[Cite as *State v. Mitchell*, 2009-Ohio-6950.]

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

STATE OF OHIO	C.A. No. 24730
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WENDELL J. MITCHELL	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 08 2887(B)

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Wendell J. Mitchell, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} The Akron Police Department received a tip that large marijuana plants were growing in the backyard at 1152 Burkhardt Avenue and that surveillance cameras had been installed on the home. A detective in the Street Narcotics Uniform Detail ("SNUD") verified the tip by traveling one street west of Burkhardt and viewing the backyard of 1152 Burkhardt Avenue from the property directly to its rear. The detective readily identified marijuana plants approximately nine feet tall rising above a six-foot-tall privacy fence. The detective then sought and obtained a search warrant for the residence and the marijuana in the backyard.

{¶3} Wendell and Karen Mitchell jointly owned the property at 1152 Burkhardt Avenue. The two were not officially married, although they essentially held themselves out as

such and shared the same last name. Karen changed her name from Penn to Mitchell at a time when Wendell was in prison and apparently could be visited only by people who shared his last name.

{¶4} On August 29, 2007, several SNUD members executed the search warrant. Neither Karen nor Wendell was present at that time. In the backyard, the police found and seized ten marijuana plants, with trunks as thick as four to five inches. They also observed a watering system and tool for digging post holes nearby. Inside the home they discovered smaller pots, which could be used for starting marijuana plants, a children's pool filled with dirt, a shovel stuck in the dirt, a scale typically used for weighing narcotics and mail addressed to Wendell and postmarked in August of 2007. The police also discovered four loaded firearms, including a 9 mm rifle, a .38 caliber handgun, a .45 caliber pistol and a .30-30 rifle. They also found a bag of marijuana stored in a freezer in the basement. The total mass of marijuana seized from the home and yard was 6,617 grams.

{¶5} Some time after the search was complete the police received a tip that the Mitchells had returned to 1152 Burkhardt Avenue. The police arrived for a second time and arrested them.

{¶6} On September 11, 2007, Wendell was indicted on charges of illegal cultivation of marijuana in violation of R.C. 2925.04(A), a felony of the first degree; possession of marijuana in violation of R.C. 2925.11(A), a felony of the second degree; possessing criminal tools in violation of R.C. 2923.24, a felony of the fifth degree; and, four counts of having weapons while under disability in violation of R.C. 2923.13(A)(1)/(2), felonies of the third degree.

{¶7} On January 15, 2009, Wendell was indicted on additional charges, including cultivation of marijuana in violation of R.C. 2925.04(A), a felony of the second degree, and possession of marijuana in violation of R.C. 2925.11(A)(C)(3), a felony of the third degree.

{¶8} Immediately prior to trial, the State dismissed the first-degree felony cultivation of marijuana and the second-degree felony possession of marijuana.

{¶9} The remaining charges were tried to a jury, which found Wendell guilty on each count.

{¶10} Wendell timely filed a notice of appeal. He raises three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED AS A MATTER OF LAW TO THE PREJUDICE OF [WENDELL] WHEN IT SUA SPONTE GAVE THE JURY AN INSTRUCTION ON THE TESTIMONY OF AN ACCOMPLICE OVER THE OBJECTIONS OF DEFENSE COUNSEL, AND/OR COMMITTED PLAIN ERROR IN SO DOING, IN DEROGATION OF THE CLEAR MANDATES OF R.C. 2923.03(D)."

{¶11} In his first assignment of error, Wendell contends that the trial court erred when it sua sponte instructed the jury regarding accomplice testimony. Wendell further contends that the trial court's decision to give an accomplice testimony instruction constituted plain error. We disagree.

{¶12} Wendell's counsel on appeal acknowledged that Wendell's trial counsel did not preserve an objection to the accomplice testimony instruction. Therefore, he has forfeited this issue on appeal. Crim.R. 30(A). Typically, if a party fails to object in the trial court, reviewing courts may notice only "[p]lain errors or defects affecting substantial rights[.]" Crim.R. 52(B). Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed

although it was not brought to the attention of the trial court. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. 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." *Kobelka*, supra, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. Wendell has argued plain error on appeal. As such, we will address his argument regarding the accomplice testimony instruction.

{¶13} Wendell contends that R.C. 2923.03(D) requires an accomplice instruction only when an accomplice testifies against a defendant. We agree. R.C. 2923.03(D) provides that:

> "If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:
>
> "'The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> "'It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.'"

{¶14} In this case, Karen testified on behalf of Wendell rather than against him. That is, she was called as a witness by the defense and testified favorably for the defense. In fact, she attempted to take responsibility for all aspects of the marijuana cultivation and possession of the weapons. She testified that Wendell did not live at the property during that time and he was unaware of the marijuana. She further testified that she planted the marijuana on her own with

seeds she found at her job. This scenario does not satisfy the requirement of the statute that the accomplice testify *against* the defendant in order to trigger the instruction. Therefore, it was error for the trial court to insert and read the accomplice instruction and this should have been apparent to the trial court in light of the plain text of the statute. *State v. Feerer*, 12th Dist. No. CA2008-05-064, 2008-Ohio-6766, at ¶33.

{¶15} Because it was error to read the accomplice instruction, we must now determine if "the outcome of the trial clearly would have been different" but for the error. *Kobelka*, supra, at *2. Although the accomplice instruction cast suspicion upon Karen's testimony that Wendell was not involved in the marijuana cultivation or firearms possession, there was other evidence connecting Wendell to the charges. In rebuttal to Karen's testimony, Detective Schmidt testified that upon her arrest Karen admitted that the marijuana cultivation was a pet project between her and Wendell. Upon his arrest, Wendell stated that he "didn't have any drugs, just weed." At that time, he also admitted that he thought it was legal to possess firearms because so much time had elapsed since his aggravated drug trafficking conviction. At least one neighbor also testified, contrary to Karen, that Wendell was at the shared residence on Burkhardt every day in August of 2007. Karen also testified that she and Wendell have been living together again since the arrest despite an affair for which she testified she "put him out" as of Valentine's Day in 2007. Wendell also received mail at 1152 Burkhardt Avenue during the month of August 2007. Curiously, despite the fact that Wendell was allegedly living in Cleveland with a girlfriend at the time, when Karen received a call from her son that the house had been broken into she in turn called Wendell and asked him to return to the home. Accordingly, even without the cautionary accomplice charge, there was significant evidence upon which the jury could have found Karen's testimony to be incredible and upon which the jury could have based Wendell's convictions.

Wendell has not demonstrated that the results of the trial clearly would have been different but for the accomplice instruction. Wendell's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"WENDELL WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶16} In his second assignment of error, Wendell contends that he was denied effective assistance of counsel because his trial counsel failed to pursue a motion to suppress. Wendell's argument rests on the assertion that the officer who first observed the marijuana plants in plain view was not lawfully on the premises from which he observed them. We do not agree.

{¶17} To show ineffective assistance of counsel, Wendell 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 Wendell fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶18} The record on appeal demonstrates that a skeletal motion to suppress was filed at the trial level. In its body, the motion indicated that a brief more fully explaining Wendell's position would be forthcoming prior to any suppression hearing. No brief was filed. The record does not indicate that a hearing took place. Nor does it indicate that the trial court ever ruled on

the motion. There are many reasons that might explain a competent attorney's tactical decision to abandon the motion to suppress. We are unable to determine from the record what information trial counsel learned during discovery that might have indicated the fruitless nature of pursuing the motion.

{¶19} Even assuming that Wendell's counsel engaged in a substantial violation of an essential duty to his client by failing to pursue the motion to suppress, Wendell has failed to demonstrate any prejudice. There is no evidence anywhere in the record that demonstrates a reasonable probability that a motion to suppress would have been successful. Testimony in the record demonstrates that Detective Schmidt received an anonymous tip that marijuana was growing in the backyard of the residence at 1152 Burkhardt Avenue. In order to investigate the tip, Detective Schmidt went one street to the west and through the backyard of the house directly behind 1152 Burkhardt Avenue. He then observed ten marijuana plants, each of which was at least nine feet tall, stretching above a six-foot-tall privacy fence. There is no testimony in the record with regard to whether Detective Schmidt had permission to be on the property directly to the west of 1152 Burkhardt Avenue or that the neighboring property owner objected to the detective's presence. Despite the fact that the marijuana was growing within the curtilage, Mitchell had no reasonable expectation of privacy in plants that tower over a six-foot-tall privacy fence. *State v. Davis* (Oct. 31, 1983), 12th Dist. No. CA-791, at *5 (holding that defendant had no reasonable expectation of privacy in the contents of a protective covering, which had been outgrown by marijuana plants that were then clearly visible to neighbors), reversed on other grounds by *State v. Davis* (1985), 16 Ohio St.3d 34.

{¶20} Although the State would have had, if challenged, the burden of proving that the detective observed the marijuana while lawfully on the neighbor's property, there is no evidence

in the record suggesting an objection from the neighbor. Further, the motion to suppress did not contain a specific challenge to the detective's location, meaning the State was not put on notice that the detective's location was at issue. For these reasons, any suggestion that the motion to suppress would be successful based on the testimony of an unidentified neighbor is purely speculative both because Mitchell's motion does not raise the issue and 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 any event, 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, Wendell's "claim is more suitable to postconviction relief, where this additional evidence could be presented." *Ushry*, at ¶43. Accordingly, Wendell cannot establish prejudice. Id.

{¶21} Mitchell's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"WENDELL'S CONVICTIONS WERE BASED UPON INSUFFICIENT EVIDENCE AS A MATTER OF LAW, AND WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶22} In his third assignment of error, Wendell contends that his convictions were based on insufficient evidence and against the manifest weight of the evidence.

{¶23} With regard to sufficiency of the evidence, Wendell contends only that the State failed to present any evidence that he engaged in cultivation of the marijuana. We disagree.

{¶24} Appellate review of a conviction for sufficiency of the evidence calls for a legal determination, which this Court reviews de novo. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386. "The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, at paragraph two of the syllabus.

{¶25} R.C. 2925.04(A) provides that no person shall knowingly cultivate marijuana. "Cultivate" is defined to include "planting, watering, fertilizing, or tilling." R.C. 2925.01(F).

{¶26} Although the State did not elicit direct testimony that Wendell engaged in cultivation of marijuana, circumstantial evidence allowed for the reasonable inference that he planted and watered the marijuana. Circumstantial evidence has the same probative value as direct evidence. See *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Further, "if the State relies on circumstantial evidence to prove any essential element of an offense, it is not necessary for 'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.' (Internal quotations omitted.)" *State v. Tran*, 9th Dist. No. 22911, 2006-Ohio-4349, at ¶13, quoting *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2.

{¶27} The State introduced evidence at trial that Wendell and Karen Mitchell owned the house at 1152 Burkhardt Avenue. At least one neighbor testified that Wendell was at the house every day in August of 2007 when the marijuana was seized. Wendell also received mail at that address during August of 2007. Pursuant to a search warrant, inside the house the police discovered a children's swimming pool filled with soil and nearby, smaller pots in which marijuana plants could have been started. A shovel was sticking out of the dirt in the swimming pool. In the backyard, the police found 10 marijuana plants, each standing at least nine feet tall. Near the marijuana plants was a tool used for digging post holes. A detective also testified that a watering system was located near the large marijuana plants in the backyard. It was reasonable to infer that Wendell participated in planting and watering marijuana plants. Accordingly, after viewing the evidence in the light most favorable to the State, we conclude that a reasonable trier

of fact could have found the essential elements of marijuana cultivation proven beyond a reasonable doubt. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus.

{¶28} In his argument that his conviction was against the manifest weight of the evidence, Wendell contends that he did not live at 1152 Burkhardt Avenue during any time that marijuana cultivation occurred. Instead, he argues that he was living in Cleveland with his girlfriend of three years, Cassandra Sheppard. Cassandra testified to this and stated at trial that she and Wendell intended to marry. Karen Mitchell corroborated Cassandra's testimony that Wendell lived elsewhere after February of 2007. Karen stated that she "put him out" on Valentine's Day in 2007 when she learned that he was having an affair with Cassandra. As of the date of Karen's testimony in this matter, the Mitchells had resumed cohabitation. Karen, who previously pleaded guilty to charges of marijuana cultivation in connection with these events, further testified that after she "put him out" of the house, she planted the marijuana in the backyard in mid-May of 2007. Karen explained that the children's swimming pool full of dirt was a litter box for her dog. She described the shovel as a "pooper scooper." She also stated that she installed the outdoor surveillance cameras, which she claimed did not work, simply because the neighborhood had declined. She testified that Wendell was entirely unaware of her operation. Karen stated that the only reason Wendell was at the Burkhardt address to be arrested with her on August 29, 2007 was because she called him when the execution of the search warrant caused her to believe the home had been burglarized.

{¶29} Karen also explained that none of the firearms found in the house belonged to Wendell. She testified that she purchased one gun at a pawn shop not long after 1990 and the others were gifts to her children from their grandfather.

{¶30} "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 *Thompkins*, 78 Ohio St.3d at 390.

{¶31} 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.

{¶32} In addition to Cassandra and Karen's in-court testimony regarding the cultivation and firearms charges, the jury also heard some admissions the Mitchells made to detectives near the time of their arrests. Detective Danzy of the Akron Police Department testified that upon his arrest, Wendell said, "For what, those five plants?" Detective Danzy also testified that Wendell stated that he thought he could have firearms at that time because so much time had passed since his previous conviction. At her arrest, Karen admitted that the marijuana was a pet project between her and Wendell. Additionally, at his intake interview at the Summit County Jail, Wendell told the deputy that he only had three plants growing in his yard, a number that he then increased to as many as six. Further, he stated that he resided at 1152 Burkhardt Avenue.

{¶33} At trial, the State produced evidence from the Summit County Auditor's website, which indicated that 1152 Burkhardt Avenue was owned by Wendell and Karen Mitchell. During the month of August in 2007, Wendell received mail at that address. Further, a neighbor

testified that Wendell was at the property every day in August of 2007. Law enforcement officers testified that they recovered a loaded .38 caliber handgun, a loaded 9 mm rifle, a loaded .45 caliber Ruger P90 pistol, and a loaded .30-30 rifle from the residence. From Wendell's acknowledgement that he thought he was now able to own guns, the jury could have determined that he acquired, had or used the firearms. Karen attempted to take responsibility for each item, even claiming that he did not live at 1152 Burkhardt Avenue and knew nothing of the cultivation. However, her admission to the arresting officer that growing the marijuana with Wendell was a pet project tainted any testimony favorable to the defense. After reviewing the entire record, we cannot say that the jury lost its way and created a manifest miscarriage of justice by finding Wendell guilty of each charge. *Otten*, 33 Ohio App.3d at 340.

{¶34} Wendell's third assignment of error is overruled.

III.

{¶35} Appellant's assignments of error are overruled. The judgment of the Summit 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 Summit, 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

CARR, J.
DICKINSON, J.
CONCUR

APPEARANCES:

JEFFREY N. JAMES, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.