[Cite as *State v. Hilton*, 2010-Ohio-1923.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C. A. No. 09CA0036
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARILYN L. HILTON	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellant	CASE No. 08-CR-0275

DECISION AND JOURNAL ENTRY

Dated: May 3, 2010

MOORE, Judge.

{¶1} Appellant, Marilyn L. Hilton, appeals from the judgment of the Wayne County Court of Common Pleas. We affirm.

I.

{¶2} On August 18, 2008, the Wayne County Grand Jury indicted Marilyn L. Hilton (referred to herein as Marilyn Hilton II to distinguish her from her mother, also Marilyn Hilton) on two counts of trafficking in cocaine in violation of R.C. 2925.03, each a felony of the fifth degree. Count I resulted from a drug sale between Hilton II and a confidential informant, Doug Blasingame, on the evening of March 18, 2008. The confidential informant was working with the Medway Drug Enforcement Agency in Wayne County, Ohio. Count II resulted from a drug sale between Hilton II and the confidential informant on the evening of March 19, 2008.

{¶3} On March 23, 2009, the matter was tried to a jury, which found Hilton II guilty of each count. The trial court sentenced Hilton to 24 months of community control.

{¶4} Hilton II timely filed a notice of appeal, raising five assignments of error for our review. We have rearranged her assignments of error to facilitate our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED ERROR OR PLAIN ERROR BY ADMITTING CERTAIN EVIDENCE INTO THE JURY ROOM DURING DELIBERATIONS WHICH HAD NOT BEEN OFFERED INTO EVIDENCE BY THE STATE AT THE CLOSE OF TRIAL."

{¶5} In her first assignment of error, Hilton II contends that the trial court committed error or plain error in allowing the jury to consider during its deliberations evidence that had not been formally offered by the State at the close of trial. We disagree.

{¶6} The record reveals that some time after the jury began its deliberations defense counsel notified the trial court that the State never moved to admit its exhibits. Counsel argued that the State should not be allowed to reopen its case to have those exhibits admitted into evidence. Defense counsel renewed his Crim.R. 29 motion on this basis. The trial court noted that Hilton II's counsel had stipulated to the admission of reports from the Bureau of Criminal Identification and Investigation ("BCI") identifying the substances as containing cocaine, which constituted exhibits 12 and 13, as well as phone records for the house where Hilton II lived, marked as exhibit 14. The prosecutor indicated that she believed she had rested the State's case by stating "the State has no further witnesses pending the admission of my exhibits. That's my recollection." The trial judge agreed that his recollection was the same as the prosecutor's. The trial judge stated "[w]ell, if the Court inadvertently didn't formally admit the evidence, the exhibits, the Court's going to do that now." In doing so, the trial court granted the State the opportunity to reopen its case for the purpose of admitting Exhibits 1 through 11.

{¶7} We review a trial court's decision to allow the State to reopen its case for an abuse of discretion. *State v. Mathis*, 9th Dist. No. 23507, 2007-Ohio-2345, at ¶5. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶8} In *Mathis*, this Court approved a trial court's decision to allow the State to reopen its case to provide specific testimony as to the quantity of marijuana in order to support a second degree felony conviction. *Mathis* at ¶7. In that case, defense counsel had moved for acquittal pursuant to Crim.R. 29. Id. at ¶4. All of the evidence supporting the conviction had been presented, and upon reopening the witness clarified how he arrived at the mass of the individual packages (he had already testified to the mass of the individual packages) and specifically stated that the total mass exceeded the relevant statutory minimum. Id. at ¶7.

{¶9} In this case, Exhibits 1 through 11 are at issue. During the trial, each was identified and marked and a witness testified to the contents or the State published the contents to the jury. For instance, Exhibit 1 was a cassette-tape recording of a controlled phone call on March 18, 2008 arranging a drug transaction for later that day. The tape was played in its entirety for the jury during the testimony of the confidential informant. In essence, although the State did not specifically move to admit these exhibits during trial, the members of the jury were fully exposed to the contents. Hilton II's trial counsel did not object to any of the exhibits at the time of their presentation and in fact cross-examined witnesses regarding the exhibits. We believe this case is indistinguishable from *Mathis* because the jury had already been exposed to testimony, and had the tape played in their hearing. Moreover, this case does not present a

situation where a defendant's Crim.R. 29 motion became "a vehicle by which the defense informs the State of fatal deficiencies in its case, so that it can have a second bite at the apple." *State v. Nerren*, 9th Dist. No. 05CA0052, 2006-Ohio-2855, at ¶28 (Moore, J., concurring). Accordingly, the trial court did not abuse its discretion in allowing the State to reopen its case for the limited purpose of admitting Exhibits 1 through 11. *Blakemore*, 5 Ohio St.3d at 219.

{¶10} In the alternative, Hilton II contends that the decision to allow the State to reopen its case in this instance constituted plain error.

> "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has established that the outcome of the trial clearly would have been different but for the alleged error." (Internal citations and quotation omitted.) *State v. Estright*, 9th Dist. No. 24401, 2009-Ohio-5676, at ¶53.

{¶11} As noted above, witnesses for the State testified regarding each exhibit and, in the case of Exhibit 1 and other recordings, the contents were played in their entirety for the jury. Therefore, contrary to Hilton II's argument on appeal, the jury already had the ability to evaluate the sound of Hilton II's voice on the recordings and in the courtroom. Additionally, there is no evidence in the record as to whether the jury had listened to or watched any recordings during their deliberations before the trial judge formally admitted the exhibits. Under these circumstances, we cannot say that the outcome of the trial clearly would have been different but for the trial court's decision. *Estright* at ¶53.

{¶12} Hilton II's first assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THERE WAS INSUFFICIENT EVIDENCE TO CONVICT [] HILTON II, AND THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} In Hilton II's third assignment of error, she contends that her conviction was based on insufficient evidence and was also against the manifest weight of the evidence. We disagree.

{¶14} We limit our discussion to a manifest-weight-of-the-evidence analysis because Hilton did not engage in an analysis of the sufficiency of the evidence. Rather, Hilton II's contentions center around the credibility of the confidential informant and the fact that the phone number called by the confidential informant was not listed in Hilton II's name. Hilton II further points to a discrepancy between the time of the drug buy on March 19, 2008, as reflected in the video and the audio recordings of the controlled phone call. Because the time indicated on the audio recording arranging the sale was roughly an hour after the time reflected in the video recording of the sale, she claims the evidence leads to an objectively impossible set of facts.

{¶15} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. CA19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶16} A determination of whether a conviction is against the manifest weight of the evidence does not permit this court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶17} The State presented the testimony of the confidential informant and four Medway agents. The testimony indicated that the confidential informant purchased $50 worth of crack from Hilton II on March 18 and March 19, 2008. The drug buys were arranged by controlled phone calls from the confidential informant's cell phone to Hilton II's home phone. The confidential informant made controlled calls on March 18 and March 19, 2008. The controlled calls were made in the presence of Medway agent Charles Ellis who recorded his identification number, the date, the time, the phone number being called and the purpose of the call. The agent testified that he either dials the number himself or watches the confidential informant dial the number. All events are tape recorded. The number that the agent and confidential informant called corresponds to the telephone number registered to Marilyn Hilton, Marilyn Hilton II's mother. Hilton II resides with her mother. Although the phone records introduced at trial as Exhibit 14 do not show incoming calls, they do reflect that Hilton's number matches the number dialed in the controlled calls. On the tapes, the confidential informant can be heard telling the recipient that he wants to "go fishing." On the stand, the confidential informant testified that "I want to go fishing" means "I want $50 worth of crack."

{¶18} After each phone call, an agent placed a recording device on the confidential informant, repeated the date and time, stated the amount of money he provided to the confidential informant and stated the money was for the purchase of crack cocaine from Hilton II. Prior to providing money to the confidential informant, an agent searched him to ensure that he did not have any drugs or money on his person. The buy money was already photocopied for evidentiary purposes. The agents then dropped off the confidential informant near his house, in front of which he would wait for Hilton II to arrive. On March 18, 2008, she arrived in a 2001 Dodge sedan that an agent testified belonged to Duane Sawyer. Due to darkness, none of the

agents could identify the driver of the Dodge from their vantage point although a woman can be heard interacting with the confidential informant on the audio recording of the drug buy. The confidential informant identified the seller of the drugs as Hilton II. On March 19, 2008, the seller pulled up in a 1995 Chevy Blazer. Due to weather conditions, none of the agents could identify the driver. Again, the confidential informant testified that the seller of the drugs was Hilton II. On the audio recording of the transaction, the confidential informant can be heard saying, "[t]here's no telling what you'll pull up in." This statement corroborates his identification of Hilton II on each day and provides verification that the same seller drove a different vehicle each day. Little can be heard of the seller's statements on either of the audio recordings from the transactions or the first controlled call. After each transaction was complete, the confidential informant returned to the vehicle occupied by the Medway agents and turned over the drugs he had purchased. The drugs were tested and Hilton II's trial counsel stipulated to the admission into evidence of the reports from the Bureau of Criminal Identification and Investigation as Exhibits 12 and 13, which determined that the substances purchased by the confidential informant contained cocaine. The identification of Hilton II as the seller, however, required an evaluation of the credibility of the confidential informant.

{¶19} The confidential informant admitted that Medway paid him $100 per successful purchase of crack cocaine and that he was otherwise unemployed while he worked as a confidential informant. The confidential informant also acknowledged past convictions for aggravated drug trafficking and theft. Agent Donald Hall also acknowledged that although they searched the confidential informant's person, the agents did not search the confidential informant's porch, where he could have hidden money or drugs. Agent Ellis also admitted that the confidential informant could be heard opening the front door to his home and speaking

briefly with his wife on March 18 and a child on March 19, and that this was not an ideal undercover situation.

{¶20} Hilton II also contends that the confidential informant was not credible with regard to the March 19, 2008 transaction because the video displayed a starting time of 6:56 p.m., while the controlled call arranging the transaction stated a beginning time of 7:28 p.m. Hilton II contends that this discrepancy indicates that the transaction occurred prior to the call, which renders the State's chronology of events objectively impossible. Hilton II further contends that if the confidential informant was not credible with regard to the March 19, 2008 transaction then he lacks credibility with regard to the March 18, 2008 transaction, as well.

{¶21} The video of the March 18, 2008 transaction displays an initial time of 9:28 p.m., while the audio recording states a beginning time of 10:23 p.m. or approximately one hour later. The tape-recording of the controlled call arranging the March 18, 2008 transaction begins at 10:12 p.m. Accordingly, each video displays a time stamp one hour earlier than the corresponding audio recording of the transaction. An agent specifically stated the time at the beginning of each audio recording and each controlled call. It was, therefore, reasonable to infer that the specifically stated time, rather than the electronic time stamp of the video, was correct.

{¶22} After reviewing the entire record and weighing the evidence, we cannot say that the trier of fact "created such a miscarriage of justice that the conviction[s] must be reversed[.]" *Otten*, 33 Ohio App.3d at 340.

ASSIGNMENT OF ERROR II

> "THE COURT COMMITTED ERROR OR PLAIN ERROR BY PERMITTING THE JURY TO ASSUME A FACT NOT IN EVIDENCE, WHICH WAS CRUCIAL IN CONVICTING [] HILTON II."

{¶23} In her second assignment of error, Hilton II contends that the trial court committed error or plain error in allowing the jury to consider evidence during its deliberations that had not been offered into evidence by the State at the close of trial. We disagree.

{¶24} The testimonial exchange about which Hilton II complains occurred as the prosecutor was cross-examining Hilton II. The exchange went as follows:

"Q: *** That wasn't you driving that car?

"A: No, it wasn't.

"Q: And it comes back to Dwayne Sawyer. Do you know Dwayne Sawyer?

"A: Yes, I do.

"Q: And how do you know him?

"A: I --

"[Hilton II's counsel]: Objection. May we approach?"

{¶25} The trial court held a sidebar and Hilton II's counsel explained that he objected to the prosecutor's characterization that the car "comes back to Dwayne Sawyer" without admissible evidence of that fact. However, Hilton II's counsel did not object until after his client had answered the question to which he objected and was beginning her answer to a subsequent question. Counsel did not ask the court to strike the comment or to give the jury any type of cautionary instruction to cure the alleged error. "This Court need not consider a claimed error that an appellant failed to bring to the trial court's attention at a time when that court could have avoided or corrected the supposed error." (Citation omitted.) *State v. Goff*, 9th Dist. No. 23292, 2007-Ohio-2735, at ¶47; *State v. McDonald* (1970), 25 Ohio App.2d 6, 11 ("when a question is asked and answered without objection, the error, if any, will be considered to have been waived"). At this juncture, we find it prudent to note the difference between the waiver of an

objection and the forfeiture of an objection. Although the terms are frequently used interchangeably,

> "[w]aiver is the intentional relinquishment or abandonment of a right, and waiver of a right cannot form the basis of any claimed error under Crim.R. 52(B). On the other hand, forfeiture is a failure to preserve an objection [.] *** [A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B)." (Internal citations and quotations omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶ 23.

{¶26} Accordingly, trial counsel forfeited the objection. Forfeiture of the objection, however, does not foreclose Hilton II's plain-error argument on appeal.

{¶27} Hilton II's argument ignores the fact that Agent Lacy Cherry testified without objection during the State's case-in-chief that the car involved in the March 18, 2008 drug transaction was registered to Duane Sawyer. Agent Cherry's testimony placed the fact in evidence.

{¶28} As Hilton II made a plain-error argument, we will address the issue. In this instance, we utilize the same standard of review for plain error as in our discussion of Hilton II's first assignment of error. See *Estright* at ¶53. In order to correct a plain error, all of the following elements must be present:

> "First, there must be an error, i.e., a deviation from the 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[]' [to the extent that it] *** affected the outcome of the trial." *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶9, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

{¶29} Even assuming that the admission of the statement regarding registration of the vehicle constituted an obvious error, we have already determined that Hilton II's convictions are not against the weight of the evidence without reference to the challenged evidence.

Accordingly, we cannot say that the result of the trial would have been different but for the prosecutor's statement regarding the ownership of the vehicle. *Hardges* at ¶9; *Estright* at ¶53.

{¶30} Hilton II's second assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"DEFENSE COUNSEL WAS INEFFECTIVE IN NOT PURSUING THE CHRONOLOGICAL DISCREPANCIES IN THE STATE'S EXHIBITS."

{¶31} In her fourth assignment of error, Hilton II contends that she was denied the effective assistance of counsel because her trial counsel failed to pursue the time discrepancy between that stated on the March 19, 2008 controlled phone call arranging the second crack cocaine sale and the initial time displayed on the video of the second cocaine sale. We disagree.

{¶32} To show ineffective assistance of counsel, Hilton II must satisfy a two prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a "'substantial violation of any *** essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel's ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. "Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel." *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if Hilton II fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶33} Even assuming that Hilton II's trial counsel engaged in a substantial violation of an essential duty to his client by failing to pursue the time discrepancy, Hilton II has failed to demonstrate any prejudice. There is no evidence anywhere in the record that demonstrates a

reasonable probability that testimony regarding the discrepancy between the time displayed on the video recordings of the drug transactions and the times stated on the audio recordings of the controlled calls and drug transactions would have altered the result at trial.

{¶34} Any suggestion that the result at trial would be different based on testimony about the time discrepancy is purely speculative because this Court has no way of knowing what testimony might be elicited. *State v. Ushry*, 1st Dist. No. C-050740, 2006-Ohio-6287, at ¶43. In fact, in arguing her third assignment of error, Hilton II acknowledges that the discrepancy could be explained by "inconsistent Daylight Savings Time adjustments, but there wasn't anything in the record dealing with those issues." A direct appeal is not the appropriate context to present evidence outside the record. *State v. Siders*, 4th Dist. No. 07CA10, 2008-Ohio-2712, at ¶19. Instead, Hilton II's "claim is more suitable to postconviction relief, where this additional evidence could be presented." *Ushry*, at ¶43. Accordingly, Hilton II cannot establish prejudice. Id.

{¶35} Hilton II's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"WHEN TAKEN TOGETHER, THE ERROR BY COUNSEL AND/OR THE EVIDENTIARY MISRULINGS IN THIS CASE AMOUNT TO CUMULATIVE ERROR, DEPRIVING [] HILTON II OF A FAIR TRIAL."

{¶36} In her fifth assignment of error, Hilton II contends that the error by her trial counsel and the trial court's erroneous evidentiary rulings constitute cumulative error, which deprived her of a fair trial. We disagree.

{¶37} To support a claim of cumulative error, there must be multiple instances of harmless error. *State v. Garner* (1995), 74 Ohio St.3d 49, 64. Cumulative error exists only where the errors during trial actually "deprive[d] a defendant of the constitutional right to a fair

trial." *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "[T]here can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial." *State v. Hill* (1996), 75 Ohio St.3d 195, 212, quoting *U.S. v. Hasting* (1983), 461 U.S. 499, 508-09. Moreover, "errors cannot become prejudicial by sheer weight of numbers." *Hill*, 75 Ohio St.3d at 212. After reviewing the record, we cannot say that Hilton II's trial was plagued with numerous errors or that her constitutional right to a fair trial was violated.

{¶38} Hilton II's fifth assignment of error is overruled.

III.

{¶39} Hilton II's assignments of errors are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

BELFANCE, J.
CONCURS

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶40} The trial court did not abuse its discretion by allowing the prosecutor to reopen the State's case for admission of exhibits. Any error regarding the prosecutor's statement that the car Ms. Hilton was allegedly driving "comes back to Dwayne Sawyer" was harmless because Agent Cherry had testified without objection that the car was registered to Mr. Sawyer. Ms. Hilton's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Without knowing what pursuing the "chronological discrepancies in the State's exhibits" would have revealed, it is impossible to conclude that Ms. Hilton's lawyer was ineffective for not doing so. And, having concluded that Ms. Hilton's first four assignments of error are without merit, her fifth assignment of error, that her first four assignments of error "amount to cumulative error," is without merit as well. Accordingly, I concur in the majority's judgment.

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.