# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 1, 2009 |
| v | No. 287088<br>Cass Circuit Court |
| CHARLES EUGENE BIGGS,<br><br>Defendant-Appellant. | LC No. 08-010096-FH |

Before: Murray, P.J., and Markey, and Borrello, JJ.

PER CURIAM.

Defendant appeals by right from his jury convictions of conspiracy to operate a methamphetamine lab, MCL 750.157a, MCL 333.7401c(2)(f), and operating a methamphetamine lab, MCL 333.7401c(2)(f). We affirm.

The evidence established that while methamphetamine was "being cooked" at a trailer, a fire broke out and Shaun Cody's leg caught fire. A carpet remnant and a blanket were used to extinguish the fire. Nick Oliver and Cody were involved in making the methamphetamine; Oliver and Janelle Ransom, who claimed she lived at the trailer with defendant, said defendant was also involved in making the methamphetamine.[1] Defendant claimed that he came to the trailer while the other three were involved in the process. After the fire and lab were cleaned up, Ransom and Oliver drove down the road and dumped the trash bags.

Cass County Drug Enforcement Team Officer Beth Davis found the "meth trash," burned carpeting, and a burned blanket. A forklift license and receipt for Sudafed led officers to arrest Oliver and Ransom.

Defendant first argues that his attorney rendered ineffective assistance by failing to object on Sixth Amendment or hearsay grounds to references that Davis made to unnamed informants. Alternatively, defendant argues that his attorney should have requested a limiting instruction.

[1] Oliver and Ransom entered plea bargains that included their testimony against defendant.

Defendant did not move for an evidentiary hearing below; thus, review is limited to errors apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court stated the standard for reviewing claims of ineffective assistance of counsel:

> A defendant seeking new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first objects to Davis' testimony that, "Detective Gizzi had received information that [defendant] had a meth lab go bad, and that it was in his bathroom and it exploded and there was a fire." In context, it is apparent that this testimony was not offered to show that defendant had a meth lab that exploded. Rather, it was offered to explain why Davis took the carpet remnant to the trailer when a search warrant was executed on an unrelated matter. Since it was not offered for the truth of the matter asserted, it was not hearsay. MRE 801(c).

Defendant next objects to the following testimony by Davis on cross-examination:

> Q: And the only thing that seems to tie [defendant] there from the dump would be the same type of carpet?
>
> A: The information that we had previous to me locating the meth dump, that he had a cook there that had exploded to the carpet.
>
> Q: My question is: Anything in the bags itself, the only thing, there was this same type of carpet?
>
> A: Right, yeah.

This comment indicated that defendant, not the trailer, was linked to the meth lab based on extraneous information, and that that information tended to show that defendant, and not others,

was operating the lab. It went to the truth of the matter asserted. Defense counsel could have moved to strike the answer, but also he could have decided that a motion to strike would have highlighted the comment. He was emphasizing the absence of evidence from the dump showing a link and may have concluded that pursuing this point was more advantageous. Since this may be considered to sound trial strategy, defendant has not shown ineffective assistance.

Defendant next objects to the following testimony by Davis:

> [O]nce you start going through the list [of Sudafed purchasers] you can start associating people together, and this was an obvious association because we knew Janelle Ransom and [defendant] were together, and we had information that she would go out and purchase ephedrine for him to supply to people to cook.

The purpose of this testimony was to show that the Sudafed was tied to Ransom, who was associated with defendant. Ransom testified that she had bought Sudafed for defendant and Oliver for this purpose a few days earlier. The challenged testimony tended to establish Davis' reasoning for making the link between the Sudafed purchase and defendant, as opposed to establishing that Ransom actually made the purchases for defendant. Accordingly, it was not hearsay. However, even if it were hearsay, the appropriate response, if any, would have been a motion to strike. Again, such a motion would have highlighted the remark, and, thus, the decision not to bring such a motion could be a matter of sound trial strategy.

Defendant also maintains that to the extent this evidence may have been admissible to explain Davis' behavior, defense counsel should have requested a limiting instruction. Even if such an instruction might have been warranted, the request would have called additional attention to these comments. Counsel could have legitimately determined that this was not warranted. Accordingly, counsel did not render ineffective assistance. *Rodgers*, *supra* at 718.

Finally, defendant argues that admission of these statements was plain error because the admission violated his Sixth Amendment right of confrontation. The Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), citing *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We conclude that the second comment was hearsay and objectionable; however, defendant would be required to establish plain error warrants reversal. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In this case, there was a myriad of evidence linking defendant to the meth lab. Thus, it cannot be said that any error was outcome determinative. *Id*.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello