**[Cite as *State v. Jones*, 2010-Ohio-2385.]**

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

State of Ohio — Court of Appeals No. S-09-019

Appellee — Trial Court No. 09-CR-46

v.

John H. Jones — **DECISION AND JUDGMENT**

Appellant — Decided: May 28, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Christian R. Moore, for appellant.

* * * * *

OSOWIK, P.J.

**{¶ 1}** This is an appeal from a judgment of the Sandusky County Court of Common Pleas that found appellant guilty of one count of trafficking in cocaine. For the reasons that follow, the judgment of the trial court is affirmed in part and reversed in part.

**{¶ 2}** On January 8, 2009, appellant was indicted on one count of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and (C)(4)(a), a felony of the fifth degree. Appellant entered a plea of not guilty and the matter proceeded to trial on June 9, 2009. The jury returned a verdict of guilty and the trial court sentenced appellant to 11½ months incarceration. Appellant received credit for 52 days served.

**{¶ 3}** Appellant sets forth the following assignments of error:

**{¶ 4}** "I. The conviction of defendant-appellant was against the manifest weight of the evidence presented at trial.

**{¶ 5}** "II. The evidence submitted to the jury was insufficient to support a conviction of trafficking in cocaine.

**{¶ 6}** "III. The appellant was prejudiced by the prosecution's improper statements regarding the defendant-appellant's refusal to testify at the trial.

**{¶ 7}** "IV. The trial court committed reversible error when it sentenced defendant-appellant to a prison sentence not authorized by Ohio Revised Code."

**{¶ 8}** Appellant's first and second assignments of error will be addressed together as both can be resolved by examining the evidence presented at trial as summarized below.

**{¶ 9}** In support of his first assignment of error, appellant challenges the credibility of a confidential informant who testified on behalf of the state that she purchased cocaine from appellant. Appellant asserts that the informant's testimony was erratic and full of contradictions and also demonstrated a lack of reliable memory.

Appellant also argues that a recording which the state offered as evidence of a telephone conversation between the informant and appellant failed to prove beyond a reasonable doubt that appellant offered to sell cocaine. In support of his second assignment of error, appellant argues that the state's evidence was not sufficient to prove that appellant knowingly sold or offered to sell crack cocaine.

**{¶ 10}** "Sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must examine "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a 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, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra, at 386-387.

**{¶ 11}** In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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*, supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

**{¶ 12}** Appellant was found guilty of R.C. 2925.03, trafficking in cocaine, which provides in relevant part:

**{¶ 13}** "(A) No person shall knowingly do any of the following:

**{¶ 14}** "(1) Sell or offer to sell a controlled substance;

**{¶ 15}** "* * *

**{¶ 16}** "(C) Whoever violates division (A) of this section is guilty of one of the following:

**{¶ 17}** "* * *

**{¶ 18}** "(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

**{¶ 19}** "(a) Except as otherwise provided * * *, trafficking in cocaine is a felony of the fifth degree * * *."

**{¶ 20}** The jury in this case heard testimony from a confidential informant ("CI") for the Fremont Police Department and the Sandusky County Sheriff's Office. The CI stated that on occasion she would attempt to purchase drugs with money given to her by a detective. If she was successful in making a purchase, she would be paid $50 when she

handed over the drugs. In June 2008, the CI arranged with Fremont Police Detective Shawn O'Connell to attempt to purchase cocaine from appellant, whom the CI had known for several years. On June 17, 2008, the CI used O'Connell's cell phone to call appellant. The conversation, which was recorded, was as follows:

**{¶ 21}** "Hello.

**{¶ 22}** "Hey, can I get – I'm calling for a four.

**{¶ 23}** "Okay.

**{¶ 24}** "Bye."

**{¶ 25}** The CI testified that the term "four" referred to a $40 piece of crack cocaine. She further testified that she was certain it was appellant who answered the phone and explained that she knew his voice because she lived with him for several months during 2006. After the phone call, O'Connell and another officer drove the CI to a location near appellant's home. The CI walked to appellant's house and when appellant let her in she gave him $40 for the crack cocaine. While the CI and appellant were talking, a car pulled into the driveway. Appellant went outside briefly and returned with the cocaine, which he gave to the CI. The CI then left and turned the cocaine over to Detective O'Connell. The CI identified appellant as the person who provided her with the cocaine.

**{¶ 26}** Detective O'Connell testified that he had worked with the CI on numerous occasions prior to the drug buy from appellant. On the night of June 17, 2008, O'Connell met with the CI and arranged for a "controlled buy." O'Connell testified that he initially

verified that the phone number the CI gave him belonged to appellant. The detective set up a recording device, dialed the number and handed the phone to the CI. Once the buy was arranged, O'Connell and another detective drove the CI to an alley near appellant's house. O'Connell testified that he did not lose sight of the CI from the time he dropped her off until she returned to his car, with the exception of the brief time she was inside appellant's house. After the recording of the telephone call was played in court, O'Connell identified one of the voices as that of appellant, with whom he had spoken on numerous occasions. O'Connell testified that the field test he ran on the substance the CI gave him indicated it was cocaine based. The detective also identified the evidence submission sheet, which indicated that the substance was found to contain cocaine. The evidence submission sheet was admitted into evidence without objection.

**{¶ 27}** This court has thoroughly considered the entire record of proceedings in the trial court and the testimony as summarized above and finds that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty beyond a reasonable doubt of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and (C)(4)(a). See *State v. Jenks* (1991), 61 Ohio St.3d 259, syllabus.

**{¶ 28}** As this court has consistently affirmed, the trier of fact is vested with the discretion to weigh and evaluate the credibility of conflicting evidence in reaching its determination. It is not within the proper scope of the appellate court's responsibility to judge witness credibility. *State v. Hill*, 6th Dist. No. OT-04-035, 2005-Ohio-5028, ¶ 42.

Further, based on the testimony summarized above and the law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charge of trafficking in cocaine. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172. Accordingly, we find that appellant's first and second assignments of error are not well-taken.

**{¶ 29}** In his third assignment of error, appellant asserts that the prosecutor improperly referred in his closing argument to the fact that appellant did not testify at trial. In support of this argument, appellant cites the following statement made by the prosecutor: "You heard his voice [on the tape], you haven't heard him speak, so you can't independently [identify him on the tape] * * *, obviously."

**{¶ 30}** We note at the outset that defense counsel did not object to the prosecutor's comment. Therefore, appellant waives all but plain error as to this issue. The plain error doctrine represents an exception to the usual rule that errors must first be presented to the trial court before they can be raised on appeal. It permits an appellate court to review an alleged error where such action is necessary to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91. In order to prevail under a plain error standard, an appellant must demonstrate that there was an obvious error in the proceedings and, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044.

**{¶ 31}** Generally, prosecutors are entitled to considerable latitude in opening and closing arguments. *State v. Ballew*, 76 Ohio St.3d 244, 1996-Ohio-81. Moreover, the prosecutor's conduct must be viewed in the context of the entire trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410. The record reflects that there was testimony from both the confidential informant and Detective O'Connell identifying the voice on the tape recording.

**{¶ 32}** Having reviewed the state's closing argument in the context of all of the evidence presented at trial, we find appellant's claim of prejudice to be without merit. Plain error is absent here, since appellant has not shown that, but for the claimed error, the outcome of his trial would have been otherwise. Accordingly, appellant's third assignment of error is not well-taken.

**{¶ 33}** In his fourth assignment of error, appellant claims that the trial court erred by originally imposing a prison sentence of 11½ months. R.C. 2929.14 provides that for a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven or twelve months. Appellee state of Ohio concedes this error.

**{¶ 34}** The record reflects that on July 15, 2009, the trial court issued a nunc pro tunc entry resentencing appellant to a term of 11 months. However, pursuant to Crim.R. 43, an offender is required to be present for sentencing. Therefore, the nunc pro tunc entry modifying appellant's sentence without hearing did not have the effect of remedying the original invalid sentence. Accordingly, appellant's fourth assignment of error is well-taken.

**{¶ 35}** On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed in part and reversed in part. The judgment of the trial court is affirmed as to appellant's conviction but this matter is remanded for resentencing in accordance with this decision. Costs of this appeal are assessed to both parties equally pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

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. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE