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FILED
Mar 05 2010, 9:23 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY SCOTT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0905-CR-416
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Judge
Cause No. 49G20-0804-FA-96508

March 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Anthony Scott appeals his convictions for three counts of Dealing in Cocaine,[1] a class A felony, and one count of Resisting Law Enforcement,[2] a class A misdemeanor. Scott argues that the trial court's decision to admit portions of an audio recording into evidence violated his right to confront witnesses. Finding no reversible error, we affirm.

FACTS

On April 27, 2008, Speedway Police Officer Chris Ristuccia drove a confidential informant (CI) to a public phone, where she placed a telephone call. Officer Ristuccia then drove the CI to an apartment complex. When they arrived, Scott approached the vehicle in which the CI and the officer were sitting and handed the CI a bag of cocaine in exchange for the CI's buy money. Approximately four hours later, Officer Ristuccia and the CI repeated the same transaction, and Scott again exchanged cocaine for the CI's buy money. After the completion of the second controlled buy, law enforcement officers appeared and chased Scott into an apartment, where he was arrested. The officers found scales bearing cocaine residue, the buy money from the first controlled buy, and more cocaine in the apartment. Scott had a twenty-dollar bill from the second controlled buy on his person when he was arrested.

[1] Ind. Code § 35-48-4-1.

[2] Ind. Code § 35-44-3-3.

On April 28, 2008, the State charged Scott with three counts of class A felony dealing in cocaine, one count of class A felony possession of cocaine, one count of class B felony possession of cocaine, and class A misdemeanor resisting law enforcement.

During Scott's two-day jury trial, the State introduced into evidence an audio recording of the controlled buys that was produced by the recording device worn by the CI. Scott objected. The trial court held that the portion of the tape containing the post-arrest debriefing with police officers was inadmissible, but admitted the portion of the tape consisting of the recordings of the controlled buys into evidence. The CI did not testify at the trial.

On March 27, 2009, the jury found Scott guilty as charged. The trial court entered judgment on the three class A felony dealing in cocaine convictions and the conviction for class A misdemeanor resisting law enforcement. Following the April 14, 2009, sentencing hearing, the trial court sentenced Scott to an aggregate term of forty years imprisonment. Scott now appeals.

DISCUSSION AND DECISION

Scott argues that the admission of the audiotape into evidence violated his right to confront witnesses as contained in the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has explained that the admission of testimonial statements by witnesses who are not present at trial is prohibited except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 42 (2004). An out-of-court

statement that falls within an exception to the hearsay rule is not admissible unless it also passes the Crawford test. Id. at 51, 56-61. Scott argues, therefore, that the trial court erred by analyzing his objection solely under the Indiana hearsay rules rather than the Crawford constitutional test.

Even if we assume solely for argument's sake that the audio recording should not have been admitted pursuant to Crawford, we need not reverse unless Scott was prejudiced by the admission. Under the federal harmless error analysis, the State has the burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Black v. State, 794 N.E.2d 561, 565 (Ind. Ct. App. 2003). In analyzing whether an error is harmless, we must examine such factors as "(1) the importance of the witnesses's [sic] testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) whether other evidence corroborated or contradicted the witness's material testimony; and (4) the overall strength of the prosecution's case." United States v. Ochoa, 229 F.3d 631, 639-40 (7th Cir. 2000).

Here, the audiotape contained a recording of the CI reciting a telephone number. During the telephone conversation, the CI can be heard saying, "Ant[3], it's Leah. You at home? Need a twenty. I'll be there in three minutes." State's Ex. 18. After the CI and police officer drove to the apartment complex, the CI can be heard saying, "Hey little dude . . . alright, thanks." Id.

[3] Before the controlled buys took place, the police only knew of Scott by the nickname "Ant." Appellant's Br. p. 3.

As the State explains, the tape was not offered to prove any facts contained in the CI's statements, but merely to show that the CI was present, to provide context for Scott's statements, and to corroborate the officers' testimony. The crux of the State's case against Scott was the following evidence: (1) the testimony of Sergeant Robert Dine, who had developed the relationship with the CI and was involved in the investigation against Scott; (2) the testimony of Officer Ristuccia, who was present for both controlled buys; and (3) the evidence found on Scott's person and in his apartment, including buy money from both controlled buys, dealing paraphernalia, and cocaine.

Under these circumstances, we can only conclude that the CI's limited statements on the audio recording were not important to the State's overall case, that the information contained on the recording was cumulative of the officers' testimony, that other evidence corroborated the information on the recording, and that the prosecution's overall case against Scott was significantly strong. Therefore, we find that the State has proved beyond a reasonable doubt that there is no reasonable possibility that the audio recording might have contributed to Scott's conviction; thus, any error was harmless.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.