STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY SCOTT VIAVADA,

Defendant-Appellant.

UNPUBLISHED
January 30, 2014

No. 310164
Gratiot Circuit Court
LC No. 11-006408-FH

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction for operating or maintaining a controlled substance laboratory involving methamphetamine, MCL 333.7401c(2)(f). Defendant was sentenced to serve 15 to 30 years' imprisonment in compliance with MCL 333.7413(2), this being his second drug offense. Because we find no error meriting reversal or resentencing, we affirm.

The prosecution presented evidence that at the time of his arrest, defendant was being driven home from Auburn Hills by his girlfriend, Elizabeth Baker, and that during the trip defendant requested that Baker stop at a Home Depot in Owosso, defendant's brother's home in Middleton, and a Wal-Mart in Alma. Defendant made purchases at the two stores. While approaching their home in St Louis, Michigan, defendant instructed Baker to drive past their driveway because something did not feel right. After they passed their driveway, a police officer initiated a traffic stop. Defendant instructed Baker to deny any requests to search the vehicle. Defendant, who had several outstanding warrants, was placed under arrest. The police then searched the vehicle where they found multiple items related to the preparation of methamphetamine including drain cleaner and Coleman fuel under defendant's seat as well as fertilizer spikes, and a man's green jacket with Sudafed in the pocket. A search of defendant's person revealed four batteries and a Wal-Mart receipt for the purchase of Coleman fuel. After obtaining a warrant, the police searched defendant's house, finding evidence of a methamphetamine production laboratory in defendant's upstairs living space. There, police found most of the items needed to complete the second phase of cooking methamphetamine, including a gas generator, coffee filters, Coleman fuel, and remnants of lithium batteries. A plastic vessel at the site had a brown granular substance inside, which was consistent with the cooking process.

Defendant first argues that police testimony regarding the statements of a confidential informant was erroneously admitted hearsay and that the testimony violated his Sixth Amendment right to confront witnesses against him. Because defendant did not object to the testimony at trial, we review this claim for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 59 NW2d 130 (1999). Where plain error is shown, "reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the guilt or innocence of the accused." *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012).

This Court has described a defendant's Confrontation Clause right as it applies to testimony regarding confidential informants as follows:

> A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *Id*. at 68. A statement by a confidential informant to the authorities generally constitutes a testimonial statement. *United States v Cromer*, 389 F3d 662, 678 (CA 6, 2004). However, 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*, *supra* at 59 n 9. Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause. *People v Lee*, 391 Mich 618, 642-643; 218 NW2d 655 (1974). Specifically, a statement offered to show why police officers acted as they did is not hearsay. *People v Jackson*,113 Mich App 620, 624; 318 NW2d 495 (1982). [*People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007).]

In this case, a deputy sheriff testified that an anonymous source provided law enforcement with a tip that led to defendant's arrest. There are two relevant portions of this testimony.

First, the deputy testified that he went to work on the date of defendant's arrest because, "We had a – we had somebody call me, a source that wished to remain anonymous, to give me a tip regarding [defendant]." At oral argument, defendant conceded, and we agree, that this portion of the deputy's testimony did not violate defendant's Confrontation Clause rights, because it was offered to show why the deputies placed defendant under surveillance. See *id*.

Defendant also challenges the following portion of the deputy's testimony, elicited by the prosecutor on direct examination:

> *Q*. And what specifically were you looking for with respect to [defendant]?

A. The person that called in the tip advised that he was going to be coming into the Middleton area and had intentions of cooking methamphetamine that night.

We agree with defendant that this testimony regarding the statements of the confidential informant was testimonial and offered for the truth of the matter asserted. Specifically, that defendant and Baker were suspected of previously manufacturing methamphetamine and intended do so in Middleton on the night in question. Thus, the deputy's statements, gleaned from a confidential informant who did not testify at trial, constituted hearsay erroneously admitted in violation of defendant's Confrontation Clause rights. *Chambers*, 277 Mich App at 10-11.

However, defendant is not entitled to relief because we reject his contention that the plainly erroneous admission of the hearsay testimony affected his substantial rights. *Carines*, 460 Mich at 763. Outside of the hearsay statement, there was overwhelming evidence of defendant's guilt. Defendant was in a vehicle with every component, aside from water, necessary to complete the first phase of cooking methamphetamine, and some of them were on his person. The police discovered a methamphetamine cooking area in defendant's upstairs living area. It was also demonstrated that defendant sent a postcard to Baker requesting her to lie under oath regarding the activities of which he was accused. In sum, there was an abundance of circumstantial evidence that strongly linked defendant to methamphetamine production. See MCL 333.7401c(2)(f). That is, there was significantly more evidence of defendant's guilt than the mere hearsay statement of a confidential informant that defendant had previously engaged in methamphetamine production. Accordingly, the plainly erroneous admission of the hearsay testimony was harmless, and reversal is not warranted. *King*, 297 Mich App at 473.

Defendant also argues that his trial counsel was ineffective for failing to object to the hearsay testimony. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness *and* that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010) (emphasis added). Given our conclusion that the erroneous admission of the testimony was harmless, defendant cannot establish that his counsel's failure to object affected the outcome of the trial, even if we assume that counsel's failure to object fell below an objective standard of reasonableness. Thus, defendant is not entitled to a new trial on the basis of ineffective assistance of counsel.

Defendant next argues that the trial court abused its discretion[1] by overruling objections to introduction of certain hearsay statements attributed to Baker. A deputy testified that defendant denied owning the jacket found during the search Baker's vehicle. Over defendant's objection, he added that Baker told him that the jacket did in fact belong to defendant.

[1] A trial court's decision whether or not to admit evidence is reviewed for an abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006).

The trial court erred by allowing this testimony. Baker's out-of-court declaration as to the ownership of the jacket was offered for the truth of the matter asserted. Thus, it constituted hearsay and the trial court abused its discretion by admitting it over objection. However, to obtain reversal, defendant must show that the erroneous admission of the testimony resulted in a miscarriage of justice. *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010). As discussed above, there was overwhelming evidence of defendant's guilt independent of either erroneously admitted hearsay testimony. Accordingly, defendant is not entitled to reversal.

Lastly, defendant challenges the scoring of OV 14. With regard to the sentencing guidelines, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

OV 14 is to be scored at ten points if the defendant was the "leader in a multiple offender situation." MCL 777.44(1)(a). A multiple-offender situation is "a situation consisting of more than one person violating the law while part of a group." *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350, vacated in part on other grounds, 494 Mich 880 (2013). A leader is "one who is a guiding or directing head of a group." *Id.* To determine if a defendant was the leader, the entire criminal transaction must be evaluated. *People v Lockett*, 295 Mich App 165, 184; 814 NW2d 295 (2012).

A consideration of the whole criminal transaction at issue makes clear that the trial court did not err by finding that defendant was the leader in a multiple-offender situation. Defendant instructed Baker to purchase products necessary to cook methamphetamine, to stop at multiple locations on their drive home from Auburn Hills, to pass their driveway when he thought something was amiss, and to withhold her permission for the police to search their vehicle. Further, defendant did not allow Baker into the methamphetamine cooking area found in the upstairs of the home, demonstrating that he was "one who [was] a guiding or directing head of a group." *Jones*, 299 Mich App at 287.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro