[Cite as *State v. Wilson*, 2014-Ohio-1005.]

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

State of Ohio — Court of Appeals No. H-13-002

Appellee — Trial Court No. CRI-2012-0928

v.

Keith D. Wilson — **DECISION AND JUDGMENT**

Appellant — Decided: March 7, 2014

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney,
for appellee.

James J. Sitterly, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Keith Wilson, appeals the judgment of the Huron County Court of Common Pleas, sentencing him to 18 months in prison following a jury's

determination of guilt on one count of trafficking in heroin. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On September 12, 2012, the Huron County Sheriff's Department received information that Wilson was a drug supplier from its informant, Sarah Trapp. Consequently, it decided to set up a controlled buy of heroin using Trapp as the buyer. On that date, Huron County detectives Eric Bardar, Josh Querin, and Troy Kimball prepared Trapp to purchase the drugs by providing her with $400 and installing a remote audio device on her person. The transaction was to take place in Willard, Ohio. After making preparations, the detectives, along with Trapp and another detective, John Harris, traveled to the destination of the sale. Trapp was driving her own automobile, which was searched extensively prior to leaving the station. The detectives were traveling in an unmarked Chevrolet Trailblazer.

{¶ 3} Originally, the sale was to occur at a reservoir in Willard, Ohio. However, due to time constraints and Wilson's need to return the vehicle he was using to its owner, the location of the sale was changed to Trapp's residence located at 315 1/2 Dale Avenue, Willard, Ohio.

{¶ 4} Upon arrival at Trapp's residence, the detectives parked their vehicle at a church lot where they would have an unobstructed view of the transaction. Wilson appeared from inside Trapp's residence, approached Trapp's vehicle, and sold her the heroin in exchange for $320. Once the transaction was complete, Trapp signaled the

officers, who then approached the residence. As the officers were approaching, Wilson noticed them and fled inside the building and up the stairs. They followed Wilson upstairs, and began knocking on the door leading into the room where Wilson was located. Nobody answered the door.

{¶ 5} Receiving no answer, the officers decided to impersonate a pizza delivery person, knowing that Wilson had ordered a pizza prior to selling the drugs. Upon opening the door, Wilson was apprehended, and the premises were searched. Drug paraphernalia and tar heroin was located inside, along with the drug money Trapp used to purchase the drugs. The money was located inside a purse belonging to a woman who was inside the residence, Sarah Root. Because the detectives had written down the serial numbers on the currency, they were able to ascertain that the money they found at the scene was the same money they provided to Trapp earlier that day.

{¶ 6} Wilson was subsequently indicted on a single count of trafficking heroin in violation of R.C. 2925.03(A)(1)(c)(6), a felony of the fourth degree. A jury trial commenced on January 9, 2013, after which Wilson was found guilty. At sentencing, Wilson was ordered to serve 18 months in prison. Wilson's timely appeal followed.

B. Assignment(s) of Error

{¶ 7} On appeal, Wilson assigns the following errors for our review:

> I. THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS AND COMMITTED PLAIN ERROR WHEN IT FAILED TO DECLARE A MISTRIAL DUE TO IRREPARABLE,

PREJUDICIAL STATEMENTS UNRELATED TO THE CRIME FOR WHICH APPELLANT STOOD TRIAL.

II. THE TRIAL COURT ERRED BY CONVICTING APPELLANT WITHOUT EVIDENCE THAT HURON COUNTY, OHIO WAS THE PROPER VENUE.

III. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

II. Analysis

A. The trial court did not commit plain error in failing to declare a mistrial.

{¶ 8} In his first assignment of error, Wilson argues that the trial court erred by failing to declare a mistrial following the admission of allegedly improper "prior bad acts."

{¶ 9} A mistrial is an extreme remedy, "declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991), citing *Illinois v. Somerville*, 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). Regarding mistrial claims, the Supreme Court of Ohio has stated: "This court has * * * adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial." *State v. Glover*, 35 Ohio St.3d 18, 19, 517 N.E.2d 900 (1988), citing *State*

v. Widner, 68 Ohio St.2d 188, 189, 429 N.E.2d 1065 (1981); *Wade v. Hunter*, 336 U.S. 684, 687, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

{¶ 10} Review of a trial court's decision denying a motion for mistrial ordinarily falls under an abuse of discretion standard. *State v. Rossbach*, 6th Dist. Lucas No. L-09-1300, 2011-Ohio-281, ¶ 39, citing *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). Here, however, Wilson failed to move for a mistrial. Thus, the trial court's refusal to declare a mistrial is reviewed under plain error analysis. *Id.* In *State v. Barnes*, 94 Ohio St.3d 21, 759 N.E.2d 1240 (2002), the Supreme Court of Ohio articulated the following three-part test for finding plain error:

> First, there must be an error, i.e., a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. *Id.* at 27 (internal citations omitted).

{¶ 11} An appellate court should only take notice of plain error under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990).

{¶ 12} In the case at bar, the errors upon which Wilson bases his argument center on the state's use of "other acts" evidence under Evid.R. 404(B). Evid.R. 404(B) states in relevant part:

> 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.

{¶ 13} In support of his argument, Wilson cites to five instances in which the state allegedly violated Evid.R. 404(B). The first two instances occurred during Root's testimony on direct examination. Regarding the first instance, Wilson complains that "[t]he State's initial questioning produced Ms. Root's statement that she met the Defendant at a 'crack house.'" Indeed, the trial transcript reveals the following with respect to Root's testimony:

> [THE STATE]: And, where did you meet [Wilson]?
>
> [ROOT]: At a crack house * * *.
>
> [DEFENSE COUNSEL]: I'm going to object, Your Honor, move to strike.
>
> [ROOT]: Well, my friends are crack heads that live there.
>
> * * *

THE COURT: Hang on. Before we proceed any further, the Court is going to grant the motion to object. I'm going to strike out the answer with regard to a crack house or to ignore that as we go forward.

{¶ 14} While it is true that Root referred to the location at which she met Wilson as a "crack house," the trial court adequately addressed the statement by granting Wilson's motion to strike and providing a curative instruction. We presume the jury followed the instructions given by the trial court. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). Wilson has failed to offer any evidence to overcome that presumption. Thus, we see no error in the trial court's handling of Root's reference to a "crack house."

{¶ 15} Next, Wilson takes issue with the following portion of Root's testimony:

[THE STATE]: And, did the defendant, was he your supplier of heroin?

[DEFENSE COUNSEL]: Objection, Your Honor.

[ROOT]: I never bought no heroin –

THE COURT: Hang on. Hang on. Basis of the objection? You may.

* * *

(The following was outside the hearing of the jury)

[DEFENSE COUNSEL]: It's completely prejudicial. Prior bad acts are not admissible in the State's case-in-chief, and it should – there should

be a curative instruction. The idea that he sold drugs in the past to her or anybody else is not what the case-in-chief is about here today. It's about September 12th. I ask that the questions be confined to September 12th or –

[THE STATE]: Okay. I'll – okay. I'll restrict the drug use question to September 12th.

THE COURT: All right. Very good.

{¶ 16} Notably, Wilson fails to point to any reference in the foregoing testimony of any "other acts" evidence. Indeed, Root never testified that Wilson had previously sold her heroin or any other drug for that matter, because her answer was cut off by defense counsel's objection. Further, the state withdrew the question and agreed to limit its questioning to the day in question. Therefore, we find no error in Root's testimony that would warrant a mistrial.

{¶ 17} The remainder of Wilson's argument centers on testimony given by Trapp during direct examination. Wilson contends that the following testimony contains the third instance of "other acts" evidence:

[THE STATE]: Did your friend Emily Daniel know you were going to do this?

[TRAPP]: No.

[THE STATE]: That you were getting her involved in this kind of a deal?

[TRAPP]: No.

[THE STATE]: Did she know this defendant at all?

[TRAPP]: Yes.

[THE STATE]: How did she know him?

[TRAPP]: Because she came up to my place couple times, and bought off of him.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: The objection is sustained. I'm going to strike that answer. You'll disregard that.

{¶ 18} As previously discussed in the context of Root's testimony, we note that the trial court promptly sustained defense counsel's objection and ordered the jury to disregard Trapp's answer. Thus, Wilson's argument concerning the foregoing testimony is without merit.

{¶ 19} Next, Wilson cites the following testimony in support of his contention that the trial court committed plain error in failing to declare a mistrial:

[THE STATE]: When did you setup this buy?

[TRAPP]: That day.

[THE STATE]: what I'm – you have to give people a little notice, right, the sheriff?

[TRAPP]: Yes. Yes. I let them know – well, like, I let them know about him and then, you know, that day, I let them know, and that morning,

and you know, prior to that day, they would ask me how much for a gram, and all that stuff.

[THE STATE]: Okay.

[TRAPP]: So then we got there, we talked about price, all that stuff.

[THE STATE]: Did you text the defendant's –

[TRAPP]: Yes.

[THE STATE]: – phone about the pricing?

[TRAPP]: Yes.

[THE STATE]: What was the pricing supposed to be?

[TRAPP]: 155 a gram.

[THE STATE]: Is that higher than for regular people, are you ripping off the –

[TRAPP]: No.

[THE STATE]: Does he get a good deal because he's selling to someone working for the Sheriff's Department?

[TRAPP]: It, it's the regular price.

{¶ 20} Referring to this testimony, Wilson argues that the trial court should have declared a mistrial on the basis that Trapp impermissibly referred to the "regular price" of the drugs, which suggests that she had previously purchased drugs from Wilson. We disagree. When read in its full context, the foregoing testimony does not refer to Wilson's "regular price." Rather, we understand the "regular price" as the price Trapp,

an experienced drug user, was accustomed to paying for similar drugs when purchasing from any dealer, not Wilson specifically. Understood properly, this testimony does not contain any references to a "prior bad act." Therefore, Wilson's argument is without merit.

{¶ 21} Finally, Wilson cites the following testimony as another example of allegedly improper other acts evidence that was admitted at trial:

> [THE STATE]: Did you ever check to see if he had bath salts for sale?
>
> [TRAPP]: No.
>
> [THE STATE]: Wasn't that something they –
>
> [TRAPP]: Or sorry –
>
> [THE STATE]: That Detective Querin wanted you to do?
>
> [TRAPP]: Yes, I did, and he didn't have none.
>
> [THE STATE]: Okay.
>
> [TRAPP]: But he did have some like prior to that, being at my house and stuff. That's how I knew he had bath salt.

{¶ 22} We conclude that the foregoing testimony was within the exceptions of Evid.R. 404(B). Trapp's testimony showed her knowledge of Wilson's possession of bath salts, which helped to shed light on why she was given enough money to purchase both heroin and bath salts. *State v. Kobi*, 122 Ohio App.3d 160, 173, 701 N.E.2d 420 (6th Dist.1997) (concluding that testimony regarding the witness's prior purchases of

drugs from the defendant was admissible under Evid.R. 404(B) because it "showed her knowledge of [the defendant's] drug trafficking practices"). Further, defense counsel did not object to the testimony, and Trapp's statement was not solicited by the prosecution. Thus, we do not find that the trial court committed plain error in failing to sua sponte declare a mistrial based on Trapp's testimony.

{¶ 23} Finding no errors in the trial court's handling of the evidentiary issues cited by Wilson, we conclude that the trial court did not commit plain error in failing to declare a mistrial. Accordingly, Wilson's first assignment of error is not well-taken.

B. The state established Huron County as the proper venue.

{¶ 24} In his second assignment of error, Wilson argues that the trial court erred by denying his Crim.R. 29(A) motion for acquittal, which was premised on the argument that the state failed to produce sufficient evidence to establish Huron County as the proper venue.

{¶ 25} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under the sufficiency standard, we must determine whether the evidence admitted at trial, "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." *State v. Jenks*, 61 Ohio St.3d

259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997).

{¶ 26} Regarding venue, R.C. 2901.12(A) provides: "The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." Proper venue is also guaranteed by Section 10, Article I of the Ohio Constitution. Although venue is not a material element of the crime, it is still a fact that must be proved at trial unless waived. *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983). It is not necessary that the venue of the crime be stated in express terms. However, it is essential that the facts and circumstances prove, beyond a reasonable doubt, that the crime was in fact committed in the county and state alleged. *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), paragraph one of the syllabus. Finally, the court has broad discretion to determine the facts which would establish venue. *Toledo v. Taberner*, 61 Ohio App.3d 791, 793, 573 N.E.2d 1173 (6th Dist.1989).

{¶ 27} In the present action, the state insists that it established venue by eliciting testimony that revealed the exact address where the drug transaction took place. Indeed, the record confirms that Trapp testified that her address was 315 1/2 Dale Avenue, Willard, Ohio. She went on to indicate that the transaction took place outside her home. Detective Bardar further testified he witnessed the transaction taking place in front of

Trapp's home. Because Willard lies exclusively within the borders of Huron County, the state argues that venue was clearly established. We agree.

{¶ 28} Ohio courts have held that reference to a street address only, without reference to a city, county, or state, is insufficient to prove venue. *See State v. Myers*, 9th Dist. Summit No. 21874, 2004-Ohio-4195. However, in *State v. Brown*, 7th Dist. Mahoning No. 03-MA-32, 2005-Ohio-2939, the Seventh District found that venue was established where the appellant's address was testified to and the arresting officer, a Youngstown police officer, arrested appellant at that address. *See also Toledo v. Loggins*, 6th Dist. Lucas No. L-06-1355, 2007-Ohio-5887 (affirming the trial court's determination that the city of Toledo was the proper venue where a street address was provided and the Toledo Police Department responded to the address); *State v. Davis*, 8th Dist. Cuyahoga No. 84610, 2005-Ohio-289 (finding that the trial court properly denied appellant's Crim.R. 29 motion based on venue where the state provided evidence of the address where the crime was committed). Here, the record clearly reveals that the transaction took place in Willard, Ohio, which is located in Huron County. Further, Wilson was arrested by officers working for the Huron County Sheriff's Department. Therefore, we conclude that sufficient evidence exists in the record to support the determination that Huron County was the proper venue.

{¶ 29} Accordingly, Wilson's second assignment of error is not well-taken.

C. Wilson received effective assistance of trial counsel.

{¶ 30} In his third assignment of error, Wilson argues that he was denied effective assistance of trial counsel. He contends that his counsel was ineffective for failing to move for a mistrial following the admission of the "other acts" evidence discussed in his first assignment of error. Further, he argues that counsel was ineffective for failing to object to testimony concerning the contents of documents that were not produced at trial as required under Evid.R. 1002. Finally, Wilson asserts that counsel was ineffective for failing to request a continuance following the state's last-minute disclosure of evidence on the eve of trial.

{¶ 31} To support a claim for ineffective assistance of counsel, Wilson must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, he must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 694. In *Strickland*, the United States Supreme Court opined,

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 697.

{¶ 32} Concerning the failure to move for a mistrial, Wilson argues that counsel should have so moved where the record contains "multiple bad acts" in violation of Evid.R. 404(B). However, because we have already determined that the evidence to which Wilson points was not admitted erroneously, or was properly corrected via a curative instruction, we find that Wilson cannot establish that he was prejudiced by his counsel's failure to move for a mistrial.

{¶ 33} We now turn to Wilson's argument that counsel was ineffective for failing to make a best-evidence objection under Evid.R. 1002. In particular, Wilson contends that counsel should have objected to text messages that were received into evidence through verbal testimony without introduction of the actual text messages.

{¶ 34} The text messages to which Wilson refers pertain to the negotiated price of the heroin. Even assuming, arguendo, that the trial court erred in allowing Trapp to testify regarding the contents of the text messages, we nonetheless conclude that such error would have been harmless. The state introduced additional evidence to establish the cost of the heroin via Trapp's remaining testimony, the admissibility of which Wilson does not challenge. Further, the money used to complete the sale was recovered from inside Trapp's residence and the serial numbers on the currency were cross-referenced to ensure that they were the same as those listed on the money given to Trapp prior to the transaction. Given such evidence, we find that any error associated with the trial court's decision to overrule Wilson's best-evidence objection was harmless. *See State v. Owens*, 6th Dist. Lucas No. L-11-1207, 2013-Ohio-325, ¶ 19, citing *State v. Williams*, 6 Ohio

St.3d 281, 290, 452 N.E.2d 1323 (1983) ("Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt.").

{¶ 35} Lastly, Wilson asserts that counsel was ineffective for failing to request a continuance following the state's disclosure of evidence on the eve of trial. The evidence consisted of additional tape recordings that were potentially damaging to Wilson's defense. The trial court paraphrased counsel's acknowledgement that "there [is nothing] particularly exculpatory about the tape itself, but it just contains additional information that wasn't otherwise provided." Instead of granting a continuance, the trial court decided to exclude the evidence and grant counsel some time to review the material on the morning of trial.

{¶ 36} Given the trial court's exclusion of the evidence, we find that Wilson cannot establish that he was prejudiced by counsel's failure to request a continuance. Indeed, the exclusion of the evidence is perhaps the best possible outcome for Wilson since the tape admittedly contained no exculpatory information. Further, we note that counsel's decision not to request a continuance is generally a matter of trial tactics and strategy, and is generally not second-guessed by us on appeal. *State v. Wynn*, 2d Dist. Montgomery No. 25097, 2014-Ohio-420, ¶ 5.

{¶ 37} In light of the foregoing, we conclude that Wilson received effective assistance of trial counsel. Accordingly, his third assignment of error is not well-taken.

III. Conclusion

{¶ 38} For the foregoing reasons, the judgment of the Huron County Court of Common Pleas is affirmed. Wilson is ordered to pay the 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.