STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY LEON MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED
October 23, 2007

No. 269682
Allegan Circuit Court
LC No. 05-014257-FH

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was charged with possession of a chemical or laboratory equipment for the purpose of manufacturing methamphetamine, MCL 333.7401c(2)(f), and fourth-degree fleeing and eluding, MCL 257.602a(2). Following a jury trial, defendant was convicted only of fourth-degree fleeing and eluding, and he was sentenced as an habitual offender, fourth offense, MCL 769.12, to 3 to 15 years' imprisonment for that conviction. Defendant appeals as of right. We affirm.

Defendant and his friend, John Copen, left a trailer park in Gun Plain Township, Michigan, at approximately 3:00 a.m. on April 10, 2005, with defendant driving his black Trans Am. Unknown to defendant or Copen, undercover police officers had them under surveillance. Defendant became aware that his vehicle was being pursued, and he took evasive actions by pulling into a driveway. One of the undercover police officers spotted defendant's vehicle pulling into the driveway and pulled in front of it. The undercover police officer clearly observed defendant in the driver's seat. Defendant then darted around the unmarked police vehicle, fleeing at a high rate of speed. Meanwhile, a sheriff's deputy was proceeding in the other direction to render support to the undercover police officers. The deputy pulled over to the side of the road, and he activated his radar, which indicated that defendant's vehicle was speeding at a rate of 89 mph. The deputy turned on his marked vehicle's flashing lights, performed a u-turn, and pursued defendant's vehicle. Defendant's vehicle was discovered later, wedged between some trees in a two-track road behind the residence of his parents. The police discovered a large quantity of pseudoephedrine tablets in a bag, which was cast aside from the vehicle. One police officer heard two distinct sounds crashing through the wooded area in different directions heading away from the abandoned vehicle. A deputy with a canine unit apprehended Copen shortly thereafter.

Defendant first argues that the trial court abused its discretion by admitting statements from a non-testifying informant through a police officer. Defendant claims that the challenged statements violated his rights under the Confrontation Clause. We generally review a trial court's ruling to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). Pertinent issues of law, i.e., the Confrontation Clause[1] issue, are generally reviewed de novo. See *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). However, defendant's allegation of error related to the Confrontation Clause is not preserved. Therefore, absent plain error requiring reversal, defendant is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford, supra* at 59 n 9. The United States Supreme Court did not delineate a "precise articulation" of what constitutes testimonial evidence. *Id.* at 68. However, the Court outlined the following three broad categories of testimonial statements:

> ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially
>
> extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, prior testimony, or confessions
>
> statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. [*Id.* at 51-52 (citations omitted).]

The sixth circuit has held that "statements by a confidential informant are testimonial and are thus subject to the dictates of the Confrontation Clause . . . ." *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). Our Supreme Court, in dicta, had previously acknowledged that a nontestifying informant's tip had confrontation implications. *People v Wilkins*, 408 Mich 69, 74; 288 NW2d 583 (1980). This Court has also held previously that "[t]he content of a confidential informant's tip is generally inadmissible as hearsay." *People v Starks*, 107 Mich App 377, 383; 309 NW2d 556 (1981). Admission of the substance of an informant's tip "is not justified to show an officer's state of mind, since the state of mind is not relevant." *Id.* at 383-384.

In this case, the prosecution examined the undercover police officer as follows:

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[1] The Confrontation Clause provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI.

Q. Now, my understanding is that you were on duty on April 10th of 2005. Is that correct?

A. That's correct

Q. And, sometime in the early morning hours? Do you remember what time approximately this incident started?

A. This incident started approximately 3:00 a.m. in the morning.

Q. How did it get started? What led you to the area that you went to?

A. I was actually I guess in the late hours of the night before out on a meth lab, and during that investigation I was given the information that [defendant] was in Gun River East Trailer Park and in possession of a large amount of pseudoephedrine tablets which he was going to make meth with.

Q. Okay. Did you try to go and check out that information you were given?

A. Yes, the information further described that he was going to be in a black Firebird or Trans Am at that—in this trailer park, and I went to the trailer park at about 3:00 in the morning.

It can be reasonably inferred that this was an out-of-court statement by an unnamed declarant, who did not testify at trial. Clearly, the undercover police officer responded to this tip by going to the trailer park, looking for defendant. However, the undercover police officer was also provided with defendant's name, a description of defendant's vehicle, information that defendant possessed a quantity of methamphetamine precursor, and information that defendant planned on manufacturing methamphetamine. Under the circumstances, we find the challenged statement to be testimonial in nature. *Crawford, supra* at 51 ("an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"). In failing to recognize the confrontation implications under *Crawford, supra*, the trial court did not afford the prosecution an opportunity to argue whether any of the exceptions may have applied under the circumstances. The prosecution did not have an opportunity to provide any reason for the third party's unavailability or set forth whether the statement was being offered for some purpose other than to prove the truth of the matter asserted. See *Crawford, supra* at 57-58, 59 n 9. The prosecution may have been able to explain that the third party was unavailable to testify as a result of improper conduct on the part of defendant. *Id.* at 62. However, on the record before us, we cannot speculate with respect to what could have been shown. We therefore conclude that the challenged statement was testimonial and inadmissible.

Further, the statement was inadmissible hearsay. *Starks, supra* at 383. Hearsay is an out-of-court statement offered for the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible unless a specific exception applies. MRE 802. Even though the undercover police officer's testimony was vague in that he merely stated that he was given information, the admission of some unknown declarant's statements that defendant possessed methamphetamine precursor with the intent to manufacture methamphetamine was clearly offered for the truth of

the matter asserted and was improper hearsay evidence. *Starks, supra* at 383. The statement bolstered the prosecution's case, as it pointed to defendant's guilt of the charge for possession with intent to manufacture methamphetamine. *Wilkins, supra* at 74.

Thus, we conclude that the trial court abused its discretion in admitting that testimony as violative of defendant's confrontation rights. *Crawford, supra* at 51-52. However, reversal is not warranted in this case. Defendant asserts that this testimony "convincingly explained why [defendant] might run from police," and that the prosecution "infected" the trial with "the informant's inflammatory allegations." However, these contentions are self-serving. Significantly, defendant failed to explain how the plain error affected his substantial rights, *Carines, supra* at 763-764, and we find that it did not. The undercover police officer's testimony regarding what he learned from an alleged informant can be characterized as brief, and it related to the charge for which defendant was acquitted. Further, defense counsel used the alleged informant's tip to demonstrate bias by the police against defendant. The challenged statement had no effect on the outcome of trial. As to the fleeing and eluding charge, the jury, as factfinder, determined the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). The informant's information was unrelated to that. And, in this case, there is no basis for reversal, because there was no showing that "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774.

Next, defendant contends that he was denied effective assistance of counsel. He claims that defense counsel's conduct fell below an objective standard of reasonableness, when defense counsel drew the jury's attention to the substance of the previously discussed informant's tip during opening statement. Because no hearing was held and no findings were made, this Court's review is limited to apparent errors on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To sustain a claim of ineffective assistance of counsel, a defendant must prove that trial counsel's "performance was deficient" and that deficiency "prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove defense counsel's deficient performance, the defendant must show that defense counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. A defendant must also demonstrate that, but for defense counsel's conduct, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland, supra* at 694; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A defendant must overcome "a strong presumption that [defense] counsel's performance constituted sound trial strategy." *Id.* This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

In this case, defendant's claim attacks defense counsel's trial strategy, which disclosed the substance of an informant's tip during opening statement. Moreover, defendant asserts that "[t]here could have been no strategic reason for trial counsel to introduce this inadmissible testimony into the proceedings." Defense counsel advanced a theory that defendant did not possess (or even know of) the pseudoephedrine and that defendant was not driving the vehicle that fled from Deputy Horton. During opening statement, defense counsel stated "[t]hat [the police officers] receive a tip from somebody else that possibly there's meth or methamphetamine

components or something of that nature in [defendant's] possession." Defense counsel underscored this point by stating that "[the police] wanted to believe [the informant's tip] therefore they acted over zealously. That they went into this, their beliefs are that [defendant] was involved and therefore they never are going to come away from that belief. But . . . the evidence is going to show, was not involved in this." Defense counsel concluded that "[defendant] wasn't there, [defendant] never possessed these things and [defendant] never tried to flee and elude the officer." During closing argument, defense counsel emphasized this theory, contending that the detectives had been overzealous. "They believed the tip that [defendant] had these pills therefore it's true and we've got to lead along to that. The version has got to lead to somehow [defendant] being guilty of having these pills. The reality is it's Mr. Copen who had the pills." The strategy worked and defendant was acquitted of the charge related to the pills.

With appellate review limited to the existing record, *Matuszak, supra* at 48, defendant has not overcome the presumption that defense counsel referenced the informant's statements as a matter of trial strategy. *Rockey, supra* at 77. The record, as well as the outcome of defendant's trial, demonstrates that defense counsel rendered effective assistance of counsel. Defendant has not shown that defense counsel's performance "fell below an objective standard of reasonableness." *Strickland, supra* at 690-691. We reject defendant's ineffective assistance of counsel argument based on defense counsel mentioning the informant's tip during opening statement because we will not substitute our judgment for that of defense counsel on matters of trial strategy. *Rockey, supra* at 76-77.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray