[Cite as *State v. Ortiz-Bajeca*, 2011-Ohio-3137.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-07-181
	:	O P I N I O N
- vs -		6/27/2011
	:	
JORGE B. ORTIZ-BAJECA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR 2010-03-0561

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011-6057, for plaintiff-appellee

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HUTZEL, J.

{¶1} Defendant-appellant, Jorge B. Ortiz-Bajeca, appeals his conviction in the Butler County Court of Common Pleas for permitting drug abuse. We affirm the conviction.

{¶2} In early 2010, Agent Greg Barber of the Butler County Sheriff's

Undercover Narcotics Unit ("BURN unit") conducted several controlled marijuana purchases from a residence located at 1110 Harmon Avenue in Hamilton, Ohio. During his final controlled purchase, Agent Barber approached the Harmon Avenue residence and knocked on the door. Agent Barber's usual dealer, Ricardo Martinez, greeted him and asked him to wait several minutes while the marijuana was prepared for sale. Before Martinez returned with the drugs, appellant opened the door to the residence, but retreated inside after seeing Agent Barber.

{¶3} Following Agent Barber's controlled purchases, the BURN unit applied for and obtained a search warrant for the Harmon Avenue residence. With the assistance of a SWAT team, the BURN unit executed the warrant on March 18, 2010. Upon entering the residence, the BURN unit found appellant in the living room, along with another individual named Ramon Ortiz-Bajeca.

{¶4} After securing the residence, the BURN unit discovered approximately 39½ pounds of marijuana, plastic bags, and money hidden in various areas of the basement, along with digital scales in an upstairs bedroom. As a result of these findings, appellant was charged with permitting drug abuse in violation of R.C. 2925.13(B). Following a bench trial, appellant was found guilty and sentenced to six months in prison.

{¶5} Appellant now appeals, raising three assignments of error. For ease of discussion, we will address appellant's assignments of error out of order.

{¶6} Assignment of Error No. 2:

{¶7} "THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT THE APPELLANT WAS THE 'OWNER, LESSEE OR OCCUPANT, OR WHO HAS CUSTODY, CONTROL, OR SUPERVISION, OF PREMISES OR REAL ESTATE'

AND THAT HE 'KNOWINGLY' PERMITTED FELONY DRUG ABUSE TO OCCUR, UNDER O.R.C. § 2925.13(B)."

{¶8} Assignment of Error No. 3:

{¶9} "APPELLANT'S CONVICTION FOR PERMITTING DRUG ABUSE PURSUANT TO O.R.C. § 2925.13 (B) [sic] WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶10} In these assignments of error, appellant argues his conviction was not supported by sufficient evidence and that his conviction was against the manifest weight of the evidence.

{¶11} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Smith*, Warren App. No. CA2011-01-002, 2011-Ohio-2346, ¶9; *State v. Perkins*, Fayette App. No. CA2009-10-019, 2010-Ohio-2968, ¶9.

{¶12} A manifest weight of the evidence challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Smith* at ¶10. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. Id. The credibility of witnesses and weight given to the evidence are primarily matters for the trier of fact to decide. Id. Upon review, the question is whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. Id.; *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25.

{¶13} As noted above, appellant was charged with permitting drug abuse in

violation of R.C. 2925.13(B), a fifth-degree felony, which provides:

{¶14} "No person who is the owner, lessee, or occupant, or who has custody, control, or supervision, of premises or real estate, including vacant land, shall knowingly permit the premises or real estate, including vacant land, to be used for commission of a felony drug abuse offense by another person."

{¶15} "Knowingly" is defined in R.C. 2901.22(B):

{¶16} "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."

{¶17} Initially, appellant argues the state failed to prove appellant was an "owner, lessee, or occupant, or who [had] custody, control, or supervision, of premises or real estate" under R.C. 2925.13(B). We disagree.

{¶18} At trial, Agent Barber testified that after appellant's arrest, he admitted he lived at the Harmon Avenue residence for approximately ten years. The state also submitted evidence of a cable bill addressed to "George Ortiz," and further testimony indicated appellant's name, "Jorge," is Spanish for "George." Additionally, when the BURN unit executed the search warrant on March 18, 2010, appellant was found in the living room of the residence. Lastly, Agent Miguel Lopez, the interpreter during the raid, testified he knew "for a fact" that appellant and Ramon Ortiz-Bajeca were "roommates" in the residence. This evidence, if believed, is sufficient to establish appellant was an "occupant" of the residence pursuant to R.C. 2925.13(B), thus the trial court did not clearly lose its way by making such a finding.

{¶19} Next, appellant argues the state failed to prove appellant knowingly

permitted the residence to be used for felony drug abuse, specifically, trafficking of marijuana. We disagree.

{¶20} While there is no direct evidence of this matter, it is well-established that a fact or matter in issue may also be proved through circumstantial evidence. See, e.g., *State v. Shannon*, Brown App. No. CA2010-03-004, 2010-Ohio-6079, ¶10. "Circumstantial evidence is proof of certain facts and circumstances in a given case, from which the trier of facts may infer other, connected facts which usually and reasonably follow according to the common experience of mankind." *State v. Cranford*, Montgomery App. No. 23055, 2011-Ohio-384, ¶38. "Circumstantial evidence and direct evidence inherently possess the same probative value." Id.

{¶21} While appellant denied knowing about the marijuana in the basement, Agent Barber testified that appellant was inside the residence during the final controlled drug purchase. Agent Barber additionally testified that immediately upon entering the residence on March 18, 2010, the BURN unit detected a faint odor of marijuana. As the BURN unit approached the basement, the odor became "very strong," and once inside the basement, the odor was "overcoming." Moreover, appellant's alleged roommate, Ramon Ortiz-Bajeca, told Agent Barber "everyone took showers" in the basement, in apparent proximity to the odorous drug stash. Additionally, during cross-examination, Agent Barber testified that another individual named "Adolfo" told Agent Barber he was the only person who "messed" with the marijuana, but that "everyone that stayed at the residence knew the marijuana was there * * * and allowed [Adolfo] to keep it there, as long as * * * he didn't get them into trouble."

{¶22} This evidence, if believed, would permit a reasonable inference that

appellant had knowledge of the marijuana in the basement. Cf. *State v. Wiley* (M.C.1987), 36 Ohio Misc.2d 20, 22 ("the court is permitted to consider an inference that the defendant knew about the existence of drugs on the premises * * * because of the small size of the apartment, the quantity of drugs seized, the various locations where drugs were found, and the defendant's presence in the apartment when the seizure took place").

{¶23} Because the state presented competent, credible evidence to establish appellant was an occupant of the Harmon Avenue residence and that he knowingly permitted the residence to be used for drug abuse, the trial court did not clearly lose its way thereby creating such a manifest miscarriage of justice requiring appellant's conviction be reversed. Further, because appellant's conviction was not against the manifest weight of the evidence, we necessarily conclude the state presented sufficient evidence to support the trial court's finding of guilt.

{¶24} Accordingly, appellant's second and third assignments of error are overruled.

{¶25} Assignment of Error No. 1:

{¶26} "THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY TESTIMONY AND EVIDENCE OF UNCERTIFIED RECORDS FROM THE OHIO BUREAU OF MOTOR VEHICLES THAT WERE RETRIEVED FROM THE LAW ENFORCEMENT AUTOMATED DATABASE SYSTEM (LEADS), UNDER EVIDENCE RULES 803(8) AND 901."

{¶27} In this assignment of error, appellant argues the trial court erroneously admitted a document the state purported to be a printout from the Ohio Bureau of Motor Vehicles, listing appellant's address as 1110 Harmon Avenue. Appellant

argues the document was instead an uncertified, unauthenticated document retrieved from the Law Enforcement Automated Data System ("LEADS"). Appellant argues the document was inadmissible hearsay and could not be used to prove he was an "owner, lessee, or occupant, or who [had] custody, control, or supervision, of premises or real estate," as required by R.C. 2925.13(B). See Evid.R. 901. We disagree.

{¶28} A trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion. *Mason v. Cave*, Warren App. No. CA2008-11-140, 2010-Ohio-208, ¶7. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶29} 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 evidence is not admissible as evidence unless it falls within one of the clearly delineated hearsay exceptions. Evid.R. 802.

{¶30} However, as this court recently stated, even when "evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless beyond a reasonable doubt if the remaining evidence alone comprises overwhelming proof of defendant's guilt." *State v. Wynn*, Butler App. No. CA2009-04-120, 2009-Ohio-6744, ¶20.

{¶31} We acknowledge a split among the courts of appeals regarding the admissibility of a LEADS report. See, e.g., *State v. Papusha*, Preble App. No. CA2006-11-025, 2007-Ohio-3966 (LEADS reports admissible if properly

authenticated pursuant to Evid.R. 803[8][a] and 901); *State v. Cooper* (Mar. 18, 1982), Cuyahoga App. No. 43765, 1982 WL 5240. But, see, *State v. Straits* (Oct. 1, 1999), Fairfield App. No. 99 CA7, 1999 WL 976212 (LEADS reports not admissible pursuant to Evid.R. 803[8], finding they are not public records). However, we need not determine whether the trial court properly admitted the alleged LEADS report. Even when the report is excluded from consideration, the remaining evidence against appellant provides overwhelming proof that appellant was an "occupant" of the residence. See R.C. 2925.13(B).

{¶32} At trial, as noted above, the state presented ample additional evidence of appellant's occupancy, including, but not limited to: cable bills addressed to appellant, appellant's presence during the March 18, 2010 raid, and Agent Barber's testimony that appellant admitted to living at the Harmon Avenue residence for approximately ten years.

{¶33} Accordingly, any error the trial court may have committed by admitting the alleged LEADS report was harmless.

{¶34} Appellant's first assignment of error is overruled.

{¶35} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.