[Cite as *State v. Cassell*, 2010-Ohio-1881.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-1093 (C.P.C. No. 07CR10-7817)
v.	:	
Otha Cassell, Jr.,	:	No. 08AP-1094 (C.P.C. No. 07CR07-4951)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on April 29, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Brehm & Associates, and *Eric W. Brehm*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Otha Cassell, Jr., has filed these delayed appeals from judgments of the Franklin County Court of Common Pleas convicting him of promoting prostitution, possession of crack cocaine, having a weapon while under disability and trafficking in crack cocaine. For the following reasons, we affirm appellant's convictions.

{¶2} In early January 2007, a Columbus Police Department ("CPD") patrol unit informed CPD Vice Squad Detective, Steven Lazar ("Lazar"), that a female they had

detained on a suspected solicitation/prostitution charge indicated that she had information she wanted to share with the police. Lazar went to the scene and met the woman, a street prostitute named Misty Jones ("Jones"). Jones informed Lazar that the Columbus Dispatch contained an advertisement for a prostitution ring run by appellant at 418 South Terrace Avenue. Jones further stated that she lived with appellant and that he engaged in narcotics trafficking and kept several weapons at the house.

{¶3} Lazar attempted to locate the advertisement over the next few weeks. On February 17, 2007, he observed the advertisement in the classifieds section of the Columbus Dispatch. As Jones had described, the advertisement read simply "Olivia," "24 hrs," and "614-279-3651." (State's exhibit No. 11, Tr. 275.) At approximately 11:00 p.m. on February 19, 2007, Lazar called the number listed in the advertisement and asked to speak to Olivia. The woman who answered the phone identified herself as Sapphire, and stated that Olivia was currently unavailable. Sapphire provided a physical description of herself and asked Lazar if he would be interested in meeting her instead of Olivia. When Lazar agreed, Sapphire stated that the cost "to meet her" was $100 for one hour and $80 for one-half an hour. (Tr. 278.) When Lazar asked what those prices covered, Sapphire replied that she did not describe specific acts over the telephone.

{¶4} Sapphire instructed Lazar to go to a convenient store on the west side and call the number again for further directions. Lazar asked if he could bring his "girlfriend" (CPD Vice Squad Officer Heidi Malone ("Malone")) with him. (Tr. 278.) Sapphire agreed, and scheduled Lazar for an 11:30 p.m. appointment. At 11:30 p.m., Lazar called Sapphire from the convenient store. Sapphire provided directions to 418 South Terrace Avenue. Sapphire met Lazar and Malone at the door and led them to an upstairs

bedroom. Lazar gave Sapphire $80 for one-half hour. Jones came to the door and asked if everything was alright. Sapphire handed Jones the money, and Jones left. Sapphire removed her pants and asked Lazar what he wanted to do. Once they agreed on the act, Lazar and Malone identified themselves as police officers and arrested Sapphire for solicitation. Lazar confiscated some papers, which were lying in plain view on the bedroom floor. The papers contained the names and physical descriptions of several women; Lazar believed this paperwork indicated that the named women engaged in prostitution inside the house.

{¶5} Shortly thereafter, Jones knocked on the door again; Lazar let her into the bedroom. Lazar asked Jones and Sapphire if anyone else was in the house. Jones reported that appellant and his son were asleep in another bedroom. Lazar and CPD Detective Mike Perrigo ("Perrigo") woke appellant and handcuffed him; Perrigo searched him and recovered a bag of crack cocaine from his pants pocket. A subsequent search of appellant's bedroom uncovered a bag containing 190 prophylactics. No other persons were present in the house.

{¶6} Appellant agreed to a police interview. During the interview, which was recorded, appellant admitted that he lived at 418 South Terrace, that his home telephone number was 614-279-3651, and that he paid the telephone bill each month. He described himself as the "head of the household." (Tr. 378.) He stated that for the past three or four months he had rented one of the three bedrooms to several different women, including Jones and Sapphire, at a cost of $100 per week. He further stated that he was aware that the women ran an "escort" service out of the house, and that they had their own "personal clientele." (Tr. 379.) However, he denied any involvement in the

women's "business." (Tr. 380.) He also denied placing the advertisement in the newspaper. He admitted, however, that he knew the women had placed the advertisement, but that the advertisement was supposed to have listed a 900 number which, when called, would refer the caller to the 614-279-3651 number. Appellant also stated that the crack cocaine recovered from his pants pocket was for his personal use and that he typically snorted it rather than smoked it. Appellant later admitted that he owned a loaded firearm and ammunition, which he kept hidden in the basement. Appellant directed Perrigo to the location of the firearm, and Perrigo retrieved it. Subsequent lab analysis revealed that the crack cocaine recovered from appellant weighed 5.1 grams.

{¶7} Several months later, appellant again became the subject of a police investigation. On August 23, 2007, CPD Detective William Best ("Best") was working undercover when a female, later identified as Jones, approached his unmarked police vehicle and requested a ride. Believing Jones to be a prostitute, Best drove her around for ten minutes or so. When she did not say the words necessary to arrest her for solicitation, he identified himself as a police officer. Best told Jones he would not charge her with a crime if she agreed to provide information about drug trafficking and prostitution. Jones told Best she would show him some houses where those crimes routinely occurred. To that end, she directed Best to a house located at 418 South Terrace, where she averred that a person named "J.B." whom she described as her "pimp" and "drug supplier," sold drugs. (Tr. 220, 232.) Jones then directed Best to a house in the south end where, according to Jones, her "connection," J.B., picked up his

drug supply. (Tr. 87.) Best gave Jones his cell phone number and told her to call him if she became aware of any drug trafficking at the house in the south end.

{¶8} At approximately 9:47 p.m., Best received a call from a telephone number he did not recognize – 614-376-9067. The caller, Jones, reported that drugs had already been retrieved from the south end location and that J.B. was willing to sell half of an ounce of crack cocaine for $1,200. Approximately 20 minutes later, Best received a second call from Jones, from the same telephone number, confirming the price and establishing the location (a bank parking lot) for the drug transaction. Based upon this conversation, Best assumed that J.B. would be present at the drug transaction, as it involved a sizable amount of cash and crack cocaine. Best, together with several other police officers, coordinated a plan to effectuate the drug transaction and subsequent arrest of J.B.

{¶9} Best drove to the pre-arranged location and waited. Shortly thereafter, a car pulled into the parking lot. Jones exited the passenger seat and ran to Best's vehicle, handed him a baggie of crack cocaine, and said "here's your dope." (Tr. 107.) Best signaled the other officers to arrest the driver, assuming it to be J.B. J.B. was not the driver; rather, the driver was a woman named Cricket.

{¶10} Cricket was arrested and transported to the police station; Jones remained at the scene. Upon questioning, Jones told Best she sometimes met her prostitution clients at hotels on the west side. Best then devised a plan to lure appellant to deliver drugs to one of these hotels. To that end, at approximately 11:50 p.m., Best directed Jones to call J.B. and arrange the purchase of one quarter ounce of powder cocaine. Best listened in on the call, and overheard Jones tell J.B. that she and Cricket were

"partying" with some men, that the men wanted to purchase more drugs, that they were all too high to drive, and that J.B. would have to deliver the drugs to them. (Tr. 126, 129.) J.B. was upset and talking very loudly; he stated that he would not deliver any more drugs until he received the $1,200 from the earlier crack cocaine sale. At Best's urging, Jones convinced J.B. to bring the powder cocaine to one of the hotels. Thereafter, Best contacted the CPD SWAT team to request surveillance at 418 South Terrace. Best told the SWAT team that Jones said J.B. would probably leave the house driving a Jaguar.

{¶11} SWAT Officer Randolph Rich ("Rich") was a member of the surveillance team. As part of his duty, Rich prepared a surveillance log (State's exhibit No. 1), which demonstrates that at 12:13 a.m. on August 24, 2007, an African-American male, later identified as appellant, exited the rear door of the house, entered the garage while talking on a cell phone, exited the garage in a dark-colored Jaguar, and drove away. Rich remained at the house while other members of the SWAT team followed appellant to the hotel. Upon arrival, appellant was arrested and charged with offering to sell powder cocaine.

{¶12} Best asked CPD Officer Roger Nolan ("Nolan") to interview appellant at the scene. During the interview, appellant told Nolan he was at the hotel "looking for his girls" in order to retrieve the money they had collected from their "clients." (Tr. 257-58.) Appellant stated that two of the women often stayed with him and "worked for him." (Tr. 261.) Appellant also stated that he would supply the women's clients with drugs if requested to do so. Nolan assumed these statements meant that appellant and the women were engaged in a prostitution ring.

{¶13} Following Nolan's interview, Best spoke with appellant. Best recognized appellant's voice as the one he heard on the phone with Jones. Appellant admitted that he sometimes went by the initials J.B. A subsequent search of appellant's car recovered $686 and a cell phone with the number 614-376-9067. No drugs were recovered from appellant's person or car. Subsequent lab analysis revealed that the baggie Jones gave Best contained 12.6 grams of crack cocaine.

{¶14} On July 12, 2007, a Franklin County grand jury indicted appellant, in case No. 07CR-4951, on one count of promoting prostitution in violation of R.C. 2907.22, one count of possession of crack cocaine in violation of R.C. 2925.11, and one count of having a weapon while under disability in violation of R.C. 2923.13. The promoting prostitution and crack cocaine possession charges carried firearm specifications. All three charges stemmed from the February 2007 incident.

{¶15} On October 26, 2007, a Franklin County grand jury indicted appellant, in case No. 07CR-7817, on two counts of trafficking in crack cocaine in violation of R.C. 2925.03. Both counts stemmed from the August 2007 incident.

{¶16} On January 7, 2008, appellee moved, pursuant to Crim.R. 7(D), 8(A), and 13, to join case Nos. 07CR-4951 and 07CR-7817 for trial. Appellant opposed the motion. Following a March 11, 2008 hearing, the trial court granted appellee's motion for joinder.

{¶17} On October 1, 2008, a Franklin County grand jury indicted appellant, in case No. 08CR-7248, on one count of trafficking in powder cocaine in violation of R.C. 2925.03. Immediately prior to the commencement of trial on October 2, 2008, appellee explained that it filed case No. 08CR-7248 only to cure a defect in count two of case No. 07CR-7817, as the drug at issue was powder, not crack, cocaine. The trial court

arraigned appellant on 08CR-7248, and, upon appellee's motion, joined 08CR-7248 with the previously consolidated cases. At appellee's urging, the trial court dismissed the firearm specifications in case No. 07CR-4951. Appellant executed a jury waiver and agreed to allow the weapon while under disability charge to be tried to the court.

{¶18} Following presentation of appellee's case, appellant moved, pursuant to Crim.R. 29, for judgment of acquittal on all counts tried to the jury. The trial court granted appellant's motion as to the trafficking in powder cocaine count, but denied the motion as to the other counts. The jury subsequently found appellant guilty of promoting prostitution, possession of crack cocaine, in an amount exceeding five grams but less than ten grams, and trafficking in crack cocaine in an amount exceeding ten grams but less than 25 grams. The trial court found defendant guilty of having a weapon while under disability. The trial court sentenced appellant accordingly.

{¶19} Appellant's first assignment of error contends he was denied his right to confrontation in violation of the Sixth and Fourteenth Amendments to the United States Constitution, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, and Section 10, Article I of the Ohio Constitution, when the trial court permitted Lazar and Best to testify as to statements made to them by Jones. Appellant has not referred this court to the specific testimony he now challenges, but, rather, cites the entire direct testimony of both Lazar and Best. An appellate court is not required to comb through the record on appeal to search for error when an appellant fails to specify precisely where error occurred. See App.R. 12(A)(2). However, having reviewed the direct testimony of both Best and Lazar in its entirety, and in the interest of justice, we will address appellant's argument.

{¶20} We begin with Lazar's testimony regarding Jones' statements to him pertaining to the promoting prostitution and possession of crack cocaine counts. As noted, Lazar testified that Jones told him that appellant ran a prostitution ring out of his home and advertised this fact in the newspaper. She also stated that appellant engaged in narcotics trafficking and kept a cache of weapons in his house. Appellant contends that Lazar's testimony was improperly admitted hearsay, the admission of which violated his constitutional right to confrontation. Appellee maintains that the testimony was not hearsay, as it was not offered for the truth of the matter asserted, but, rather, to explain Lazar's investigative procedure. Appellee also notes that in closing argument, the prosecutor specifically informed the jury that it should not rely on any statements made by Jones because the prosecutor could not vouch for Jones' credibility and that the purpose for Lazar's testimony about Jones was simply to explain how the police came to be involved with appellant.

{¶21} As an initial matter, we note that appellant did not object to Lazar's testimony, nor did he request that the trial court instruct the jury not to consider the statements for the truth of the matter asserted, but as an explanation for Lazar's actions. As such, appellant has forfeited his constitutional argument in the absence of plain error. See *State v. Barnes*, 94 Ohio St.3d 21, 27, 2008-Ohio-68, citing *State v. Allen*, 73 Ohio St.3d 626, 634, 1995-Ohio-283; Crim.R. 52(B).

{¶22} Under the plain error standard, we must first find error, i.e., "a deviation from a legal rule." *Barnes* at 27, citing *State v. Hill*, 92 Ohio St.3d 191, 200, 2001-Ohio-141. Second, the error must be "plain," i.e., an "obvious" defect in the trial proceeding. *Barnes* at 27, citing *State v. Sanders*, 92 Ohio St.3d 245, 257, 2001-Ohio-189, citing

State v. Keith (1997), 79 Ohio St.3d 514, 518. Finally, the error must have impacted appellant's "substantial rights" by affecting the outcome of the trial. *Barnes* at 27, citing *Hill* at 205. Even if the forfeited error satisfies the foregoing, Crim.R. 52(B) does not mandate that the appellate court correct it. To that end, the Supreme Court of Ohio has "acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *State v. Long* (1978), 53 Ohio St.2d 91.

{¶23} The Sixth Amendment to the United States Constitution guarantees that a person accused of committing a crime has the right to confront and cross-examine witnesses testifying against him. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065. Section 10, Article I of the Ohio Constitution contains a similar guarantee of confrontation, and Ohio construes its Confrontation Clause as providing an equal guarantee as that of the federal constitution. See *State v. Self* (1990), 56 Ohio St.3d 73, 78; *State v. McKenzie,* 8th Dist. No. 87610, 2006-Ohio-5725, ¶2. ("Although the 'face to face' language of the Ohio Constitution would arguably appear to grant even greater rights to confrontation, the Ohio Supreme Court has construed Section 10, Article I, to parallel that of the federal constitution, rejecting the argument that the section requires an interpretation as its literal extreme.")

{¶24} In *Crawford,* the United States Supreme Court held that the proper analysis for determining whether out-of-court statements violate the Confrontation Clause is not whether they are reliable but, rather, whether they are testimonial. Id. at 61. The court further stated that the Confrontation Clause does not apply to nontestimonial hearsay but

that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. Rejecting its former hearsay formulations, the court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Id. at 53-54. The court declined to provide a comprehensive definition of "testimonial." However, the court indicated that the term includes statements " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id. at 51-52, quoting the brief of amicus curiae National Association of Criminal Defense Lawyers. The court further stated that the term includes at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements made during police interrogations. Id. at 68. Regarding the last example, the court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51. After *Crawford* was decided, the Supreme Court of Ohio held that testimonial statements include statements that an objective person would believe might be used to prosecute the offender. *State v. Stahl,* 111 Ohio St.3d 186, 2006-Ohio-5482, ¶36.

{¶25} In the instant case, Jones made the challenged statements while detained in a police cruiser on a solicitation/prostitution charge, presumably for the purpose of avoiding prosecution. Jones undoubtedly knew that statements made to the police about appellant running a prostitution ring and selling drugs would be used to prosecute appellant. "Statements made to the police describing illegal activities are usually

testimonial." *State v. Hart,* 1st Dist. No. C-060686, 2007-Ohio-5740, ¶22. Appellee did not prove that Jones was unavailable to testify and appellant did not have a prior opportunity to cross-examine her. Further, Lazar did not simply testify that Jones provided him with general information which led him to investigate appellant. Rather, Lazar testified that Jones provided detailed information about appellant's criminal enterprise, that is, that he ran a prostitution ring out of his home at 418 South Terrace, that appellant advertised this fact in the newspaper, that the advertisement included the name Olivia and the phone number for appellant's home, and that appellant trafficked in narcotics and kept weapons in his home. Insofar as Jones' statements were introduced to prove that, in truth, appellant ran a prostitution ring, they are testimonial hearsay and violate the Confrontation Clauses of the Sixth Amendment and the Ohio Constitution. Thus, the admission of the testimony was error.

{¶26} However, the error did not affect the outcome of the trial. Appellant's own tape-recorded statement provided independent evidence of his guilt on the promoting prostitution count. R.C. 2907.22 prohibits promoting prostitution and provides, in relevant part, that "[n]o person shall knowingly * * * [e]stablish, maintain, operate, manage, supervise, control, or have an interest in a brothel" or "induce or procure another to engage in sexual activity for hire." Appellant admitted that he lived at 418 South Terrace, that he was the head of the household and that his telephone number was the one that appeared in the newspaper advertisement. He further admitted that he was aware that the women to whom he rented rooms ran an "escort service" out of the house and that they had placed the advertisement in the newspaper. In addition, search of appellant's bedroom uncovered a bag containing 190 prophylactics, which the jury could reasonably

infer were not merely for appellant's personal use. As this other evidence convincingly demonstrated that appellant was guilty of promoting prostitution, it was not plain error to admit Lazar's testimony regarding Jones' statements.

{¶27} Similarly, evidence independent of Jones' statements to Lazar regarding appellant's possessing drugs at his house established that he possessed crack cocaine. R.C. 2925.11 states, as relevant here, that "[n]o person shall knowingly obtain, possess, or use a controlled substance." Lazar testified that Perrigo recovered crack cocaine from appellant's pants pocket after he was handcuffed. In addition, in his tape-recorded statement, appellant admitted that the crack cocaine recovered from his pants pocket was for his personal use. As this evidence could reasonably have persuaded the jury that appellant was guilty of possession of crack cocaine, it was not plain error to admit Lazar's testimony regarding Jones' statements.

{¶28} We now turn to Best's testimony as to the statements Jones made to him. As noted, Best testified that Jones told him that appellant, her "pimp" and "drug supplier," ran a prostitution and drug trafficking enterprise at 418 South Terrace. Best asked Jones to call him if she became aware of any future drug trafficking. Jones eventually called Best and told him that appellant was willing to sell half of an ounce of crack cocaine for $1,200 at a bank parking lot. When appellant did not show up at the prearranged location, Best questioned Jones about the prostitution ring. Jones told Best where she took her clients. Best had Jones call appellant and arrange the purchase of powder cocaine at the place Jones took her clients. Best listened in on the call and overheard Jones tell appellant that the client she was with needed more drugs and that appellant would have to deliver them because they were too high to drive.

{¶29} Appellant maintains that Best's testimony regarding Jones' statements to him was improperly admitted hearsay and that its admission violated his constitutional right to confrontation. Appellee counters that the testimony was not hearsay, as it was not offered for the truth of the matter asserted, but, rather, to explain the actions Best took in investigating appellant's alleged drug trafficking.

{¶30} Preliminarily, we note that during Best's testimony about the sale of the crack cocaine, he opined that $1,200 was too high a price to pay for half of an ounce. At that point, appellant raised a general hearsay objection to Best's previous testimony about what Jones had told him. Appellee argued that such testimony was not hearsay because it was not being offered for the truth of the matter asserted; rather, it was offered to demonstrate why Best took the actions he did. The trial court overruled appellant's objection, noting that the testimony offered by Best immediately preceding appellant's objection related only to Best's opinion about the price of the drugs, which was not hearsay. The court acknowledged that while some of Best's previous testimony concerning what Jones had told him may have been hearsay, the court was not going to rule on those matters because appellant had not objected to any of that testimony. The court stated that it would rule only on future hearsay objections. Later, appellant objected to Best's testimony about what Jones said to appellant when she called him to set up the powder cocaine sale. Appellant did not specify any grounds for the objection, and the trial court overruled it.

{¶31} Though defendant now maintains that Best's testimony about Jones' statements was inadmissible hearsay that violated his constitutional right of confrontation, he did not timely object to Best's testimony, nor did he assert a constitutional violation as

the basis of his objection. See Evid.R. 103(A)(1); *State v. Murphy* (2001), 91 Ohio St.3d 516, 532. Accordingly, appellant has waived all but plain error. *Barnes* at 27.

{¶32} In this case, Jones told Best that appellant engaged in drug trafficking and prostitution after Best told her he would not charge her with a crime if she agreed to provide information about that type of criminal activity. Jones later told Best that appellant would sell him drugs and she arranged a time and place for those transactions. Jones was certainly aware that her statements to Best about appellant's criminal enterprises would be used to prosecute appellant. As previously noted, statements made to police that describe illegal activities are considered to be testimonial. *Hart* at ¶22. Best's testimony about what Jones told him directly linked appellant to drug trafficking – the very thing appellee set out to prove. Jones' out-of-court statements named appellant directly as the person conducting the illegal activity, and appellant was denied the opportunity to cross-examine her. The testimony thus violated appellant's Sixth Amendment right to confront her accusers.

{¶33} However, the error did not affect the outcome of the trial. Best's testimony about what he overheard appellant tell Jones on the cell phone provided independent evidence of appellant's guilt on the trafficking in crack cocaine count. As pertinent here, R.C. 2925.03(A)(1) provides that "[n]o person shall knowingly * * * [s]ell or offer to sell a controlled substance[.]" If the drug involved in the sale is "cocaine or a compound, mixture, preparation, or substance containing cocaine," appellant may be convicted of trafficking in cocaine. R.C. 2925.03(C)(4). "Sale" includes delivery made by a "principal, proprietor, agent, servant, or employee." R.C. 2925.01(A) (incorporating definition found in R.C. 3719.01(A)(A)).

{¶34} As noted, Best testified that he listened in on the call and heard appellant say that he would not deliver any powder cocaine until he received his $1,200 payment for the crack cocaine he had already sold. Best further testified that when he spoke to appellant after he was arrested, he immediately recognized appellant's voice as the one he heard on the phone with Jones. In addition, the cell phone recovered from appellant's vehicle had the same number as the one Jones used to call Best. From this evidence, the jury could reasonably infer that appellant was the principal involved in the drug sale; thus, it was not plain error to admit Best's testimony regarding Jones' statements. The first assignment of error is overruled.

{¶35} In his second assignment of error, appellant argues his conviction for trafficking in crack cocaine is not supported by sufficient evidence and is against the manifest weight of the evidence. We disagree.

{¶36} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court examines the evidence in the light most favorable to the state and concludes whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78.

{¶37} In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks,* paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts

do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We may not disturb a verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶38} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25, citing *Thompkins* at 386. Under the manifest weight standard of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive–the state's or the defendant's? Id. at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶39} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the

conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶40} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶41} Appellant was convicted of trafficking in crack cocaine in an amount exceeding ten grams but less than 25 grams. As we have already stated, R.C. 2925.03(A)(1) provides that: "[n]o person shall knowingly * * * [s]ell or offer to sell a controlled substance." R.C. 2925.03(C)(4) provides that "[i]f the drug involved [in the sale] is cocaine or a compound, mixture, preparation, or substance containing cocaine," the offender is guilty of trafficking in cocaine. R.C. 2925.03(C)(4)(d) provides that if the sale involves crack cocaine in an amount equal to or exceeding ten grams but less than 25 grams, the offense is a second-degree felony.

{¶42} Appellant does not contend that the substance sold to Best was not crack cocaine, nor does he challenge the amount sold. Rather, appellant maintains that appellee failed to introduce evidence proving that he was the one who actually sold the crack cocaine to Best. Appellant contends that appellee provided no evidence that he delivered or handled the crack cocaine, and that the evidence demonstrated that it was Jones who actually conceived and conducted the drug sale.

{¶43} Appellant correctly contends that the record is void of any testimony or other direct evidence that he delivered or handled the crack cocaine. Thus, this case turns on circumstantial evidence. The Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-55. Indeed, circumstantial evidence may " 'be more certain, satisfying and persuasive than direct evidence.' " *State v. Ballew,* 76 Ohio St.3d 244, 1996-Ohio-81, quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 11.

{¶44} R.C. 2901.22(B) defines the culpable mental state of "knowingly" as follows: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." "[W]hether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d 555, 563. Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel* (May 1, 1988), 2nd Dist. No. 16221, citing *State v. Elliott* (1995), 104 Ohio App.3d 812.

{¶45} As noted, for purposes of R.C. Chapter 2925, "sale" is defined as including "delivery, barter, exchange, transfer, or gift, or offer thereof, and each transaction of those natures made by any person, whether as principal, proprietor, agent, servant, or employee." R.C. 2925.01(A) (incorporating definition found in R.C. 3719.01(A)(A)).

{¶46} Viewed in a light most favorable to the state, the circumstantial evidence presented at trial could convince the jury of appellant's guilt beyond a reasonable doubt. Although Jones actually delivered the crack cocaine to Best, circumstantial evidence demonstrated that appellant was the principal in the drug transaction, as he owned the drugs and benefited from the sale. Jones told Best that J.B. sold drugs out of his home at 418 South Terrace. She later called Best and told him that J.B. agreed to sell half of an ounce of crack cocaine for $1,200. That phone call was made from the cell phone recovered from appellant when he was arrested later that evening. Best testified that in his more than ten years' experience as an undercover police officer, he had never known a street prostitute such as Jones to possess that quantity of drugs for sale. After the sale, Best listened in on the phone call between Jones and J.B. and overheard J.B. repeatedly tell Jones that he would not deliver more drugs until he received the $1,200 from the earlier crack cocaine sale. When Jones convinced J.B. to deliver the drugs, SWAT officers watched appellant leave his home and arrive at the meeting place arranged by Jones and Best. Following his arrest, appellant told Best that he went by the initials J.B. This evidence was sufficient to establish appellant's guilt beyond a reasonable doubt.

{¶47} Appellant makes no additional argument in support of his manifest weight claim. Appellant argues that the evidence supported a finding that Jones, not he, sold the crack cocaine. For the same reasons his conviction is supported by sufficient evidence, the conviction is not against the manifest weight of the evidence. The jury had the opportunity to hear the direct and cross-examination testimony of each of the witnesses and determine their credibility. The weight to be given the evidence and the determination of witness credibility was within the province of the jury as trier of fact.

State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury was free to believe or disbelieve any or all of the testimony of any of the witnesses. *State v. Lipsey,* 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶15, citing *State v. Morris,* 10th Dist. No. 05AP-1139, 2009-Ohio-2396, ¶33. After careful review of the record in its entirety, we conclude there is nothing to indicate the jury clearly lost its way or that any miscarriage of justice resulted. As such, we cannot find that appellant's conviction for trafficking in crack cocaine is against the manifest weight of the evidence. Appellant's second assignment of error is overruled.

{¶48} Appellant's third assignment of error argues he was denied the effective assistance of counsel at trial. In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Accordingly, the burden of demonstrating ineffective assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343.

{¶49} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to succeed on his claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. Id. at 687. This requires a showing that counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. If appellant can

show deficient performance, he must next demonstrate that there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694.

{¶50} Appellant first contends that defense counsel was ineffective in failing to renew his objection to joinder of the indictments. As noted, appellee filed a pretrial motion to consolidate the indictments for trial. Appellant opposed the motion, arguing that "[t]o lump prostitution, personal drug use, and an undercover sex sting operation with alleged drug offenses that occurred at a later date" was manifestly prejudicial because the charges were not of the same or similar character, were not based on the same act or transaction, and did not constitute parts of a common scheme or plan.

{¶51} The trial court held a hearing on appellee's motion on March 11, 2008. Appellee argued that the charges stemming from the February and August 2007 incidents constituted parts of a common scheme or plan, or were part of a course of criminal conduct by appellant, that is, running a prostitution and drug trafficking enterprise. Appellee noted that the incidents were only six months apart, that at least one person (Jones) was involved in both incidents, and that appellant utilized the women who worked as prostitutes for him to traffic drugs. In response, appellant argued that the two cases were not related, as the February case involved allegations related only to prostitution and personal drug possession, whereas the August case involved allegations pertaining solely to drug trafficking. Appellant maintained that he would be prejudiced were the indictments tried together.

{¶52} Following argument, the trial court orally granted appellee's motion. In so doing, the court noted the potential for overlapping witnesses, appellee's theory that the

charges were of the same or similar character and were part of a course of conduct, and the fact that the rules of criminal procedure favor joinder of indictments for trial. The trial court memorialized its oral decision by journal entry filed April 30, 2008.

{¶53} At trial, defense counsel did not directly renew his objection to the joinder; however, he raised the issue indirectly during appellee's response to his Crim.R. 29 motion. In arguing that it had presented sufficient evidence to convict appellant on the promoting prostitution count, appellee cited, among other evidence, Nolan's testimony that appellant admitted during the interview following his arrest in August 2007 that he was at the hotel collecting money from the women who worked as prostitutes for him. Defense counsel objected on grounds that Nolan's testimony was not relevant to the promoting prostitution charge because Nolan was involved only in the drug trafficking incident, not the promoting prostitution incident. The trial court overruled the objection.

{¶54} We fail to see how defense counsel's performance fell below an objective standard of reasonable representation. Counsel filed a response to appellee's motion for joinder, setting forth arguments against joinder, and also made arguments at the hearing conducted by the trial court on appellee's motion. The trial court denied the motion after hearing arguments presented by appellee and defense counsel, and issued a decision providing its reasons for granting the motion. Even had defense counsel raised the issue more directly, the trial court would presumably have affirmed its prior decision because it had already considered the merits of appellee's motion prior to trial and had found joinder to be warranted in this case. The state of the case had not appreciably changed between that ruling and the trial, and therefore, any attempt by defense counsel to revisit the issue would have been futile. " 'Failure to do a futile act cannot be the basis for claims of

ineffective assistance of counsel, nor could such a failure be prejudicial.' " *State v. Henderson*, 8th Dist. No. 88185, 2007-Ohio-2372, ¶42, quoting *State v. Shannon* (June 16, 1982), 9th Dist. No. 10505.

{¶55} We further note that appellant could not have been prejudiced by counsel's failure to renew his objection because the trial court properly granted appellee's motion for joinder. Pursuant to Crim.R. 13, "[t]he court may order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment * * *." Crim.R. 8(A), in turn, provides that "[t]wo or more offenses may be charged in the same indictment * * * in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." The law generally favors joinder because it " 'conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.' " *State v. Walters,* 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶21, citing *State v. Daniels* (1993), 92 Ohio App.3d 473, quoting *State v. Thomas* (1980), 61 Ohio St.2d 223, 225.

{¶56} If two or more indictments are properly joined pursuant to Crim.R. 13, a defendant may still move to sever indictments pursuant to Crim.R. 14 if their consolidation will prejudice his rights. "If it appears that a defendant or the state is prejudiced by a * * * joinder for trial together of indictments * * * the court shall order an election or separate trial of counts * * * or provide such other relief as justice requires." Crim.R. 14.

{¶57} "When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced." *State v. Quinones,* 11th Dist. No. 2003-L-015, 2005-Ohio-6576, ¶38. "The accused must provide the trial court with sufficient information demonstrating that he would be deprived of the right to a fair trial if joinder is permitted." Id., quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 163. "The state may negate the defendant's claim of prejudice by demonstrating either of the following: (1) that the evidence to be introduced relative to one offense would be admissible in the trial on the other, severed offense, pursuant to Evid.R. 404(B); or (2) that, regardless of the admissibility of such evidence, the evidence relating to each charge is simple and direct." *Quinones* at ¶39, citing *Franklin* at 122. "The former is generally referred to as the 'other acts test,' while the latter is known as the 'joinder test.' " *Quinones* at ¶39, citing *Lott* at 163. "If the state can meet the joinder test, it need not meet the stricter 'other acts' test." *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276.

{¶58} Appellant contends he was prejudiced because the joinder permitted the jury to simultaneously consider evidence of all the offenses with which he was charged. Appellant argues that the consolidated trial resulted in the admission of other acts evidence that would not have been admissible had the indictments been tried separately, and that the jury used the accumulated evidence to convict him of all the charges. In particular, appellant contends that the jury relied upon evidence that appellant possessed crack cocaine in February 2007 to convict him of trafficking in crack cocaine in August 2007 and that the jury relied upon Nolan's testimony that appellant admitted to running a prostitution ring in August 2007 to convict him of promoting prostitution in February 2007.

{¶59} As noted, the state may contradict a defendant's claim of prejudice by demonstrating that regardless of the admissibility of other acts evidence, the evidence relating to each charge is simple and direct. Appellee so contends here, and we agree. Although both incidents involved Jones and appellant, the incidents took place six months apart, at separate locations. The February 2007 incident involved promoting prostitution and possession of crack cocaine occurred at appellant's home, while the August 2007 incident involved trafficking in crack cocaine occurred in a parking lot. The cases involved different police officers, who testified to their specific interactions with appellant. The record contains no indication that the jury was unable to segregate the proof as to the individual cases. Finally, appellant does not argue that he would have defended either case differently had the indictments not been joined. See *Johnson* at 110; *Franklin* at 123.

{¶60} Having determined that the evidence was direct and uncomplicated and capable of being segregated, we conclude there was no ineffective assistance of counsel arising from defense counsel's failure to renew his objection to joinder of the cases.

{¶61} Appellant also contends that trial counsel was ineffective in failing to object to testimony regarding the possibility of appellant "working off his charges." We disagree.

{¶62} Best testified that following appellant's arrest, he discussed with appellant the possibility that he would hold off filing charges against appellant if appellant agreed to provide information about his drug suppliers. More specifically, Best told appellant that "I'm the guy you're going to be working with * * * so you need to think about this if you want to do this." (Tr. 138.) Appellant initially indicated his willingness to work with police, and Best gave appellant his cell phone number. Appellant called Best on August 28,

2007 to discuss the arrangement. He also wrote Best a letter indicating that he would provide the names of two suspects who would be "just the beginning of your case." (State's exhibit No. 31, Tr. 141.) In response to the letter, Best called appellant on August 31, 2007. Appellant told Best he had the name of two suspects, whom he described as "big-time kilo dealers" who "would put feathers in [Best's] cap when the bust would happen." (Tr. 149.) Best told appellant he would meet with him to begin the process of becoming a confidential informant. For reasons unknown to Best, appellant ultimately decided not to work with the police.

{¶63} Appellant contends that Best's testimony was inadmissible as it constituted evidence of an offer to compromise, which is prohibited by Evid.R. 408, and/or evidence of a statement made during plea negotiations, which is prohibited by Evid.R. 410. Appellant maintains that defense counsel's failure to object to this inadmissible evidence amounted to ineffective assistance of counsel.

{¶64} As appellee points out, Evid. R. 408 applies only to civil cases. *State ex rel. Celebreeze v. Howard* (1991), 77 Ohio App.3d 387, 391. Thus, Evid.R. 408 does not apply here, and defense counsel was not ineffective in failing to object to Best's testimony on such grounds.

{¶65} Evid.R. 410 is similarly inapplicable. Evid.R. 410(A)(5) prohibits admission of "any statement made in the course of plea discussions in which counsel for the prosecuting attorney or for the defendant was a participant and that do not result in a plea of guilty or that result in a pleas of guilty later withdrawn." In *State v. Kidder* (1987), 32 Ohio St.3d 279, the Supreme Court of Ohio held that the accused's statements to police in which he asked if pending charges could be dropped if he was "straight up about

everything" did not contain an offer to plead guilty to any charge, nor did such statements indicate a serious effort at negotiating such a plea. Id. at 284, fn. 3. According to the court, admission of the accused's statements did not violate Evid.R. 410. We find the discussions between Best and appellant to be similar to those in *Kidder,* and conclude that such statements should not have been excluded inasmuch as Evid.R. 410 is "not intended to be used to hamper police at such an early investigatory stage." Id. at 285. As the statements were not inadmissible under Evid.R. 410, defense counsel was not ineffective in failing to object to them.

{¶66} Finally, appellant contends trial counsel was ineffective in failing to object to the hearsay testimony of Lazar and Best regarding what Jones said to them. Assuming, arguendo, that counsel was ineffective in failing to object to the testimony, appellant has failed to prove that he was prejudiced by such ineffectiveness. As we noted previously, evidence other than the detectives' recitation of Jones' statements convincingly established appellant's guilt on all counts. Thus, no reasonable probability exists that, but for counsel's errors, the result of the trial would have been different. The third assignment of error is overruled.

{¶67} Having overruled each of appellant's three assignments of error, this court hereby affirms the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

TYACK, P.J., and McGRATH, J., concur.

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