**[Cite as *State v. Frashuer*, 2010-Ohio-634.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| STATE OF OHIO | C. A. No. 24769 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| TODD SCOTT FRASHUER | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellant | CASE No. CR 08 12 4067(A) |

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

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BELFANCE, Judge.

**{¶1}** Appellant-Defendant, Todd S. Frashuer, appeals his conviction from the Summit County Court of Common Pleas. For the reasons that follow, we affirm each of Frashuer's convictions.

I.

**{¶2}** On December 10, 2008, Todd Frashuer was at a home at 721 Beechview Drive in Akron, Ohio. The home was rented by Donneall Cate, the mother of two of Frashuer's children. While there, Frashuer encountered another man, Jody Simone, whom Frashuer believed was drunk. Frashuer claims he also became aware that Simone was involved with drugs. Frashuer became upset and the two men got into a physical altercation. As the fight spilled out to the front yard, Frashuer realized that a neighbor was calling the police. Knowing that he had a warrant for his arrest due to non-payment of child support, Frashuer left the home.

**{¶3}** Later in the day, Cate called Frashuer to tell him to return to the house because the police had left. When Frashuer returned, he went down to the basement. While he was down there, members of the Summit County Drug Task Force arrived at 721 Beechview. They had received an anonymous tip that there was a methamphetamine lab in the house and intended to also arrest Frashuer on his outstanding warrant.

**{¶4}** Detective Susan Barker went to the front door while another detective stood at the home's rear entrance to be sure that no one left. A child looked out of the window when Det. Barker knocked. Det. Barker showed the child her sheriff's badge and the child disappeared from the window. While Det. Barker was waiting for someone to answer the door, she noticed a male figure inside near the rear of the house, then the figure disappeared, likely into the basement.

**{¶5}** Cate answered the door and Det. Barker stated that she was looking for Frashuer. Cate directed her to the basement.

**{¶6}** Frashuer was waiting at the bottom of the basement stairs and Det. Barker placed him under arrest. While in the basement, Det. Barker noticed the distinctive odor indicative of the crystallization phase of methamphetamine production. Also, in plain view she observed items associated with methamphetamine production, including numerous matchbooks and matchbook covers with the matches removed, Mason jars, and coffee filters. Det. Barker also heard other people moving around in the basement. She secured a search warrant for the house.

**{¶7}** While waiting for the search warrant, Det. Robert Scalise, also of the Drug Task Force, remained in the home's living room with Frashuer, Cate, and their two daughters, J.F., age ten, and M.F., age five. Det. Scalise testified that the home smelled and was messy and dirty. Specifically, there was trash, food wrappers, and even old food strewn about the floor. During

this time, one of the children became hungry. Det. Scalise went to the kitchen to get her some food, however, there was no food in the house and only an onion and a stick of butter in the refrigerator. He was eventually able to find a cup of yogurt, but he was not able to give it to the child because there were no clean dishes with which she could eat the yogurt. In general, Det. Scalise believed that the condition of the house was unsanitary.

**{¶8}** When the search warrant arrived, Dets. Barker, Scalise, Thomas Gottas, and Michael Yovanno, all of the Drug Task Force, participated in the search. Det. Scalise searched the home's master bedroom. He discovered a digital scale and a homemade pipe of tinfoil used to smoke methamphetamines. Det. Gottas remained on the first floor and compiled the inventory of the items recovered by the detectives executing the search. He also stated that the home was in such disarray that it was difficult to move around and there was no food for the children to eat.

**{¶9}** Dets. Barker and Yovanno searched the basement dressed in protective gear. In a bedroom in the basement, Det. Yovanno found a cigar box containing razor blades, a scraper, and a glass pipe used to smoke methamphetamines. He also found other drug paraphernalia, including syringes and a burnt spoon. A bulletproof vest was hanging in the bedroom closet. Det. Yovanno also found a coat with identification for Mark Teets. He stated that it did not seem as though Teets lived at 721 Beechview. However, John Thomas rented another bedroom in the basement from Cate. No paraphernalia was found in Thomas' room and he told the detectives he was mentally handicapped due to a severe head injury.

**{¶10}** In the workshop area in the basement, the detectives found apparatus used to manufacture methamphetamines, such as, a hotplate, a butane torch, rubber tubing, heavy rubber gloves and coffee filters. One of the coffee filters was stained with a reddish-brown color

indicative of a chemical reaction in the methamphetamine production process. Another coffee filter contained 1.6 grams of usable methamphetamine.

**{¶11}** Det. Barker, an expert on clandestine methamphetamine labs, found equipment and large quantities of chemicals necessary for methamphetamine production in the basement. She recovered gallon jugs of muriatic acid, acetone, a three-pound container of iodine, eight bottles of lye, and pseudoephedrine. She also identified an amount of red phosphorus that had been extracted from the striker plates on the matchbooks. The equipment found consisted of glassware and tubing, rubber stoppers, masks and latex gloves. Some of the equipment was stained or damp, indicating recent chemical processing of methamphetamines. Some of the items Det. Barker found were contained in a wooden box and a cardboard box from an electronic basketball game. Photographs taken during the search show that the items had been neatly packed and some of them were protectively wrapped in newspaper. Det. Barker also recovered a homemade apparatus used in one phase of the production process.

**{¶12}** Frashuer and Cate were arrested in light of the items found during the search of 721 Beechview. Deputy Charles Brown booked Frashuer into the jail that night. He stated that Frashuer's ticket listed 721 Beechview as his address and Frashuer gave that address when asked for the information by Dep. Brown.

**{¶13}** The day after Frashuer's arrest, Lauren Clark, a caseworker with the Summit County Board of Children's Services ("CSB") visited him in the jail to notify him that J.F. and M.F. were in the custody of CSB. Frashuer admitted to Clark that he had been manufacturing methamphetamines in the basement of 721 Beechview to earn money since he had lost his job.

**{¶14}** Frashuer pled not guilty to illegal manufacture of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, aggravated possession of drugs, and four

counts of child endangering. At trial, Frashuer testified that he did not live at 721 Beechview and was only there on December 10, 2008, to visit his children, something Cate rarely allowed. He also claimed that he did not have any knowledge of the methamphetamine lab in the basement before that day. Further, when the police arrived, he was packaging the chemicals and equipment to dispose of them because he did not want a methamphetamine lab in the home in which his children lived. He also contended that case worker Clark never came to visit him in jail, thus, he never admitted to her that he manufactured methamphetamines. The jury found Frashuer guilty of all charges. Frashuer then filed the instant appeal.

**{¶15}** On appeal, Frashuer argues that all of his convictions are based on insufficient evidence, are against the manifest weight of the evidence, and that his trial counsel was ineffective.

II.

**Manifest Weight**

**{¶16}** In his first assignment of error, Frashuer asserts that his convictions for illegal manufacture of drugs, child endangering, aggravated possession of drugs, and illegal assembly or possession of chemicals for the manufacture of drugs must be overturned as they are against the manifest weight of the evidence presented at trial.

**{¶17}** When determining whether a conviction is supported by the manifest weight of the evidence,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in "extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant." *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶9, citing *Otten*, 33 Ohio App.3d at 340. When reviewing a conviction pursuant to the manifest weight standard, we must determine whether the State met its burden of persuasion. *Cepec* at ¶6.

**{¶18}** Frashuer suggests that his conviction is against the manifest weight of the evidence because there was conflicting testimony and evidence. It is true that Frashuer's testimony directly contradicted that of the State's witnesses. Frashuer implicitly complains that because it is apparent that the jury chose not to believe his version of events, his conviction is against the manifest weight of the evidence. However, the mere fact that the jury chose to disbelieve much of Frashuer's testimony does not equate to a manifest miscarriage of justice.

**{¶19}** Frashuer also contends that his convictions for manufacturing and possession of illegal drugs and child endangering are against the manifest weight of the evidence because "the evidence had shown that [Frashuer] did not live in the residence, did not possess with the intent to manufacture, and did not have custody of his children[.]" Beyond this statement and Frashuer's partial recitation of the evidence, Frashuer has failed to develop his argument so that this Court can understand why these three allegations, if true, warrant reversal of his convictions. Notwithstanding, this Court has undertaken a thorough review of the evidence adduced at trial. We cannot say that the jury lost its way and created a manifest miscarriage of justice when it found Frashuer guilty of the charged offenses.

**{¶20}** Despite Frashuer's failure to develop his argument, he does contend that the finding that he resided at 721 Beechview is against the manifest weight of the evidence. However, although Frashuer testified that he did not live at the Beechview residence, there was

evidence to the contrary. After his arrest and during booking, Frashuer told a deputy that his address was 721 Beechview. Det. Barker testified that she had personal knowledge that Cate and Frashuer lived at the Beechview residence. In addition, the State also presented an audio recording of a telephone call Frashuer made while he was in jail. Frashuer spoke about whether or not he should try to call *his* house because he assumed Cate, who was also arrested on December 10, 2008, was out of jail and wondered if she would be there to speak with him. Frashuer also spoke about waiting for the search warrant for 721 Beechview to arrive and mentioned waiting in "my house" for over an hour. Although Frashuer testified that he did not live at 721 Beechview, we cannot say that the jury lost its way in finding otherwise.

**{¶21}** Frashuer also contends that the evidence demonstrated that he "did not possess with the intent to manufacture." This statement itself is ambiguous in that it suggests that although he might have possessed drugs, he did not intend to manufacture them. Notwithstanding that ambiguity, we assume that Frashuer contends that the jury's findings that he possessed drugs as well as had the intent to manufacture are against the manifest weight of the evidence. At trial, Frashuer denied that the methamphetamine found in the home was his. He also denied that the paraphernalia used to manufacture the methamphetamine was his. This argument was in part founded upon his contention that he did not live at the home. He also contended that when he was at the Beechview residence on the day of the arrest, he had an altercation with a person who was consuming drugs in the home. He stated he left the home after the altercation because he knew he had a warrant for his arrest and a neighbor had called the police. Later, when he returned to the home, he stated that he found the methamphetamine lab and began to pack it up because he knew that it was hazardous to his children.

**{¶22}** The jury also heard evidence that conflicted with Frashuer's version of events. Clark, the CSB caseworker, visited Frashuer in jail on December 11, 2008. The purpose of her visit was to inform him that J.F. and M.F. had been placed in CSB custody. Clark explained that placement was made because Frashuer was charged with operating a methamphetamine lab in his home. She further testified that Frashuer admitted that he had been "cooking" methamphetamines for a few weeks because he had lost his job. He admitted that he had set up the lab in the basement, but stated that the children were told to not go in the basement.

**{¶23}** Det. Barker found Frashuer in the basement where he was found with chemicals and supplies used to produce methamphetamine. Frashuer does not deny that he was in the basement where the methamphetamine lab was located. Instead, he testified that his purpose for being in the basement was to pack up the lab. He stated that although he was not in the basement previously, upon his return to the house he went straight to the basement to dispose of the methamphetamine lab. He did not adequately explain how he knew that the lab was there. He placed the items in a toolbox, a cooler, and the box from the electronic basketball game. Frashuer recognized the purpose for the items in the basement because he had prior involvement with methamphetamine production and the police previously searched a different residence of his on the suspicion that he was manufacturing methamphetamines. While he was packing up the chemicals and supplies, the detectives from the Drug Task Force knocked on the front door. Frashuer peacefully surrendered to Det. Barker when she came into the basement. Frashuer also suggested that that the drugs and paraphernalia belonged to the other residents of the home or Jody Simone.

**{¶24}** In the face of evidence that Frashuer admitted to a CSB caseworker that he manufactured methamphetamine in the basement of the Beechview home and evidence that

Frashuer was in the basement of the Beechview home packing up the methamphetamine lab, we cannot say that the jury lost its way in finding that Frashuer possessed with intent to manufacture.

**{¶25}** The relevant intent required to establish that a person has illegally manufactured drugs is knowingly. R.C. 2925.04(A). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). There was an abundance of evidence presented a trial that there was a methamphetamine lab in the basement of 721 Beechview. The characteristic odor of methamphetamine production permeated the residence. All the necessary chemicals and equipment, some of which was homemade, were located in the basement. Although some of the items, such as iodine and matchbooks, are common, household items, the quantity present and the condition of some of the items indicated that they were not being used in a common, household manner. Some of the manufacturing apparatus was stained or damp, suggesting that the equipment had recently been used. The detectives also discovered usable methamphetamine and paraphernalia for ingesting the drug.

**{¶26}** Frashuer maintained that when the detectives arrived he was attempting to pack the equipment and chemicals to be disposed of, however, the photographs show that the articles were neatly packed and protectively wrapped in newspaper when necessary. Frashuer's own testimony established that he is familiar with the process and tools required to produce methamphetamines because he has participated in the process in the past. The testimony of Clark further undermines Frashuer's claim. She stated that the day after his arrest, he admitted to

manufacturing methamphetamines in the basement of his children's home because he needed the money.

**{¶27}** Additionally, Frashuer has argued that he could not be convicted of child endangering because he did not have custody of J.F. and M.F. Although Frashuer does not specify in his brief which subsection of the child endangering statute of which he could not be convicted due to lack of custody, neither subsection provides that a person charged with such a violation must have custody of the children at issue.

**{¶28}** Frashuer was convicted of two counts of child endangering pursuant to R.C. 2919.22(A) and two counts pursuant to R.C. 2919.22(B)(6). R.C. 2919.22(A) states that "[n]o person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * *, shall create a substantial risk to the health or safety of the child * * *." R.C. 2919.22(B)(6), concerning endangerment stemming from a child's proximity to the manufacture of illegal drugs or chemicals used in the manufacturing process, mandates that "[n]o person" shall permit a child to be within one hundred feet of such violations. Frashuer has not argued before this Court that he is not the parent of J.F. or M.F. and admitted at trial that the girls are his children. Moreover, Frashuer has not provided this Court with authority to support his assertion that his convictions for child endangering are improper because, as he claims, he does not have legal custody of the girls. Accordingly, Frashuer's argument on this point is not well taken.

**{¶29}** For purposes of the charges brought pursuant to R.C. 2919.22(A), Det. Barker stated that the house was quite dirty and messy, that trash and food were lying around on the floors, and that one bedroom was so full of junk that it was difficult to move around. Additionally, the kitchen sink was so full of dirty dishes that the faucet could not be turned on.

One of the girls had a cat litter box in her bedroom with waste in it, some of which had spilled out of the box and onto the floor. She also noticed that the hazardous gasses from the methamphetamine lab had permeated the first-floor living area of the ranch-style home. She estimated that the methamphetamine lab was approximately fifty feet from the children's living area. This fact supports Frashuer's charges for child endangering pursuant to R.C. 2919.22(B)(6).

**{¶30}** Frashuer argues that there were conflicts in the evidence. Most notably, his version of events differed significantly from that of the State's witnesses. The jurors are charged with the duty to evaluate the credibility of the witnesses and in so doing, are free to believe the testimony of the State's witnesses and disbelieve the defense witnesses. Id. Based on the evidence presented at trial, the jury could find that Frashuer lived in the house and participated in the production of methamphetamines. Based on our review of the evidence, we do not find that the jury lost its way in so finding. This is not the extraordinary case in which the evidence weighs heavily in favor of the defense. *Flynn* at ¶9, citing *Otten*, 33 Ohio App.3d at 340. Accordingly, we hold that the State met its burden of persuasion and the jury did not lose its way when it found Frashuer guilty of the charges of illegal manufacture of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, aggravated possession of drugs, and child endangering. *Cepec* at ¶6.

**{¶31}** Based on the foregoing, Frashuer's first assignment of error is overruled.

**Sufficiency**

**{¶32}** In his second assignment of error, Frashuer contends that the trial court committed reversible error when it denied his Crim.R. 29 motion as to all charges. According to

Frashuer, the State failed to prove that he knowingly possessed or manufactured illegal drugs and the date of the alleged manufacture.

**{¶33}** We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence. *Flynn* at ¶8. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is sufficient if it allows the jury to reasonably conclude that the essential elements of the crime charged were proven beyond a reasonable doubt. Id.

**{¶34}** In his second assignment of error, Frashuer argues that the prosecutor did not prove all of the essential elements of the offenses with which he was charged, "to wit: knowing possession or manufacture, and date of manufacture of the illegal drugs." Frashuer offers no further development of this argument but concludes that this Court should reverse the conviction on the charges. He has not cited to any of the applicable statutes, legal authority or the record of this case. See App.R. 16(A)(7). Thus, we decline to speculate as to what Frashuer's specific arguments might be regarding the sufficiency of the evidence relating to the possession or manufacture of the illegal drugs. *Catanzarite v. Boswell*, 9th Dist. No. 24184, 2009-Ohio-1211, at ¶¶16-17.

**Ineffective Assistance of Counsel**

**{¶35}** In his final assignment of error, Frashuer claims that trial counsel was ineffective. Frashuer points to the fact that the trial court failed to administer the oath to the jury after they were empanelled. Instead, the judge administered the oath to the venire before voir dire then, to

the seated jurors before the verdict was read in court. Frashuer argues that trial counsel should have objected to the irregularities with respect to the oath and his failure to do so constitutes ineffective assistance.

**{¶36}** In order to prove that trial counsel was ineffective, a defendant must demonstrate: (1) deficiency in his attorney's representation and, (2) that the deficiencies prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142. Deficiency of representation "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Prejudice to the defense "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. To succeed on his claim, the defendant must establish both elements, because "'[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" (Internal citation omitted.) *Bradley*, 42 Ohio St.3d at 142, quoting *Strickland*, 466 U.S. at 691.

**{¶37}** In examining a claim of ineffective assistance, "[a]n appellate court may analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice." *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003-Ohio-641, at ¶37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83. Thus, we shall begin our analysis by considering whether Frashuer has demonstrated prejudice from the alleged deficiencies of trial counsel.

**{¶38}** In his brief, Frashuer makes no argument with respect to prejudice. Although the brief states: "Said lack of an objection [to the improper timing of the jury oath] prejudiced the defense[,]" this conclusory statement is not supported by facts from the record evidencing the

prejudicial effect of trial counsel's lack of objection. As Frashuer has not demonstrated a reasonable probability that trial counsel's failure to object affected the outcome of the trial, we need not address the issue of whether the lack of objection constitutes deficient representation. *Bradley*, 42 Ohio St.3d at 142 quoting *Strickland*, 466 U.S. at 694; *Kordeleski* at ¶37. Frashuer's third assignment of error is overruled.

III.

**{¶39}** In light of the foregoing, Frashuer's three assignments of error are overruled and the judgment of Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

LEONARD J. BREIDING, II, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.