ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-187

FEBRUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Markell L. Barnes	}	DOCKET NO. 738-2-06 Cncr
		Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, based on a jury verdict, of two drug-related charges. Defendant contends the court erred in admitting several hearsay statements by a confidential informant. We affirm.

The facts may be summarized as follows. On January 26, 2006, drug enforcement officers with the Burlington Police Department arranged for a confidential informant to call defendant, whom they suspected of dealing drugs, to arrange for the purchase of an ounce of cocaine. The informant had been found to be in possession of cocaine during an earlier incident, had no criminal record, and had agreed to cooperate with the police. During the call, overheard by the investigating officer, the informant agreed to meet defendant that day at the Best Buy store in Williston, Vermont. The officers drove the informant to the store, fitted her with a wire, and gave her $230 for the purchase. Officers stationed inside the store observed the informant meet a man, later identified as defendant, and they appeared to make an exchange. Defendant then talked with another man from whom he received some money, returned to the informant, and all three walked to the front of the store where defendant handed something to the informant. The informant then returned to the waiting police car with a plastic bag containing a white powder that tested positive for cocaine.

The officers decided to arrange a second purchase and planned to arrest defendant in the course thereof. The confidential informant made several recorded telephone calls to defendant and arranged to meet him that evening at a local Kwik Stop. The officers arrested defendant near the store. A search revealed a plastic bag, hidden in defendant's underwear, containing a white powder that proved to be baking soda rather than cocaine. Defendant was charged with selling cocaine, in violation of 18 V.S.A. § 4231(b)(2), and attempting to sell a non-controlled substance upon the express or implied representation that it was a controlled drug, in violation of 18 V.S.A. § 4228(a)(1). Following a one-day trial, the jury returned guilty verdicts on both counts. This appeal followed.

Defendant contends the trial court erred in admitting over objection the investigating officer's testimony concerning the confidential informant's first telephone conversation with defendant. The officer testified that, as the confidential informant listened and spoke on the

telephone, "she was saying some things out loud, kind of reiterating, and there was a mention of the Best Buy, Williston." The officer further "heard her say 225 was the price." The court overruled defendant's hearsay objection, admitting the testimony as "part of the res gestae."

Our review of the trial court's evidentiary rulings is deferential, and we will reverse only where there is an abuse of discretion resulting in prejudice. State v. Jackson, 2008 VT 71, ¶ 9, 184 Vt. 173. As we have explained, the excited-utterance and present-sense-impression exceptions to the hearsay rule, codified at V.R.E. 803(1) & (2), "are among several that at common law were grouped together under the general heading res gestae." State v. Solomon, 144 Vt. 269, 272 (1984).[1] As we further explained,

> In contrast to the excited utterance exception, the present sense impression utterance need not be made in response to an exciting event. The reliability or trustworthiness of such an utterance comes from its timeliness. If made contemporaneously with the event or immediately thereafter, there is little chance of misstatement due to loss of memory and little or no time for fabrication or calculated misstatement.

Id. at 273.

Applying this exception, courts have admitted hearsay testimony where—as here—the witness heard the declarant repeating, or immediately recalling, statements made by a person on other end of a telephone conversation. In Bonavitacola v. Cluver, 619 A.2d 1363, 1372 (Pa. Super. Ct. 1993), for example, the court admitted testimony by the plaintiff where her deceased husband had "immediately repeated to plaintiff the comments that [the defendant] made on the telephone" to the decedent, reasoning that the circumstances "provided decedent little or no time to consciously manipulate the truth, [thus] qualifying the statement as a present sense impression." The court reached a similar conclusion in McBeath v. Commonwealth, 244 S.W.3d 22, 37 (Ky. 2007), where the witness testified that he was riding in a truck with a friend who received a telephone call and immediately after hanging up told the witness that the caller, the defendant, "was looking for a gun." The court concluded that the statement "fit within the present sense impression exception" due to "the immediacy of the statement after the phone call" and explained that if "there had been any lapse of time, the statement would have lost its reliability." Id. at 38; see also Amos v. State, 896 N.E.2d 1163, 1168-69 (Ind. Ct. App. 2008) (admitting under the present-sense-impression hearsay exception the witness's testimony that, immediately after speaking with the defendant on the telephone, the victim told the witness that defendant said he would kill her if she did not give him money).

These cases may be distinguishable, as none involved a declarant who was an agent of the police and whose statements, therefore, may not necessarily be as free from calculation. Nevertheless, any possible error in their admission was plainly harmless. There was ample testimony from the investigating officers concerning the meeting place and purchase price, the amount of money given to the confidential agent for the purchase, and the police observations of defendant in the Best Buy during the transaction. In light of this evidence, we are persuaded that the few statements overheard by the officer during the telephone conversation had no effect on the verdict, and therefore were harmless beyond a reasonable doubt. See State v. Lipka, 174 Vt.

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[1] V.R.E. 803(1) defines the "present sense impression" exception as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

377, 384 (2002) (we may uphold a criminal conviction, despite even a constitutional error, if we find that the error was harmless beyond a reasonable doubt).

Defendant also contends that the trial court erred in admitting a recorded conversation between the confidential informant and defendant during their meeting at the Best Buy, and in admitting several subsequently recorded telephone conversations between the informant and defendant before their scheduled meeting at the Kwik Stop. Defendant maintains that the informant's statements were inadmissible hearsay, and that their admission violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. It is undisputed, however, that defendant did not object on these grounds, and we therefore review solely for plain error. As we have explained, plain error exists "only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Pelican, 160 Vt. 536, 538 (1993) (quotation omitted).

Applying this standard, we find no basis for reversal. Defendant identifies no specific statements as objectionable in the recorded conversation in the Best Buy, alleging merely that it was the "only direct evidence of the actual transaction." The conversation itself merely contains several references to dollar amounts, with the informant stating that she had $230 and telling defendant "[y]ou better have $5." It is undisputed that defendant's own statements during the recorded conversations were admissible as non-hearsay admissions by a party opponent under V.R.E. 801(d)(2). See State v. Bernier, 157 Vt. 265, 268 (1991) (admissions include any statement by a party). In forming the conversation's "other half," the informant's statements provided "context" and therefore were admissible for purposes other than establishing the truth of the matter asserted, even if had there been a timely objection. See id. at 269 (holding that a police officer's questions to the defendant during interrogation "provided context for defendant's responses and were not offered for the truth of the matters asserted").

Moreover, any conceivable error in the admission of the confidential informant's statements—even for the truth of the matters asserted—was harmless beyond a reasonable doubt. Lipka, 174 Vt. at 384. The informant's only incriminating remarks during the conversation in the Best Buy are two references to the dollar amounts exchanged. This was largely cumulative, however, of the investigating officer's direct testimony that he gave the confidential informant $230 and that she returned from the store with $5 and a substance that tested positive for cocaine. Another officer also testified that he observed the confidential informant make contact with a man whom he later identified as defendant, saw both the informant and defendant extend their arms as though they were making an exchange, saw defendant approach another man and receive some money, and then saw all three walk to the front of the store, where defendant handed something to the confidential informant, who returned to the waiting police car. In light of this evidence, we have no difficulty concluding that the verdict on the charge of selling cocaine would have been identical even without the brief, taped conversation in the Best Buy, and any error in its admission was therefore harmless beyond a reasonable doubt.

A similar conclusion follows with respect to the recorded telephone conversations preceding defendant's arrest outside the Kwik Stop. The only potentially incriminating statements by the informant during the recorded conversations consisted of two questions, whether the defendant "[c]an . . . still do that zip?" and whether it was "[s]till for $1000, same price"? "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." V.R.E. 801(c). Here, the allegedly objectionable statements were merely questions, and were not presented to prove the truth of any matter asserted therein. See State v. Leroux, 2008 VT 104, ¶ 24, 184 Vt.

396 (holding that the declarant's "inquiries" were not hearsay as they "were presented as questions"). Moreover, the questions were largely cumulative of the investigating officer's testimony that he had asked the confidential informant to call defendant to arrange for the purchase of an ounce of cocaine for $1000. The officer testified further that he observed the informant dial defendant's number and speak with him several times, and then drove the informant to the Kwik Stop, where the officers arrested defendant and found hidden in his underwear a plastic bag containing a white powdery substance. The officer also testified—without objection—that after the arrest, defendant waived his Miranda rights and denied cocaine trafficking, but admitted "that he would, quote, unquote, trick somebody out with baking power when, you know, when asked to, basically." In light of the surrounding circumstances and defendant's own admission, we have no doubt that the jury would have reached the identical verdict without the recorded conversations, and that any error in their admission was harmless beyond a reasonable doubt. Accordingly, we find no basis to disturb the judgment. [2]

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

[2] In light of our conclusion that any error was harmless, we need not determine whether, for purposes of Sixth Amendment analysis, the confidential informant's statements were "testimonial" in nature. See Crawford v. Washington, 541 U.S. 36, 53-54 (2004) (holding that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination"); Davis v. Washington, 547 U.S. 813, 821 (2006) (noting that "[o]nly [testimonial] statements . . . cause the declarant to be a 'witness' within the meaning of the Confrontation Clause").