[Cite as *State v. Vannoy*, 2010-Ohio-2927.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-23
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-266
v.	:	
	:	(Criminal Appeal from
JAMES M. VANNOY, JR.	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 25th day of June, 2010.

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NICK A. SELVAGGIO, Atty. Reg. #0055607, Champaign County Prosecutor's Office, 200 North Main Street, Urbana, Ohio 43078
Attorney for Plaintiff-Appellee

WILLIAM N. MERRELL, Atty. Reg. #0015957, Post Office Box 2901, Springfield, Ohio 45501
Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} James VanNoy has appealed from his convictions on three counts of drug trafficking, in violation of R.C. 2925.03(A)(1). A jury found VanNoy guilty on each count and found that he committed each offense "in the vicinity of a juvenile." See R.C. 2925.03(C)(4)(c). VanNoy assigns four errors to the trial-court proceedings. First, he argues that the trial court erred by admitting testimony of

other criminal acts. Second, VanNoy argues that the trial court plainly erred by admitting testimony that misstated the statutory definition of "in the vicinity of a juvenile." Third, he argues that the jury's findings that the offenses were committed "in the vicinity of a juvenile" are contrary to the weight of the evidence. Fourth, VanNoy argues that, with respect to the first and second errors, he was denied the effective assistance of counsel. We will affirm.

I

{¶ 2} On each of July 15, 17, and 22, 2008, in the parking of a shopping center just outside Urbana, Ohio, in Champaign County, VanNoy sold more than five grams but less than ten grams of powder cocaine to Larry Swank. Each transaction followed a similar script: Swank waited for VanNoy in the parking lot; VanNoy parked alongside Swank, then walked to Swank's vehicle carrying a manila folder; dumped on the seat was the folder's sole content, a baggie of cocaine. But, unbeknownst to VanNoy, Swank worked as an informant for the Champaign County Drug Task Force, who watched and photographed each transaction. Detective Scott Curnutte, with the Task Force, and Officer Josh Jacobs, with the Urbana Police Department, photographed not only VanNoy and Swank but also children nearby in the parking lot. Their photographs also revealed, during two transactions, a child sitting in the passenger seat of VanNoy's vehicle. The child was later identified by Swank as VanNoy's minor son.

{¶ 3} A fourth transaction was also set to take place. This time, VanNoy

was to sell Swank two ounces of powder cocaine, roughly 56 grams. VanNoy lived in the city of Springfield, Ohio, in Clark County, so Curnutte called the Springfield police department's narcotics unit, which works with the Task Force on drug cases. He asked Detective Eujean Bell if they had anything on VanNoy. Bell told Curnutte that they did have some trafficking charges on him but that they had delayed filing the charges because of Champaign County's ongoing investigation. Curnutte told Bell that they were preparing to make a two-ounce buy of cocaine from VanNoy on July 31, 2008, and asked Bell for help. On the appointed day, Bell waited for VanNoy at a house in Springfield to which they had followed VanNoy before, a suspected drug house. When he arrived, VanNoy got out of the vehicle, went into the house, came out a few minutes later, and drove away. Bell followed. As he followed, Bell asked Curnutte whether he should make the stop; Curnutte told him to go ahead. Before VanNoy crossed into Champaign County, Bell pulled VanNoy over. Bell discovered that VanNoy's son was with him in the vehicle, whose age he unequivocally placed under eighteen years. Also, under Bell's roadside questioning, VanNoy admitted that he had two ounces of cocaine in the vehicle. VanNoy was found guilty of a drug offense in Clark County and sentenced to prison.

{¶ 4} While in prison, VanNoy stood trial in Champaign County for the three transactions that are the subjects of the present case. VanNoy argued that the police entrapped him. But a jury rejected this defense and found him guilty on all three counts. The trial court sentenced VanNoy to a four-year prison term on each count. The court ordered the three terms to run concurrently to each other and consecutively to the prison term he received in Clark County. From the convictions

in Champaign County, VanNoy timely appealed.

II

First Assignment of Error

{¶ 5} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE PROSECUTOR TO ILLICIT [sic] TESTIMONY OF OTHER CRIMINAL ACTS."

{¶ 6} VanNoy argues, based on R.C. 2945.59 and Evid.R. 404, that evidence related to his Clark County conviction–testimony suggesting he had trafficked drugs before, testimony linking him to a suspected drug-house, testimony about the age of his son, and testimony about his July 31 offense–should not have been admitted.

{¶ 7} The state argues that, since VanNoy asserted the affirmative defense of entrapment, this evidence is admissible because it tends to show that VanNoy was predisposed to commit the offenses. We agree in part. According to the Ohio Supreme Court, when a defendant asserts the defense of entrapment, evidence relevant to the defendant's predisposition to commit the charged offense should be freely admitted. See *State v. Doran* (1983), 5 Ohio St.3d 187, 192. Relevant evidence concerns matters relevant on the issue of predisposition, including "the accused's previous involvement in criminal activity of the nature charged" and "the accused's ready access to contraband." Id. The testimony that he had trafficked drugs before and has a connection to a suspected drug-house is therefore admissible.

{¶ 8} But the July 31 offense occurred after the Champaign County offenses,

so the former cannot logically be said to show a predisposition to commit the latter. Bell's testimony about VanNoy's son's age is plainly admissible simply as corroboration of Swank's testimony that his son was a juvenile at the time of the three Champaign County offenses. Regarding the offense itself, Evidence Rule 404(B) says that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But, the rule continues, "[i]t may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This rule is reflected in section 2945.59 of the Revised Code.[1] The Ohio Supreme Court has said that, under this rule, "'evidence of *subsequent* crimes or acts of misconduct is admissible if it is relevant to an issue at trial and its probative value is not outweighed by its prejudicial effect.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶85, quoting *Cleveland v. Dillingham* (May 11, 1995), Cuyahoga App. No. 67693 (Emphasis added). At trial, the prosecutor argued that the events of July 31 were relevant as evidence of a common scheme and plan, and the trial court gave the jury an appropriate limiting-instruction regarding the evidence. VanNoy concedes in his brief that this evidence is relevant because his plan was to proceed to Champaign County with the cocaine and sell it to Swank. But he suggests that the probative value of this

[1]"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." R.C. 2945.59.

evidence is outweighed by the possibility of prejudice. We disagree. The danger of unfair prejudice does not substantially outweigh the probative value of the evidence. See Evid.R. 403(A).

{¶ 9} Still, we find that the trial court abused its discretion by admitting evidence of the July 31 offense. Evidence concerning the offense that Defendant committed on that occasion had no probative force in relation to the charges against him other than the inference forbidden by Evid.R. 404(B). See *State v. Pierson* (1998), 128 Ohio App.3d 255, 260-261. Nevertheless, in light of the strength of the state's case against VanNoy, we find that the admission of the evidence is harmless error.

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

Second Assignment of Error

{¶ 11} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT PERMITTED THE STATE TO ILLICIT [sic] TESTIMONY ABOUT OHIO LAW WHICH WAS ERRONEOUS AND AMOUNTED TO PLAIN ERROR."

{¶ 12} VanNoy's offenses were raised to third-degree felonies because the jury found that they were committed "in the vicinity of a juvenile." See R.C. 2925.03(C)(4)(c) (saying that "if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the third degree"). According to the statutory definition, "An offense is 'committed in the vicinity of a juvenile' if the offender commits the offense within *one hundred feet* of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the

offender knows the offense is being committed within *one hundred feet* of or within view of the juvenile, or whether the juvenile actually views the commission of the offense." R.C. 2925.01(BB) (Emphasis added).

{¶ 13} The prosecutor, during his opening statement before jury selection, told the potential jurors that "[a]ll three drug buys took place in the vicinity of a juvenile, which means as defined by the State legislature within 1,000 feet of a juvenile." (Tr. 18). Later, while being questioned by the prosecutor about distances between points surrounding the offense location, Officer Jacobs said that "[a]ccording to the State law it [distance] makes a difference when it comes to selling drugs or trafficking in drugs when it this comes to a juvenile spec. Juveniles–if there's a juvenile within a thousand feet of a school, within a thousand feet of that actual drug transaction, then it elevates and enhances the charge." (Tr. 230-231). Likely, the prosecutor and Jacobs were confusing the meaning "in the vicinity of a juvenile" with the meaning of "in the vicinity of a school," which means "on school premises, in a school building, or within *one thousand feet* of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within *one thousand feet* of the boundaries of any school premises." R.C. 2925.01(P) (Emphasis added).

{¶ 14} Nevertheless, VanNoy did not object to either apparent misstatement of law. Consequently, we review the admission of these statements only for plain error. See Crim.R. 52(B). 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* (1996), 75 Ohio St.3d 163,

166. We conclude that VanNoy fails to prove that admitting the misstatements of law is plainly erroneous.

{¶ 15} The law that a jury applies in a case is given by the trial court: "The trial court's instructions, not counsel's statements, govern the law to be applied in the case, and it is presumed that the jury will follow the trial court's instructions." *State v. Gardner*, Montgomery App. No. 21357, 2007-Ohio-182, at ¶34, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 75, overruled on other grounds; see, also, R.C. 2945.11 ("In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict. * * *"). In the preliminary jury-instructions, the court told the jury: "The Court and the jury have separate functions. You must decide the disputed facts. The Court provides the instructions of law." (Tr. 117). The court continued, "It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be. These instructions plus the instructions to be given later are the law of the trial." (Tr. 117). Finally, in the concluding jury-instructions, the court gave the jury the correct meaning of "in the vicinity of a juvenile," saying, "In the vicinity of a juvenile means the offense was committed within 100 feet of or within the view of any person under the age of 18." (Tr. 318).

{¶ 16} We find no plain error. Before the trial began the court clearly told the jury which statement of the law it was to use, and the court correctly instructed the jury on the meaning of "in the vicinity of a juvenile." Since we presume that the jury followed the court's instructions regarding the law, we must conclude that the

incorrect statement had no effect on the jury's guilty finding.

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

Third Assignment of Error

{¶ 18} "THE CONVICTIONS FOR THE SPECIFICATIONS OF 'COMMITTED IN THE VICINITY OF A JUVENILE' ARE AGAINST THE MANIFEST WEIGHT OF EVIDENCE AND CONTRARY TO LAW."

{¶ 19} In a weight-of-the-evidence challenge, the question is whether a verdict, though supported by sufficient evidence, is nevertheless inconsistent with the weight of the evidence presented. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The verdict is inconsistent if the appellate court concludes that "the inclination of the *greater amount of credible evidence*, offered in a trial, * * * support[s] one side of the issue rather than the other." Id. This of course presupposes that evidence was offered that supports both sides; the question of weight makes little sense when the evidence supports only one side.

{¶ 20} Although he labels it a manifest-weight challenge, VanNoy actually argues insufficiency. He says that no one identified the passenger as his son and no one identified conclusively the passenger's age. Even if it were his son, VanNoy says, his age was not established beyond a reasonable doubt. Swank admitted that he was guessing the child's age, says VanNoy. Also, no other juveniles were identified, except through surveillance photographs, he says, but the photos did not establish directions, distances, obstacles, or other things regarding whether they could view his offense.

{¶ 21} An offender commits an offense "in the vicinity of a juvenile" if he commits the offense either within one hundred feet of a juvenile *or* within view of a juvenile, see R.C. 2925.01(BB), a juvenile being "a person under eighteen years of age," R.C. 2925.01(N). And, an offense is committed "in the vicinity of a juvenile" "regardless of * * * whether the juvenile actually views the commission of the offense." R.C. 2925.01(BB). The law, then, requires the state only to prove that the alleged juvenile was under eighteen-years of age; "proof of a juvenile's age or identity is not required to support a juvenile specification." *State v. Creech*, Fayette App. No. CA2006-05-019, 2007-Ohio-2558, at ¶18.

{¶ 22} Here, all the evidence offered supports the jury's finding that juveniles were in the vicinity when VanNoy committed each offense. Jacobs testified that during each offense he saw children in the parking lot walking to and from various stores (with a parent), and police surveillance photographs corroborate this testimony. Swank, the informant who bought the cocaine each time, testified that during the second two offenses VanNoy's son sat in VanNoy's vehicle. The basis of Swank's knowledge was VanNoy himself: "He told me that his son was with him." (Tr. 195).[2] Swank, who saw the boy, estimated, based on his experience as a father and grandfather, that the boy was 10-12 years old. Corroborating police surveillance photographs indeed show a small head in the passenger seat. VanNoy is correct that the state's evidence does not establish that, during each offense, at least one child seen in the parking lot in fact could have had an unobstructed view of

[2]We note that this is not hearsay; it is an admission by a party-opponent. See Evid.R. 801(D)(2).

the offense being committed. But, from the evidence presented by the officers watching the transaction, the jury could reasonably conclude this. See *State v. Riel*, Washington App. No. 08CA3, 2008-Ohio-5354, at ¶¶8-9.

{¶ 23} The third assignment of error is overruled.

Fourth Assignment of Error

{¶ 24} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 25} Finally, VanNoy argues that trial counsel was ineffective because he failed to limit the state's witness's testimony about his other bad acts (referring to the first assignment of error) and because counsel failed to object to the misstatement of law (referring to the second assignment of error).

{¶ 26} "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Here, counsel's representation of VanNoy did not fall below this standard. As we determined above, much of the other-acts evidence was admissible, the rest harmlessly admitted, and the misstated law was not the law that the jury would apply.

{¶ 27} The fourth assignment of error is overruled.

{¶ 28} Having overruled each assignment of error, the judgment of the trial

court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Nick A. Selvaggio
William N. Merrell
Hon. Roger B. Wilson