STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2010
v	No. 289232 Charlevoix Circuit Court
JESSE JAMES WISDOM, Defendant-Appellant.	LC No. 08-047410-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of failing to meet the notification requirements of the Sex Offender Registration Act (SORA), MCL 28.725(1)(a); MCL 28.729. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a term of 18 months to 15 years in prison. Defendant appeals as of right. We reverse.

We first address defendant's claim that insufficient evidence was presented at trial to sustain his conviction. No special action at the trial court level is necessary to preserve a challenge to the sufficiency of evidence in a criminal matter. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). In reviewing a sufficiency of the evidence claim, we must apply a de novo standard. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Due process prohibits a criminal conviction unless the prosecution proves each essential element of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A reviewing court must examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Hawkins*, 245 Mich App at 457. All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The SORA requires, in pertinent part, a registered individual to "notify the local law enforcement agency . . . where his or her new residence or domicile is located . . . within 10 days after the individual changes or vacates his or her residence." MCL 28.725(1). Thus, the requirement to notify is not triggered until a registered individual "changes or vacates" his or her residence. The SORA defines "residence" in pertinent part, as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." MCL

28.722(g). In addition, the statute contemplates that a person may have more than one residence, and provides that, if so, "that place at which the person resides the greater part of time shall be his or her official residence for the purpose of this act." MCL 28.722(g).

Defendant argues that the evidence was insufficient to show that he had changed or vacated his registered residence. At trial, a law enforcement officer testified that defendant's significant other, Jessica Derosia, had stated that defendant was no longer living at the home. As will be discussed in more detail below, this testimony should have been excluded as impermissible hearsay and as violative of defendant's right of confrontation. However, in reviewing a challenge to the sufficiency of the evidence, a reviewing court must consider all of the evidence presented to the jury, regardless of whether it was properly admitted. See *Lockhart v Nelson*, 488 US 33, 40-42; 109 S Ct 285; 102 L Ed 2d 265 (1988). Accordingly, we find that a rational trier of fact could find that this essential element of the crime was proven beyond reasonable doubt based on the officer's testimony. *Hawkins*, 245 Mich App at 457.

Defendant also claims that his conviction resulted from the admission of impermissible hearsay testimony. Because defendant did not object at trial to the testimony he challenges now on appeal, this issue is not preserved for appellate review. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Consequently, we review this issue for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights" or showed prejudice in the lower court proceedings. *Id*. Defendant has the burden of persuasion regarding the third element of prejudice. *Id*. The trial court's findings will be reversed only if a plain error has resulted in the conviction of an innocent defendant or when the error will affect the fairness and integrity of the judicial proceedings. *Id*.

As noted above, testimony was introduced at trial that defendant's girlfriend had stated that defendant had moved out when she was questioned as to defendant's whereabouts. Defendant asserts that this testimony constituted a violation of his Sixth Amendment rights, as well as a violation of the rules of evidence prohibiting the introduction of hearsay testimony. We agree.

The trial court has a duty to ensure all parties receive a fair trial and to limit the introduction of evidence accordingly. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). A criminal defendant has a constitutional right "to be confronted with the witnesses against him . . . ." US Const, Am VI; see also Const 1963, art 1, §20. This provision prohibits the admission of testimonial statements of a non-testifying witness, unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The *Crawford* Court declined to precisely define what constituted a testimonial statement, but indicated that statements made during police interrogation qualified. *Id*. at 68. The *Crawford* Court also clarified that its use of the word "interrogation" should be viewed in the colloquial sense, and not the technical, legal sense of the word. *Id*. at 53, n 4.

The United States Supreme Court revisited the Confrontation Clause in *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006), and held that statements made in the course of police interrogation are nontestimonial, and therefore admissible, when the

"primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," but are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Accordingly, we conclude that Derosia's statement to police was a testimonial statement because the statement was made in the course of a police interrogation and the circumstances of the instant case do not indicate that the primary purpose of the exchange was to enable police assistance for an ongoing emergency. We note that the interrogation occurred two days after the domestic violence report.

In reaching this conclusion we reject plaintiff's assertion that our Supreme Court's recent decision in *People v Bryant*, 483 Mich 132; 768 NW2d 65 (2009), supports its position that Derosia's statement was nontestimonial. As the *Bryant* Court noted, when engaging in analysis of a statement in the context of the Confrontation Clause, the declarant's statement should be evaluated, rather than the questions that produced the statement. *Id*. at 140, quoting *Davis*, 547 US at 822 n 1. Therefore, we find unpersuasive plaintiff's argument that Derosia's statement was nontestimonial because the offense defendant was charged with was still in progress when the interview was conducted. Regardless of the motivation for the law enforcement official's questions, Derosia's statement was later used to establish or prove past facts or events to pursue a criminal conviction against defendant. Moreover, it was also designed to provide information concerning another, albeit earlier, criminal prosecution.

Even if we were to determine that the challenged statement was nontestimonial, and thus not subject to the Confrontation Clause, its admissibility is still subject to a hearsay analysis. *Crawford*, 541 US at 68. Hearsay is an unsworn, out-of-court statement, which is offered to demonstrate the truth of the matter asserted. MRE 801(c). Hearsay is generally inadmissible unless it falls under one of the recognized exceptions. MRE 802. Plaintiff does not assert that the challenged statement qualified for a hearsay exception, but relies instead on its position that the statement was not hearsay because it was not offered to prove the truth of the matter asserted. However, plaintiff's assertion that the challenged testimony was offered only to explain why the residence was not searched appears disingenuous. The prosecutor did not provide this clarification when the testimony was elicited, and no limiting instruction was provided. In addition, during closing arguments, the prosecutor again referenced that law enforcement had been told defendant had moved, albeit with the concession that they might have been told defendant was not there and Derosia did not know where he was. Nor do we find that this statement falls within any of the enumerated hearsay exceptions, or was sufficiently trustworthy to fall within a catchall hearsay exception, because Derosia had ample time, and perhaps motive to fabricate. MRE 803; MRE 804. Therefore, the challenged statement should have been excluded as a hearsay violation that did not fall under a recognized exception.

Having concluded that the challenged statement was admitted in error, we next determine whether such error affected defendant's substantial rights, or merely constituted harmless error.

Excluding the evidence of Derosia's statement that defendant had moved, the following evidence was presented at trial: (1) law enforcement personnel were unable to contact defendant at his registered address on July 11, 2008; (2) another member of the household was asked to have defendant contact law enforcement and inform defendant of the need to turn himself in on an unrelated matter; (3) officers again visited the registered residence on July 21 in an unsuccessful attempt to execute a warrant arrest; (4) East Jordan police officers were instructed

to monitor the Water Street residence during the early morning and evening hours to see if defendant showed up; (5) defendant was eventually apprehended at his parent's home in Boyne City on July 30, 2008; and (6) between July 11 and July 30, defendant had not contacted his parole officer.

We recognize the general proposition that circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). However, the reasonable inference that can be drawn from the evidence detailed above is that defendant was avoiding law enforcement officials, not that defendant had "changed or vacated" his residence. The prosecution presented no evidence that the place defendant habitually slept, kept his personal effects, and had a regular place of lodging had changed or been vacated.[1] In fact, defendant's parole officer admitted that none of defendant's personal belongings were found at any other location. To the contrary, defendant presented the testimony of several witnesses that he was seen at the registered residence, along with his personal items, and appeared to be living there during the time period in question.[2] Thus, especially in light of defendant's proffered testimony, if the challenged testimony had been properly excluded, we find a reasonably likely chance that a different outcome would have resulted. See *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1997). In light of this determination, we conclude that

[1] Notably, the testifying officer did not provide specific testimony as to whether any of his officers did, in fact, watch defendant's residence or if so, how often, or for what length of time.

[2] We reject plaintiff's argument that the notification requirement was triggered by defendant's admitted brief absence from the registered home immediately following the dispute that occurred on July 9, 2008. Under plaintiff's interpretation, a person subject to the SORA who planned on taking a week-long vacation at a campground would be required to register the campground as his new address, then re-register his home upon the completion of his trip. Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006). The Legislature has stated that the purpose of the SORA is "to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor" convicted sex offenders. MCL 28.721a. Plaintiff's interpretation of the SORA is that the Legislature intended to know where each person on the registry spends each night. We disagree. We are unconvinced that it is necessary to know the daily whereabouts of each person on the registry to achieve appropriate, comprehensive, and effective monitoring. More importantly, however, plaintiff's interpretation is directly contrary to the Legislature's intent and the SORA's explicit recognition that a person may reside in more than one place but have only one required registration address, MCL 28.722(g). See also *People v Dowdy*, ___ Mich App ___; ___ NW2d ___ (Docket No. 287689, issued February 2, 2010). The Legislature's use of words such as "habitually" and "regular" in the definition of residence, coupled with the provision that a registrant should use "that place at which the person resides the greater part of the time" as his or her official residence for registration purpose in cases where the registrant has two homes or where the registrant's spouse has a residence separate from the registrant contradicts plaintiff's arguments. MCL 28.722(g). This language indicates the Legislature's recognition that one's residence is not affected when he or she spends an occasional night elsewhere. See, e.g., *Dowdy*, slip op, p 3 (finding that where a homeless person happens to spend the night does not fall within the definition of a "habitual" residence or a "regular place of lodging" under the statute).

the evidence admitted in error constituted a plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

We further conclude that trial counsel's failure to object to the testimonial hearsay evidence discussed above constituted ineffective assistance of counsel. Our review of this unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

While acknowledging that our Supreme Court has recognized the possibility that the failure to object to an error may constitute a strategic decision to avoid drawing the jury's attention to the challenged testimony, see *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995), we agree with defendant that allowing Derosia's statement, which essentially served as the lynchpin for defendant's conviction, to be admitted at trial without objection cannot be sound trial strategy because such decision simply could not have been to defendant's benefit. As discussed above, without the admission of the challenged statement, the prosecution could not have reasonably established that defendant had changed or vacated his residence, an essential element of the charged offense.

In reaching this conclusion, we reject plaintiff's argument that trial counsel's failure to object can be explained as trial strategy because the statement would have been admissible as impeachment evidence if Derosia had testified. The glaring defect with this argument is that the evidence could not be used to impeach Derosia *before* she testified. See MRE 613 (requiring that a witness be afforded an opportunity to explain or deny a prior inconsistent statement in order to be admissible) and *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007) (setting forth proper procedure for impeaching a witness with a prior inconsistent statement). Moreover, even if Derosia had testified and the challenged statement had been proffered to impeach her testimony, impeachment testimony generally cannot be used as substantive evidence. See *People v Jenkins*, 450 Mich 249, 260-261; 537 NW2d 828 (1995).

In light of our finding that defendant is entitled to a new trial, it is not strictly necessary to address his final claim that he was improperly denied jail credit. However, because the issue may arise following a subsequent trial, we provide the following analysis.

MCL 769.11b governs jail credit and provides that a defendant is entitled to jail credit when any time in jail has been served prior to sentencing "because of being denied or unable to furnish bond for the offense for which he is convicted." Our Supreme Court has recently addressed the applicability of this statute as it pertains to parolee and held that parole detainees are not entitled to jail credit at sentencing for a subsequent offense. *People v Idziak*, 484 Mich 549, 568; 773 NW2d 616 (2009). *Idziak* specifically addressed and rejected defendant's claims that denying jail credit to parolees violates constitutional guarantees to due process and equal

protection. *Id*. at 572-573. This Court is bound to follow the decisions of our Supreme Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Consequently, the trial court correctly denied jail credit.

Reversed and remanded for a new trial.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio