[Cite as *State v. Lipsey*, 2009-Ohio-3956.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-822
v.	:	(C.P.C. No. 07CR07-5389)
DeVaughn M. Lipsey,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 11, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, DeVaughn M. Lipsey, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} On February 1, 2007, Columbus police officers executed a search warrant at a house located at 844 Seymour Avenue. The warrant was based on drug buys made at the house by a confidential informant. The officers entered the house and found a number of people, including appellant. Officer Wallace Sprague searched appellant and found a handgun, money, and crack cocaine. Appellant was the only person in the house

who had crack cocaine on his person, although officers found additional crack cocaine on a plate in the house. An inventory of evidence form,[1] completed by the police after the search of the house, indicated that two bags of crack cocaine were taken from appellant. The bags were submitted to the Columbus Police Department crime laboratory. One bag contained 2.4 grams of crack cocaine, and the other contained .7 grams of crack cocaine, for a total of 3.1 grams of crack cocaine.

{¶3} As a result of these events, a Franklin County Grand Jury indicted appellant with one count of possession of crack cocaine, in violation of R.C. 2925.11, with a firearm specification pursuant to R.C. 2941.141. The indictment alleged that appellant possessed one gram or more but less than five grams of crack cocaine. The indictment also charged appellant with one count of carrying a concealed weapon, in violation of R.C. 2923.12, and one count of having a weapon while under disability, in violation of R.C. 2923.13. Appellant entered not guilty pleas and proceeded to trial.

{¶4} At trial, Officer Sprague only recalled finding one bag of crack cocaine on appellant. Officer James Roberts, however, testified that the inventory of evidence form indicated that two bags of crack cocaine were found on appellant. He also testified that he interviewed appellant at the house. When Officer Roberts asked appellant about the quantity of drugs in his possession, appellant told him that he bought two "8 balls" off the street. Appellant testified on his own behalf and admitted to possessing crack cocaine but stated that he only had one bag. The jury found appellant guilty of possession of crack cocaine, as charged, and the attendant firearm specification, as well as the count of carrying a concealed weapon. The trial court found appellant guilty of having a weapon while under disability. The trial court sentenced appellant accordingly.

[1] The document lists the items, if any, found during the execution of a search warrant. It is filed with the

court after the search warrant has been executed.

{¶5} Appellant appeals and assigns the following errors:

> [1.] THE TRIAL COURT IMPROPERLY EXPOSED THE JURY TO INADMISSIBLE OUT-OF-COURT DECLARATIONS IN VIOLATION OF THE OHIO RULES OF EVIDENCE.
>
> [2.] THERE WAS INSUFFICIENT COMPETENT, CREDIBLE EVIDENCE TO SUPPORT THE JURY'S VERDICT ON THE CHARGE OF POSSESSION OF DRUGS, THEREBY, DENYING APPELLANT DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS.
>
> [3.] THE VERDICT OF THE JURY ON THE CHARGE OF POSSESSION OF DRUGS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶6} For ease of analysis, we address appellant's assignments of error out of order. In appellant's second and third assignments of error, he contends that his conviction for possession of crack cocaine was not supported by sufficient evidence and was against the manifest weight of the evidence.[2] We disagree.

{¶7} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss appellant's sufficiency of the evidence and weight of the evidence arguments.

{¶8} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could

[2] Appellant does not contest his other convictions.

> have found the essential elements of the crime proven beyond a reasonable doubt. * * *

{¶9} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶10} In order to convict appellant of possession of crack cocaine in this case, the state had to prove beyond a reasonable doubt that he possessed an amount of crack cocaine weighing one gram or more but less than five grams. R.C. 2925.11. Appellant does not dispute that he possessed crack cocaine. Instead, he argues that the state failed to prove that he possessed more than one gram of crack cocaine because there was not clear testimony as to which bag of crack cocaine he possessed. We disagree.

{¶11} The inventory of evidence form submitted by the police after the execution of the search warrant indicated that two bags of crack cocaine were found on appellant—one from his left inside coat pocket and the other from his left front coat pocket. Officer Sprague did not find drugs on any other person in the house. Although Officer Sprague could only recall finding one bag of crack cocaine on appellant's person, he testified that when he finds something on an individual, he calls over an officer whose job it is to take

pictures of what was recovered from the individual. Here, there were pictures of two bags of crack cocaine taken at the house. Finally, Officer Roberts testified that appellant told him that he had bought two "8 balls" of crack cocaine. This evidence, viewed in a light most favorable to the state, would allow a rationale trier of fact to conclude that appellant possessed both bags of crack cocaine. Therefore, appellant's conviction for possession of crack cocaine is supported by sufficient evidence.

{¶12} Appellant's manifest weight of the evidence claim requires a different review. A manifest weight of the evidence claim concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶13} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The trier of fact is free to believe or disbelieve all or any part of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor,

and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01 AP-1393, 2002-Ohio-4491, ¶74.

{¶14} Appellant makes no additional argument in support of his manifest weight claim. Appellant argues that the evidence only supported a finding that he possessed one bag of crack cocaine. Again, we disagree.

{¶15} For the same reasons his conviction is supported by sufficient evidence, the conviction is also not against the manifest weight of the evidence. Although appellant testified that he only possessed one bag of crack cocaine, the jury was free to disbelieve his testimony and believe the state's evidence indicating that he possessed two bags. This was within the province of the jury. *State v. Morris*, 10th Dist. No. 05AP-1139, 2009-Ohio-2396, ¶33. A conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution's evidence. Id. This is not the exceptional case where the evidence weighs heavily against the conviction.

{¶16} Appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Accordingly, we overrule appellant's second and third assignments of error.

{¶17} Appellant contends in his first assignment of error that the trial court erred by admitting inadmissible hearsay testimony. Specifically, Officer Roberts was allowed to testify that his confidential informant described the man inside the house that he bought

drugs from as "a male black, * * * approximately 5'9", 200 pounds, approximately 40 years old * * * wearing a black and grey jacket and blue jeans." (Tr. Vol. 1, 62.) The description arguably matched pictures of appellant taken the night of the search.

{¶18} Appellant's trial counsel objected to this testimony at trial. The grounds for that objection, however, are not in the record. Counsel did not state a basis when making the objection. A sidebar with the court after the objection was not recorded and is not part of the record. After the sidebar, the witness was allowed to repeat the confidential informant's description. Because trial counsel failed to state on the record the specific grounds for the objection, admission of the testimony will not be reversible error unless the admission constitutes plain error. *State v. Patterson* (Sept. 22, 1998), 10th Dist. No. 97APA12-1682, citing Evid.R. 103; *State v Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶129.[3]

{¶19} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id.; *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim.R. 52(B) " ' with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of

[3] Evid.R. 103 forgoes the requirement of a specific objection if the specific grounds are apparent from the context. Evid.R. 103(A)(1); *State v. Coyle* (Mar. 15, 2000), 4th Dist. No. 99 CA 2480. Here, the specific grounds appellant raises are not apparent from the record. In fact, based on the trial court's jury instructions, it appears that appellant's trial counsel argued that the testimony violated Evid.R. 403(A), not that the testimony was hearsay.

justice.' " *Barnes*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus.

{¶20} Evid.R. 801(C) defines "hearsay" as "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." "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.' " *State v. Maurer* (1984), 15 Ohio St.3d 239, 262; *State v. Bedell*, 10th Dist. No. 05AP-496, 2006-Ohio-5746, ¶50.

{¶21} At trial, Officer Roberts repeated an out-of-court statement—the confidential informant's description of the person inside the house from whom he bought drugs. The state contends that the officer's testimony was not hearsay, however, because it was not offered to prove the truth of the matter asserted (i.e., that appellant sold crack cocaine). The state argues that the testimony was offered to explain the basis for the search, the identity of appellant as the person possessing the crack cocaine, or appellant's knowledge as to the amount of crack cocaine. The state's argument is not persuasive.

{¶22} First, the confidential informant's drug buys provided the basis for the search of the house and all its occupants. The description of the person making those sales was not necessary. Second, appellant never disputed that he possessed crack cocaine at the time of the search. Additionally, Officer Sprague testified that appellant was the only occupant of the house found with crack cocaine in his possession. Finally, the confidential informant's description does not in any way prove that appellant had knowledge of the amount of crack cocaine he possessed. Therefore, it appears that the state offered the testimony to prove the truth of the matter it asserted.

{¶23} Because Officer Robert's testimony was offered to prove the truth of the matter asserted, his testimony was hearsay, and therefore, not admissible.[4] Evid.R. 802. The trial court's admission of the hearsay testimony was error. Nevertheless, for a number of reasons, we cannot say that this error affected the outcome of the trial.

{¶24} First, the testimony did not address the disputed issue in this case: how much crack cocaine appellant possessed. The testimony tended to prove that appellant sold crack cocaine. However, appellant was not indicted for selling crack cocaine in this case. Thus, the informant's description of appellant was irrelevant.

{¶25} Second, although the testimony tended to prove that appellant sold, and therefore, possessed crack cocaine, appellant did not dispute that he possessed crack cocaine. In fact, he admitted to possessing crack cocaine. Moreover, the inventory of evidence found at the house indicated that he possessed crack cocaine and Officer Roberts testified that appellant admitted to purchasing two "8 balls" of crack cocaine.

{¶26} Finally, as already addressed in our resolution of appellant's second and third assignments of error, the state presented ample evidence, without considering the improperly admitted hearsay testimony, supporting appellant's conviction. *State v. McDowell*, 10th Dist. No. 03AP-1187, 2005-Ohio-6959, ¶55, overruled on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 411, 2006-Ohio-2394. See also *State v. Brown*, 10th Dist. No. 05AP-962, 2006-Ohio-4594, ¶25 (improper admission of hearsay testimony not plain error where other evidence supported conviction); *State v. Scott*, 10th Dist. No. 05AP-1144, 2006-Ohio-4981, ¶27 (no plain error

[4] Hearsay is admissible if it fits under an exception found in Evid.R. 803. However, the state does not argue that Officer Robert's testimony meets any of those exceptions.

where remaining evidence, without considering improperly admitted evidence, supported conviction).

{¶27} Because the error did not affect the outcome of the trial, the trial court's admission of Officer Robert's hearsay testimony does not constitute plain error. Accordingly, we overrule appellant's first assignment of error.

{¶28} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.