

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 9, 2013

v

MICHAEL SHAWN BIRMINGHAM,

Defendant-Appellant.

No. 309053
Genesee Circuit Court
LC No. 11-029802-FH

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury acquitted defendant of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), but convicted him of the lesser offense of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 2 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

I. BASIC FACTS

Defendant's conviction arises from the discovery of heroin inside his boxer shorts during a police search on November 13, 2011. After receiving a tip from a confidential informant, the police conducted surveillance of a McDonald's restaurant parking lot. According to information provided by the informant, defendant would be arriving in a blue Envoy to sell narcotics to someone in a red pickup truck. After a blue Envoy arrived and pulled alongside a red pickup truck, the police arrived and apprehended defendant, who was in the passenger side of the Envoy. Defendant was arrested on an outstanding warrant. No drugs were discovered during an initial search of defendant. However, after the female driver of the Envoy informed an officer that defendant had heroin inside his boxer shorts, another search was conducted, which resulted in the discovery of packets of heroin.

II. ANALYSIS

On appeal, defendant argues that his constitutional right of confrontation was violated by the introduction of police testimony describing statements made by the confidential informant and by the female driver of the blue Envoy.

Initially we disagree with the prosecutor's argument that defense counsel waived this constitutional issue by attacking the reliability of the confidential information and by criticizing the prosecutor for failing to call the female driver as a witness in his closing argument. A defendant's constitutional right to confront witnesses against him may be waived through actions by defense counsel. *People v Buie*, 491 Mich 294, 304-306; 817 NW2d 33 (2012). But a waiver is the "intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). In this case, there is nothing in the record to indicate that defense counsel knowingly acquiesced in any judicial decision regarding this constitutional issue, see *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), or that counsel knowingly permitted the alleged constitutional violation. See *People v Fackelman*, 489 Mich 515, 543; 802 NW2d 552 (2011) (counsel could not have intentionally relinquished a known confrontation violation where he did not recognize the violation). Defense counsel's remarks in closing argument referring to his decision not to raise a hearsay objection to the female driver's statements do not establish that counsel was intentionally waiving any constitutional claim. Accordingly, we conclude that defendant's claim of constitutional error was not affirmatively waived. But because there was no objection to the challenged testimony at trial, defendant's constitutional claim is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Fackelman*, 489 Mich at 537; *Carines*, 460 Mich at 763.

Evidentiary errors are generally nonconstitutional in nature unless a specific constitutional right is implicated. *People v Blackmon*, 280 Mich App 253, 259-261; 761 NW2d 172 (2008). The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him[.]" US Const, Am VI. The Michigan Constitution also affords a defendant this right of confrontation. Const 1963, art 1, § 20; *People v Fackelman*, 489 Mich 515, 525; 802 NW2d 552 (2011). "These constitutional provisions are underscored by MCL 763.1, which provides a criminal defendant the express right to 'meet the witnesses who are produced against him face to face.'" *Id.*

The constitutional concern is with out-of-court statements of witnesses, that is, persons who bear testimony against the defendant. *Id.* at 528. "As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront the witness." *Bullcoming v New Mexico*, ___ US ___; 131 S Ct 2705, 2713; 180 L Ed 2d 610 (2011). Nonetheless, the Confrontation Clause only applies to statements used as substantive evidence. *Fackelman*, 489 Mich at 528. Thus, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, such as to show why police officers took certain actions. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007).

In this case, testimony regarding the confidential informant was relevant to explain why the police conducted surveillance at the McDonald's restaurant and targeted a blue Envoy and a red pickup truck. In addition, police testimony regarding the female driver's statement that defendant had heroin inside his boxer shorts was relevant to explain why the police decided to search defendant's boxer shorts. Thus, there was no plain error in the admission of the informant's and female driver's statements for the purpose of explaining why the police acted as they did.

To the extent defendant argues that the prosecutor exceeded the permissible use of the informant's statements by suggesting in closing and rebuttal arguments that the informant's "tip" could be used substantively as proof of defendant's intent to deliver the heroin, any error did not affect defendant's substantial rights because the jury acquitted defendant of possession with intent to deliver and instead convicted him of simple possession. Possession was established by the police testimony describing the discovery of heroin inside defendant's boxer shorts, not by the information obtained from the informant.

Additionally, the record does not reveal any impermissible use of the female driver's statements. In her rebuttal argument, the prosecutor referred to the driver's statements to explain why the police searched defendant's boxer shorts, and urged the jury to rely on the results of the police search to find that defendant possessed the heroin. Because the prosecutor did not use the driver's statements as substantive proof that defendant possessed heroin, defendant has not established a plain error. Further, because defendant's possession of the heroin was independently established by the police testimony describing the search of defendant and the discovery of heroin inside his boxer shorts, there is no basis for concluding that the driver's statements affected defendant's substantial rights.

Affirmed.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher