[Cite as *State v. Brown*, 2009-Ohio-3933.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-12-049
	:	O P I N I O N
- vs -		8/10/2009
	:	
DONALD G. BROWN, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI 2008-5040

Richard E. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Blaise S. Underwood, 97 N. South Street, Wilmington, Ohio 45177, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Donald G. Brown, Jr., appeals his conviction in the Clinton County Court of Common Pleas for drug trafficking. We affirm the decision of the trial court.

{¶2} On December 8, 2007, Officer Matt Hamilton, a police officer with the City of Wilmington Police Department, initiated a traffic stop of a white vehicle with out-of-state license plates after he observed the driver commit a marked lane violation. Appellant was a passenger in the vehicle. After the traffic stop was initiated, and upon learning that the driver was operating the vehicle on a suspended license, Officer Hamilton called for a canine unit,

which led to the discovery of digital scales, plastic baggies, and a white rock substance, later determined to be 13.48 grams of crack cocaine, within the center console. A cocaine "residue" was also found on the digital scales.

{¶3} Appellant was subsequently charged with drug trafficking in violation of R.C. 2925.03(A)(2), a second-degree felony, and possession of criminal tools in violation of R.C. 2923.24, a fifth-degree felony. Following a two-day jury trial, appellant was found guilty on both charges and sentenced to a total of four years in prison. Appellant now appeals his drug trafficking conviction, but not his conviction for possessing criminal tools, raising one assignment of error.

{¶4} "THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT BY IMPROPERLY INSTRUCTING THE JURY AS TO APPELLEE'S BURDEN OF PROOF WITH RESPECT TO THE FIRST COUNT CONTAINED IN THE INDICTMENT AS SUCH WAS CONTRARY TO THE BILL OF PARTICULARS."

{¶5} In his sole assignment of error, appellant challenges the jury instruction provided by the trial court regarding his drug trafficking charge. Specifically, appellant argues that the jury instruction was a "dramatic expansion from the bill of particulars," and therefore, because his defense was prejudiced thereby, his conviction should be reversed. This argument lacks merit.

{¶6} A reviewing court may not reverse a conviction in a criminal case due to jury instructions unless "it is clear that the jury instructions constituted prejudicial error." *State v. McKibbon,* Hamilton App. No. C-010145, 2002-Ohio-2041, ¶4, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 154. In order to determine whether an erroneous jury instruction was prejudicial, a reviewing court must examine the jury instructions as a whole. *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶36, citing *State v. Van Gundy,* 64 Ohio St.3d 230, 233-34, 1992-Ohio-108. A jury instruction constitutes prejudicial error where it

results in a manifest miscarriage of justice. *State v. Hancock*, Warren App. No. CA2007-03-042, 2008-Ohio-5419, ¶13.

{¶7} Appellant did not object to the trial court's jury instruction regarding his drug trafficking charge. As a result, since no objection was raised to the jury instruction provided, appellant has waived all but plain error. *State v. Curtis*, Butler App. No. CA2008-01-008, 2009-Ohio-192, ¶90; Crim.R. 30(A); Crim.R. 52(B).

{¶8} Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull,* 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. Notice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶9} On January 31, 2008, following a police investigation, the Clinton County Grand Jury returned an indictment against appellant charging him with, among other things, one count of drug trafficking in violation of R.C. 2925.03(A)(2), which prohibits any person from "knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when [that person] knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." *State v. Luna*, Butler App. No. CA2008-04-115, 2009-Ohio-3421, ¶26. The indictment read, in pertinent part:

{¶10} "The Jurors of the Grand Jury of the State of Ohio, * * * do find and present that on or about the 8th day of December, 2007, at Clinton County, Ohio, [appellant] did knowingly, prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute Crack Cocaine, a Schedule II controlled substance in an amount that equals or exceeds ten

grams but is less than twenty-five grams of crack cocaine, when [appellant] knew or had reasonable cause to believe that the controlled substance was intended for sale or resale, in violation of Ohio Revised Code Title 29, Section 2925.03(A)(2) * * *."

{¶11} On April 30, 2008, and upon appellant's request, the state filed a bill of particulars, which read, in pertinent part, as follows:

{¶12} "[Appellant] on or about December 8, 2007 at Wayne Rd., Wilmington, Clinton County, Ohio at approximately 9:30 p.m. [appellant] did knowingly prepare for shipment, ship, transport, or prepare for distribution crack cocaine, a Schedule II controlled substance, in an amount equal or exceeding ten grams but less than twenty-five grams when [appellant] knew or had reasonable cause to believe that it was intended for sale or resale. Specifically, [appellant] was transporting a bag containing crack cocaine, baggies as well as electronic scales containing cocaine residue."

{¶13} On December 3, 2008, after appellant rested his case, the trial court instructed the jury, without objection, as follows:

{¶14} "In the First Count of Indictment, [appellant] is charged with a violation of §2925.03(A)(2), Ohio Revised Code, Trafficking in Crack Cocaine. Before you can find [appellant] guilty, you must find beyond a reasonable doubt that on or about December 8, 2007 in Clinton County, Ohio, [appellant] did knowingly prepare for shipment, ship, transport, prepare for distribution or distribute Crack Cocaine, a schedule II controlled substance, in an amount equal or exceeding 10-grams but less than 25-grams, when [appellant] knew or had reasonable cause to believe that the controlled substance was intended for sale or resale."

{¶15} Appellant takes exception to this jury instruction because, according to him, "[the state] limited itself to satisfying the actus reus component of trafficking to the act of 'transporting,'" as the bill of particulars only "placed [him] on notice that the specific method by which an alleged violation of [R.C. 2925.03(A)(2)] occurred with respect to the actus reus

was 'transport.'"[1] However, as noted above, the indictment, as well as the bill of particulars, explicitly alleged that appellant knowingly prepared for shipment, shipped, transported, or prepared for distribution at least 10 grams of crack cocaine, a schedule II controlled substance, on the night in question. As a result, we do not find the trial court's jury instruction, which essentially mirrored the language found in the indictment and the bill of particulars, somehow expanded upon the information contained therein.

{¶16} In addition, appellant claims that he was prejudiced by the trial court's so-called "expansion" because he was only "prepared to defend and did defend against a trafficking indictment predicated upon an act of transport." However, during opening statements, appellant's trial counsel made it clear that he was prepared to defend against any and all criminal act elements contained in the indictment and bill of particulars when he stated the following:

{¶17} "One other thing I would like you all to please do is to focus on the law here. Think about the acts that are required in crack trafficking; transporting, shipment, distribution, preparation for shipment, preparation for distribution and delivery.

{¶18} "We – I don't see anything in these facts that would lead anyone, rational trier of fact, a jury, you name it, to believe that there's trafficking in this case."

{¶19} Moreover, after careful review of the record, appellant's defense was not based solely on whether he was, in fact, transporting drugs that evening. Instead, appellant defended against the drug trafficking charge by testifying that he "had no idea" that the vehicle contained drugs, and that he did not "sell," "cut," "prepare," "bag," or do "anything" with drugs. In turn, and as noted above, appellant was prepared to defend against, and did defend against, any and all of the criminal act elements required to support the drug

1. An essential element of every crime is the defendant's actus reus, or criminal act. See R.C. 2901.21(A); *State v. Hackedorn*, Ashland App. No. 2004-COA-053, 2005-Ohio-1475, ¶35.

trafficking charge. Therefore, we do not find that appellant was prejudiced by the trial court's jury instruction as he has not demonstrated a manifest miscarriage of justice.

{¶20} Furthermore, even if we were to find the trial court erred by instructing the jury as such, appellant has failed to establish that, but for the trial court's allegedly improper jury instruction, the outcome of the trial would have been different as the state presented evidence indicating appellant was seen "cutting" crack cocaine that he would then weigh, bag, and transport to his "clientele" to sell.[2] See *State v. Gibson*, Cuyahoga App. No. 82087, 2003-Ohio-5839. Therefore, because appellant failed to demonstrate the jury instruction provided by the trial court was in error, let alone plain error, his sole assignment of error is overruled.

{¶21} Judgment affirmed.

YOUNG and RINGLAND, JJ., concur.

2. There was also evidence that appellant told his brother that "he had got caught, [and that] he had stuff in the glove compartment" when the vehicle in which he was a passenger was pulled over. The "stuff" was later identified as crack cocaine.

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