DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0646
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	
	)	**MEMORANDUM DECISION**
RODOLFO ZAZUETA OCHOA,	)	(Not for Publication -
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-011448-001 DT

The Honorable James T. Blomo, Judge

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorney for Appellant

B R O W N, Judge

¶1 Rodolfo Zazueta Ochoa appeals from his conviction and sentence for possession of narcotic drugs for sale, a class 2

felony. We hold that the trial court erred by admitting hearsay from a declarant who was unavailable at trial and not subject to cross-examination by Ochoa. Because we are unable to find beyond a reasonable doubt that admission of this evidence was harmless, we reverse Ochoa's conviction and sentence and remand for further proceedings consistent with this decision.

BACKGROUND

¶2 On August 21, 2006, a Phoenix Police drug enforcement detective obtained information from a confidential informant about a major drug trafficking organization in Phoenix. The informant, a California produce truck driver, told the detective that the organization was run by a man named Edgar, with assistance from his brother Edwin and Ochoa, and explained how they hired cross-country semitrailer drivers to transport the drugs back east. That same day, the detective conducted surveillance on a meeting between the informant and Edgar. The informant made arrangements with Edgar to drive through Phoenix on August 27, 2006, to pick up a multi-kilogram load of cocaine for transport to New York.

¶3 When the informant returned to Phoenix on August 27, he met with the detective and then telephoned Edgar to inform him that he was ready for the load of cocaine. Within minutes of the call, officers watching Edgar's residence observed a Ford F-150 truck being moved into the garage. A short time later,

the truck left the residence. A patrol officer in a marked police unit stopped the truck on the pretext of a traffic violation. The driver was identified as Edgar, and Ochoa was the passenger. The two agreed to voluntarily accompany the patrol officer to the precinct station for fingerprinting and photographs, leaving the truck parked where it had been stopped.

¶4 While Edgar and Ochoa were at the station, other officers entered the truck and found a large duffel bag on the backseat. Inside the duffle bag was approximately thirty-eight kilograms of cocaine, packaged and divided into thirty-five bricks. The officers seized the duffle bag with the cocaine and, to protect the informant, ransacked the truck to make it appear as if it had been burglarized. When Edgar and Ochoa returned two hours later, both appeared to become very agitated after Edgar looked in the truck and discovered the duffle bag missing. No arrests were made at that time to avoid tipping them off to the on going police investigation.

¶5 Ochoa was indicted several months later on one count of possession of narcotic drugs for sale based on the cocaine found in the truck on August 27, 2006. Prior to trial, the State filed a motion in limine seeking admission of (1) general statements made by the informant to the detective on August 21 regarding Ochoa's role in the drug trafficking ring, and (2) a more specific statement the informant made about Ochoa on August

27. The State indicated in the motion that the informant was unavailable to testify because he had been murdered, allegedly by Edgar, and argued that his statements to the detective should be admitted under the doctrine of forfeiture-by-wrongdoing or, in the alternative, under Arizona Rule of Evidence 804(b)(7), which provides for admission of reliable hearsay when a declarant is unavailable to testify.[1] At the hearing on the motion, the State conceded Ochoa was not involved in the informant's murder and abandoned its argument for admitting the hearsay statements under the doctrine of forfeiture-by-wrongdoing. Over Ochoa's objection, the trial court ruled that the informant's general statements to the detective on August 21 about Ochoa's role in the drug trafficking ring were admissible as reliable hearsay under Rule 804(b)(7). In addition, the trial court concluded the informant's statement on August 27 constituted a statement of a co-conspirator of a party in

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[1] Rule 804(b)(7) describes the hearsay admissible under this rule as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

furtherance of the conspiracy and therefore was not hearsay under Rule 801(d)(2)(e). The court further determined that the informant's statements bore "an indicia of reliability because the information that was being provided by the confidential informant . . . came to fruition."

¶6 At trial,[2] the detective testified that on August 21, the informant provided him with general details on a drug trafficking ring "that was being run by Edgar and . . . assisted by a person by the name of Rudy."[3] The detective also testified that the informant told him Rudy would fly to Pennsylvania to assist in transporting cocaine, "Rudy was involved in shipping large quantities of marijuana back east," and Rudy was the "second person in charge" in the group. In addition, the detective testified about a phone call the informant made on August 27 to Edgar to arrange the transfer. The detective was with the informant when he called Edgar. The detective could hear a male voice on the other end but not what the man said. The informant asked to speak with Edgar. The detective testified the informant informed him that Rudy had answered

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[2] For reasons not relevant here, the trial court declared a mistrial on March 25, 2010. Prior to the start of the second trial, defense counsel reiterated her objection to the admissibility of the informant's statements and the trial court again ruled they were admissible.

[3] The detective later identified Ochoa as the man the informant referred to as Rudy.

Edgar's phone and then passed the phone to Edgar. A few minutes later, Edgar and Ochoa left Edgar's home in the F-150 pickup to meet the informant.

¶7 A jury found Ochoa guilty as charged. The trial court sentenced Ochoa to an aggravated nine-year term of imprisonment and further imposed a mandatory fine of $150,000 and a statutory surcharge of $126,000. Ochoa timely appealed.

DISCUSSION

¶8 Ochoa argues that the admission of the statements by the informant to the detective violated his Sixth Amendment right of confrontation. Although trial court rulings on the admissibility of evidence are generally reviewed for abuse of discretion, we conduct a de novo review of challenges to admissibility under the Confrontation Clause. *State v. Boggs*, 218 Ariz. 325, 333, ¶ 31, 185 P.3d 111, 119 (2008).

¶9 The Confrontation Clause states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the United States Supreme Court held that the Confrontation Clause prohibits the use of out-of-court testimonial statements in lieu of testimony from a witness unless there was a prior opportunity to cross-examine the witness. Testimonial statements include statements made with the reasonable expectation that they would

be used in the investigation and prosecution of the accused. *Id.* at 51-52; *State v. Parks*, 211 Ariz. 19, 30, ¶ 50, 116 P.3d 631, 642 (App. 2005), *supp. op.*, 213 Ariz. 412, 142 P.3d 720 (App. 2006).

¶10 In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the Court had previously held that the Confrontation Clause did not bar the admission of an unavailable witness's statement that either fell within a "firmly rooted hearsay exception" or otherwise bore "adequate 'indicia of reliability.'" *Crawford*, however, overruled *Roberts*, stating "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69. Thus, the trial court in the instant case erred in ruling that the informant's statements to the detective regarding Ochoa were admissible as reliable hearsay under Rule 804(b)(7), given Ochoa's lack of opportunity for cross-examination. *See id.*; *see also State v. King*, 212 Ariz. 372, 379-80, ¶ 35, 132 P.3d 311, 318-19 (App. 2006).

¶11 Although not the basis of the trial court's ruling below, the State argues on appeal that the detective's testimony regarding the informant's statements about Ochoa's role in the drug trafficking ring and his identification of Ochoa as the person who answered Edgar's phone on the day of the drug

transfer were admissible for a proper non-hearsay use to provide context for how the police conducted their investigation. We consider the State's argument because we are obliged to uphold a trial court's ruling if it is ultimately correct, even if for the wrong reason. *State v. Canez*, 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 (2002).

¶12 Generally, testimony not admitted for the truth of the matter asserted is not testimonial hearsay and therefore does not violate the Confrontation Clause. *State v. Tucker*, 215 Ariz. 298, 315, ¶ 61, 160 P.2d 177, 194 (2007). We recognize that in certain situations the State will need to provide information to the jury as to why the police are present at a particular place. *See United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) ("If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out [the defendant] for nefarious purposes."). This should not be viewed, however, as providing an open invitation to evade *Crawford* and the normal restrictions on hearsay. "Instead, a statement that an officer acted 'upon information received,' or words to that effect, should be sufficient." 2 Kenneth S. Broun et al., *McCormick on Evidence* § 249, at 103 (6th ed. 1999).

¶13 The requisite factor for admissibility of out-of-court statements for non-hearsay purposes is relevancy. *State v. Rivera*, 139 Ariz. 409, 414, 678 P.2d 1373, 1378 (1984). In other words, there must be a showing of the relevance of the non-hearsay use of the statement. When there is no relevant use of the statement for other than the truth of the matter asserted, it is hearsay. *Id.* "It is the prosecutor's duty to avoid the introduction of out-of-court statements that go beyond what is reasonably necessary to explain police conduct." *Commonwealth v. Palsa*, 555 A.2d 808, 811 (Pa. 1989). Here, there was no relevant reason for the detective to testify about Ochoa's role in the drug organization as reported by the informant other than as proof of guilt. Any question about the reason for the actions of the police before, during, and after the stop of the truck could be readily explained without any reference to the informant's statements regarding Ochoa's alleged top-level position in the drug organization or his identification of Ochoa as the person who answered Edgar's phone. As the court observed in *Palsa*,

> [I]t cannot be said that every out-of-court statement having bearing upon subsequent police conduct is to be admitted, for there is great risk that, despite cautionary jury instructions, certain types of statements will be considered by the jury as substantive evidence of guilt. Further, the police conduct rule does not open the door to unbounded admission of testimony, for

> such would nullify an accused's right to cross-examine and confront the witnesses against him.

Id. at 810; *see also Silva*, 380 F.3d at 1020 ("Allowing [police] to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule.").

¶14 Moreover, it is not an absolute rule that admission of a non-hearsay statement will never violate the Confrontation Clause. *Lee v. McCaughtry*, 892 F.2d 1318, 1325 (7th Cir. 1990). Such testimony may be found to violate the Confrontation Clause where the prosecutor destroys the non-hearsay nature of the statement during trial by misusing the testimony for the truth of the matter asserted. *Id.* at 1325-27. Notwithstanding the State's claim that the detective's testimony describing what he was told by the informant was merely background information, the record reflects that the prosecutor argued the truth of the out-of-court statements during closing as evidence of guilt. The prosecutor reminded the jury during his closing argument that the informant had described Ochoa as Edgar's "right-hand man." And the prosecutor referred again to Ochoa as Edgar's "right-hand man" at least five times during his rebuttal. Because the detective's testimony went far beyond what was necessary to avoid misleading the jury as to the actions taken by the police

and included testimonial hearsay used by the prosecutor during closing argument, the admission of this testimony was error.

¶15 When the trial court errs in admitting evidence, we review for harmless error. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). An error is harmless "if the state, in light of all of the evidence, can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (citation and internal quotation omitted).

¶16 The State maintains that any error in the admission of the improper hearsay should be found harmless in light of the other evidence of Ochoa's guilt presented at trial. Even though there was substantial evidence to support the verdict, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (citations and internal quotations omitted).

¶17 The defense presented in the instant case was mere presence: Ochoa claimed lack of any knowledge of the cocaine in the duffle bag. It has long been held that "mere presence of the defendant where narcotics or marijuana is found is insufficient to establish that he knowingly possessed or exercised dominion and control over the drugs." *State v. Van*

Meter, 7 Ariz. App. 422, 427, 440 P.2d 58, 63 (1968). In responding to defense counsel's claim that the State failed to meet its burden of proving the element of knowing possession, the prosecutor made repeated reference in his rebuttal argument to the statements by the informant about Ochoa's involvement in the drug organization, including the description of Ochoa as Edgar's "right-hand man," in urging the jury to find Ochoa knowingly possessed the cocaine. Under these circumstances, we cannot say beyond a reasonable doubt that the erroneous admission of the testimonial hearsay was harmless. Accordingly, Ochoa's conviction must be reversed.

¶18 Ochoa further asserts that the prosecutor engaged in misconduct during closing arguments and that the trial court erred in calculating the surcharge for the fine. Because we are reversing due to error in the admission of the hearsay evidence, we need not engage in fundamental error review of these additional claims, which Ochoa raises for the first time on appeal. On remand, the court shall address such claims if the need arises.

CONCLUSION

¶19 For the foregoing reasons, we reverse Ochoa's conviction and sentence and remand for further proceedings consistent with this decision.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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ANN A. SCOTT TIMMER, Judge

/s/

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PHILIP HALL, Judge