

[Cite as *State v. DeSarro*, 2015-Ohio-5470.]

STATE OF OHIO, COLUMBIANA COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 13 CO 39
VS.	)	
	)	OPINION
JOSEPH J. DESARRO	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Columbiana County, Ohio  
Case No. 13 CO 39

JUDGMENT: Affirmed

APPEARANCES:  
For Plaintiff-Appellee Attorney John Gamble  
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For Defendant-Appellant Attorney Coleen Dailey  
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JUDGES:  
  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: December 18, 2015

[Cite as *State v. DeSarro*, 2015-Ohio-5470.]  
DeGENARO, .J.

{¶1} Defendant-Appellant Joseph J. DeSarro appeals the September 6, 2013 judgment of the Columbiana County Court of Common Pleas convicting him of three counts of drug possession and sentencing him accordingly. On appeal, DeSarro asserts that the trial court erred by allowing the State to make a motion in limine off the record. He further claims the trial court erred by ruling that his self-serving statement to the police was inadmissible hearsay. Additionally, DeSarro asserts that the trial court erred by allowing testimony on redirect that went beyond the scope of cross-examination. Finally, DeSarro asserts his convictions are against the manifest weight of the evidence.

{¶2} The trial court properly considered the State's oral motion in limine at the beginning of trial, and more importantly, during the trial. The trial court did not abuse its discretion when it determined that DeSarro's statement to the officer was not an excited utterance and therefore was inadmissible hearsay. The questioning on redirect was reasonably related to matters inquired about during cross-examination. It does not appear the jury lost its way so as to create a manifest miscarriage of justice in convicting DeSarro of three counts of drug possession. Accordingly, DeSarro's assignments of error are meritless and the judgment of the trial court is affirmed.

### **Facts and Procedural History**

{¶3} On January 16, 2013, DeSarro was indicted by the Columbiana County Grand Jury on two counts of drug possession under R.C. 2925.11(A), third-degree felonies, the first for possession of heroin equal to or greater than 5 grams but less than 10 grams and the second for possession of cocaine equal to or greater than 10 grams but less than 20 grams. He was also indicted with one count of drug possession under R.C. 2925.11(A), a fifth-degree felony, for possession of oxycodone.

{¶4} DeSarro was arraigned, pled not guilty and was initially appointed, but later retained counsel. The case proceeded to a jury trial on August 26, 2013.

{¶5} Just prior to opening statements and outside of the presence of the jury, the trial court noted that prior to going on the record the prosecutor had mentioned he

intended to file a motion in limine requesting a ruling regarding the admissibility of a statement made by DeSarro to the police as he was being arrested, to wit: that the drugs found did not belong to him. The trial court noted that the prosecutor had provided the court with a "memorandum that was actually filed in another case, [but that] the issue remains the same."

{¶6} The trial court ruled the arresting officer could not testify about DeSarro's statement because it constituted inadmissible hearsay. The trial court noted that if a defendant's statement is offered against him, it is considered non-hearsay, but here, because it would be offered *in favor* of DeSarro, it is inadmissible hearsay unless it falls under one of the exceptions. Thus, the trial court ruled that DeSarro would be precluded from mentioning the statement during opening statements and precluded from questioning the arresting officer about it unless and until a hearsay exception was established. DeSarro claimed that the excited utterance exception applied. The parties agreed to voir dire the officer outside the presence of the jury, at the appropriate time during trial, to determine whether any of the hearsay exceptions applied.

{¶7} The State then proceeded with its case in chief. East Liverpool Patrolman Steven Adkins testified that while on patrol near the close of his August 24, 2012 midnight shift, he observed an automobile traveling north on Minerva Street and eventually parking in front of a residence at 755 Minerva. Patrolman Adkins observed a suspicious female step out of the automobile, walking quickly and attempting to conceal her face from him. Patrolman Adkins recognized the woman as Cindel Hawkins, and believed she had an outstanding warrant.

{¶8} Patrolman Adkins proceeded to the rear of 755 Minerva Street where he observed Hawkins and two other individuals, a black male and a white male. When Patrolman Adkins approached Hawkins to place her under arrest for the outstanding warrant, she yelled to her associates to "Run, run run!" When Patrolman Adkins ordered the two to stop, the black male complied and placed his hands on the vehicle a short distance from Patrolman Adkins location. That man, Ramone Sumlin

was placed under arrest for an outstanding warrant and taken into custody. The third person, the white male, fled the scene.

{¶9} Patrolman Kelsey Hedrick testified next. He ultimately found and arrested the white male, who turned out to be DeSarro. Prior to his testimony, Patrolman Hedrick was voir dired outside of the presence of the jury with regard to whether DeSarro's statement to him, that the drugs found belonged to someone else, constituted an excited utterance and was therefore excepted from the rule against hearsay. The trial court ultimately ruled that DeSarro's statement was not an excited utterance and therefore was impermissible hearsay.

{¶10} Patrolman Hedrick then proceeded to testify in front of the jury that he was directed by radio to the area on Minerva Street where Patrolman Adkins had encountered the three persons behind 755 Minerva Street. En route, Patrolman Hedrick observed a white male matching the description provided to him by Patrolman Adkins. Patrolman Hedrick pursued this man running from Minerva Street when a passerby driving a minivan pointed in the direction of Riley Avenue. Patrolman Hedrick then parked his cruiser on Riley Avenue, continuing on foot to the area to which he was directed where he also heard a dog barking loudly.

{¶11} Moments later, Patrolman Hedrick found DeSarro hiding behind the garage between a building and an embankment. He ordered DeSarro out at taser point. As DeSarro walked out, the officer noticed a "blunt" cigar wrapper on the ground where DeSarro had been squatting. The blunt wrapper was "directly under his [DeSarro's] feet where he was." Patrolman Hedrick explained that these wrappers are typically used for rolling marijuana cigars. DeSarro was then detained with Patrolman Sean Long who had arrived to assist. Patrolman Hedrick returned to the area behind the garage to retrieve the blunt wrapper when he observed plastic baggies protruding from underneath a rock. Because the baggies contained what he suspected to be narcotics, Patrolman Hedrick photographed the items, and placed them into custody where they became the subject of this indictment.

{¶12} The State also presented the testimony of Shervonne Bufford, a

forensic scientist with the Ohio Bureau of Criminal Identification and Investigation. She tested the suspected drugs found under the rock by DeSarro and they consisted of 13.3 grams of cocaine, six 30-miligram Oxycodone tablets, and 5 grams of heroin. Photographs of the drugs and of the scene where the drugs were found were admitted into evidence.

{¶13} The State rested and DeSarro elected not to testify at trial.

{¶14} After considering all the evidence, the jury found DeSarro guilty of all charges in the indictment. After a sentencing hearing, the trial court sentenced DeSarro to 30 months on Count 1, 30 months on Count 2, and 12 months on Count 3. The trial court ordered that the sentences be served concurrently. The trial court also imposed the following mandatory fines: \$5,000.00 on Count 1, \$5,000.00 on Count 2. DeSarro was advised of his lifetime weapons disability. His driver's license was suspended for a total of 3 years. The trial court imposed up to 3 years of discretionary post-release control. DeSarro was granted 11 days of jail-time credit, plus time while awaiting transport to the appropriate state correctional facility.

#### **Motion in Limine**

{¶15} In his first of four assignments of error, DeSarro asserts:

The court erred in allowing the State to make a motion in limine off the record and in violation in Ohio Rule of Criminal Procedure 12.

{¶16} Here, DeSarro contends that the trial court's decision to rule on the motion in limine just before the commencement of trial was somehow error. DeSarro cites Crim.R. 12(D) in support, which states: "All pretrial motions except as provided in Crim. R. 7(E) [motion for bill of particulars] and 16(M) [demands for discovery] shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions."

{¶17} However, the flaw in this argument is that it fails to recognize that the rule immediately preceding Crim.R 12(D) defines which pretrial motions must be

made prior to trial, see Crim.R. 12(C), and motions in limine preventing the anticipated introduction of hearsay are not included in the five examples set forth in the Rule. Moreover, oral motions in limine just before the commencement of trial are routine. See, e.g., *State v. Canada*, 10th Dist. No. 14AP–523, 2015-Ohio-2167, ¶25; *State v. Palmer*, 12th Dist. Nos. CA2013–12–243, CA2014–01–014, 2014-Ohio-5491, ¶3; *State v. Roy*, 2014-Ohio-5186, 22 N.E.3d 1112, ¶67 (9th Dist.)

{¶18} Even if the timing were problematic, DeSarro failed to object to the procedure employed by the trial court regarding the motion in limine. To the contrary, DeSarro seemed to acquiesce in it, agreeing to voir dire the officer later during trial so that the trial court could determine whether any of the hearsay exceptions applied. In fact, this is precisely the correct manner to preserve a purported in limine ruling; by raising the issue during trial. "[A] motion in limine, if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue." *State v. Grubb*, 28 Ohio St.3d 199, 201-202, 503 N.E.2d 142, 145 (1986). In limine rulings are not final; they can be revisited and changed during the course of a trial. *State v. Croom*, 7th Dist No. 12 MA 54, 2013-Ohio-5682, ¶ 173. Failing to lodge a contemporaneous objection to the disputed evidence during trial waives review of the purported error on appeal. *State v. Hill*, 75 Ohio St.3d 195, 203, 661 N.E.2d 1068 (1996). Accordingly, DeSarro's first assignment of error is meritless.

### Hearsay

{¶19} In his second of four assignments of error, DeSarro asserts:

The court erred in ruling that the Defendant's statement to the police that the drugs were not his was inadmissible hearsay.

{¶20} Evidentiary rulings at trial are reviewed on appeal for an abuse of discretion. *State v. Beshara*, 7th Dist. No. 07 MA 37, 2009–Ohio–6529, ¶ 55, citing *State v. Bey*, 85 Ohio St.3d 487, 490, 709 N.E.2d 484 (1999). "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the

record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶21} As an initial matter, note that Evid.R. 801(D) defines statements which are not hearsay by their very definition and among these are admissions by a party-opponent. See Evid.R. 801(D)(2). However, per the Rule, such statements must be offered "*against* a party." (Emphasis added.) *Id.*

{¶22} Consequently, when a statement of a defendant in a criminal case made to a law enforcement officer is offered by the State of Ohio, a party-opponent, that statement is by its very definition not a hearsay statement. Therefore, in order to offer that statement, the State need not argue that the statement falls within one of the clearly defined exceptions to the hearsay rule. The statement is not hearsay. On the other hand, if the defendant, during cross examination or in his case in chief should seek to offer an exculpatory statement he made to a law enforcement officer those statements are, by definition, hearsay statements. Evid.R. 801(C). In order for those statements to be permitted in that context, the defendant must establish that the statements fall within one of the clearly defined exceptions to the hearsay rule. See *State v. Lewis*, 7th Dist. No. 03 MA 36, 2005-Ohio-2699, ¶127-128.

{¶23} DeSarro asserts that his statement to the officer falls under the excited utterance exception to the rule against hearsay. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Evid.R. 803(2). We use a four-part test to judge whether a statement is admissible as an excited utterance: (1) there was an occurrence startling enough to produce a nervous excitement in the declarant and sufficient to still her reflective faculties, making her declarations the unreflective, spontaneous, and sincere expression of her actual impressions; (2) the declaration, even if not strictly contemporaneous with its exciting cause, was made before there was time for the nervous excitement to lose a domination over reflective faculties; (3) the declaration related to the startling event or circumstances surrounding the event; and (4) the declarant had an opportunity to personally observe the matters asserted

in the declaration. *State v. Jones*, 135 Ohio St.3d 10, 2012–Ohio–5677, 984 N.E.2d 948, ¶ 166.

{¶24} During voir dire of Patrolman Hedrick regarding this issue, the following facts were adduced. He stated that after DeSarro was already in the custody of Officer Long, seated in the rear of the police cruiser, with the door open, Hedrick made a general comment that he had "found the stash." Patrolman Hedrick said he believed he was speaking more to Officer Long at that time. DeSarro then stated that it must belong to David Lucas, a man who apparently resides near where DeSarro and the drugs were found.

{¶25} This does not fall under the excited utterance exception. There was no occurrence startling enough to produce a nervous excitement in the declarant. The trial court properly excluded the statement as hearsay. Accordingly, DeSarro's second assignment of error is meritless.

#### **Testimony on Redirect**

{¶26} In his third of four assignments of error, DeSarro asserts:

The court erred in allowing the State of Ohio to testify as to the value of the drugs on redirect as said matters went beyond the scope of redirect.

{¶27} DeSarro takes issue with the fact "the State sought through redirect, to introduce more definitive evidence of the value of the drugs in this case[.]" Although, DeSarro fails to cite where in the record this occurred, it appears DeSarro is referring to Patrolman Hedrick's testimony.

{¶28} "As to the scope of redirect examination, it is generally limited to matters inquired into by the adverse party on cross-examination." *State v. Thomas*, 12th Dist. No. CA2010–10–099, 2012-Ohio-2430, ¶15, citing *State v. Corbin*, 12th Dist. No. CA2010–01–001, 2010–Ohio–3819, ¶ 20, citing *Holtz v. Dick*, 42 Ohio St. 23 (1884), syllabus.

{¶29} On direct, Patrolman Hedrick was asked about the drugs found at the scene. Exhibit 1B contained several rocks of cocaine. Over objection of defense

counsel, Hedrick testified that he considered this to be "a lot" of cocaine, which was not likely just for someone's personal use. He subsequently opined about the street value of the cocaine, along with the other drugs found.

{¶30} On cross-examination, defense counsel probed Patrolman Hedrick about what evidence the State had that DeSarro possessed the drugs so as to support the charges. Hedrick responded: "[j]ust the fact that he [DeSarro] was where they [the drugs] were."

{¶31} On redirect, the State inquired more specifically about the street value of the drugs found. Defense counsel objected based upon relevancy and "improper redirect." (*Id.*) The State responded that during cross-examination it appeared that defense counsel sought to imply that the drugs were simply found at the scene—that DeSarro was not in possession of them. The State thus explained it sought to inquire further about the value of the drugs so as to demonstrate that it would be unlikely for someone to leave drugs of that value barely hidden by a rock outside.

{¶32} The trial court overruled DeSarro's objection. This was not an abuse of discretion. Rather, the questioning on redirect was reasonably related to matters inquired about during cross-examination.

{¶33} DeSarro also asserts that the State's above line of questioning somehow constitutes prosecutorial misconduct. "The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial." *State v. Kozic*, 7th Dist. No. 11 MA 135, 2014-Ohio-3807, ¶133, citing *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999). As there was nothing improper about the prosecutor's actions, there can be no prosecutorial misconduct. Accordingly, DeSarro's third assignment of error is meritless.

#### **Jury Instructions/Manifest Weight**

{¶34} In his fourth and final assignment of error, DeSarro asserts:

The jury's verdict was against the manifest weight of the evidence in light of the court's instruction on possession.

{¶35} Weight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.* This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶36} Thus, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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 reversed and a new trial ordered. *Thompkins* at 387. However, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002–Ohio–1152, \*2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Under these circumstances, the verdict is not against the manifest weight and is affirmed.

{¶37} DeSarro was convicted of three counts of drug possession under R.C. 2925.11(A); each involving different types and quantities of drugs. DeSarro only challenges the possession element. He believes the jury lost its way in concluding he possessed the drugs since they were merely found near him, not on his person.

{¶38} R.C. 2925.11(A) provides: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." In addition, "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. R.C. 2901.22(B). "'Possess' or 'possession'

means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K).

**{¶39}** Further as this court has previously explained:

Ohio courts have held that possession may be actual or constructive. See *State v. Hankerson* (1982), 70 Ohio St.2d 87, 90-91, 24 O.O.3d 155, 434 N.E.2d 1362; *State v. Nichols*, 7th Dist. No. 07JE50, 2009-Ohio-1027, at ¶ 27. "Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession." *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, at ¶ 13 (citations omitted). To establish constructive possession, the state must prove that the defendant was conscious of the object, and able to exercise dominion or control over it even though that object may not be within his immediate physical possession. *Hankerson* at 90-91.

*State v. St. John*, 7th Dist. No. 09 BE 13, 2009-Ohio-6248, ¶ 19.

**{¶40}** The jury instructions in this case mirrored the above law on possession:

Possess or possession means having control over a thing or substance that may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

Possession can be actual or constructive. Constructive possession exist when an individual knowingly exercises dominion and control over an object, even though that object may not be within his or her immediate physical possession.

**{¶41}** In addition, a defendant can be convicted based upon circumstantial evidence of possession. *Pankey* at ¶44. "[R]eadily usable drugs found in very close

proximity to a defendant may constitute circumstantial evidence and support a conclusion that the defendant had constructive possession of such drugs." *State v. Barker*, 7th Dist. No. 05JE21, 2006-Ohio-1472, ¶78, quoting *State v. Kobi*, 122 Ohio App.3d 160, 174, 701 N.E.2d 420 (1997). See also *State v. Chambers*, 179 Ohio App.3d 770, 2008-Ohio-6973, 903 N.E.2d 709, ¶27 (7th Dist.) (constructive possession of deer parts without a tag, seal, or certificate of ownership, where deer bones found under front steps of house on the property, defendant lived on the property, used to hunt on the property, and helped others hunt on the property); *State v. Carter*, 7th Dist. No. 97JE24, 2000 WL 748140 (May 30, 2000); (constructive possession of drugs where alone with drugs in close proximity).

{¶42} Patrolman Adkins testified that when he tried to arrest Hawkins for a bench warrant, Hawkins told the two men with her to run; one of these men turned out to be DeSarro, who Patrolman Hedrick then encountered a few blocks away hiding behind a behind a garage between a building and an embankment. Patrolman Hedrick observed a "blunt" cigar wrapper on the ground where DeSarro had been squatting. The officer explained that these wrappers are typically used for rolling marijuana cigars. He said it was clear the blunt wrapper belonged to DeSarro because it was right at his feet.

{¶43} DeSarro was then detained with Patrolman Long who had arrived to assist. Meanwhile, Patrolman Hedrick walked back behind the garage to retrieve the blunt wrapper. When he bent down to pick it up, he observed clear plastic baggies protruding from underneath a rock, which were found to contain the drugs that are the subject of this indictment.

{¶44} Based on this testimony, DeSarro constructively possessed the drugs. The verdicts are not against the manifest weight of the evidence. Accordingly, DeSarro's fourth assignment of error is meritless.

### **Conclusion**

{¶45} In sum, all of DeSarro's assignments of error are meritless. The trial court properly considered the State's oral motion in limine at the beginning of trial,

and more importantly, during the trial. The trial court did not abuse its discretion when it determined that DeSarro's statement to the officer was not an excited utterance and therefore was inadmissible hearsay. The questioning on redirect was reasonably related to matters inquired about during cross-examination. It does not appear the jury lost their way so as to create a manifest miscarriage of justice in convicting DeSarro of three counts of drug possession. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P. J., concurs

Waite, J., concurs