[Cite as *State v. Fitts*, 2020-Ohio-1154.]

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

State of Ohio

Appellee

v.

Johnathan D. Fitts

Appellant

Court of Appeals Nos. WD-18-092
WD-18-093

Trial Court Nos. 2017-CR-0056
2018-CR-0416

DECISION AND JUDGMENT

Decided: March 27, 2020

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David T. Harold, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

MAYLE, J.

{¶ 1} In this consolidated appeal, defendant-appellant, Johnathan D. Fitts, appeals the November 19, 2018 judgments of the Wood County Court of Common Pleas, convicting him of two counts of trafficking in cocaine, one count of complicity in the

commission of an offense, and one count of failure to appear. For the following reasons, we affirm the trial court judgments.

I. Background

{¶ 2} In January of 2017, M.T. approached Charles Broshious, the chief of the Bradner Police Department, and offered to act as a confidential informant in an arranged drug buy. M.T. said that she had a daughter who recently died from using illegal narcotics, and she was "tired of it" and wanted to help "catch somebody." She also explained that she had recently been arrested in Sandusky County after drugs were found in the vehicle she was driving. She hoped that her cooperation would secure her leniency in that case.

{¶ 3} Working with Chief Broshious and other officers, including Officer Jakob Rinehammer and Officer Jeremy Salaz, M.T. arranged three drug buys with a dealer she knew as "Memphis." She arranged all three buys by communicating with him over text messaging or Facebook messenger. Chief Broshious maintained copies of M.T.'s messages with Memphis by either forwarding the messages to his email or taking snapshots of the messages on M.T.'s phone, which he then forwarded to his email.

{¶ 4} Before each buy, officers followed the same protocol: they photocopied the money to be used for the purchase; they patted M.T. down to ensure that she had no contraband before the purchase; they stationed officers to maintain a visual of M.T.; they ensured that the vehicles used to transport M.T. to the exchange sites were free of contraband; and they provided M.T. with a camera watch and a voice recorder. Each buy

was recorded on audio and videotape. After each buy, M.T. gave the officers the substance she purchased, and she was taken to the police station where she was patted down again. Officers used a NIK testing kit to test the substance purchased for the presence of illegal drugs.

{¶ 5} The first transaction occurred on January 23, 2017. M.T. purchased $300 worth of crack cocaine and paid $20 for the gas associated with delivering the drugs. The exchange took place outside a bar in Bradner. Memphis was driven to the location by a white male driving a maroon Chrysler. The substance provided to M.T. tested positive for the presence of cocaine.

{¶ 6} The second transaction occurred on January 25, 2017. M.T. purchased $175 worth of cocaine and paid $20 for gas. The exchange took place outside a laundromat in Bradner. The drugs were delivered by the same white male driving the same maroon Chrysler. He was accompanied by a heavyset woman; Memphis was not in the car. M.T. expressed to the driver—and to Memphis via text message—that she was unhappy that Memphis did not personally deliver the drugs. The driver told M.T. that "John" was busy and that he had been running for him for a while, and Memphis assured her that the man he sent was his runner and it was okay. The substance provided to M.T. tested positive for the presence of cocaine.

{¶ 7} The third transaction occurred on January 31, 2017. M.T. purchased $2,500 worth of cocaine and paid $20 for gas. The exchange again took place outside the laundromat. Memphis was a backseat passenger in a silver Durango. The driver was a

white male and the front-seat passenger was a black male. Neither the driver nor the passenger were present for the first two transactions.

{¶ 8} After the third transaction was completed, officers closed in and arrested Memphis and the two other occupants of the vehicle. Memphis disclosed that his real name is Johnathan Fitts. Cash matching the serial numbers of the cash provided to M.T. was found within Fitts's reach. The officers called the phone number associated with the text messages on M.T.'s phone, and the call rang on Fitts's telephone. At the police station, the substance sold to M.T. tested positive for the presence of cocaine.

{¶ 9} Fitts was charged in Wood County case No. 2017-CR-0056 with trafficking in cocaine in an amount greater than 20 grams but less than 27 grams, a violation of R.C. 2925.03(A)(1) and (C)(4)(e) (Count 1); complicity in the commission of an offense, a violation of R.C. 2923.03(A)(2) and (F) (Count 2); and trafficking in cocaine in an amount less than five grams, a violation of R.C. 2925.03(A)1) and (C)(4)(a) (Count 3). After failing to appear for a final pretrial, Fitts was also charged in Wood County case No. 2018-CR-0416 with failure to appear as required by recognizance, a violation of R.C. 2937.22.

{¶ 10} Before the case could be tried, M.T. was killed in an accidental house fire. The state moved in limine to admit M.T.'s statements at trial under Evid.R. 801(D)(2)(e), as the statements of a co-conspirator. Fitts filed a cross-motion, asking that M.T.'s oral and written statements—specifically witness statements that were written on police-department letterhead after each buy and oral statements that were recorded in police

reports—be excluded as violating the confrontation clause of the Sixth Amendment to the U.S. Constitution.

{¶ 11} The trial court ruled in favor of the state. It held that even though she was acting as a confidential informant for the state and was not engaging in the purchase of cocaine in furtherance of a criminal endeavor, a conspiracy existed between M.T. and Fitts; the court described it as a "unilateral conspiracy." It concluded that the text messages between M.T. and Fitts were statements by co-conspirators made in the course of and in furtherance of the conspiracy under Evid.R. 801(D)(2)(e). It found that admission of the statements would not violate Fitts's right to confrontation because the statements were non-testimonial in nature.

{¶ 12} The case was tried to a jury on November 14-15, 2018. Chief Broshious, Officer Rinehammer, and Officer Salaz testified. The trial court admitted into evidence the audio and video recordings of the transactions taken on the watch worn by M.T. and the recorder carried in her pocket, and it admitted copies of the Facebook and text messages exchanged between M.T. and Fitts.

{¶ 13} The jury found Fitts guilty on all counts. The trial court sentenced him to a prison term of six years on Count 1, 11 months on Count 2, and 11 months on Count 3, to be served consecutively to one another and concurrently with a sentence imposed in a Huron County case. Fitts entered a plea of guilty in case No. 2018-CR-0416, for failing to appear and was sentenced to 17 months in prison, to be served concurrently with the sentence imposed in Wood County case No. 2017-CR-0056.

{¶ 14} Fitts appealed and assigns four errors for our review:

I. The trail [sic] court abused its discretion and denied Appellant his fundamental right to a fair trial, and his Sixth Amendment right to confrontation of witnesses, by permitting the State to submit audio, video and text messaging evidence obtained through the use of a confidential informant when the informant was deceased and no longer available for Appellant to confront at trial.

II. The trial court erred in denying Appellant's Crim.R. 29 motion.

III. The jury's verdict was against the manifest weight of the evidence presented at trial.

IV. The trial court committed error to the prejudice of Appellant by imposing the costs of prosecution without consideration of Appellant's present or future ability to pay.

II. Law and Analysis

{¶ 15} In his first assignment of error, Fitts argues that the trial court erred when it admitted audio, video, and text messaging evidence. In his second assignment of error, he argues that the trial court erred when it denied his Crim.R. 29 motion. In his third assignment of error he argues that his convictions were against the manifest weight of the evidence. And in his fourth assignment of error, he argues that the trial court erred when it imposed the costs of prosecution without finding that he is able to pay. We review each of these assignments in turn.

A. Right to Confrontation

{¶ 16} Fitts argues in his first assignment of error that the trial court erred when it admitted into evidence audio and video recordings of the drug buys and copies of the text messages between M.T. and Fitts. He maintains that this evidence was testimonial in nature and argues that because M.T. was not subject to cross-examination, the admission of the evidence violated his Sixth-Amendment right to confront the witnesses against him. He also claims that the state failed to prove that he and M.T. were involved in a conspiracy, therefore, the trial court erred when it relied on Evid.R. 801(D)(2)(e) as authority for its evidentiary ruling.

{¶ 17} The Sixth Amendment provides an accused the right to be confronted with the witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In *Crawford*, the U.S. Supreme Court held that a defendant's right to confront the witnesses against him is violated when the court admits out-of-court statements that "are testimonial and the defendant has had no opportunity to cross-examine the declarant." *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 13, citing *Crawford* at 68. "The key issue is what constitutes a testimonial statement: 'It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.'" *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, ¶ 33, quoting *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A statement will be said to be "testimonial" if "it is made with a

primary purpose of creating an out-of-court substitute for trial testimony." (Internal quotations and citations omitted.) *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028.

{¶ 18} We ordinarily review a trial court's evidentiary rulings under an abuse-of-discretion standard. *In re S.*, 102 Ohio App.3d 338, 344, 657 N.E.2d 307 (6th Dist.1995). But where those rulings implicate a defendant's rights under the confrontation clause, we conduct a de novo review. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97.

1. The Audio and Video Recordings

{¶ 19} Fitts challenges the admission of the audio and video recording of the drug transactions.[1] He did not raise this objection at trial. In fact, at trial, counsel for Fitts specifically expressed to the court that she had *no* objection to the admission of the audio and video recordings ("Your Honor, I'm not objecting to the admission of the audio and video.").

{¶ 20} Fitts does not acknowledge the fact that his counsel acceded to the admission of the recordings. The fact that she did leads us to conclude that Fitts has waived any error in the admission of the recordings.

{¶ 21} The Ohio Supreme Court recognized in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 22, that there is a critical distinction between the

[1] The quality of the audio and video recordings was extremely poor and were, therefore, of very little assistance to the state's case.

terms "waiver" and "forfeiture" as applied to the preservation of objections for appeal. *See also State v. Hairston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 9 ("There is a fine distinction between the terms waiver and forfeiture as applied to the preservation of objections for appeal."). Forfeiture "is a failure to preserve an objection," while waiver "is the intentional relinquishment or abandonment of a right." *Id.* at ¶ 23, quoting *State v. McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737 (2001), at fn. 3 (Cook, J., dissenting). An objection that has been *forfeited* "'does not extinguish a claim of plain error under Crim.R. 52(B)'"; however, an objection that has been *waived* "'cannot form the basis of any claimed error under Crim.R. 52(B)'" unless the error is structural. *Id.*

{¶ 22} Because counsel for Fitts specifically stated that she had no objection to the admission of the audio and video recordings, Fitts has *waived* the right to claim error. *See State v. Anderson*, 9th Dist. Summit No. 24304, 2009-Ohio-837, ¶ 21 ("Anderson's counsel stated that he had no objections, therefore affirmatively waiving the argument for appeal."); *State v. Ponce*, 8th Dist. Cuyahoga No. 91329, 2010-Ohio-1741, ¶ 42 ("He waived any objection to the tapes, however, because during trial, defense counsel stated that he had no objection to the tapes being put into evidence.").

{¶ 23} But as Justice Cook laments in her dissenting opinion in *McKee* "[w]hile waiver and forfeiture are not the same, courts 'have so often used them interchangeably that it may be too late to introduce precision.'" *Id.* at fn. 3, quoting *Freytag v. Commr. of Internal Revenue*, 501 U.S. 868, 894, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), fn. 2 (Scalia, J., concurring). The conflation of these terms has led courts to engage in

plain-error analyses where none was warranted. *See, e.g., State v. Jackson*, 92 Ohio St.3d 436, 438, 751 N.E.2d 946 (2001) ("Defense counsel did not object, and in fact expressly stated that he had no objection to their presence. Therefore, since defense counsel acquiesced to the alternate jurors' presence in deliberations, the alleged error is subject to plain error analysis."); *State v. Osborne*, 6th Dist. Huron No. H-96-013, 1997 WL 243575, *6 (May 9, 1997) ("[A]t the close of the state's case, appellant ultimately stated that he had no objections to the admission of the photos from the 1995 lineup. Therefore, appellant has waived this issue on appeal, unless the error, if any, rises to the level of plain error.").

{¶ 24} Even if we were to apply a plain-error analysis, Fitts's challenge to the admission of the audio and video recordings would fail. Plain error is error that affects substantial rights. Crim.R. 52(B). In determining whether plain error occurred, we must examine the alleged error in light of all of the evidence properly admitted at trial. *State v. Hill*, 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001). Plain error should be found "only in exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "Reversal is warranted only if the outcome of the trial clearly would have been different absent the error." *Id.,* citing *Long* at paragraph two of the syllabus.

{¶ 25} Ohio courts have routinely recognized that "audio recordings of actual drug transactions are not hearsay, and * * * the introduction of such recordings does not violate the confrontation clause." *State v. Ward*, 3d Dist. Seneca No. 13-11-17,

2012-Ohio-988, ¶ 45. *See also State v. Hill*, 5th Dist. Stark No. CA-8094, 1990 WL 237485, * 4 (Dec. 31, 1990) ("[I]ntroducing such tapes does not violate the Confrontation Clause or any evidence rules governing hearsay. Such statements are merely necessary to establish the context of the defendant's statements and responses, and therefore not offered to prove the truth of the matter asserted."); *State v. Martin*, 5th Dist. Delaware No. 19 CAA 01 0004, 2019-Ohio-4931, ¶ 14-18; *State v. Oglesby*, 6th Dist. Erie No. E-96-082, 1999 WL 1022869, * 1 (Nov. 12, 1999); *State v. Kelley*, 903 N.E.2d 365, 2008-Ohio-6598, ¶ 13 (7th Dist.). The trial court did not err in admitting the audio and video recordings of the drug transactions.

2. The Text Messages

{¶ 26} Fitts also challenges the trial court's decision admitting evidence of his text messages with M.T. and insists that the state failed to prove that a conspiracy existed between Fitts and M.T. such that Evid.R. 801(D)(2)(e) would allow admission of those statements. The state counters that evidence of the recordings and messages were properly admitted because they were non-testimonial in nature and, therefore, not subject to the protections of the confrontation clause, and it maintains that they were properly found to be statements of a co-conspirator that were admissible under Evid.R. 801(D)(2)(e). The state also argues that Fitts failed to preserve this issue for appeal because he did not object when the officers testified about the content of the text messages; rather he waited to register an objection until the state moved for the admission into evidence of the copies of the text messages.

{¶ 27} The trial court relied on Evid.R. 801(D)(2)(e) in admitting M.T.'s statements. Evid.R. 801(D)(2)(e) provides that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and the statement is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." The court concluded that M.T. was engaged in a conspiracy with Fitts to sell and purchase cocaine.

{¶ 28} We do not agree with the trial court's conclusion. As concluded by a number of federal courts applying the analogous federal rule, a confidential informant is not a co-conspirator for purposes of Evid.R. 801(D)(2)(e). *See United States v. Felton*, 908 F.2d 186, 188 (7th Cir.1990) ("Because Cargill was a confidential informant, not a co-conspirator, his statement was not admissible as an admission of a party opponent pursuant to Fed.R.Evid. 801(d)(2)(E)."); *Boykins v. United States*, M.D. Ala. No. 2:11cv174–WHA, 2013 WL 870515, *4 (Feb. 13, 2013), *report and recommendation adopted,* M.D. Ala. No. 2:11cv174–WHA, 2013 WL 870670 (Mar. 7, 2013) ("[T]he confidential informant was not a coconspirator * * *."); *United States v. Fassnacht*, N.D.Ill. No. 01 CR 0063, 2002 WL 63523, *7 (Jan. 15, 2002) ("Because Newell ceased being a co-conspirator at the time he became a government informant, his tape-recorded statements are inadmissible against the defendants if offered to prove the truth of the matter asserted."); *United States v. Saneaux*, 365 F.Supp.2d 493, 500 (S.D.N.Y.2005) ("Neither a confidential informant working with law enforcement nor an undercover law enforcement agent can be regarded in law as a member of a criminal conspiracy.");

29A American Jurisprudence 2d, Evidence, Section 833 ("[T]he statement of a confidential informant is inadmissible under the coconspirator hearsay rule.").

{¶ 29} We, therefore, reject the trial court's reasoning here. Nevertheless, we find that evidence of the text messages between Fitts and M.T. was properly admitted. "A judgment by the trial court which is correct, but for a different reason, will be affirmed on appeal as there is no prejudice to the appellant." *Bonner v. Bonner*, 3d Dist. Union No. 14-05-26, 2005-Ohio-6173, ¶ 18.

{¶ 30} Statements that are nonhearsay "do not implicate the Confrontation Clause." *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, citing *McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, at ¶ 186. Accordingly, "[a] necessary question when evaluating an alleged Confrontation Clause violation is whether the out-of-court statement constitutes hearsay or nonhearsay." *State v. McIntosh*, 4th Dist. Gallia No. 17CA14, 2018-Ohio-5343, ¶ 26. Evid.R. 801(C) defines hearsay 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." Under Evid.R. 801(A), a "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

{¶ 31} Fitts's end of the text messages are admissions by a party-opponent and do not constitute hearsay under Evid.R. 801(D)(2)(a). *See, e.g., United States v. Lewisbey*, 843 F.3d 653, 658 (7th Cir.2016) ("The text messages Lewisbey *sent* are his own statements and as such are excluded from the definition of hearsay by Rule

801(d)(2)(A).”). As for M.T.’s end of the text messages, those text messages are either not “statements” or were not offered for the truth of the matter asserted.

{¶ 32} Most of the messages sent by M.T. can be broken down into three categories: (1) “small talk” initiated for the purpose of reestablishing the relationship between M.T. and Fitts; (2) questions posed to Fitts relating to various aspects of the drug transactions; and (3) details relating to the transactions such as quantity, price, and location of the exchanges.

{¶ 33} M.T. engaged in “small talk” with Fitts in reestablishing their relationship. M.T. told Fitts a number of things about herself, including that her daughter passed away, that her phone broke, and that she is living with her brother. These statements were not offered for the truth of the matter asserted, thus the confrontation clause was not implicated.

{¶ 34} M.T. also asked Fitts numerous questions relating to the details of the transactions, such as “Price still the same?’, “Anyway we can meet in Bradner? At bar?”, “This shit is real right?”. When Fitts did not personally appear for the second exchange, M.T. asked “What was that shit!”, “How do I know who that was?”, “How would you feel if I’d have sent someone for me? You wouldn’t fuck with me anymore….right?????”, and “What was that suppose [sic] to weigh?”. These questions are not “statements.” *See United States v. Ellis*, E.D. Mich. No. 12-CR-20228, 2013 WL 2285457, *2 (May 23, 2013) (“[Q]uestions and commands are not statements covered under the hearsay rule.”). The Sixth Circuit Court of Appeals, applying the analogous

federal rule, explained that "a question is typically not hearsay because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content." *United States v. Wright*, 343 F.3d 849, 865 (6th Cir.2003), citing *Quartararo v. Hanslmaier,* 186 F.3d 91, 98 (2d Cir.1999). M.T.'s questions were not statements, thus the confrontation clause was not implicated.

{¶ 35} Finally, M.T. sent text messages relating to the details of the purchases—telling Fitts how much money she had to spend, assuring him that she was getting the money together, providing the addresses of the meeting spots, advising him of her arrival at the exchange points, complaining that the cocaine she had been given weighed less than what she had paid for. These messages were not admitted to prove the truth of the matter asserted, but rather to explain the course of the events and the effect on Fitts.

{¶ 36} "[T]the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (Internal quotations and citations omitted.) *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 18. To that end, "[a] statement is not hearsay when introduced to show its effect on the listener." *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 122. *See State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 130-132 (finding that the confrontation clause did not apply where statements were admitted to show the effect on the listener and to explain how certain events came to pass).

{¶ 37} In *State v. Crocker*, 4th Dist. No. 14CA3640, 2015-Ohio-2528, 38 N.E.3d 369, ¶ 49-51, the Fourth District held that text messages between the defendant and an unidentified person were not hearsay statements because the challenged evidence was offered to explain the defendant's activities and give context to his responses. Like the messages in *Crocker*, M.T.'s statements in the text messages with Fitts were offered to show the effect on Fitts, to explain the events, and to provide context—they were not offered to prove the truth of the matters asserted. Admission of the text messages, therefore, did not violate Fitts's Sixth Amendment right to confront the witnesses against him.

{¶ 38} Because we find no error in the trial court's admission into evidence of the audio and video recordings and copies of the text and Facebook messages, we find Fitts's first assignment of error not well-taken.

B. Crim.R. 29 Motion for Acquittal

{¶ 39} In his second assignment of error, Fitts argues that the trial court erred in denying his Crim.R. 29 motion for acquittal. He contends that "police officers could not identify Appellant at either of the first two prearranged drug buys" and "could only testify that Appellant was present at the third drug buy." Accordingly, he claims, the state failed to present sufficient evidence of each of the essential elements of the offenses.

{¶ 40} A motion for acquittal under Crim.R. 29(A) challenges the sufficiency of the evidence. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39. The denial of a motion for acquittal under Crim.R. 29(A) "is governed by the same

standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 41} Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In reviewing a challenge to the sufficiency of evidence, "[t]he 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." (Internal citations omitted.) *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court will not weigh the evidence or assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

{¶ 42} It is well-established in Ohio that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. While the state may not have offered direct evidence that Fitts committed the offenses of which he was convicted, it presented circumstantial evidence.

{¶ 43} With respect to the first buy, Fitts in his text messages provided updates as he was on his way to meet M.T. When he arrived at the bar, he told M.T. that he was in a maroon car. Officer Broshious saw M.T. walk over to a maroon car. When M.T. and the officers reconvened, she no longer had the money provided to her for the drug buy, and she had in her possession a substance that was confirmed to be cocaine.

{¶ 44} With respect to the second buy, M.T. can be heard on the audio recording asking the driver where Memphis was and the driver assured M.T. that he had been "running for him for a while now." She also confronted Fitts via text messaging, expressing her dissatisfaction that he had sent somebody in his place. Fitts responded by explaining that he had sent his runner. M.T. received cocaine during this exchange with the man that Fitts described as his runner.[2]

{¶ 45} And with respect to the third buy, the officers testified that they saw the backseat, driver-side passenger get out of the car and go to M.T.'s window. When the officers approached the silver Durango, Fitts was in the back, driver-side passenger seat. Cash with the serial numbers matching the buy money was found within Fitts's reach. And officers called the phone number taken from M.T.'s text messages, which rang to Fitts's phone. In addition to this, M.T. was in possession of cocaine that she did not have before interacting with the man at her window.

{¶ 46} In sum, the state presented sufficient evidence, albeit circumstantial, that Fitts sold cocaine to M.T., therefore, the trial court did not err in denying his Crim.R. 29 motion. We find Fitts's second assignment of error not well-taken.

C. Manifest Weight of the Evidence

{¶ 47} In his third assignment of error, Fitts argues that his convictions are against the manifest weight of the evidence. In support of this argument, he relies on the

[2] This transaction formed the basis for Fitts's complicity conviction.

arguments advanced in support of his first and second assignments of error. He adds that "the jury's verdict was based upon the nature of the charges against him and the general societal affect [sic] of illegal drugs within the common, shared experience of the jurors," and that "the jurors may have improperly based their verdict on considerations of sympathy for the deceased confidential informant."

{¶ 48} When reviewing a claim that a verdict is against the manifest weight of the evidence, the appellate court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way in resolving evidentiary conflicts so as to create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We do not view the evidence in a light most favorable to the state. "Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson,* 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15, citing *Thompkins* at 388. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 49} We have already addressed the arguments in support of Fitts's first and second assignments of error. Turning to the new arguments he makes, Fitts does not explain the basis for his claim that societal concerns about illegal drug use impacted the jury's verdict. The state never remarked on the societal effect of the crimes in either its

opening statement or in its closing argument, so there is nothing to suggest that the jury's verdict was a product of any such concern.

{¶ 50} With respect to sympathy for the confidential informant, the state commented in its opening statement that M.T. would not be there to testify because she "passed away in an accidental house fire." In its closing argument, it commented that "it would have been great if [M.T.] could have been here and she could have testified, * * * [b]ut she's not." These statements merely explained the absence of a witness that the jury may have otherwise expected to testify. There was nothing inflammatory about the state's explanation for her absence, and no basis for us to conclude that sympathy for M.T. played any role in the jury's verdict.

{¶ 51} We find Fitts's third assignment of error not well-taken.

D. Costs

{¶ 52} In his fourth assignment of error, Fitts argues that the trial court erred by imposing the costs of confinement, attorney fees, and costs of prosecution without considering his current or future ability to pay such costs. Our standard of review on this issue is whether the imposition of costs was contrary to law. R.C. 2953.08(A)(4) and (G)(2)(b); *State v. Farless*, 6th Dist. Lucas Nos. L-15-1060 and L-15-1061, 2016-Ohio-1571, ¶ 4, citing *State v. Collins*, 2015-Ohio-3710, 41 N.E.3d 899, ¶ 30 (12th Dist.) ("An appellate court may not modify a financial sanction unless it finds by clear and convincing evidence that it is not supported by the record or is contrary to law.").

{¶ 53} Fitts's challenge to the imposition of costs is perplexing for two reasons. First, with respect to attorney fees and costs of confinement, the trial court judgments do not purport to impose such costs—the trial court judgments state only that Fitts "shall pay the outstanding costs of this prosecution." In fact, Fitts explicitly acknowledges that the court did not impose the costs of confinement ("[T]he trial court's order does not specify that Appellant pay the costs of confinement * * *."). It is unclear why he argues error in the imposition of costs that were never imposed.

{¶ 54} Second, with respect to costs of prosecution, R.C. 2947.23(A)(1)(a) provides that "[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution * * * and render judgment against the defendant for such costs." As we have repeatedly acknowledged, the trial court is obligated to impose the costs of prosecution without first finding that the defendant is able to pay such costs. *See State v. Trimpe*, 6th Dist. Wood No. WD-18-048, 2019-Ohio-3017, ¶ 29; *State v. Dotson*, 6th Dist. Wood No. WD-15-060, 2016-Ohio-8085, ¶ 23; *State v. Tucker*, 6th Dist. Wood No. WD-16-063, 2018-Ohio-1869, ¶ 37; *State v. Hughes*, 6th Dist. Wood No. WD-16-056, 2018-Ohio-1237, ¶ 64. Again, Fitts acknowledges this point in his brief ("[U]nder R.C. 2947.23, absent a waiver, the trial court is required to assess court costs in every case.").

{¶ 55} Because the court did not impose the costs of confinement and attorney fees, and because it was obligated to impose the costs of prosecution without finding that Fitts was able to pay, we find Fitts's fourth assignment of error not well-taken.

III. Conclusion

{¶ 56} As to Fitts's first assignment of error, defense counsel acceded to the admission into evidence of the video and audio recordings of the drug transactions, and even if she had not, courts routinely hold that such recordings are admissible and do not violate the confrontation clause. Admission of the text messages did not violate the confrontation clause because the messages that Fitts sent were admissions by a party-opponent, and texts that M.T. sent were either questions—and, therefore, not hearsay—or statements not offered for the truth of the matters asserted.

{¶ 57} As to his second assignment of error, the state presented circumstantial evidence that Fitts sold cocaine to M.T. on three occasions.

{¶ 58} As to his third assignment of error, there is nothing in the record to suggest that the jury's verdict was the result of its concern over the general societal effect of illegal drugs or sympathy for the deceased confidential informant. The verdict was not against the manifest weight of the evidence.

{¶ 59} And as to his fourth assignment of error, the court did not impose the costs of confinement and attorney fees, and it was obligated to impose the costs of prosecution without finding that Fitts was able to pay.

{¶ 60} We find Fitts's four assignments of error not well-taken and affirm the November 19, 2018 judgments of the Wood County Court of Common Pleas. Fitts is ordered to pay the costs of this appeal under App.R. 24.

Judgments affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Christine E. Mayle, J.
CONCUR.

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JUDGE