[Cite as *Cleveland v. Mohamoud*, 2004-Ohio-6104.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84333

CITY OF CLEVELAND	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
ALMUSA MOHAMOUD	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 18, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Cleveland Municipal Court
	:	Case No. 2003-CRB-36919A
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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Director of Law
City of Cleveland
By: BRYAN FRITZ, ESQ.
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For defendant-appellant:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Almusa Mohamoud appeals from his conviction for selling alcohol to an underage person, in violation of Cleveland Codified Ordinance section 617.02. He claims the Cleveland Municipal Court committed reversible error by allowing a police detective to attest to the age of the confidential reliable informant ("CRI") who had purchased the alcoholic beverage. Mohamoud argues that the detective's testimony regarding the CRI's age should have been excluded by the court as inadmissible hearsay. Finding no merit to Mohamoud's claim, we affirm his conviction.

{¶ 2} On September 16, 2003, Detective John Hall conducted a liquor law compliance investigation at Super One Market, located on Lee Road. Detective Hall stopped at Super One Market with the CRI to determine whether the employees of the store were selling alcohol to persons under the age of 21. Detective Hall testified that he had worked with this particular CRI on thirty prior occasions and personally looked at his Ohio driver's licence six times. Detective Hall stated that the CRI was born on December 21, 1984 and was approximately 18 years old at the time of the investigation.

{¶ 3} Before entering the store, the CRI was given a ten dollar bill that had been photocopied and marked as Cleveland Police buy money. The CRI was instructed to retrieve a twenty-two ounce bottle of Miller Genuine Draft Beer and pay for it with the marked money. Detective Hall testified that he stood behind the CRI at the cash register and observed the transaction.

{¶ 4} Detective Hall stated that Mohamoud, who was operating the cash register, took the marked money from the CRI and allowed him to purchase the beer without requesting any identification or proof of age. The detective then arrested Mohamoud for selling alcohol to an underage person, and the marked money was retrieved from the cash register drawer.

{¶ 5} On December 9, 2003, after a brief bench trial at which only Detective Hall testified, Mohamoud was found guilty and was sentenced to six months of probation and a $250 fine. On December 22, 2003, Mohamoud moved for a new trial, which was denied after hearing. Mohamoud ("appellant") brings this appeal alleging two assignment's of error for review.

{¶ 6} "I. The trial court erred in entering judgment of conviction without direct evidence, only hearsay, and in denying the motion for a new trial, as there was insufficient evidence to support a conviction."

{¶ 7} In his first argument, the appellant claims the trial court erred when it allowed Detective Hall to attest to the fact that the CRI was born on December 21, 1984 and was only 18 years old on September 16, 2003. He argues that the testimony concerning the CRI's age was clearly hearsay and should have been excluded from the record, causing his conviction to fail on sufficiency grounds. We disagree with the appellant's assertion. We note that the appellant failed to object to any of the testimony regarding the above stated evidence; therefore, in the absence of objection, any error is deemed to have been waived unless it constitutes plain error. To constitute plain error, the error must be obvious on the record, palpable, and fundamental so that it should have been apparent to the trial court without objection. See *State v. Tichon*, (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State*

v. Waddell (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043; see, also, *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 656 N.E.2d 643.

{¶ 8} Under Evid.R. 801(C), "hearsay" is defined as 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(B) defines a "declarant" as a person who makes a statement; and a "statement," as defined in Evid.R. 801(A), is: (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion. Hearsay evidence is generally inadmissible unless an exception is determined to be applicable. See Evid.R. 802-807.

{¶ 9} Cleveland Codified Ordinance section 617.02(a) states, "except as otherwise provided in this chapter or R.C. Chapter 4301, no person shall sell beer or intoxicating liquor to an underage person ***."

{¶ 10} In the instant matter, Detective Hall testified that he physically looked at the CRI's Ohio driver's license on at least six prior occasions and that the license was real and authentic. He further testified that because he had worked with the CRI conducting liquor law compliance investigations on at least thirty occasions, he had memorized the CRI's birth date and age. He stated that the CRI was 18 years old at the time of the liquor investigation and was born on December 21, 1984. Detective Hall further stated that he stood behind the CRI in line at the store and watched him purchase the alcoholic beverage from the appellant, and the appellant did not ask the CRI for identification or proof of age.

{¶ 11} We find that Detective Hall's testimony about the CRI's age was based on his own personal knowledge and observations and was not based on statements from an out-of-court declarant; therefore, his testimony did not fall within the realm of inadmissible hearsay. He personally examined the CRI's driver's license at least six times and had memorized his birth date. We note it is always better practice to produce corroborating evidence proving the CRI's age, such as producing the CRI to testify at trial, producing a picture depicting the CRI's appearance at the time of the investigation, or producing a copy of the CRI's driver's license for trial. However, because Detective Hall's testimony was not hearsay, we find that the evidence submitted was sufficient to convict the appellant of selling alcohol to an underage person. The appellant's first assignment of error is, therefore, overruled.

{¶ 12} "II. Defense Counsel's performance of his duties was deficient to the level of ineffective assistance of counsel."

{¶ 13} In his second argument, the appellant claims his trial counsel was ineffective for failing to object to Detective's Hall's alleged hearsay statements establishing the CRI's age. Because we held that Detective Hall's testimony regarding the CRI's age was not hearsay and found no error in the admission of his testimony, the appellant's second assignment of error must also be overruled. The appellant cannot prove that his trial counsel was deficient for failing to object to Detective Hall's testimony about the CRI's age, nor can he prove he suffered any prejudice as a result.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into

execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
JUDGE

ANNE L. KILBANE, P.J., AND

ANTHONY O. CALABRESE, JR., J., CONCUR.