[Cite as *State v. Pettaway*, 2015-Ohio-1597.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 13-14-18**

v.

CHESTER PETTAWAY, JR., **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 13-CR-0204

Judgment Affirmed

Date of Decision: April 27, 2015

APPEARANCES:

Jessica L. Monday **for Appellant**

Stephanie J. Reed **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Chester Pettaway, Jr., ("Pettaway") brings this appeal from the June 18, 2014 judgment of the Common Pleas Court of Seneca County, Ohio, finding him guilty of two counts of trafficking in cocaine, one count of possession of cocaine, and one count of possessing criminal tools, and sentencing him to twelve months in prison as to each count, to be served concurrently to one another. For the reasons that follow, we affirm the trial court's judgment.

I. Facts and Procedural History

{¶2} On February 19, 2013, and March 1, 2013, the Seneca County Drug Task Force METRICH Enforcement Unit conducted controlled drug purchase operations at 228 South Union Street, Apartment C, in Fostoria, Ohio, during which a confidential informant ("CI"), purchased crack cocaine from Pettaway. The operations were conducted pursuant to standard procedures of METRICH, which included a pre-operational and a post-operational search of the CI, photocopying of the money given to the CI to complete the purchase, recording of the transaction through audio and video transmitters that the CI had on her person, visual observation of the CI from a distance as she walked to and from the residence at 228 South Union Street, and live surveillance of the audio through the CI's audio transmitter. The premises at 228 South Union Street, Apartment C, in

Fostoria, Ohio, where the purchases at issue took place, were believed to be Pettaway's residence at the time. Following the controlled drug purchase operations, Detective Gabe Wedge ("Detective Wedge"), a member of METRICH who was in charge of the controlled purchase operations, obtained a search warrant for the residence.

{¶3} On March 5, 2013, Detective Wedge conducted surveillance of the residence at 228 South Union Street, in Fostoria, Ohio, and observed Pettaway leaving Apartment C upstairs. He observed Pettaway drive away from the location. Knowing at the time that Pettaway was driving under suspension and had warrants for his arrest, Detective Wedge called Officer Brandon Bell ("Officer Bell"), who conducted a traffic stop on Pettaway. Detective Wedge then returned to the residence at 228 South Union Street and executed the search warrant.

{¶4} Upon the traffic stop, Officer Bell found a substantial amount of money on Pettaway. After arresting Pettaway and conveying him to custody of another officer on scene, Officer Bell joined Detective Wedge at Pettaway's residence to assist in the ongoing search of the residence. Officer Bell handed the money found on Pettaway to Detective Charles Boyer ("Detective Boyer"), another METRICH detective who was involved in the controlled purchase operations at issue.

{¶5} Evidence found during the search confirmed that Pettaway lived in the residence at 228 South Union Street, Apartment C, in Fostoria, Ohio. Additional evidence found included money, plastic bags with drug residue, and a digital scale of a type commonly used for weighing drugs for sale.

{¶6} As a result of the evidence collected through the controlled drug purchase operations and the search, Pettaway was charged in a five-count indictment on December 4, 2013. Counts one and two charged Pettaway with trafficking in cocaine, a felony of the fifth degree in violation of R.C. 2925.03(A)(1), (C)(4)(a), with forfeiture specifications. Count three charged Pettaway with aggravated possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(1)(a). Count four charged him with possession of cocaine, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(4)(a), and count five, with possessing criminal tools, a felony of the fifth degree in violation of R.C. 2923.24(A), (C).

{¶7} The trial court found Pettaway indigent and appointed trial counsel, Francis M. Marley, Jr. ("Mr. Marley"). On February 11, 2014, Pettaway entered a plea of not guilty and on May 6, 2014, he executed a waiver of jury trial. Prior to the trial, the State dismissed count three, which charged Pettaway with aggravated possession of drugs. Therefore, the matter proceeded to a trial to the court on the remaining four charges, on June 11, 2014. The trial court found Pettaway guilty

on all four charges. Following the sentencing, the instant appeal followed.[1] Pettaway alleges six assignments of error for our review.

II. Assignments of Error

ASSIGNMENT OF ERROR I

> The conviction in the trial court should be reversed because it was against the manifest weight of the evidence and because the evidence supporting it was insufficient as a matter of law to prove the conviction of Chester Pettaway beyond a reasonable doubt.

ASSIGNMENT OF ERROR II

> The Appellant was denied his right to the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I Section 10 of the Ohio Constitution.

ASSIGNMENT OF ERROR III

> The Trial Court erred when it allowed Detective Wedge to identify Appellant by voice on the audio recordings, without sufficient foundation, which severely prejudiced the rights of Appellant and did not further the administration of justice.

ASSIGNMENT OF ERROR IV

> Chester Pettaway, Jr. was deprived of his right to confront all witnesses against him when Confidential Informant Sara Sullivan was unable to be subpoenaed to court, in contravention of the Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, which severely prejudiced the rights of Appellant and did not further the administration of justice.

[1] We note that the trial court's Judgment Entry of Sentence does not order forfeiture of the items specified in the Indictment, ordering instead that the matter be scheduled for a separate forfeiture hearing. (R. at 42.) Nonetheless, the entry states that it is "a final appealable order," which is consistent with the Ohio Supreme Court's decision in *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509, ¶ 19-33 (2012). The Ohio Supreme Court in *Harris* held that "[a] journal entry of conviction need not include a nonmandatory, related forfeiture in order to be a final, appealable order pursuant to Crim.R. 32(C)." *Id.*, at paragraph two of the syllabus. We recently followed this holding in *State v. McMeen*, 3d Dist. Seneca No. 13-14-26, 2014-Ohio-5482, 25 N.E.3d 422, ¶ 9, recognizing however, that it was "difficult to comprehend since the General Assembly has included forfeiture in the criminal statutes and mandated that a forfeiture specification be included in the indictment," *id.* at ¶ 9, fn. 1.

ASSIGNMENT OF ERROR V

The Trial Court erred when it failed to sustain the objection of Trial Counsel when Prosecuting Attorney classified Appellant as a "Drug Trafficker", which severely prejudiced the rights of Appellant and did not further the administration of justice.

ASSIGNMENT OF ERROR VI

The Trial Court erred when it failed to sustain the objection of Trial Counsel when Detective Wedge stated "... or whatever drug they're selling using the bag", which severely prejudiced the rights of Appellant and did not further the administration of justice.

III. Analysis

First Assignment of Error— Evidentiary Support for Convictions

{¶8} In the first assignment of error, Pettaway combines two challenges: sufficiency and manifest weight of the evidence, both of which concern evidentiary support for his convictions. These two challenges have different standards of review, however. While the question of the manifest weight of the evidence concerns an "effect in inducing belief," and involves resolving conflicts in evidence, the review for sufficiency "focuses primarily upon the adequacy of the evidence; that is, whether the evidence submitted at trial, if believed, could reasonably support a finding of guilt beyond a reasonable doubt." *In re Willcox*, 3d Dist. Hancock No. 5-11-08, 2011-Ohio-3896, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Importantly, the test for

sufficiency raises a question of law and does not allow us to weigh the evidence. *In re Willcox* at ¶ 10.

{¶9} Pettaway does not separate the arguments for the two challenges in his brief, arguing instead that the evidence was not sufficient because it was not credible due to, for example, insufficient search of the confidential informant, a gap in surveillance of the confidential informant, a limited view of the surveillance camera, or lack of proof that he lived in the residence where the drugs were found. To allow for a proper appellate review, we separate the two challenges in this assignment of error.

1. Sufficiency of the Evidence

{¶10} As stated above, an appellate review for the sufficiency of the evidence focuses upon the adequacy of the evidence. Therefore, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Dirmeyer*, 3d Dist. Seneca No. 13-13-24, 2014-Ohio-759, ¶ 11, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1981), paragraph two of the syllabus. Pettaway does not point to any specific deficiencies that would have us conclude that when "viewing the evidence in a light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime proven beyond a reasonable

doubt." *Id.* Indeed, when we look at the evidence presented at trial in the light most favorable to the prosecution, we find all essential elements of each count of the indictment sufficiently supported. We summarize evidentiary support for each count below.

a. Trafficking in Cocaine

{¶11} Under the indictment filed, the convictions for trafficking in cocaine in counts one and two required the State to prove that Pettaway knowingly sold or offered to sell "cocaine or a compound, mixture, preparation, or substance containing cocaine," on two separate instances, on February 19, 2013, and on March 1, 2013. R.C. 2925.03(A)(1), (C)(4)(a). The State offered testimony of Detective Wedge, who described the operations conducted on the two dates at issue when the CI purchased crack cocaine. Detective Wedge had personal knowledge of the facts surrounding the transactions because he was the person who arranged the controlled buy operations, performed pre-operation and post-operation protocols, drove the CI to the meeting location, listened to live audio of the transactions, and collected the drugs from the CI after the purchases. (Tr. at 20-26.)

{¶12} As additional proof that Pettaway sold crack cocaine to the CI on February 19, 2013, and March 1, 2013, recordings from the surveillance camera of the controlled purchases taking place on February 19, 2013, and March 1, 2013,

were played to the trial court. (Tr. at 30, 38, Ex. 5, 7.) Detective Wedge testified that the recordings were fair and accurate representations of the operations that occurred on February 19, 2013, and March 1, 2013. (Tr. at 30, 38-39, 41.) He identified the person who could be seen and heard on the video recording as Pettaway. (Tr. at 42-46.) Detective Wedge also testified that money found on Pettaway during the traffic stop on March 5, 2013, was consistent with the money given to the CI for the controlled purchases on February 19, 2013, and March 1, 2013, based on the photocopies made prior to the controlled drug purchase operations. (Tr. at 68-69.)

{¶13} Detective Boyer also testified that he had been involved in the controlled purchase operations on February 19, 2013, and March 1, 2013. (127-130.) He identified Pettaway as the person from whom the CI purchased drugs and who was seen on the video recordings on the two dates at issue, during the controlled purchase operations conducted at 228 South Union Street, Apartment C, in Fostoria, Ohio. (130-133, 151, 169.) Detective Boyer testified about the surveillance during the operations, which included listening to the audio recordings as the transactions were progressing and which confirmed that the seller was Pettaway. (Tr. at 135, 138, 147-149.)

{¶14} The above evidence, viewed in a light most favorable to the prosecution, sufficiently proved that Pettaway knowingly sold crack cocaine on two separate instances, on February 19, 2013, and on March 1, 2013.

b. Possession of Cocaine and Possessing Criminal Tools

{¶15} In order to prove Count IV, possession of cocaine, the State had to provide evidence that Pettaway knowingly obtained, possessed, or used "cocaine or a compound, mixture, preparation, or substance containing cocaine," on or about March 5, 2013. R.C. 2925.11(A), (C)(4)(a). In order to prove Count V, possessing criminal tools, the State had to provide evidence that on or about March 5, 2013, Pettaway possessed or had under his control the digital scale "with purpose to use it criminally." R.C. 2923.24(A). Here, although no drugs or criminal tools were found on Pettaway personally, the charges were based on the results of the search at 228 South Union Street, Apartment C, in Fostoria, Ohio.

{¶16} Detective Wedge and Detective Boyer testified about the address at which the controlled purchase operations of February 19, 2013, and March 1, 2013, took place and the facts that linked Pettaway to this address. (*See, e.g.*, Tr. at 49, 53-54.) Detective Wedge testified that he had seen the CI walk to the door of the residence during the controlled purchase operations. (Tr. at 24.) The audio/video recording indicated that Pettaway was the person selling the drugs from the residence. (Tr. at 42-46.)

{¶17} Detective Wedge saw Pettaway on March 5, 2013, leaving the residence, while conducting surveillance of the premises prior to executing the search warrant. (Tr. at 53-54.) During the search, a utility bill was found in the residence, addressed to Pettaway at 228 South Union Street, Apartment C, Fostoria, Ohio. (Tr. at 49-50, 61; Ex. 23.) A photograph of Pettaway was found on a computer stand. (Tr. at 60-61; Ex. 22.) Additionally, Detective Boyer testified that he tested a set of keys found on Pettaway by Officer Bell. The keys matched the locks at the outer and inner doors of the residence at 228 South Union Street, Apartment C, Fostoria, Ohio. (Tr. at 171; *see also* Ex. 11, Search Warrant Inventory.)

{¶18} Detective Wedge, Detective Boyer, and Officer Bell all testified about things found at the residence, which included the digital scale and sandwich bags with drug residue. (Tr. at 64-66, 101, 101-102, 118, 118-120, 154-161.) Additionally, physical exhibits depicting the items and photo exhibits showing where those items were found were submitted in evidence. (*See, e.g.*, Tr. at 118-119; Ex. 20.)

{¶19} The testimony and exhibits discussed above sufficiently linked Pettaway to the residence at 228 South Union Street, Apartment C, Fostoria, Ohio, where evidence of possession of drugs and possessing criminal tools was found. Accordingly, the State supported each element of these crimes with evidence.

This evidence, "if believed, could reasonably support a finding of guilt beyond a reasonable doubt." *Willcox*, 3d Dist. Hancock No. 5-11-08, 2011-Ohio-3896, at ¶ 10, citing *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541. Therefore, we reject Pettaway's assertion that his convictions were not supported by sufficient evidence.

2. Manifest Weight of the Evidence

{¶20} When reviewing a conviction challenged as being against the manifest weight of the evidence, an appellate court acts as a " 'thirteenth juror' " and may disagree with the trier of fact's resolution of the conflicting testimony. *Thompkins*, 78 Ohio St.3d 380 at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). But the appellate court must give due deference to the findings of the trier of fact, because

> [t]he fact-finder occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

(Alterations omitted.) *State v. Dailey*, 3d Dist. Crawford, No. 3-07-23, 2008-Ohio-274, ¶ 7, quoting *State v. Thompson*, 127 Ohio App.3d 511, 529, 713 N.E.2d 456 (8th Dist.1998). Therefore, an argument that a conviction is against the manifest weight of the evidence will only succeed if the appellate court finds that

"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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). We discuss the specific parts of the testimony that are challenged by Pettaway as creating conflicts in evidence that the trial court allegedly improperly resolved.

a. Search of the Confidential Informant

{¶21} Pettaway first asserts that the controlled purchase operations "were flawed from the beginning" because the CI "was not properly searched" before they took place. (App't Br. at 8.) Pettaway specifically points out that although the CI's socks, shoes, pockets, and the body were searched, the inside of her bra, her underwear, and body cavities were not searched. (*Id.*, quoting Tr. at 163-164.) Pettaway further alleges that there was "a gap in time of surveillance" of the CI during the controlled purchase operations, when the CI was "completely out of view" of Detective Wedge and Detective Boyer for a period of time after she had been dropped off near the residence and before she reappeared after completing the purchase. (App't Br. at 8-9.) He thus alleges that the CI "obviously could have had cocaine stored in or on her person" and she used it to "set up" Pettaway "without the detectives even noticing." (*Id.*)

{¶22} Pettaway's words that the CI "could have had cocaine stored in or on her person" amount to pure conjecture, unsupported by any evidence in the record. Because there was no evidence that the CI had anything on her person, there was no basis for a conflict in evidence that the trial court improperly resolved, clearly losing its way. We have recently rejected a similar argument in *State v. Maxie*, 3d Dist. Marion No. 9-13-73, 2015-Ohio-816, ¶ 31, where the defendant alleged, without any support, that the CI could have had drugs with her prior to the meetings with him. Additionally, we note that although the CI was not constantly in direct view of Detective Wedge and Detective Boyer, she was under an uninterrupted audio and video surveillance. Both detectives testified that they watched the video of the transaction and listened to the live audio, and through their training and experience, they would be able to recognize if the CI was "doing something covertly with money and/or drugs." (Tr. at 77-80, 96-97, 170.) There were no indications of any such actions. (*Id.*) Therefore, we reject Pettaway's contention that the conviction is against the manifest weight of the evidence due to insufficient search or surveillance of the CI.

b. Identification of the Suspect on the Surveillance Videos

{¶23} Pettaway next alleges that the conviction should be reversed because the videos do not clearly show that he was the person selling drugs to the CI on February 19, 2013, and March 1, 2013. He quotes the testimony of Detective

Boyer, who attested that the video only showed "a partial, a viewing of the subject. And if you wouldn't have known him, I mean, I knew what he looked like so it appeared to be him but I could not positively identify him, no. Not visually." (App't Br. at 9, quoting Tr. at 165.) Pettaway ignores the remaining testimony of Detective Boyer, who attested that he was able to identify Pettaway through his voice and the silhouette. (Tr. at 138, 149, 169.)

{¶24} Additionally, there was overwhelming evidence identifying Pettaway as the person involved in the controlled purchase operations and linking him to the address at issue, some of which is discussed in our analysis of the sufficiency of the evidence above. Detective Wedge described still images pulled from the video recording, which showed "a black male wearing dark clothing and a dark—dark ball cap with a B on the ball cap." (Tr. at 43.) He testified that a similar hat was found during the search of the residence at 228 South Union Street, Apartment C, on March 5, 2013. (Tr. at 62.) Both detectives testified that they were familiar with Pettaway's voice and they were able to positively identify it on the audio recordings made during the controlled purchase operations on February 19, 2013, and March 1, 2013. (Tr. at 43-46, 82, 136-147, 138, 149, 169.) Detective Wedge testified about the twenty-dollar bills found on Pettaway during the traffic stop on March 5, 2013, which were consistent with the money given to the CI for the controlled purchases and which were photocopied prior to the transactions. (Tr. at

68; Ex. 14.) Finally, the keys found on Pettaway matched the residence where the controlled drug purchases were made. (Tr. at 171.)

{¶25} Apart from attempting to undermine the visual identification of the person seen on the video recordings, Pettaway did not present any evidence that would contradict the detectives' testimony identifying him as the person involved in the controlled purchase operations on February 19, 2013, and March 1, 2013. Accordingly, we reject his contention that his convictions must be reversed due to poor quality of the surveillance videos.

c. Residence at 228 South Union Street, Apartment C, Fostoria, Ohio

{¶26} Pettaway alleges that the convictions in counts four and five should be reversed because the "Detectives were incorrect in assuming that [he] resided at 228 South Union Street." (App't Br. st 10.) He submits that the lease for the premises was not in his name, as attested by Detective Wedge at trial. (*Id.*, quoting Tr. at 89.) Therefore, the residence and the contraband found there did not belong to him. (*Id.*)

{¶27} As we have already discussed in our analysis of the sufficiency of the evidence, multiple factors indicated that Pettaway lived at 228 South Union Street, Apartment C, Fostoria, Ohio. Pettaway did not present any evidence to the contrary. He argues, however, "Just because Appellant paid an electric bill for a friend does not prove that the residence was his." (*Id.* at 10.) In addition to the

payment of the electric bill, the events of February 19, 2013, and March 1, 2013, linked Pettaway to the residence; Detective Wedge saw Pettaway on March 5, 2013, leaving the residence; a photograph of Pettaway was found on a computer stand; Pettaway had a set of keys for the residence; and other evidence of Pettaway's presence there was found, such as male clothing. Accordingly, we reject Pettaway's argument that convictions in counts four and five were against the manifest weight of the evidence, where no conflicting evidence was presented to the trial court.

{¶28} Based on the above discussion, we hold that Pettaway's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Therefore, we overrule the first assignment of error.

Second Assignment of Error—
Ineffective Assistance of Counsel

{¶29} In his second assignment of error, Pettaway contends that he was not effectively assisted by his trial counsel. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that the counsel's performance was deficient in that it fell "below an objective standard of reasonable representation." *State v. Keith*, 79 Ohio St.3d 514, 534, 684 N.E.2d 47 (1997). Second, the defendant must show "that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984). In order to demonstrate prejudice, the defendant must prove a reasonable probability that the result of the trial would have been different but for his or her counsel's errors. *Id.* In applying these standards, the reviewing court must " 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 108, quoting *Strickland* at 669. Therefore, the court must be highly deferential in its scrutiny of counsel's performance. *State v. Walker*, 90 Ohio App.3d 352, 359, 629 N.E.2d 471 (3d Dist.1993), quoting *Strickland* at 689.

{¶30} Pettaway points to multiple instances of allegedly deficient performance by his trial counsel. First, he complains about his trial counsel's failure to object to Detective Wedge's testimony about Pettaway's prior acts. In particular, he asserts that the trial counsel should have objected when Detective Wedge testified that he had conducted "several" "controlled purchase operations involving Chester Pettaway, Junior." (Tr. at 16-17.) Detective Wedge also stated that Pettaway "had warrants for his arrest for other drug cases." (Tr. at 53-54.) Later on, Detective Wedge testified about a search conducted at Pettaway's other residence in 2012, when crack cocaine was found in the residence, which resulted in charges and a plea of guilty. (Tr. at 97-98.)

{¶31} It is well-established that "failure to object to error, alone, is not enough to sustain a claim of ineffective assistance." *State v. Campbell*, 69 Ohio St.3d 38, 52-53, 630 N.E.2d 339 (1994), quoting *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). The courts recognize that there are many reasons why competent counsel may make a reasonable decision to not object to a variety of potentially objectionable testimony at trial. *See id.* at 53; *State v. Daley*, 3d Dist. Seneca No. 13-13-26, 2014-Ohio-2128, ¶ 63. It may well have been trial counsel's reasonable strategy to refrain from objecting in this bench trial, where the trial judge, not the jury, was weighing the evidence. In a bench trial, a judge is presumed to use evidence for its proper limited purposes and therefore, "concern that other acts evidence will be improperly considered by trier of fact does not exist in a bench trial." *State v. Murray*, 8th Dist. Cuyahoga No. 91268, 2009-Ohio-2580, ¶ 25, citing *State v. Craig*, 4th Dist. Gallia No. 01 CA8, 2002-Ohio-1433, ¶ 13. Thus, the Ohio Supreme Court held that an error was harmless where other acts evidence was improperly admitted at trial to the court because "a judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record." *State v. Eubank*, 60 Ohio St.2d 183, 187, 398 N.E.2d 567 (1979), citing *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968), *superseded by statute on*

other grounds as stated in State v. Wilson, 9th Dist. Lorain No. 92CA005396, 1994 WL 558568, *36 (Oct. 12, 1994).

{¶32} There is no indication in the case at issue that Pettaway was prejudiced by the fact that the trial judge heard the allegedly improper testimony and Pettaway fails to show "a reasonable probability" that the trial court would not have found him guilty of the charges had his counsel objected.

{¶33} Pettaway's next complaint in this assignment of error is about the trial counsel's failure to object when Detective Wedge testified. "We're not part of the drug scene where a lot of these people have been or came from. So a lot of times it's easier for them to be in, around people who are selling drugs." (Tr. at 13.) Pettaway suggests that this testimony "was clearly given to imply that the Appellant is a career drug dealer." (App't Br. at 13.) We disagree. A review of the transcript reveals that this testimony was given as part of an explanation of the mission and methods of operation at METRICH. (Tr. at 12-13.) Detective Wedge was asked why "confidential informants rather than uniformed police officers" are used in controlled purchase operations and in response, he uttered the challenged statement. (Tr. at 13.) Neither Pettaway's name nor any facts relevant to his case had been mentioned by the State or Detective Wedge by that point of the examination. In fact, this introductory questioning about METRICH operations continues for several more pages of transcript before Pettaway's name is

mentioned on page 16. Accordingly, the suggestion that the testimony in any way related to Pettaway or was given to prejudice him is highly speculative. We thus reject Pettaway's contention that his trial counsel was deficient by failing to object to it, or that Pettaway was prejudiced as a result.

{¶34} The third contention in this assignment of error concerns the trial counsel's failure to file a motion in limine "against prejudicial questions and statements * * * to request that the judge refuse to admit into evidence any criminal information of the Appellant." (App't Br. at 14.) Pettaway specifically refers to the testimony of Detective Wedge, which is discussed above. Because we already decided that no prejudice resulted from the challenged statements, we reject Pettaway's contention that the result of the trial would have been different had his trial counsel filed a motion in limine regarding those statements.

{¶35} The fourth complaint about the trial counsel's actions concerns failure to object to Detective Wedge's testimony identifying Pettaway's voice on the audio/video recording without proper foundation. (App't Br. at 14-15.) Pettaway argues that Detective Wedge's testimony that he was familiar with Pettaway's voice was not sufficient to authenticate the recorded voice and therefore, the audio/video recording, as well as the subsequent testimony, should have been excluded. He recognizes, however, that "there is not an absolute method to authenticate a recorded voice," and the trial court considers the

witness's familiarity with the voice based on the surrounding circumstances. (*Id.* at 15, citing *State v. Spires*, 7th Dist. Noble No. 04 NO 317, 2005-Ohio-4471.) Furthermore, "[t]he admission of evidence lies within the broad discretion of the trial court." *Spires* at ¶ 19, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290, 752 N.E.2d 904 (2001).

{¶36} Evid.R. 901 provides examples of several methods of authentication or identification, and states that other methods are available as well. For example, methods mentioned by Evid.R. 901 are:

> *(1) Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.
>
> * * *
>
> *(5) Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> * * *
>
> *(9) Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Evid. R. 901. Here, Detective Wedge testified that the audio and video transmitters were placed on the CI before she was sent to meet with a suspect at 228 South Union Street, Apartment C, in Fostoria Ohio, who was later identified as Pettaway based on multiple clues. (Tr. at 23, 32.) Detective Wedge identified

the audio/video recordings from the operations at issue and testified that he had reviewed them prior to the trial, attesting that they were fair and accurate representations of the operations at issue. (Tr. at 29-30, 36-39.) Detective Wedge attested that he was familiar with Pettaway through previous dealings in law enforcement and was "very familiar" with his voice. (Tr. at 43-44.) He attested that he was capable of recognizing that voice and that he recognized it on the audio as belonging to Pettaway. (Tr. at 44, 45, 46.) The above testimony sufficiently satisfies the requirements of Evid.R. 901 to show "that the matter in question is what its proponent claims." Evid. R. 901(A). Accordingly, we refuse to hold that Pettaway's trial counsel violated the standard of reasonable professional assistance by failing to object to the admissibility of audio/video recording, which was properly authenticated.

{¶37} Furthermore, we note that Mr. Marley did object to Detective Wedge's identification of the recorded voice, contending that Detective Wedge is not "a voice recognition expert." (Tr. at 45.) The trial court overruled the objection and that ruling is not challenged on appeal. In so far as the current assignment of error concerns admissibility of the audio/video recording for insufficient authentication, while the objection at trial concerned an authentication method, both claims are effectively resolved by looking at Evid.R. 901. The rule

provides for a variety of authentication methods, which are left to the trial court's discretion and do not require a voice recognition expert's testimony.

{¶38} The last point of criticism in this assignment of error concerns a discussion that happened at the end of the trial. Before Mr. Marley began his closing argument, he remarked, "I don't recall any testimony by any of the officers about finding keys to 228 South Union on my client. It may be in the inventory. There was no testimony on that." (Tr. at 213.) The following exchange then occurred:

> THE COURT: I believe there was.
>
> MR. MARLEY: There was?
>
> THE COURT: But I don't know. I'm the trier of fact. I'll have to figure that out.[2]
>
> MR. MARLEY: I didn't—I might have been sleeping then. Anyway.
>
> THE COURT: You weren't sleeping, Mr. Marley. You were awake throughout the entire trial.

(Tr. at 213-214.) Pettaway complains about Mr. Marley's use of the words, "I didn't—I might have been sleeping then. Anyway." (*Id.*) He alleges that "[t]his comment was extremely unprofessional and improper." (App't Br. at 15.) Nevertheless, Pettaway does not allege that his counsel was indeed sleeping during

[2] We note that Ex. 11, Search Warrant Inventory, confirms Detective Boyer's testimony that the keys were found on Pettaway.

the trial and he fails to state that this comment prejudiced him in any way. Accordingly, Pettaway fails to establish the ineffective assistance under *Strickland* stemming from Mr. Marley's comment about sleeping.

{¶39} For all the foregoing reasons, we overrule the second assignment of error.

Third Assignment of Error—
Admissibility of Testimony

{¶40} In the third assignment of error, Pettaway alleges that the trial court erred when it allowed Detective Wedge to identify him by voice on the audio recordings. He asserts that the foundation for admissibility was "not enough to 'support a finding that the matter in question is what its proponent claims.' " (App't Br. at 17, quoting Evid.R. 901(A).) Yet, as Pettaway recognizes in his second assignment of error, no objection was raised to this allegedly insufficient authentication. Accordingly, our review on appeal is under a plain error standard. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15-16 (2014); *State v. Slagle*, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992).

{¶41} The standard of review under plain error "is a strict one." *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001).

> "[A]n alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.' " We have warned that the plain error rule is not to be invoked lightly. "Notice of plain error under

> Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Id., quoting *Campbell*, 69 Ohio St.3d at 41, 630 N.E.2d 339, *and State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraphs two and three of the syllabus. Under the plain error standard, "the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights" and "[e]ven if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' " (Emphasis sic.) *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E .2d 643, ¶ 14, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and *Long* at paragraph three of the syllabus. "Even constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.' " *Murphy* at 532, quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968).

{¶42} Here, Pettaway does not even allege that a plain error occurred or that his substantial rights have been affected in any way as a result of Detective Wedge's testimony identifying him based on the audio recording. The Ohio Supreme Court has recently refused to engage in a plain error review where the defendant did not make any attempt to demonstrate plain error on appeal. *Quarterman* at ¶ 20-21. Therefore, under the benchmark provided by the Ohio Supreme Court that "[n]otice of plain error * * * is to be taken with the utmost

caution," *Murphy* at 532, and that the defendant carries the burden "of demonstrating that a plain error affected his substantial rights," *Perry* at ¶ 14, we choose not to proceed on plain error analysis. We note, however, that no manifest miscarriage of justice is apparent from the record as a result of this alleged error, as discussed in our analysis of the second assignment of error, where an identical claim is raised alleging ineffective assistance of counsel.

{¶43} Accordingly, we overrule the third assignment of error.

Fourth Assignment of Error—
Right to Confrontation

{¶44} In the fourth assignment of error, Pettaway alleges that his constitutional right to confront all witnesses against him was violated when the confidential informant "was unable to be subpoenaed to court." (App't Br. at 17.) But he does not allege that the CI testified as the witness against him or that any of the CI's statements were improperly admitted into evidence. The complaint in this assignment of error states that Pettaway "was unable to cross examine [the CI] regarding her intentions, her actions, and any details of the alleged 'controlled buys.' " (App't Br. at 19.) In so far as this assignment of error challenges the admissibility of the video recording in which the CI appears, Pettaway failed to object to it at trial. Accordingly, as in the prior assignment of error, plain error review applies.

{¶45} Since Pettaway does not allege that a plain error occurred, we do not need to proceed with a plain error analysis. *See Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, at ¶ 20-21. We note, however, that no manifest miscarriage of justice is apparent from the record as a result of this alleged error for the reasons that follow.

{¶46} "The Sixth Amendment provides in pertinent part: 'in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.' " *State v. Stewart*, 3d Dist. Seneca No. 13-08-18, 2009-Ohio-3411, ¶ 80, quoting the Sixth Amendment to the U.S. Constitution and *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶ 13. "[T]he key issue under the Confrontation Clause is whether a statement is testimonial in nature." *Id.* at ¶ 81, citing *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 59 (2007). In *Stewart*, we reviewed an allegation that recordings of drug transactions with the use of a confidential informant, which were introduced at trial, violated the confrontation clause. We held that the recordings were not testimonial in nature and therefore, they did not implicate the confrontation clause. *Id.* at ¶ 89-90. We reaffirmed this holding in *State v. Perkins*, 3d Dist. Seneca No. 13-10-36, 2011-Ohio-2705, ¶ 5, where we stated:

> In this case, Perkins argues that the trial court erred in admitting the video and audio tapes made of the drug buy because the CI was not available for cross-examination. This court has previously addressed the question of whether tapes of drug purchases are testimonial

> evidence in *State v. Stewart*, 3d Dist. No. 13-08-18, 2009-Ohio-3411. In *Stewart*, this court held that tape recordings made of the actual drug transactions are not hearsay. *Id.* at ¶ 90. Instead, the tapes are merely being used to establish the context of a defendant's statements and not to prove the truth of the matter asserted in the statements by the CI. *Id.* (citing *State v. Sloan*, 8th Dist. No. 79832, 2002-Ohio-2669; *United States v. Price* (1986), 792 F.2d 994; and *United States v. Lemonakis* (1973), 485 F.2d 941). If the statements are not testimonial in nature, then the Confrontation Clause is not implicated. The video tape of Perkins approaching the site of the drug transaction and the audio tape of the drug transaction are thus not testimonial in nature and need not be excluded.

{¶47} Because Pettaway failed to object to the audio/video evidence at trial, and he fails to argue on appeal that any prejudicial *testimonial* statements of the CI were admitted in the evidence, his fourth assignment of error has no merit and is overruled.

Fifth and Sixth Assignments of Error—
Failure to Sustain Objections

{¶48} The last two assignments of error are almost identical. In both of them Pettaway asserts prejudice stemming from certain statements, claiming that they classified him as a drug trafficker who "was dealing in more drugs than for that which he had been charged." (App't Br. at 20, 21.) We analyze those statements below.

{¶49} In the fifth assignment of error, Pettaway complains about State's question directed to Detective Wedge, "In fact, is it common that from your law enforcement training and experience that drug traffickers often keep other

residences for the purpose of selling drugs?" (Tr. at 98.) Pettaway's counsel objected to the State "classifying [Pettaway] as a drug trafficker." (*Id.*) The trial court partially sustained the objection with respect to the use of the word "other," allowing the State to "just say drug trafficker." (*Id.*) The State rephrased the question into, "Is it common in your law enforcement training and experience that drug traffickers, in general, keep other residences besides one that they might claim to be their true residence for the purpose of trafficking in drugs?"[3] (Tr. at 99.) Detective Wedge responded in the positive, using words like "they" and "guys," explaining different reasons why drug traffickers keep various residences. (*Id.*)

{¶50} In the sixth assignment of error, Pettaway complains about the following exchange between the State and Detective Wedge.

> Q: And State's Exhibit 28?
>
> A: These are more baggies. These are tear away baggies.
>
> Q: And what is a tear away baggie?
>
> A: A tear away baggie is the top of where once the crack cocaine or cocaine or whatever drug *they're* selling using the bag--.

(Emphasis added.) (Tr. at 64.) The trial court overruled the trial counsel's objection to the last statement by Detective Wedge. Pettaway's complaint is about

[3] We note that the State again used the word "other," in spite of the trial court's admonition. No assignment of error is alleged based on the State's use of the word "other."

the words, "or whatever drug they're selling using the bag." (*Id.*) We note that this statement was made in response to the State's general question, "what is a tear away baggie?" (Tr. at 64.) Even though this question was asked after Detective Wedge testified that he had found tear away baggies in the residence at 228 South Union Street, Apartment C, it did not refer to Pettaway in particular, but to people who are selling drugs using tear away baggies, to whom Detective Wedge referred as "they."

{¶51} The quoted language shows that the challenged words referred to "drug traffickers" and "guys" in general, rather than to Pettaway. Therefore, the statements in no way indicate that Pettaway was dealing in more drugs than those for which he was on trial. Furthermore, Pettaway fails to show prejudice from these statements and therefore, the fifth and sixth assignments of error are overruled.

IV. Conclusion

{¶52} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Common Pleas Court of Seneca County, Ohio, is therefore affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr