STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 5, 2009
v	No. 272367 Wayne Circuit Court
BRIAN RICHARDSON, Defendant-Appellant.	LC No. 06-002364-01

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (third offense), MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 10 months to 40 years each for the possession of cocaine and heroin convictions, six months to eight years for the possession of marijuana conviction, and six months to ten years for the felon in possession conviction, to be served consecutive to a ten-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I

Police officers executed a search warrant at an apartment rented by Andrena Simmons and discovered defendant sitting at a table counting assorted bags containing drugs. On the table were 30 clear plastic Ziploc packets containing an off-white lumpy material, 17 white paper packages containing an off-white powder, and two clear plastic Ziploc packets containing suspected marijuana. The substances were later analyzed and tested positive for cocaine, heroin, and marijuana, respectively. A loaded firearm was discovered under the seat cushion of the chair that defendant was sitting in. Defendant had more than $1,400 in cash on his person.

At trial, the defense attempted to shift blame to Simmons, suggesting that she possessed the drugs because they were in her apartment. During cross-examination by defense counsel, Officer Jerold Blanding testified that Simmons was issued a ticket in relation to operating or occupying a place of illegal activity. At one point, Officer Blanding stated that Simmons told

him that she permitted defendant to sell drugs from the apartment. Defendant did not object to or move to strike that statement.

The defense presented defendant's ex-girlfriend, Aisha Penick, who testified that defendant agreed to help her move on the day of his arrest, and that he went to Simmons's apartment to look for additional people to help him move her heavy appliances and furniture.

II

Defendant first argues that Officer Blanding's testimony that Simmons told him that she allowed defendant to sell drugs from her apartment was inadmissible hearsay and violated his rights under the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20.

As defendant concedes, there was no objection to this testimony at trial and, therefore, the issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Defendant also argues that defense counsel was ineffective for failing to object to the testimony and requesting that it be stricken. To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for his attorney's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001);

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *McLaughlin*, *supra*. Simmons's statement to Blanding was an out-of-court statement and was not offered under any hearsay exception. We agree that the statement was inadmissible hearsay.

Furthermore, the statement qualifies as a "testimonial statement" for purposes of the Confrontation Clause. In *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that the Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court held that "[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." *Id.* at 68-69. A pretrial statement is testimonial if the declarant should have reasonably expected the statement to be used in a prosecutorial manner, and if the statement is made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51-52; *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005). Here, an objective witness reasonably would expect that a statement to a police officer that she permitted a person to sell illegal drugs from her apartment would be used in a prosecutorial manner. Thus, the statement qualifies as testimonial and its admission at trial violated defendant's constitutional right of confrontation.

For these reasons, Officer Blanding's testimony regarding Simmons's out-of-court statement was plain error. Additionally, it was objectively unreasonable for defense counsel not

to object to the statement and move to have it stricken. Indeed, defense counsel conceded at a posttrial *Ginther*[1] hearing that he should have moved to strike the statement. We conclude, however, that the plain error did not affect defendant's substantial rights and that defendant was not prejudiced by defense counsel's failure to object.

The significance of the objectionable testimony was that it linked defendant to the drugs found in the apartment. But the statement pales in comparison to the officers' testimony that, when they entered the apartment, defendant was leaning over the table counting the assorted bags of drugs. Further, a fully loaded handgun was discovered under the cushion of the chair defendant had been sitting in when the police entered the apartment. Finally, although the defense argued that defendant was present at the apartment only to get additional people to help him move his ex-girlfriend's furniture, there was no one else at the apartment other than a woman and an older, bedridden man. The defense theory did not address why defendant was found seated at a table counting bags of drugs. Under these circumstances, we conclude that there is no reasonable probability that the outcome of trial would have been different had Simmons's statement not been received, or if defense counsel had moved to strike the statement. Reversal is not required on this ground.

III

Defendant also argues that defense counsel was ineffective for failing to elicit from defense witness Penick that she allegedly gave defendant $1,700 on the day he was arrested, which was to be used to pay her rent and security deposit at her new apartment. We disagree. Such evidence only would have explained why defendant had more than $1,400 in cash in his possession at the time of his arrest. It would not have explained why he was seated at a table counting assorted bags of drugs when the police entered the apartment. Further, testimony that Penick entrusted defendant with a large sum of cash likely would have been viewed with suspicion, considering that Penick testified at trial that she did not come forward sooner with potentially exculpable information because she did not know what defendant had been arrested for and did not discuss his arrest with him, because they were not getting along at the time. Under these circumstances, we find no basis for concluding that defense counsel erred by failing to elicit this information, or that defendant was prejudiced by its omission. Accordingly, defendant has not established that defense counsel was ineffective. *Carbin, supra* at 599-600.

IV

Defendant lastly argues that misconduct by the prosecutor denied him a fair trial. Defendant did not object to the prosecutor's conduct at trial. Therefore, this issue is not preserved. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *McLaughlin, supra* at 645.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant argues that the prosecutor improperly vouched for the credibility of a prosecution witness and improperly characterized Penick as a liar. We disagree. A prosecutor may not vouch for a witness's credibility or suggest that the government has some special knowledge that a witness's testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

In this case, the prosecutor's argument that Penick's testimony was not worthy of belief was based on the evidence. The prosecutor referred to the fact that Penick waited until the eve of trial to come forward with her purportedly exculpatory information, and the fact that defendant's presence and activities in the apartment were inconsistent with Penick's explanation. Similarly, the prosecutor's argument that the officers' testimony was credible was also based on the evidence. The prosecutor referred to the officers' testimony to explain why it showed that their testimony was credible. The prosecutor did not make any statements suggesting that she had some special knowledge or information that their testimony was truthful. Accordingly, the prosecutor's comments were not improper and there was no plain error.

Affirmed.

/s/ Henry William Saad
/s/ Alton T. Davis
/s/ Deborah A. Servitto