[Cite as *State v. Luna*, 2009-Ohio-3421.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-04-115
	:	O P I N I O N
- vs -		7/13/2009
	:	
FORTINO ALVAREZ LUNA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-01-0128

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Fortino Alvarez-Luna, appeals his conviction in the Butler County Court of Common Pleas on one second-degree felony count of drug trafficking while in the vicinity of a juvenile in violation of R.C. 2925.03(A)(2). We affirm the judgment of the trial court.

{¶2} On December 13, 2007, the West Chester Township Police Department obtained a search warrant for 4397 Leeds Point Court, apartment number 272, Hamilton, Ohio. The warrant was obtained based upon information received from the

Texas State Police, and through surveillance by the West Chester Township Police Department, which indicated that appellant, who resided at the apartment, was involved in the trafficking of marijuana.

{¶3} Upon executing the warrant, the officers located five individuals in the living room of the apartment, including appellant and a ten-month-old child. As they searched the apartment for contraband, the officers detected a strong odor of marijuana coming from the northeast bedroom of the apartment. This bedroom was later determined to be occupied by appellant. Upon searching a walk-in closet in the bedroom, the officers discovered two black trash bags underneath a table. One bag contained 22 small plastic sandwich bags, each filled with approximately one-half pound of marijuana. Upon opening the second bag, the officers discovered a cardboard box containing a large bulk amount of marijuana. A further search of the closet revealed two additional sandwich bags of marijuana, and several empty sandwich bags were also found on top of the table. Later laboratory analysis revealed that 13,238.2 grams of marijuana (approximately 29 pounds) were removed from the closet in appellant's bedroom.

{¶4} On February 13, 2008, appellant was indicted on one count of trafficking in marijuana in an amount equal to or exceeding 5,000 grams, but less than 20,000 grams, while in the vicinity of a juvenile, in violation of R.C. 2925.03(A)(2), a felony of the second degree.

{¶5} Appellant moved to suppress the evidence seized from his apartment, arguing that the search warrant lacked probable cause because it was based on unreliable hearsay from a confidential informant. The court overruled appellant's motion, finding, in part, that based on the information set forth in the affidavit, there was "ample basis" for the issuing judge to find the confidential informant reliable. Following

a jury trial on March 10, 2008, appellant was convicted of the trafficking charge.

{¶6} Appellant filed a motion for a new trial on March 24, 2008, arguing that he was substantially prejudiced as a result of alleged prosecutorial misconduct in the state's closing argument. At a hearing held on the day of sentencing, the court overruled appellant's motion and sentenced him to seven years in prison.

{¶7} Appellant appeals his conviction, advancing four assignments of error for our review. For ease of discussion, appellant's assignments of error will be addressed out of order.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO GRANT APPELLANT'S MOTION TO SUPPRESS."

{¶10} In his first assignment of error, appellant argues that the trial court erred in denying his motion to suppress evidence recovered from his apartment pursuant to the search warrant. Specifically, appellant contends that the warrant was not supported by probable cause because the affidavit submitted by Detective David Stromberg of the West Chester Township Police Department contained uncorroborated hearsay from a confidential informant. We find this argument unpersuasive.

{¶11} Pursuant to Crim.R. 41(C), a judge may issue a search warrant only upon a finding that "probable cause for the search exists." In determining whether probable cause exists to support the issuance of a warrant, courts employ a "totality-of-the-circumstances" test, which requires an issuing judge "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit * * * including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Moore*, Butler App. No. CA2005-08-366, 2006-

Ohio-4556, ¶11, quoting *State v. George* (1989), 45 Ohio St.3d 325, 329.

{¶12} When reviewing a finding of probable cause in a search warrant affidavit, reviewing courts "may not substitute their own judgment for that of the issuing magistrate by conducting a *de novo* (emphasis sic) determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court would issue the search warrant. On the contrary, reviewing courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *George* at 330. "The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Moore* at ¶12.

{¶13} With regard to hearsay information in a search warrant application, Ohio courts have determined that hearsay evidence is relevant to a probable cause determination. Id. at ¶13. Where a confidential or anonymous informant is the source of the hearsay, there must be some basis in the affidavit to indicate the informant's credibility, honesty or reliability. See *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380, ¶20. An affidavit containing detailed information from informants (permitting an inference that illegal activity was personally observed by the informants), police corroboration of an informant's [information] through its own independent investigation, or additional testimony by the affiant helps to bolster and substantiate the facts contained in the affidavit." Id., citing *State v. Ingram* (Sept. 26, 1994), Butler App. No. CA94-03-076, at 4-5.

{¶14} Detective Stromberg's affidavit contained the following pertinent facts: On December 13, 2007, he was contacted by Sergeant Coy of the Narcotics Service Unit of the Texas State Police. Sergeant Coy informed him that after a lengthy investigation, appellant was identified as being the "overseer of the financial transactions" for the

smuggling operations of large quantities of marijuana. Sergeant Coy's eight-page narrative describing the Texas investigation was attached to Detective Stromberg's affidavit in support of the warrant request.

{¶15} Sergeant Coy related to Detective Stromberg that on November 29, 2007, he was advised by a confidential informant, identified as "C.I. #1," about the criminal activities of an individual named Mario Alberto Lopez of Waco, Texas. According to Coy, the informant had provided specific information about Lopez, including the color and registration number of Lopez's vehicle. This information was subsequently verified by Coy. The informant also provided Coy with the details of a recent smuggling operation involving both Lopez and appellant, during which the informant was arrested for possession of 55 pounds of marijuana.

{¶16} The informant advised Coy that on November 23, 2007, he and appellant had traveled together to McAllen, Texas, in a van rented by the informant with funds provided by Lopez. The van was to be used to transport a shipment of marijuana back to Waco on the following day. The informant told Coy that appellant "never traveled with the shipments of marijuana," and that appellant was "only involved in the money or financial operations of the smuggling organization."

{¶17} The informant also told Coy that appellant drove a brown 1994 GMC truck with a California license plate. The informant advised that appellant was believed to be from Ohio, and while overseeing the drug operations in Texas, frequently stayed at the Kingsway Inn located at 1H and 17th Street in Waco. According to the informant, appellant had also requested that the informant travel to Ohio with him.

{¶18} On the day the shipment of marijuana was to be transported, appellant advised the informant that he would be following him as the informant drove the rental van through the border patrol checkpoint at Falfurrias, Texas. A drug detection dog

alerted to the van, and the informant was arrested and subsequently charged with marijuana possession.

{¶19} Verifying appellant's involvement in the smuggling operation, Detective Stromberg averred that Sergeant Coy personally examined the records from the Kingsway Inn and had observed appellant's name in the occupancy records. The records also indicated that appellant paid cash for his visits and had provided the inn with his 4397 Leeds Point Court, Hamilton, Ohio address. Through its own investigation, the West Chester Township Police Department determined that appellant's name was on the lease for the apartment, and while conducting surveillance on December 13, 2007, observed a brown 1994 GMC truck with a California license plate number matching the number provided by the informant parked outside 4397 Leeds Point Court. A male Hispanic person was seen exiting the truck and entering apartment number 272.

{¶20} Although there was no specific averment in the affidavit that the confidential informant had provided reliable information in the past, the affidavit included specific information regarding Lopez which was independently verified by Sergeant Coy. In addition, the intelligence information relating to appellant was personally observed and independently corroborated by both Texas and local law enforcement authorities. Viewing the totality of the circumstances, as we are required to do, we conclude that the information in Detective Stromberg's affidavit provided a substantial basis for the issuing judge to conclude there was a fair probability that evidence of drug trafficking would be found at appellant's apartment.

{¶21} Based on the foregoing, appellant's first assignment of error is overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE JURY ERRED TO THE PREJUDICE OF APPELLANT BY FINDING

APPELLANT GUILTY OF TRAFFICKING IN MARIJUANA."

{¶24} In his third assignment of error, appellant argues that his conviction is against the manifest weight of the evidence. In considering a manifest weight challenge, an appellate court must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Hubbard*, Warren App. No. CA2007-01-008, 2008-Ohio-2630, ¶8, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. The question is whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Bryant*, Warren App. No. CA2007-02-024, 2008-Ohio-3078, ¶30.

{¶25} In performing its review, an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of the witnesses and the appropriate weight to be given the evidence. *Hubbard* at ¶14, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. A reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury. *State v. Benge*, 75 Ohio St.3d 136, 143, 1996-Ohio-227. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶26} Appellant was convicted of drug trafficking under R.C. 2925.03 (A)(2) which provides, in part, "[n]o person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." The Ohio Revised Code defines the culpability element "knowingly" as "when [a defendant] is aware that his

conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). To act knowingly, a defendant merely has to be aware that the result may occur. *State v. Nutekpor,* Wood App. No. WD-05-062, 2006-Ohio-4641, ¶15, citing *State v. Edwards* (1992), 83 Ohio App.3d 357, 361.

{¶27} In addition to direct evidence, circumstantial evidence may be used to establish the offense of drug trafficking. See *Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380 at ¶50. Circumstantial evidence and direct evidence "inherently possess the same probative value[.]" *State v. Smallwood*, Wayne App. No. 07CA0063, 2008-Ohio-2107, ¶13, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph one of the syllabus. In some instances, certain facts can be established only by circumstantial evidence. *State v. Jones*, Cuyahoga App. No. 90395, 2008-Ohio-5737, ¶13.

{¶28} In challenging the weight of the evidence to support his conviction, appellant contends that the state failed to produce any evidence linking him to the marijuana because the contraband was seized from a bedroom shared by appellant and two other individuals. Appellant further argues that there was no evidence presented that he packaged or sold the contraband.

{¶29} At trial, appellant testified that on December 12, 2007, he was approached outside of his apartment by an individual who identified himself as Hernandez Desoto. Desoto, apparently a fellow Hispanic, asked if he could stay at appellant's apartment for several days while he looked for a job. Appellant testified that although he did not know Desoto, he agreed to let him stay at his apartment. Appellant stated that members of the Hispanic community "try to help each other" by allowing other Hispanics arriving in the United States to temporarily stay with them until they can secure employment. According to appellant, Desoto brought two black garbage bags into the apartment and

placed them under the table in appellant's bedroom closet. Appellant testified that he did not know the contents of the bags, and that if he had known they contained marijuana, he would have called the police immediately.

{¶30} The jury also heard the testimony of Detective Stromberg, who stated that although there were two additional beds in the bedroom, the officers determined that appellant's bed was located in closest proximity to the walk-in closet due to a number of documents near the bed bearing his name. In light of this evidence, as well as Detective Stromberg's testimony that a strong odor of marijuana was present in the bedroom, the jury could have reasonably determined that, contrary to appellant's testimony, he was aware of the presence of marijuana in his apartment. See *Harry* at ¶49.

{¶31} In addition, although no one observed appellant selling or packaging the marijuana, the offense of trafficking also includes "transporting or preparing marijuana intended for distribution." *State v. Greiner*, Belmont App. No. 05 BE 27, 2007-Ohio-1390, ¶37; R.C. 2925.03(A)(2). Detective Stromberg testified that based on his training and experience as a narcotics detective, he considered the presence of the large number of individual bags of marijuana of roughly the same weight, as well as the bulk amount of marijuana found in the box, indicative that the marijuana was being "prepared for distribution." Detective Stromberg also testified that plastic bags are a normal mode of transporting drugs in trafficking cases, particularly those involving marijuana. Based on this evidence, the jury could have reasonably inferred that the marijuana was being prepared for distribution and sale. See, also, *Harry* at ¶51. The jury could have also inferred that appellant prepared the marijuana for sale in light of the evidence presented that the drugs were found in the bedroom occupied by appellant, and that his bed was located in closest proximity to the closet where the drugs were discovered.

{¶32} The fact that appellant provided the jury with an alternate version of the

facts does not "automatically lead to the conclusion that his conviction was against the manifest weight of the evidence." *Greiner* at ¶36. The jury was able to listen to each witness presented and judge their respective credibility. The jury was within its province to credit the testimony of Detective Stromberg and discredit appellant's testimony. *State v. Howard*, Ross App. No. 07CA2948, 2007-Ohio-6331, ¶16. "The jury 'is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony.'" Id., quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. In this case, the jury simply did not find appellant's testimony credible.

{¶33} Upon review of the record, we conclude that there was substantial evidence presented to the jury, which, if believed, would support appellant's conviction for drug trafficking. Accordingly, it cannot be said that the jury lost its way and created a manifest miscarriage of justice. Appellant's third assignment of error is overruled.

{¶34} Assignment of Error No. 2:

{¶35} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO GRANT APPELLANT'S MOTION FOR ACQUITTAL."

{¶36} In his second assignment of error, appellant challenges the sufficiency of the evidence presented to the jury to support the trafficking charge, and argues that the trial court erred in overruling his motion for acquittal.

{¶37} Pursuant to Crim.R. 29(A), "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." The purpose of a motion for acquittal is to "test[ ] the sufficiency of the evidence presented at trial." *State v. Terry*, Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9, citing *State v. Williams*, 74 Ohio

St.3d 569, 576, 1996-Ohio-91; *State v. Miley* (1996), 114 Ohio App.3d 738, 742. Therefore, "a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, paragraph one of the syllabus.

{¶38} The record indicates that although appellant moved for a Crim.R. 29(A) acquittal at the close of the state's case-in-chief, he did not renew his motion at the close of all the evidence. "It is well-established that a failure to renew a Crim.R. 29(A) motion for acquittal at the close of all the evidence constitutes a waiver of any error relative thereto." *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶38. As a result, we decline to consider appellant's argument as to the sufficiency of the evidence presented to support his conviction. Appellant's second assignment of error is overruled.

{¶39} Assignment of Error No. 4:

{¶40} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO GRANT APPELLANT'S MOTION FOR [A] NEW TRIAL."

{¶41} In his final assignment of error, appellant contends that the trial court erred in overruling his motion for a new trial as a result of alleged prosecutorial misconduct in the state's closing argument. The decision to grant or deny a motion for a new trial is within the sound discretion of the trial court, and will not be reversed absent an abuse thereof. *State v. Chambers*, Butler App. No. CA2006-07-178, 2007-Ohio-4732, ¶37, citing *State v. Hawkin*s (1993), 66 Ohio St.3d 339, 350. An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶42} In determining whether a prosecutor's remarks constitute misconduct, a court must consider the following: "(1) whether the remarks were improper; and, if so, (2) whether the remarks prejudicially affected a defendant's substantial rights. * * * To demonstrate prejudice, a defendant must show that the improper remarks or questions were so prejudicial that the outcome of the trial would clearly have been otherwise had they not occurred." *State v. Jones*, Butler App. No. CA2006-11-298, 2008-Ohio-865, ¶21. (Internal citations omitted.) The closing argument "must be reviewed in its entirety to determine if the prosecutor's remarks were prejudicial." Id. at ¶22, quoting *State v. Byrd* (1987), 32 Ohio St.3d 79, 82.

{¶43} Appellant presents two arguments in support of his motion for a new trial. Although he did not designate specific statements in the record, appellant argues generally that the prosecutor "extensive[ly] ridicule[d]" defense counsel by calling his closing argument a "joke" and by implying that defense counsel was dishonest. Appellant also argued that the prosecutor misrepresented the rules of evidence relating to the cross-examination of a defendant regarding his criminal history, and misled the jury into believing that it should speculate about appellant's past criminal convictions.

{¶44} Upon review of the transcript of the hearing on appellant's motion, however, we note that appellant proceeded only on his second allegation of misconduct, i.e., the prosecutor's misstatement of the rules of evidence. The record reveals that the court overruled appellant's motion on that basis. Generally, an appellate court does not address issues or arguments raised by the parties but not presented to the trial court. See *Estate of Heintzelman v. Air Experts, Inc.*, Delaware App. No. 07CAE090045, 2008-Ohio-4883 at ¶55. Accordingly, our review is confined to whether the trial court abused its discretion in denying appellant's motion on the basis of the prosecutor's alleged misstatement of the rules of evidence.

{¶45} However, on appeal appellant has failed to allege any error on the part of the trial court in denying his motion on the basis of the prosecutor's alleged misstatement of the evidentiary rules. Appellant's fourth assignment of error is therefore overruled.

{¶46} Judgment affirmed.

POWELL and WALSH, JJ., concur.

Walsh, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.