

63298-1

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NO. 63298-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ALAN ZIERMAN

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the Confrontation Clause violated where the challenged statement was not hearsay given it was not offered for the truth of the matter, but was a narrowly tailored explanation of the genesis of the relevant law enforcement investigation?

2. Was the Confrontation Clause violated where the out-of-court statement admitted was not testimonial given its primary purpose was to relate a then-occurring emergency situation in a non-formal setting?

3. Assuming the Confrontation Clause was violated, is retrial warranted where the error was harmless under the circumstances?

II. STATEMENT OF THE CASE

A. TRIAL.

Defendant was charged by amended information with two felonies: Manufacture of a Controlled Substance, Methamphetamine, and Bail Jumping. 1CP 84.¹

On January 22, 2006, shortly before 1:00 pm, Snohomish County Sheriff's Deputy James Upton was informed by dispatch of "an anonymous [911] complaint that an individual was moving tanks

¹ Defendant does not challenge the Bail Jumping conviction. Thus, the facts relevant to that charge alone will not be detailed.

around in someone else's yard" at a Sultan, WA residence. 2RP 41-42; 3RP 169. Afterward, Upton met with a City of Sultan police officer and traveled to the reported house, arriving at 1:55 pm. 2RP 42-43, 46; 3RP 169.

The residence, a single-wide mobile home next to a two-car garage, stood on a lot approximately an acre in size. Upton spoke with the occupant-renter, Jeffrey Adcock, and asked for permission to check out the back yard and a shed there. The Deputy explained there had been "a report of somebody in [the] back yard,"... "a 911 call stating there was suspicious person moving things around." 2RP 50-51, 54-56.

Adcock had just woken up, having worked a graveyard shift, and informed the Deputy that no one should be there. Though he lived with his ex-wife and two children, they were not at home at the time. He granted permission for the search. 2RP 51, 57-60.

The shed stood in the backyard's back corner, 10 to 20 feet from the house, next to a large pile of rubbish. 2RP 48, 62; 3RP 110. The structure looked "pretty beat up" and "ready to fall down." 2RP 108-09.

Upton opened the shed door and was confronted by an overpowering chemical smell, similar to cat urine. The shed

appeared to be a single room, its dimensions approximately 8 feet by 8 feet.² Defendant was alone inside. A hand torch, the type usually associated with soldering, was on the floor, its flame alight. 2RP 43-45, 47.

Upton immediately suspected he had found a methamphetamine production laboratory. PVC and plastic piping were hanging from the ceiling attaching to a glass tube and a five gallon tank of the sort normally used to contain propane. The shed also contained a can of acetone, a gallon jug, two other propane tanks, a bottle of aluminum jelly, a Coleman fuel tank, and two glass jars. One jar contained coffee filters, sludge and brown liquid; the other contained a layer of clear liquid. Also found in the shed: lithium batteries, a large metal spoon with white and brown residue, a pair of plastic sports bottles, and a digital scale with a residue on it. 2RP 44; 3RP 116-18, 123-36.

The Snohomish County Task Drug Task Force was called to the scene. A safe perimeter was established and the above items were removed. Expert testimony was presented illustrating how

² No oral testimony was presented as to the exact dimensions of the shed's interior, however, an 8' x 8' single room appears consistent with the photographs admitted. Ex. 1, 2, 3, and 12. Further, in questioning the fingerprint expert as to whether fingerprints could have been expected to have been found on items inside, both the Defendant's and State's questioning assumed a hypothetical 8' by 8' room. 4RP 51, 53.

each was a component necessary in the distillation and production of methamphetamine. 2RP 45; 3RP 118, 148-167. This was also confirmed by chemical analysis. All the chemicals necessary for the various stages of methamphetamine production were present in the items, as was the final product, methamphetamine itself. 3RP 117-18, 133, 4RP 13-17, 20-28.

The lab and the items were processed for fingerprints. Only one latent was discovered, a partial print on the Coleman fuel can. It did not match any known inked prints, defendant's included. 2RP 88-90.

Adcock was unaware of the meth lab. He had only been renting the property for the previous three months, living there with his wife and two children. He was aware that the owner stored paint and oil in the shed, but given its state of disrepair, it was not used by him or his family. 2RP 57-60.

Adcock knew the defendant. He lived three doors down the street and they had met each other previously. Defendant did not, however, have permission to be on his property or inside the shed on the date he was found there or any other date. 2RP 57-60, 63-64.

Defendant took the stand. He testified that on the date in question, Adcock had come to him stating that there was someone on his property, and asked if he would check it out for him. Defendant did so, taking his dog. At some point, defendant claimed, his dog ran into the shed. Defendant entered to get it back. The dog scurried under a rotten portion of the floor, and the next thing he knew, Dep. Upton was at the door. 2RP 76-82.

Defendant denied knowing he was in a methamphetamine laboratory while he was in the shed. He claimed not to have seen any of the production items while he was there because he was not looking for anything other than his dog. He denied even seeing the flaming torch of the floor. 4RP 81-82.

Christine Dunlop testified she was present with defendant when Adcock approached him on the day in question, asking to speak with him outside. 4RP 85-87. Dunlop described defendant as a long-time friend. Cross-examination revealed a closer relationship; defendant was the father of her six-month-old child. 4RP 92-93.

The jury returned a guilty verdict on both counts. 1CP 42, 43.

B. PRE-TRIAL MOTIONS.

Months prior to trial, defense counsel moved for an order directing the State to provide the identity of the anonymous 911 caller, also seeking to suppress all evidence discovered subsequent to the call. 1CP 72-83. In support of its motion, defendant's memorandum included a copy of Dep. Upton's report. In pertinent part, the report stated:

Dispatch received an anonymous phone call from a neighbor stating that someone was sneaking around another neighbor's yard and taking propane bottles into a neighbor's shed.

1CP 82.

At the September 25, 2008, hearing, Dep. Upton confirmed, as per his report, that dispatch had informed him that it had received an anonymous 911 call that an individual was in a neighbor's back yard, "sneaking about," moving propane bottles into a shed. 1RP 30-33. Upton also noted that, while not revealed in his report, dispatch had also related the caller suspected the person sneaking about was Zierman, the defendant. 1RP 31.

Dep. Upjohn placed a follow-up call to the complainant, learning the citizen's name for the first time in that discussion. The complainant related to Upjohn that he or she was "pretty sure" it

was defendant, and that they wanted to remain anonymous because defendant “would do bad things to them” if he discovered they had called the police. 1RP 31-32.

Defendant’s motions were denied. 1RP 45-50.

On October 13, 2008, the morning of trial, defense counsel filed several motions in limine. Among them was a request to exclude any mention of the anonymous call, arguing such constituted inadmissible hearsay. 1CP 68; 2RP 14-15.

The State noted that it did not seek to admit any identification or suspicion of *defendant* by the caller. Rather, it sought to admit the remainder of dispatch’s initial report to the Deputy, not for the truth of what it asserted, but instead to explain how Upton came to arrive at the residence and request permission from Adcock to enter onto his property and look around. 2RP 15-17.

Defense argued the statement, even so limited, was hearsay. It further argued that given the defendant was found in the shed by the deputy afterward, such ruled out another person being the subject of the 911 call. 2RP 17. It was established, however, that the 911 call had been placed over an hour before the

deputy arrived at the scene. 2RP 18. (Testimony as to this point was produced at trial as well. 3RP 168-69.)

The court ultimately admitted the statement with the proviso there could be no mention that *defendant* had been reported as the individual witnessed or suspected by the 911 caller. 1RP 37.

At trial, during direct examination of Upton, the State asked: “[P]lease tell the jury what you remember about the initial date that you received from dispatch.” 2RP 41.

Defense re-urged its hearsay objection. It was again overruled. 2RP 41-42. At defense request, however, the court gave a limiting instruction to the jury:

There are different reasons by information or evidence can be admitted. Some of it is for the truth of the matter. And generally that’s the case. There’s other times when evidence is admitted for other purposes. In this instance, because the person who made the report is not here to be cross-examined and won’t be testifying, it is not admitted for the truth of what was told to the 911 dispatch person or to the officer, but simply for the purposes of describing or explaining why the officer went and did whatever actions he took afterward.

2RP 37-38, 42.

Thereafter, Dep. Upton testified:

Dispatch had an anonymous complaint that an individual was moving tanks around in someone else’s yard.

2RP 42.

Upton also went on to testify, without objection, that he had informed the renter-occupant that there had been “a 911 call stating there was suspicious person moving things around in his yard.”

2RP 50.

III. ARGUMENT

A. DEFENDANT’S RIGHT TO CONFRONTATION WAS NOT VIOLATED BECAUSE THE STATEMENT WAS NOT HEARSAY

1. The Statement Was Admissible To Explain The Genesis Of The Investigation.

Washington Courts recognize that an out-of-court statement may properly be admitted, not for the truth for the matter asserted, but to explain why an officer began an investigation.

When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible.

State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005).

Out-of-court statements may also be admitted to explain how an investigation came to center on a defendant specifically. State v. Post, 59 Wn. App. 389, 394-95, 797 P.2d 1160 (1990).

The challenged statement [a telephone call from an individual who provided defendant’s name] was not hearsay. It was not offered for the truth of what the caller said; rather, it is clear when viewed in context

that the testimony was offered to establish why the detective acted as he did.

Out-of-court statements have also been admitted to explain certain events and steps taken by the detective in the investigation of an already known crime. State v. Lillard, 122 Wn. App. 422, 437, 93 Wn. App. 969 (2004) (“The State did not offer [the informant/victims’] statements to prove what the cardholders had said, but to show how [the detective] conducted his investigation. The evidence was not hearsay.”)

Washington courts have also recognized this particular non-hearsay use overcomes *Confrontation Clause* claims as well. State v. James, 138 Wn. App. 628, 641, 158 P.3d 102 (2007) (statement of unidentified female’s hearing ‘six of seven shots’ to explain why police were conducting an investigation in a particular neighborhood did not violate Clause.)

Other jurisdictions have recognized the same quite recently:

In this case, Detective Rodriguez’s testimony regarding the confidential informant’s tip was not introduced to show that there actually was a marijuana hydroponic laboratory at the 159th Street house. Rather, Detective Rodriguez was simply explaining why he decided to investigate the 159th Street house. ... [B]ecause the confidential informant’s statement was not hearsay, admission of that statement did not violate the Confrontation Clause.

U.S. v. Salom, No. 08-10322, 2009 WL 3297131, at 4 (11th Cir. 2009).³

[S]tatements that are not offered for the truth of the matter asserted may not be excluded under Crawford.

...

[Here,] the informant's tip was made for the limited purpose of explaining why the government agent had reason for the stop, search and seizure of [defendant], not for the purpose of establishing a fact.

U.S. v. Holmes, 311 Fed. Appx. 156, 2009 WL 323246, at 8 (10th Cir. 2009)⁴ citing Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004).

[T]he Confrontation Clause preference for a face to face confrontation at trial is to allow the jury to determine the witness credibility, possible bias, and ability to recall. ... These statements were introduced not for their truth, but to explain why the investigator began reviewing surveillance tapes and turned his attention to the cashier and customer couple later determined to be defendant and his girlfriend.

State v. Brunelle, 184 Vt. 589, 592, 958 A.2d 657, 663 (Vt. 2008).

Defendant has offered up several opinions in which courts have ruled an informant's statements to police were inadmissible hearsay. Those opinions, however, are distinguishable from the cases cited above and the facts of the present case.

³ Attached as 'Appendix A.'

⁴ Attached as 'Appendix B.'

In Sanabria v. State, 974 A.2d 107 (Del. 2009), the court did not hold that admission of out-of-court informants' statements necessarily violates the Confrontation Clause. Indeed, the court recognized the potential need to explain:

the reason for [investigating officers'] presence at the scene of a crime. The officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct.

Id. at 113.

Rather, the court held that any admissibility analysis must entail a review of the need for the statement and the potential prejudice posed by such. There, defendant was charged with burglary and the central issue was whether or not defendant was ever inside the residence. The out-of-court statement from the alarm company that an alarm *inside* the house was activated, however, was unnecessary to explain why the police responded to the residence, the claimed use. Id. at 111.

In State v. Aaron, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990), on review, the court found the prosecution was not, in fact, seeking to use the out-of-court statement for a valid non-truth-of-the-matter reason. Rather:

It seems clear that the State introduced [the] testimony solely to suggest to the jury that the jacket containing [items taken in the charged burglary] belonged to [defendant].

Id. at 280.

Similarly, in State v. Stamm, 16 Wn. App. 603, 610-12, 559 P.2d 1 (1977), the contested statement was not necessary to explain the genesis of the investigation. Rather, it was simply offered to explain the informant's state of mind which was "not relevant to any issue of the case." Id. at 612.

In State v. Lowrie, 14 Wn. App. 408, 411, 542 P.2d 128 (1976), and State v. Edwards, 131 Wn. App. 611, 613-15, 128 P.3d 631 (2006), the State sought to admit the out of court statement of an informant that *defendant specifically* had committed the charged crime. Where the potential for direct prejudice is so central and obvious, a court's reluctance to admit such is, expectedly, heightened. However, unlike the statements admitted in those cases, here the court took careful steps to exclude any mention of *defendant* being the reported to have committed the criminal activity.

In both U.S. v. Silva, 380 F.3d 1018 (7th Cir. 2004) and U.S. v. Maher, 454 F.3d 13 (1st Cir. 2006), like Lowrie and Edwards

above, the courts were specifically troubled by the fact the informant's out-of-court statement implicated defendant *personally* by name in the underlying criminality. In each, the court found there was no explanation given as to why such testimony was relevant. Silva, 380 F.3d at 1020; Maher, 454 F.3d at 22-23 (noting that potential prejudice in naming defendant could have been avoided by stating the officer's were "acting on information received.")

In short, from the above, it would appear courts, Washington included, recognize the necessity of admitting out of court statements to explain the genesis of the investigation. Such statements however, should actually be necessary for that purpose and tailored to avoid prejudice.

Here, the State offered the statement to explain the origin of the investigation, not for its truth. Absent some explanation addressing this basic point, the jury would have been confused as to why Dep. Upton arrived at the house asking the questions he did. Some degree of prejudicial speculation would have inevitably filled the void. Did law enforcement have some reason to suspect the renter, Adcock, that is being kept from us? Was the particular

deputy doing some sort of broad crime sweep? On what authority?...

Additionally, the State may not have been the only party potentially prejudiced. The jury may well have wondered whether the deputy arrived there with a particular suspicion defendant was on the property? Had law enforcement had been surveilling/following him?...

Further, the statement was properly redacted. Unlike Lowrie, Edwards, Silva, and Maher, defendant was not named in the admitted statement. U.S. v. Miller, 995 F.2d 865 (8th Cir. 1993) directly examines just what redaction is necessary to pass Confrontation Clause muster – i.e. exactly what implication of defendant is permissible in an out of court statement under the Clause.

There, the original unredacted statement was an out-of-court co-conspirator's claim directly *naming* defendant as receiving marijuana from that co-conspirator. At trial, the court admitted the statement, but redacted defendant's name, limiting the statement to an admission by the co-conspirator that he had "provided marijuana to persons in Minnesota." Id. at 866. The appellate court upheld admission. Given the redacted statement did not in and of itself

expressly implicate the defendant, it did not violate the Confrontation Clause:

[T]he Confrontation Clause is not violated where a defendant's name is replaced by a neutral pronoun and the redacted confession implicates the defendant *only when connected with other evidence in the case*.

In the present case, we find [the co-conspirator's] confession was properly redacted to refer to generic "person in Minnesota" so as not to 'expressly implicate' [defendant] See Bruton, 391 at 124 n. 1., 88 S.Ct. at 1622 n. 1. ... Only when evidence concerning [defendant's] role in the conspiracy was introduced did the jury have a basis on which to conclude that [defendant] was one of the persons to whom [the co-conspirator] was providing marijuana.

Id. at 867 (emphasis added), citing Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Thus, though the co-conspirator's statement that he "provided marijuana to people in Minnesota" ultimately may have created the implication he supplied marijuana to *defendant*, because this implication arose, not because of the statement itself, but as a result of its interaction with other evidence properly admitted, the Confrontation Clause was not violated.

Similarly, here the admitted statement was of *an individual* moving tanks around in the back yard. All reference to the caller's suspicion it was *defendant* was redacted by the court. Any

implication, if any, that it was defendant who was observed arises only as a result of other evidence properly admitted in the case – defendant’s presence in the methamphetamine lab with a lit hand-torch an hour later. The Statement was properly redacted so as not to violate the Clause.

In short, the out of court statement was admissible here because it was necessary to explain the genesis of the investigation and was properly redacted for that purpose.

2. Statements Not Offered For The Truth Of The Matter Do Not Violate The Confrontation Clause.

Crawford holds that the Confrontation Clause only applies to those statements that are offered for the truth what they assert – i.e., those statements that are also hearsay.

One thing that is clear from Crawford is that the Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement. Crawford states: “The Clause... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” And the only nontestimonial statements that it considers to be possible subjects of the Clause are “nontestimonial *hearsay*.” (to the extent Confrontation Clause covers more than testimonial statements, its subject is hearsay.) In other words, the Clause restricts only statements meeting the traditional definition of hearsay.

U.S. v. Faulkner, 439 F.3d 1221, 1226 (10th Cir. 2006) quoting Crawford, 541 U.S. at 60, n. 9, 68, 124 S.Ct. at 1369, 1374.

Defendant, to the contrary, urges Crawford should not be read so as to exclude non-hearsay from Confrontation Clause consideration. Here he cites Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985), the case cited in Crawford for the non-hearsay exclusion. Street, defendant argues, examined solely a non-hearsay statement that was also offered specifically to rebut a claim of the defendant. Thus, defendant argues, Crawford really endorses only a limited view of the notion that non-hearsay does not violate the Clause.

Courts, however, have not construed Crawford in the limited manner defendant suggests. Crawford itself clearly speaks in broader terms as noted in Faulkner above. Moreover, Washington Courts have squarely interpreted Crawford to exclude non-hearsay from Confrontation Clause claims: “[E]ven testimonial statements may be admitted if offered for purpose other than to prove the truth of the matter asserted.” State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005); James, 138 Wn. App. at 641 (“This testimony does not appear to be presented for the truth of the matter

asserted. The confrontation clause is not implicated.”) See also In Re Threders, 130 Wn. App. 422, 495, 123 P.3d 489 (2005):

The Crawford Court specifically retained the pre-existing rule of Tennessee v. Street, that “the Confrontation Clause... does not bar the use of testimonial statements for the purposes other than establishing the truth of the matter asserted.” There is no doubt that when out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no confrontation clause concerns arise.

Further, as pointed out above, multiple courts have found admission of out-of-court statements does not violate the Confrontation Clause specifically in the context here - explaining the genesis of an investigation. See e.g. James, Salom, Holmes, and Brunelle.

In a further attempt to narrow the Confrontation Clause’s non-hearsay exclusion, defendant relies upon the quote below from State v. Mason, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007):

However, the Crawford court also said, ‘where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protections to the vagaries of the rules of evidence.’ Whether or not the United States Supreme Court would approve the introduction of Santoso’s *entire* testimonial story... under one theory of another that the evidence was not offered for its truth is, at the very least, debatable. [...] [W]e are not convinced a trial court’s ruling that a statement is offered for a purpose other than the truth of the matter asserted

immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.

(emphasis added). Br. of Appellant, pp. 12-13.

This quote, however, does not indicate that the court endorses a new standard contrary to Crawford such that non-hearsay statements may, in fact, violate the Confrontation Clause. Rather, the court is merely stating that the Clause requires appellate courts to review the trial court's non-hearsay use admissibility determination in a less deferential fashion. This can be seen can be seen from the court's language directly following that quoted by defendant above:

An appellate court's conclusion that a statement was properly admitted for a purpose other than to prove its truth does not affirm that the ruling was *correct*; it affirms no more than that the trial court's ruling was *reasonable*. We review the admission of hearsay for an abuse of discretion. ...

A confrontation clause challenge is, on the other hand, reviewed de novo.

Mason, 160 Wn.2d at 922.

Thus, rather than changing the Crawford rule that non-hearsay statements *do not* violate the Confrontation Clause, or employing some new standard, Mason simply stands for the proposition that an appellate court must engage in its own non-

deferential review to make sure the statement was, *in fact*, not hearsay - i.e. not offered for its truth and properly narrowed for that purpose.

Here, as detailed above, even a non-deferential review reveals the statement was properly admitted for other than the truth of the matter – to explain the genesis of the investigation.

Furthermore, the concern expressed by the court in Mason with the introduction of the complainant's "entire testimonial story" is not present here. Id. at 921 (emphasis added). The trial court properly excised any allusion by the complainant to defendant being the individual observed. Accord Lowrie, Edwards, Silva, Maher, and Miller. The limited information admitted here completed the story in a truthful manner, curtailing speculation and potential prejudice against either party.

B. DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED BECAUSE THE STATEMENT WAS NOT TESTIMONIAL.

The Sixth Amendment's Confrontation Clause "guarantees a defendant's right to confront those who 'bear testimony' against him." Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2531, 174 L.Ed. 2d 314 (2009). Not every out-of-court

statement introduced at trial, however, necessarily implicates that right.

The Confrontation Clause only applies to out-of-court statements that are “testimonial” in nature (in addition to only those statements that are admitted for the truth of the matter). Crawford; Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Whether an out-of-court statement is “testimonial” depends on the purpose for which, and the attendant solemnity with which, the interrogation that originally produced the statement was conducted:

‘Testimony,’ ... is typically a *solemn* declaration or affirmation *made for the purpose* of establishing or proving some fact.

Crawford, 541 U.S. at 51, 124 S.Ct. at 1364 (emphasis added).

This, in turn, is determined by the objective circumstances.

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 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 prosecutions.

Davis, 547 U.S. at 822, 126 S.Ct. at 2273-74; see also State v.

Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007).

The Washington Supreme Court has recently had the opportunity to review Davis at length, and endorsed its four part test to distinguish statements whose primary purpose is to describe an “on-going emergency” (nontestimonial) from those to “prove past events” (testimonial). The examination is as follows:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? ... (2) Would a “reasonable listener” conclude that the speaker was facing an ongoing emergency that required help? ... (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past?. ... (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial.

State v. Koslowski, 166 Wn.2d 409, 418-419, 209 P.3d 479, (2009).

Applying these factors to the present matter reveals the statement was non-testimonial.

1. The Caller Was Relating Current Events As They Were Actually Occurring.

The Washington Supreme Court, in expounding on this factor, made much of the Davis court’s emphasis on the speaker’s words, were they phrased in past tense or the present tense?

In Davis, the court twice referred to the distinction as being between “what is happening” and “what happened.” ... the difference between speaking about events *as they were actually happening*, rather than describing past events.

Koslowski, 166 Wn.2d at 486 (emphasis original).

Elsewhere, however, the court indicated this factor is not entirely a matter of the verb tense. Rather, a description of the very recently occurred, even if phrased in the past tense, may be considered a description of an ongoing event sufficient to be non-testimonial:

Information essential to assessing a situation will necessarily sometimes include recitation of events that occurred in the past, *if only by a couple of minutes*. Furthermore, it is worth considering that while [the witness’s] statements in Davis were phrased in the present tense, she was, most likely, technically describing events that had already occurred. Certainly there is no indication that she was being assaulted as she spoke with the 911 operator. Thus Davis supports a more nuanced approach than merely noting whether a declarant phrased his or her statement using past or present tense.

Ohlson, 162 Wn.2d at 14-15.

Here, even under the stricter interpretation, all indications are that the witness was using the present tense, describing contemporaneously observed events:

Dispatch received an anonymous phone call from a neighbor stating that someone *was sneaking* around another neighbor's yard and taking propane bottles into a neighbor's shed.

1CP 82.

Upton's pre-trial testimony also clarified that the call to dispatch was of a then-occurring incident: "[T]he initial dispatch call was that someone *was sneaking around*,..." 1RP 31.

Indeed, in his briefing defendant concedes the call's contemporaneousness to the events described: "This fact [that the call was otherwise testimonial] does not change because the unnamed caller described present facts rather than past fact." Br. of Appellant, p. 10.

Here, the initial 911 call to dispatch, as in Davis, was of 'then occurring event.

2. A Reasonable Listener Would Conclude That The Speaker Was Facing An Emergency That Required Help Given It Was A Report Of A Crime In Progress.

In reciting the standard as to what constitutes an ongoing *emergency* for purposes of "testimonial" analysis, the Washington Supreme Court has written:

Courts have recognized that there are two ways in which an ongoing emergency may exist: first, when the crime is still in progress, and second, when the victim or the officer is in danger, either because of the

need for medical assistance or because the defendant poses a threat.

Koslowski, 166 Wn.2d at 419, fn.2.

Defense argues that the “primary purpose of the call was to relate events that would possibly be pertinent to a criminal prosecution.” Br. of Appellant, p. 10. It appears this claim is based on the notion that the caller was not relating a situation where a life was in immediate danger. As seen from the above, however, a “threat posed” is only one type of “on-going” emergency. Defendant’s analysis ignores that reports of then occurring crimes also constitute an ongoing emergency.

Here, the content of the caller’s statements indicates he or she was relating what he or she believed to be a crime in progress. The report of someone in the neighbor’s yard “sneaking around” and moving tanks, indicates the caller was reporting criminality that they believed, at the very least, to entail an on-going trespass.

Moreover, the mere fact that the caller was relating events that “would possibly” relate to a criminal prosecution cannot be a basis for excluding a statement as testimonial. If this were the test, then there would be no test at all – all facts related to a police officers by witnesses (except in response to non-criminal

emergencies) necessarily relate to potentially criminal events in some fashion.

Defendant further argues against this being a report of an on going crime because, given the time it took police to respond “police obviously did not consider the matter particularly urgent.” Br. of Appellant, p. 10, fn. 3. Again, the standard is not how the particular agency viewed the report or reacted, but “whether a ‘reasonable listener’ would conclude that the speaker was” reporting a crime. Koslowski, 166 Wn.2d at 418-419.

Moreover, even the notion that the particular officer involved did not view the situation as particularly urgent given the time it took him to respond is belied by the fact that the interim was filled by the officer taking necessary steps to respond. These steps included calling the complainant back and getting details, waiting for a back-up officer to arrive, and traveling to the scene. 1RP 30-33.

3. The Statements Were Necessary And Pertinent To Resolve The Then Occurring Emergency Situation.

The third prong involves a question of the interplay between what was asked and answered in the interrogation and the relevance of such to resolving the situation as immediately posed.

Here, the present emergency was that of an individual sneaking around a neighbor's backyard, carrying tanks. This, however, does not appear to a statement elicited through law enforcement's questioning. Rather, all circumstances indicate it was the sum total of the initial unsolicited report. That report carried no content beyond that necessary to report the suspected crime. This was not a statement that also concerned, for example, prior episodes between the caller and the defendant to put the matter in "context," to illustrate how the present situation was criminal or an emergency.

The report was limited to the details necessary to explain why a crime was suspected and to generate a response to the scene.

4. The Interrogation Was Not Formal.

This final Davis / Koslowski factor is not, in actuality, an enquiry into the "purpose" of the interrogation. Rather, the enquiry into the "formality" of the statement reflects that a "testimonial" statement, apart from its purpose, is distinguished from a non-testimonial statement by the fact the former is a "*solemn* declaration." Id., 541 U.S. at 51, 124 S.Ct. at 1364; Davis, 547 U.S. at 824; 126 S.Ct. at 2274 (emphasis added).

It is hard to imagine contact with government agents less formal or solemn than the short, anonymous complaint of criminal activity to a 911 operator as here. The statement here is unlike the testimonial statement in Crawford, which was in given in person, produced at a police station before officers, and in writing. Here, the contested statement was taken orally, over the telephone, from, presumably, the comfort and informality of the caller's own home. (This can be seen in that the caller was describing events as he witnesses them in a *neighbor's* yard). Even then it was not made to a police officer, but merely a dispatcher. The circumstances much more closely resemble the 911 call in Davis held to be non-testimonial.

Furthermore, the caller's efforts to secure anonymity tends toward the statement being "nontestimonial" given the inherent lack of formality or solemnity associated with anonymous statements.

The solemnity of even an oral declaration of a relevant past fact to an investigating officer is well enough established by the severe consequences that can accompany a deliberate falsehood.

Davis, 547 U.S. at 826, 126 S.Ct. at 2276.

Here, the caller, when providing the contested statement, sought anonymity. This anonymity, or at least attempted

anonymity, was a measure to avoid consequences in providing the statement. Moreover, apart from avoiding potential consequences associated with reporting a falsehood, it would appear the caller, in requesting anonymity from even defendant, strongly wished to avoid consequences from defendant as well – possible retaliatory action. It would appear he or she wanted to spur police to the scene and nothing more. There is little “solemnity” or formality associated with a statement offered under these circumstances.

C. ASSUMING ARGUENDO THAT ADMISSION OF THE STATEMENT VIOLATED THE CONFRONTATION CLAUSE, RETRIAL IS NOT WARRANTED BECAUSE THE CLAIMED ERROR WAS HARMLESS.

[I]t is well established under federal and state law that a violation of the confrontation clause is subject to harmless error analysis. State v. Watt, 160 Wn.2d 626, 633, 160 P.3d 640 (2007); see also Davis, 154 Wn.2d at 304 (“A violation of the confrontation clause is... subject to harmless error analysis[.]”)

Under this standard, the error is presumed prejudicial unless the State demonstrates that any reasonable jury would have reached the same result in the absence of the error – that beyond a reasonable doubt, the verdict would have been the same. Watt,

160 Wn.2d at 635. Here, the admission of the statement, even if erroneous, did not contribute to the verdict.

The court instructed the jury that it was not to consider the statement as evidence that defendant committed the crime. 2RP 42. Given this, it can be presumed that the statement did not contribute to the verdict. This presumption has been found to hold specifically in situations where out of court statements were admitted to explain steps in the investigation:

The law presumes and must presume, that the jury finds the facts from the evidence the court permits them to consider. Any other rule would render the administration of the law impractical. We presume that the jury followed the trial court's instruction to disregard Detective's Constantine's remark [that 'We became aware of Mr. Post from a telephone information call from an individual who gave us his name'] and did not consider it as evidence before them.

Post, 59 Wn. App. at 395; State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) ("The jury is *presumed* to follow the instructions of the court.") (emphasis added). See also State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994).

This presumption holds even where the claimed error concerns the Confrontation Clause:

The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue.

Street, 471 U.S. at 416, fn. 6, 105 S.Ct. at 2089.

Moreover, any prejudice potential was also reduced by the court's precluding any mention of defendant – the admitted statement being that “*an individual* was moving tanks around in someone else's yard.” 2RP 42. See Miller. Moreover, given that excision, the introduction of the complainant's “*entire* testimonial story” is not present here, unlike the situation that troubled the court in Mason, 160 Wn.2d at 921-22.

Additionally, testimony also revealed that the complaint came in at least an hour before officers arrived at the scene. 3RP 168-69. Defendant did not suffer prejudice from admission of the statement given his trial defense was grounded in the claim that he had arrived in the shed just moments before he was found there by Upton. 2RP 80-82.

Ultimately, the jury rejected defendant's claims that he had just arrived in the shed, chasing after his dog, and had no idea that he was in the presence of a methamphetamine laboratory. Uncontested testimony revealed otherwise – the overwhelming chemical odor and the presence of a hearing torch still flickering

included. Given these facts and others adduced at trial, given that the jury was properly instructed as to the proper use of the carefully excised statement, the contested statement did not contribute to the verdict.

IV. CONCLUSION

For the foregoing reasons, defendant's appeal should be denied.

Respectfully submitted on December 7, 2009.

JASON J. CUMMINGS
Snohomish County Prosecuting Attorney

By:



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Deputy Prosecuting Attorney
Attorney for Respondent

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Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
 Eleventh Circuit.
 UNITED STATES of America, Plaintiff-Appellee,
 v.
 Guy SALOM, a.k.a. Roberto Falcon, Defendant-Appellant.
 No. 08-10322
 Non-Argument Calendar.

Oct. 15, 2009.

Alvin E. Entin, Entin, Margules & Della Fera, P.A.,
 Ft. Lauderdale, FL, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 07-20470-CR-JEM.

Before BLACK, MARCUS and ANDERSON, Circuit Judges.

PER CURIAM:

*1 Guy Salom, proceeding *pro se*, appeals his convictions for conspiracy to possess with intent to distribute at least 100 marijuana plants, and to maintain a drug-involved premises, 21 U.S.C. § 846, possession with intent to distribute at least 100 marijuana plants, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vii), and maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2. Salom raises a number of issues on appeal: (1) the

district court erred by denying his motion to suppress evidence; (2) the district court made various procedural and evidentiary errors during his trial; (3) the evidence presented at trial is insufficient to support the jury's finding that he possessed at least 100 marijuana plants; (4) the Government failed to provide him with certain potentially exculpatory evidence, as required by *Brady v. Maryland*, 83 S.Ct. 1194 (1963); (5) his trial counsel provided him with ineffective assistance; and (6) the errors which he has identified had the cumulative effect of depriving him of his right to a fair trial. We address each issue in turn, and upon careful review we affirm Salom's convictions.

I.

On appeal, Salom argues the district court erred in denying his motion to suppress evidence seized during the officers' search of his van and a subsequent search of a house located at 14780 S.W. 159th Street in Miami (159th Street house).

In reviewing a district court's denial of a motion to suppress, we review the district court's factual findings for clear error and its application of the law to those facts *de novo*. *United States v. Mercer*, 541 F.3d 1070, 1073-74 (11th Cir.2008). When a district court denies a motion to suppress on the basis that it is untimely, however, we review only for an abuse of discretion. *United States v. Smith*, 918 F.2d 1501, 1509 (11th Cir.1990).

The Federal Rules of Criminal Procedure provide that a motion to suppress evidence must be made before trial. Fed.R.Crim.P. 12(b)(3)(C). In addition, a district court has discretion to set a deadline for the parties to file pretrial motions. Fed.R.Crim.P. 12(c). Any Rule 12(b)(3) defense that is not raised by a deadline set by the court under Rule 12(c) is waived, although the district court may grant relief from that waiver rule for good cause shown. Fed.R.Crim.P. 12(e); *see also United States v. Mil-*

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an-Rodriguez, 828 F.2d 679, 682-84 (11th Cir.1987) (holding the district court did not abuse its discretion by denying as untimely a motion filed after deadline set under Fed.R.Crim.P. 12(c)). This waiver rule applies even if the district court also addressed the merits of the untimely motion. *Milan-Rodriguez*, 828 F.2d at 683.

In this case, the district court informed the parties that all motions *in limine* needed to be filed no later than August 15, 2007. Salom's codefendant Echavarria did not file his motion to suppress until August 24, 2007, and Salom did not file his motion to adopt Echavarria's motion to suppress until August 27, the morning of the first day of trial. Therefore, the district court did not abuse its discretion by denying Salom's motion as untimely.

II.

*2 Salom argues the district court made various procedural and evidentiary errors during his trial, which we address in turn.

A. Opening Statements

Salom argues the district court abused its discretion in limiting his defense counsel's opening statement. Salom also argues it was improper for the district court to remark that Fernando Quintana, a codefendant who later pled guilty and agreed to cooperate with the Government, had to "please" the court, as well as the prosecutor, to receive the benefit of a substantial assistance motion.

We review a district court's conduct during trial for an abuse of discretion. *United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir.2005). As Chief Justice Burger explained, the purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." *United States v. Dinitz*, 96 S.Ct. 1075, 1082 (1976) (Burger, J., concurring).

The district court may "exclude irrelevant facts and stop argument if it occurs." *United States v. Zielie*, 734 F.2d 1447, 1455 (11th Cir.1984), *abrogated on other grounds by United States v. Chestang*, 849 F.2d 528, 531 (11th Cir.1988).

Generally, a trial judge must scrupulously avoid expressing any opinion on the merits of a case or on the weight of particular evidence. *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988). "[I]n order to amount to reversible error, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case." *Verbitskaya*, 406 F.3d at 1337 (citation and quotation marks omitted).

In this case, the district court did not abuse its discretion in limiting defense counsel's opening statement because defense counsel was challenging the motives of the Government's main witness, Quintana, rather than simply explaining the evidence to the jury. Moreover, it does not appear that the district court's statement, "He has to please me, too," was intended as a comment on Quintana's credibility or on the merits of the defense's case. Also, it is unlikely that the court's brief remark, made at the beginning of trial, had any influence on the jury's verdict.

B. Rule 404(b) Evidence

Next, Salom argues he was denied a fair trial due to the improper introduction of evidence that he committed other crimes. Moreover, he notes the Government did not provide notice that it was going to introduce this evidence, as required by Fed.R.Evid. 404(b).

Generally, we review a district court's evidentiary rulings for an abuse of discretion. *United States v. Edouard*, 485 F.3d 1324, 1343 (11th Cir.2007). Because Salom did not raise any Rule 404(b) objections during trial, however, we are reviewing this claim only for plain error. *Id.*

Rule 404(b) provides that "[e]vidence of other

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crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). However, such evidence is not extrinsic, and therefore is admissible, if it is: "(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." *Edouard*, 485 F.3d at 1344 (citation and quotation marks omitted).

*3 In this case, Quintana's testimony concerning mortgage fraud he and Salom had committed when Quintana purchased the 159th Street residence, and the theft of electricity to conceal the fact that they were using powerful lamps to grow marijuana, reflected uncharged conduct that arose out of the same series of transactions as the charged drug offenses because it showed how Quintana and Salom conducted their marijuana-growing conspiracy. In addition, Quintana's testimony concerning Salom's use of aliases was inextricably intertwined with the charged offenses because it showed that Salom tried to conceal his involvement with the 159th Street house by placing a false name on the lease. Because this evidence was intrinsic to the charges against Salom, the district court did not abuse its discretion by admitting it.

C. Limitations on Cross-Examination

Salom also asserts the district court improperly limited his cross-examination of Quintana.

Under the Confrontation Clause of the Sixth Amendment, a criminal defendant has the right to cross-examine a witness in order to show bias, prejudice, or ulterior motives for testifying. *Davis v. Alaska*, 94 S.Ct. 1105, 1110 (1974). The need for full cross-examination is particularly important "where the witness is the star government witness or participated in the crimes for which the defendant is being prosecuted." *United States v. Williams*, 526 F.3d 1312, 1319 (11th Cir.2008). Nevertheless,

"trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1435 (1986). The test is "whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *Williams*, 526 F.3d at 1319 (citation and quotation marks omitted).

In this case, Salom was allowed to cross-examine Quintana concerning his motives for testifying, and Quintana acknowledged he was hoping to receive a reduced sentence in exchange for his testimony. Therefore, the jury was aware that Quintana had a motive for giving testimony that was favorable to the Government. Any additional questions concerning whether Quintana was trying to avoid a sentencing enhancement based on his son's overdose would merely have reinforced that impression, and would not have given the jury a significantly different picture of Quintana's credibility. Therefore, the district court's decision to disallow that line of questioning did not violate the Confrontation Clause.

D. Hearsay/Confrontation Clause

Next, Salom argues Detective Rodriguez's testimony concerning a tip he received from a confidential informant constituted inadmissible hearsay.

As noted above, we review a district court's evidentiary rulings for an abuse of discretion. *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir.2005). Generally, we review constitutional claims *de novo*. *United States v. Williams*, 527 F.3d 1235, 1239 (11th Cir.2008). However, because Salom did not offer a Confrontation Clause objection during trial, we review that claim for plain error only. See *United States v. Jiminez*, 564 F.3d 1280, 1286 (11th Cir.2009) (noting a hearsay objection

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does not preserve a Confrontation Clause issue for appellate review).

*4 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.” Fed.R.Evid. 801(c). “Statements by out of court witnesses to law enforcement officials may be admitted as non-hearsay if they are relevant to explain the course of the officials' subsequent investigative actions, and the probative value of the evidence's non-hearsay purpose is not substantially outweighed by the danger of unfair prejudice....” *Baker*, 432 F.3d at 1209 n. 17.

“[T]he Confrontation Clause of the Sixth Amendment prohibits the admission of out of court statements that are testimonial unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant.” *Jiminez*, 564 F.3d at 1286. “[T]he Confrontation Clause prohibits *only* statements that constitute impermissible hearsay.” *Id.*

In this case, Detective Rodriguez's testimony regarding the confidential informant's tip was not introduced to show that there actually was a marijuana hydroponic laboratory at the 159th Street house. Rather, Detective Rodriguez was simply explaining why he decided to investigate the 159th Street house. In addition, this testimony did not result in any unfair prejudice to Salom because the confidential informant did not suggest that Salom was involved with the 159th Street house. Accordingly, the district court did not abuse its discretion by admitting the confidential informant's statement as non-hearsay. Finally, because the confidential informant's statement was not hearsay, admission of that statement did not violate the Confrontation Clause.

E. Improper Vouching

Next, Salom argues the prosecutor improperly vouched for the truthfulness of Detective Rodrig-

uez's testimony by asking him on redirect examination whether he stood upon his oath, and whether he knew that he was under oath.

A claim of improper vouching by the prosecution presents a mixed question of law and fact that is subject to plenary review. *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir.1991). Normally, a prosecutor may not personally vouch for the credibility of a witness. *Eyster*, 948 F.2d at 1206. The test for improper vouching is whether “the jury could reasonably believe that the prosecutor indicated a personal belief in the witness' credibility.” *Id.* In applying that test, we consider whether the prosecutor: (1) “placed the prestige of the government behind the witness by making explicit assurances of the witness's credibility,” or (2) “implicitly vouched for the witness's credibility by implying that evidence not formally presented to the jury supports the witness's testimony.” *United States v. Castro*, 89 F.3d 1443, 1457 (11th Cir.1996).

In this case, the prosecutor's questions to Detective Rodriguez were intended to show that Detective Rodriguez continued to stand by his direct testimony, despite the fact that there were inconsistencies with his report. The prosecutor did not express a personal belief that Detective Rodriguez was telling the truth, nor did he suggest that there was evidence not presented to the jury that supported Detective Rodriguez's testimony. Thus, the prosecutor did not engage in any improper vouching.

F. Comment on Failure to Testify

*5 Next, Salom asserts the district court should have granted his motion for a mistrial based on the prosecutor's improper comments concerning Salom's decision not to testify at trial.

We review a district court's denial of a motion for a mistrial based on a prosecutor's statements during closing argument for abuse of discretion. *United States v. Knowles*, 66 F.3d 1146, 1163 (11th Cir.1995). “A prosecutor's statement violates the

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defendant's right to remain silent if either (1) the statement was *manifestly intended* to be a comment on the defendant's failure to testify; or (2) the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* at 1162-63 (citation and quotation marks omitted). The prosecutor's remarks "must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement." *Id.* at 1163.

During closing arguments, the prosecutor noted that Quintana and Salom knew each other since 2004 or 2005 and acknowledged that Quintana was a convicted felon who had committed mortgage fraud. The prosecutor then stated,

Guess who his partner in the mortgage fraud was? Now, is that a big stretch to believe under all of this what they were doing on June 4th to go back in time, to go back in time, to go back in time to 2004, to 2005, when he's not saying he didn't know him. Nobody said specifically with reference to Mr. Salom-

After defense counsel objected and reserved a motion, the prosecutor continued: "There's no suggestion from Mr. Quintana's testimony that was found to be untrue. He was cross examined on that issue. He was cross-examined vigorously."

It is unclear whether pronoun "he" in the prosecutor's statement "he's not saying he didn't know him," was meant to refer to Salom or Quintana. Moreover, it is not clear what the prosecutor meant by saying, "Nobody said specifically with reference to Mr. Salom," because the prosecutor never completed that sentence. Given the ambiguity of the prosecutor's remarks, it does not appear that a jury would "necessarily and naturally" interpret those remarks as a comment on Salom's decision not to testify. Also, there is no indication that the prosecutor "manifestly intended" to comment on Salom's failure to testify. Accordingly, the district court did not abuse its discretion in denying Salom's motion for a mistrial.

G. Salom's Requested Jury Instruction

Salom also asserts the district court erred by declining to issue his proposed jury instruction.

We review a district court's refusal to give a requested jury instruction for an abuse of discretion. *United States v. Fulford*, 267 F.3d 1241, 1245 (11th Cir.2001). A court's failure to give a requested jury instruction only constitutes reversible error if: "(1) the requested instruction correctly stated the law; (2) the actual charge to the jury did not substantially cover the proposed instruction; and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *Id.*

*6 Here, Salom requested an instruction that, if the jury were to find that a witness was lying about a particular fact, then it could infer the opposite of that witness's testimony. Although Salom's proposed instruction was essentially a correct statement of the law, the district court's jury instructions concerning witness credibility covered the substance of Salom's proposed instruction. Moreover, the court's failure to give the requested instruction did not substantially impair Salom's defense, as he was still permitted to suggest to the jury during closing argument that they could believe the exact opposite of Quintana's testimony. Therefore, the district court did not abuse its discretion by denying Salom's proposed jury instruction.

III.

Salom argues the evidence introduced at trial was not sufficient to support the jury's finding that he was responsible for at least 100 marijuana plants.

A. Admissibility of the Photographs of the Drug Enforcement Administration ("DEA") Warehouse

Salom asserts the photographs of the DEA warehouse were "false and misleading" because they showed plants that were taken from a different and

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completely separate grow house. He argues the photographs of the DEA warehouse should not have been admitted into evidence because they were irrelevant to his case.

A district court's evidentiary rulings are reviewed for a clear abuse of discretion and "[t]he district court has broad discretion to determine the relevance and admissibility of any given piece of evidence." *United States v. Merrill*, 513 F.3d 1293, 1301 (11th Cir.2008). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

In this case, Special Agent Molina testified that the photographs of the DEA warehouse accurately depicted the manner in which the 159th Street plants were stored at the warehouse. This evidence was relevant because it suggested that the agents had, in fact, seized marijuana plants from the 159th Street house. Although Salom argues the plants depicted in the photographs actually came from a different grow house, it is the jury's role to choose between different constructions of the evidence, and Salom had an opportunity to cross-examine Agent Molina concerning the possible discrepancy. The district court did not abuse its discretion by admitting those photographs.

B. Sufficiency of the Evidence

Salom also argues that, if the photographs of the warehouse had been properly excluded, the evidence introduced at trial would have been insufficient to support his convictions.

We review *de novo* whether there is sufficient evidence to support the jury's verdict in a criminal case. *United States v. Beckles*, 565 F.3d 832, 840 (11th Cir.2009). Evidence is sufficient to support a conviction where "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id.* (citation and quotation marks omitted).

ted). We "view [] the evidence in the light most favorable to the government, and draw [] all reasonable factual inferences in favor of the jury's verdict." *Id.*

*7 In this case, the applicable penalty statute for Counts One and Two, 21 U.S.C. § 841(b)(vii), establishes a mandatory minimum sentence of five years' imprisonment for offenses involving 100 or more marijuana plants. As this Court has previously explained, cuttings or seedlings do not count as marijuana plants unless there is "some readily observable evidence of root formation." *United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir.1995) (citation and quotation marks omitted).

Salom's argument on appeal is that the law enforcement agents failed to inspect the marijuana plants for roots while the plants were still at the 159th Street house, and then inspected the wrong group of plants after they were transported to the DEA warehouse. However, Special Agent Molina testified she counted 166 plants while she was at the 159th Street house, she did not recount the plants after they were taken to the warehouse, and she later explained that she only counted those plants that had observable root systems. A jury could reasonably have concluded the plants inspected at the DEA warehouse were the same plants that were seized from the 159th Street house. Accordingly, we conclude the jury's finding that Salom possessed over 100 marijuana plants is supported by sufficient evidence.

IV.

Salom asserts the Government failed to disclose potentially exculpatory evidence, as required by *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

We review a defendant's *Brady* objection for plain error where the defendant failed to raise that objection in his motion for a new trial. *United States v. Lindsey*, 482 F.3d 1285, 1293 (11th Cir.2007). "[T]he Supreme Court has made it clear that the

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Brady rule is not an evidentiary rule that grants broad discovery powers to a defendant and that '[t]here is no general constitutional right to discovery in a criminal case.' " *United States v. Quinn*, 123 F.3d 1415, 1421 (11th Cir.1997) (quoting *Weatherford v. Bursey*, 97 S.Ct. 837, 846 (1977)). In order to prevail on a *Brady* claim, a defendant must establish: (1) the government possessed evidence favorable to him; (2) the defendant did not possess the evidence, nor could he have obtained it himself through reasonable diligence; (3) the government suppressed the evidence; and (4) if the evidence had been revealed to the defense, there is a reasonable probability that the outcome of the proceedings would have been different. *United States v. Perez*, 473 F.3d 1147, 1150 (11th Cir.2006).

Salom has failed to identify any potentially exculpatory evidence that was improperly withheld by the Government. The record indicates the Government did provide defense counsel with the photographs taken at the 159th Street house and the DEA warehouse. Salom states in his reply brief his defense counsel was given a DVD with the photographs on it and Salom even introduced one of those photographs as a defense exhibit at trial. In addition, Salom describes in his reply brief what the recordings of Quintana's phone calls and personal visits will show, therefore, it appears Salom was able to independently obtain the information contained on those recordings. Finally, although the videotapes of Salom's conversations with his trial counsel might potentially be relevant to an ineffective assistance claim, it does not appear those videotapes would have had any impact on Salom's trial. Therefore, Salom has failed to establish any *Brady* error.

V.

*8 Salom argues his trial counsel provided him with ineffective assistance by making a "unilateral concession of guilt" and by failing to subject the Government's case to any meaningful challenge.

Generally, we will not review a claim of ineffective assistance of counsel raised on direct appeal where the district court neither addressed that claim nor developed a factual record. *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir.2002); see also *Mas-saro v. United States*, 123 S.Ct. 1690, 1694 (2003) (noting that it is usually preferable to address ineffective assistance of counsel claims on collateral review rather than on direct appeal).

In this case, the district court did not address the merits of Salom's ineffective assistance claim, nor did the court develop a factual record with respect to that claim. Therefore, Salom's ineffective assistance claim is not cognizable on direct appeal.

VI.

Salom asserts that, even if the individual errors he has identified are not sufficient to merit reversal, the cumulative effect of these errors deprived him of his right to a fair trial.

We have held that "the cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible." *United States v. Khanani*, 502 F.3d 1281, 1295 (11th Cir.2007) (citation and quotation marks omitted).

As described above, Salom has not shown that the district court committed any errors. Therefore, he also cannot establish any cumulative error.

Accordingly, for the above-stated reasons, we affirm Salom's convictions.

AFFIRMED.

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END OF DOCUMENT

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H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
 Tenth Circuit.
 UNITED STATES of America, Plaintiff-Appellee,
 v.
 David Lee HOLMES, II, Defendant-Appellant.
 No. 07-3355.

Feb. 11, 2009.

Background: Defendant charged with possession with intent to distribute cocaine base moved to compel discovery regarding an informant, and to suppress evidence. The United States District Court for the District of Kansas, 487 F.Supp.2d 1206, denied the motions in part, and the defendant appealed.

Holdings: The Court of Appeals, Robert H. Henry, Circuit Judge, held that:

- (1) reasonable suspicion test for an investigatory stop was satisfied;
- (2) probable cause supported the searches and seizures of defendant's person and vehicle;
- (3) maintaining a confidential informant's anonymity did not deny drug defendant due process of law or violate his Sixth Amendment right to confront witnesses against him; and
- (4) evidence did not entitle defendant to a jury instruction on a necessity defense.

Affirmed.

West Headnotes

[1] Arrest 35 ↪63.5(6)

35 Arrest

35II On Criminal Charges

35k63.5 Investigatory Stop or Stop- And-Frisk
 35k63.5(6) k. Motor Vehicles, Stopping.

Most Cited Cases

Reasonable suspicion test for an investigatory stop was satisfied by informant's detailed description of drug defendant, including his attire, location, vehicle, and companion, together with the informant's in-person confirmation that the location, vehicle, and persons identified were those previously named and a police officer's surveillance, including the running of defendant's license plate. U.S.C.A. Const.Amend. 4.

[2] Arrest 35 ↪63.5(5)

35 Arrest

35II On Criminal Charges

35k63.5 Investigatory Stop or Stop- And-Frisk
 35k63.5(3) Grounds for Stop or Investiga-

tion

35k63.5(5) k. Particular Cases. Most Cited Cases

Controlled Substances 96H ↪113

96H Controlled Substances

96HIV Searches and Seizures

96HIV(B) Search Without Warrant

96Hk110 Motor Vehicle Searches

96Hk113 k. Informants. Most Cited

Cases

Probable cause supported the searches and seizures of drug defendant's person and vehicle; the searching officer had a history with an informant who had provided detailed information regarding the defendant and made a subsequent in-person identification and confirmation of the defendant, prior to the stop, the officer surveyed the area and ran a check on defendant's vehicle, which revealed registration in the name of a known drug distributor, and the defend-

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ant made “furtive gestures” and refused the officer
 initial request to raise his hands. U.S.C.A.
 Const.Amend. 4.

[3] Constitutional Law 92 ↪4594(4)

92 Constitutional Law
 92XXVII Due Process
 92XXVII(H) Criminal Law
 92XXVII(H)4 Proceedings and Trial
 92k4592 Disclosure and Discovery
 92k4594 Evidence
 92k4594(2) Particular Items or
 Information, Disclosure of
 92k4594(4) k. Witnesses.
 Most Cited Cases

Criminal Law 110 ↪627.10(5)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclos-
 ure
 110k627.10(5) k. Informer Not a Wit-
 ness to or Participant in Offense. Most Cited Cases
 Maintaining a confidential informant's anonymity
 did not deny drug defendant due process of law;
 there was no indication that the informant was a
 participant in the illegal transaction. U.S.C.A.
 Const.Amend. 14; Fed.Rules Evid.Rule 501, 28
 U.S.C.A.

[4] Criminal Law 110 ↪627.10(3)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclos-
 ure
 110k627.10(2) Particular Cases
 110k627.10(3) k. Drug and Narcot-
 ic Offenses. Most Cited Cases

Criminal Law 110 ↪662.5

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k662 Right of Accused to Confront
 Witnesses

110k662.5 k. Informants, Failure to
 Produce or Disclose. Most Cited Cases
 Maintaining a confidential informant's anonymity
 did not deny drug defendant his Sixth Amendment
 right to confront witnesses against him; informant's
 tip was made for the limited purpose of explaining
 why a government agent had reason for the stop,
 search and seizure of defendant, not for the purpose
 of establishing a fact. U.S.C.A. Const.Amend. 6;
 Fed.Rules Evid.Rule 801(c), 28 U.S.C.A.

[5] Criminal Law 110 ↪814(8)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requis-
 ites, and Sufficiency

110k814 Application of Instructions to Case
 110k814(8) k. Matters of Defense in
 General. Most Cited Cases

Evidence did not entitle a drug defendant to a jury
 instruction on a necessity defense, despite his claim
 that he offered to take cocaine from a convicted
 murderer to avoid violence; defendant offered no
 evidence to show that he had no legal alternative to
 socially engaging with a felon convicted of murder,
 inviting to chauffeur him, and offering to hold his
 drugs.

*157 James A. Brown, Office of United States At-
 torney Topeka, Topeka, KS, for Plaintiff-Appellee.

Dwight L. Miller, Topeka, KS, for Defendant-App-
 ellant.

Before HENRY, Chief Judge, ANDERSON, and
 SEYMOUR, Circuit Judges.

***158 ORDER AND JUDGMENT^{FN*}**

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FN* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

ROBERT H. HENRY, Circuit Judge.

**1 Defendant-Appellant David Lee Holmes, Jr., received a 121-month sentence for his conviction for possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). On appeal, he challenges his conviction on three grounds. First, Mr. Holmes argues that the district court erred in denying his motion to suppress contraband because the police lacked a constitutional basis upon which to conduct the searches of and seizures from his person and vehicle. Applying *McCray v. Illinois*, 386 U.S. 300, 312-314, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), which sets the standard under which an informant's tip may supply probable cause, we affirm the district court's determination.

Second, Mr. Holmes argues that the district court erred in denying his motion to compel discovery regarding the Government's confidential informant. Applying *United States v. Reardon*, 787 F.2d 512, 517 (10th Cir.1986) and *United States v. Mendoza-Salgado*, 964 F.2d 993, 1000-1001 (10th Cir.1992), which conclude that no disclosure is necessary for non-participant informants, we affirm the district court's determination.

Third and finally, Mr. Holmes argues that the district court erred in refusing to supply an instruction on the necessity defense to the jury. We hold that Mr. Holmes provided insufficient evidence for a jury to find this defense, which is "strictly and parsimoniously" given, and we affirm the district court's determination. See *United States v. Baker*, 508 F.3d 1321, 1325 (10th Cir.2007) (The general rule is the necessity defense is "strictly and parsimoniously applied.").

I. BACKGROUND

On April 13, 2005, Topeka Police Department Officer Doug Garman received information from a confidential informant, who advised him that a black male, "David," possessed approximately one ounce of crack cocaine. The informant told Officer Garman that David (1) was wearing black clothing with a black ball cap that had red on it, (2) was driving a tan Chevy Caprice, and (3) had individually-packaged cocaine inside his pants. The informant disclosed the location of David's vehicle and the name of David's vehicle passenger, Andre Baker ("Dre-Dre").

Officer Garman characterized the informant's degree of reliability as extremely high. Prior to April 2005, Officer Garman and the confidential informant cooperated in four successful controlled purchases of drugs. In addition, the informant had previously provided information on seven other individuals involved in drug distribution in Topeka.

Based on the informant's tip, Officer Garman drove to a location identified by the informant, set up surveillance, and had the informant come to the scene to confirm the location as correct. The informant himself drove to the location and personally identified the residence; the vehicle's make, color, and location; Mr. Holmes, Mr. Holmes's clothing, and Mr. Holmes's companion, as those named previously. A records check of the vehicle identified by the informant revealed that the car was registered in the name of a known drug distributor.

**2 When Mr. Holmes and Dre-Dre left in the identified vehicle, Officer Garman followed. Thereafter, Officer Garman called *159 another police officer, Officer Youse, to conduct the traffic stop. Officer Youse stopped the car in a Taco Tico restaurant parking lot, and Officer Garman joined him there. Thereafter, Officer Garman approached the car and observed Mr. Holmes "immediately reach towards the right side of his waist." Aple's Br. at 3. Officer Garman commanded both Mr. Holmes and Dre-Dre to show their hands; neither complied.

Officer Garman drew his gun and repeated his com-

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mand, and this time, both obeyed. Following Officer Garman's orders, Mr. Holmes exited the car and was handcuffed. Officer Garman performed a pat-down of Mr. Holmes beginning with his waistband, which revealed a plastic bag of marijuana in his pockets.

Officer Garman then conducted a search of Mr. Holmes, finding two pieces of crack cocaine inside the brim of the hat he was wearing. Then, Officer Garman searched the vehicle and discovered more cocaine and a loaded pistol. *Id.*

On July 14, 2005, a grand jury indicted Mr. Holmes for possession of crack cocaine with intent to distribute. Mr. Holmes filed a motion to suppress the drugs found during a search of the vehicle, as well as incriminating statements he made after his arrest. He also filed a motion to compel discovery regarding the informant, which the district court denied. A jury convicted Mr. Holmes and the district court sentenced Mr. Holmes to 121 months' imprisonment. This appeal followed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

II. THE DISTRICT COURT DID NOT ERR BY DENYING MR. HOLMES'S MOTION TO SUPPRESS.

Mr. Holmes contends that the officers violated his Fourth Amendment rights by illegally stopping and searching him in the Taco Tico parking lot. The district court disagreed, finding that the facts and circumstances gave rise to reasonable suspicion sufficient to withstand Fourth Amendment scrutiny. Although we note that the district court's reliance on a "reasonable suspicion" rationale might be called into question, we affirm the district court's conclusion and uphold the constitutionality of the search and seizures.

As the United States Supreme Court instructed in *Ornelas v. United States*, appellate courts review determinations of reasonable suspicion and probable cause *de novo*. 517 U.S. 690, 691, 116 S.Ct.

1657, 134 L.Ed.2d 911 (1996). In so doing, the "reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

A. *The Initial Justification for the Stop was Based on Reasonable Suspicion.*

[1] The district court held that the confidential informant's tip, along with the police officers' subsequent observations, gave rise to reasonable suspicion sufficient to justify the investigative detention and subsequent pat-down of Mr. Holmes's person and vehicle for weapons. Because the district court denied Mr. Holmes's motion on the basis that the police had reasonable suspicion to conduct an investigative stop, the district court did not reach the issue of probable cause. *See Terry v. Ohio*, 392 U.S. 1, 37, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (upholding the stop of a person by law enforcement officers based upon "reasonable suspicion" that a person may have been engaged in criminal activity).

**3 In *Terry v. Ohio*, the Supreme Court affirmed the long-standing rule that, *160 where police conduct is subject to the warrant requirement of the Fourth Amendment, a reviewing court must "ascertain whether 'probable cause' existed to justify the search and seizure which took place." 392 U.S. at 20, 88 S.Ct. 1868. The Court noted, however, that the probable cause standard does not control in all circumstances, specifically, that of swift police "action predicated upon the on-the-spot observations of the officer on the beat." *Id.* In the latter category of cases, a more flexible "reasonable suspicion" standard applies, which justifies police inquiry where specific and articulable facts exist that "taken together with rational inferences from those facts, reasonably warrant [an] intrusion." *Id.* at 21, 88 S.Ct. 1868. We agree that the informant's detailed description of Mr. Holmes, including his attire, location, vehicle, and companion; together

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with the informant's in-person confirmation that the location, vehicle, and persons identified were those previously named; and Officer Garman's surveillance, including the running of Mr. Holmes's license plate, more than satisfy *Terry's* reasonable suspicion test for an investigatory stop. Thus, we reject Mr. Holmes's challenge to the validity of the initial stop.

B. The Search and Seizure Were Justified.

[2] We turn next to Mr. Holmes's challenge to the searches and seizures of Mr. Holmes's person and vehicle. Based on the record, the district court concluded that Officer Garman not only had reasonable suspicion to conduct a *Terry* stop, but also had reasonable suspicion to handcuff Mr. Holmes, reach into Mr. Holmes's pocket to seize a plastic bag containing marijuana, and seize crack cocaine from the brim of Mr. Holmes's hat and pants, as well as a loaded firearm from a gym bag in the back seat of Mr. Holmes's car. Under *Minnesota v. Dickerson's* "plain view" doctrine, the district court concluded that the incriminating character of the plastic bag of marijuana was apparent; thus, Officer Garman's further inquiry was warranted. See 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) (articulating the "plain view" doctrine).

Pursuant to the plain view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. *Id.* However, as the *Dickerson* Court stated, "[if] police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object-*i.e.*, if its incriminating character [is not] immediately apparent-the plain-view doctrine cannot justify its seizure." *Id.* at 375, 113 S.Ct. 2130 (internal quotations and citations omitted). Under the "plain-feel" doctrine, a corollary to *Dickerson's* "plain-view" doctrine, an officer may seize contraband detected during a pat down where the officer knows the

nature of the item. *United States v. Thomson*, 354 F.3d 1197, 1200 (10th Cir.2003). According to the district court, a plain-feel analysis justifies Officer Garman's seizure of the marijuana in this case.

**4 As an experienced police officer, Officer Garman may be uniquely qualified to distinguish between contraband and non-contraband items based on texture. Nevertheless, how it was immediately apparent that a small plastic bag, concealed within the fabric of Mr. Holmes's pants, contained marijuana and not anything from a range of other, non-contraband substances is unclear. Because we hold that Officer Garman had probable cause to conduct a search, we need not resolve the issue under *Dickerson*.

*161 As the Supreme Court stated in *Illinois v. Gates*, probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The *Gates* Court adopted a "totality-of-the-circumstances approach" to the determination of probable cause, taking into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 230-31, 103 S.Ct. 2317. Inasmuch as probable cause is a "fluid concept-turning on the assessment of probabilities in particular factual contexts," so too do informants' tips "come in many shapes and sizes from many types of persons." *Id.* at 232, 103 S.Ct. 2317. When performing a probable cause inquiry involving a confidential informant, the informant's veracity, reliability, and basis of knowledge are "highly relevant." *Id.* at 230, 103 S.Ct. 2317. These factors are not mutually exclusive, however, and "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Id.* (internal quotations omitted).

The Supreme Court has stated that a tip from a reliable informant, in conjunction with police corrobor-

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ation, is sufficient to establish probable cause to arrest. *McCray v. Illinois*, 386 U.S. 300, 304, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); see also *Draper v. United States* 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) (where an informant has been "accurate and reliable" in the past, and information provided is corroborated prior to defendant's arrest, there is probable cause for arrest, even if the officer's observation alone would not amount to probable cause). Although the confidential informant in *McCray* had been a source for five years (versus the matter of months here), the elements of *McCray*'s probable cause test are met here. Officer Garman had a history with this informant; the informant had provided reliable information in the past; the informant provided detailed information regarding the defendant and made a subsequent in-person identification and confirmation of the defendant. Prior to the stop, Officer Garman surveyed the area and ran a check on Mr. Holmes's vehicle, which revealed registration in the name of a known drug distributor. Mr. Holmes made "furtive gestures" and refused Officer Garman's initial request to raise his hands. Rec. vol. 1, doc. 31, at 2-7. Because police possessed a constitutional basis-probable cause-upon which to perform the searches of and seizures from Mr. Holmes, we affirm the determination of the district court.

III. THE DISTRICT COURT DID NOT ERR IN DENYING MR. HOLMES'S MOTION TO COMPEL DISCOVERY REGARDING THE GOVERNMENT'S INFORMANT.

A. *Maintaining the informant's anonymity did not deny Mr. Holmes due process of law.*

**5 [3] Mr. Holmes next challenges the district court's denial of his motion to compel, contending that the investigatory stop was "based solely on the word of the informant," and "[t]he requested information about this person was critical for the court and counsel to make a determination as to his or her credibility." *Apl'ts Br.* at 14. Specifically, he

contends that the absence of discovery denies him (1) due process and (2) his Sixth Amendment right to confront witnesses against him. Reviewing the district court's order denying Mr. Holmes's motion to compel discovery for abuse of discretion, *162 *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1299 (10th Cir.1999), we affirm.

Under the Rules of Evidence,

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed.R.Evid. 501.

In 1957, the United States Supreme Court abrogated the government's absolute nondisclosure privilege of a confidential informant's identity at common law and held that the informer's privilege is limited where the interest in the free flow of information is outweighed by an individual's right to prepare an effective defense. See *Roviaro v. United States*, 353 U.S. 53, 64, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (refusing to extend privilege to an informant's identity where the informant was "the sole participant, other than the accused, in the transaction charged," and thus was "the only witness in a position to amplify or contradict the testimony of government witnesses."). The *Roviaro* Court empowered trial courts to require disclosure where "the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of cause." *Id.* at 61, 77 S.Ct. 623. As the Court observed:

Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a war-

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rant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.

Id.

Since its decision in *Roviaro*, the Supreme Court has revisited the nondisclosure privilege. For example, in 1965, the Court held that the Sixth Amendment right of confrontation is obligatory on the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (“[T]he right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding....”).

**6 While the district court must allow the disclosure of the informant's identity if the informant's testimony “might be relevant to the defendant's case and justice would best be served by disclosure,” *United States v. Reardon*, 787 F.2d 512, 517 (10th Cir.1986), we have consistently held that where the informer was not a participant in the illegal transaction, no disclosure is required. *United States v. Mendoza-Salgado*, 964 F.2d 993, 1000-01 (10th Cir.1992) (citing *United States v. Scafe*, 822 F.2d 928, 933 (10th Cir.1987); *United States v. Freeman*, 816 F.2d 558, 562 (10th Cir.1987); *Reardon*, 787 F.2d at 517). “[M]ere speculation about the usefulness of an informant's testimony” is not enough to require disclosure. *Scafe*, 822 F.2d at 933. The government is not required to supply information about an informer to a defendant when the informer merely provides the initial introduction. *Reardon*, 787 F.2d at 517.

Mr. Holmes has submitted no information indicating that the confidential informant was a participant in the illegal transaction. We see no error in the trial court's refusal to require disclosure of the informant in this case.

*163 B. *Maintaining the government informant's anonymity did not violate Mr. Holmes's Sixth Amendment rights to confrontation.*

[4] According to Mr. Holmes, Officer Garman provided “lengthy testimony regarding the reliability of th[e confidential] informant” at motions hearings prior to trial. Aplt's Br. at 3. In addition,

Officer Garman testified the informant had personally observed Mr. Holmes in possession of the cocaine in question ... [and] that the informant told him the cocaine would be in Mr. Holmes' pants.... Officer Garman went on to testify that the informant described the car Mr. Holmes was driving ... Officer Garman went on to testify that he made contact with the confidential informant and requested that the informant go to an area where the informant would be able to re-identify the vehicle and confirm that the vehicle at question was the one that he had provided to Garman.

Id. at 3-4. Mr. Holmes argues that Officer Garman's statements regarding the informant's statements violated Mr. Holmes's Sixth Amendment rights, because:

[d]isclosure would have provided defense counsel an opportunity to interview the informant prior to the court deciding the motion to suppress, and to have access to his prior history and the agreement which existed between him and the government or law enforcement officers.... The accused also sought to discover the criminal record of the informant.... Similarly, defense counsel could have cross-examined the witness....

Aplt's Br. at 14.

As the Supreme Court observed in *Crawford v. Washington*, the Confrontation Clause applies to witnesses against the accused—in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (internal citation and quotation marks omit-

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ted). As a result, statements that are not offered to prove the truth of the matter asserted may not be excluded under *Crawford. Id.* at 59 n. 9, 124 S.Ct. 1354. Indeed, as we ruled in *United States v. Faulkner*, “the [Confrontation] Clause restricts only statements meeting the traditional definition of hearsay.” 439 F.3d 1221, 1226 (10th Cir.2006) (citing Fed.R.Evid. 801(c)).

**7 Based on the record, the informant's tip was made for the limited purpose of explaining why a government agent had reason for the stop, search and seizure of Mr. Holmes, not for the purpose of establishing a fact. *See, e.g., United States v. Freeman*, 816 F.2d 558, 563 (10th Cir.1987) (stating that out of court statements are not hearsay when “offered for the limited purpose of explaining why a Government investigation was undertaken”). Testimony as to the truth of the matters asserted came from the testimony of Officer Garman.

In addition, we hold that Mr. Holmes's contention that he was unconstitutionally deprived of the right to confront such a witness because the state did not produce the informant to testify against him is “absolutely devoid of merit.” 386 U.S. at 312, 87 S.Ct. 1056 (citing *Cooper v. California*, 386 U.S. 58, 62 n. 2, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967)).

IV. THE DISTRICT COURT DID NOT ERR IN REFUSING TO SUPPLY AN INSTRUCTION FOR THE NECESSITY DEFENSE ON MR. HOLMES'S BEHALF.

[5] Third and finally, Mr. Holmes contends that his offer to take the cocaine *164 from Dre-Dre so as to avoid violence constituted “necessity” sufficient to warrant an instruction regarding his “necessity defense” to the jury. More specifically, Mr. Holmes claims that he was afraid of Dre-Dre because Dre-Dre had a previous murder conviction. Mr. Holmes maintains that he offered to take the cocaine from Dre-Dre to avoid a shoot out with police. Based on these facts, Mr. Holmes believes he was entitled to a jury instruction on the “necessity defense,” and

thus the district court's refusal to submit a necessity instruction to the jury was error. Aplt's Br. at 19-20.

We review for abuse of discretion a district court's refusal to supply an instruction for the necessity defense and consider the instructions as a whole *de novo* to determine whether “they adequately apprise the jury of the issues and the governing law.” *United States v. Williams*, 403 F.3d 1188, 1195 n. 7 (10th Cir.2005). If the district court's failure to give the instruction was erroneous, “we must determine whether the conviction must be set aside because the error had a substantial influence on the outcome of the trial or leaves us in grave doubt as to its influence on the verdict. If the error is harmless the conviction will stand.” *United States v. Al-Rekabi*, 454 F.3d 1113, 1119 (10th Cir.2006) (internal quotation marks omitted).

A defendant is entitled to a theory-of-defense instruction if the defense theory is “supported by sufficient evidence for a jury to find in [the] defendant's favor.” *United States v. Grissom*, 44 F.3d 1507, 1512 (10th Cir.1995); *see also Al-Rekabi*, 454 F.3d at 1122 (holding that a defendant “must prove his claimed defenses by a preponderance of the evidence”). Mr. Holmes bears the burden to produce evidence of each element sufficient to warrant its consideration by the jury. *United States v. Bailey*, 444 U.S. 394, 415, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). The defense may be asserted “*only* by a defendant who was confronted with ... a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts.” *Al-Rekabi*, 454 F.3d at 1121 (internal quotation marks omitted) (emphasis supplied). District courts must “strictly and parsimoniously” apply the defense. *United States v. Baker*, 508 F.3d 1321, 1326 (10th Cir.2007) (internal quotation marks omitted).

**8 In support of his necessity defense theory, Mr. Holmes cites an unpublished decision, *United States v. Benally*, which defines the necessity defense as warranted where: “(1) there is no legal alternative to violating the law, (2) the harm to be

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prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm." Apt's Br. at 20 (citing *United States v. Benally*, 233 Fed.Appx. 864, 868 (10th Cir.2007) (internal quotation marks omitted)); *Al-Rekabi*, 454 F.3d at 1121 .

Our reading of *Benally*, and our Circuit precedent, however, undermine Mr. Holmes's defense. In *Benally*, the defendant sought a necessity defense on the charge of possessing a firearm, arguing that her possession stemmed from an attempt to avoid a fight on school grounds. In *Benally*, we refused to issue a necessity instruction where the defendant had knowledge of and access to a firearm when she entered a school zone, knew that the weapon was next to her in the vehicle, and could exercise dominion and control over the firearm. *Id.* at 870.

Assuming Mr. Holmes's version of the facts as true, Mr. Holmes similarly knew *165 that his companion, Dre-Dre, possessed drugs, those drugs were next to him in the vehicle, and he had access to those drugs (as evidenced by his receipt upon "offering" to carry them).

"The purpose of requiring the defendant to show that he had no legal alternative to violating the law is to force an actor to evaluate the various options presented and choose the best one because in most cases, there will be a clear legal alternative." *Baker*, 508 F.3d at 1326 (internal quotation marks omitted). Indeed, as the Sixth Circuit noted in *United States v. Singleton*, "the keystone of the analysis is that the defendant must have no alternative-either before or during the event-to avoid violating the law." 902 F.2d 471, 473 (6th Cir.1990). Mr. Holmes has provided no evidence to show that he had no legal alternative to socially engaging with a felon convicted of murder (Dre-Dre), inviting to chauffeur him, and offering to hold his drugs.

V. CONCLUSION

We therefore AFFIRM the district court's denial of Mr. Holmes's Motion to Suppress, AFFIRM the denial of Mr. Holmes's Motion to Compel, and AFFIRM the district court's refusal to issue an instruction on the necessity defense.

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