[Cite as *State v. Young*, 2015-Ohio-2075.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 14CA25
	:	
MARIO YOUNG, SR.	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2013 CR 0505 D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 26, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND CO. PROSECUTOR JOHN C. NIEFT 38 South Park Street Mansfield, OH 44902	CASSANDRA J. M. MAYER 452 Park Ave. West Mansfield, OH 44906

Delaney, J.

{¶1} Appellant Mario Young, Sr. appeals from the February 27, 2014 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the trial record. This case involves a confidential informant identified as "C.I. 13-04." This person's identity was revealed at trial but the person was also repeatedly referred to by the anonymous identifier. We will therefore refer to the informant as C.I. 13-04.

{¶3} C.I. 13-104 was traffic stopped by the Ohio State Highway Patrol on the morning of February 18, 2013, and found to be in possession of five ounces of heroin. Upon arrest for O.M.V.I. and heroin possession, C.I. 13-104 consented to speak to officer from Metrich, a multi-county drug task force. The goal of cooperation was to permit C.I. 13-104 to go home rather than immediately to jail.

{¶4} During the Metrich interview, officers determined they did not have enough funds available to attempt a controlled buy from the heroin dealer C.I. 13-104 had recently dealt with. The informant also advised, however, that a payment of $1300 had already been made to appellant for a delivery of cocaine that was supposed to take place later that day.

{¶5} Metrich officers testified about their usual protocol with confidential informants. First, they attempt to corroborate the information the informant brings to them; for example, if they already are aware of the alleged dealers involved and, based upon law enforcement intelligence, whether it is likely the target can provide the amount

of narcotics the informant is promising. Second, they corroborate the planned actions of the informant by placing recorded phone calls to the target. The informant is wired for audio and video recording of the transaction. Finally, the informant and his or her vehicle are thoroughly searched before and after the transaction to ensure the informant did not hide contraband anywhere. The drugs or contraband obtained in the controlled buy are seized by Metrich and submitted to the crime lab for testing.

{¶6} In this case, C.I. 13-104 provided Metrich with the phone number of appellant. Officers testified they did not independently verify the accuracy of the phone number because it was not likely the number was registered in appellant's name anyway. The call was recorded and appellant told the informant to come to the "Legion," the American Legion bar located at 460 Harmon Avenue, Mansfield. The calls placed by the informant were recorded and introduced as State's Exhibit 1 at trial.

{¶7} The informant was wired for video and sound and thoroughly searched. The informant picked up a personal vehicle which was also searched, the video camera was activated and the transaction was captured on video and audio. The informant drove to the bar, went in and approached appellant. The two entered the bathroom, and spoke as other individuals came in and out of the bathroom. Appellant appears on the video alternately eating pizza, wiping his face with toilet paper, and parceling out a white powdered substance from a plastic bag.

{¶8} After the transaction, the informant drove back to a Metrich facility, pulled into a garage, was searched again, and turned over the substance obtained from appellant. C.I. 13-104 was shown a photo lineup of six individuals with similar physical characteristics. Appellant's photo was selected as the person who sold the cocaine.

{¶9} The substance recovered from C.I. 13-104 was submitted to the Mansfield Police Forensic Science Laboratory and found to contain 30.90 grams of cocaine, a Schedule II controlled substance.

{¶10} Appellant was charged by indictment with one count of trafficking cocaine pursuant to R.C. 2925.03(A)(1) and (C)(4)(f), a felony of the first degree [Count I]; one count of trafficking cocaine pursuant to R.C. 2925.03(A)(2) and (C)(4)(f), a felony of the first degree [Count II]; and one count of possession of cocaine pursuant to R.C. 2925.11(A) and (C)(4)(e), a felony of the first degree [Count III]. All three counts alleged the amount of cocaine at issue exceeded 27 grams but was less than 100 grams.

{¶11} Appellant entered pleas of not guilty and the case proceeded to trial by jury. Appellant was found guilty as charged and sentenced to a mandatory prison term of ten years on Count I, trafficking cocaine. Counts II and III were found to be allied offenses.

{¶12} Appellant now appeals from the judgment entry of conviction and sentence entered on February 27, 2014.

{¶13} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶14} "I. MARIO YOUNG, SR. WAS DENIED THE RIGHT TO DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION AS A RESULT OF PROSECUTORIAL MISCONDUCT."

{¶15} "II. THE TRIAL COURT ERRED WHEN IT ADMITTED THE PHOTO ARRAY AS EVIDENCE IN VIOLATION OF MARIO YOUNG SR.'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION."

{¶16} "III. THE TRIAL COURT ERRED AND DEPRIVED MARIO YOUNG, SR. OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE JURY VERDICTS AS A MATTER OF LAW AND BECAUSE THE JURY VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ANALYSIS

I.

{¶17} In his first assignment of error, appellant argues his rights to due process and a fair trial were compromised by repeated instances of prosecutorial misconduct. We disagree.

{¶18} The test for prosecutorial misconduct is whether the prosecutor's remarks and comments were improper and if so, whether those remarks and comments prejudicially affected the substantial rights of the accused. *State v. Lott,* 51 Ohio St.3d 160, 555 N.E .2d 293 (1990), cert. denied, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 596 (1990). In reviewing allegations of prosecutorial misconduct, we must review the complained-of conduct in the context of the entire trial. *Darden v. Wainwright,* 477 U.S.

168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived appellant of a fair trial based on the entire record. *Lott*, supra, 51 Ohio St.3d at 166. Appellant points to a number of instances of alleged prosecutorial misconduct and argues that the cumulative effect of these examples deprived him of a fair trial.

Use of Photo Array Exhibit

{¶19} Appellant first argues appellee impermissibly referred to inadmissible evidence when he asked a police officer to identify the photo array before the informant testified. We do not have the benefit of a record of the pretrial discussion and ruling appellant partly relies upon. Instead, appellant points us to the portion of the trial record in which Det. Tidaback identifies State's Exhibit 5 as the photo array shown to the informant, and the following conversation took place upon appellant's objection:

> [DEFENSE COUNSEL:][1] Regarding, I think that goes to, I think there is a problem, he's going to show he identified [appellant]. That picture is all marked up, didn't we talk about that?
>
> THE COURT: What he can do is identify them. Whether they are admissible, whether they get to show it to the jury is an issue.
>
> [DEFENSE COUNSEL:] He's showing the jury as he is holding them up.
>
> [PROSECUTOR:] We admit photo arrays through detectives.
>
> THE COURT: You can have him identify it, okay. The Crawford issue is if [C.I. 13-104] does not testify, and [the detective's]

[1] Defense trial counsel is also appellate counsel.

> indicated that No. 2 is [appellant], without [C.I. 13-104] that's a problem. If he's going to show No. 2 to the jury, you cannot do it.
>
> [PROSECUTOR:] Can I ask him if he can identify--
>
> THE COURT: Yes, but he can't put it to the jury.
>
> [PROSECUTOR:] Can I say does the person depicted in No. 2, do you see that person on the video?
>
> [DEFENSE COUNSEL:] No.
>
> THE COURT: You hadn't said No. 2 -- you had him say No. 2, but that becomes testimonial as soon as he says who No. 2 is, then your guy is [appellant], and I think that's testimonial. That's my ruling anyway, you will have to live with it.
>
> THEREUPON, the bench conference concluded.
>
> T. 180-181.

{¶20} Appellant also directs us to the portion of the record at the conclusion of appellee's case. The photo array is admitted as an exhibit over appellant's objection and the trial court remarks, "There was a large discussion at the beginning of this case when it appeared that [C.I. 13-104] would not take the stand and would not testify and answer questions, that there is a confrontation issue which would have kept the photo array out, but it was identified sufficiently I think to come in." T. 315.

{¶21} The underlying issue in appellant's claim here is not whether the photo array could properly be introduced through a witness other than the informant, but whether the prosecutor improperly commented on inadmissible evidence. Appellant equates the instant case to *State v. McKinney*, in which a defendant was charged with

murder and raised a self-defense argument. 7th Dist. Mahoning No. 08 CR 528, 2011-Ohio-4333. The trial court ruled early in the trial that the victim's criminal record was not admissible but the prosecutor argued in closing the defense had failed to present any evidence the victim was a "large, mean, convicted felon." Id., 2011-Ohio-4333 at ¶ 52. The appellate court determined the prosecutor's statement was misleading and improper, but did not prejudice the defendant in the context of the entire trial. Id.

{¶22} In the instant case, however, we find no such improper comment by the prosecutor on evidence previously ruled inadmissible. Within the context of the sidebar conference and the ruling by the court regarding admission of the photo array, the prosecutor did not commit misconduct.

Questioning of Witnesses and Closing Argument

{¶23} Appellant next argues appellee "purposefully questioned an officer in such a way as to deliver a message to the jury that counsel for [appellant] was attempting to mislead the jury with her questions related to the use of 'them' and 'their' in the reports." We note, though, during cross-examination, defense trial counsel did question the use of the pronouns "them," "they," and "their" throughout the police report and probed whether the informant acted with someone else. T. 198. The officer responded the collective pronouns are meant to conceal the identity of the informant and not reveal the person's gender. Upon redirect, the prosecutor asked the officer whether he is aware the reports are disclosed to the defense in discovery, establishing police realize the accused will have access to the informant's identity if it is contained in the report. The prosecutor then stated, "So [defense trial counsel] would know full well that they or their is a generic term that's used to---" and the trial court immediately sustained appellant's

objection. Again, in the context of the entire statement, this comment does not rise to the level of prosecutorial misconduct.

{¶24} Appellant next contends appellee committed prosecutorial misconduct evidenced by "inappropriate influence" over the confidential informant, "badger[ing] and bully[ing" the witness. The prosecutor admonished the informant several times, required by the informant's obvious reluctance to testify despite a generous plea agreement in exchange for doing so. The prosecutor's conduct toward the increasingly hostile witness was not improper and is not prosecutorial misconduct.

{¶25} Next, appellant cites multiple instances of alleged misconduct in appellee's closing statement, asserting the prosecutor misstated the evidence. Appellant did not object to these statements. We have reviewed the trial record and exhibits, including the videotape of appellant in the American Legion bathroom genially weighing out a portion of a white substance to the informant as other people come and go. The substance is tested and found to contain cocaine. In closing argument, a prosecutor may comment on “what the evidence has shown and what reasonable inferences may be drawn therefrom.” *Lott*, supra, 51 Ohio St.3d at 165. Each instance cited here is a fair comment on the evidence.

Denigration of Defense Counsel

{¶26} Finally, appellant argues the prosecutor committed misconduct by denigrating defense trial counsel. It is improper to denigrate defense counsel in the jury's presence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 304, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 167. However, "[i]t is true, of course, that the prosecution is entitled to some latitude and

freedom of expression in closing argument." *State v. Keenan*, 66 Ohio St.3d 402, 409, 613 N.E.2d 203 (1993). “Realism compels us to recognize that criminal trials cannot be squeezed dry of all feeling.” Id.

{¶27} Appellant cites a number of comments during appellee's closing argument and rebuttal which "remarks directed at the evidence and not counsel." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565 at ¶ 221. Stating the defense argument is illogical does not, by extrapolation, denigrate defense counsel.

{¶28} Appellant points to another comment, however, which is misstated in appellant's brief and we must evaluate in context. Appellee stated:

> [APPELLEE:] * * * *.
>
> And then she says you don't prepay for drugs. Well, there are one or two implications here. Either [defense trial counsel] is a long-time drug dealer and knows more about it than these veteran detectives or--
>
> [DEFENSE TRIAL COUNSEL:] Objection.
>
> THE COURT: Overruled, it's argument.
>
> [APPELLEE:] --or she doesn't know what she's talking about. I will give her the benefit of the doubt and say she doesn't know what she's talking about. She wants to suggest things to you to make you go back there and get tricked into thinking there is some reasonable doubt.
>
> * * * *.
>
> T. 374-375.

{¶29} The prosecutor could properly respond to the defense argument regarding the improbability of drug dealers "pre-paying" for drugs. The prosecutor's sarcastic comparison of defense counsel to a drug dealer, coupled with the reference to argument as a "trick," however, may be said to have disparaged the defense counsel. See, *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶¶ 304-308 (2008), citing *LaMar,* supra, 2002-Ohio-2128 at ¶ 167.

{¶30} Prosecutors are entitled to respond, fairly, to arguments of the defense. In this case, one line of defense argument was the unlikelihood of a drug purchaser being willing to "pre-pay" for drugs not immediately delivered. Police witnesses testified this practice is not common but is not unheard of. In that context, appellant mischaracterizes the comment as referring to counsel as a "long-time drug dealer." The either-or statement was patently a sarcastic commentary on one line of defense argument. Combined with the statement inferring counsel's intent to "trick" the jury, however, the statement is bordering on denigration of counsel. In *LaMar*, supra, the prosecutor contrasted his "honest" case with the defense case and directly criticized a defense attorney, which the appellate court found "[i]n the context in which they were stated, the prosecution's comments imputed insincerity to defense counsel and were therefore improper. " 2002-Ohio-2128 at ¶ 149.

{¶31} The fact that the prosecutor engaged in some improper argument, however, does not warrant reversal unless the remarks prejudicially affected substantial rights of the accused. *State v. Hessler*, 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 (2000). In making this determination, we must consider the effect of any misconduct in the context of the entire trial and view the prosecutor's closing argument in its entirety

when determining prejudice. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *Keenan*, supra, 66 Ohio St.3d at 410.

{¶32} We find no basis for reversing appellant's conviction based on these comments. Although some of the argument was improper and imputed insincerity to defense counsel, these comments did not pervade the entire trial or the closing argument. The result of the trial would not have been different absent the arguably improper comments by appellee. *LaMar*, 2002-Ohio-2128 at ¶¶ 167-169.

{¶33} Appellant argues the cumulative impact of multiple alleged instances of the prosecutor's misconduct prejudiced him. We find only one such comment to be improper and it does not rise to the level of prosecutorial misconduct because it did not prejudicially affect appellant's substantial rights. The record demonstrates appellant received a fair trial and any error was nonprejudicial. *Diar*, supra, 2008-Ohio-6266 at ¶ 223. Appellant's first assignment of error is overruled.

II.

{¶34} In his second assignment of error, appellant argues the trial court improperly admitted the photo array. We disagree.

{¶35} As mentioned supra in our discussion of appellant's first assignment of error, the trial court ruled the photo array could not be admitted into evidence unless C.I. 13-104 testified at trial. C.I. 13-104 did testify, but appellant argues appellee failed to introduce the array during the informant's testimony and thus was prevented from introducing the array during the testimony of police officers.

{¶36} The admission or exclusion of relevant evidence is a matter left to the sound discretion of the trial court. Absent an abuse of discretion resulting in material

prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶37} We addressed a similar issue in *State v. Watters*, 5th Dist. Licking No. 2007-CA-00067, 2008-Ohio-4344, in which the appellant argued an officer's testimony regarding identification by the victim from a photo array violated his right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

{¶38} In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that a testimonial statement from a witness who does not appear at trial is inadmissible against the accused unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 59, 124 S.Ct. 1354, 158 L.Ed.2d 177." *Id.*

{¶39} Evid. R. 801(D)(1)(c) provides that a statement made out of court is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, and the statement is one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification. Reliability factors include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." See *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977). Consistent with the Rule, prior identification of the accused may be shown by testimony of the identifier or by testimony of a third person to

whom or in whose presence identification was made, where the identifier has testified and is available for cross-examination, as substantive proof of identity of accused as guilty party. *Watters*, supra, 2008-Ohio-4344 at ¶12, citing *State v. Anderson,* 2nd Dist. Montgomery No. C.A. 13003, unreported (March 23, 1994).

{¶40} In the instant case, Tidaback testified an array was shown to the informant, identified the array as an exhibit, and testified the informant identified the person in photo number 2 as the person who delivered the narcotics to him during the transaction. He was not permitted to testify appellant was Number 2. The next witness, the informant, testified to a life-long relationship with appellant as "cousins" and identified appellant in court as the person who delivered the cocaine.

{¶41} As in *Watters*, the informant here was confronted by cross-examination. Later in the trial, Detective Perry Wheeler testified he put the photo array together and the informant selected photo number 2. We find the trial court did not abuse its discretion in permitting the photo array to be introduced or admitted. The informant was available and testified, subject to cross examination; the out-of-court identification was reliable because the informant was familiar with appellant and positively identified him in the photo array within hours of the transaction. Tidaback's testimony was admissible pursuant to Evid.R. 801(D)(1)(c) and did not violate the rule of law set forth in *Crawford v. Washington.*

{¶42} Also as in *Watters, e*ven if we were to find the testimony and exhibit to be inadmissible hearsay, the error in the admission was harmless. 2008-Ohio-4344 at ¶ 19. Harmless errors are to be disregarded and the erroneous admission or exclusion of evidence is not reversible unless it affects a substantial right that prejudices the

defendant. See, Crim.R. 52(A); Evid.R. 103(A); *State v. Brown*, 65 Ohio St.3d 483, 485, 605 N.E.2d 46 (1992). Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless, and therefore, will not be grounds for reversal. *State v. Lytle*, 48 Ohio St 2d 391, 358 N.E.2d 623 (1976), paragraph three of syllabus, vacated on other grounds in 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed 2d 1154 (1978).

{¶43} Identity was not an issue in this case and the photo array was all but superfluous to the rest of appellee's evidence. “The test for determining whether the admission of inflammatory or otherwise erroneous evidence is harmless and non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then decide whether there is other substantial evidence to support the guilty verdict." *State v. Davis*, 44 Ohio App.2d 335, 347, 338 N .E.2d 793 (1975). Absent the photo array, substantial evidence supports appellant's guilt.

{¶44} In light of the video and audio recordings of appellant delivering cocaine to the informant, coupled with the surrounding circumstances of the controlled delivery, there is sufficient evidence to establish beyond a reasonable doubt that the appellant committed the offenses of which he was convicted.

{¶45} Appellant's second assignment of error is without merit and is overruled.

III.

{¶46} In his third assignment of error, appellant argues his convictions are against the manifest weight of the evidence and are not supported by sufficient evidence. We disagree.

{¶47} 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."

{¶48} 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.*

{¶49} Appellant was found guilty of one count of trafficking cocaine pursuant to R.C. 2925.03(A)(1) and (C)(4)(f) [Count I]; one count of trafficking cocaine pursuant to R.C. 2925.03(A)(2) and (C)(4)(f) [Count II];[2] and one count of possession of cocaine pursuant to R.C. 2925.11(A) and (C)(4)(e) [Count III].[3]

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[2] R.C. 2925.03(A)(1) states: "No person shall knowingly * * * [s]ell or offer to sell a controlled substance or a controlled substance analog." R.C. 2925.03(A)(2) states: "No person shall knowingly * * * [p]repare 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." The penalty is determined by R.C. 2925.03(C)(4)(f):

> Whoever violates division (A) of this section is guilty of one of the following:
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:
> (f) If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine and regardless of whether 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 first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

[3] R.C. 2925.11 (A) states "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." The penalty is determined by R.C. 2925.11(C)(4)(e):

> Whoever violates division (A) of this section is guilty of one of the following:
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:
> (e) If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

{¶50} All three counts alleged the amount of cocaine at issue exceeded 27 grams but was less than 100 grams.

{¶51} We disagree with appellant's characterization of the record in this case; appellee did not rely upon "inference stacking." Appellee's evidence, as we have exhaustively reviewed, included audio and video evidence of appellant in the American Legion parceling out white powder to the informant. The white powder was later found to contain cocaine. Appellant insists appellee's entire case falls because it is unlikely drug dealer would "pre-pay" for drugs. Officers testified, however, the practice is not common but also not unheard of. Additionally, appellant was the informant's "cousin" and the informant testified to a level of "trust" in their transactions. Moreover, the informant told police the amount fronted for cocaine was $1300 and the powder cocaine tendered by appellant is consistent in amount and value. Appellant further argues that appellee insufficiently established that he personally delivered the drugs but again the video evidence is clear. Despite moments of other people passing in and out of the scene, the jury could reasonably find the evidence of the informant's heroin bust, followed by consent to cooperate with a controlled delivery from appellant of $1300 worth of cocaine, followed by a taped transaction demonstrating appellant doing exactly that, established appellant's guilt beyond a reasonable doubt.

{¶52} Appellant's third assignment of error is overruled.

CONCLUSION

{¶53} Appellant's three assignments of error are reversed and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.