

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES DANIEL HOLMES,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 266587

St. Joseph Circuit Court

LC No. 05-012901-FH

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant was charged with and convicted of manufacturing a controlled substance, specifically methamphetamine, MCL 333.7401c(2)(f), and third-degree fleeing and eluding, MCL 750.479a(3). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 10 to 40 years’ imprisonment for the manufacturing conviction and 23 months’ to 10 years’ imprisonment for third degree fleeing and eluding. We affirm.

Defendant first argues that a cellular telephone and its stored digital images and video clips should have been excluded as evidence because the prosecution did not establish a secure chain of custody for the phone. We review for abuse of discretion a trial court’s decision on evidentiary matters. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). “Photographic evidence is admissible if relevant, pertinent, competent, and material to *any* issue in the case.” *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). When items are fairly distinctive and relatively impervious to tampering or other alteration, a proponent of an offered article of evidence only needs to demonstrate that the article is the item in question and its condition has not substantially changed. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Even if the article offered has fungible, pliable, or vulnerable characteristics, the proponent only needs to demonstrate a reasonable probability that the item has not undergone a substantial modification since it played a relevant role in the case. *Id.* at 131. In short, “the admission of real evidence does not require a perfect chain of custody,” and “any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims.” *Id.* at 130-131.

In this case, defendant challenged the introduction of the cell phone’s images because the phone was not discovered in defendant’s car for five days, and then the car itself went missing. However, the prosecutor established a sufficient chain of custody and presented sufficient

evidence of authentication to justify the admission of the photographs and other visual images. A friend of defendant's testified that her boyfriend bought two cell phones with built-in cameras, and defendant used one of them. On the night of the police chase, she and her boyfriend were visiting a house with defendant. The three of them left the house at the same time, and the couple's car followed defendant's green car for a few blocks. When the cars reached a crossroads with Chicago Drive, the couple turned eastward on the road, and defendant headed west. Although she denied seeing the events unfold, she testified that her boyfriend almost immediately indicated that a police car had its lights activated behind them, and he mentioned that he hoped defendant was not being stopped.

A police officer testified that he and a reserve officer were watching the Chicago Drive intersection when he saw a green car turn west onto the roadway. The car had only one headlight, so the officer activated his overhead lights and attempted to stop the car for a warning. The car paused long enough for the police officer to stop, but then took off again, leading the officer on a chase through residential streets in slick, wintry conditions. The reserve officer radioed in their position, and a police sergeant headed toward the pursuit. At one point, defendant turned off his headlight. When he turned down a dead-end road, he had to pull off the roadway and turn around in a nearby yard to continue his flight from the officers. As he passed the officers' car, the driver flashed his spotlight into defendant's face and got a good look at him. The reserve officer maintained communication with the sergeant, who shortly saw a green car speeding toward him without any headlights on. The sergeant veered to miss the car, but then turned around to give chase. The sergeant found the car off the side of the road and abandoned. Officers initiated a search of the vehicle, but immediately detected the odor and presence of methamphetamine-making equipment, so they called in a special unit. Officers ran a check on the car's identification and found that it was registered to defendant. A picture of defendant was located, and the original officer positively identified defendant as the individual driving the car.

According to a member of the special methamphetamine unit, a five-gallon bucket found in the back of defendant's car contained chemicals that were in the process of making methamphetamine when the special unit arrived. The car had so much evidence of methamphetamine manufacture that it was referred to as a mobile laboratory.

The hazardous materials and evidence were secured and removed from the car, and it was impounded. Several days later, an officer went out to the impound lot to look for a camera phone that the investigation indicated may be located in the car. The phone at issue was found on the driver's-side floor of the vehicle. A few days after the phone was recovered, the car was stolen from the impound lot. Nevertheless, the phone resembled the phone described by defendant's friend, it was located under the driver's seat in his car, and he was the last individual seen driving the car. There was no evidence that the phone was exchanged with another, was contaminated, or was tampered with, so the prosecutor sufficiently demonstrated that the camera phone and the images it contained were what the prosecutor claimed them to be, images captured by defendant on his phone. *Id.* at 131. The defects, if any, in the chain of custody affected the weight of the evidence, not its admissibility. *Id.* at 130-131. Once tied to defendant, the images reflected defendant's participation in the production and distribution of methamphetamine, so they were relevant and material to the issues at trial. MRE 402. Therefore, the trial court did not abuse its discretion by allowing the prosecutor to introduce the images over defendant's objections.

Next, defendant asserts that the trial court abused its discretion and denied him a fair trial by admitting, over objection, statements from a non-testifying witness through a police officer. Defendant claims that the challenged statements were not admissible under a hearsay exception and violated his rights under the Confrontation Clause. Even if a hearsay exception applies to an out-of-court statement, the statement is not admissible if it is testimonial and the defendant has not been afforded the opportunity to cross-examine the declarant regarding the statement. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); see also *People v Lonsby*, 268 Mich App 375, 390; 707 NW2d 610 (2005).

At trial, a deputy stated that he had known defendant's girlfriend for approximately 10 years, and that they had gone to the same school. Defense counsel objected to the testimony at the outset, so the trial court excused the jury and allowed the prosecution to lay a foundation for the testimony. The officer testified that the defendant's girlfriend told him that defendant was her boyfriend and that they lived together. He also identified defendant's girlfriend as the woman primarily featured in the images on defendant's camera phone. After defense counsel objected to the testimony regarding the out-of-court statements, the trial court ruled that it was admissible under MRE 803(19). The officer then repeated the out-of-court statements for the jury.

Under the circumstances of the investigation, the girlfriend's statements to police were clearly testimonial in nature. However, the evidence against defendant was overwhelming regardless of his girlfriend's confirmation of their relationship. This evidence was ancillary and cumulative to the stronger evidence of defendant's guilt and his direct association with the camera phone. The pursuing officer identified defendant as the driver of the fleeing vehicle and confirmed that he was the registered owner as well. The vehicle contained a bucket and the camera phone. Defendant's friend testified that her boyfriend had purchased an identical phone for defendant and that he used it. The laboratory evidence confirmed that the bucket in defendant's car had been used to make methamphetamine, and the phone's digital images brazenly depicted its production and use. Although the friend often equivocated in her testimony, she never claimed that the recovered phone belonged to anyone other than defendant. On this record, it was clear that a reasonable jury would have found defendant guilty of manufacturing methamphetamine and third degree fleeing and eluding even if the improper testimonial hearsay had not been admitted, so reversal is not required. MRE 103.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis