

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

State of Ohio

Court of Appeals No. OT-12-032

Appellee

Trial Court No. 11-CR-101

v.

Daniel Washington

DECISION AND JUDGMENT

Appellant

Decided: March 7, 2014

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Geoffrey L. Oglesby, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Daniel J. Washington, appeals his convictions, following a jury trial in the Ottawa County Court of Common Pleas, for trafficking in drugs, possession of drugs, tampering with evidence, and child endangering, with a criminal forfeiture

specification in regard to \$7,060. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} On August 29, 2011, the Ottawa County Grand Jury issued an indictment, charging appellant with trafficking in drugs, a violation of R.C. 2925.03(A)(2), a felony of the first degree (Count 1); possession of drugs, a violation of R.C. 2925.11(A), a felony of the first degree (Count 2); tampering with evidence, a violation of R.C. 2921.12(A)(1), a felony of the third degree (Count 3); and child endangering, a violation of R.C. 2919.22(A), a misdemeanor of the first degree (Count 4). Both Count 1 and Count 2 contained criminal forfeiture specifications seeking \$7,060 in U.S. currency.

{¶ 3} A jury trial was held wherein the state presented the following testimony and evidence.

{¶ 4} One August morning in 2011, while driving westbound on State Route 2 in Ottawa County, an Ohio State Highway Patrol Trooper, Timothy Grimm, observed a speeding car traveling eastbound on the same roadway. Trooper Grimm activated his radar and clocked the car at 70 m.p.h. in a zone where the posted lawful speed limit was 55 m.p.h. The trooper made a U-turn in the roadway. As he was making his U-turn, the trooper observed the car make a right turn onto Benton-Carroll Road. As Trooper Grimm turned onto Benton-Carroll Road, he observed “a white object” come out the passenger window of the car and strike the pavement. After the object struck the pavement, the car “took off at a high rate of speed.” Trooper Grimm followed the car south on Benton-Carroll Road. Trooper Grimm indicated that while he was driving south both he and the

car he was following reached speeds of over 100 m.p.h. After a short period of time, Trooper Grimm activated his emergency lights.

{¶ 5} The car pulled to the side of the road. Trooper Grimm approached and made contact with the driver, appellant Daniel J. Washington. Appellant's girlfriend was in the front passenger seat. The couple's three-month-old child was in a safety seat in the right rear of the vehicle. When asked where he was headed, appellant indicated that he was traveling to Cedar Point, an Erie County amusement park. Recognizing that appellant had made a wrong turn, Trooper Grimm instructed appellant to return to State Route 2, turn right, and follow the signs to the amusement park. After issuing a citation for speed, Trooper Grimm allowed appellant to leave the scene. It was 7:58 a.m.

{¶ 6} When asked whether he questioned appellant about what had been dropped out of the car's window, Trooper Grimm admitted that he did not ask about the "white object" during the traffic stop. Instead, when the stop concluded, he returned to the portion of Benton-Carroll Road where the object had been dropped. Trooper Grimm explained:

After I had cleared from the stop, I checked the area for approximately ten minutes driving slowly down the road, checking the edge line of the roadway. If I saw anything, I would get out and check it real quick. I checked all the way up to the area where I thought that the item would have come out of the vehicle.

After that, after about ten minutes of checking the area, I went and resumed my regular patrol of the area on State Route 2 at the time.

{¶ 7} At approximately 8:30 a.m., as Trooper Grimm drove westbound on State Route 2, he observed appellant's car driving eastbound, just west of Benton-Carroll Road. The trooper became suspicious because appellant had not followed his directions to the amusement park. Trooper Grimm explained,

Based off my suspicion before that I saw something come out of the vehicle, I was suspicious that the vehicle might return to Benton-Carroll Road if they had thrown or something had come out of the vehicle that they would return to try to retrieve it.

{¶ 8} Trooper Grimm made a U-turn on State Route 2. Just as he suspected, appellant did turn south onto Benton-Carroll Road. He then observed appellant traveling "at a very slow rate of speed * * * no more than five miles per hour." As Trooper Grimm turned onto Benton-Carroll Road, appellant sped up to the posted speed limit.

{¶ 9} Trooper Grimm activated his lights in the area appellant had slowed down, the same area he had initially witnessed something come out of appellant's passenger window. The trooper got out of his patrol car and began searching the roadway once again. It was then that Trooper Grimm found what he believed to be "several large rocks of crack cocaine." Wearing a disposable glove, Trooper Grimm picked up several pieces of the substance and placed the pieces in a plastic evidence bag. Trooper Grimm contacted dispatch and requested assistance from surrounding law enforcement agencies.

{¶ 10} At 10:17 a.m., on his way back to the post with the evidence he had collected from the roadway, Trooper Grimm observed appellant traveling west on State Route 2, east of Benton-Carroll Road. The trooper followed appellant, one vehicle back, into Lucas County. Once the requested backup arrived, the trooper initiated a second traffic stop. This time, when asked where he was headed, appellant indicated “he was having issues and was just out for a drive.” The vehicle was searched. Inside a purse in the front passenger seat, troopers located four bundles of U.S. currency totaling \$7,000. The troopers also located \$60 in the visor just above the driver’s seat, and a “metal [marijuana] grinder” in the rear seat of the vehicle. No crack cocaine was found in the vehicle or on any of its occupants.

{¶ 11} Appellant and his girlfriend were arrested. The child was taken into protective custody and the vehicle was towed to a patrol station and secured. Trooper Grimm testified that when he questioned appellant about the money, appellant asserted that the money belonged to him and that he had won it in a “settlement.”

{¶ 12} Appellant and his girlfriend were driven to a substation for the Lucas County Sheriff’s Department. Three Ohio Highway Patrol units were awaiting their arrival. Trooper Michael Capizzi and Sergeant Scott Wyckhouse counted the currency. A canine sniff test was conducted by Trooper Stacey Arnold. The test was observed by Trooper Grimm and described by him as follows:

There were five mailing boxes, three of which were empty. One had uncirculated money and one had the money that was seized. The boxes were placed in random locations, unknown to the canine handler.

The dog checked each of the boxes, stood over the one longer than the other ones, but didn't fully indicate to the box and continued on.

It went to the box that had the money that was seized from [Washington] and the canine positively indicated to the box based on the canine handler's statement to me.

{¶ 13} The canine handler, Trooper Arnold, explained that she had been working with her dog for over two years and that the dog was trained to detect "cocaine, meth, heroine, marijuana and then their derivative." After observing her dog's behavior during the test, Trooper Arnold concluded that the seized currency contained one of the odors that her dog had been trained to detect.

{¶ 14} Trooper Arnold testified that her dog had gone through extensive training. When asked the amount of drug her dog could detect, Trooper Arnold explained:

A. I train with all different amounts. It could be, I train with a gram of a substance. I train with 250 pounds of a substance, bulk amount. It varies.

Q. So it is really that odor that is on something and not necessarily the drug, in this instance, the money?

A. Correct.

Q. It doesn't have to be dipped in the drug or saturated, but on the table with some drugs?

A. At some point, I would say that the U.S. currency was exposed to some type of drug, yes.

Q. So it had to have been exposed.

A. Yes.

Q. Can the dog detect the odor of drugs on one bill or does he need many, many bills in order to detect that odor?

A. I would say odor is odor. I have never placed just one single bill out.

Q. But if there was one single bill in this room this morning, you are confident of that?

A. I trust my dog's ability, yes.

Q. That doesn't necessarily mean that all the money in the room has been exposed to drugs?

A. Correct.

{¶ 15} Trooper Grimm testified that the substance found on the roadway was sent to a crime laboratory for analysis. The laboratory's criminologist testified that the substance tested positive for crack cocaine and weighed 77.45 grams.

{¶ 16} Video footage from Trooper Grimm’s cruiser was shown to the jury. The trooper testified that a still image from the footage taken moments before the first stop depicts the white substance he later found and identified as crack cocaine.

{¶ 17} The jury found Washington guilty of all four counts in the indictment and found the currency subject to forfeiture. Washington was sentenced to five years in prison for Count 1 (trafficking in drugs), five years in prison for Count 2 (possession of drugs), twelve months in prison for Count 3 (tampering with evidence), and 120 days in the Ottawa County Detention facility for Count 4 (child endangering). The court ordered the sentences for Counts 1, 2, and 4 be served concurrently to each other and consecutively to the sentence for Count 3. Washington was ordered to pay a \$10,000 fine. The \$7,060 found in the vehicle was forfeited.

{¶ 18} Appellant timely appealed and raises six assignments of error for our review.

First Assignment of Error

THE TRIAL WAS CONDUCTED IN A MANNER SO AS TO
DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

{¶ 19} In his first assignment of error appellant asserts that the presence of a uniformed deputy in the courtroom during his jury trial “gave the appearance that defendant [was] dangerous” and that the presumption of his innocence was lost. We disagree.

{¶ 20} In *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), the United States Supreme Court held that the presence of uniformed armed security forces in a courtroom does not violate a defendant's constitutional right to a fair trial. *Id.* Here, there is nothing in the record to suggest that a uniformed deputy would have created an impression in the minds of the jury that appellant was dangerous. Thus, appellant's first assignment of error is not well-taken.

Second Assignment of Error

APPELLANT WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION BY PROSECUTORIAL MISCONDUCT DURING TRIAL, INCLUDING OPENING AND CLOSING STATEMENTS.

{¶ 21} In his second assignment of error appellant asserts that the state engaged in prosecutorial misconduct when the prosecutor suggested that the “‘odor’ smelled by the dog was ‘crack cocaine’” both during opening statement and again during the closing argument.

{¶ 22} “The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused.” *State v. Eley*, 77 Ohio St.3d 174, 187, 672 N.E.2d 640 (1996), *overruled on other grounds*; *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990).

{¶ 23} Appellant first points to the following remarks made by the prosecutor during opening statement.

The dog skipped over the empty box and didn't indicate at all. The dog made an indication at the box that contained the money that was known to not have any drug residue on it, but didn't hit on it and indicate that it was money with drug residue.

When the dog got to the box with the money from Mr. Washington's car, the dog scratched at the box and sat in front of the box, which indicated to the trooper who is trained in these exercises, that this money had crack cocaine residue on it.

{¶ 24} Next, appellant points to the following remarks made by the prosecutor during closing arguments. He asserts that the prosecutor erred because "there was no connection shown of how crack cocaine would somehow come in contact with 'money.'"

They do a drug test on it with the drug dog. You heard testimony from Sergeant Wyckhouse and Trooper Arnold. They testified to what they did with the money. They had a controlled environment where they had a number of empty boxes. They had one box with some money that they knew had not been contaminated with any drugs, and then they had the money from Mr. Washington's car. Sure enough, the dog that was trained to detect narcotics indicated at the box where the money from Mr. Washington's car, where that money was.

That signified that that money had been in contact with drugs. Why was that money in contact with drugs? Well, I ask you to use your common sense. That money was in contact with drugs because Mr. Washington had been trafficking. That is why he had such a large amount of money. He had been trafficking. He either had sold it, was about to sell it. There was selling of drugs going on, and that is why that money had been in contact with drugs.

{¶ 25} We note that prior to opening statements, the trial court informed the jury that the statements were not evidence, but an opportunity for the parties to “outline what they expect their evidence to be.” The trial court further stated the opening statements “are simply a preview of the claims that each party has and they are designed to help you follow the evidence as it is later presented from the witness stand.” Similarly, the court stressed that closing arguments were “designed to assist you, but they are not evidence.”

{¶ 26} Reviewing the state’s opening statement in its entirety, we find that appellant was not prejudiced because the remarks were drawn from an inference that a dog trained to detect the odor of cocaine had indicated on currency that was found in a car from which crack cocaine had been dropped. Reviewing the state’s closing argument in its entirety, we find that appellant was not prejudiced by the prosecutor’s suggestion that the dog had identified the odor of crack cocaine on the money because the evidence demonstrated that the dog was trained to detect “cocaine, meth, heroine, marijuana and

then their derivative[s].” Accordingly, we find appellant’s second assignment of error not well-taken.

Third Assignment of Error

THE VERDICT WAS INSUFFICIENT AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 27} In his third assignment of error, appellant contends that his convictions are not supported by sufficient evidence and are also against the manifest weight of the evidence.

{¶ 28} “Sufficiency and manifest-weight challenges are separate and legally distinct determinations.” *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 17 (2d Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). “A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law.” *State v. Shaw*, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ¶ 28, citing *Thompkins* at 387. When reviewing for the sufficiency of the evidence, an appellate court’s function is to “examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. “The 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.” *Id.*

{¶ 29} “A manifest weight of the evidence challenge contests the believability of the evidence presented.” *State v. Wynder*, 11th Dist. Ashtabula No. 2001-A-0063, 2003-Ohio-5978, ¶ 23. When determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences drawn from it, consider the witnesses’ credibility, and decide whether in resolving any 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. Prescott*, 190 Ohio App.3d 702, 2010-Ohio-6048, 943 N.E.2d 1092, ¶ 48 (6th Dist.), citing *Thompkins* at 387.

{¶ 30} “Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency.” *State v. Vencill*, 10th Dist. Franklin No. 11AP-1050, 2012-Ohio-4419, ¶ 9 (citations omitted).

Possession of Drugs

{¶ 31} Appellant was convicted of possession of drugs, a violation of R.C. 2925.11(A). R.C. 2925.11(A) provides that “[n]o person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.” Crack cocaine is a controlled substance. “[P]ossess” means “having control over a thing or substance, but

may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.” R.C. 2925.01(K). “[T]he element of possession may be established as actual physical possession, or constructive possession where the contraband is under the defendant’s dominion or control.” *State v. Perry*, 8th Dist. Cuyahoga No. 84397, 2005-Ohio-27, ¶ 70, citing *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. Constructive possession of drugs may be inferred from “the surrounding facts and circumstances, including the defendant’s actions.” *State v. Pilgram*, 184 Ohio App.3d 675, 2009-Ohio-5357, 922 N.E.2d 248, ¶ 28 (10th Dist.).

{¶ 32} The evidence presented by the state is sufficient to tie appellant to the crack cocaine. Trooper Grimm witnessed a white object come out appellant’s vehicle before pulling appellant over for speeding. During the traffic stop, appellant indicated that he was driving his girlfriend and their infant child to an Erie County amusement park. A short time later, Trooper Grimm witnessed appellant driving very slowly in the area the white object had previously been discarded. Upon checking the area, Trooper Grimm found 77.45 grams of crack cocaine. Later, Trooper Grimm witnessed appellant again driving in the opposite direction of appellant’s stated destination. Finally, during a sniff test, a dog trained to identify cocaine and other controlled substances indicated on money that appellant claimed he had won in a “settlement.”

{¶ 33} Considering all this evidence, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. A reasonable fact finder could have

inferred, and found beyond a reasonable doubt, that appellant knowingly possessed the crack cocaine before it was discarded from the window of appellant's vehicle.

Appellant's conviction for possession of drugs is not against the manifest weight of the evidence. Appellant's third assignment of error is not well-taken as to the possession of drugs conviction.

Trafficking in Drugs

{¶ 34} The jury found appellant guilty of trafficking in drugs, a violation of R.C. 2925.03(A)(2). The jury further found that the amount of crack cocaine involved "equals or exceeds twenty five grams but is less than one hundred grams." R.C. 2925.03(A)(2) provides that no person shall

Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶ 35} Appellant argues that there was no evidence presented that the crack cocaine was "intended for sale or resale." In response, the state asserts "[g]iven the amount of drugs, the amount of cash on hand, and the lack of any evidence that the drugs would be for personal use, it is reasonable to believe he possessed the drugs or was transporting the drugs for purposes of sale."

{¶ 36} Circumstantial evidence has long been used to successfully support drug trafficking convictions. “Circumstantial evidence is the ‘proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind.’” *Toledo v. Thompson-Bean*, 173 Ohio App.3d 566, 2007-Ohio-4898, 879 N.E.2d 799, ¶ 30 (6th Dist.).

{¶ 37} Although nothing in the state’s case directly proved that appellant was trafficking in crack cocaine, the state’s evidence could well have convinced the jury that “the application of various facts formed a larger picture that, when viewed as [a] whole, made a compelling case of [appellant’s] guilt.” *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 19. As detailed above, a large quantity of crack cocaine was dropped from appellant’s vehicle moments before a traffic stop was initiated but after appellant was clocked for speeding down a rural highway. A short time after the traffic stop, appellant twice returned to the vicinity of the drop despite having told the officer he was headed to a nearby amusement park. Once the officer recovered the crack cocaine and witnessed appellant’s behavior, a search of appellant’s vehicle yielded \$7,060 in U.S. currency.

{¶ 38} While the evidence is circumstantial, circumstantial evidence has the same probative value as direct evidence. *State v. Nicely*, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988). “[C]ircumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Heinisch*, 50 Ohio St.3d 231, 238, 553 N.E.2d 1026 (1990). “[N]umerous courts

have determined that items such as plastic baggies, digital scales, and large sums of money are often used in drug trafficking and may constitute circumstantial evidence of conduct proscribed by R.C. 2925.03(A)(2).” *State v. Forte*, 8th Cuyahoga Dist. No. 99573, 2013-Ohio-5126, ¶ 10, citing *State v. Rutledge*, 6th Dist. Lucas No. L-12-1043, 2013-Ohio-1482, ¶ 15 (collecting cases); *State v. Kutsar*, 8th Dist. Cuyahoga No. 89310, 2007-Ohio-6990, ¶ 20 (same).

{¶ 39} After viewing the evidence adduced at trial in a light most favorable to the prosecution, a rational trier of fact could find the sheer quantity of crack cocaine coupled with the large amount of cash found in appellant’s car to be wholly consistent with the transportation of crack cocaine for sale. Appellant’s third assignment of error is not well-taken as to the trafficking in drugs conviction.

Tampering with Evidence

{¶ 40} Appellant was convicted of tampering with evidence, a violation of R.C. 2921.12(A)(1). R.C. 2921.12(A) provides, in relevant part:

No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following: (1) Alter destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

{¶ 41} As stated above, Trooper Grimm clocked appellant speeding on State Route 2. After he turned around to follow appellant, appellant turned onto Benton-

Carroll Road. Trooper Grimm then observed “a white object” come out of the passenger window of appellant’s car and strike the pavement. The state argues that this evidence demonstrates that appellant knew he was about to be pulled over for speeding and was attempting to discard evidence of drug possession.

{¶ 42} Upon consideration of the evidence presented at trial, this court finds that there was substantial probative evidence upon which the jury could conclude that all the elements of the offense of tampering with evidence had been proven beyond a reasonable doubt. Appellant’s conviction for tampering with evidence is not against the manifest weight of the evidence. This resolution is also dispositive of appellant’s claim that his conviction for tampering with evidence was not supported by sufficient evidence. Appellant’s third assignment of error is not well-taken as to the tampering with evidence conviction.

Child Endangering

{¶ 43} Appellant was convicted of child endangering, a violation of R.C. 2919.22(A). R.C. 2919.22(A) provides, in relevant part:

No person who is the parent, guardian, custodian, person having custody or control, or a 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, by violating a duty of care, protection, or support.

{¶ 44} “Substantial risk” is defined as “a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain

circumstances may exist.” R.C. 2901.01(A)(8). An essential element of the crime of endangering children under R.C. 2919.22(A) is the existence of the culpable mental state of recklessness. *State v. McGee*, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997), syllabus. R.C. 2901.22(C) provides

A person acts recklessly when, with headless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result, or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶ 45} Viewing the evidence in a light most favorable to the prosecution, we cannot say that the trier of fact clearly lost its way in finding that appellant recklessly created “a substantial risk to the health or safety of the child by violating a duty of care, protection, or support.” The state presented evidence that a significant amount of crack cocaine was dropped from appellant’s car and that that appellant drove at speeds in excess of 100 m.p.h. while being followed by law enforcement. During this time, appellant’s young child was in a car seat in the back seat of the car. Thus, the evidence was sufficient to establish the elements of R.C. 2919.22(A). Further, our review of the evidence and all reasonable inferences drawn from it lead to our conclusion that appellant’s child endangering conviction was supported by the weight of the evidence.

Therefore, appellant's third assignment of error is not well-taken as to the child endangering conviction.

Fourth Assignment of Error

THE TRIAL COURT IMPROPERLY SHIFTED, OR FAILED TO GIVE A PROPER STANDARD, FOR THE BURDEN OF PROOF ON CRIMINAL FORFEITURE ACTION.

{¶ 46} In his fourth assignment of error appellant asserts that the trial court erred when it inserted the "EQUALLY BALANCED" paragraph into its instruction on the possession of drugs forfeiture specification. The court's written jury instructions provided, in relevant part, as follows:

FORFEITURE SPECIFICATION. If your verdict is guilty, you will also separately decide, by the greater weight of the evidence, the specification of criminal forfeiture.

PROPERTY DERIVED FROM PROCEEDS. The state claims that the defendant's right, title and interest in \$7,060 * * * is subject to forfeiture to the State of Ohio. You will return a verdict of forfeiture if you find by the greater weight of the evidence that the right, title or interest in \$7,060 * * * was acquired by the defendant during the period of the commission of possession of drugs, or within a reasonable time thereafter, and there is no likely source for the defendant's right, title or interest in the

\$7,060 * * * other than the proceeds obtained from the commission of possession of drugs.

* * *

PREPONDERANCE OF THE EVIDENCE. Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity.

CONSIDER ALL EVIDENCE. In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that issue regardless of who produced it.

EQUALLY BALANCED. If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the *defendant* has not established such issue.

(Emphasis added).

{¶ 47} Appellant did not object to the jury instruction at trial. Absent plain error, the failure to object to a jury instruction constitutes a waiver of the issue on appeal. *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983), syllabus; Crim.R. 30. “Notice

of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), 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 clearly would have been otherwise.” *Long* at 97.

{¶ 48} We find that it was improper for the trial court to insert the “EQUALLY BALANCED” definition into the criminal forfeiture specification section of the jury instructions. In examining the trial court’s jury instructions we must review the court’s charge as a whole, not in isolation, in determining whether the jury was properly instructed. *State v. Burchfield*, 66 Ohio St.3d 261, 262, 611 N.E.2d 819 (1993).

{¶ 49} Our review of the jury instructions as a whole reveals that the trial court was clear when it explained to the jury that the prosecution bore the burden of proving by the greater weight of the evidence that the right, title, or interest in the currency was acquired by appellant while committing the possession offense, or within a reasonable time thereafter, and that there is no likely source for appellant’s right, title or interest in the currency other than the proceeds obtained from the commission of the offense. The greater weight of the evidence—or preponderance of the evidence—is the appropriate standard for a criminal forfeiture specification. *See* R.C. 2981.04(A).

{¶ 50} Here, when the instructions are read as a whole, the court’s error does not constitute plain error. We do not find that but for the trial court’s error the outcome of the trial would have been any different. *See State v. Henderson*, 6th Dist. Lucas No.

L-80-330, 1981 WL 5775, * 5 (Sept. 4, 1981) (not plain error when trial court failed to give complete instruction on circumstantial evidence), *State v. Davenport*, 5th Dist. Richland No. CA-2851, 1992 WL 274729, * 6 (Sept. 24, 1992) (trial court's improper inference instruction did not constitute plain error). Reversal is not necessary to prevent a manifest miscarriage of justice. Accordingly, appellant's fourth assignment of error is not well-taken..

Fifth Assignment of Error

THE TRIAL COURT ERRED BY ALLOWING VARIOUS STATE WITNESSES TESTIFY ABOUT DRUG DEALERS AND THE REACTIONS OF A DOG TO SUPPORT THE CONVICTION OF THE DEFENDANT.

{¶ 51} In his fifth assignment of error appellant first asserts that the trial court erred by allowing the state to present certain evidence to prove his guilt at trial. In particular, appellant asserts that the following testimony by Sergeant Scott Wyckhouse should have been excluded as unduly prejudicial:

Q. Out of those 20 times, how many times have you seen a dog indicate on a box that had currency in it that you suspected had residue on it?

A. I don't know the percentage exactly, but it is just about every time. There may have been an occasion where there wasn't but typically, the dog alerts to the box that we suspect as drug money.

Q. When you performed this test, is it every time a trooper stops a car and somebody is found to have money?

A. Not just to have money, but that is suspected to be involved with drug activity because, typically, every car we stop, somebody has money in their pocket, so if it is a large amount of U.S. currency that we believe is involved with drug activity, and we have reason to believe that through our suspicion and through the totality of the circumstances, then we would do that.

Q. Explain some circumstances where you have that kind of suspicion.

A. A lot has to do with behavior, people's criminal history, their behavior. There is a lot of different behaviors, people don't make eye contact with you, people driving third party vehicles. Rental vehicles are associated with it a lot of times. Like I said, prior drug arrests. There is just extreme nervousness. Unusual trips, where they are going to, coming from, a lot of it has to do with known drug areas that they are coming to and going from. A lot of times the stories don't add up as to where they are going. A lot of it has to do with the money, too, as to the way it is packaged.

{¶ 52} Our review of Sergeant Wyckhouse's testimony indicates that his job responsibilities include supervising the district's canine handlers. He explained the

training requirements for the state's narcotic-detecting drug dogs. He also explained when and how the highway patrol used the drug dogs, including the standard procedures and controls used in this case. Just prior to the testimony that is the subject of appellant's assignment of error, Sergeant Wyckhouse explained:

A. Every canine handler has approximately a gallon-size bag of shredded U.S. currency that does not have drug odor on it.

That money is shredded money is placed as a control in one of the boxes, so if the canine does the walk around on all five boxes, three being empty, one having shredded currency and one having the suspected drug money in it, that that just shows the difference in the two currencies.

If the dog does not alert to anything at all, there is no odor of narcotic anywhere, if the dog alerts to the box with the suspected money it is, but does not alert to the shredded currency, that just shows that the suspected currency is tainted with drug odor.

* * *

Q. Trooper, can you describe what training you have received to administer this procedure that you testified about?

A. We train with our master dog trainer in Columbus. He puts on a quarterly training. I am required to go every quarter, every three months to go to the training, and he sets the standard for exactly how we are supposed to do this.

My experience just over the past year, I have, with the money seizures that the State Highway Patrol have gotten in our district, I have done this over 20 times in the past year.

Q. How many times total?

A. I have been the kennel control trooper for just about a year now, so probably 20 times, give or take.

{¶ 53} We find no merit in appellant’s argument. The jury was charged with the responsibility of “weighing the credibility and believability of the witnesses and the weight to be given to each testimony to each of the witnesses.” Consequently, we do not agree that the trial court erred by allowing the dog sniff testimony of Sergeant Wyckhouse. Accordingly, appellant’s fifth assignment of error is not well-taken.

Sixth Assignment of Error

TESTIMONIAL EVIDENCE OF A DOG’S REACTION TO SNIFFING MONEY VIOLATES THE SIXTH AMENDMENT’S CONFRONTATION CLAUSE.

{¶ 54} In his sixth assignment of error appellant argues that the dog sniff was testimonial and that because he could not cross-examine the dog, his Sixth Amendment right to confront witnesses against him was violated.

{¶ 55} “The Sixth Amendment to the United States Constitution guarantees an accused the right to confront witnesses against him.” *Crawford v. Washington*, 541 U.S. 36, 54 (2004). This right applies to statements that are testimonial in nature. *Id.* The dog

sniff is not a statement, nor is the dog capable of making a testimonial statement.

Therefore, appellant has no right to cross-examine the dog and his Sixth Amendment right to confront witnesses against him was not violated. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 56} The judgment of conviction of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment 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.

JUDGE

Arlene Singer, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.