[Cite as *State v. Hedges*, 2016-Ohio-5038.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA21
vs.	:	
MICHAEL E. HEDGES,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Scott P. Wood, Lancaster, Ohio, for Appellant.

Kyle C. Henderson, Hocking County Prosecuting Attorney, and William L. Archer, Jr., Hocking County Assistant Prosecuting Attorney, Logan, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-29-16
ABELE, J.

{¶ 1} This is an appeal from a Hocking County Common Pleas Court judgment of conviction and sentence. A jury found Michael E. Hedges, defendant below and appellant herein, guilty of (1) illegal manufacture of drugs in violation of R.C. 2925.04(A); (2) illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A); (3) having weapons while under disability in violation of R.C. 2923.13(A)(4); and (4) aggravated possession of drugs in violation of R.C. 2925.11(A).

{¶ 2} Appellant assigns the following error for review:

> "THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR THE TESTIMONIAL HEARSAY STATEMENTS OF AN UNAVAILABLE WITNESS, IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶ 3} In January 2014, law enforcement officers received an anonymous tip that appellant was manufacturing methamphetamine at 598 Navajo Lane, located in the Hide-A-Way Hills area. After the officers approached the residence to investigate, the officers observed a translucent white trash bag that contained Coleman Fuel and Morton salt. The officers also observed a vehicle in the driveway and learned that it was registered to the appellant. The officers then knocked on the door, and Lindsay Burkhart answered. The officers explained the reason for their presence, and Burkhart eventually implicated appellant as the individual responsible for manufacturing methamphetamine. A subsequent search of the residence uncovered, inter alia, copious amounts of materials used to manufacture methamphetamine.

{¶ 4} On March 27, 2015, a Hocking County grand jury returned an indictment that charged appellant with (1) illegal manufacture of drugs, (2) illegal assembly or possession of chemicals for the manufacture of drugs, (3) having weapons while under disability, and (4) aggravated possession of drugs. Appellant entered not guilty pleas.

{¶ 5} On June 11 and 12, 2015, the trial court held a jury trial. Hocking County Sheriff's Deputy Alex Brown stated that on January 21, 2014, officers visited 598 Navajo Lane located in Hide-A-Way Hills (HAH) to conduct a "knock-and-talk." Officer Brown explained that officers had received a tip that methamphetamine was being manufactured at that address. Officer Brown stated that when they arrived at HAH, the security officer advised them that appellant lived at 598 Navajo Lane. The officer further stated that when they arrived at the

residence, they observed a vehicle in the driveway registered to the appellant. When the officers approached the residence, they observed a translucent trash bag outside the residence that contained Coleman Fuel and Morton salt. Officer Brown stated that both items are used to manufacture methamphetamine.

{¶ 6} Officer Brown testified that when the officers knocked on the door, Burkhart answered. He explained that the officers then conducted a safety sweep and that, during this sweep, they observed Drano and Liquid Fire, also items used to manufacture methamphetamine.

{¶ 7} Officer Brown intended to testify regarding his conversation with Burkhart, but before he did, appellant objected. Appellant noted that Burkhart was unavailable to testify as a witness and that permitting Officer Brown to testify regarding her statements would violate his right to confront the witness. The trial court overruled appellant's objection.

{¶ 8} Officer Brown then related to the jury his conversation with Burkhart. When he informed Burkhart that law enforcement officers had received a tip regarding methamphetamine manufacturing at the residence and had learned that Burkhart purchased approximately ten boxes of pseudoephedrine, a necessary ingredient to manufacture methamphetamine, in a three- to four-month time frame. Officer Brown stated that Burkhart admitted that she provided pseudoephedrine to appellant for manufacturing methamphetamine, but denied that she helped appellant manufacture the methamphetamine. Burkhart also informed the officer that appellant lives at the residence. Officer Brown further stated that the law enforcement officers searched the residence and discovered numerous materials used to manufacture methamphetamine, appellant's tax return as well as photographs of appellant.

{¶ 9} The state also introduced into evidence an inventory of items that the officers recovered from the residence. The inventory lists twenty-seven items involved in methamphetamine manufacturing, including glass pipes, coffee filters, lithium batteries, Coleman Fuel, Liquid Fire, Drano, Morton salt, a plastic pipe, Miracle-Gro, funnels, tubing, and a 32-ounce Powerade "one pot bottle." The state also introduced evidence that appellant rented the Navajo Lane residence from the owner. The state presented a document entitled, "Hide-A-Way Hills Club Non-Member Tenant Registration Form." This form lists the owner's (member) information and the tenant information. Appellant is listed as the first tenant and he also signed the document.

{¶ 10} On June 15, 2015, the jury found appellant guilty of all four counts as charged in the indictment. On July 21, 2015, the trial court sentenced appellant to serve concurrent prison terms of (1) three years for manufacturing methamphetamine, (2) two years for the illegal assembly or possession of chemicals for the manufacture of drugs, and (3) twelve months for having weapons while under disability. The court merged appellant's aggravated possession of drugs and manufacturing methamphetamine convictions. This appeal followed.

{¶ 11} In his sole assignment of error, appellant asserts that the trial court erred by permitting hearsay testimony from Burkhart, an unavailable witness. Appellant argues that admission of Burkhart's statement violated his constitutional right to confront the witness. He contends that if the trial court had properly excluded Burkhart's testimony, the state would have been unable to prove his involvement in manufacturing methamphetamine.

{¶ 12} The Sixth Amendment to the United States Constitution[1] provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Section 10, Article I of the Ohio Constitution similarly provides: "In any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face." Both provisions prohibit the introduction of testimonial hearsay statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); accord Clark, 135 S.Ct. at 2179; State v. Ricks, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶18, quoting Crawford at 59, fn. 9 (noting that the Confrontation Clause "'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"). Appellate courts review alleged violations of a criminal defendant's confrontation rights under a de novo standard. State v. Thompson, 4th Dist. Washington No. 13CA41, 2014-Ohio-4665, ¶11, citing State v. Smith, 162 Ohio App.3d 208, 2005–Ohio–3579, 832 N.E.2d 1286 (8th Dist.), and United States v. Robinson, (C.A.6, 2004), 389 F.3d 582, 592.

{¶ 13} The phrase "testimonial statements" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. at 68. However, not all police interrogations result in "testimonial statements." Clark, 135 S.Ct. at 2179-2180 (discussing evolution of Crawford standard). Instead, courts must examine the primary purpose of the interrogation to ascertain whether the

[1] The Sixth Amendment right of confrontation applies to the states through the Fourteenth Amendment. Ohio v. Clark, 135 S.Ct. 2173, 2179, 192 L.Ed.2d 306 (2015).

resulting statements are testimonial or nontestimonial. Id. at 2180. "'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" Id. at 2179-2180, quoting Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A court that is determining whether statements are testimonial under the primary purpose test must consider "'all of the relevant circumstances.'" Id. at 2180, quoting Michigan v. Bryant, 562 U.S. 344, 369, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to "creat[e] an out-of-court substitute for trial testimony.'" Id., quoting Bryant, 562 U.S. at 358.

{¶ 14} In the case at bar, we do not need to decide whether admitting into evidence Burkhart's out-of-court statements violated appellant's confrontation rights. Instead, we believe that even if we assume for purposes of argument that the court should have excluded Burkhart's statement under the Confrontation Clause, ample other competent, credible evidence supports appellant's conviction. Thus, any error that the trial court may have committed is harmless beyond a reasonable doubt. See State v. Maxwell, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶64 (determining that any error admitting testimony in violation of defendant's confrontation rights harmless error beyond a reasonable doubt when "overwhelming evidence" established defendant's guilt); see also Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (federal constitutional error is harmless if it appears "beyond a reasonable

doubt that the error complained of did not contribute to the verdict obtained"); In re J.M., 4th Dist. Pike No. 08CA782, 2011-Ohio-3377, ¶37 (stating that "[w]e may decline to notice a constitutional error if the error is harmless beyond a reasonable doubt"). "'[E]rror is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt.'" J.M. at ¶37, quoting State v. Williams, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus.

{¶ 15} Recently, in State v. Harris, 142 Ohio St.3d 211, 2015-Ohio-166, the Ohio Supreme Court further clarified the harmless error doctrine. In Harris, the court adopted a three-part analysis that a reviewing court must use to determine whether an alleged error affected a defendant's substantial rights and requires a new trial: (1) whether the error prejudiced the defendant (whether the error had an impact on the verdict); (2) whether the error was not harmless beyond a reasonable doubt; and (3) whether, after the prejudicial evidence is excised, the remaining evidence establishes the defendant's guilt beyond a reasonable doubt.

{¶ 16} In the case sub judice, after our review of the entire record we believe that the evidence adduced at trial, absent Burkhart's statements, constitutes overwhelming proof that appellant engaged in manufacturing methamphetamine.[2] An anonymous tip identified appellant as an individual engaging in the manufacture of methamphetamine at the Navajo Lane residence. Officers discovered at the residence twenty-seven items related to manufacturing methamphetamine, including glass pipes, coffee filters, lithium batteries, Coleman Fuel, Liquid Fire, Drano, Morton salt, a plastic pipe, Miracle-Gro, funnels, tubing, and a 32-ounce Powerade

[2] We note that appellant has not argued that the evidence otherwise fails to support his remaining convictions. We limit our review accordingly.

"one pot bottle." The state also presented documentary evidence that appellant is listed as a tenant of the residence, and that he signed a document acknowledging his tenancy. Photographs of appellant were found at the residence, and appellant's vehicle was parked in the driveway. Based upon the evidence that appellant lived at the residence, and the prevalence of the methamphetamine materials located throughout the premises, a reasonable jury could have easily concluded that appellant engaged in manufacturing methamphetamine. See State v. Wickersham, 4th Dist. Meigs No. 13CA10, 2015-Ohio-2756. Even though Burkhart may have been the only witness who directly implicated appellant, the remaining circumstantial evidence more than adequately implicates appellant. Furthermore, while Burkhart's testimony was not an insignificant part of the state's case, we cannot state that it was so crucial that the jury could not have found appellant guilty without it.

{¶ 17} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.