[Cite as *State v. Wilkes*, 2013-Ohio-2369.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1119

Appellee — Trial Court No. CR0201003256

v.

Joseph Alex Wilkes, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: June 7, 2013

* * * * *

Kenneth J. Rexford, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his judgment of conviction for trafficking in heroin and crack cocaine and possession of a firearm under a disability, entered on a jury verdict in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} In late summer of 2010, Toledo police received information that drugs were being sold from a house on Knower Street on the city's south side. In August, 2010, officers of the vice-narcotics unit set up surveillance on the house.

{¶ 3} Over a period of several weeks, officers later testified, they saw numerous people come to the house, stay only a few minutes, then depart. On one occasion, according to the testimony of one vice-narcotics officer, a man the officer believed was appellant, Joseph Wilkes, appeared at the side door of the house and exchanged something hand to hand with an unidentified female.

{¶ 4} Officers believed this activity indicated a pattern of drug trafficking from the Knower Street house. They next arranged for a confidential informant to conduct a "controlled buy" from the house. When the confidential informant was successful in purchasing crack cocaine, police obtained a warrant to search the property.

{¶ 5} On September 30, 2010, vice-narcotics detectives, accompanied by a police SWAT team, entered the Knower Street house to execute the warrant. When they entered, police found appellant and a female companion on a make-shift bed on the floor of a center room. In searching the house, officers discovered a glass jar containing 37 individual packets, each containing approximately an ounce of crack cocaine. Also found were 31 packets, each containing approximately an ounce of heroin, and a loaded handgun. In a woman's purse and jacket found in the house were a syringe, two spoons with heroin residue and some heroin.

{¶ 6} Appellant was arrested and later named in a five count indictment, charging him with possession and trafficking in crack cocaine, possession and trafficking in heroin and possessing a weapon under disability. Appellant entered a plea of not guilty to all charges and the matter moved to a trial before a jury.

{¶ 7} At trial, the state called the officers who conducted the investigation that led to appellant's arrest. These officers testified to finding the drugs and weapon in the Knower Street house. The drugs and pistol were admitted into evidence along with a gas company bill addressed to appellant at the Knower Street house. Also admitted was a report of a forensic analysis of the contents of a cell phone found in the house. One of the pictures on the cell phone showed appellant with what appeared to be a gun similar to the one found in the house tucked into his waistband. Appellant rested without presenting a defense. After 50 minutes of deliberation, the jury found appellant guilty on all counts.

{¶ 8} Following a presentence investigation, the court merged the possession counts with the trafficking counts and sentenced appellant to a four-year term of incarceration for heroin trafficking, a concurrent four year term for cocaine trafficking with a two-year term for possessing weapons under a disability, to be served consecutively to the drug terms. This appeal followed. Appellant sets forth the following nine assignments of error:

I. The Verdict Forms and the resulting Entry were Insufficient under R.C. §2945.75 to Support Mr. Wilkes' Convictions and Sentences for

Trafficking in Heroin and Cocaine as a felony of the Degree Reflected in the Entries, as to Counts II and IV of the Indictment (and as to pre-merger Counts I and III).

II. The prosecuting attorney improperly attempted to shift the burden of proof as to the *mens rea* element for Counts II and IV to the defense, in violation of Mr. Wilkes' right under the Ohio Constitution and the United States Constitution to trial by jury and due process.

III. Mr. Wilkes was denied his right under the Ohio Constitution and under the United States Constitution to Due Process of Law and effective assistance of counsel when Trial Counsel failed to object to the prosecution shifting of the burden of proof to the defense as discussed in the second assignment of error.

IV. Mr. Wilkes was denied Due Process of Law when the prosecution was allowed to present testimony from a State officer on direct in the State [sic] case in chief of Mr. Wilkes's assertion of his right to remain silent and his right to an attorney and to argue at close in such a way as to suggest that assertion of these rights suggested consciousness of guilt, all while Mr. Wilkes was also deprived of effective assistance of counsel in failing to seek suppression and/or exclusion of this evidence and these comments effectively.

V. Mr. Wilkes was deprived of effective assistance of counsel when the defense did not seek to limit the discussion of the weapons disability.

VI. Mr. Wilkes was denied due process of law and denied effective assistance of counsel when the State was allowed to introduce evidence of an attorney fee agreement pertaining to defense of a criminal charge.

VII. The verdicts for each and every count were not supported by sufficient evidence.

VIII. The verdicts for each and every count were against the manifest wright of the evidence.

IX. Mr. Wilkes was deprived of the effective assistance of counsel when defense counsel failed to object to the admissibility of a journal entry purporting to indicate a prior conviction for a felony offense of violence.

I. Effective Assistance of Counsel

{¶ 9} Appellant suggests in six of his nine assignments of error that he was denied effective assistance of counsel. We shall discuss these assignments together.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

> performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 10} Scrutiny of counsel's performance must be deferential. *Strickland* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *Smith*, *supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland* at 687. "Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel." *State v. Stevenson*, 5th Dist. No. 2005-CA-00011, 2005-Ohio-5216, ¶ 43. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id*. Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. *Strickland* at 694. *See also State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), for Ohio's adoption of the *Strickland* test.

A. Mens Rea

{¶ 11} During closing argument, the state made the following statement to the jury:

> In order for you to find Joseph Wilkes guilty of all five charges in the indictment you have – the State must have proven beyond a reasonable

doubt every element of each one of those charges. * * *

The drugs in this case were packaged in such a manner and were of such a large quantity that you can make the inference that they were packaged for sale and distribution, the 37 individually wrapped baggies of crack cocaine, the 31 individually wrapped baggies of heroin.

* * *

As to Count 2 of the indictment that Joseph Wilkes, Jr., on the 30th day of September, 2010, in Lucas County, Ohio, did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance.

Here we are talking about preparing for distribution. Preparing to sell these drugs, okay? 37 individually wrapped bags, 31 individually wrapped bags.

And when the offender knew or had reasonable cause to believe that the controlled substance was intended for sale. You can also make that inference because of this large quantity because how it is packaged that those drugs weren't sitting there for someone's personal consumption. They're ready to go.

{¶ 12} In his second assignment of error, appellant asserts that this argument to the jury somehow attempted to improperly shift the burden of proving the scienter element of

the offense to appellant. In his third assignment of error, appellant maintains that his trial counsel was ineffective for failing to object to this statement.

{¶ 13} In all fairness to appellant, we have expanded somewhat from the edited quote in appellant's brief. We have included the part in which the prosecution is explaining that the state has the burden to prove beyond a reasonable doubt the elements about to be discussed.

{¶ 14} Even without the addition of this introduction, appellant's argument is without merit. Prosecutors are afforded latitude with respect to interpretation of what the evidence shows and what inferences may be drawn. *State v. Richey*, 64 Ohio St.3d 353, 362, 595 N.E.2d 815 (1992). Mens rea may be proven by circumstantial evidence. Indeed, the manner in which drugs are packaged may give rise to a valid inference that a defendant had knowledge that such drugs were intended for sale. *State v. Mitchell*, 8th Dist. No. 60999, 1992 WL 205115 (Aug. 20, 1992). We find nothing in the prosecutor's statement that suggests any attempt to shift the burden of proof or any other irregularity. Accordingly, appellant's second assignment of error is not well-taken and his third assignment of error, which asserts trial counsel was ineffective for failing to object to the prosecutor's statement, is similarly not well-taken.

B. Post-*Miranda* Silence

{¶ 15} In his fourth assignment of error, appellant suggests the state made improper reference to his silence during questioning. Specifically, appellant complains of testimony by the lead vice-narcotics detective who recounted his post-*Miranda*

questioning of appellant the night of the raid. Appellant previously had adamantly denied that the Knower Street house was his:

> A. He said it was not his – I'm sorry it was not his house, but it was his girl's house. And I asked him whether by his girl he meant Miss Szymanski who was the female that was there at the time of the search warrant, and he said no, some other girl. I asked who that was, and he remained mute and would not tell me the name of this other girl.
>
> Q. So he had the opportunity to say it was [Miss Szymanski's] house?

{¶ 16} Appellant's objection to this question was sustained. During closing argument, the state argued that appellant's attempt at trial to put forth Miss Szymanski as owner of the contraband was a recent fabrication because the questioning the night of the raid was a "perfect opportunity to tell [police] look, dude, it was all my girl's. This stuff is not mine. I'm just staying here. * * * He didn't do that, did he?" Appellant maintains that the state improperly commented on appellant's silence and trial counsel was ineffective for failing to object to that comment.

{¶ 17} The right to someone in police custody to remain silent is derived from the Fifth Amendment guarantee that an individual in a criminal case may not be compelled to bear witness against himself or herself. *Miranda v. Arizona*, 384 U.S. 436, 442, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The right to remain silent is one of those rights which one who is arrested must be informed before interrogation proceeds. It is a warning that

carries an implicit promise that exercise of such right is without penalty. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The prosecution, therefore, may not use a defendant's silence during questioning against him or her. *Id.*

{¶ 18} The right to remain silent, like the right to have an attorney present during questioning, may be waived. Even if the accused does not expressly invoke the right to remain silent, a post-*Miranda* statement may not be used unless the prosecution can show that the statement was made following a knowing and voluntary waiver. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). The waiver, however, need not be express. Once the *Miranda* warnings have been given and understood, an uncoerced statement is presumed to constitute a waiver of the right to remain silent. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 2262, 176 L.Ed.2d 1098 (2010).

{¶ 19} Once a waiver of the right to remain silent is established, the implicit promise that the prosecution will refrain from commenting on partial silence dissolves. In such instances, a defendant's strategic omissions are not protected by *Doyle* or *Miranda* and become fair game for purposes of impeachment or comment. *State v. Morgan*, 2d Dist. No. 19416, 2004-Ohio-461, ¶ 21.

{¶ 20} In this matter, it is undisputed that appellant was read *Miranda* warnings prior to questioning. There has been no suggestion that he did not understand these warnings. Similarly, nothing in the record suggests coercion. Consequently, appellant may be deemed to have waived his right to remain silent and, concomitantly, the

expectation of immunity from comment. As a result, the state's comment with respect to apellant's reticence to name the girlfriend he maintained lived in the house was proper and trial counsel was not ineffective for failing to object. Appellant's fourth assignment of error is not well-taken.

C. Stipulation

{¶ 21} In his fifth assignment of error, appellant maintains that trial counsel's failure to impose a stipulation as to appellant's prior conviction constituted deficient performance on counsel's part because it allowed testimony about appellant's involuntary manslaughter conviction to be heard by the jury. Citing *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 135 L.Ed.2d 574 (1997), appellant argues that such testimony was inherently more prejudicial than probative and the trial court would have abused its discretion had it denied such a stipulation.

{¶ 22} The state responds that the prior conviction is an element of the weapon under disability offense that must be proved. Moreover, *Old Chief* construed the federal rules of evidence and is not controlling authority in Ohio.

{¶ 23} Appellee's more persuasive argument is based on the axiom that jurors are presumed to follow the instruction given by the court. *State v. Fears*, 86 Ohio St.3d 329, 334, 715 N.E.2d 136 (1999). In this matter, the court instructed the jury that the evidence of appellant's conviction for involuntary manslaughter, "was only for a limited purpose. It was not received, and you may not consider it, to prove the character of the defendant in order to show that he acted in conformity with the character. It cannot be considered

for any other purpose." There is nothing in the record to suggest that the jury disregarded this admonition. Accordingly, irrespective of whether trial counsel should, or should not, have entered into a stipulation on the prior conviction, this decision could not have operated to appellant's prejudice. Accordingly, appellant's fifth assignment of error is not well-taken.

D. Fee Agreement

{¶ 24} During trial, one of the documents admitted into evidence as having been found in the Knower Street house was a fee agreement between appellant and a Michigan law firm dated a month prior to the raid. The document states the agreement is for representation in a felony possession of heroin case. During closing argument, trial counsel argued "[i]f there were charges pending or against Mr. Wilkes in Michigan common sense and reason would tell you there would have been some form * * * of followup * * *. It wasn't."

{¶ 25} Appellant, in his sixth assignment of error, suggests that the agreement should not have been admitted because it was subject to attorney-client privilege. Moreover, appellant argues, trial counsel was ineffective for failing to attempt to exclude this document from evidence or, at least, seek redaction of the prejudicial parts.

{¶ 26} Appellee responds that attorney fee information is not necessarily privileged and that, in any event, any privilege that may be due the agreement was waived when appellant did not assert the privilege during trial. Moreover, permitting the document to be admitted was part of appellant's trial strategy that allowed appellant to

argue in closing that neither the fee agreement nor the gas bill proved appellant actually lived at the Knower Street address.

{¶ 27} Purportedly privileged testimony, or in this case a document, is admissible if the privilege is not asserted at trial. Absent such an assertion, any error predicated on the admission of such evidence is deemed waived. *State v. Brown*, 38 Ohio St.3d 305, 312, 528 N.E.2d 523 (1988). As to whether the counsel's failure to assert the privilege constituted ineffective assistance, trial counsel was clearly aware of the document and its potential impact on the jury. Indeed counsel discussed the document at length in closing. Absent some indicator that this tactic lacked any strategic basis, we cannot conclude that it constituted ineffective assistance of counsel. Accordingly, appellant's sixth assignment of error is not well-taken.

E. Inadequate Judgment of Conviction

{¶ 28} In his ninth assignment of error, appellant asserts that he received ineffective assistance of counsel because trial counsel failed to object to the admission of the judgment entry used to prove prior conviction of a violent felony, an essential element of a weapons under disability offense. The entry, according to appellant, failed to comport to Crim.R. 32(C) for want of a recitation of the manner of conviction as mandated by *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus.

{¶ 29} *Baker* was subsequently modified by *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, which held, at ¶ 11, that the manner of conviction was

not a substantive requirement and did not affect the finality of the judgment of conviction. As to the elements of the entry necessary to provide sufficient proof of conviction pursuant to R.C. 2945.75(B)(1), the judgment of conviction, "must contain (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *State v. Gwen*, 134 Ohio St.3d 284, 2012-Ohio-5046, 982 N.E.2d 626, ¶ 20. The judgment entry admitted into evidence in the present case meets all of these requirements.

{¶ 30} Since the entry at issue was proper, trial counsel's failure to object to its admission contains no element of ineffectiveness. Appellant's ninth assignment of error is not well-taken.

II. Verdict Form

{¶ 31} Appellant, in his first assignment of error, asserts that, because the verdict forms completed by the jury failed to state the degree of the offense or what elements elevated the degree of the offense, he should not have been found guilty of more that the least degree of the drug offenses charged. In support of this proposition, appellant relies on R.C. 2945.75(A)(2) and *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

{¶ 32} R.C. 2945.45(A) provides:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶ 33} In *Pelfrey*, syllabus, the court held that the statute must be applied as written, "a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense."

{¶ 34} The jury forms returned in this case state; "We the Jury find the Defendant, JOSEPH WILKES* Guilty of TRAFFICKING IN HEROIN, in violation of R.C. 2925.03(A)(2) and (C)(6)(e)" and "We the Jury find the Defendant, JOSEPH WILKES * Guilty of TRAFFICKING IN COCAINE, in violation of R.C. 2925.03(A)(2) and (C)(4)(f)."

{¶ 35} Appellant maintains that these verdict forms do not contain the degree of the offense or a statement that an aggravating element has been found, therefore, pursuant to *Pelfrey*, he may be found guilty only of the least degree of the offense charged.

{¶ 36} Appellant is correct, but the victory is pyrrhic. R.C. 2925.03(A)(2) and (C)(6)(e) charges trafficking in heroin in excess of 10 grams and less than 50 grams and is a second degree felony. R.C. 2925.03(A)(2) and (C)(4)(f) charges trafficking in cocaine when the amount exceeds 27 grams but is less than 100 grams. It is a first degree felony. Appellant's judgment of conviction records him as having been found guilty of heroin trafficking, as a second degree felony, and cocaine trafficking, as a first degree felony. Consequently, appellant was found guilty of the least degree of the offenses charged. Appellant's first assignment of error is not well-taken.

III. Sufficiency and Weight of the Evidence

{¶ 37} In his remaining assignments of error, appellant argues that there was insufficient evidence to support his conviction and his conviction was against the manifest weight of the evidence.

{¶ 38} In a criminal context, a verdict may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact 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*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the

defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 39} In these assignments of error, appellant chooses to merely reiterate his closing argument. He fails to direct our attention to any missing element of the offenses of which he was convicted. Our own examination of the record fails to reveal any element of any of the offenses charged that was not supported by direct or circumstantial evidence or reasonable inference. Accordingly, appellant's seventh assignment of error is not well-taken.

{¶ 40} With respect to the weight of the evidence, again we have carefully reviewed the record of these proceedings and fail to find anything to suggest that the jury lost its way or that a manifest miscarriage of justice occurred. Accordingly, appellant's eighth assignment of error is not well-taken.

{¶ 41} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment Affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE