STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2009
v	No. 283747 Kent Circuit Court
AARON TERENCE TAYLOR, Defendant-Appellant.	LC No. 07-006709-FH

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of maintaining a drug house, MCL 333.7405(1)(d). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 34 to 180 months. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his right of confrontation was violated by a police officer's testimony concerning statements purportedly made by a nontestifying confidential informant that drug trafficking was occurring at the house where defendant lived with his mother and that "Aaron" had sold him cocaine. Defendant further argues that defense counsel's failure to object to this testimony deprived him of the effective assistance of counsel.

This Court reviews defendant's unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Geno*, 261 Mich App 624, 631; 683 NW2d 687 (2004). With regard to defendant's ineffective assistance of counsel claim, because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, defendant must show that counsel's representation "fell below an objective standard of reasonableness" and he must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.* at 302-303 (citation and internal quotations omitted).

The Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable for trial and the defendant had a prior opportunity for cross-examination. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Only "testimonial statements" implicate the Confrontation Clause. *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006). "A statement by a confidential informant to the authorities generally constitutes a testimonial statement." *Chambers*, *supra* at 10, citing *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). See also *United States v McGee*, 529 F3d 691, 697-698 (CA 6, 2008).

Although we agree with defendant that admission of the officer's testimony concerning the confidential informant's statements was plain error, defendant has not shown that admission of this testimony affected his substantial rights. The location of drug paraphernalia found in the home indicated that defendant's room was the situs for drug-related activities, and defendant's testimony indicated that he was aware that drugs were being used in the house. Although the confidential informant's statements were probative of defendant's identity as the seller, a conviction for maintaining a drug house does not require proof that the defendant was involved in the transactions. For example, in *People v Bartlett*, 231 Mich App 139, 152-153; 585 NW2d 341 (1998), the defendant was convicted where he admitted that he knew that drug deals were occurring in the house he shared with others, and drug paraphernalia and a shotgun were located in the room where he and another man were found at the time of the raid. We are not persuaded that the outcome of the proceeding would have been different but for the informant's statements through the officer's testimony. Therefore, defendant is not entitled to relief with respect to this unpreserved issue.

We likewise reject defendant's related claim that defense counsel was ineffective for failing to object to this testimony. Defendant has failed to overcome the presumption that counsel's failure to object was a matter of trial strategy. Defense counsel repeatedly emphasized differences between defendant's appearance and the description allegedly provided by the informant, who described the seller as bald and younger than defendant. Defense counsel noted the discrepancies in his opening statement, during his cross-examination of the police officer, and again in closing argument. Defense counsel may have made the strategic decision to allow the officer's testimony concerning the informant's statements to support defendant's theory that he was not the seller, despite the incriminating items found in defendant's bedroom. In addition, for the reasons previously explained, defendant cannot establish a reasonable probability that but for counsel's failure to object, the result of the proceeding would have been different. *Toma*, *supra* at 302-303.

Defendant also argues that his constitutional rights were violated when the prosecutor elicited details about his prior drug-related convictions. Although defendant frames this issue as a constitutional issue, his argument presents an evidentiary issue. To preserve an evidentiary issue for appellate review, the party opposing the evidence must object at trial and state the same ground for objection as the party asserts on appeal, unless the specific ground is apparent from the context. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In this case, defendant did not state the ground for his objection on the record below and the specific ground is not apparent from the context of the record. Even if it was apparent that the prosecution was attempting to elicit evidence concerning defendant's prior drug activities, it is

not clear on what basis defendant was claiming that the evidence was inadmissible. Defendant's claim that the evidence was inadmissible character evidence is not the only possibility. In fact, defendant had previously asked the trial court "to bar any 404(B) evidence in this case for failure to comply with the rules of discovery in providing me that information." Defendant's unspecified objection was insufficient to preserve this issue for appeal. Accordingly, defendant must demonstrate a "plain error" under *Carines*, *supra*, to avoid forfeiture of the issue.

To be admissible under MRE 404(b)(1), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). During the challenged line of questioning, the prosecutor elicited that defendant had been arrested twice for possession with intent to deliver cocaine and once for possession of cocaine. The evidence of defendant's prior involvement with drugs was probative of defendant's awareness that baggies, digital scales, razors, and trays were used in drug trafficking. Thus, the evidence was admissible for a proper purpose under MRE 404(b)(1). With respect to relevance, this Court inquires whether the evidence was material and probative. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Defendant's knowledge of ongoing drug activities was material in this prosecution for keeping and maintaining a drug house. Defendant's prior drug involvement was probative of his knowledge that the baggies, scale, razor, and plate suggested ongoing drug activities in the home. Although defendant contends that the danger of unfair prejudice substantially outweighed the probative value of the evidence, the alleged imbalance was not so evident that any error could be deemed "plain," i.e., clear or obvious, as is necessary to satisfy *Carines*, *supra*.

Moreover, this case is comparable to *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991), in which defense counsel did not object to testimony concerning prior drug transactions between the defendant and the informant, and admitted to the trial court that he purposely allowed the evidence so that he could use it to attack the informant's credibility. This Court stated, "Defendant may not now claim as error on appeal that evidence he purposely used in support of his defense theory was inadmissible." Here, defendant explored his criminal record in great detail and attempted to show that he was a changed man, who had not had any positive drug screens since he was paroled. He purposely used evidence of his past drug involvement and contrasted it to the situation existing at the time of his arrest to support his claim that he was not responsible for any drug trafficking at the home. Because defendant contributed to any prejudice resulting from the evidence, he is not entitled to appellate relief.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio