[Cite as *State v. Hill*, 2019-Ohio-3432.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2018CA00077
	:	
JOHN LAWRENCE HILL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2018CR0284
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 5, 2019

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR KRISTINE W. BEARD 110 Central Plaza S., Ste. 510 Canton, OH 44702-1413	AARON KOVALCHIK 116 Cleveland Ave. N.W. Suite 808 Canton, OH 44702

Delaney, J.

{¶1} Appellant John Lawrence Hill appeals from the May 25, 2018 judgment entry of the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

Suppression hearing: probable cause to search Smith Street "stash house"

{¶2} The following evidence was adduced at the suppression hearing on April 11, 2018. In his motion to suppress, appellant asserted the search warrant of his residence was not premised upon probable cause because the information from a confidential informant (C.I.) was neither credible nor reliable.

{¶3} Agent Blanc of the Stark Metro Narcotics Unit has worked with the confidential informant ("C.I.") in this case since 2012. The C.I. has always provided Blanc with reliable information, and Blanc made the C.I. available to the Canton Police Department for use as a C.I. as well. In November 2017, the C.I. approached Blanc to advise that someone referred to as "Eddie" sold heroin out of a house in the northwest end of Canton. On a "moving tour" of the city, the C.I. pointed out an address on Oxford Avenue Northwest and identified the house as the location of heroin sales. Through a search of B.M.V. records and utility bills, appellant was identified as "Eddie."

{¶4} Throughout December 2017 and January 2018, Metro made a series of controlled buys from appellant and others at the Oxford address. Agents obtained and executed a search warrant for the Oxford address. Blanc then attempted to speak to appellant but appellant was uncooperative.

{¶5} Metro became aware of a second location associated with appellant, at 352 Smith Street, Canton. Appellant is the A.E.P. account holder at that address. The C.I.

made a series of controlled buys in which they could speak to appellant on the phone and he would direct them to meet him at a certain location.[1] Appellant would go to the Smith address in the meantime, enter the house for several minutes, leave, and meet the C.I. During these meetings, hand-to-hand narcotics sales were made.

{¶6} Metro obtained a tracking warrant allowing them to place a G.P.S. tracker on a gold pickup truck registered to appellant. Via the tracking warrant, agents learned appellant was in "nightly" contact with the Smith address. The C.I. reported that appellant was also known to drive a red Dodge Challenger. The C.I. called appellant and set up a controlled buy; appellant drove to the Smith address in the red Challenger; appellant then met with the C.I. at a location he directed them to; and a hand-to-hand transaction occurred.

{¶7} The suppression hearing focused on what Metro knew about the Smith address. Blanc acknowledged he had no direct evidence that drugs were inside the house; the C.I. was never inside the Smith address; and Metro had no knowledge of appellant selling drugs directly from the house. Nevertheless, Metro had the circumstantial evidence of appellant stopping at the house prior to his rendezvous with the C.I.

{¶8} Blanc obtained a search warrant for the Smith Street address. He testified that the affidavit contained one factual error: the affidavit stated two relevant controlled buys were made on December 14, 2017. In fact, one controlled buy was made on December 14 and one was made on December 20, 2017.

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[1] The gender of the C.I. is not evident from the record. The C.I. will be referred to with the gender-neutral pronoun "they" or "them" when necessary.

{¶9} The search warrant for the Smith address was executed on February 9, 2018. Metro agents observed the red Challenger parked outside and waited for appellant to leave. He drove off and was soon traffic-stopped by previous arrangement with Canton police. In the meantime, agents entered the house and found digital scales with white-powder residue on them; a bag containing one ounce of a "brown rock substance;" and a bag containing approximately 7 grams of brown powder.

{¶10} Appellant moved to suppress evidence obtained upon execution of the Smith Street search warrant, including drug paraphernalia, carfentanil, and marijuana. The trial court overruled the motion to suppress, noting that "* * * while none of the buys occurred *inside* the Smith Ave residence, the pattern of traffic by [appellant] to and from the residence in conjunction with the controlled buys, lead (*sic*) officers to reasonably infer that the Smith residence was being used to stash drugs and drug paraphernalia commonly used for drug trafficking, thus providing a nexus between [appellant's] illegal activities and the residence searched."

Jury trial: Trafficking and possession of carfentanil

{¶11} The following evidence is adduced from the record of appellant's jury trial.

{¶12} Agent Blanc began investigating appellant on November 29, 2017, when a C.I. advised someone known on the street as "Eddie" was selling heroin out of a house on Oxford Northwest in the city of Canton. Metro agents identified "Eddie" as appellant and began surveilling him. Agents obtained a tracking warrant to place a G.P.S. tracker on a gold pickup truck appellant was known to drive. Pursuant to the tracking warrant, agents learned appellant was "nightly" going to a residence at 352 Smith Street in Canton.

Most of appellant's time was spent at the Smith Street address. The electric bill for the Smith residence was in appellant's name and he appeared to live there alone.

{¶13} Appellant stopped driving the gold pickup truck and was thereafter known to be driving a red Dodge Challenger.

{¶14} Agents set up a controlled buy from appellant to the C.I. on February 5, 2018. As a result of the controlled buy, Blanc sought and obtained a search warrant for the 352 Smith Street residence.

{¶15} Agents planned to execute the search warrant on February 9, 2018. They surveilled the house beginning around 9:00 a.m. and observed the red Challenger parked outside. Appellant left the residence, alone, and was traffic-stopped by prior arrangement a short distance away. Five cell phones were found in the vehicle.

{¶16} Meanwhile, agents executed the search warrant. No one else was present inside the residence. In the kitchen, agents found two bags containing brown substances, one hard and one powder. Agents also found a digital scale with residue on it, and plastic baggies of the type used for packaging narcotics in unit doses.

{¶17} Agents obtained search warrants for the cell phones found in the Challenger, and Blanc testified to text messages found on one of the phones, over appellant's objections. The texts presented by appellee were dated February 9, 2018, and were received between 9:00 and 10:00 a.m. A contact under the name "Jes Dude" stated, "I'm gonna need a hundo at about 9 and another hundo after I get my check like 11….just a heads up I will text you when I'm 15 minutes from my crib." Blanc testified a "hundo" is street parlance for $100 of narcotics. Another text stated, "I'm going to get my check can you do a b for 200?" Blanc testified a "b" is an "8-ball," or 1/2 –ounce of

narcotics. Later, “what a b cost” and, “I got you 200.” Blanc testified this conversation references the sale of narcotics.

{¶18} An “Ohio Direction card” was found in a drawer under one of the digital scales. Blanc testified the card represents welfare benefits, i.e. food stamps, and is sometimes traded for narcotics.

{¶19} An analyst from the Stark County Crime Lab testified about his analysis of items seized from the Smith residence. The tied plastic bag of a hard, brown material tested positive as 28.27 grams of carfentanil. The plastic bag of beige powder tested as 7.36 grams of carfentanil. Residue on one of the digital scales tested as carfentanil. Finally, a small tied plastic bag containing a hard, brown substance tested as .39 grams of carfentanil. Carfentanil is a Schedule II controlled substance and is the most potent synthetic opioid commercially available.

{¶20} Two witnesses testified on behalf of appellant at trial. Latonia Rutledge is appellant’s friend and the registered owner of the red Dodge Challenger. She testified she has visited appellant at the Smith residence several times and there are always other people at the house. She permitted appellant to borrow her car to drive. A’Donte Collier is also a friend of appellant’s who has visited him at the Smith residence. Collier testified there are always numerous people in and out of the Smith residence.

Indictment, suppression, trial, and conviction

{¶21} Appellant was charged by indictment with one count of aggravated drug trafficking pursuant to R.C. 2925.03(A)(2)(C)(1)(b), a felony of the third degree [Count I], and one count of aggravated drug possession pursuant to R.C. 2925.11(A)(C)(1)(b), a

felony of the third degree [Count II].[2] The indictment charged appellant with possessing and selling carfentanil in an amount greater than 20 grams but less than 100 grams. Appellant entered pleas of not guilty.

{¶22} On March 20, 2018, appellant filed a motion to suppress all evidence found in his residence during execution of a search warrant. Appellant alleged the search warrant was fatally defective because it lacked probable cause and was not based upon reliable or credible information from a confidential informant. The matter was scheduled for an evidentiary hearing.

{¶23} On April 19, 2018, the trial court overruled the motion to suppress.

{¶24} On April 24, 2018, appellant filed a motion in limine asking the trial court to exclude evidence of text messages taken from three of appellant's cell phones. Appellee filed a written memorandum in opposition. On May 15, 2018, via Judgment Entry, the trial court overruled the motion in limine and found the text messages to be admissible.

{¶25} The matter proceeded to trial by jury. Appellant moved for judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence but the motion was overruled. Appellant was found guilty as charged. The trial court found that Counts I and II merged for purposes of sentencing and sentenced appellant to a single prison term of 36 months.

{¶26} Appellant now appeals from the trial court's judgment entries of conviction and sentence, incorporating the trial court's decision overruling his motion to suppress.

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[2] Count I was originally charged pursuant to R.C. 2925.03(A)(1)(C)(1)(c), a felony of the second degree, but appellee amended the indictment with leave of the trial court on May 25, 2018, eliminating the provision that the controlled substance was trafficked in the vicinity of a school.

{¶27} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶28} "I. APPELLANT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 14 OF THE OHIO CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT OVERRULED THE MOTION TO SUPPRESS."

{¶29} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY OF PRIOR BAD ACTS."

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

ANALYSIS

I.

{¶31} In his first assignment of error, appellant argues the trial court should have granted his motion to suppress. We disagree.

{¶32} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See, *Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final

issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

{¶33} The affidavit for search warrant in the instant case was marked at the suppression hearing, but not admitted into evidence (T. Suppression, 26). It has not been made part of the record for our review. Appellant's argument does not address the search warrant affidavit, however, although he claims the warrant lacked probable cause. Instead, he points to Blanc's testimony at the suppression hearing that the C.I. was never inside the Smith residence and Blanc had no direct knowledge that there were narcotics in the Smith residence. Therefore, he concludes, there was insufficient probable cause for the magistrate to issue the search warrant.

{¶34} In his motion to suppress, appellant argued there was insufficient probable cause for a search warrant to issue because no undercover buys were conducted at the Smith residence and there was no underlying information regarding the reliability of the C.I. other than a blanket statement that the C.I. was reliable. In its Judgment Entry of April 19, 2018, the trial court did not make any findings regarding the affidavit for search warrant, stating: "In reviewing this matter, the Court has considered the testimony of Agent Blanc, his knowledge and experience as a law enforcement officer, his testimony as to the reliability of his C.I., his personal knowledge of surveillance of [appellant's] activities, and the reasonable inferences drawn therefrom."

{¶35} When challenging the sufficiency of an affidavit on the basis of lack of probable cause to support the issuance of the warrant, it is the duty of a reviewing court

to simply ensure that the magistrate had a substantial basis for concluding that probable cause existed. *State v. McDaniel*, 5th Dist. Richland No. 14CA47, 2015-Ohio-1007, ¶ 26, citing *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). A judge may issue a search warrant only upon a finding that "probable cause for the search exists." Crim.R. 41(C). When reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, an appellate court should accord great deference to the magistrate's judgment. See, *State v. Mills*, 62 Ohio St.3d 357, 367, 582 N.E.2d 972, 982 (1992); *State v. DeLeon*, 76 Ohio App.3d 68, 600 N.E.2d 1137 (1991); *United States v. Travisano*, 724 F.2d 341 (C.A.2, 1983.)

{¶36} A search warrant and its supporting affidavits enjoy a presumption of validity. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Roberts, 62 Ohio St.2d 170, 178, 405 N.E.2d 247 (1980); *U.S. v. Ventresca*, 380 U.S. 102, 105–106, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *State v. George*, 45 Ohio St.3d 325, 330, 544 N.E.2d 640 (1989). When a motion to suppress attacks the validity of a search conducted pursuant to a warrant, the burden of proof is on the defendant to establish that evidence obtained pursuant to the warrant should be suppressed. *State v. Dennis*, 79 Ohio St.3d 421, 426, 683 N.E.2d 1096 (1997); *State v. Carter*, 2d Dist. Greene No. 2011 CA 11, 2011–Ohio–6700, 2011 WL 6835278, ¶ 11.

{¶37} Lewis R. Katz, in Oh. Arrest, Search & Seizure, "Motion to Suppress and the Suppression Hearing," Section 27:8 (June 2014), describes the defendant's burden upon challenging a search pursuant to a warrant:

> There is a presumption of regularity when an arrest or a search is authorized by a warrant. A judicial officer has conducted a

> prior review of the facts and circumstances supporting the request for the warrant and has decided that probable cause exists to justify the intrusion. Generally, any defect in the warrant process or the execution will be readily provable from the affidavits, warrant, and return of the execution on file with the court and is accessible to the defendant. Consequently, the burden of establishing any factual matter proving a defect or error in form falls on the defendant who seeks to exclude the evidence. The defendant must raise any defects in the warrant at the trial court and may not raise those issues for the first time on appeal. Whether probable cause existed to issue the warrant will be ascertainable within the four corners of the supporting affidavits and record of oral testimony taken in support of the request for a warrant. The reviewing court determines whether there was sufficient information presented to the magistrate to justify a finding of probable cause and issuance of a warrant. The reviewing court may not augment the written affidavit with testimony unless such testimony was taken by the magistrate prior to the issuance of the warrant, transcribed and made part of the affidavit. (Citations omitted).
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> * * * *.

{¶38} In the instant case, as noted above, the search warrant and the affidavit were not admitted into evidence by either party during the suppression hearing. Appellant did not enter the affidavit before the trial court or present any evidence beyond cross-

examination of Agent Blanc. We find appellant has thus failed to carry his burden in rebutting the presumed validity of the affidavit in the absence of any evidence of deliberate falsehood or reckless disregard for the truth. *McDaniel*, supra, 5th Dist. Richland No. 14CA47, 2015-Ohio-1007, ¶ 29.

{¶39} It is axiomatic that any error on the part of the trial court must affirmatively appear on the record or an appellate court will presume that the judgment and proceedings below were valid. See, generally, *State v. Prince*, 71 Ohio App.3d 694, 595 N.E.2d 376 (4th Dist.1991); *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987); *State v. Frost*, 14 Ohio App.3d 320, 471 N.E.2d 171 (11th Dist.1984); *State v. Render*, 43 Ohio St.2d 17, 330 N.E.2d 691 (1975). For purposes of appellate review, the appellant has the burden of showing error by reference to the matters in the record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶40} In the instant case, we may not speculate upon the content of the affidavit and search warrant when those documents are not in the record before us and apparently were not before trial court at hearing on the motion to suppress. *State v. Robinson*, 53 Ohio St. 2d 211, 373 N.E.2d 1257 (1978) (per curiam). When the search warrant is not entered into evidence, “nothing in the record exemplifies the claimed error.” *State v. Lutz*, 1st Dist. Hamilton No. 810003, 1981 WL 10104, *1 (Nov. 10, 1981), citing *Robinson*, supra; see also, *State v. Fugate*, 2nd Dist. Greene No.2006 CA 111, 2007–Ohio–6589, ¶ 13 [In the absence of the search warrant and affidavit in the record, “we have nothing to pass upon and thus presume the validity of the trial court's proceedings.”]; *State v. Cooley*, 1st Dist. Hamilton No. C–930644, 1994 WL 570254, *8 (Oct. 19, 1994) [“Obviously, without the affidavit itself to examine, and in light of the deferential standard

of review set forth in Gates, we cannot say that the trial court, "given all the circumstances set forth in the affidavit," erred in finding probable cause."].

{¶41} Finally, appellant raised no argument here as to deliberate falsity or reckless disregard for the truth. *McDaniel*, supra, 2015-Ohio-1007 at ¶ 34. It was appellant's burden to produce such evidence, however, and argument does not meet this burden. As *Franks* tells us, " * * * the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine." *Franks v. Delaware*, supra, 438 U.S. at 171.

{¶42} We note Blanc's uncontroverted testimony supports the trial court's finding of probable cause and appellant failed to rebut the affidavit's presumption of validity. *McDaniel*, supra, 2015-Ohio-1007 at ¶ 35. Further, because the affidavit is not in the appellate record, we must presume the validity of the proceedings in the lower court. Id.

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

II.

{¶44} In his second assignment of error, appellant argues the trial court erred in permitting testimony of appellant's prior bad acts. We disagree.

{¶45} Appellant argues that admission of the text messages regarding the purported drug sale(s) between appellant and "Jes Dude" constitute improper admission of prior bad acts. Although appellee apparently had other text messages in its possession, the trial court limited testimony and evidence of text messages to the single day of February 9, the day the search warrant was executed. Appellee agreed to the limitation and stated the texts on that date are part of the res gestae of the charged offenses and are evidence of appellant's knowledge. (T. I., 105). Appellant argued the

texts were "prior bad acts," hearsay, and unindicted other crimes. Appellee responded that the texts of February 9 established appellant's knowledge that there were narcotics in the house which were intended for sale. Appellee agreed not to introduce evidence of text messages and/or controlled buys throughout December.

{¶46} On appeal, appellant summarily argues the text messages should not have been admitted because they are evidence of "prior bad acts" and were admitted for the sole purpose of demonstrating appellant "acted in conformity with this bad behavior." 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).

{¶47} In this case, appellant argues there was no evidence that the transaction between appellant and "Jes Dude" actually occurred; there was no evidence the text messages actually referred to drugs; and the evidence was admitted for the sole purpose "of establishing [he] acted in conformity with this bad behavior." We note, though, that appellee fully acknowledged at trial that the text messages from February 5, 2018 were part of the res gestae of the crime and were offered as evidence of appellant's knowledge of the offenses in the indictment. T. 105.

{¶48} All relevant evidence is admissible unless otherwise excluded by law. Evid.R. 402. Under Evid.R. 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Although relevant, evidence must be excluded "if its probative value is substantially outweighed by the

danger of unfair prejudice, of confusion of the issues, or of misleading the jury." (Emphasis added.) Evid.R. 403(A). The admitted evidence is relevant to appellee's case in chief.

{¶49} Appellant argues, though, that the text messages violate Evid. R. 404(B), which states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "Other acts" evidence may be properly admitted either as "inextricably intertwined" with an offense or under Evid.R. 404(B) for a legitimate purpose.

{¶50} In the instant case, we find the text messages are inextricably intertwined with the offenses of aggravated drug trafficking and aggravated drug possession. It is not necessary to exclude evidence of other conduct when "the 'other acts' form part of the immediate background of the * * * crime charged in the indictment." *State v. Curry*, 43 Ohio St.2d 66, 73, 330 N.E.2d 720 (1975). "In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible * * * the 'other acts' testimony must concern events which are inextricably related to the alleged criminal act." *Curry* at 73. "This situation is sometimes described as evidence of "res gestae [.]" Gianelli & Synder, Evidence (2 Ed.2001) 240, Section 404.20.

{¶51} Evid.R. 404(B) applies initially to limit the admission of other acts evidence that is "extrinsic" to the crime charged. See *Jordan v. Dayton Testing Lab*., Inc., 2d Dist. Montgomery No. 19741, 2004–Ohio–2425, ¶ 48 (Evid.R. 404(B) only excludes extrinsic

evidence). Accordingly, acts intrinsic to the alleged crime do not fall under Evid.R. 404(B)'s limitation on admissible evidence.

{¶52} When other acts are “inextricably intertwined” with that offense, those acts are said to be intrinsic to the alleged crime. In other words, acts that are “inextricably intertwined” aid understanding by “complet[ing] the story of the crime on trial.” *United States v. Siegel*, 536 F.3d 306, 316 (4th Cir.2008). “Evidence of other crimes is admissible when evidence of the other crime is so blended or connected with the crime on trial as the proof of one crime incidentally involves the other crime, or explains the circumstances, or tends logically to prove any element of the crime charged.” *State v. Long*, 64 Ohio App.3d 615, 617, 582 N.E.2d 626 (9th Dist.1989).

{¶53} The rule does not bar evidence which is intrinsic to the crime being tried. See *State v. Smith*, 49 Ohio St.3d 137, 139–140, 551 N.E.2d 190 (1990) (evidence of other acts is admissible if it tends to prove a specific element of the crime charged). So-called “other acts” are admissible if “they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged.” *State v. Roe*, 41 Ohio St.3d 18, 23, 535 N.E.2d 1351 (1990), citing *State v. Wilkinson*, 64 Ohio St.2d 308, 317, 415 N.E.2d 261 (1980), quoting *United States v. Turner*, 423 F.2d 481, 483–484 (7th Cir.1970). Consequently, a court can admit evidence of other acts which form the immediate background of and which are inextricably related to an act which forms the foundation of the charged offense. *State v. Lowe*, 69 Ohio St.3d 527, 531, 634 N.E.2d 616 (1994).

{¶54} We find that the evidence relates to the counts charged in the indictment and the circumstances surrounding appellant's prosecution, which leaves this evidence outside the purview of Evid.R. 404(B). *State v. Rardon*, 5th Dist. Delaware No. 17 CAA 04 0027, 2018-Ohio-1935, 112 N.E.3d 380, ¶ 49, *appeal not allowed,* 153 Ohio St.3d 1475, 2018-Ohio-3637, 106 N.E.3d 1260. The text message conversations were not "extrinsic acts" because they were part of the operative facts in this case and related directly to conduct alleged in the indictment. *Id.*

{¶55} We find that evidence of the text messages was relevant, intrinsic evidence related to the narcotics trafficking and possession. The trial court did not abuse its discretion in allowing introduction of evidence of the text messages between appellant and "Jes Dude" on February 9, 2018. Accordingly, appellant's second assignment of error lacks merit and is overruled.

III.

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

{¶57} 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."

{¶58} 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.*

{¶59} Appellant was convicted of one count of drug trafficking pursuant to R.C. 2925.03(A)(2)[3] and one count of drug possession pursuant to R.C. 2925.11(A).[4] There is no dispute that the narcotic at issue is carfentanil, a Schedule II controlled substance. Appellant argues there was no evidence that the carfentanil found at the Smith residence was his because the substance was not found on his person when he was arrested, there was no DNA or other evidence linking him to the carfentanil found inside the house, and there were other people in and out of the Smith residence.

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[3] 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."

[4] R.C. 2925.11(A) states, "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶60} We find appellant's arguments unpersuasive. Appellee presented evidence of a sustained narcotics trafficking investigation of appellant. He was linked to sales of carfentanil by the C.I., leading to surveillance by the Metro Narcotics agents. He was found in possession of five cell phones, with one containing an incriminating text conversation from that very morning. His own witnesses said he lived at the Smith residence, although they claimed other people were usually around. No one else was present on the morning of the execution of the search warrant. No one else was linked to the cell phones found in the car with appellant, and appellant's own witness testified she had loaned him the car to drive.

{¶61} Appellee's case against appellant was largely circumstantial, but it was strong nevertheless. The elements of an offense may be established by direct evidence, circumstantial evidence, or both. *State v. Durr*, 58 Ohio St.3d 86, 92, 568 N.E.2d 674 (1991). Circumstantial evidence is defined as "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought proved. * * *." *State v. Nicely*, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988), quoting Black's Law Dictionary (5th Ed.1979) 221. Circumstantial and direct evidence are of equal evidentiary value. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991).

{¶62} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witnesses' credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Johnson*, 5th Dist. Stark No. 2014CA00189, 2015–

Ohio–3113, 41 N.E.3d 104, ¶ 61, citing *State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). The jury need not believe all of a witness' testimony, but may accept only portions of it as true. *Id.*

{¶63} Utility bills for the Smith residence were in appellant's name. During surveillance, he visited the house "nightly." During the controlled buy on February 5, 2018, appellant returned to the residence for a few moments before meeting the C.I. at a pre-arranged destination and participating in a hand-to-hand transaction. Bags of carfentanil were found in the kitchen of the residence, in immediate proximity to digital scales containing carfentanil residue. Also found were plastic bags typical of packaging of narcotics for sale. Finally, multiple cell phones, including one with an incriminating text conversation, established appellant was negotiating the terms of a drug transaction.

{¶64} Construing all of the evidence in favor of appellee, sufficient evidence supports appellant's conviction. Also, this is not the case in which the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be overturned and a new trial ordered. Appellant's conviction is not against the manifest weight of the evidence.

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

CONCLUSION

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

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.