[Cite as *State v. Kirk*, 2010-Ohio-2006.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-09-006

Appellee — Trial Court No. CRI-2008-1080

v.

Damone L. Kirk — **DECISION AND JUDGMENT**

Appellant — Decided: May 7, 2010

* * * * *

Russell Leffler, Huron County Prosecuting Attorney, and
Dina Shenker, Assistant Prosecuting Attorney, for appellee.

John D. Allton, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction for drug possession following a jury trial in the Huron County Court of Common Pleas. For the reasons that follow, we reverse.

{¶ 2} On May 8, 2008, deputies of the Huron County Sheriff's Department executed a search warrant on a second story apartment in Willard, Ohio. Deputies kicked

in the door and threw a flash bang grenade into the apartment. They then entered the living space, announced their purpose and ordered the apartment occupants to get on the floor.

{¶ 3} The living space of the apartment contained three rooms: a kitchen through which deputies first passed, a living room that contained a stairway to a second exit and a front room with no exit other than through the living room. Deputies encountered Jamie McCleod in the kitchen. McCleod obeyed the deputies' order to get on the floor. In the living room, deputies found the resident of the apartment, Phillip Hampton. At the same time, deputies saw a third man, later identified as appellant, Damone L. Kirk, running out of the front room toward the door that led to the stairway to the outside. When deputies ordered appellant to stop and get on the floor, he complied.

{¶ 4} Once the three occupants of the apartment were restrained, deputies searched the apartment. In the front room from which appellant was seen emerging, deputies found a dinner plate upon which had been placed a number of small objects. These objects were later determined to contain crack cocaine. A plastic bag next to the plate contained more crack cocaine. On a nearby chair, deputies found a loaded 9mm pistol. When deputies searched appellant, in addition to his wallet with a small amount of cash, he had $1,320 in cash on his person.

{¶ 5} Appellant was arrested and subsequently named in a two-count indictment, charging one count of drug trafficking and one count of drug possession, both as

first-degree felonies. Appellant entered a plea of not guilty. Both counts were subsequently reduced to second-degree felonies. The trafficking count was dismissed.

{¶ 6} On January 15, 2009, the matter proceeded to a trial before a jury. The state's first witness was the captain of detectives who led the investigation. Over appellant's objection, the captain testified that in 2007, he began hearing through law enforcement channels that there was a drug connection between Willard and Akron. A year later, according to the captain, he received more specific information to the effect that "individuals in Willard" provided locations from which the out of town drug dealers would sell. One of these locations was the apartment in which appellant was arrested.

{¶ 7} On receiving this information, the captain testified, he arranged for a confidential informant to go to the apartment to make a small purchase of crack cocaine. Again over appellant's objection, the captain testified that, when the confidential informant returned after the buy, the informant identified Phillip Hampton as the person who sold him drugs. The informant described another unknown individual in the apartment as a "tall black male with long hair." From a photo, the informant also identified the driver of a car that delivered drugs to the apartment as Justin Roberts, IV. According to the captain, Akron police had advised him that Roberts was under "active investigation" for selling cocaine. Asked of Roberts' connection to appellant, the captain testified: "I believe they're brothers."

{¶ 8} The detective captain also relayed the report of an Alcohol, Tobacco and Firearms Department ("ATF") investigation into the gun found in the apartment.

According to the captain, the ATF reported that the last record of the gun was in 1998 when it was sold at a Canton gun show.

{¶ 9} The captain's testimony was followed by the testimony of two members of the team that raided the apartment who described appellant's presence and attempted flight from the front room, and the discovery of the drugs and the gun. A lab technician testified the substance seized was slightly under 25 grams of crack cocaine.

{¶ 10} Appellant's Crim.R. 29 motion was denied at the conclusion of the state's case. Appellant presented no witnesses of his own.

{¶ 11} On close, the state argued that appellant had brought crack to Willard. "The defendant had no business being in Willard whatsoever. No business whatsoever." (Objection overruled.) "His business was to be there for crack cocaine." The state also argued, "The crack didn't walk here by itself from Akron." Appellant's objection that the state was arguing facts outside the record was overruled, with the direction by the court that the state should "stick to the evidence that has been produced here."

{¶ 12} The state responded. Relying on the captain's testimony, the state connected the transportation of drugs from Akron, to the apartment, with appellant's brother serving as drug courier. Appellant's objection was again overruled, this time with a specific instruction to the jury that closing arguments were not evidence. The state continued, noting the resemblance of appellant to the "tall, black male with long hair" described to the detective captain by the confidential informant. Moreover, the ATF trace of the gun added another Akron-Willard connection.

{¶ 13} After deliberation, the jury found appellant guilty of possession of crack cocaine in violation of R.C. 2925.03(A)(2)(C). The court accepted the verdict and sentenced appellant to a four-year term of incarceration.

{¶ 14} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

{¶ 15} "I. The Court improperly admitted hearsay, repeatedly throughout the transcript, that was prejudicial and denied the substantial rights of the Defendant.

{¶ 16} "II. The Court improperly allowed the Prosecutor, during closing arguments, to state facts not in evidence or to argue beyond the record."

{¶ 17} Appellant, in his first assignment of error, asserts the trial court allowed the jury to hear improper evidence. Specifically, the court permitted appellee to present hearsay into evidence.

{¶ 18} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is inadmissible into evidence unless deemed admissible by Constitution, statute or rule. Evid.R. 802. Nevertheless, testimony offered not to prove the truth of the matter asserted, but to explain the investigative activities of a witness may be admissible. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 98, citing *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. If there is an instance of improperly admitted hearsay, a reviewing court must also determine whether its

admittance constitutes harmless or prejudicial error. *State v. Smith* (1989), 64 Ohio App. 3d 383, 387.

{¶ 19} Appellant first objected, on hearsay grounds, to the captain's testimony about information he received through his police channels that Willard residents were allowing Akron drug dealers to sell drugs out of their homes. This testimony was not offered to prove that there were, in fact, Akron drug dealers selling drugs from Willard homes, but to explain what prompted the investigation of Hampton's apartment. "[I]f a statement is offered for some purpose other than to prove the truth of the matter asserted, admissibility should be governed by the standards of relevancy and prejudice. (Citation omitted.) The issue herein therefore is not whether the testimony was hearsay but rather whether it was relevant." *State v. Maurer* (1984), 15 Ohio St.3d 239, 263. The captain's testimony demonstrated his reason for initiating an investigation and is not inherently prejudicial to appellant. Accordingly, this testimony was admissible.

{¶ 20} The same reasoning applies to the captain's testimony regarding what the confidential informant told him after the controlled purchase. The informant's statements were offered for their effect on the listener, prompting the captain to seek a warrant to search the apartment, regardless of whether the informant's statements were accurate. Because the testimony is not hearsay, it is admissible if it is not more prejudicial than it is relevant. The informant's statements about an unidentified individual present at the controlled purchase and the informant's identification of the driver of the vehicle, without

more, are not facially prejudicial to appellant. For this purpose, they are not hearsay and are admissible.

{¶ 21} The captain, however, expands this information by testifying that he believed the driver is appellant's brother. After reviewing the captain's statements, it is clear appellee sought to convey that appellant's brother was a known drug dealer and appellant was likely involved as well.

{¶ 22} Although the captain's statement that appellant and the driver were brothers was not hearsay, it is meaningless without the prior statements describing who the driver is. Appellee claims the testimony describing the driver is used to explain subsequent action by the detectives. Yet, it is clear that all of the statements, as a whole, were offered to prove the truth of the matter asserted in them. For that purpose, demonstrating appellant's guilt by connecting him to a known drug dealer, the statements, collectively, should have been excluded from evidence as hearsay. See, e.g., *Smith,* supra at 387; *State v. Blanton*, 10th Dist. No. 08AP-844, 2009-Ohio-5334, ¶ 43.

{¶ 23} The state also indisputably offered hearsay into evidence when the captain testified to the contents of the ATF report on the investigation of the gun found at the apartment. The captain stated that, according to the ATF investigation, the last known owner of the gun sold it at a gun show in Canton. Appellee argues this testimony falls under the business records exception to hearsay. Evid.R. 803(6). We disagree.

{¶ 24} Appellee failed to submit the ATF record into evidence. Evid.R. 803(6) provides, in part, that "[a] *memorandum, report, record, or data compilation* * * * if kept

in the course of a regularly conducted business activity, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation * * *" is an exception to the hearsay exclusion. (Emphasis added). The rule sets out an exception for the *record* itself to be admitted into evidence. A witness's testimony of the contents of the record does not carry the same trustworthiness that makes the record itself admissible. Thus, while the record was hearsay with an exception, the captain's statements asserting the contents of the ATF record was a second level of hearsay for which no exception was offered. As a result, the captain's testimony concerning the ATF report was inadmissible hearsay. Nevertheless, its admission was harmless. The mere fact that the owner of the gun found in Hampton's apartment could not be traced beyond 1998 prejudices appellant very little, if at all.

{¶ 25} By itself, the improper introduction of evidence of which appellant complains in his first assignment of error would not have been prejudicial. In fairness, however, we must also consider those irregularities in light of the conduct of which appellant complains in his second assignment of error. In his second assignment of error, appellant insists that the trial court "improperly allowed the [p]rosecutor, during closing arguments, to state facts not in evidence or to argue beyond the record."

{¶ 26} "[T]he conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives [appellant] of a fair trial." *Maurer*, supra, at 266. A prosecutor's improper remarks have substantially prejudiced appellant and denied him a fair trial if, absent the improper remarks, the jury may not have found appellant

guilty beyond a reasonable doubt. *State v. Burke* (May 12, 2000), 6th Dist. No. L-98-1166; see, also, *State v. Smith* (1984), 14 Ohio St.3d 13; *Maurer,* supra.

{¶ 27} "[T]he effect of counsel's misconduct 'must be considered in light of the whole case.'" *Maurer,* at 266, citing *Mikula v. Balogh* (1965), 9 Ohio App.2d 250, 258. "If * * * the misconduct is of such a prejudicial character that the prejudice resulting therefrom cannot be eliminated or cured by prompt withdrawal, and admonition and instructions from the court to the jury to disregard it, a new trial should be granted, or the judgment reversed * * *." *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 401.

{¶ 28} If a statement made by an out-of-court declarant is offered into evidence for a purpose other than asserting the truth of its content, then the content is not substantive evidence. See *State v. Kline* (1983), 11 Ohio App.3d 208, 211. A prosecutor must not later assert those statements for their truth during closing argument. See, e.g., *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. At the root of appellant's claims of prosecutorial misconduct are many of the same statements challenged on hearsay grounds.

{¶ 29} Appellant rightfully objected to the prosecutor's closing remarks when the prosecutor referred to testimony which she expressly claims to have offered not for its truth, but to explain subsequent action taken by the detectives. During the closing argument the prosecutor told the jury that appellant brought the crack cocaine into Willard. The prosecutor stated, "Captain McLaughlin testified that the crack cocaine dealers from Akron – based on the intelligence that they had collected, he testified that

this crack was being brought in. He testified that the person driving the car * * * to Phil Hampton's house was identified by the confidential informant as Justin Lewis Roberts, IV. Justin Lewis Roberts, IV, was also identified as the major crack cocaine dealer out of Akron. He was identified as the person who drove the car to Phil Hampton's residence, and he's – he's the defendant's brother." There is no doubt that the prosecutor's purpose in referring to the informant's hearsay statement goes far beyond explaining the detectives' subsequent actions. The prosecutor has now relied on extrajudicial statements for their truth – statements which she maintained during trial were not offered for their truth – as evidence that appellant brought the crack cocaine from Akron into Willard. The prosecutor's remarks were improper and argued beyond the record.

{¶ 30} The prosecutor also improperly relied on hearsay as fact in closing argument when she referred to the confidential informant's description of an unknown tall, black male with long hair. The prosecutor says that the confidential informant "* * * testified [that appellant] had long hair, and that would fit the profile that [the captain] learned from his intelligence[.]" The "intelligence" was an extrajudicial statement made by the confidential informant to the captain after the controlled purchase. Again, the prosecutor argues this information was offered to explain action taken. That argument was persuasive only until the prosecutor relied on the informant's description as evidence that appellant was present at the controlled purchase because appellant was also a tall, black male with long hair. Using the informant's statements in this manner asserts them

as true statements, improperly prejudices the defendant, and goes beyond the evidence in the record.

{¶ 31} The prosecutor, for a third time, improperly asserted hearsay for its truth during closing argument. The prosecutor reminded the jury of the contents of the ATF gun investigation report. The prosecutor stated, "[the] loaded gun belonged to a gentleman who sold the gun at a gun show in Summit County in Akron, Ohio. And after that gun was sold, that gun was never seen again up until it was discovered at [Hampton's apartment.]" The prosecutor then asserted appellant must have been in possession of the gun due to the fact that the only time the gun resurfaced was in close proximity to appellant.

{¶ 32} The problem here is not the prosecutor's suggested theory, but that in suggesting her theory she asserted the contents of the ATF report were true; an assertion she could permissibly make only had the ATF report been submitted into evidence. But, because the report was not submitted and the content of the report was impermissible hearsay, the prosecutor's reliance on the content as fact in closing argument is improper.

{¶ 33} Moreover, in her closing rebuttal, the prosecutor made statements to the jury regarding hearsay which only served to make her improper reliance on hearsay more onerous. The prosecutor stated to the jury, "Hearsay. That is not your job. The testimony that you heard was allowed into this courtroom. Judge Conway allowed the testimony, and felt it was important enough for you to hear it. You don't need to worry about hearsay. This is information that came to you, and that is the information that you

should be able to use and decide." She then added, "[T]he biggest hearsay information, I believe, * * * is when the defendant's brother and known crack cocaine dealer from Akron drops off a black male at that residence. It's pretty * * * cut and dry there. We didn't talk through 25 different people. We didn't pass it along." These statements by the prosecutor are inaccurate, misleading, and confusing to the jury. The information given from the confidential informant to the captain and then presented to the jury was passed along. The prosecutor also mislead the jury by implying that the sole problem with hearsay is the number of people involved in relaying a statement. The prosecutor essentially gave the jurors permission to use the hearsay statements as substantive evidence. No curative instruction on hearsay was given by the court, thus eliminating any hope that the jury could properly apply the contents of the extrajudicial statements.

{¶ 34} Combining the standards for prosecutorial misconduct and improperly admitted hearsay, the evidence in this case must be reviewed excluding the prosecutor's remarks and the hearsay statements. If the remaining evidence is "overwhelming evidence of guilt" or if there is "any other indicia that the disputed evidence did not contribute to the conviction" then the error was harmless and does not warrant reversal. *Smith,* supra, at 387. See, also, *State v. Rahman* (1986), 23 Ohio St.3d 146, 150-151; *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166.

{¶ 35} Excluding all of the improperly admitted evidence leaves the jury with only circumstantial evidence of appellant's guilt. Appellant attempted to flee the apartment. Appellant was the only person located in the same room as the drugs and paraphernalia.

Appellant was carrying $1,320. This is circumstantial evidence to which appellant made rebuttals: neither his DNA nor fingerprints were found on any contraband. While we cannot foreclose that a jury could have convicted appellant on this evidence, we cannot say the remaining evidence was overwhelming or that there is an indicia that the improper evidence did not contribute to appellant's conviction.

{¶ 36} Absent overwhelming evidence of appellant's guilt, we are not confident a reasonable jury would find appellant guilty of possession beyond a reasonable doubt. Accordingly, both of appellant's assignments of error are found well-taken.

{¶ 37} On consideration whereof, the judgment of the Huron County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

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JUDGE