[Cite as *State v. Freeman*, 2009-Ohio-5218.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91842

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY FREEMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505074

BEFORE: Blackmon, J., Kilbane, P.J., and Dyke, J.

RELEASED: October 1, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Anthony Freeman appeals his convictions for drug trafficking and possession of drugs. He assigns five errors for our review.[1]

{¶ 2} Having reviewed the record and relevant law, we affirm Freeman's convictions. The apposite facts follow.

Facts

{¶ 3} An arrest warrant was issued for Freeman in connection with information that he had raped a child. The subject of the arrest warrant was excluded from trial per the defense's motion in limine.

{¶ 4} Officer Smith testified that his investigation revealed that Freeman owned a white Cadillac and spent time at three different addresses in the area of East 72nd Street, Harvard, and Classan Avenue. The officer located the Cadillac at the East 72nd Street address. After confirming the car belonged to Freeman by running the license plate through the Bureau of Motor Vehicles' ("BMV") data base, the officer set up surveillance at the East 72nd address. The BMV information also provided a photograph of Freeman.

{¶ 5} The officer maintained constant vigilance of the Cadillac for two hours. A little after 6:00 p.m., he observed Freeman enter the car and drive to a nearby gas station. Officer Smith advised back-up officers who pulled Freeman over as he left the gas station and arrested him.

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[1]See appendix.

{¶ 6} After Freeman was removed from the vehicle, the officer conducted an inventory search of the Cadillac. In the area inside the vehicle, where the windshield meets the roof of the car, the officer observed it was pulled back. Inside, the officer found three envelopes containing heroin and a baggie containing sixteen rocks of crack cocaine. No drugs were found on Freeman's person; approximately $42 and two cell phones were removed from his pocket and confiscated.

{¶ 7} Based on the evidence, the jury found Freeman guilty of one count of drug trafficking and two counts of possession of drugs. The jury found Freeman not guilty of possession of criminal tools. The court sentenced Freeman to a concurrent sentence of one year incarceration on all counts.

Manifest Weight of the Evidence

{¶ 8} In his first assigned error, Freeman argues that his convictions were against the manifest weight of the evidence. We disagree.

{¶ 9} In *State v. Wilson*,[2] the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d**

[2]113 Ohio St.3d 382, 2007-Ohio-2202.

380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v.*

Florida **(1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 10} However, an appellate court may not merely substitute its view for that of the jury, but must find that "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."[3] Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction."[4]

{¶ 11} Freeman argues that there was no evidence that he possessed the drugs because the drugs were not found on his person. The fact the drugs were not found on his person is not dispositive. This court has previously recognized the following:

> **"Possession may be actual or constructive. To place a defendant in constructive possession, the evidence must demonstrate that the defendant was able to exercise dominion or control over the items. Moreover, readily 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."**[5]

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[3] *State v. Thompkins*, supra, at 387.

[4] Id.

[5] *State v. Barr* (1993), 86 Ohio App.3d 227, 235 (internal citations omitted).

{¶ 12} In this case, although the drugs were not found on Freeman's person, they were found in an area that Freeman, as the driver of the vehicle, could easily exercise dominion and control because the drugs were found in the roof lining above the driver's seat. Moreover, Freeman owned the vehicle and the officer testified that he was the only person who had access to the vehicle during the two hours he observed the vehicle prior to Freeman's arrest. These factors have previously been found to support drug possession charges.[6]

{¶ 13} Freeman also contends that his parole officer testified that he had been drug tested on six random occasions during his probation and had always tested negative; he contends this evidence supports his contention that he did not possess the drugs. Merely because Freeman does not use the drugs does not mean he did not possess the drugs. As two of the officers testified, drug traffickers typically do not smoke or ingest the drugs that they sell.

{¶ 14} Freeman also contends there was no evidence to support the drug trafficking count because the officers did not observe him selling the drugs. This court has held that a charge of drug trafficking can be sufficiently

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[6] *State v. Cola* (1991), 77 Ohio App.3d 448; *State v. David*, 11th Dist. No. 2005-L-109, 2006-Ohio-3772.

supported by circumstantial evidence.[7] Although the officers did not observe Freeman prepare the drugs or engage in any activity consistent with drug trafficking, the circumstances under which the drugs were found were sufficient to establish drug trafficking. The officers testified that the amount of drugs and the manner in which the crack cocaine was packaged (the crack cocaine was in a baggie that was twisted and knotted with a torn corner) were indicative of preparation for sale. Freeman had also been subjected to drug testing without detection indicating he is a seller of drugs, not a user.

{¶ 15} Freeman also contends the fact that his probation officer's testimony contradicted the testimony of Officer Smith weighs against his convictions. Officer Smith had maintained he observed Freeman's Cadillac from 4:00 p.m. to 6:00 p.m., and that Freeman's car remained stationery during this time. The probation officer testified that Freeman met with her from approximately 4:30 p.m. to 4:50 p.m. However, there is no evidence that Freeman drove his car to the probation appointment; he could have used a different means of transportation. This inconsistency alone is not sufficient to conclude the jury resolved the conflicting evidence in such a manner as to constitute a manifest injustice. Accordingly, Freeman's first assigned error is overruled.

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[7] *State v. Jones*,Cuyahoga App. No. 90395, 2008-Ohio-5737; *State v. Wallace*, Cuyahoga App. No. 85541, 2005-Ohio-4397.

Misconduct by the Prosecutor

{¶ 16} In his second assigned error, Freeman contends the prosecutor engaged in misconduct by making improper remarks during closing argument. We disagree.

{¶ 17} We initially note that Freeman failed to object to the prosecutor's comments. Therefore, absent plain error, he has waived the issue on appeal. Plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions.[8] We conclude plain error did not occur.

{¶ 18} A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial.[9] The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.[10] The effect of the prosecutor's misconduct must be considered in light of the whole trial.[11] A prosecutor is afforded wide latitude during closing argument; it is within the trial court's sound discretion to determine whether a comment has gone too

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[8] *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 1996-Ohio-100.

[9] *State v. Keenan* (1993), 66 Ohio St.3d 402, 405; *State v. Gest* (1995), 108 Ohio App.3d 248, 257.

[10] *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78.

[11] *State v. Durr* (1991), 58 Ohio St.3d 86, 94; *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

far.[12] Freeman contends the prosecutor engaged in misconduct by stating as follows:

> **"Count 1, trafficking in drugs, that the defendant, Mr. Freeman, did, on November 7th of 2007, in Cuyahoga County, knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance. That's the disjunctive. We can prove - - we're only required to prove one of those things that I just read to you. That's it one. Just one. We may prove more than one, but we're only required to prove one, to-wit, crack cocaine, a schedule two drug in an amount equal to or exceeding one gram but less than five grams."[13]**

{¶ 19} Freeman contends this comment led the jury to believe the state only had to prove that the drugs were present in order to find him guilty of drug trafficking. Although the comment was erroneous, it was harmless. While the prosecutor misstated the law, the prosecutor later detailed the state's theory that the defendant was trafficking the drugs, not simply possessing the drugs and correctly elaborated what the prosecution needed to prove. Moreover, the trial court properly instructed the jury as to the elements of drug trafficking and also

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[12]*State v. Benge* (1996), 75 Ohio St.3d 136.

[13]Tr. 383.

instructed the jury that closing arguments are not to be considered as evidence. Consequently, the prosecutor's isolated remark did not constitute plain error.

{¶ 20} Freeman also claims the prosecutor diluted its burden of proof by stating:

> **"* * * you apply it to the elements to see whether or not we have met our burden, our burden of beyond a reasonable doubt, a burden that we meet, we are required to meet every day of the year, every year that we have worked of the several decades that we've worked here. It is not an impossible burden."**[14]

{¶ 21} We fail to see how this statement diluted the prosecutor's burden of proof. The prosecutor correctly stated that its burden of proof was beyond a reasonable doubt. Moreover, the trial court instructed the jury thoroughly as to the state's burden of reasonable doubt. Accordingly, Freeman's second assigned error is overruled.

Curative Instruction

{¶ 22} In his third assigned error, Freeman contends the trial court erred by failing to give a curative instruction after the prosecutor misstated the law. We disagree.

{¶ 23} Freeman failed to request a curative instruction. When defense counsel fails to request a curative instruction, any error in the trial court's failure to give one is waived.[15] Under a plain error review, we also find no

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[14]Tr. 382.

[15]*State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, at ¶182; *State v. Davie*

prejudicial error, because as we stated in the previous assigned error, the prosecutor later correctly stated the law, and the trial court correctly instructed the jury. Accordingly, Freeman's third assigned error is overruled.

Hearsay

{¶ 24} In his fourth assigned error, Freeman contends the trial court improperly permitted Officer Smith to testify that the information he retrieved from the BMV database indicated that Freeman was the owner of the white Cadillac. He contends this information constituted hearsay. We disagree.

{¶ 25} We note that counsel failed to object to the admission of this evidence; therefore, absent plain error, Freeman has waived the issue. We conclude plain error did not occur.

{¶ 26} Unless a valid exception applies, hearsay is inadmissible.[16] Two exceptions apply to the testimony regarding the BMV evidence. "[S]tatements offered to explain a police officer's conduct during an investigation do not constitute hearsay."[17] In the instant case, Officer Smith

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80 Ohio St.3d 311, 1997-Ohio-341.

[16]Evid.R. 802.

[17]*State v. Thomas* (1980), 61 Ohio St.2d 223, 232. See, also, *State v. Price* (1992), 80 Ohio App.3d 108, 110.

stated that he confirmed the white Cadillac belonged to Freeman by running the plate through the BMV data compilation. Therefore, he was explaining his conduct during an investigation; statements explaining investigatory conduct are admissible evidence.[18] Moreover, this court has also held that BMV records constitute public records because they represent "the routine activities of a public agency relative to the ownership of a motor vehicle."[19] Accordingly, Freeman's fourth assigned error is overruled.

Ineffective Assistance of Counsel

{¶ 27} In his fifth assigned error, Freeman contends his counsel was ineffective because counsel (1) failed to object to the prosecutor's improper comments during closing argument, (2) failed to object to comments by the prosecutor referring to him as a suspect in a sex offense case and, (3) failed to object to the hearsay statements by Officer Smith regarding the results of his BMV search. We disagree.

{¶ 28} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.[20] Under *Strickland*, a

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[18]*State v. Thomas*, supra, at 232.

[19]*State v. Cooper* (Mar. 18, 1982), Cuyahoga App. No. 43765. See, also, *City of Middleburg Hts. v. D'ettorre* (2000), 136 Ohio App.3d 700.

[20](1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.[21] To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.[22] Judicial scrutiny of a lawyer's performance must be highly deferential.[23]

{¶ 29} We already addressed Freeman's argument regarding Officer Smith's testimony as to the BMV records and the prosecutor's improper comments as to the burden of proof and essential elements of drug trafficking and have determined counsel's failure to object did not result in prejudicial error. Therefore, regarding these two arguments, Freeman has not shown but for his attorney's error, the result of the proceedings would have been different.

{¶ 30} Freeman also contends counsel was ineffective for allowing evidence regarding Freeman's status as a convicted sex offender in spite of the trial court's granting counsel's motion in limine limiting the state from

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[21] *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of the syllabus.

[22] Id. at paragraph two of the syllabus.

[23] *State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343.

referring to his status as a sexual offender. The motion in limine, however, was more narrow than what Freeman alleges. The motion in limine concerned excluding testimony that a reported rape led to the investigation of Freeman. In fact, when the prosecutor interviewed the officers regarding the investigation, the prosecutor was careful to respect the motion in limine by asking specific questions that avoided the subject matter of the investigation.

{¶ 31} Evidence of Freeman's past history as a sexual offender was admitted when Freeman's counsel called Freeman's probation officer as a witness. The probation officer testified that she was in charge of supervising sex offenders. This opened the door for the prosecution to inquire on cross-examination why Freeman was assigned to the sexual offender unit. In response, the probation officer stated Freeman's prior sex offenses were for the compelling and promoting of prostitution. The underlying facts of these offenses were not discussed. The pending rape case at that time was not mentioned.

{¶ 32} Although counsel's trial strategy in calling Freeman's probation officer to bolster Freeman's character is questionable, we cannot conclude that the jury's knowledge of Freeman's prior offenses concerning prostitution was so prejudicial it affected the outcome of the trial. The evidence clearly showed that Freeman owned the vehicle; no one else was observed entering

the car; and the drugs were found above the driver's seat, which was in close proximity to Freeman. Because the evidence overwhelmingly supported Freeman's convictions, we conclude no prejudice occurred. Accordingly, Freeman's fifth assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR

APPENDIX

Assignments of Error

"I. Defendant's convictions for drug possession and drug trafficking were against the manifest weight of the evidence."

"II. The prosecution violated Mr. Freeman's constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper argument that misstated the law and misled the jury."

"III. The court violated Mr. Freeman's constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it failed to give a curative instruction to the jury in regard to the improper argument of the prosecution."

"IV. The court violated Mr. Freeman's constitutional rights under Article I, Section 10 of the Ohio Constitution, and the Fifth and Sixth Amendments to the United States Constitution and Ohio hearsay law when it allowed Officer Smith to testify about what he learned from non-witnesses."

"V. Defendant Anthony Freeman was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution."