

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE MCCRACKEN,

Defendant-Appellant.

UNPUBLISHED

September 13, 2012

No. 306100

Calhoun Circuit Court

LC No. 11-000340-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

A jury convicted defendant of receiving and concealing a stolen firearm, MCL 750.535b; being a felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.12, to concurrent prison terms of 30 to 240 months for receiving and concealing a stolen firearm, 30 to 120 months for being a felon in possession of a firearm, and to a consecutive two year term for felony-firearm. Defendant appeals as of right. We affirm.

A rifle was stolen from the bedroom of Tanaya Stimoff in the home of her mother, Tina Hoffman. A month after the theft, Stimoff received an anonymous voicemail stating that defendant was “down the road” trying to sell her rifle. Police investigated but found no rifle. Later the same day, defendant was found with the magazine to the rifle in his pocket and the rifle was discovered in the backseat of the car into which he was reaching when police arrived. At trial, Stimoff and Hoffman testified to the content of the voicemail when asked why they had walked to defendant’s location. A police officer testified that a dispatcher had reported a 911 call made by either Stimoff or Hoffman implicating defendant, and a police officer also testified, over objection, about statements Stimoff and Hoffman made while police were investigating a second time following the 911 call.

Defendant argues that the trial court erred in allowing the above testimony, which defendant characterizes as inadmissible hearsay. This Court reviews the preserved issue regarding admission of Stimoff and Hoffman’s statements to officers for an abuse of discretion, and, if an abuse of discretion is found, reversal is warranted if defendant can show that it is more probable than not that excluding the evidence would have been outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Because defendant failed to object to

testimony about the voicemail and testimony about the dispatcher's report at trial, the admission of that testimony is reviewed for plain error *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). To establish plain error, "defendant[] must show that (1) error occurred; (2) the error was plain; i.e., clear or obvious; and (3) the plain error affected a substantial right of the defendant. Generally, the third factor requires a showing of prejudice—that the error affected the outcome of the trial proceedings." *Pipes*, 475 Mich at 279.

The testimony at issue was properly admitted. Hearsay is an out of court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c). In this case, however, the challenged testimony was not introduced to prove the truth of the matter asserted. The voicemail message testimony was not introduced to show that defendant was actually trying to sell the rifle, but to show why Stimoff took the action she did. When the testimony is given to show why someone took a particular action, rather than to establish the truth of the matter, the testimony is not hearsay. *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994).

Further, police testimony that a call was received indicating that defendant was seen running out of a house with a gun was elicited in response to a question about why police responded to the area for a second time in the same day. Again, because the information was not being offered to show that defendant actually ran out of the house with a gun, but rather to show why police took the actions that they did, this testimony is not hearsay. *Okopski*, 208 Mich App at 77.

Finally, the testimony recounting Hoffman and Stimoff's statements to the police during the second investigation was similarly introduced to establish why the police drove to defendant's location. The trial court gave a limiting instruction to that effect, and jurors are presumed to follow such instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court did not abuse its discretion in permitting the challenged testimony.

Defendant also argues that trial counsel was ineffective for failing to object to the voicemail testimony at trial. To determine that counsel was constitutionally deficient, defendant must establish that (1) counsel's performance fell below "an objective standard of professional reasonableness"; and (2) that it is "reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *People v Jordan*, 275 Mich App 659, 668; 739 NW2d 706 (2007). "Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.*

The challenged testimony related to the voicemail was not hearsay as previously discussed. Therefore, any objection would have been meritless, and counsel cannot be ineffective for not having objected. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Moreover, it appears that defense counsel actually used the voicemail evidence strategically. The defense theory was the defendant was being framed by the spurned suitor of defendant's girlfriend, and the voicemail message was intended to lead police, or Stimoff, to defendant in possession of the stolen rifle. Therefore, defendant cannot overcome the strong presumption that counsel's failure to object constituted sound trial strategy.

Finally, even if defendant had been able to establish that the conduct of trial counsel was objectively unreasonable, defendant has not established that the result of trial would have been different but for trial counsel's failure to object to the voicemail testimony.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot