[Cite as *State v. Jones*, 2010-Ohio-865.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA1
vs.	:	
GREGORY A. JONES,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Kristopher A. Haines, Assistant Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: C. Jeffrey Adkins, Gallia County Prosecuting Attorney, 18 Locust Street, Gallipolis, Ohio, 45631

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:3-1-10

ABELE, J.

{¶ 1} This is an appeal from a Gallia County Common Pleas Court judgment that overruled a motion for new trial. A jury found Gregory A. Jones, defendant below and appellant herein, guilty of (1) drug possession in violation of R.C. 2925.11(A); (2) drug trafficking in violation of R.C. 2925.03(A)(1); and (3) having a weapon under disability in violation of R.C. 2923.13(A)(3).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED MR. JONES'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THE TRIAL COURT CONVICTED MR. JONES OF TRAFFICKING IN DRUGS IN THE VICINITY OF A SCHOOL OR JUVENILE, AND CONVICTED MR. JONES OF HAVING WEAPONS WHILE UNDER DISABILITY, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY REGARDING ALL ESSENTIAL ELEMENTS OF THE CHARGED CRIMES OF POSSESSION OF DRUGS AND TRAFFICKING IN DRUGS, AND WHEN IT FAILED TO INSTRUCT THE JURY REGARDING THE FORFEITURE SPECIFICATION TO THE CHARGED CRIME OF TRAFFICKING IN DRUGS, IN VIOLATION OF MR. JONES'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO PROVIDE THE JURY WITH VERDICT FORMS IN COMPLIANCE WITH R.C. 2945.75, AND ENTERED ENHANCED CONVICTIONS AGAINST MR. JONES FOR POSSESSION OF DRUGS AND TRAFFICKING IN DRUGS, IN VIOLATION OF JONES'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE AT TRIAL TESTIMONIAL HEARSAY STATEMENTS OF INDIVIDUALS

WHO WERE NOT SUBJECT TO PRIOR CROSS-EXAMINATION, IN VIOLATION OF MR. JONES'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

FIFTH ASSIGNMENT OF ERROR:

"TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MR. JONES'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT OVERRULED MR. JONES'S MOTION TO CONTINUE THE DATE OF HIS TRIAL, IN VIOLATION OF MR. JONES'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶ 3} On the evening of November 15, 2007, Gallipolis Police sent a confidential informant into a residence at 34½ Smithers Street to make a "controlled" drug purchase. A few minutes later, the informant returned with a baggie of material later confirmed as "crack" or "base" cocaine.

{¶ 4} The Gallia County Grand Jury returned an indictment charging appellant with the aforementioned offenses. Those charges were later dismissed nolle prosequi. A second indictment was returned on September 9, 2008, to which appellant pled not guilty. A jury trial was conducted in September 2008 and the jury found appellant guilty on all charges. The trial court sentenced appellant to serve five year terms of imprisonment for possession and trafficking, as well as three years for having a weapon

under disability with all sentences to be served consecutively for a total of thirteen years imprisonment. A motion for new trial was filed November 14, 2008, but denied three days later. This appeal followed.[1]

I

{¶ 5} We proceed, out of order, to consider appellant's third assignment of error. Appellant contends, and the State concedes, the trial court erred by accepting the guilty verdicts and sentencing him for greater degrees of trafficking and possession in violation of both R.C. 2945.75 and State v. Pelfrey, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256. We agree with the parties view on this point, albeit with some reservation.

{¶ 6} Ohio law provides that "[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." (Emphasis added.) R.C. 2945.75(A)(2). This statute is "clear" on its face, the Ohio Supreme Court has held, and if a verdict form does not include (1) the degree of the offense, or (2) a statement that aggravating circumstances have been found to justify a conviction on the greater offense, then a defendant can only be convicted and sentenced for the lowest degree of the offense. 2007-Ohio-256, at ¶14.

{¶ 7} In the case sub judice, the verdict form for the possession charge states

[1] The final appealable order in this case was the October 17, 2008 entry that denied the motion for new trial. See State v. Waulk, Ross App. No. 02CA2649, 2003-Ohio-11, at ¶9. Appellant did not file his notice of appeal from that entry until November 26, 2008, which is beyond the applicable time limit. See App.R. 4(A). However, on February 10, 2009 we granted appellant leave to file a delayed appeal.

"[w]e, the jury in this case . . . find the Defendant, Gregory A. Jones, Guilty of Possession of Drugs in a manner and form as he stands charged in the Indictment." Similarly, the trafficking verdict form states the that jury found appellant "Guilty of Trafficking in Drugs in a manner and form as he stands charged in the indictment."[2] Neither of the verdict forms set out the degrees of the offenses, nor do they list aggravating factors or the drug that appellant was convicted of possessing and trafficking. Thus, the verdicts in the case sub judice do not comply with R.C. 2945.75(A)(2) and appellant can only be convicted and sentenced for the lowest degree of those offenses.

{¶ 8} For these reasons, the assignment of error is well taken and is hereby sustained.[3]

II

{¶ 9} We now turn to appellant's first assignment of error wherein he argues that the evidence was insufficient to convict him of trafficking drugs in the vicinity of a school

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See App.R. 5(A).

[2] The "as charged in the indictment" language in the verdict form does not cure the defect, even though the degrees of the offense were included in the indictment. The same language appeared on the verdict forms in Pelfrey and the majority found a violation of the statute. See 2007-Ohio-256, at ¶17 (O'Donnell, J., Dissenting). Although we may not fully agree with the Ohio Supreme Court's view of this matter, we, as an intermediate appellate court, must follow the Ohio Supreme Court decision.

[3] Although the State concedes appellant's third assignment of error and posits that the offenses must be treated as minor misdemeanors, we are not sure that this is the case. Admittedly, this Court has ruled that when a jury verdict fails to specify the drug involved, the convictions must be treated as being associated with the least serious drug for possession/trafficking (usually marijuana). See State v. New, Gallia App. No. 08CA9, 2009-Ohio-2632, at ¶26 & fn.3; State v. Huckleberry, Scioto App. No. 07CA3142, 2008-Ohio-1007, ¶24. Although we agree with the State that possession of marijuana is a minor misdemeanor, R.C. 2925.11(C)(3)(a), the lowest degree of trafficking in that offense is a fifth degree felony. See R.C. 2925.03(C)(3)(a).

or juvenile, as well as having a gun under disability.

{¶ 10} We begin our analysis with a recitation of the proper standard of review. In a review for sufficiency of the evidence, we look to the adequacy of evidence and whether that evidence, if believed, supports a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. In other words, after viewing all the evidence and each inference reasonably drawn therefrom in the light most favorable to the prosecution, would any rational trier of fact have found all of the essential elements of the offense beyond a reasonable doubt. State v. Hancock, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, at ¶34; State v. Jones (2000), 90 Ohio St.3d 403, 417, 739 N.E.2d 300.

{¶ 11} First, appellant contends that insufficient evidence was adduced to establish that he trafficked drugs in the vicinity of a school or a juvenile. We need not consider this argument, however, due to our ruling on his third assignment of error. The proximity of a drug sale to schools/juveniles simply elevates the degree of the offense. See e.g. State v. Salaam, Hamilton App. No. C-020324, 2003-Ohio-1021, at ¶7. In light of our ruling on appellant's third assignment of error, he can no longer be sentenced to the higher degree of the trafficking offense.

{¶ 12} Appellant's second argument is that insufficient evidence demonstrated that he possessed a weapon while under a disability. We disagree. Gallipolis Police Sergeant Matt Champlin testified that during the search of the residence, authorities discovered a "Beretta 9mm" semi-automatic handgun. Sgt. Champlin described the handgun as having been "field stripped," and that the "frame of the weapon" was in

appellant's bedroom and the "remainder of the weapon" was in a nearby bedroom. Once they reassembled the weapon, Sgt. Champlin related, it was test fired and found that it operated properly.

{¶ 13} R.C. 2923.13 bars possession of a firearm while under a disability. Here, the parties stipulated to the disability. Thus, the dispositive issue is whether the disassembled handgun constitutes a firearm for purposes of the statute.

{¶ 14} R.C. 2923.13 does not define the word "firearm." R.C. 2923.11(B)(1) defines firearm, inter alia, as any firearm that is "inoperable but that can readily be rendered operable." We believe that the evidence established that the disassembled firearm could be made readily operable.

{¶ 15} The adverb "readily" connotes that something can be done "promptly" or "easily." The American Heritage Dictionary (2nd Ed. 1985) 1030. Although we have found no Ohio case law to define this word, we note that the above noted definition is consistent with definitions applied elsewhere. See e.g. Terway v. Real Estate Agency (Or. App. 2008), 196 P.3d 1022, 1028 ("speedily" and/or "without much difficulty"); Fort Worth v. Groves (Tex. App. 1988), 746 S.W.2d 907, 922 (Keltner, J. Dissenting) ("reasonably fast" and "without much difficulty").

{¶ 16} In the case sub judice, Sgt. Champlin described the firearm as having been "field stripped" with the gun's frame in appellant's bedroom and the gun's remaining parts (the witness testified the "slide, the barrel and the recoil spring for the weapon") in an adjoining bedroom. The gist of Sgt. Champlin's testimony was that the disassembly of the firearm was no impediment to easy reassembly and, once reassembled, the

weapon was readily operable. This evidence is sufficient for the trier of fact to find a R.C. 2923.13(A)(3) violation. Further, we doubt that the Ohio General Assembly would have intended that the provisions of R.C. 2923.13 could be defeated by simply stripping a gun and placing some of the component parts in one easily accessible location and other parts in another easily accessible location.

{¶ 17} In support of his argument, appellant cites several carrying concealed weapon cases for the proposition that a disassembled weapon does not satisfy the R.C. 2923.12(A) "ready at hand" requirement. We, however, reject this view. The prohibition against having a weapon while under a disability provides that an offender shall not "knowingly acquire, have, carry or use any firearm." Unlike the concealed weapon offense that requires quick access to a firearm, the purpose of the disability statute is to prevent any person convicted of a felony offense from having any access or control whatsoever over a firearm. We believe that the fact that all of the component parts were on the premises and could be rendered operable through simple reassembly of the weapon is sufficient for a violation of the disability statute.

{¶ 18} For all these reasons, we hereby overrule appellant's first assignment of error.

III

{¶ 19} Appellant asserts in his second assignment of error that the trial court committed plain error when it failed to instruct the jury concerning the precise quantity of drug that they must find to find appellant guilty of possession and trafficking. The State apparently concedes the error(s), but argues that they are moot in as much as appellant can only be convicted for the lowest degree of the offenses. We agree with the State

and disregard this assignment of error pursuant to App.R. 12(A)(1)(c).

IV

{¶ 20} We now proceed to appellant's fourth assignment of error. Appellant asserts that the trial court erred in admitting into evidence a tape recording of the "controlled" drug purchase. Specifically, he argues that this "testimonial evidence" is barred by Crawford v. Washington (2004), 541 U.S. 36, 124 S.Ct. 354, 158 L.Ed.2d 177. We disagree.

{¶ 21} First, it should be pointed out that appellant did not raise the Crawford issue in the trial court and, thus, has waived the issue for purposes of appeal. State v. Bennett, Scioto App. No. 05CA2997, 2006-Ohio-2757, at ¶17; also, see State v. Peagler (1996), 76 Ohio St.3d 496, 499, 668 N.E.2d 489; State v. Lott (1990), 51 Ohio St.3d 160, 174, 555 N.E.2d 293; State v. Gordon (1971), 28 Ohio St.2d 45, 276 N.E.2d 243, at paragraph two of the syllabus. Trial counsel did object to the playing of this tape to the jury, but the transcript reveals the basis for that objection was "foundation." Neither Crawford, nor the Confrontation issue, was raised.

{¶ 22} Second, even if the Crawford issue had not been waived, we would find no merit to this argument. The United States Supreme Court's holding in Crawford is that testimonial statements of witnesses absent from trial may be admitted only if the declarant is unavailable, and only when defendant had a prior opportunity to cross-examine that declarant. Otherwise, the admission of such statements violates a defendant's confrontation rights.

{¶ 23} This assignment of error involves the question of whether the tape

recording of the controlled drug purchase constitutes testimonial evidence. The United States Supreme Court has not set forth a clear test to define precisely what constitutes a "testimonial statement," but did say that it is in the nature of a solemn declaration/affirmation made to establish or prove a fact such as ex parte in court testimony, affidavits, custodial examinations, depositions, confessions or statements made under circumstances that would lead a witness to reasonably believe the statement would be available for use at a later trial. 541 U.S. at 51-52. In light of this amorphous definition, is a recording of a controlled drug buy "testimonial evidence"? We conclude that it is not.

{¶ 24} Clearly, a recording of a criminal defendant's own actions or reactions does not implicate the Confrontation Clause. State v. Graves, Lorain App. No. 08CA9397, 2009-Ohio-1133, at ¶8. Our Third District colleagues recently held that the comments of the confidential informant are not hearsay as they give context to a defendant's statements and are not offered to prove the truth of the matter asserted. See State v. Stewart, Seneca App. No. 13-08-18, 2009-Ohio-3411, at ¶90. These rulings are consistent with other jurisdictions that have considered the admissibility of recorded drug purchases post-Crawford. See e.g. United States v. Jones (C.A.6 2006), 205 Fed. Appx. 327, 342; Turner v. Kentucky (KY. 2008), 248 S.W.3d 543, 545-546; Connecticut v. Smith (CT 2008),960 A.2d 993, 1011-1012.

{¶ 25} Thus, we conclude that Crawford did not bar the admission of the tape recorded drug purchase into evidence. Furthermore, we find nothing amiss with police testifying as to the confidential informant's comments. Those comments provided context to the use of the informant and the recorded controlled purchase.

{¶ 26} The search warrant affidavit, which also contains statements from the confidential informant, is a more difficult issue. However, having previously determined that neither the recording nor police statements that recounted the informant's statements violate the appellant's confrontation rights, we need not address the affidavit. Assuming, arguendo, that the affidavit's admission into evidence may have violated Crawford, it is cumulative of the recorded drug buy and the contextual testimony of Gallipolis police. Thus, such cumulative testimony could not have prejudiced appellant.

{¶ 27} For all of these reasons, we hereby overrule appellant's fourth assignment of error.

V

{¶ 28} Appellant's fifth assignment of error sets forth various reasons for why he claims that he received ineffective assistance from trial counsel. We find no merit in those arguments.

{¶ 29} Our analysis begins with the premise that a criminal defendant has a right to counsel, including a right to the effective assistance from counsel. McCann v. Richardson (1970), 397 U.S. 759, 770, 25 L.Ed.2d 763, 90 S.Ct. 1441; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182; State v. Doles (Sep. 18, 1991), Ross App. No. 1660. To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed .2d 674, 104 S.Ct. 2052; also see State

v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916. Both prongs of the Strickland test need not be analyzed if the claim can be resolved under one. See State v.. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52. To establish the latter element, i.e. the existence of prejudice, a defendant must show a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

{¶ 30} In the case at bar, several of the arguments that appellant advances have already been resolved in the other assignments of error. For example, he asserts that trial counsel was constitutionally ineffective for not objecting to jury instructions, as well as the deficiency of the verdict forms. In view of the fact that we have sustained appellant's third assignment of error, these issues have been rendered moot. Appellant also asserts that counsel failed to object to the search warrant affidavit's admission into evidence. However, as we discussed in appellant's third assignment of error, this evidence is merely cumulative of other evidence that the trial properly admitted. Thus, appellant suffered no prejudice, even if counsel should have arbuably objected to its admittance.

{¶ 31} Appellant also points to trial counsel’s failure to conduct discovery, to request the identity of the confidential informan and to request the testimony of the laboratory analyst. While such motions may have been helpful to appellant, he has not demonstrated that he suffered prejudice. This Court may not simply presume that prejudice exists in an ineffective assistance of counsel claim, but must require that

prejudice be affirmatively established. See e.g. State v. Tucker (Apr. 2, 2002), Ross App. No. 01CA2592; State v. Kuntz (Feb. 26, 1992), Ross App. No. 1691; State v. Maughmer (Feb. 7, 1991), Ross App. No. 1667.

{¶ 32} Finally, appellant argues that his trial counsel was defective for not filing a request for waiver of fines due to his indigency. This, too, has been rendered moot in light of the fact that this matter will be remanded for resentencing and this issue may be fully addressed.

{¶ 33} For all these reasons, we hereby overrule appellant's fifth assignment of error.

VI

{¶ 34} Appellant's sixth assignment of error involves a continuance motion that he filed in the late afternoon on the first day of trial. The trial court overruled the motion and appellant claims that the court's decision constitutes an abuse of discretion. We disagree with appellant.

{¶ 35} The decision to grant a continuance rests in trial court's sound discretion. State v. Mason (1998), 82 Ohio St.3d 144, 155, 694 N.E.2d 932; State v. Unger (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, at the syllabus. A court's decision will not be reversed on appeal absent an abuse of discretion. State v. Bomar (Oct. 23, 2000), Scioto App. No. 00CA2703; State v. Meredith (Jun. 22, 2000), Lawrence App. No. 99CA2. The phrase "abuse of discretion" means more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary or unconscionable. See State v. Herring (2002), 94 Ohio St.3d 246, 255, 762 N.E.2d 940; State v. Adams

(1980), 60 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 36} Appellant's second indictment was handed down on September 9, 2008. Appellant was arraigned on September 18, 2008, at which time trial counsel was appointed and a trial date set for Monday, September 29, 2008. Counsel requested a continuance late in the day on the Friday prior to trial because he asserted that he did not have time to make the requisite motions or to complete discovery. As the trial court noted, however, counsel had ample time prior to late afternoon, on the last working day before trial, to make his motion. As for discovery or any other motion, counsel could have consulted the attorney who represented appellant in the previous case. Most important, we point out that appellant has made no showing of prejudice resulting from the failure to obtain a continuance.

{¶ 37} For all these reasons, we are not persuaded that the trial court abused its discretion and we hereby overrule appellant's sixth assignment of error.

{¶ 38} Having partially sustained appellant's first assignment of error, and having sustained his third assignment of error in its entirety, we hereby reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, that the case be remanded for further proceedings. Appellant recover of appellee the costs herein

taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

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

McFarland, P.J.: Concurs in Judgment & Opinion
Kline, J.: Concurs in Judgment Only

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.