[Cite as *State v. Burrell*, 2006-Ohio-2593.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86702

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
THEONDREY BURRELL,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 25, 2006
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-463740
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

William D. Mason, Esq.
Cuyahoga County Prosecutor
BY: Joanna A. Whinery, Esq.
Assistant County Prosecutor
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellant:

Robert L. Tobik, Esq.
Cuyahoga County Public Defender
BY: John T. Martin, Esq.
Assistant Public Defender
1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113

MICHAEL J. CORRIGAN, J.:

{¶1} Appellant, Theondrey Burrell ("Burrell"), appeals his conviction of drug possession in an amount exceeding five grams. He was sentenced by the trial court to a one-year prison term. Burrell cites four assignments of error.

I.

{¶2} For his first assignment of error, Burrell contends that the evidence was insufficient to support a finding that Burrell was guilty of possession of crack in an amount exceeding more than five grams. In particular, he contends that there was a discrepancy in the weight of the crack cocaine found in the car he was driving - a difference of .28 grams. The weight of the crack was less than five grams; thus, Burrell argues his conviction cannot stand. In his second assignment of error, Burrell argues that should this court find that the evidence was sufficient to sustain his conviction for drug possession in an amount exceeding five grams, then the trial court erred by admitting into evidence the weight analysis performed by Scott Miller ("Miller") since he did not testify at trial.

{¶3} The first analyst, Miller, weighed the crack on the day it was discovered in Burrell's car and found the weight to be 5.19 grams. Miller was unable to testify at trial and in his stead, Cynthia Lewis ("Lewis"), the second analyst, testified. Lewis personally analyzed the crack and weighed it on the day of trial. She discovered the weight of the crack to be 4.91 grams and testified that Miller weighed the crack at 5.19 grams. Lewis explained that the reasons for the differences between the two weights are two-fold: (1) water evaporation occurs when the crack, like here, sits for over a year between the first test and the test on the day of trial, resulting in a loss of some weight of the crack; and (2) there is some destruction of the sample used to be analyzed that is taken from the crack

that could result in some weight loss. Based on Lewis' testimony and her explanation for the weight differences, it cannot be said that it was unreasonable for a juror to conclude that the weight of the crack exceeded five grams. Thus, Burrell's first assignment of error is overruled.

{¶4} Turning to his second assignment of error, it should be noted that Burrell did not object to Lewis' testimony that Miller weighed the crack at 5.19 grams, nor did he object to Lewis' explanation of the weight discrepancy. Forever mindful of the trial court's broad discretion in the admissibility of evidence, we review any alleged error in admitting in evidence under a plain error analysis where, like here, there was no objection.

{¶5} Here, Lewis initialed Miller's original report showing the weight to be 5.19 grams. Based on her initials, Miller's report could arguably have been admitted into evidence. Although the report itself was not admitted into evidence, Lewis still had the requisite knowledge to testify as to the original report and her weight analysis of the crack cocaine. As an expert, she was well within her realm of expertise to testify as to the reasons for the differences in the weight of the crack - at least so much to enable a juror to conclude if the weight exceeded five grams. It cannot be said that it was plain error to allow Lewis to testify as to the two weights. It was ultimately a question of fact for the jury to decide. Thus, Burrell's second assignment of error is overruled.

II.

{¶6} Burrell argues in his third assignment of error that the trial court plainly erred when it instructed the jury that it should find Burrell guilty of drug possession if Burrell was able to exercise control over the portion of the car where the crack was found at the same time that he was consciously aware that the drugs were present in his car. In particular,

Burrell contends that the following trial court's instruction to the jury on constructive possession amounted to plain error:

{¶7} "A person constructively possesses a substance when he knowingly exert[s] or is able to exercise dominion or control over the substance or over the area in this case of the auto in which the substance was found or concealed. Even though the substance was not in his physical possession."

{¶8} Here, the crack was discovered in the center armrest of the car that Burrell was driving. The trial court specifically followed Ohio law when it gave that instruction to the jury as "[c]onstructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Worley* (1976), 46 Ohio St.2d 316, 329, 348 N.E.2d 351. Even if this court were to accept Burrell's argument that there is a difference between the ability to exercise control over the drugs themselves and the ability to exercise control over the area where the drugs are present, it is more than reasonable for a juror to conclude that as the driver of the car, Burrell had access (or exercised the ability to control) the crack in the center armrest of the car.

{¶9} Because the trial court followed Ohio law when it instructed the jury on possession, coupled with the fact that the two police officers who testified at trial stated that Burrell admitted the crack was his[1], Burrell's third assignment of error is overruled.

IV.

[1] It should be noted that if the jury believed the police officers' testimonies that Burrell admitted the crack was his, then any alleged erroneous jury instruction on constructive possession is moot because the possession is indeed actual.

{¶10} Finally, for his fourth assignment of error, Burrell argues that he was denied the effective assistance of counsel when his counsel failed to object to Miller's weight analysis and the trial court's jury instruction on possession. However, Burrell cannot show, under *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, that he was prejudiced as it is highly unlikely that Burrell would have been acquitted of drug possession had his counsel objected. Thus, Burrell's fourth assignment of error is overruled and Burrell's conviction for drug possession in an amount exceeding five grams is affirmed.

Judgment affirmed.

MICHAEL J. CORRIGAN
JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS.

ANN DYKE, A.J., DISSENTS WITH OPINION.

ANN DYKE, A.J., DISSENTING:

{¶11} I respectfully dissent. For the reasons below, I would find that the trial court erred in allowing Lewis to testify as to the results of the lab report prepared by Miller which concluded that the crack cocaine weighed 5.19 grams. Therefore, I would reverse and remand because without evidence that the crack cocaine weighed 5.19 grams, the state would be unable to prove an essential element of its case.

{¶12} Appellant concedes that trial counsel failed to continue to object to the testimony of Lewis as to the conclusion of the report prepared by Miller ("Miller Report").[1]

[1] The majority maintains that "Burrell did not object to Lewis' testimony that Miller weighed the crack at 5.19 grams, nor did he object to Lewis' explanation of the weight discrepancy." I note, in the interests of clarifying the facts revealed in the record, that the

Therefore, Appellant has waived all but plain error. Pursuant to Crim.R. 52(B), plain errors or defects which affect substantial rights may be grounds for reversal even though they were not brought to the attention of the trial court. Notice of plain error, however, applies only under exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Plain error does not exist unless it can be said that but for the error, the outcome of the trial would have clearly been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894; *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶13} In the instant matter, it is undisputed that Miller did not testify as to the conclusions of the Miller Report. Instead, Lewis testified that the report concluded that the substance was crack cocaine and that it weighed 5.19 grams. She admitted under oath that she did not prepare the Miller Report. It is well-settled that in the absence of a court appearance by the preparer of the report, a laboratory report prepared by a qualifying agency or accredited institution of higher learning may nevertheless be admissible as prima facie evidence of content, identity, and weight, or the existence or number of dosages of the substance tested, so long as the parties comply with certain procedural requirements proscribed in R.C. 2925.51. *State v. Stephens* (1998), 126 Ohio App.3d 540, 552, 710 N.E.2d 1160. Accordingly, in order to affirm the admission of Lewis' testimony as

---

trial court initially sustained Appellant's objection to Lewis' mention of the results indicated in the Miller Report. However, the trial court subsequently allowed, without objection, the prosecutor to ask the same question again. I also note that the record reveals that Appellant did in fact object to Lewis testifying to the differences in the conclusions in the weight contained her report and the Miller report, but that the trial court sustained trial counsel's objection.

to the identity and weight of the substance, one must determine whether the Miller Report adhered to the requirements proscribed in R.C. 2925.51.

{¶14} R.C. 2925.51(A) mandates that the report be signed by the person performing the analysis and contain a copy of a notarized statement by that person. Additionally, the report must state that the signer is an employee of the laboratory issuing the report and that the employee performed the analysis as part of his regular duties. Id. The report shall also include "an outline of the signer's education, training and experience for performing an analysis of materials included under this section." Id. The report must contain an attestation that the laboratory tests were conducted with due caution and in accordance with established and accepted procedures. Id. Furthermore, the report is required to bear notice of the right of the accused to demand, and the manner in which to demand, the testimony of the signer of the report. R.C. 2925.51(D). In addition, R.C. 2925.51(B) requires service of the report to the attorney representing the accused prior to any proceeding in which the report may be utilized. Finally, the report is not prima facie evidence of the contents, identity and weight of the substance tested when the accused, within seven days of receiving the report, demands the testimony of the person signing the report. See R.C. 2925.51(C).

{¶15} In the instant matter, the Miller Report does not meet one of the mandates proffered in R.C. 2925.51. Instead, the report merely states, "One plastic bag containing numerous pieces of off-white rock-like material. Analyzed and found to be POSITIVE for COCAINE. Class II, wt. = 5.19 grams. SMM-TLK-CLL." The only additional information contained in the Miller Report is the lab number, bag number and RMS number. Failure to meet the procedural requirements proscribed in R.C. 2925.51 violates the statute and

renders the report inadmissible. *State v. Bates*, Allen App. No. 1-03-83, 2004-Ohio-2219; State *v. Bethel*, Tuscarawas App. No. 2002AP0010, 2002-Ohio-5437. Accordingly, I would find that the trial court correctly denied the State's request to admit the Miller Report into evidence.

{¶16} Without the admittance of the Miller Report, I would conclude that the trial court could not permit Lewis to testify as to the conclusion of the report because she did not have any personal knowledge as to its contents. In *State v. Crager*, Marion App. No. 9-04-54, 2005-Ohio-6868, the Third District determined that a witness could not testify as to the conclusions in an inadmissible report where the witness was not the preparer of the report, nor did he have personal knowledge of the report's conclusions. In that case, the witness testified that, although he did not prepare the report, he did perform a technical check on the preparer's work. Id. He then went on to testify to the conclusions in the preparer's report. Id. The court found that while the witness had some personal knowledge, he only had personal knowledge of findings in the preparer's report. Id. The court reasoned:

{¶17} "While he did perform the technical review of [the preparer's] work in this case, it seems that review merely involved checking her notes, to make sure that she followed correct procedures and came to a reasonable conclusion. He did not observe or supervise her work. * * * Additionally, throughout [the witness's] testimony the DNA conclusions he gives come solely from [the preparer's] report, which should not have been admitted into evidence." Id.

{¶18} The court held that, where the report is inadmissible, the mere review of the report, absent any independent testing, does not qualify the witness to testify to

conclusions in the report. Id. See, also, *State v. Jarrett*, Auglaize App. No. 2-05-37, 2006-Ohio-882; *State v. Danner* (June 21, 1996), Wood App. No. WD-95-111.

{¶19} As in *Crager*, the testimony of Lewis in this case reveals that she did not have personal knowledge as to the conclusion of the Miller Report. Lewis testified that while her initials are upon the Miller Report, she did not conduct the test, nor did she observe Scott Miller perform the test. She merely recalls being present in the lab on that day, although she cannot recall the day that Miller conducted the test.[2] As such, Lewis was not qualified to testify as to the conclusions in the Miller Report. Accordingly, I would conclude that, because the Miller Report was inadmissible and Lewis did not prepare the report or have personal knowledge of its conclusions, any mention by Lewis that the crack cocaine initially weighed 5.19 grams was improper and should have been excluded. Likewise, the trial court should have excluded any explanation by Lewis regarding the weight differences in the Miller Report and her report.

{¶20} Having decided that the trial court should have excluded Lewis' testimony as to the conclusions in the Miller Report and the differences between the Miller Report and her report, because Appellant's counsel failed to continue to object to the admission of such evidence, one must still determine whether a manifest miscarriage of justice occurred as a result of the improperly admitted evidence. In so doing, one must decide whether, but

---

[2]The majority makes the assertion that "the first analyst, Miller, weighed the crack on the day it was discovered in Burrell's car * * * ." A review of the record, however, does not establish this fact. The lab report does not prescribe the date the substance was tested. Further, Lewis testified that while it is common practice to weigh a substance the day of its arrival, she can only testify that substances can be weighed within the week of their arrival. Therefore, due to the absence of Miller's testimony, the date the crack was tested is unknown.

for the error, the outcome of the trial would have clearly been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894; *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643. Here, without the Miller Report and testimony of Lewis as to its conclusions, the jury would never have been presented with evidence that the crack-cocaine initially weighed 5.19 grams. Instead, the jury would have only heard that the crack cocaine weighed 4.91 grams. Accordingly, without evidence establishing the weight of the crack cocaine to be over five grams, the State would be unable to prove an essential element of its case, i.e. that the substance "equals or exceeds five grams but is less than ten grams of crack cocaine." R.C. 2925.11(C)(4)(c). Consequently, I would sustain Appellant's second assignment of error.

{¶21} Furthermore, the determination as to Appellant's second assignment of error would render moot Appellant's remaining assignments of error pursuant to App.R. 12(A). Accordingly, I would reverse and remand.