[Cite as *State v. Kennedy*, 2023-Ohio-2283.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BILLY LEE KENNEDY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 BE 0014

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 2020 CR 123

BEFORE:
Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor and *Atty. Jacob A. Manning*, Assistant Prosecuting Attorney, 52160 National Road, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

Atty. Charles A.J. Strader, Attorney Charles Strader, LLC, 175 Franklin Street, SE, Warren, Ohio 44481, for Defendant-Appellant.

Dated: June 27, 2023

HANNI, J.

{¶1} Defendant-Appellant, Billy Lee Kennedy, appeals from a Belmont County Common Pleas Court judgment convicting him of aggravated possession of drugs following a jury trial.

{¶2} On April 23, 2019, Appellant was an inmate at the Belmont Correctional Institution. While Appellant was out in the "yard," Lieutenant George Sutton believed Appellant was acting suspiciously. The lieutenant stopped Appellant and conducted a "pat-down" search of his person. The lieutenant found a folded-up piece of paper in Appellant's pocket. The paper contained a small baggie. The baggie contained a white powdery substance. Lt. Sutton confiscated the items and placed Appellant in a holding cell.

{¶3} Appellant claimed he had traded liquor for what was supposed to be methamphetamine. However, he tasted and snorted the substance he was given and believed that it was not, in fact, methamphetamine.

{¶4} Investigator Paul Bumgardner field-tested the evidence. The field test was positive for methamphetamine. Consequently, the evidence was transported to the Ohio State Highway Patrol. Further testing at the State Highway Patrol Laboratory confirmed that the substance was, in fact, methamphetamine.

{¶5} On June 5, 2020, a Belmont County Grand Jury indicted Appellant on one count of aggravated possession of drugs, a fifth-degree felony in violation of R.C. 2925.11(A)(C)(1)(a).

{¶6} The matter proceeded to a jury trial on February 24, 2022. The jury found Appellant guilty as charged. At a subsequent sentencing hearing, the trial court sentenced Appellant to 12 months in prison to be served consecutively to the prison sentence he was already serving.

{¶7} Appellant filed a timely notice of appeal on April 4, 2022. He now raises six assignments of error for our review.

{¶8} Appellant's first and second assignments of error are related and Appellant addresses them together. Thus, we too will address them together.

{¶9} Appellant's first assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PREVENTED THE DEFENDANT/APPELLANT, BILLY LEE KENNEDY, FROM OBTAINING AN INDEPENDENT ANALYSIS OF THE SUBSTANCE CONFISCATED FROM HIS PERSON, IN ACCORDANCE WITH OHIO REVISED CODE SECTION 2925.51.

{¶10} Appellant's second assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AS A MATTER OF LAW, AND/OR COMMITTED PLAIN ERROR IN DENYING THE DEFENDANT/APPELLANT'S, BILLY LEE KENNEDY, ABILITY TO HAVE THE SUBSTANCE THAT WAS CONFISCATED TO UNDERGO INDEPENDENT TESTING, WHEN COUNSEL FOR THE DEFENDANT/APPELLANT, BILLY LEE KENNEDY, REQUESTED SAME, IN WRITING, TO THE COURT.

{¶11} In this case, the evidence was first sent to the Ohio State Highway Patrol Lab (OSHP Lab) for testing. But the OSHP Lab outsourced the testing to a third party, Miami Valley Regional Crime Lab (Miami Valley), which performed the initial testing.

{¶12} On September 25, 2020, Appellant filed a "motion to continue trial and motion for expert re-test of drugs." The trial court sustained Appellant's motion on September 30, 2020. It also granted Appellant permission to engage the services of a particular lab to conduct the testing.

{¶13} Appellant's public defender filed a motion to withdraw on April 20, 2021, stating that Appellant was unhappy with the representation provided by the public defender's office. The trial court held a hearing on the motion. In a May 13, 2021 judgment entry, the trial court detailed the hearing. The court stated Appellant had argued at the hearing that he demanded the public defender's office file a motion seeking an order that the OSHP Lab re-test the evidence. Then, depending on the results, he would seek a further, independent re-test. Appellant informed the court that his attorneys had not complied with his demands. The trial court consequently granted defense counsel's

motion to withdraw and appointed new counsel, which was only standby counsel as Appellant stated he wished to represent himself. Appellant then orally motioned the court for an order to require the state to have the evidence re-tested. Appellant later requested that court-appointed counsel represent him.

{¶14} The evidence was re-tested by the OSHP Lab, as Appellant had requested. Appellant next filed a motion to suppress, which the court overruled and will be addressed in his third assignment of error.

{¶15} Prior to the start of trial, Appellant's counsel brought up Appellant's request to have the evidence re-tested by a third-party lab. (Trial Tr. 12-13). The state responded by pointing out that a re-test was performed by the OSHP Lab. (Trial Tr. 14-15). The state noted that Appellant did not object to this as the re-test. (Trial Tr. 15). The state also pointed out that the test results from Miami Valley and the OSHP Lab were consistent with each other. (Trial Tr. 17). Thus, the court overruled Appellant's request for further testing. (Trial Tr. 17-18).

{¶16} Appellant now argues that he was statutorily entitled to an independent re-test or to have an independent observer present at the re-test. He claims the state did not provide him with either of these alternatives.

{¶17} Pursuant to R.C. 2925.51(E):

> Any person who is accused of a violation of this chapter or of Chapter 3719. of the Revised Code is entitled, upon written request made to the prosecuting attorney, to have a portion of the substance that is, or of each of the substances that are, the basis of the alleged violation preserved for the benefit of independent analysis performed by a laboratory analyst employed by the accused person, or, if the accused is indigent, by a qualified laboratory analyst appointed by the court.

{¶18} Thus, pursuant to the statute, Appellant was entitled to have a portion of the evidence preserved so that he could have an independent laboratory test it. Appellant was not entitled to have the prosecutor arrange such testing.

{¶19} In *State v. Glenn*, 3d Dist. Allen No. 1-06-100, 2007-Ohio-4369, the appellant filed a motion pursuant to R.C. 2925.51 requesting that the prosecution present

the testimony of the scientist who prepared the laboratory report, that the appellant receive a copy of all lab reports, that a sample of the alleged drugs be preserved for independent testing, and demanded to be present at all subsequent testing. The alleged drugs were preserved. But the appellant did not subsequently contact the state to designate an analyst or move the court for the appointment of an analyst. *Id*. at ¶ 7. Nothing indicated that the appellant followed up on his original motion by requesting the sample from the prosecutor's office or through a motion to the court. *Id*. at ¶ 8. Citing to a prior case, the court noted "that R.C. 2925.51 does not provide that the substance be turned over to a defendant or his counsel directly, but rather 'merely provides that it be preserved for the benefit of an independent analysis.'" *Id*. at ¶ 7, quoting *State v. Wright*, 3d Allen Dist. No. 1-81-11, 1981 WL 6705 (October 30, 1981). The court determined that, as was the case in *Wright*, the appellant failed to follow through with the request for independent testing of a sample. *Id*. at ¶ 7. The court noted that other courts have found a denial of a defendant's due process rights under R.C. 2925.51 where none of the substance in question was preserved for testing or where the trial court specifically denied the motion for independent testing. *Id*. at ¶ 9, citing *State v. Riley*, 69 Ohio App.3d 509, 591 N.E.2d 263 (12th Dist.1990); *State v. Robinson*, 8th Dist. Cuyahoga No. 84930, 2005-Ohio-1988. But because neither of those two scenarios applied, the court overruled the assignment of error. *Id*.

{¶20} As was the case in *Glenn* and in *Wright*, the evidence in this case was preserved and the trial court granted the motion for independent testing. The trial court granted Appellant's motion on September 30, 2020. But Appellant did not follow through with independent testing. And Appellant asked the court to have the OSHP Lab conduct a re-test, which it did. Then on February 24, 2022, the first day of trial, Appellant brought up his request to have the evidence re-tested by a third-party lab. (Trial Tr. 12-13). At this point, as the trial was set to begin, the trial court overruled his motion.

{¶21} Based on the statute, Appellant was entitled to have a portion of the evidence preserved so that he could have an independent test performed. The trial court granted his request. The state also had the evidence re-tested by the OSHP Lab, which Appellant had requested. Appellant did not arrange any other re-testing nor did he raise

any objections until the day of trial. Thus, we cannot find that the trial court violated Appellant's due process rights in this matter.

{¶22} Accordingly, Appellant's first and second assignments of error are without merit and are overruled.

{¶23} Appellant's third assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO SUPPRESS EVIDENCE REGARDING THE CHAIN OF CUSTODY OF EVIDENCE IN THE ABOVE CAPTIONED MATTER, AS THE PLAINTIFF/APPELLEE, STATE OF OHIO, FAILED TO PRESERVE ALL EVIDENCE SEIZED FROM THE DEFENDANT/APPELLANT, BILLY LEE KENNEDY, AND THAT SAID EVIDENCE SEIZED WAS NOT PRESERVED IN SUBSTANTIAL COMPLIANCE WITH THE OHIO ADMINISTRATIVE CODE.

{¶24} On November 29, 2021, Appellant filed a motion to suppress all evidence relating to the testing and identity of the drugs. He argued the state could not prove the chain of custody and that alteration or substitution of the drugs did not occur given the amount of time that passed and the fact that testing was outsourced. The trial court subsequently held a hearing on the motion. It concluded that Appellant's argument went to the weight of the evidence, not to its admissibility. Therefore, the court overruled the motion.

{¶25} In this assignment of error, Appellant argues the state failed to present any evidence at the suppression hearing regarding the chain of custody or the preservation of the evidence. Thus, he asserts the court should have suppressed the evidence.

{¶26} A motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence. *Id*. Accepting these facts as true, the appellate court

must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *Id*.

{¶27} Two witnesses testified at the suppression hearing, Investigator Paul Bumgardner and State Trooper Ross Thompson. Appellant's position at the hearing was that there was a piece of paper with the drugs when they were seized and that the paper went missing at some point, indicating that the chain of custody was broken.

{¶28} Bumgardner is the liaison between the Ohio State Highway Patrol and the Belmont Correctional Institution. Bumgardner testified that after Lt. Sutton retrieved the drugs from Appellant, the lieutenant filled out a contraband slip and placed them in the "major vault" in the investigator's wing on April 23, 2019. (Suppression Tr. 7-8). Bumgardner opened the vault the next day, removed the drugs, and performed a field test on them. (Suppression Tr. 8). The field test was positive for methamphetamine. (Suppression Tr. 8-9). Bumgardner indicated on the contraband slip when he removed the evidence from the major vault and when he then placed it in the "investigator's vault." (Suppression Tr. 11). He then removed the evidence on April 26, 2019, and gave it to Trooper Thompson and indicated this on the contraband slip. (Suppression Tr. 11).

{¶29} On cross-examination, defense counsel referred Bumgardner to the incident report completed by Lt. Sutton regarding this case. (Suppression Ex. 1). In this incident report, Lt. Sutton indicated that when he searched Appellant's pocket, he found a piece of paper that stated "'$KashClark1' $200 today." (Suppression Tr. 15). Bumgardner testified that he did not know whether this paper was attached to the alleged drugs. (Suppression Tr. 15-16).

{¶30} Trooper Thompson is an investigator who handles major investigations within the Belmont Correctional Institution. He stated that Bumgardner contacted him regarding the drugs in this case. (Suppression Tr. 21). He went to the prison and retrieved the evidence on April 26, 2019. (Suppression Tr. 21-22). He indicated this on the contraband slip. (Suppression Tr. 22-23). When he received the evidence, it did not include the piece of paper. (Suppression Tr. 29-30). The trooper then transported the evidence to the OSHP facility in Cambridge where it was photographed, packaged, and shipped to the OSHP Lab. (Suppression Tr. 25). The OSHP Lab then shipped the evidence to Miami Valley Lab because the OSHP Lab had too high of a volume of items

needing testing so it was sending some items to outside labs. (Suppression Tr. 27). This chain was all documented. (Suppression Tr. 27; Ex. B).

{¶31} After listening to this testimony, the trial court determined Appellant's argument went to the weight of the evidence, not to its admissibility. The trial court's ruling was correct.

{¶32} Appellant's only argument at the suppression hearing was to attack the chain of custody. But "a motion is [sic] to suppress is not the appropriate vehicle in which to attack a chain of custody issue." *State v. Stoll*, 5th Dist. Stark No. 1998CA00291, 1999 WL 333348 (May 24, 1999) *3. Chain of custody issues are not properly raised in a motion to suppress, instead they should be raised in a motion in limine. *State v. Watkins*, 12th Dist. Preble No. CA2020-03-005, 2021-Ohio-163, ¶ 33; *State v. Woltz*, 4th Dist. Athens No. 17CA20, 2017-Ohio-9042, 101 N.E.3d 507, ¶ 15. Thus, the trial court properly overruled Appellant's motion to suppress.

{¶33} Accordingly, Appellant's third assignment of error is without merit and is overruled.

{¶34} Appellant's fourth assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR AS THE PLAINTIFF/APPELLEE, STATE OF OHIO, FAILED TO PRESERVE VIDEO EVIDENCE THAT MAY HAVE LED TO EXCULPATORY EVIDENCE OF THE DEFENDANT/APPELLANT, BILLY LEE KENNEDY.

{¶35} Appellant contends the state failed to preserve any video evidence of his search and the seizure of the alleged drugs. He points to Bumgardner's statement that at one time there may have been a video; however, because this was only a possession case the video was never viewed nor saved. (Trial Tr. 11). He further points out that his counsel filed a request for discovery just eight days after his arraignment. Appellant claims that video evidence may have shown that the search of his person was not in accordance with Lt. Sutton's testimony and could have been a basis for a motion to suppress.

{¶36} The United States Supreme Court addressed the issue of whether a criminal defendant is denied due process of law by the state's failure to preserve evidence

in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). The Court stated:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in [*Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant. * * * We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id. at 57-58.

{¶37} The United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the suppression of materially exculpatory evidence violates a defendant's due process rights, regardless of whether the state acted in good or bad faith. See *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 7. But if the evidence in question is not materially exculpatory, and is instead only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation. *Geeslin*, 116 Ohio St.3d 252, at ¶ 10.

{¶38} Therefore, we must first determine if any video in this case would have been "materially exculpatory" or only "potentially useful."

{¶39} Evidence is materially exculpatory if it (1) "possesses an exculpatory value that was apparent before the evidence was destroyed, and (2) is of such a nature that the

defendant would be unable to obtain comparable evidence by other reasonable means." *State v. Benton*, 136 Ohio App.3d 801, 805, 737 N.E.2d 1046 (6th Dist.2000), citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

{¶40} On the other hand, evidence is potentially useful when "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood,* 488 U.S. at 57.

{¶41} In this case, any video evidence, if it even existed, would not be materially exculpatory. Firstly, there is no evidence that a video certainly existed showing Appellant in his cell or in the yard. The testimony was only that there might have been a video. Secondly, even if a video did exist showing Appellant snorting the drugs in his cell or of Lt. Sutton's pat down of Appellant, neither of these things can be said to be materially exculpatory.

{¶42} Because a video would only be potentially useful, Appellant had to demonstrate that the state acted in bad faith in failing to preserve it for testing.

{¶43} Bad faith usually implies something more than bad judgment or negligence. State *v. Tate*, 5th Dist. Fairfield No. 07CA55, 2008-Ohio-3759, ¶ 13. Bad faith involves such things as "'a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.'" *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 80-81, quoting *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983).

{¶44} In this case, Appellant did not offer any evidence that the state acted in bad faith. This was a case of possession. As will be seen in Appellant's fifth and sixth assignments of error, the evidence was simple and straightforward. Lt. Sutton stopped Appellant and found the drugs in his pocket. There was no reason for the state to preserve video in search of anything else. Appellant's arguments here are based on mere speculation.

{¶45} Accordingly, Appellant's fourth assignment of error is without merit and is overruled.

{¶46} Appellant's fifth assignment of error states:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AS THE CONVICTION OF THE DEFENDANT/APPELLANT, WAS ADVERSE TO THE SUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL.

{¶47} Appellant argues here his conviction was not support by the sufficiency of the evidence.

{¶48} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Dickson*, 7th Dist. Columbiana No. 12 CO 50, 2013-Ohio-5293, ¶ 10 citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Sufficiency is a test of adequacy. *Id*. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id*. In reviewing the record for sufficiency, 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 proven beyond a reasonable doubt. *Id*., citing *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). When evaluating the sufficiency of the evidence to prove the elements, it must be remembered that circumstantial evidence has the same probative value as direct evidence. *Id*., citing *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991) (superseded by state constitutional amendment on other grounds).

{¶49} A sufficiency of the evidence challenge tests the burden of production while a manifest weight challenge tests the burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). Therefore, when reviewing a sufficiency challenge, the court does not evaluate witness credibility. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79. Instead, the court looks at whether the evidence is sufficient if believed. *Id*. at ¶ 82.

{¶50} The jury convicted Appellant of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a). Pursuant to R.C. 2925.11(A), "[n]o person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." If the drug involved in the violation is a schedule I or II compound, mixture, preparation, or substance, with certain exceptions, whoever violates R.C. 2925.11(A) is guilty of aggravated possession of drugs. R.C. 2925.11(C)(1).

{¶51} We must consider the state's evidence to determine if it met each element of aggravated possession of drugs.

{¶52} Brandon Werry is a director at the OSHP Lab who tested the drugs at issue. He testified that the drugs in this case had the molecular fingerprint of methamphetamine. (Trial Tr. 158-59). He also testified that the testing conducted by Miami Valley also indicated that the drugs contained methamphetamine. (Trial Tr. 187; Ex. E). Lt. George Sutton is a supervisor at the Belmont Correctional Institution. Lt. Sutton testified that on the day in question, he noticed Appellant walking outside in the yard with his hands in his pockets. (Trial Tr. 200-201). Lt. Sutton thought Appellant looked suspicious so he conducted a pat down of Appellant. (Trial Tr. 200-201). The lieutenant felt a piece of paper that "was like a lump" in Appellant's left pocket. (Trial Tr. 201). He pulled the piece of paper from Appellant's pocket and asked Appellant what it was. (Trial Tr. 201). Appellant told the lieutenant it was "meth." (Trial Tr. 201). Lt. Sutton testified that he then confiscated the alleged drugs and handcuffed Appellant. (Trial Tr. 201).

{¶53} Lt. Sutton described the paper that he confiscated from Appellant as being a three-by-three paper folded up with a pebble-sized lump inside of it. (Trial Tr. 202). He stated that the paper had a "Cash App" name written on it with a message that said, "Pay $200 today." (Trial Tr. 202-203). The drugs were inside of a plastic baggie that was twisted at the end. (Trial Tr. 203).

{¶54} Lt. Sutton initially placed the evidence in his pocket. (Trial Tr. 205). He then went to the investigation wing where he opened up the paper and took the plastic baggie from it. (Trial Tr. 205). Next, the lieutenant filled out a contraband control slip with his name, the inmate involved, what he confiscated, and where he placed it. (Trial Tr. 205; Ex. 2). Lt. Sutton then placed the evidence in the "major vault" where drugs are stored in the prison. (Trial Tr. 206). Before he placed the evidence into the major vault, the lieutenant removed the plastic baggie with the drugs from the folded piece of paper. (Trial Tr. 214). He then put the plastic containing the drugs into another baggie and stapled the contraband control form to it. (Trial Tr. 213-214). He did not save the piece of paper but noted the information contained on it. (Trial Tr. 214). Lt. Sutton stated that he was the first person in the chain of custody and he indicated this in the "chain of custody" section on the contraband control slip. (Trial Tr. 209-211).

{¶55} Paul Bumgardner is the investigator at the Belmont Correctional Institution. Bumgardner testified that when he arrived at work on April 24, 2019, he learned of the seizure of the drugs from Appellant when he opened the vault to go through any contraband that had been seized the previous day. (Trial Tr. 236-238). He stated that the contraband control slip was stapled to a baggie containing another baggie with the smaller baggie containing a white, powdery substance. (Trial Tr. 239-240, 254). He performed a field test on the substance, which was positive for methamphetamine. (Trial Tr. 242).

{¶56} Bumgardner testified that he filled out the chain of custody form, indicating that he removed the evidence from the major vault on April 24, 2019 at 6:26 a.m. (Trial Tr. 243-244). He then testified that he made a mistake on the chain of custody form. (Trial Tr. 251-252). Bumgardner stated that he placed the evidence into the "invest vault" at 7:01 a.m. on April 24, 2019. (Trial Tr. 252). However, instead of writing "4/24/19" on the form, he wrote "4/25/19." (Trial Tr. 252, 255-256; Ex. 11). On April 26, Bumgardner took the evidence out of the invest vault and gave it to State Highway Patrol Trooper Ross Thompson. (Trial Tr. 256). He indicated this on the chain of custody form. (Trial Tr. 257).

{¶57} On cross-examination, defense counsel asked Bumgardner whether there was video surveillance in the yard where Appellant was searched by Lt. Sutton. (Trial Tr. 269). Bumgardner stated that there may have been video, but he never viewed a video. (Trial Tr. 269).

{¶58} Ohio State Highway Patrol Trooper Ross Thompson testified that the highway patrol conducts all investigations of incidents that occur at state prisons. (Trial Tr. 281-282). He stated that Bumgardner contacted him and informed him that an inmate had been in possession of a white, powdery substance that had field-tested for methamphetamine. (Trial Tr. 285). He went to the prison on April 26, 2019, and picked up the evidence from Bumgardner at 8:28 a.m. (Trial Tr. 288, 293). He signed the chain of custody form and took the evidence back to the state highway patrol headquarters. (Trial Tr. 288). Next, Trooper Thompson filled out a property control form, which contained the date and time that he then placed the evidence in the U.S. Mail to send to the lab for testing. (Trial tr. 294; Ex. 8).

{¶59} Trooper Thompson also interviewed Appellant. (Trial Tr. 299; Ex. 9). The audio recording of the interview was played for the jury. (Ex. 9). In the interview, Appellant never denied having the contraband on his person. (Ex. 9). He stated that he made a deal with another inmate to get some "meth." (Ex. 9). However, he tasted and snorted some of the substance he received and did not believe it was "meth." (Ex. 9). Instead, he thought it was some type of "psyche" pill. (Ex. 9). Appellant indicated that he had intended to deal for "meth." (Ex. 9).

{¶60} Trooper Thompson also indicated that he did not look for a video in this case because a video was not pertinent to a possession case. (Trial Tr. 311).

{¶61} The evidence presented in this case was sufficient to support Appellant's conviction for aggravated possession of drugs. There was no question that Lt. Sutton searched Appellant and found a piece of paper folded around a baggie containing a white, powdery substance in his pocket. According to the lieutenant, Appellant admitted on the spot that the substance was methamphetamine. Field-testing revealed that the substance was positive for methamphetamine. In addition, subsequent lab testing confirmed this. Viewing this evidence in the light most favorable to the prosecution as we are required to do, there was sufficient evidence to prove Appellant was guilty of aggravated possession of drugs.

{¶62} Accordingly, Appellant's fifth assignment of error is without merit and is overruled.

{¶63} Appellant's sixth assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AS THE CONVICTION OF THE DEFENDANT/APPELLANT, WAS ADVERSE TO THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL.

{¶64} In his final assignment of error, Appellant asserts his conviction was against the manifest weight of the evidence.

{¶65} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the

conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d 380. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id*. (Emphasis sic.). In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id*. at 390.

{¶66} Only when "it is patently apparent that the factfinder lost its way," should an appellate court overturn the jury verdict. *Id*. citing *State v. Woullard*, 158 Ohio App.3d 31, 2001-Ohio-3395, 813 N.E.2d 964 (2d Dist.). If a conviction is against the manifest weight of the evidence, a new trial is to be ordered. *Thompkins* at 387. "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶ 36 quoting Ohio Constitution, Article IV, Section 3(B)(3).

{¶67} In addition to the state's evidence set out in the analysis of Appellant's sufficiency of the evidence argument, we must also consider the evidence put forth by the defense in analyzing whether Appellant's conviction was against the manifest weight of the evidence.

{¶68} Appellant was the only witness to testify in his defense. According to Appellant, on the day in question he arranged to trade some liquor that he had made to another inmate in exchange for methamphetamine. (Trial Tr. 330). He met the other inmate and made the exchange. (Trial Tr. 331). Appellant took the "meth" back to his cellblock. (Trial Tr. 331-332). He took a piece of paper with a "Cash App" name written on it and placed it on a chess board. (Trial Tr. 332). He then wrapped the baggy with drugs inside the paper. (Trial Tr. 332). A small amount of the drug fell onto the chessboard, so Appellant tasted it then snorted it. (Trial Tr. 332, 334). Appellant testified that it did not taste like meth. (Trial Tr. 334). Appellant stated that there are video cameras facing his cellblock that he believes would have recorded this. (Trial Tr. 332-333).

{¶69} After packing up the drugs, Appellant walked out into the "yard." (Trial Tr. 333). Appellant noticed that Lt. Sutton and the inmate who had just given him the drugs

were looking at him. (Trial Tr. 334). The lieutenant then approached Appellant, instructed him to put his hands up, and patted him down. (Trial Tr. 334). Lt. Sutton found the paper with the drugs in Appellant's pocket. (Trial Tr. 334-335). Appellant stated that he did not say anything to the lieutenant. (Trial Tr. 335). He testified Lt. Sutton took him to a holding cell where he fell asleep. (Trial Tr. 335-336). Appellant stated that he was urine tested and the test came back "clean." (Trial Tr. 335-337).

{¶70} When asked why the drugs tested positive for methamphetamine, Appellant testified that he believed the drugs were mixed up and the wrong contraband slip was stapled to the drugs that were confiscated from him. (Trial Tr. 345). He stated that he was supposed to have methamphetamine, but that was not what was given to him. (Trial Tr. 347).

{¶71} An appellate court may independently weigh the credibility of the witnesses when determining whether a conviction is against the manifest weight of the evidence. *State v. Jackson*, 7th Dist. Jefferson No. 09-JE-13, 2009-Ohio-6407, at ¶ 18. But we must give deference to the fact finder's determination of witnesses' credibility. *Id*. The policy underlying this presumption is that the trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶72} In this case, the jury did not believe Appellant's testimony that the drugs found on his person did not contain methamphetamine. Instead, the jury believed the testimony of the other witnesses that the chain of custody was solid and the drugs found on Appellant were the same drugs that tested positive for methamphetamine. We will not second-guess this determination. Thus, Appellant's conviction is not against the manifest weight of the evidence.

{¶73} Accordingly, Appellant's sixth assignment of error is without merit and is overruled.

{¶74} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.