[Cite as *State v. Gullick*, 2013-Ohio-3342.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-26 (C.P.C. No. 09CR-3359)
Kevin Gullick,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 30, 2013

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

Barnhart Law Office LLC, and *Robert B. Barnhart*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Kevin Gullick is appealing from his conviction on a charge of possession of drugs in violation of R.C. 2925.11. He assigns two errors for our consideration:

> [I.] THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT PERMITTED A WITNESS TO TESTIFY ABOUT INADMISSIBLE HEARSAY IN VIOLATION OF OHIO EVIDENCE RULE 802 AND APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> [II.] APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHT TO COUNSEL, DUE PROCESS, AND A FAIR TRIAL

> GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶ 2} Since defense counsel at the trial did not object to the evidence referenced in the first assignment of error, we must apply a plain error standard.

{¶ 3} To constitute plain error, the error must be obvious on the record, palpable, and fundamental such that it should have been apparent to the trial court without objection. See *State v. Tichon*, 102 Ohio App.3d 758, 767 (9th Dist.1995). Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166 (1996). Notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83 (1995); *State v. Ospina*, 81 Ohio App.3d 644, 647 (10th Dist.1992).

{¶ 4} Applying this standard, we must review the evidence presented at the trial to determine if the evidence referenced was inadmissible if a proper objection had been made and if the outcome of the trial would have been different had the proper objection been made.

{¶ 5} Reynoldsburg Ohio police accompanied by Columbus Ohio police conducted a search of 1947 Fountainview Court in that city on October 10, 2008. Controlled substances were found. The issue for a trial then became whether Kevin Gullick possessed those controlled substances. Possess or possession is defined in R.C. 2925.01(K) as follows:

> "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

{¶ 6} Police had been informed that controlled substances were being sold out of the Fountainview address and, as a result, had an undercover informant make a controlled buy at that location. Reynoldsburg police developed a person called "OG" as a suspect. Detective Tye Downard testified at the trial that Gullick was "OG." Detective Downard had seen Gullick enter the residence without knocking or using a key.

{¶ 7} Letters found at the Fountainview address were addressed to Gullick and to "OG." Gullick's picture was hanging in the master bedroom at the address. These items and Detective Downard's observations clearly indicated that Gullick had access to the Fountainview address, but more was required to establish that Gullick had actual control over the controlled substances found upon the execution of the search warrant to meet the statutory definition of possess or possession.

{¶ 8} That "more" was provided by pictures taken at the time of the search and other evidence developed at that time. Large plastic bowls of cash were clearly visible in a closet. Gullick was physically present at the time of the search, but so were four other people.

{¶ 9} The crack cocaine found at the residence was at various locations. One was in a kitchen drawer. Also in that drawer was the box for a digital scale and sandwich baggies with the corner cut off. Also in the kitchen area was a paper plate with white specs of crack cocaine, a digital scale, and knotted up baggies of crack cocaine.

{¶ 10} The master bedroom, which had Gullick's picture hanging over the television, had a large baggie containing individually wrapped baggies of crack cocaine. Also in the master bedroom were the large plastic containers of $5 bills and $1 bills. A safe in the master bedroom contained approximately $200 in cash, the magazine for a 9 mm firearm, and several individual baggies of crack cocaine. Several documents in the bedroom were notes or letters written to Gullick as "OG" and from Gullick signed "OG."

{¶ 11} In brief, Gullick had extensive ties to the residence which far exceeded "mere access." The evidence that he was "OG" far exceeded the inference that the confidential informant who executed the controlled buy said OG sold him the controlled substance purchased. This was the "inadmissible hearsay" referenced in the first assignment of error and the testimony arguably in violation of Gullick's right to confront the witnesses against him.

{¶ 12} The failure of defense counsel to object to that one small indication that Gullick was "OG" selling controlled substances from 1947 Fountainview Court could not have affected the outcome of the trial.

{¶ 13} The first assignment of error is overruled.

{¶ 14} For similar reasons, trial counsel could not be seen as rendering ineffective assistance of counsel for purposes of the Sixth Amendment to the U.S. Constitution. The seminal case is *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires some proof that counsel's performance was so deficient that the fairness of the trial was in question. That did not happen here.

{¶ 15} The second assignment of error is overruled.

{¶ 16} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.