[Cite as *State v. Eafford*, 2011-Ohio-927.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94718

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONALD EAFFORD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527280

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: March 3, 2011

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

David M. King
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Tiffany Hill
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Donald Eafford appeals his convictions and sentence and assigns the following errors for our review:

> **"I. Defendant's convictions for permitting drug abuse and possession of drugs were against the manifest weight of the evidence."**
>
> **"II. The trial court erred in allowing jurors to submit questions of the witnesses at trial in violation of the United**

States Constitution Amendments V, VI, and XIV, Ohio Constitution Art. I, Section 10 & 16, and Crim.R. 24."

"III. The accused's convictions for drug possession and permitting drug abuse were not supported by sufficient evidence as required by due process in violation of U.S. Constitution Amendment XIV and Crim.R. 29."

"IV. The court erred in sentencing Mr. Eafford in count one on a charge for which the jury had not convicted him in violation of R.C. 2945.75."

"V. The court erred in sentencing Mr. Eafford in count two on a charge for which the jury had not convicted him in violation of R.C. 2945.75."

"VI. The court erred when it allowed the state to enter inadmissible opinion testimony based on inadmissible hearsay."

"VII. Defendant Donald Eafford 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."

{¶ 2} Having reviewed the record and pertinent law, we affirm Eafford's conviction and sentence on the fifth-degree felony, permitting drug abuse. We modify his conviction on the possession of drugs from a third-degree felony to a third-degree misdemeanor. We reach this conclusion because Eafford only could be convicted and sentenced for possession of drugs, a third-degree misdemeanor. Consequently, we remand to the trial court for resentencing on Count 2.

The Facts

{¶ 3} The state charged Eafford with permitting drug abuse, possession of drugs, and possession of criminal tools, in a three-count indictment filed on August 6, 2009. Eafford pleaded not guilty, and his jury trial commenced in January 2010.

{¶ 4} The state's evidence consisted of several witnesses, and the main witness was Detective Roland Mitchell, a veteran police officer who had made numerous drug arrests. Detective Mitchell used information from a confidential informant ("CRI") to obtain a search warrant for property located at 12216 Rexford Avenue, where Eafford was located and arrested. Eafford was also identified as the leaseholder of the Rexford Avenue property.

{¶ 5} Detective Mitchell described in detail how a drug dealer with the first name "Donald" at the Rexford Avenue property came to his attention from his CRI. The CRI had worked for Detective Mitchell in the past and given him reliable information that resulted in numerous prosecutions of drug-related crimes. The CRI told Detective Mitchell of the drug activity at the Rexford Avenue property, and on an unknown date prior to the execution of the search warrant, the CRI made a drug purchase at that address under the surveillance and operation of Detective Mitchell and other officers. Detective Mitchell observed the CRI enter the property and obtain the drugs.

{¶ 6} On May 8, 2009, Detective Mitchell, other officers, and the SWAT team executed the search warrant at the Rexford Avenue property. Detective

Mitchell testified that while they were waiting on the SWAT team, they observed significant vehicular and foot traffic going into and out of the Rexford Avenue property. Detective Mitchell estimated four or five individuals entered and exited the property after staying for a short period.

{¶ 7} One of the officers described the Rexford Avenue property as a "smoke house," which is a place where individuals meet to engage in drug activity. When the SWAT team entered the house, they found several individuals in the immediate vicinity of drugs. At the kitchen table, a person was smoking what appeared to be crack cocaine; he attempted to flee but was apprehended. Several others were found with various drug paraphernalia and crack cocaine, which was in plain view.

{¶ 8} During the execution of the search warrant, Eafford and a woman were asleep in an upstairs bedroom. The officers found a crack pipe with cocaine residue in the medicine cabinet in the bathroom. In addition, Detective Mitchell testified that he found a Dominion East Ohio gas bill in Eafford's name for gas service to that address.

{¶ 9} At the close of the state's case, Eafford moved for a judgment of acquittal under Crim.R. 29. The trial judgment granted the motion for acquittal for the criminal tools count but denied the motion as to the remaining counts.

{¶ 10} The case was presented to the jury, and the jury found Eafford guilty of permitting drug abuse and drug possession. The trial court sentenced Eafford to concurrent eight-month prison terms for each count. In addition, the trial court sentenced Eafford to serve six months for an unrelated case where Eafford pleaded guilty to passing a bad check and forgery. The trial court ordered Eafford to serve this sentence consecutively.

{¶ 11} In this appeal, we will address the assigned errors out of sequence. Consequently, we will begin with Eafford's third assigned error.

Sufficiency of Evidence

{¶ 12} In his third assigned error, Eafford challenges whether the state proved that he obtained, possessed, or used a controlled substance and that he knowingly permitted his property to be used for drug activity by others; consequently, the trial court should have granted his Crim.R. 29 motion for acquittal.

{¶ 13} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the state's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of evidence review require the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386.

{¶ 14} In analyzing the sufficiency issue, the reviewing court must view the evidence "in the light most favorable to the prosecution" and ask whether

"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965.

{¶ 15} In this case, the state's evidence showed that a drug dealer, first name "Donald," was selling drugs at 12216 Rexford Avenue. A CRI purchased drugs at 12216 Rexford Avenue, and on May 8, 2009, the police executed a search warrant for that address. On the date of the execution of the warrant, the police found many individuals in the house using drugs and possessing drugs on their person.

{¶ 16} Donald Eafford was found asleep in the bedroom and a gas bill was found in his name as the leaseholder. Drugs were found in the medicine cabinet not far from where Donald was sleeping.

{¶ 17} On the day of the CRI purchase, several people were observed entering and leaving the premises. On the day of the execution of the warrant, as the SWAT team was about to enter the property, a woman exited the property; she was stopped and found to have crack cocaine on her person. She was arrested. When the SWAT team entered the property, they observed two men sitting at a kitchen table preparing to smoke crack cocaine. One of the men fled out the back door, but was apprehended. The other man at the

kitchen table was found in possession of a crack pipe containing cocaine residue.

{¶ 18} A woman was asleep in bed with Eafford, and the officers found a crack pipe containing cocaine residue on the night stand next to the woman and found a second crack pipe with cocaine residue in the bathroom medicine cabinet.

{¶ 19} Consequently, viewing the evidence in the light most favorable to the state, specifically the testimony regarding the high volume of vehicular and foot traffic at the residence, the contraband and drug paraphernalia found in plain view, the observation of the two individuals preparing to smoke crack cocaine, and the evidence of drugs in the medicine cabinet and on the night stand, any rational trier of fact could have found that Eafford, the leaseholder, knew or had reason to know of any activity taking place in his residence and that he knowingly possessed drugs.

{¶ 20} Thus, we conclude the state proved all of the essential elements of the instant charges beyond a reasonable doubt. As such, the trial court properly denied Eafford's motion for acquittal. Accordingly, we overrule the third assigned error.

Manifest Weight of the Evidence

{¶ 21} In the first assigned error, Eafford argues his convictions are against the manifest weight of the evidence.

{¶ 22} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, 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*, 78 Ohio St.3d 380, 1997-Ohio-52, 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."**

{¶ 23} In this assigned error, Eafford maintains that the officers were not credible and their testimonies were inconsistent. However, a defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958. The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The

rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

{¶ 24} Accordingly, an appellate court may not substitute its view for that of the jury, but our role "in resolving conflicts in the evidence" is to determine whether the jury lost its way thereby creating a manifest miscarriage of justice that requires a new trial. *Thompkins* at 387.

{¶ 25} Here, we are not disposed to reach such a conclusion. One of the officers testified that this was a smokehouse. Several individuals were found in the house smoking crack cocaine. One was found with drugs in her possession. Donald Eafford was identified as the leaseholder through a gas bill. He was found asleep at the house with a woman, and a crack pipe was found on the nightstand. A second crack pipe with cocaine residue was found in the medicine cabinet in the bathroom.

{¶ 26} Consequently, we cannot conclude that after reviewing the entire record that any of the evidence weighs heavily against the jury's finding of guilt. Accordingly, we overrule his first assigned error.

Questioning by Jurors

{¶ 27} In the second assigned error, Eafford argues the trial court erred in allowing jurors to submit questions of witnesses.

{¶ 28} In *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court put to rest the inquiry of allowing jurors to question witnesses. *State v. Gaston*, 6th Dist. No. L-06-1183, 2008-Ohio-1856. Like other evidentiary matters, the decision to allow jurors to question witnesses is a matter within the discretion of the trial court and should not be disturbed on appeal absent an abuse of that discretion. Id., citing *Fisher*, supra. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 29} However, to minimize any danger of prejudice, courts that allow juror questions should "(1) require jurors to submit their questions to the court in writing, (2) ensure that jurors do not display or discuss a question with other jurors until the court reads the question to the witness, (3) provide counsel an opportunity to object to each question at sidebar or outside the presence of the jury, (4) instruct jurors that they should not draw adverse inferences from the court's refusal to allow certain questions, and (5) allow counsel to ask follow-up questions of the witnesses." *State v. Nicholson*, 5th Dist. No. 2009-CA-0069, 2010-Ohio-763, ¶35, citing *Fisher* at ¶29.

{¶ 30} In this case, prior to opening statements, the trial court instructed the jurors in detail on how they would be permitted to ask questions of the witnesses. After the questions were submitted in accordance with the trial court's prior instructions, the attorneys were permitted to object to the questions. Notably, Eafford's attorney objected to several questions, which the trial court sustained.

{¶ 31} Our review of the record indicates that the trial court followed all of the recommended procedures of the Ohio Supreme Court in permitting the jurors' questions of the witnesses. In addition, Eafford offers no evidence to support his contention that he was prejudiced. Thus, we find that the record fails to establish that the trial court abused its discretion in allowing the jury to question witnesses. Accordingly, we overrule the second assigned error.

Verdict Form One

{¶ 32} In the fourth assigned error, Eafford argues the trial court sentenced him on charges for which he was not convicted.

{¶ 33} Pursuant to R.C. 2945.75(A)(2):

> **"When the presence of one or more additional elements makes an offense one of more serious degree: * * * 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."**

{¶ 34} Pursuant to the clear language of R.C. 2945.75, 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. *State v. Bryant*, 7th Dist. No. 10-MA-11, 2010-Ohio-4401, citing *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, syllabus.

{¶ 35} In the instant case, Eafford contends the trial court should have sentenced him to a first degree misdemeanor because the verdict form failed to comply with R.C. 2945.75. We disagree.

{¶ 36} Regarding Count 1 of the indictment, the jury form, containing two pages, states in pertinent part as follows:

> **"We, the jury in this case, being duly impaneled and sworn, do find the Defendant Donald Eafford guilty of permitting drug abuse, in violation of Section 2925.13(B) of the Ohio Revised Code, as charged in the indictment."**

Verdict Form, Page 1.

> **"We, the jury in this case, find the Defendant Donald Eafford guilty of permitting drug abuse, and we do further find that the felony drug abuse in question, specifically trafficking in drugs, was a violation of Section 2925.02 or 2925.03 of the Ohio Revised Code."**

Verdict Form, Page 2.

{¶ 37} Here, the verdict form complies with R.C. 2945.75 even though page one only states that Eafford was found guilty as charged in the indictment. Page two of the verdict form contains a statement that an

aggravating element has been found to justify convicting Eafford of the greater degree of the offense. Page two specifically states that the jury further found that the felony drug abuse in question was trafficking in drugs. Consequently, because the verdict form contained the aggravated element as required by R.C. 2945.75, the form was in proper order, and the trial court imposed the appropriate sentence. Accordingly, we overrule the fourth assigned error.

Verdict Form Two

{¶ 38} In the fifth assigned error, Eafford argues he was improperly sentenced on Count 2 of the indictment. We agree.

{¶ 39} Regarding Count 2 of the indictment, the verdict form, containing a single page, states in pertinent part as follows:

> **"We, the Jury in this case, being duly impaneled and sworn, do find the defendant, Donald Eafford, guilty of Possession of Drugs in violation of §2925.11(A) of the Ohio Revised Code, as charged in Count Two of the indictment."**

{¶ 40} In the instant case, the verdict form does not include a statement indicating either the degree of the offense charged or that an aggravating circumstance existed to justify a conviction on the greater offense, specifically that the drug involved was cocaine or a compound, mixture, preparation, or substance containing cocaine in an amount less than five grams. The verdict form simply states that Eafford was guilty of drug possession in violation of

Section 2925.11(A) of the Ohio Revised Code as "charged in the indictment." This is insufficient.

{¶ 41} The "as charged in the indictment" language in the verdict form in the case at bar does not cure the defect, even though the degrees of the offense were included in the indictment. *State v. Moore*, 188 Ohio App.3d 726, 2010-Ohio-1848, 936 N.E.2d 981. As such, Eafford was improperly sentenced.

{¶ 42} The state contends that we should follow our reasoning in *State v. Parks*, Cuyahoga App. No. 90368, 2008-Ohio-4245. In *Parks*, we held where there exists additional documentation in the record to prove that the jury only contemplated specific charges of trafficking in crack cocaine, the *Pelfrey* mandate does not apply. Specifically, in *Parks*, the jury verdict included an enhancement finding by the jury that was attached to the verdict form. However, we find *Parks* distinguishable from the case at bar.

{¶ 43} In *Parks*, the defendant argued his conviction should have been a minor misdemeanor rather than a fifth degree felony for the possession of crack cocaine, because the verdict form only stated that the jury found him "guilty of possession of drugs in violation of R.C. 2925.11, as charged in count two of the indictment," without mentioning the drug he possessed.

{¶ 44} However, in *Parks*, we found that although the first page of the verdict form failed to indicate the specific type of drug or felony level, the second page indicated that the drug was crack cocaine. Because the verdict

form did not indicate the felony level, the defendant was convicted of the lowest level of possession of crack cocaine, which is a felony of the fifth degree.

We were unpersuaded by the defendant's argument that he should have been convicted of a misdemeanor. Page two of the verdict form in *Parks* contained a "further finding" by the jury regarding the type and amount of drugs the defendant possessed. As such, the conviction was, by operation of statute, a fifth degree felony.

{¶ 45} Nonetheless, the state alleges, in the instant case, the jury was provided written instructions, which listed the type and amount of drugs involved, the trial court instructed the jury accordingly, and Eafford was aware that he was charged with possession of crack cocaine. However, the trial court's instructions do not cure the verdict form's defect. *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 318. See, also, *Moore,* supra. As this case stands, without a statement of the degree of the offense for which he was convicted, or a statement of the aggravating element demonstrating that defendant was convicted of a greater degree of the offense, he stands convicted of only a misdemeanor.

{¶ 46} Further, while the state presented evidence that the drug involved was crack cocaine in an amount less than five grams, the jury made no specific finding in that regard. As such, the possession of drugs verdict supports a

conviction for a third degree misdemeanor. See *State v. Ligon*, 179 Ohio App.3d 544, 2008-Ohio-6085, 902 N.E.2d 1011.

{¶ 47} Although *Ligon* dicta states that a defect could be cured if the trial court's verdict entry mentions the degree of the offense, we point out that in this case, the record indicates that the degree of the offense is also absent from the trial court's verdict entry. Accordingly, we sustain the fifth assigned error, vacate Eafford's sentence as to Count 2, and remand this matter for resentencing on Count 2.

Admission of Evidence

{¶ 48} In the sixth assigned error, Eafford argues the trial court erred in allowing the opinion testimony of Detective Mitchell that there was drug activity at Eafford's residence.

{¶ 49} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Greer*, Cuyahoga App. No. 92910, 2010-Ohio-1418, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Accordingly, we review a challenge to the admission of evidence under an abuse of discretion standard. Id.

{¶ 50} A lay witness's opinion testimony is limited to those opinions or inferences that are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness's testimony or the

determination of a fact in issue. *State v. Skidmore*, 7th Dist. No. 08 MA 165, 2010-Ohio-2846; Evid.R. 701.

{¶ 51} The distinction between lay and expert witness opinion testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning that only specialists in the field can master. *State v. Bleigh*, 5th Dist. No. 09-CAA-03-0031, 2010-Ohio-1182, citing *State v. McKee*, 91 Ohio St.3d 292, 2001-Ohio-41, 744 N.E.2d 737.

{¶ 52} In the instant case, Detective Mitchell's testimony that drug activity was taking place at Eafford's home fits squarely within the framework of Evid.R. 701. Detective Mitchell testified that there were citizens' complaints about the subject property, that a CRI, with whom he had a longstanding working relationship, agreed to participate in a controlled drug buy, and that the transaction was actually completed at Eafford's address.

{¶ 53} In addition, Detective Mitchell testified that on the basis of the completed transaction, police obtained a search warrant for Eafford's residence. Further, Detective Mitchell testified that he observed significant foot and vehicular traffic at Eafford's residence, while he was waiting for the SWAT team to arrive. Finally, Detective Mitchell testified about the contraband and drug paraphernalia that was seized upon the execution of the search warrant.

{¶ 54} We find no error in the admission of Detective Mitchell's testimony. His opinion was clearly based on his perception, and it was helpful to the jury as it established that drug activity was taking place at Eafford's residence. Opinion testimony is not excludable "solely because it embraces an ultimate issue to be decided by the trier of fact." *State v. Hall*, 2d Dist. No. 19671, 2004-Ohio-663; Evid.R. 704. Accordingly, we overrule the sixth assigned error.

Ineffective Assistance of Counsel

{¶ 55} In the seventh assigned error, Eafford argues he was denied the effective assistance of counsel.

{¶ 56} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a 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 deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus.

{¶ 57} 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. Id. at paragraph two of the syllabus.

Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Moon*, Cuyahoga App. No. 93673, 2010-Ohio-4483, citing *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

{¶ 58} In the instant case, Eafford argues he was denied the effective assistance of counsel because trial counsel failed to object to questions of the jurors, to the testimony of Detective Mitchell, and to the verdict forms. However, trial counsel's failure to make objections, alone, does not establish ineffective assistance of counsel, because this decision is generally viewed as trial strategy. *State v. Turks*, 3d Dist. Nos. 1-10-02 and 1-10-26, 2010-Ohio-5944, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶103.

{¶ 59} Accordingly, we overrule Eafford's seventh assigned error.

{¶ 60} Judgment affirmed in part, reversed in part, and remanded for resentencing on Count 2.

It is ordered that appellee and appellant share the 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.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR