2015 IL App (3d) 130803-U

Order filed October 5, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0803
v.	)	Circuit No. 13-CF-42
	)	
DOUGLAS DePATIS,	)	Honorable Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant did not receive ineffective assistance of counsel where counsel's decision to call defendant's brother to testify was trial strategy and the rest of counsel's alleged errors did not prejudice defendant. (2) Defendant forfeited review of an alleged violation of the one-act, one-crime rule.

¶ 2 Defendant, Douglas DePatis, appeals his convictions for participating in the manufacture of methamphetamine (720 ILCS 646/15(a) (West 2012)) and unlawful use of property (720 ILCS 646/35(a) (West 2012)), arguing that: (1) he received ineffective assistance of counsel; and (2)

his conviction for unlawful use of property should be vacated on the basis that it violates the one-act, one-crime rule. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by supplanting indictment with: (1) participating in the manufacture of methamphetamine (720 ILCS 646/15(a) (West 2012)); (2) unlawful possession of methamphetamine precursors (720 ILCS 646/20(b)(1) (West 2012)); (3) unlawful possession of methamphetamine materials with intent to manufacture a controlled substance (720 ILCS 646/30(a) (West 2012)); (4) unlawful use of property in that defendant knowingly used a house within his control located at 115 South Sheridan Avenue in Watseka (the subject property), to allow the manufacture of methamphetamine to take place (720 ILCS 646/35(a) (West 2012)); and (5) unlawful possession of methamphetamine manufacturing waste (720 ILCS 646/45(a) (West 2012)). The subject property was owned by defendant's brother, Mark DePatis.

¶ 5 A jury trial was held. The State's first witness was Officer Ryan Garfield of the Watseka police department. Garfield testified that on May 3, 2013, he was asked by Lieutenant Josh King to address a civil matter at the subject property between defendant and Chris Laird involving a laptop computer that Laird claimed he had given to defendant to fix and which defendant refused to return. King told Garfield that defendant was living at the subject property. King also told Garfield that Laird reported that there was a possible methamphetamine lab at the subject property and asked Garfield to smell the area for anhydrous ammonia or other methamphetamine precursors. Defense counsel objected to Garfield's testimony regarding Laird's report of a possible methamphetamine lab, but the trial court allowed it for the limited purpose of allowing Garfield to explain his actions.

¶ 6 Garfield arrived at the subject property. He met with defendant in the driveway in front of a shed behind the main residence.[1] While Garfield did not enter the shed, he observed that another individual, Josh Huff, was in the shed. Defendant provided Garfield with the serial number of the laptop. While Garfield was writing down the serial number, he smelled a strong odor that he associated with anhydrous ammonia. Garfield was familiar with the odor of anhydrous ammonia because he had responded to calls at a fertilizer plant regarding open containers of anhydrous ammonia. The odor got stronger the closer Garfield got to the shed. Garfield left the laptop with defendant and left the subject property.

¶ 7 Garfield called Lieutenant King and told King what he had observed at the subject property. King told Garfield to call the State's Attorney to attempt to obtain a search warrant. Garfield secured a search warrant for the main residence and the shed less than four hours later.

¶ 8 Garfield returned to the subject property to search it with King, Detective Clint Perzee, and three other officers. At that time, defendant and Huff were inside the shed. The officers detained defendant and Huff during the search. Garfield still smelled anhydrous ammonia around the shed when he returned to search it. The shed contained only one room with a sink on the back wall and a refrigerator. Garfield did not see a bathroom, but there was a bucket that contained a substance that smelled like urine. Garfield did not recall seeing a stove or laundry facilities. Garfield admitted that the shed was not a place that would be used as a residence for a very long period of time.

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[1]The shed-like building behind the main residence was characterized differently by the various trial witnesses. For the sake of clarity, we will refer to the building as the "shed" throughout this order. We note, however, that Garfield described the building as a "smaller dwelling behind the main residence" or a "studio apartment."

¶ 9 Garfield and the other officers found several drug paraphernalia items during the search of the shed, including methamphetamine precursors. Garfield identified some photographs he had taken during the search of the shed. One photograph contained a green leafy substance that Garfield testified had an odor that he associated with cannabis. Garfield did not believe that the green leafy substance had been tested. Another photograph displayed drug paraphernalia that smelled like burnt cannabis. Other photographs showed: (1) Coke-bottle gas generators; (2) a light bulb that was altered so that it could be used for smoking drugs; (3) rock salt; (4) a Crockpot on top of a refrigerator containing a spoon and syringes; (5) lithium paper; (6) coffee filters with white residue inside; (7) a battery from which the lithium paper had been removed; (8) an ice compress; (9) a burned milk jug containing a substance, which was found approximately 15 feet from the front door; (10) a pen used as drug paraphernalia; (11) several walkie-talkies; (12) defendant's Illinois identification card, which was found on the coffee table and did not list the subject property as defendant's address; (13) a piece of mail addressed to Mark DePatis; and (14) Brillo pads. One of the Coke-bottle gas generators, which was found in the garbage can, was still fizzing when the officers found it. Some of the drug paraphernalia items that were discovered could be used to ingest drugs other than methamphetamine. The officers did not find anhydrous ammonia. Most of the seized items were not in plain view but rather were found in drawers, the garbage can, and the Crockpot. The only item Garfield could recall seeing in plain view was the green leafy substance.

¶ 10 After collecting the evidence, the officers transported defendant and Huff to the county jail. While filling out paperwork at the jail, Garfield heard a conversation between defendant and Huff in their holding cell over a live audio and video recording of the holding cell. Garfield heard defendant say that he "had someone 'special' come in and pick up his garbage for him."

The prosecutor asked Garfield if defendant's statement had any special meaning for him, and defense counsel objected on the basis that the question called for Garfield to give his opinion. The trial court then reworded the question and asked Garfield if the statement had "any relevance to [him] in the course of [his] actions or [his] investigation?" Garfield replied that he took the statement to mean that someone had come and picked up any evidence or precursors before the officers arrived back at the house.

¶ 11 The State's next witness was Detective Perzee, an investigator with the Iroquois County sheriff's office, who was also involved in the search of the shed. Perzee explained that King contacted him and said that he had secured a search warrant for "the residence of Doug DePatis." Perzee then proceeded to the Watseka police department and participated in the search of the shed at the subject property.[2]

¶ 12 Perzee had taken several training courses on methamphetamine and other drugs. Perzee took training courses given by the Drug Enforcement Administration in Quantico, Virginia, where he learned about various methods for making methamphetamine. Perzee explained that the Nazi method, or the anhydrous ammonia method, involved mixing pseudoephedrine pills, anhydrous ammonia, lithium strips from batteries, Coleman camp fuel, and hydrochloric gas. Hydrochloric gas is often produced by mixing rock salt and Rooto drain cleaner in a 20-ounce pop bottle. After the mixing process, the mixture is often filtered using coffee filters. The methamphetamine is then air-dried or dried in a microwave or on a hot plate. Ammonium nitrate taken from cold packs can be used to cook methamphetamine in place of anhydrous ammonia. Methamphetamine can be snorted, ingested through the nose, injected into the blood stream, or smoked.

[2]Perzee referred to the shed as "the smaller, rear residence."

¶ 13 When Perzee arrived at the subject property, defendant and Huff had been taken into custody and officers were already searching the shed. Perzee and the other officers collected the following evidence from the shed: (1) hydrochloric gas generators, which were 20-ounce pop bottles with tubes coming out the top; (2) batteries from which the lithium strips had been removed; (3) Rooto drain cleaner; (4) salt; (5) small pieces of tinfoil, which can be used to smoke methamphetamine or package it for sale; (6) empty cold packs; (7) a light bulb that had been altered so that it could be used to smoke methamphetamine; (8) coffee filters; (9) syringes, which could be used to inject methamphetamine into the blood stream; and (10) steel wool, which can be used to smoke methamphetamine. The hydrochloric gas generators that the officers found contained a substance inside that Perzee opined was likely rock salt and Rooto drain cleaner, which is the type of drain cleaner that Perzee has found is most commonly used in methamphetamine labs. The only purpose Perzee was aware of for stripping lithium from a battery was to produce methamphetamine.

¶ 14 A pipe and a bowl were found, which Perzee opined were commonly used to smoke cannabis. The bowl possibly could have been used to smoke methamphetamine, although methamphetamine was generally not smoked in that fashion. A larger glass tube, which could be used to smoke cocaine or methamphetamine, was also found. Specifically, a rock of crack cocaine or a small piece of methamphetamine would be placed on a Brillo pad inside the tube, and the cocaine or methamphetamine would then be lit. Hollowed out pen tubes were found, which could be used to inhale the vapors emitted from burning methamphetamine. A piece of methamphetamine would be lit on a piece of tin foil and the tube would be used to inhale the vapors.

¶ 15 A toothbrush taped to a blue rod was also found in the shed. Perzee testified that he had seen a device like that on one other occasion, and it had been used to clean bottles used to make methamphetamine so that the bottles could be reused.

¶ 16 Hand-held radios were also found. Perzee stated that, from his experience, hand-held radios are used so that the person cooking the methamphetamine and a lookout can communicate concerning whether police officers or other citizens are in the area. Perzee acknowledged that there were also many other household uses for handheld radios.

¶ 17 Approximately 15 yards northwest of the shed, Perzee found a burned milk jug that contained a chalky sludge. Perzee believed that the sludge in the milk jug was the result of something going wrong in the process of cooking methamphetamine because there are several flammable substances used to create methamphetamine. Perzee conducted a field test on the substance, which revealed that the substance was positive for ephedrine.[3] However, no lab test was performed to confirm the field test as the Illinois State Police crime lab refuses to test such substances because they could be a potential hazard to the crime lab facility. Perzee did not know how often the field test rendered false positives.

¶ 18 Perzee opined that the evidence collected from the shed contained everything that was needed to make methamphetamine and that there was an active methamphetamine lab in the shed. On cross-examination, Perzee admitted that the officers found no camp fuel, naphtha, or mineral spirits, which are necessary to make methamphetamine. The officers found no anhydrous ammonia, but they did find cold packs, which can be used in place of anhydrous ammonia. Perzee did not check for a water softener in the main residence.

[3]Ephedrine is a methamphetamine precursor. 720 ILCS 646/10 (West 2012).

¶ 19 The prosecutor moved to introduce all the photographs identified by Garfield and Perzee into evidence. Defense counsel objected to the admission of the photograph showing the green leafy substance on the basis that it was prejudicial evidence of an uncharged crime. The trial court denied the admission of the photograph of the green leafy substance, noting that it had never been tested. The trial court further stated that, even if it was marijuana, it was irrelevant because "lots of people use marijuana and they don't make meth."

¶ 20 Defense counsel also objected to the admission of photographs of multiple pipes and devices for smoking drugs that were found during the search on the basis that Perzee opined that some of them were not used for smoking meth. The trial court allowed the photographs of all the devices to be admitted.

¶ 21 The State's next witness was Lieutenant King. King testified that on May 3, 2013, he received a call from Chris Laird reporting that he had given defendant a laptop computer to fix and defendant refused to return it. Laird also stated that defendant was making methamphetamine at the subject property. King contacted Garfield and asked him to address the situation with the computer and to call him if he smelled or saw anything indicating that methamphetamine was being made at the subject property.

¶ 22 Garfield later called King and reported that he could smell a strong chemical odor at the subject property that made his tongue somewhat numb. King told Garfield to contact the State's Attorney's office. Garfield later called King back and stated that the State's Attorney's office was going to seek a search warrant. King contacted other Watseka police officers as well as Perzee and asked them to assist in the execution of the warrant.

¶ 23 When King arrived at the scene, he searched the main house but did not find anything there. King then proceeded to the shed, where the officers found several items associated with

the manufacture of methamphetamine.[4] The officers located a gas generator from the garbage can that was smoking and had a chemical smell. King did not fingerprint any of the items that were found.

¶ 24 King testified that, to his knowledge, defendant lived at the subject property. The prosecutor asked if the Watseka police department had any encounters with defendant at that address in the past. King testified that an officer had arrested defendant at that address in an unrelated incident approximately seven weeks prior to the search. The State rested.

¶ 25 Defendant's first witness was Deanna Barnard, defendant's sister. Barnard testified that she lived at 502 North Wabash in Watseka. Defendant had been living with Barnard on and off for the past three years. He had also stayed with his daughter and had his own place at one time. On May 3, 2013, defendant resided with Barnard and her husband. Defendant took some of his things to his brother, Mark DePatis' residence at the subject property when he lost his apartment. Defendant went to Mark's house sometimes, but Mark told defendant he could not live there because Mark was going through a divorce.

¶ 26 Defendant's second witness was Mark DePatis. Mark testified that defendant stayed at his house on and off for the last three months. Sometimes defendant stayed in the shed and sometimes he stayed in the main residence. Defendant was at Mark's house on the morning of May 3, 2013, but Mark did not know if he had stayed there the night before or not. Defendant had a couple boxes of clothes and some furniture in Mark's garage. Defendant also had clothes in the shed. Sometimes defendant stayed at Mark's house and other times he stayed at their sister's house. Mark believed that defendant's mail went to their sister's house.

[4]King referred to the shed as the "back property" or the "back residence."

¶ 27 Defendant and Mark sometimes repaired electronics in the shed. Mark did not typically lock the shed; it was open most of the time. Other people had access to the shed and Mark could not always keep track of who came and went. Laird, the individual who called the police regarding the laptop computer, was Mark's brother-in-law. Mark was getting divorced from Laird's sister and had previously had various problems with Laird.

¶ 28 On cross-examination, the prosecutor asked Mark if he remembered saying to King, "I let my brother stay here and this is what I get for it." Mark replied that he may have said that. The defense rested.

¶ 29 During closing arguments, the prosecutor mentioned several times that Mark testified that he allowed defendant to stay in the shed.

¶ 30 Defense counsel argued that the shed was not defendant's residence. Rather, as defendant's sister and brother testified, defendant was homeless. He may have stayed at his brother's residence sometimes, but it was not his residence and he did not have control over it. Mark testified that the shed was unlocked and others had access to it. Defense counsel argued that defendant was in the wrong place at the wrong time. Defense counsel pointed out that the evidence seized by the police officers was all concealed in drawers and the garbage can; it was not out in the open.

¶ 31 The jury found defendant guilty of all five counts. At the sentencing hearing, the prosecutor asked the court to enter judgment on only participation in the manufacture of methamphetamine, as the other charges merged based on one-act, one-crime principles. Defendant agreed. The trial court opined that it believed defendant was subject to sentencing on participating in the manufacture of methamphetamine and unlawful use of property because it did not believe that the elements of unlawful use of property were included in the elements of

participating in the manufacture of methamphetamine. Defendant did not object to the trial court's belief.

¶ 32 Defendant gave a statement in allocution, during which he contended that the State had been allowed to present misleading evidence at trial; the shed was a part of Mark's home; he did not live in the shed; and the only things he "possessed" on the day of the search were two cell phones, a green leafy substance, and a pack of cigarettes. In response, the trial court noted that Mark had testified that defendant "had run of the place."

¶ 33 The trial court sentenced defendant to eight years' imprisonment for participation in the manufacture of methamphetamine and four years' imprisonment for unlawful use of property, to be served concurrently. Defendant did not object.

¶ 34 ANALYSIS

¶ 35 I. Ineffective Assistance of Counsel

¶ 36 On appeal, defendant argues that his trial counsel was ineffective for various reasons. Defendant contends that he was prejudiced by the cumulative effect of these errors. In this order, we address trial counsel's purported errors in two groups: (1) errors regarding evidence linking defendant to the shed; and (2) other errors. We find that the purported errors regarding evidence linking defendant to the shed did not constitute deficient performance but rather were matters of trial strategy. We further find that the remaining purported errors of counsel did not prejudice defendant.

¶ 37 We use the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in assessing claims of ineffective assistance of counsel. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Thus, to establish ineffective assistance of counsel, a defendant must demonstrate both

that: (1) "counsel's performance was deficient"; and (2) "but for defense counsel's deficient performance, the result of the proceeding would have been different." *Id.*

¶ 38 A. Evidence Linking Defendant to the Shed

¶ 39 Defendant argues that trial counsel made several errors with regard to evidence linking him to the shed. Specifically, defendant contends that counsel was ineffective for failing to object on the basis of hearsay when: (1) Garfield testified that King told him defendant lived at the subject property; and (2) Perzee testified that King told him the officers had secured a search warrant for defendant's "residence" on the basis of hearsay. Also, defendant argues that trial counsel should have objected when the prosecutor asked King where he believed defendant lived on the basis of lack of foundation. Defendant contends that without the improper admission of these statements, the evidence at trial connecting defendant to the shed was very speculative.

¶ 40 Additionally, defendant argues, trial counsel erred in calling Mark to testify because Mark established a connection between defendant and the shed. Defendant contends that Mark's testimony strengthened the weakness in the State's case that there was a lack of direct evidence establishing defendant's control over anything that took place in the shed.

¶ 41 Essentially, it is defendant's position that trial counsel should have chosen not to present any evidence concerning why defendant was located in the shed on the day of his arrest. Instead, counsel should have adopted the strategy of seeking to exclude any testimony from State witnesses that defendant lived in the shed or at the subject property. Thus, defendant believes that trial counsel's chosen strategy was ineffective whereby trial counsel presented evidence that: (1) defendant did not reside at the subject property or in the shed; and (2) defendant was only in the shed on the day of the search because he was homeless.

¶ 42 The mere fact that a different trial strategy, in hindsight, appears that it may have been more successful does not establish ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 479-80 (1994) (quoting *United States v. Yancey*, 827 F.2d 83, 90 (7th Cir. 1987)) ("Errors in judgment or trial strategy do not establish incompetence [citation], 'even if clearly wrong in retrospect.' ") Due to the abundance of evidence that the shed was being used to produce methamphetamine, trial counsel's decisions to call Mark to testify and not to raise the proposed objections were reasonable strategic choice and his performance was not deficient. Stated another way, counsel had to provide some explanation as to why defendant was found in a shed that Investigator Perzee testified was being used to produce methamphetamine.

¶ 43 1. Testimony that Defendant Lived at the Subject Property

¶ 44 Defense counsel's failure to object to Garfield's and King's testimony that defendant lived at the subject property and Perzee's testimony that the officers secured a search warrant for defendant's "residence" did not constitute deficient performance but was reasonable trial strategy. In demonstrating that counsel's performance was deficient, a defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Coleman*, 183 Ill. 2d at 397. "Defense counsel's failure to object to testimony may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *People v. Evans*, 209 Ill. 2d 194, 221 (2004). "The determination of reasonableness of trial counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, without hindsight, in light of the totality of the circumstances and not just on the basis of isolated acts." *People v. Coleman*, 301 Ill. App. 3d 37, 46 (1998).

¶ 45 The record shows that trial counsel challenged the police officers' testimony that defendant lived at the subject property, including the shed, and the officers' characterization of

the shed as a "residence" or "dwelling." Rather than attempting to exclude all possible testimony that defendant lived at the subject property, trial counsel chose to present evidence that the shed was not a residence and defendant did not reside at the subject property. Specifically, trial counsel elicited testimony from Garfield that the shed did not have a bathroom, stove, or laundry facilities and could not be used as a residence for a prolonged period of time. Defendant also called witnesses—Barnard and Mark—who testified that defendant did not live permanently with Mark. Barnard testified that defendant lived permanently with her at the time of his arrest but also stayed with his daughter sometimes. Mark testified that defendant stayed off and on with him, Barnard, and defendant's daughter. During closing arguments, trial counsel argued that the shed was not a residence, defendant did not live there, and defendant did not have control over the shed.

¶ 46 2. Mark's Testimony

¶ 47 Similarly, trial counsel's decision to call Mark to testify was trial strategy. "Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002).

¶ 48 Mark's testimony served the defense's purpose of offering an explanation as to why defendant had spent three to four hours on the day of the search inside a shed that had apparently been used recently to cook methamphetamine—namely that defendant was homeless and kept some of his property in the shed. Mark's testimony also established that, although defendant stayed at the shed sometimes, he did not live there all the time but rather stayed off and on with various family members. This rebutted testimony of the State's witnesses that they believed defendant "resided" at Mark's property, including the shed. It also allowed trial counsel to argue

that defendant was just a visitor and that there was no evidence he even knew that the methamphetamine ingredients were in the shed. Additionally, Mark's testimony established that he left the shed unlocked and could not always control who had access to it. This supported defense counsel's theory that the shed was wide open, the methamphetamine-related items belonged to someone else, and defendant was merely in the wrong place at the wrong time.

¶ 49 We reject defendant's reliance on *People v. Orta*, 361 Ill. App. 3d 342 (2005), as we find the case to be factually distinguishable. In *Orta*, the defendant was found guilty of possession of a controlled substance with intent to deliver when police officers found drugs in an apartment to which defendant had a key. *Id.* at 344-45. The *Orta* court held that defense counsel was ineffective for eliciting testimony that defendant had sold drugs to a police informant the day before the search. *Id.* at 347. Defense counsel claimed that he was offering evidence of the sale to attack the police officers' credibility for failing to turn over prerecorded funds that were involved in the sale. *Id.* The trial court rejected counsel's explanation and found that evidence of the sale prejudiced the defendant's case and served no legitimate tactical purpose. *Id.*

¶ 50 In the instant case, unlike in *Orta*, Mark's testimony did not establish that defendant engaged in prior related criminal activity. Rather, Mark's testimony provided an explanation for defendant's presence in the shed at the time of the search and established that the shed was typically unlocked, allowing defense counsel to argue that others could have had access to the shed.

¶ 51 B. Other Errors

¶ 52 In addition to the purported errors regarding evidence linking defendant to the shed, defendant argues that his trial counsel was ineffective for failing to object to certain evidence, failing to raise the right objections to other evidence, failing to request limiting instructions, and

failing to include the claimed errors in a posttrial motion. We find that, even assuming that counsel's performance was deficient, defendant was not prejudiced by these alleged deficiencies.

¶ 53 Specifically, defendant argues that his trial counsel was ineffective for failing to file a motion *in limine* to exclude marijuana-related evidence and object to the admission of all photographs of marijuana-related evidence on the basis that it was improper other-crimes evidence.[5] Also, defendant contends counsel was ineffective for failing to object to King's testimony that defendant was arrested for an unspecified offense at the subject property a few weeks prior to the search on the basis that it was improper other-crimes evidence. Additionally, defendant argues trial counsel was ineffective for failing to object to Garfield's and King's testimony regarding Laird's hearsay statement that defendant had a methamphetamine lab at the subject property on the basis that it was not necessary to show the course of Garfield's or King's investigation.[6] Defendant also claims that counsel should have objected on the basis of relevancy to Garfield's testimony regarding the meaning of defendant's holding-cell statement that someone special had picked up his garbage.[7] Defendant also contends that counsel should have objected when the prosecutor asked Mark whether he had said to King "I let my brother stay here and this is what I get for it" because "and this is what I get for it" was an improper

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[5]Trial counsel objected to the admission of some of the photographs of marijuana-related evidence, and the objection was sustained.

[6]Trial counsel did object to Garfield's testimony that King told him that Laird reported that there was a methamphetamine lab on the property on the basis of hearsay, but the trial court allowed it for the purpose of explaining the course of Garfield's investigation.

[7]Trial counsel did object to Garfield's testimony on the basis that it was improper opinion testimony.

opinion of defendant's guilt. Finally, defendant contends that trial counsel should have moved to strike testimony that was allowed over objection, preserved the foregoing errors in a posttrial motion and requested limiting jury instructions regarding testimony that was admitted only for a limited purpose and not for the truth of the matter asserted.

¶ 54 Even assuming that counsel's claimed errors constituted deficient performance, defendant's ineffective assistance argument fails because defendant has not established that he was prejudiced by the cumulative effect of the claimed errors. *Coleman*, 183 Ill. 2d at 397-98 ("Courts *** may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance."). "A defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4 (2008). Prejudice must be assessed based on the totality of the evidence. *People v. Enis*, 194 Ill. 2d 361, 413 (2000).

¶ 55 Given the weight of the State's evidence in this case, we find that there is no reasonable probability that the result at trial would have been different if the aforementioned alleged errors had not occurred. Overwhelming evidence was presented that defendant committed the charged offenses. Defendant was in the driveway in front of the shed and Huff was inside the shed when Garfield initially responded to the laptop complaint. At that time, there was a strong chemical odor by the shed that Garfield associated with anhydrous ammonia. When the officers returned to search the property three to four hours later, defendant and Huff were in the shed. The officers found ingredients and equipment for cooking methamphetamine inside the shed, including rock salt, Rooto drain cleaner, gas generators, cold packs, coffee filters, and stripped lithium batteries. Perzee testified as to how these items are used to cook methamphetamine.

One of the gas generators was still fizzing and emitting a chemical odor when it was found. A burned milk jug was found near the shed that contained a substance that field-tested positive for ephedrine. Defendant told Huff in the holding cell that he had someone "special" come by and pick up his garbage for him.

¶ 56 II. One-Act, One-Crime

¶ 57 Defendant argues that his conviction for unlawful use of property should be vacated pursuant to the one-act, one-crime doctrine because his convictions for participating in the manufacture of methamphetamine and unlawful use of property were borne out of the same physical act, namely, unsuccessfully attempting to manufacture methamphetamine. We reject defendant's argument and instead find that defendant's convictions were based on multiple acts.

¶ 58 Defendant asks that we review this issue under the second prong of plain error analysis, as he forfeited the issue by failing to object at sentencing and failing to preserve the issue in a posttrial motion.[8] We review errors under the second prong of plain error analysis when " 'a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 59 "The first step of plain-error review is determining whether any error occurred." *Thompson*, 238 Ill. 2d at 613. Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. Almond*, 2015 IL 113817, ¶ 47. In the context of the one-act, one-crime rule, "act" means "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977).

[8]Defendant does not argue that the first prong of plain error analysis applies in this case.

Except where one offense is a lesser-included offense of another, "[m]ultiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts." *Id.*

¶ 60 The one-act, one-crime rule involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we ask whether defendant's conduct involved multiple acts or a single act. *Id.* If defendant's conduct involved only one physical act, multiple convictions are improper. *Id.* If defendant's conduct involved multiple physical acts, multiple convictions are improper only if one offense is a lesser-included offense of another. *Id.*

¶ 61 Here, defendant committed multiple physical acts: (1) defendant used a shed within his control to allow the manufacture of methamphetamine to take place; and (2) defendant participated in the manufacture of methamphetamine. Although defendant's use of the shed and his participation in the manufacture of methamphetamine may have occurred simultaneously, "that factor alone does not render his conduct a 'single act' for purposes of the one-act, one-crime rule." *Almond*, 2015 IL 113817, ¶ 48 (holding that the defendant who possessed a loaded firearm while being a felon committed the separate acts of possessing a firearm and possessing firearm ammunition even though he possessed the items simultaneously).

¶ 62 We find our decision in *People v. Schmidt*, 405 Ill. App. 3d 474 (2010) to be instructive. In *Schmidt*, the police apprehended the defendant, who was driving a truck, after chasing him from a fertilizer plant. *Id.* at 476-77. The police recovered a blue container with a substance containing both methamphetamine and pseudoephedrine that the defendant threw out the window of the truck as well as a white powder containing methamphetamine on the inside of the truck. *Id.* at 477. The defendant was charged and convicted of unlawful use of property, unlawful possession of methamphetamine precursor, and unlawful possession of

methamphetamine. *Id.* We held that these convictions were based on three separate acts for purposes of the one-act, one-crime rule: (1) possessing pseudoephedrine; (2) possessing methamphetamine; and (3) using a vehicle to help possess methamphetamine. *Id.* at 487. Similarly, in this case, defendant committed the distinct acts of actively participating in the manufacture of methamphetamine and using a shed to allow the manufacture of methamphetamine to take place.

¶ 63 We reject defendant's argument that *Schmidt* is somehow distinguishable on the issue of whether defendant committed separate acts. As in this case, the defendant in *Schmidt* possessed methamphetamine and methamphetamine precursor while in the truck. *Schmidt*, 405 Ill. App. 3d at 477. However, the simultaneous nature of those acts did not render them a single act. See *Almond*, 2015 IL 113817, ¶ 48.

¶ 64 We reject defendant's reliance on *People v. Crespo*, 203 Ill. 2d 335 (2001) for the proposition that defendant's conviction for unlawful use of property must be vacated because the State made no attempt to delineate the nature of the separate acts. In *Crespo*, the court held that multiple convictions of aggravated battery could not be sustained even though evidence was elicited at trial that the defendant stabbed the victims multiple times where the State failed to apportion the stab wounds among multiple charges in the indictment and the prosecutor portrayed the defendant's conduct as a single attack during closing arguments. *Id.* at 343-44. Here, the indictment charged different acts as the bases for the charges of unlawful use of property and participation in methamphetamine manufacturing. Additionally, the prosecutor argued during closing arguments that defendant committed the offense of participating in methamphetamine manufacturing by taking part in the process described by the police officers or, at the very least, he concealed Huff while Huff engaged in the manufacturing process.

Conversely, the prosecutor argued that defendant committed the offense of unlawful use of property in that he allowed a building he controlled to be used to manufacture methamphetamine. The prosecutor argued extensively that defendant had control over the shed even though it belonged to Mark.

¶ 65 Having found that defendant's convictions for participation in the manufacture of methamphetamine and unlawful use of property are based on separate acts, we now consider whether one offense is a lesser-included offense of the other. In the context of the one-act, one-crime rule, we use the abstract elements approach to determine if one offense is a lesser-included offense of another. *Miller*, 238 Ill. 2d at 174-75. "Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Id.* at 166.

¶ 66 To convict a defendant of participation in methamphetamine manufacturing, the State must prove that the defendant "knowingly participate[d] in the manufacture of methamphetamine with the intent that methamphetamine or a substance containing methamphetamine be produced." 720 ILCS 646/15(a)(1) (West 2012). On the other hand, to convict a defendant of unlawful use of property, the State must prove that the defendant "knowingly *** use[d] or allow[ed] the use of a vehicle, a structure, real property, or personal property within the [defendant's] control to help bring about a violation of [the Methamphetamine Control and Community Protection] Act." 720 ILCS 646/35(a) (West 2012). The statutory elements of participation in methamphetamine manufacture do not require a defendant to use property within his control. Similarly, the elements of unlawful use of property do not require a defendant to

participate in methamphetamine manufacturing or otherwise violate the act beyond allowing use of property within the defendant's control. Therefore, neither unlawful use of property nor participation in methamphetamine manufacturing is a lesser-included offense of the other.[9]

¶ 67 We reject defendant's reliance on *People v. Wisbrock*, 223 Ill. App. 3d 173, 175 (1991) in support of his argument that the prosecutor's statement at the sentencing hearing that he believed that all the other charges merged with the participation in the manufacture of methamphetamine charge for purposes of the one-act, one-crime rule precludes the State from arguing on appeal that participation in the manufacture of methamphetamine and unlawful use of property were based on two separate acts. *Wisbrock* concerned the doctrine of judicial estoppel, which prevents a party who assumes a certain position in a legal proceeding from assuming a contrary position in a subsequent legal proceeding where the party was successful in asserting the first position and received some benefit from it. *Id.* As the State neither succeeded in nor benefited from its position in the trial court that the unlawful use of property charge merged with the participation in manufacturing charge, we find *Wisbrock* inapplicable.

¶ 68 Finally, we reject defendant's argument that the prosecutor effectively nol-prossed the unlawful use of property charge when he opined that all the other charges merged with participation in methamphetamine manufacturing for purposes of sentencing pursuant to the one-

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[9]We note that in *Schmidt*, we examined the charging instrument in determining whether unlawful possession of methamphetamine and methamphetamine precursors were lesser-included offenses of unlawful use of property. *Schmidt*, 405 Ill. App. 3d at 487-88. We decline to adopt such an approach here, as our supreme court has made clear that we are to examine only the abstract elements of the offenses in determining whether one is a lesser-included offense of the other for purposes of one-act, one-crime analysis. See *Miller*, 238 Ill. 2d at 174-75.

act, one-crime doctrine. The prosecutor was not declining to further prosecute the unlawful use of property charge but rather was stating his legal interpretation of the one-act, one-crime rule. The prosecutor did not object when the trial court stated that it believed that the unlawful use of property charge did not merge and proceeded to enter a conviction on that charge.

¶ 69 CONCLUSION

¶ 70 The judgment of the circuit court of Iroquois County is affirmed.

¶ 71 Affirmed.