STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ALVIN KEITH DAVIS, Defendant-Appellant.	UNPUBLISHED February 10, 2011 No. 295650 Kalamazoo Circuit Court LC No. 2009-000323-FH

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), for which the circuit court sentenced defendant as a fourth habitual offender, MCL 769.12, to pay certain costs or serve 30 days in jail. We affirm.

I. FACTS

This case arose from a household search conducted by police officers in Kalamazoo. The prosecuting attorney presented evidence that the officers obtained permission from the persons inside the house to search for evidence of a methamphetamine lab, then discovered two metal spoons that appeared to have heroin residue on them on the nightstand in defendant's bedroom, and a third such spoon in a bathroom. Also on the nightstand were pill bottles with defendant's name on them. The officer who found the spoons testified that defendant denied that the spoons on the nightstand were his, and that defendant explained that many people came through that residence. Another officer testified that defendant admitted owning two of the spoons, that he had injected heroin two days earlier, and that the spoons would likely test positive for heroin residue. According to the testimony, neither of the two others in the house admitted knowing anything about the spoons.

Defendant testified that he lived in Illinois, but stayed in the house in question one or two days a week. Defendant described the two others found in the house with him as Stanley Hall, an elderly man in poor health and suffering from dementia, and Bruce Gardner, whom defendant knew through Hall. Defendant stated that he regularly visited the house in order to assist Hall. Defendant denied that the spoons in question were his, or that he ever told the police otherwise. Asked if he had admitted using heroin, defendant answered, "No, I don't use drugs." On cross-examination, however, defendant admitted that in January 1997 he pleaded guilty of a controlled substance offense, but insisted even so that he "didn't use drugs."

On appeal, defendant argues that he was denied a fair trial through introduction of certain hearsay testimony, and improper cross-examination of him concerning an earlier conviction. Alternatively, defendant argues that trial counsel was ineffective for failure to raise objections in these regards below.

II. STANDARDS OF REVIEW

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). However, a defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

III. HEARSAY

Hearsay is generally inadmissible, but is subject to several exemptions and exceptions as provided by the rules of evidence. MRE 801-805. But even hearsay falling under a well-established exception remains inadmissible if it is testimonial in character. See *Davis v Washington*, 547 US 813, 819-820, 822, 829-830; 126 S Ct 2266; 165 L Ed 2d 224 (2005).

Here, a police witness, after testifying that defendant described purchasing heroin for his own use and also that of Stanley Hall, was asked if he had discussed the matter with Hall. The officer replied, "Stanley advised more or less that he did not know what I was talking about and really gave no coherent response to—to my questions about his use." That same witness, when asked if Bruce Gardner had admitted any knowledge of the subject spoons, replied, "No, he said that he did not know about [t]he spoons." Defendant bases his testimonial hearsay issue on those accounts of what the two others in the house told the police.

We recognize the statements attributed to Hall and Gardner as hearsay subject to no exception, and regard their admission as plain error on that basis. Thus, we need not decide whether the statements were testimonial in nature. Having identified plain error, the question before us is whether the error resulted in the conviction of an innocent man, or seriously affected the fairness, integrity or public reputation of the proceedings. *Carines*, 460 Mich at 763. We conclude that it did not.

The statement attributed to Hall, examined in context, seems to concern Hall's own heroin usage. The police witness attributing the statement to Hall was being asked about defendant's, then Hall's, heroin usage, not specifically about the spoons. The assertion attributed to Hall, then, is that he did not know why the police officer was asking him about heroin usage.

Although that statement would tend to be exculpatory of Hall, it was inculpatory of defendant only in the most indirect sense. This is particularly so given that accompanying the assertion was the description of Hall as generally incoherent. We conclude that the risk of unfair prejudice to defendant in the matter was negligible.

The statement attributed to Gardner was a clear assertion that he knew nothing of the spoons. If this tended to cause the jury to think it thus more likely that defendant was the one whose use of them left the heroin residues, any such tendency should have been slight. Gardner was described as a mere acquaintance of defendant and Hall, not as one who resided in the house on any regular basis. Further, there was testimony to the effect that the household endured quite a parade of persons coming and going. That Gardner endeavored to deflect suspicion should have done little to cause the jury to direct suspicion toward defendant.

Given that there was evidence, albeit contradicted by defendant, that defendant admitted ownership of two of the spoons, and given that there was uncontroverted evidence that those two spoons were discovered alongside bottles of pills with defendant's name on them, there can be little doubt that the jury's conclusion that defendant was responsible for those heroin residues owed little to the denials of Hall and Green.

Moreover, for the same reasons that defendant has failed to show that the challenged hearsay affected his substantial rights, he has failed to show that objections below in the matter would have produced a different result. On this basis we reject his claim of ineffective assistance of counsel. *Messenger*, 221 Mich App at 181.

IV. PRIOR CONVICTION

When asked on direct examination if he had admitted to a police officer that he used heroin, defendant answered, "No, I don't use drugs." Before cross-examining defendant, the prosecuting attorney requested a bench conference, and stated as follows:

> Your Honor, I did not file a notice of impeachable offenses because the Defendant, to my understanding, did not have any (inaudible) however in direct examination he stated he has not used drugs. He does have a prior conviction for controlled substance offense. I didn't want to surprise defense or the Court, I would like to inquire, just briefly mentioning his prior conviction in reference to that statement . . . .

Defense counsel stated, "I think it's fair." The court granted the prosecuting attorney permission to question defendant over that earlier conviction.

Defendant's cross-examination ended with the following exchange:

> *Q.* Now, you testified on direct examination that you don't use drugs, is that correct?
>
> *A.* Yes, it is.
>
> *Q.* But that's not correct, is it, Sir?

A. Yes, it is.

Q. As a matter of fact back on January 14th, 1997, you pled guilty to controlled substance use and narcotic cocaine, methamphetamine or ecstasy, isn't that correct?

A. I was on my way, the police stopped me they had some murders in Benton Harbor, I got stopped along with eight other people and they were searching people and putting them in the police car. They found something in a police car.

Q. Okay, but that's again, Sir, that's not what I asked you. What I asked you is a—

A. Yeah—

Q. —very simple yes or no answer.

A. I pled—

Q. —isn't it correct that you pled guilty to possession or use of controlled substance back in 1997?

A. They found a syringe . . . in the back of the police car—

Q. I'm not asking for an explanation, Sir, a simple yes or no?

A. Yeah, it was a plea.

Q. Isn't it true you pled guilty?

A. It was a plea, I was doing [*sic*] to prison anyway. Okay?

Q. So, you've used drugs before?

A. No, I didn't use drugs.

Defense counsel expressed approval of this line of questioning. Appellate objections are thus waived, leaving nothing for this Court to review. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant again alternatively casts this issue under the rubric of ineffective assistance of counsel, in light of defense counsel's failure to preserve this issue. The question is whether defense counsel erred in agreeing to the line of questioning, and, if so, whether the error was outcome dispositive. See *Rockey*, 237 Mich App at 76; *Messenger*, 221 Mich App at 181.

Defendant argues that the discussion of his earlier conviction was inadmissible because it was irrelevant, and because the risk of unfair prejudice substantially outweighed its probative value. See MRE 403. But those two arguments tend to cancel each other. That the earlier

conviction predated the events underlying this case by more than a decade does indeed suggest that it bore but little on the question of defendant's current or recent drug habits. But, for the same reason, the potential for prejudice was minimal. By testifying that he did not use drugs, defendant opened the door to the challenged cross-examination. See MRE 404(a)(1); MRE 608(b). Although the time lapse reduced the probative value of that impeachment evidence, it did not eliminate it. But especially because of the time delay, the questioning brought little risk of unfair prejudice. For these reasons, the trial court properly allowed that questioning, and defense counsel properly acquiesced.

Defendant additionally protests the lack of any jury instruction limiting consideration of the earlier conviction to testing defendant's credibility. The record shows no discussion concerning such an instruction. Had defense counsel requested such an instruction, it would properly have been given. See CJI2d 3.4. But defense counsel may, as a matter of sound strategy, have preferred that the last the jury heard about the earlier conviction were counsel's own remarks, which emphasized that the conviction was 12 years old and at the misdemeanor level, as opposed to yet another reminder of that earlier event from the judge's instructions. Underscoring this strategy is that defense counsel used the occasion himself to advise the jury that a defendant's earlier problems with the law are not usually brought to a jury's attention. Because defense counsel did not err in agreeing that the prosecuting attorney should be allowed to cross-examine defendant about his earlier conviction, and had a strategic reason for eschewing special instructions in the matter, counsel's performance was not ineffective.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter