[Cite as *State v. Parker*, 2014-Ohio-3488.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2013CA00217
	:	
HOWARD ADAM PARKER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013CR0643
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 4, 2014

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR RENEE M. WATSON 110 Central Plaza S., Ste. 510 Canton, OH 44702-1413	GEORGE URBAN 116 Cleveland Ave. NW, Ste. 808 Canton, OH 44702

Delaney, J.

{¶1} Appellant Howard Adam Parker appeals from the October 29, 2013 judgment entry of sentence of the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose in March 2013 when Canton police received a number of calls to their 411 tip line complaining about drug transactions taking place at 2418 Bollinger NE.

Cocaine Trafficking at 2418 Bollinger NE

{¶3} Police began to watch the residence and learned it was owned by Deborah Parker, appellant's aunt, but appellant seemed to be the only resident. Appellant would frequently come and go in his green Ford Expedition. Police and neighbors also observed appellant caring for an American bulldog that lived at the residence; appellant was the person who always let the dog in and out.

{¶4} Two neighbors testified for appellee. They both have limited mobility and are home most of the day. Appellant came to their attention because there was a constant stream of traffic "lining up" in front of his home. One neighbor described as many as 10 to 15 cars per day stopping by appellant's residence; often no one would get out of these cars but appellant would briefly come out then go back into the house. The neighbors also observed appellant often get in his vehicle, drive in the direction of Mahoning Road, and return 10 or 15 minutes later. One neighbor stated the activities were the talk of the neighborhood and suggested appellant should "put in a drive-thru window."

{¶5} Both neighbors testified that while appellant had occasional overnight guests, they saw no evidence anyone other than appellant lived at the residence. They knew appellant owned an American bulldog and frequently saw appellant taking care of the dog.

{¶6} On March 13, 2013, the Special Investigations Unit of the Canton Police Department conducted a "controlled buy" from appellant. Detective Robert Smith testified to the protocol for these operations: the undercover officer or confidential informant (C.I.) is searched for contraband; Smith provides cash that has been photographed; and sometimes the individual is given a recording device to tape the transaction.

{¶7} In this case, police used a C.I. and the transaction was not recorded. Police searched the C.I. for contraband, dropped the person off a short distance away from 2418 Bollinger NE, maintained constant visual contact, and watched the C.I. enter the residence. The C.I. came back a short time later and stated appellant told him or her to go to the Circle K parking lot at the corner of Bollinger and Mahoning Road.

{¶8} Police drove the C.I. to a location near the Circle K store and watched as the C.I. stood in the parking lot for a few minutes. Other officers still watching appellant's residence radioed that he had just left in his green Expedition. The Expedition pulled into the Circle K lot and officers observed appellant driving. The C.I. walked up to the driver's side of the vehicle and the two conducted a hand-to-hand transaction observed by detectives: the C.I. gave appellant cash and appellant provided crack cocaine. The green Expedition then returned directly to 2418 Bollinger NE.

{¶9} The C.I. returned to Det. Smith's vehicle and handed over the crack cocaine. Again officers searched the C.I. for contraband; the C.I. had no contraband and was no longer in possession of the $20 cash provided by police. The C.I. gave police two rocks of crack cocaine weighing .43 grams, as established by field testing and subsequent testing by the Stark County Crime Lab.

{¶10} On March 27, 2013, Canton police obtained and executed a search warrant for the residence, outer areas, and vehicles at 2418 Bollinger NE. Appellant was not present. Police forced entry into the residence and found an American bulldog which was secured in its cage. Due to personal belongings throughout the home, it appeared the occupant was one adult male. In the kitchen, police found a black ceramic plate containing a razor blade and residue which tested positive for cocaine. Under the broiler area of the stove, they found one rock of crack cocaine. They also found jars and spoons containing cocaine residue.

{¶11} Under the couch in the living room, police found a digital scale and a bag of crack cocaine that had not yet been completely cut up. The house had a surveillance system with security cameras pointed at the front and back doors as though to show an inside occupant who was at the door. Police also found a shoe box containing $420 in one-dollar bills. A utility bill in the kitchen was addressed to appellant at the Bollinger residence.

Kenneth Boyd Attempts to "Take the Fall"

{¶12} One witness testified on behalf of appellant at trial. Kenneth Boyd has a felony criminal record and described himself as a longtime acquaintance of appellant. He claimed sometime toward the end of March, appellant gave him the keys to 2418

Bollinger NE so Boyd could "party" there with some women. Boyd said he and the women used crack cocaine and at some point Boyd decided to stash some cocaine under the couch. He wasn't sure how much cocaine it was, although it was a "nice little bit." When asked about the digital scales, Boyd denied having any scales but said the women were "doing their thing." Boyd stated appellant was not at the party. On direct examination, Boyd was asked why he was willing to "take the fall" for appellant. Boyd stated he didn't want appellant "taking the fall" for *him* because it was actually his cocaine.

{¶13} On cross examination, appellee confronted Boyd with evidence he spoke to detectives and was unable to tell them where in the house the cocaine was found. Appellee also asked Boyd whether he told detectives he was "taking the fall" for appellant because he already had a felony record and hoped to go to prison to try to get clean from his crack cocaine addiction. Boyd insisted he didn't talk to anyone about his testimony and was not promised anything by appellant for his testimony. He admitted he hoped a prison stint would help him get off crack, but otherwise denied telling detectives he didn't know where the cocaine was found.

{¶14} In rebuttal testimony, a Canton police detective testified he asked Boyd where he supposedly stashed the cocaine and Boyd could only answer "Where you found it."

Indictment, Trial, and Conviction

{¶15} Appellant was charged by indictment with one count of trafficking in cocaine pursuant to R.C. 2925.03(A)(2)(C)(4)(e), a felony of the second degree; one count of possession of cocaine pursuant to R.C. 2925.11(A)(C)(4)(d), also a felony of

the second degree; and one count of trafficking in cocaine pursuant to R.C. 2925.03(A)(1)(C)(4)(a), a felony of the fifth degree.

{¶16} Appellant entered pleas of not guilty and the case proceeded to trial by jury. Appellant moved for a judgment of acquittal at the close of appellee's evidence and the motion was overruled. Appellant was found guilty as charged and the jury made additional findings appellant trafficked and possessed cocaine in an amount greater than 20 grams in Counts I and II.

{¶17} Counts I and II merged for purposes of sentencing. The trial court sentenced appellant to a prison term of 8 years on Count I, to be served concurrent with a term of 12 months on Count III.

{¶18} Appellant now appeals from the trial court's judgment entry of sentence.

{¶19} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶20} "I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO USE A PEREMPTORY CHALLENGE TO EXCUSE A PROSPECTIVE AFRICAN AMERICAN JUROR."

{¶21} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTIONS FOR A MISTRIAL ON TWO OCCASIONS."

{¶22} "III. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶23} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A MAXIMUM SENTENCE ON APPELLANT FOR TRAFFICKING AND POSSESSION OF COCAINE."

ANALYSIS

I.

{¶24} In his first assignment of error, appellant argues the trial court erred in permitting appellee to exercise a peremptory challenge against an African-American juror pursuant to the Supreme Court's ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We disagree.

{¶25} Whenever a party opposes a peremptory challenge by claiming racial discrimination "[a] judge should make clear, on the record, that he or she understands and has applied the precise *Batson* test when racial discrimination has been alleged in opposition to a peremptory challenge." *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 99, 1997–Ohio–227, 676 N.E.2d 872.

{¶26} In *Hicks*, the Ohio Supreme Court set forth the *Batson* test as follows:

> First, a party opposing a peremptory challenge must demonstrate a prima-facie case of racial discrimination in the use of the strike. [ ]. To establish a prima-facie case, a litigant must show he or she is a member of a cognizable racial group and that the peremptory challenge will remove a member of the litigant's race from the venire. The peremptory-challenge opponent is entitled to rely on the fact that the strike is an inherently 'discriminating' device, permitting 'those to discriminate who are of a mind to discriminate'. [ ]. The litigant must then show an inference of racial discrimination by the striking party. The trial court should consider all relevant circumstances in determining whether a prima-facie case exists,

> including all statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present. [ ]. Assuming a prima-facie case exists, the striking party must then articulate a race-neutral explanation 'related to the particular case to be tried.' [ ]. A simple affirmation of general good faith will not suffice. However, the explanation 'need not rise to the level justifying exercise of a challenge for cause.' [ ]. The critical issue is whether a discriminatory intent is inherent in counsel's explanation for use of the strike; intent is present if the explanation is merely pretext for exclusion based on race. [ ]. (Internal citations omitted.) *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 98-99, 1997–Ohio–227, 676 N.E.2d 872.

{¶27} Although the striking party must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive or even plausible;" so long as the reason is not inherently discriminatory, it suffices. *Purkett v. Elem*, 514 U.S. 765, 767–768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam); *Rice v. Collins*, 546 U.S. 333, 126 S.Ct. 969, 973–74, 163 L.Ed.2d 824 (2006).

{¶28} Finally, the trial court must determine whether the party opposing the peremptory strike has proved purposeful discrimination. *Purkett*, supra, 514 U.S. at 766–767. It is at this stage that the persuasiveness, and credibility, of the justification offered by the striking party becomes relevant. Id. at 768. The critical question, which the trial judge must resolve, is whether counsel's race-neutral explanation should be

believed. *Hernandez v. New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *State v. Nash*, 5th Dist. Stark No.1995CA00024, unreported, 1995 WL 498950, *2 (August 14, 1995). This final step involves considering "the persuasiveness of the justification" proffered by the striking party, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, supra, at 768.

{¶29} In the instant case, Juror 146 stated in voir dire both of her parents were addicted to crack cocaine but it did not affect her. Upon inquiry, she further stated the law is the law and she could be fair and impartial regarding allegations involving crack cocaine. When asked for peremptory challenges, appellee stated Juror 146 would be excused because there was another African-American on the panel, Juror 146 said crack cocaine made no difference to her, and she seemed to exhibit a "laissez-faire" attitude toward drugs in general. Appellant objected and pointed out that although Juror 146's parents were crack addicts, she stated she could be fair and impartial. The trial court found appellee presented a race-neutral reason for the challenge and permitted Juror 146 to be excused.

{¶30} We agree with the trial court there is no evidence of discriminatory intent inherent in counsel's explanation for use of the strike. This case involved trafficking of crack cocaine and the broader issue of its effect on the community. Juror 146's attitude toward the use of crack cocaine, to say nothing of her "laissez-faire attitude" in general, is a race-neutral reason for appellee's challenge.

{¶31} Appellant has not persuaded us this strike was exercised with any discriminatory racial motivation. Appellant's first assignment of error is overruled.

II.

{¶32} In his second assignment of error, appellant asserts the trial court should have granted his motions for mistrial. We disagree.

{¶33} Appellant first moved for mistrial upon the detective's spontaneous statement he found eight pills while searching appellant's residence. The trial court denied the motion for mistrial and offered a curative instruction; defense trial counsel declined the curative instruction but asked that the answer be stricken. The trial court sustained the objection and struck the detective's statement.

{¶34} Appellant next moved for a mistrial during appellee's presentation of rebuttal evidence. The detective referred to appellant as a "known drug dealer" in questioning why Kenneth Boyd would offer to "take the fall for a known drug dealer." The trial court advised the jury to disregard the statement.

{¶35} In final jury instructions, the panel was instructed to disregard any statements that were stricken.

{¶36} The trial court did not abuse its discretion in refusing to grant a mistrial in both events; it was not unreasonable, arbitrary, or unconscionable to admonish the jury to ignore the stricken testimony rather than grant a mistrial. Curative instructions are presumed to be an effective way to remedy errors that occur during trial. *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001–Ohio–4, 739 N.E.2d 749. In *State v. Ahmed*, 103 Ohio St.3d 27, 42, 2004–Ohio–4190, 813 N.E.2d 637, the Ohio Supreme Court noted the following in determining a trial court properly failed to *sua sponte* declare a mistrial:

> The determination of whether to grant a mistrial is in the discretion of the trial court. *State v. Glover*, [35 Ohio St.3d 18, 19, 517 N.E.2d

> 900 (1988)]; *State v. Brown*, [100 Ohio St.3d 51, 2003–Ohio–5059, 796 N.E.2d 506, ¶ 42]. "[T]he trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial." *Glover*, 35 Ohio St.3d at 19; see, also, *State v. Williams*, 73 Ohio St.3d 153, 167, 652 N.E.2d 721 (1995). This court will not second-guess such a determination absent an abuse of discretion.

{¶37} We find the same to be true here. See, *State v. Pryor*, 5th Dist. Stark No. 2013CA00016, 2013-Ohio-5693 , ¶ 48, appeal not allowed, 138 Ohio St.3d 1494, 2014-Ohio-2021, 8 N.E.3d 964. "The trial judge in this case gave a short, authoritative instruction to the jury * * * that sufficed to remedy any possible error regarding the struck testimony." *State v. Allen*, 5th Dist. Delaware No. 2009–CA–13, 2010–Ohio–4644, ¶ 250, appeal not allowed, 127 Ohio St.3d 1535, 2011–Ohio–376, 940 N.E.2d 987. "A trial jury is presumed to follow the instructions given to it by the judge." *Beckett v. Warren*, 124 Ohio St.3d 256, 2010–Ohio–4, 921 N.E.2d 624, ¶ 18.

{¶38} Appellant's second assignment of error is overruled.

III.

{¶39} In his third assignment of error, appellant argues his convictions are against the manifest weight and sufficiency of the evidence. We disagree.

{¶40} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*,

61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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."

{¶41} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶42} Appellant was found guilty of two counts of trafficking in cocaine pursuant to R.C. 2925.03(A)(2)(C)(4)(e) and R.C. 2925.03(A)(1)(C)(4)(a), which state in pertinent part:

> No person shall knowingly
>
> (1) Sell or offer to sell a controlled substance or a controlled substance analog;

> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶43} Appellant was also convicted of one count of cocaine possession pursuant to R.C. 2925.11(A)(C)(4)(d) which states in pertinent part: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶44} Appellant argues the evidence regarding the controlled buy was deficient because the C.I. may have had cocaine hidden upon his or her person; the transaction was not videotaped; and the jury was not shown the "marked money" the C.I. provided to appellant. Detective Smith, though, testified the C.I. was searched as thoroughly as necessary, he did not observe the C.I. reach into his or her crotch area to withdraw contraband during the buy, and he observed the entire transaction. Appellant's argument on this point therefore asks us to weigh the credibility of the detective's testimony, but the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶45} Appellant further argues there is no evidence appellant was dealing the cocaine found at 2418 Bollinger NE because he was not the owner of the residence and police did not test the evidence found for D.N.A. or fingerprints. Sufficient evidence exists, though, from which the jury could determine it was only appellant who dealt

cocaine from the residence. He was the only person observed by neighbors to live at the residence; neighbors observed him in what can only be described as obvious drug transactions; police observed him sell crack cocaine to a C.I.; and police found what they described as "tools of the business," i.e. scales and uncut crack cocaine, inside appellant's residence.

{¶46} Finally, appellant points out Kenneth Boyd testified the 24.69 grams of cocaine found under the couch was his. Again, it is up to the jury to weigh the credibility of the witnesses at trial.

{¶47} We find appellant's convictions are supported by sufficient evidence and the record does not establish the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction must be overturned and a new trial ordered. Appellant's third assignment of error is therefore overruled.

IV.

{¶48} In his fourth assignment of error, appellant contends the trial court erred in sentencing him to maximum sentences of eight years upon his convictions of trafficking in cocaine and possession of cocaine. We disagree.

{¶49} We note appellant's convictions upon trafficking (Count I) and possession (Count II) merged, so appellant received one aggregate sentence of eight years. The 12-month sentence upon Count III, trafficking in cocaine, is concurrent with the 8-year term.

{¶50} In *State v. Kalish,* 120 Ohio St.3d 23, 896 N.E.2d 124, 2008–Ohio–4912, the Ohio Supreme Court established a two-step procedure for reviewing a felony sentence. The first step is to "examine the sentencing court's compliance with all

applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. If the first step is satisfied, the second step requires the trial court's decision be reviewed under an abuse-of-discretion standard. *Id.*

{¶51} Subsequent to the Ohio Supreme Court's *Foster* decision, "[t]he decision to impose the maximum sentence is simply part of the trial court's overall discretion in issuing a felony sentence and is no longer tied to mandatory fact-finding provisions." *State v. Parsons,* 7th Dist. Belmont No. 12 BE 11, 2013–Ohio–1281, ¶ 14.

{¶52} In the instant case, the trial court noted it was "incensed" by the level of blatant drug trafficking at appellant's residence, which directly impacted the community. The record establishes the trial court weighed this outrage with appellant's lack of a felony record and determined consecutive sentences would not be appropriate. The prison term of 8 years is within the statutory range for a second-degree felony offense pursuant to R.C. 2929.14(A)(2) and is in accordance with law. We further find the sentence of the trial court is supported by the record and does not constitute an abuse of discretion.

{¶53} Appellant's fourth assignment of error is overruled.

CONCLUSION

{¶54} Appellant's four assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Gwin, P.J.

Baldwin, J., concur.