**[Cite as *State v. Chandler*, 2011-Ohio-3485.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee/ Cross-Appellant, | : | No. 10AP-972 |
| v. | : | (C.P.C. No. 10CR01-224) |
| Jerry D. Chandler, | : | (REGULAR CALENDAR) |
| Defendant-Appellant/ Cross-Appellee. | : | |
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D E C I S I O N

Rendered on July 14, 2011

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*Ron O'Brien,* Prosecuting Attorney*,* and *Sarah W. Creedon*, for appellee/cross-appellant.

*Blaise G. Baker*, for appellant/cross-appellee.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

**{¶1}** Defendant-appellant, Jerry D. Chandler, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Plaintiff-appellee, the State of Ohio, appeals from the same judgment. For the following reasons, we affirm appellant's convictions and sentence. However, because the trial court awarded appellant more jail-time credit then permitted by law, we reverse in part the judgment and remand the matter with instructions.

**Factual and Procedural Background**

**{¶2}** On January 13, 2010, a Franklin County grand jury indicted appellant with nine charges arising from an armed robbery. Appellant entered a not guilty plea to the charges and proceeded to a jury trial. The jury found appellant guilty of one count of robbery in violation of R.C. 2911.12 with a firearm specification and one count of having a weapon while under disability in violation of R.C. 2923.13. The trial court sentenced appellant accordingly, awarding appellant 255 days of jail-time credit.

**{¶3}** Appellant appeals and assigns the following errors:

> ASSIGNMENT OF ERROR NO. 1: THE FAILURES OF APPELLANT'S TRIAL COUNSEL CONSTITUTED INEFFECTIVE ASSISTANCE, THEREBY DEPRIVING APPELLANT OF HIS RIGHTS AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.
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> ASSIGNMENT OF ERROR NO. 2: THE TRIAL COURT ERRED WHEN IT IMPROPERLY EXPOSED THE JURY TO INADMISSIBLE HEARSAY IN VIOLATION OF THE OHIO RULES OF EVIDENCE.

**{¶4}** The state also appeals and assigns one error:

> THE TRIAL COURT ERRED WHEN IT RECOGNIZED JAIL TIME CREDIT TOWARD DEFENDANT'S FELONY CASE FOR TIME DEFENDANT HAD SPENT SERVING A MISDEAMEANOR JAIL SENTENCE IN ANOTHER CASE.

**Appellant's First Assignment of Error - Ineffective Assistance of Counsel**

**{¶5}** Appellant contends in this assignment of error that he received ineffective assistance of trial counsel. We disagree.

**{¶6}** To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶133 (citing

*Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069) ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

**{¶7}** In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶204.

**{¶8}** Appellant contends that his trial counsel was ineffective for failing to object to testimony from Jeramie Barnes, the robbery victim, that appellant fired a gun during the robbery. (Tr. 72.) Appellant claims that he would not have been found guilty of the firearm specification in this case absent that testimony. We disagree.

**{¶9}** While appellant argues that trial counsel should have objected to one instance of Barnes' testimony where he testified that appellant fired a gun, he does not argue why that portion of his testimony was legally objectionable. Moreover, Barnes stated at other points in his testimony that appellant had a gun during the robbery and that he fired that gun. (Tr. 46-47, 51-55, 75-76.) Accordingly, even if trial counsel was deficient for not objecting to the one portion of Barnes' testimony, and assuming an

objection would have been meritorious, other testimony supported appellant's firearm specification conviction. Therefore, because the result of the proceeding would not have been different, appellant cannot demonstrate prejudice.

**{¶10}** Appellant does not demonstrate that he received ineffective assistance of counsel. Accordingly, we overrule appellant's first assignment of error.

**Appellant's Second Assignment of Error - Hearsay Testimony**

**{¶11}** In this assignment of error, appellant contends the trial court improperly allowed two instances of hearsay testimony. We disagree.

**{¶12}** Hearsay is defined 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." Evid.R. 801(C). Hearsay is inadmissible unless an exception applies. Evid.R. 802.

**{¶13}** Appellant first argues that the trial court allowed hearsay testimony from Columbus Police Officer Bryan Mason. We disagree. Officer Mason testified that he talked to a person who witnessed the events about the possible location of a suspect. Officer Mason testified that after he talked to the witness, he went up some stairs and began knocking on doors to see if other people had observed anything. Officer Mason did not repeat any statements made to him by the witness. Thus, there was no hearsay testimony admitted by the trial court. *State v. Taggart* (Dec. 20, 1993), 12th Dist. No. CA93-05-089 (detective's testimony that witness provided him with probable cause not hearsay because detective did not repeat an out-of-court statement); *State v. Wellman*, 10th Dist. No. 05AP-386, 2006-Ohio-3808, ¶16 (no hearsay because no out-of-court statement); *State v. Keith*, 3d Dist. No. 1-06-46, 2007-Ohio-4632, ¶56 (no hearsay testimony admitted because detective did not repeat any out-of-court statements).

**{¶14}** Second, appellant argues that Columbus Police Sergeant Mark Lang improperly testified regarding statements made to him by Officer Mason. Sergeant Lang testified that he responded to the scene of the events because Officer Mason told him "that they had some issues over there" and that they had a robbery where "a couple of gunshots were fired at the victim, and they thought that they had an apartment where the suspects were in and they were not coming out of that apartment." (Tr. 175.)

**{¶15}** Appellant's trial counsel did not object to this testimony. Therefore, appellant has forfeited all but plain error. *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶31. 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 justice.' " *Barnes (*quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus).

**{¶16}** Appellant has failed to demonstrate plain error regarding the admission of this alleged hearsay testimony. First, the statements were arguably admissible, because in general, statements offered to explain a police officer's conduct while investigating a crime are not hearsay because they are not offered for their truth, but, rather, are offered as an explanation of the process of investigation. *State v. Bartolomeo*, 10th Dist. No.

08AP-969, 2009-Ohio-3086, ¶17; *State v. Harris*, 10th Dist. No. 04AP-612, 2005-Ohio-4676, ¶20. Sergeant Lang testified about Officer Mason's statements to explain his appearance at the crime scene, not for the truth of the matter asserted. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶117 (officer's testimony offered to explain opening of investigation not hearsay). Additionally, appellant does not demonstrate that the outcome of his trial would have been different had the statements not been admitted. Sergeant Lang's comments did not even link appellant to the crimes; the eyewitness's testimony overwhelmingly accomplished this. *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956, ¶26.

**{¶17}** For all these reasons, we overrule appellant's second assignment of error.

**State's Cross-Assignment of Error - Jail-Time Credit**

**{¶18}** In appellant's sentencing entry, the trial court awarded him 255 days of jail-time credit. The state contends that 169 of the 255 days of jail-time credit should not have been awarded to appellant because he was serving a sentence in another case during that time. We agree.

**{¶19}** Jail-time credit is prescribed by R.C. 2967.191, which authorizes jail-time credit for "the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced." Therefore, R.C. 2967.191 requires a connection between the jail-time confinement and the offense upon which the defendant is convicted. *State v. Slager*, 10th Dist. No. 08AP-581, 2009-Ohio-1804, ¶25 (citing *State v. Hunter*, 10th Dist. No. 08AP-183, 2008-Ohio-6962, ¶17). Accordingly, "[t]here is no jail-time credit for time served on unrelated offenses, even if that time served runs concurrently during the pre-detention phase of another matter." *Hunter* at ¶20.

**{¶20}** Appellant was arrested for the instant offenses and placed in custody on January 4, 2010. He did not leave jail after that date. Under those circumstances, appellant would normally be entitled to jail-time credit for those days. However, according to the trial court's presentence investigation report, appellant committed the instant offenses while on community control from a prior conviction. As a result of the instant offenses, appellant's community control was revoked and he was ordered to serve 169 days in jail to fulfill his sentence for that prior conviction.

**{¶21}** Although he was still awaiting trial in this case, appellant spent 169 days serving a sentence for an unrelated offense. Accordingly, he is not entitled to receive credit for those days in this case, and the trial court erred in awarding that time to appellant. Id. at ¶20; *State v. Marini*, 5th Dist. No. 09-CA-6, 2009-Ohio-4633, ¶15-22. Therefore, we sustain the state's cross-assignment of error.

**{¶22}** In conclusion, we overrule appellant's two assignments of error and affirm appellant's convictions and sentence. We sustain the state's lone cross-assignment of error. Accordingly, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas and remand the matter to that court with instructions to correct its award of jail-time credit in accordance with law and this decision.

*Judgment affirmed in part and reversed in part; and cause remanded with instructions.*

BRYANT, P.J., and SADLER, J., concur.