[Cite as *State v. Zeune*, 2011-Ohio-5170.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1102
v.	:	(C.P.C. No. 09CR08-4919)
Rodney D. Zeune,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 6, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Rodney D. Zeune, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm in part and reverse in part that judgment and remand the matter for resentencing.

{¶2} On August 18, 2009, a Franklin County Grand Jury indicted appellant with a single count of trafficking in cocaine in violation of R.C. 2925.03. Appellant entered a not guilty plea and proceeded to a jury trial. On the morning of trial, the state elected to

proceed against appellant for complicity in trafficking. Although appellant's trial counsel objected, he did not accept the trial court's offer of a continuance because, as counsel candidly conceded, "I can't stand here and say that our preparation for the defense did not also include the possibility [of complicity]." (Tr. 7.)

{¶3} At trial, Ayman Musleh testified that he and appellant had been friends for years. He and appellant often used cocaine together and Musleh sometimes bought cocaine from appellant. In 2009, Musleh became a confidential informant for the Mt. Vernon Police Department after he was arrested on a drug possession charge. Musleh agreed to do a "controlled buy" of cocaine from defendant who was a "person of interest" in a Drug Enforcement Agency ("DEA") task-force investigation. Sometime thereafter, Musleh arranged to buy an ounce of cocaine from appellant. On March 5, 2009, after appellant changed the meeting location several times, Musleh and appellant met at a Staples office supply store and then immediately drove in Musleh's car to an apartment complex near the Columbus airport. Authorities had wired Musleh's car with a listening device so they could hear what transpired. On the way to the apartment complex, appellant called Rayshon Alexander to tell him they were on their way. Shortly after arriving at the apartment complex, Alexander approached the vehicle. Musleh gave appellant the money to buy the cocaine and then appellant gave that money to Alexander. Alexander gave the cocaine to appellant, who handed it to Musleh. Musleh and appellant then drove away.

{¶4} The jury found appellant guilty of complicity in trafficking and the trial court sentenced him accordingly.

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

> [1]. RODNEY ZEUNE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.
>
> [2]. THE TRIAL COURT ERRED WHEN IT FAILED TO SUA SPONTE ORDER A MISTRIAL.
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> [3]. THE TRIAL COURT DENIED MR. ZEUNE DUE PROCESS WHEN IT IMPOSED A SENTENCE PUNISHING HIM FOR EXERCISING HIS RIGHT TO A JURY TRIAL.
>
> [4]. THE TRIAL COURT ERRED WHEN IT IMPOSED AN UNLAWFUL SENTENCE.
>
> [5]. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE AFFIRMATIVE DEFENSE OF ENTRAPMENT THEREBY DEPRIVING THE DEFENDANT OF A FAIR TRIAL AS REQUIRED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION.

{¶6} For ease of analysis, we will address appellant's assignments of error out of order.

Appellant's Second Assignment of Error—Sua Sponte Mistrial

{¶7} Appellant argues in this assignment of error that the trial court erred by failing to sua sponte declare a mistrial. We disagree.

{¶8} A mistrial should not be ordered in a criminal case merely because an error or irregularity has occurred. Rather, a mistrial is appropriate only when the substantial rights of the accused are adversely affected such that a fair trial is no longer possible. *State v. Reynolds* (1988), 49 Ohio App.3d 27. A trial court may grant a mistrial sua sponte when there is manifest necessity for the mistrial or when the ends of public justice would otherwise be defeated. *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶30 (citing *Cleveland v. Walters* (1994), 98 Ohio App.3d 165, 168). The failure to

grant a mistrial sua sponte is judged under a plain error standard. Id. (citing *State v. Jones* (1996), 115 Ohio App.3d 204, 207).

{¶9} 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*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. 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).

{¶10} Appellant argues that the trial court should have sua sponte declared a mistrial after his trial counsel stated in opening statement that appellant shared the intent of the buyer by facilitating the purchase of drugs but he did not share the intent of the seller to sell drugs. According to appellant, this statement was a concession of guilt and required the trial court to sua sponte declare a mistrial. We disagree.

{¶11} To convict a person of trafficking in violation of R.C. 2925.03, the state must prove that the person knowingly sold or offered to sell a controlled substance in a certain amount. Id. Here, the state elected to proceed against appellant on a theory of complicity in trafficking. R.C. 2923.03(F). The complicity statute, R.C. 2923.03, provides in relevant part: "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * Aid or abet another in committing the

offense." R.C. 2923.03(A)(2). To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime. *State v. Johnson,* 93 Ohio St.3d 240, 245, 2001-Ohio-1336.

{¶12} During the direct examination of the state's first witness, the trial court interrupted the proceedings and held a conference with counsel in chambers. This conference was off the record. Following this in-chambers conference, and outside the presence of the jury, the trial court went back on the record. Appellant's trial counsel stated that the trial court advised him that a "more specific [jury] instruction" on complicity may be more appropriate in this case. (Tr. 73.) The trial court then expressed its belief that defense counsel's theory might not be a viable defense because "complicity" only requires that "one who acts with the intent that a transaction with a controlled substance takes place, does some act in furtherance of that intent, i.e., arranging for a seller, whether or not the person who does that received any remuneration, is sufficient to convict." (Tr. 77-78.) Regardless of whether this statement by the trial court was a complete and accurate statement of the law, the trial court did not commit plain error by not sua sponte declaring a mistrial at that point during the trial.

{¶13} Contrary to appellant's assertion, appellant's trial counsel did not concede his client's guilt in opening statement. In fact, appellant's trial counsel asserted in his opening statement that the evidence would not support the state's theory that appellant was complicit in drug trafficking. The defense theory was that appellant did not assist the

seller and, therefore, he should be acquitted. Although the trial court questioned whether trial counsel's defense theory was viable given the trial court's view of the applicable law, there was no basis for the trial court to sua sponte declare a mistrial.

{¶14} In essence, the discussion between appellant's trial counsel and the trial court following the conference in chambers concerned the substance of the jury instruction that the trial court anticipated it would give on complicity to drug trafficking. That discussion took place during the early stages of the trial and outside the presence of the jury. The precise jury instructions on the applicable legal standards were yet to be determined. We cannot say that a fair trial was impossible at that point in time.

{¶15} Moreover, we also cannot say that the defense theory expressed in trial counsel's opening statement was untenable. Even under the legal standard expressed by the trial court at that point in time, complicity to drug trafficking required some connection between appellant and the seller. Here, defense counsel's theory was that there was an insufficient connection between appellant and the seller. This case does not present the type of exceptional circumstance that requires the recognition of plain error to prevent a manifest miscarriage of justice. Therefore, we overrule appellant's second assignment of error.

Appellant's Fifth Assignment of Error—Jury Instructions

{¶16} In this assignment of error, appellant contends that the trial court should have instructed the jury on the defense of entrapment. We disagree.

{¶17} Appellant's trial counsel did not request an entrapment instruction or otherwise object to the trial court's failure to provide such an instruction. Accordingly, we

review this assignment of error under a plain error analysis. *State v. Cunigan* (Sept. 22, 2000), 2d Dist. No. 17924.

{¶18} Entrapment is an affirmative defense. *State v. Doran* (1983), 5 Ohio St.3d 187, 193. To be entitled to a jury instruction on an affirmative defense, a defendant must introduce sufficient evidence that, if believed, would raise a question in the minds of reasonable jurors as to the existence of such an issue. *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus. A trial court does not err in refusing to instruct on an affirmative defense where the evidence is insufficient to support the instruction. *State v. Daniels*, 10th Dist. No. 09AP-976, 2010-Ohio-3745, ¶22.

{¶19} A defendant establishes the defense of entrapment "where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." *Doran* at paragraph one of the syllabus; *State v. Armstead* (2000), 138 Ohio App.3d 866, 871. The state does not have the burden to establish the defendant's predisposition to commit the offense, since entrapment is an affirmative defense. *State v. Pack*, 4th Dist. No. 09CA26, 2009-Ohio-6960, ¶10. Therefore, the defendant asserting an entrapment defense must present evidence supporting his lack of predisposition. Id. (citing *Doran* at 193).

{¶20} Appellant argues that he was not predisposed to traffic in drugs because Musleh requested to purchase drugs from appellant on multiple occasions. We disagree. Musleh testified that appellant sold him drugs on a number of prior occasions. While Musleh did call appellant a number of times to arrange this particular drug purchase, Musleh did not indicate that appellant ever expressed an unwillingness to sell

him drugs. Rather, Musleh testified that appellant kept telling him that he was too busy to meet him. This evidence does not suggest that appellant had to be convinced to engage in this conduct.

{¶21} Because appellant did not present sufficient evidence to warrant an entrapment instruction, the trial court did not err, let alone plainly err, by failing to give such an instruction to the jury. Appellant's fifth assignment of error is overruled.

Appellant's Third and Fourth Assignments of Error—Sentencing

{¶22} We address these assignments of error together because they both address the sentence appellant received. The trial court sentenced appellant to four years in prison, imposed a $5,000 fine, ordered him to pay restitution to the DEA, and suspended his drivers license for four years. The trial court also notified appellant that he was subject to an optional period of post-release control.

{¶23} In his third assignment of error, appellant contends that the trial court punished him more severely for exercising his right to a trial by jury. We disagree.

{¶24} A trial court may not punish a defendant who exercises his or her right to a trial. *State v. O'Dell* (1989), 45 Ohio St.3d 140, at paragraph two of the syllabus; *Columbus v. Bee* (1979), 67 Ohio App.2d 65, 75. If courts could punish defendants for exercising their constitutional right to a jury trial, the right would be impaired by the chilling effect. *State v. Scalf* (1998), 126 Ohio App.3d 614, 621; *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072.

{¶25} A trial court must avoid creating the appearance that it enhanced a defendant's sentence because he elected to go to trial. *State v. Morris*, 159 Ohio App.3d 775, 2005-Ohio-962, ¶13 (citing *Scalf* at 621). Thus, when a trial court makes statements

that give rise to the inference that a defendant may have been punished more severely because of his assertion of the right to trial by jury, that sentence must be vacated unless the record also contains an unequivocal statement that the defendant's decision to go to trial was not considered in imposing the sentence. Id. (citing *Scalf* at 621).

{¶26} Appellant points to a portion of his sentencing hearing in which he claims the trial court expressed its intent to punish him for going to trial. Specifically, appellant had just spoken to the trial court and said how humbled he had been (apparently because of this conviction). The trial court did not believe appellant and chided him for not taking responsibility for his conduct:

> * * * [I]t was explained to him that he was responsible, that he did aid and abet the sale, and [appellant] not once, but twice refused to take responsibility. And I told him at the time taking responsibility for your actions is the first step to rehabilitation and he refused to do that.
>
> * * *
> So, for [appellant] now to say, oh, I am totally sorry and humbled, and I take full responsibility. I don't believe it. Why? Because he still wanted to roll the dice with the jury which he did. And now once the jury has convicted him, now he wants to take the responsibility. And this Court does not buy it.

(Oct. 21, 2010 Tr. 13-14.)

{¶27} We do not agree that these statements give rise to an inference that the trial court punished appellant for going to trial. The statements indicate that the trial court did not believe appellant was genuinely remorseful about his conduct, a factor that trial courts consider in determining an appropriate sentence. R.C. 2929.12.

{¶28} Even if the trial court's statements could be construed to infer a punitive intent, the trial court's next statement clearly eliminates that inference: "I never punish anybody for taking a trial and I never will." (Tr. 14.) This unequivocal statement indicates

that appellant's decision to go to trial was not considered by the trial court in its sentencing decision. Accordingly, appellant has not demonstrated that the trial court punished him for going to trial. We overrule his third assignment of error.

{¶29} Appellant's fourth assignment of error concerns two other aspects of his sentence. He first contends that the trial court erred when it imposed a non-mandatory prison sentence. The state agrees that appellant's prison sentence was mandatory. We also agree. A third-degree felony trafficking conviction carries a mandatory prison term. See R.C. 2925.03(C)(4)(d); R.C. 2929.13(F)(5). Therefore, the trial court erred when it entered a judgment indicating that the prison term imposed was not mandatory.

{¶30} Appellant also contends that the trial court erred because it imposed a four-year prison term sentence under the mistaken belief that appellant would be eligible for judicial release. According to appellant, the trial court might have imposed a lesser sentence if it had realized that appellant was not eligible for judicial release. It is undisputed that appellant was not eligible for judicial release. R.C. 2929.20(A)(1)(a)(i). Because it is unclear what sentence the trial court might have imposed had it realized that appellant was not eligible for judicial release, and because appellant's prison term was mandatory, we sustain appellant's fourth assignment of error.

Appellant's First Assignment of Error—Ineffective Assistance of Counsel

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

{¶32} 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* at 697; 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.").

{¶33} 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* at 689; 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.

{¶34} Appellant first contends that his trial counsel was ineffective by giving up on his defense theory after the trial court expressed concerns about the viability of that theory. We disagree.

{¶35} Defense counsel's theory, as explained earlier, was that appellant could not be complicit in drug trafficking because he did not intend to assist the seller in the sale, he only intended to assist the buyer. Even though the trial court expressed concern about the viability of that theory based upon its view of the law, trial counsel did not jettison this defense theory. In his closing argument, defense counsel argued that appellant was not guilty because he did not have the intent to sell drugs and that the crime of complicity

required the "same intent" as the seller. (Tr. 368-69, 373.) The instructions that the trial court ultimately gave the jury on complicity to drug trafficking left this argument open to defense counsel. Thus, appellant's premise that his trial counsel abandoned his defense theory is incorrect.

{¶36} Appellant also argues that his trial counsel was ineffective because he essentially conceded appellant's guilt. The record does not support that argument. Defense counsel never conceded appellant's guilt. Quite the contrary, he argued that appellant was not guilty because appellant's intent was not complicit with that of the seller. The fact that the jury rejected the defense theory and found appellant guilty of complicity to drug trafficking does not establish that defense counsel was ineffective.

{¶37} Appellant also contends that his trial counsel was ineffective for not requesting a mistrial after the trial court expressed concerns about his defense theory. Again, we disagree. The decision not to request a mistrial is one of trial strategy best left to trial counsel. *State v. Seiber* (1990), 56 Ohio St.3d 4, 12. Such decisions are not lightly second-guessed by this court. Id.; *State v. Stockwell* (Feb. 26, 2002), 8th Dist. No. 78501. Because appellant's substantial rights were not adversely affected by his trial counsel's opening statement, we fail to see any basis for a mistrial. Therefore, trial counsel was not ineffective for failing to move for a mistrial.

{¶38} Finally, appellant argues that trial counsel was ineffective for not requesting a jury instruction on the defense of entrapment. We have already determined that the evidence at trial did not warrant such an instruction. Therefore, counsel was not ineffective for failing to request the instruction because the request would have been denied. *State v. Cobb*, 11th Dist. No. 2007-P-0004, 2007-Ohio-5614, ¶27 (counsel not

ineffective for failing to request entrapment instruction where defendant was not entitled to instruction).

{¶39} Appellant has not demonstrated that he received ineffective assistance of trial counsel. Accordingly, we overrule his first assignment of error.

Conclusion

{¶40} We overrule appellant's first, second, third, and fifth assignments of error. We sustain appellant's fourth 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 for resentencing.

Judgment affirmed in part; reversed in part; and case remanded for resentencing.

BRYANT, P.J., and BROWN, J., concur.