme Court held that the Michigan sentencing guidelines violated a defendant's Sixth Amendment right by requiring judicial fact-finding beyond facts that were admitted by the defendant or those found by the jury. The Court thus determined that the mandatory nature of the sentencing guidelines was unconstitutional and rendered the guidelines advisory only. *Id.* at 364. Before *Lockridge*, a trial court could depart from the properly calculated legislative sentencing guidelines only if the trial court had substantial and compelling reasons for that departure and stated on the record its reasons for departure. MCL 769.34(3); *Lockridge*, 498 Mich at 391. However, the Supreme Court struck down the provision of MCL 769.34(3) that required a trial court to articulate a substantial and compelling reason to depart from the guidelines. *Lockridge*, 498 Mich at 364.

In this case, defendant does not allege that his sentence was based on judicially found facts; his offense variable score was zero. Rather, defendant challenges the trial court's compulsory adherence to the sentencing guidelines. The trial court at sentencing stated that it was bound to sentence defendant within the guidelines unless it had a substantial and compelling reason. The trial court went on to state that it did not have a substantial and compelling reason to depart downward, but it sentenced defendant to the bottom of the guidelines range. Because the trial court indicated that it was bound by law to sentence defendant within the guidelines range, defendant demonstrated that his sentence was contrary to *Lockridge*. *Terrell*, 312 Mich App at 465-466 (despite the fact "that judicial fact-finding did not increase defendant's minimum sentence guidelines range, the trial court's compulsory use of the guidelines was erroneous in light of *Lockridge*."). Because there was error, defendant is entitled to a remand pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as outlined in *Lockridge*, 498 Mich at 398, "to determine whether the error resulting from the compulsory use of the guidelines was harmless[.]" *Terrell*, 312 Mich App at 465. "[T]he purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant's sentence so that it may be determined whether any prejudice resulted from the error." *People v Stokes*, 312 Mich App 181, 200-201; 877 NW2d 752 (2015). During the *Crosby* process the trial court should make the decision whether it would sentence defendant differently in light of *Lockridge*, 498 Mich at 398.

We affirm defendant's convictions, but remand for further sentencing proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro  
/s/ Joel P. Hoekstra  
/s/ Deborah A. Servitto