

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-210
	:	(C.P.C. No. 08CR-11-8033)
Shamso Jama,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 5, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Kirk A. McVay, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, the State of Ohio ("the State"), appeals from a modified judgment entry of conviction entered by the Franklin County Court of Common Pleas following a remand from this court after we vacated the trial court's issuance of a nunc pro tunc order which purported to modify the court's original verdict entered following a bench trial. The most recent modified judgment entry amended the trial court's finding of guilt for possession of drugs from a felony of the second degree to a felony of the third degree. Because we find said modification to be unsupported by any authority, and thus in error, we reverse.

I. Facts and Procedural History

{¶ 2} On November 12, 2008, defendant-appellee, Shamso Jama ("Jama"), was indicted on the following two charges: (1) Count 1 of the indictment, aggravated

trafficking in drugs, to wit: cathinone, more commonly known as khat,¹ a Schedule I controlled substance, in an amount equal to or exceeding 3,000 grams,² a felony of the first degree; and (2) Count 2 of the indictment, aggravated possession of drugs, to wit: cathinone, more commonly known as khat, a Schedule IV controlled substance, in an amount equal to or exceeding 50 times the bulk amount but less than 100 times the bulk amount, a felony of the second degree.

{¶ 3} A jury-waived trial began on January 20, 2009. Prior to the commencement of the trial, the trial court granted the State's motion to amend the aggravated possession of drugs charge. The amendment changed the name of the drug from cathinone to cathine, thereby properly classifying it as a Schedule IV drug. No other changes were made to the indictment.

{¶ 4} Following the bench trial, the trial judge found appellant not guilty of the aggravated trafficking in drugs offense, but guilty of the aggravated possession of drugs offense. Specifically, the trial court found that "[o]n count two of the indictment, the Court will enter a finding of guilty." (Jan. 23, 2009 Tr. 6.) The court further stated: "So you have been found guilty of aggravated possession of drugs, a felony of the second degree." (Jan. 23, 2009 Tr. 6.) On January 23, 2009, the trial court filed an entry setting forth its verdict. The written verdict stated Jama had been found guilty of "Count Two of the Indictment, to wit: **POSSESSION OF DRUGS**, a Felony of the Second Degree." (Emphasis sic.) (R. 24-25.)

{¶ 5} The case was scheduled for sentencing several times. On August 17, 2009, one day before the scheduled sentencing date of August 18, 2009, trial counsel for Jama filed a "motion for issuance of *nunc pro tunc* order." (Emphasis sic.) In the motion, counsel argued the trial court's January 23, 2009 entry failed to indicate that Jama had been found guilty of the *amended* count two. Jama's counsel further argued the trial court failed to make a finding as to the quantity of drugs at issue, and moved the court to

¹ Khat is the popular name of an exotic plant known as *catha edulis*. It is a shrub grown in countries of Northeastern Africa. Its use is widespread in Somalia. It is typically consumed by chewing the leaves or by brewing it in tea. Fresh khat contains cathinone, a potent psychoactive stimulant, and cathine, a less potent stimulant. See *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639 (10th Dist.). As khat loses its freshness, the cathinone decomposes into the less potent cathine. See *State v. Mohamed*, 10th Dist. No. 08AP-960, 2009-Ohio-6658 (10th Dist.).

² A major drug offender specification was also included with the aggravated trafficking in drugs offense.

find Jama guilty of the amended count two as a felony of the third degree, rather than a felony of the second degree.

{¶ 6} At the sentencing hearing, the trial court clarified that the guilty finding previously entered should have been a finding of guilt as to possession of drugs, rather than to *aggravated* possession of drugs. The trial court went on to grant the motion, reducing the offense from a second-degree felony to a third-degree felony based upon the theory that it had the authority to do so using a nunc pro tunc order. This judgment was journalized on August 21, 2009. The relevant portion of that judgment states as follows:

Prior to the sentencing hearing the Court considered Defendant's Motion for Issuance of a *Nunc Pro Tunc* Order. After consideration of the arguments of counsel and a review of the Transcript of the Proceedings, the Court amended the finding of guilty to **GUILTY to POSSESSION OF DRUGS IN AN AMOUNT GREATER THAN BULK BUT LESS 50 TIMES THE BULK**, in violation of R.C. 2925.11, a Felony of the Third Degree.

(Emphasis sic.) (R. 61, 63, 65-67.)

{¶ 7} The trial court imposed a sentence which included community control, but failed to provide the required findings to rebut the presumption for prison on a third-degree felony drug offense. The State filed a combined appeal of right and an appeal seeking leave to appeal, asserting two assignments of error. One assignment of error involved the trial court's failure to make the necessary findings for sentencing. The second assignment of error involved the use of the nunc pro tunc order to amend the guilty verdict. Jama also filed an appeal. Jama's assignments of error challenged the trial court's failure to evaluate the credentials of her interpreter and its failure to ensure she received adequate translations. We overruled Jama's two assignments of error. However, we granted the State's leave to appeal, sustained its assignment of error as to the misuse of the nunc pro tunc order, and found its assignment of error on sentencing moot. As a result, we reversed the trial court's judgment, vacated the amended verdict, and reinstated the original verdict of January 23, 2009, in which Jama was found guilty of a second-degree felony. We limited our decision to the improper use of the nunc pro tunc order and expressed no opinion as to whether there could be another procedure used to amend

the original verdict. *See State v. Jama*, 189 Ohio App.3d 687, 2010-Ohio-4739 (10th Dist.) ("*Jama I*").

{¶ 8} Following remand, the trial court held a status conference on October 19, 2010. In order to address Jama's concerns created by the reinstatement of the original verdict, it was agreed that counsel for Jama would file a written motion and the State would have an opportunity to respond, followed by a reply brief filed on Jama's behalf. Jama's counsel further indicated Jama intended to file a motion for new trial. The State objected, stating it did not believe such a motion was the proper method by which to proceed in the case. The trial court reiterated its belief that a method did exist by which it could modify the original guilty finding to one involving a lesser included offense.

{¶ 9} On November 18, 2010, counsel for Jama filed a motion for new trial and/or modification of the verdict, citing Crim.R. 33(A)(4) and (B). The defense argued the verdict was not sustained by sufficient evidence and was contrary to law because the trial court failed to make a specific finding as to the quantity of cathine involved. The defense also argued the motion should be permitted, despite counsel's failure to file it within 14 days of the verdict, due to unavoidable prevention, claiming her original trial counsel were ineffective in discovering the insufficiency of the form of the verdict and that the State's filing of an appeal caused the trial court to lose jurisdiction, thereby preventing it from hearing the motion. The State, on the other hand, argued unavoidable prevention could not be shown for two reasons. First, the State asserted the purported flaw in the verdict could have easily been raised within 14 days and counsel's ineffectiveness was not a basis for unavoidable prevention. Second, the State submitted it did not file its appeal until well after the 14-day time frame had expired.

{¶ 10} On February 3, 2011, a hearing was held to address Jama's motion for new trial. Defense counsel reiterated the arguments made in Jama's brief, while the State continued to argue that the motion was procedurally improper. The trial court stated it had reviewed the testimony in the case, specifically the testimony of the chemist who weighed and analyzed the khat. The trial court determined the khat at issue weighed 4,634.9 grams, which was less than 50 times the bulk amount needed to constitute a felony of the second degree (i.e., 6,000 grams or more). Concluding that the evidence in the case did not support a conviction for possession of drugs as a felony of the second

degree, the trial court announced it was correcting its error and finding Jama guilty of a felony of the third degree. The State objected to the trial court's "amendment" of the verdict.

{¶ 11} The trial court further stated it was denying the motion for new trial, but it was modifying the guilty verdict in order to conform to the evidence. In proceeding to sentencing, the trial court again placed Jama on community control for three years. The trial court did not state any sentencing findings to overcome the presumption for prison for the third-degree felony drug offense.

{¶ 12} On February 3, 2011, the trial court entered a modified judgment entry. The relevant portion of that entry reads as follows:

On February 3, 2011, the Defendant appeared for resentencing. * * * The Court GRANTED the modification of the Judgment of Guilty to conform to the evidence. Defendant was found GUILTY to the lesser included offense of Count Two of the Indictment, to wit: AGGRAVATED POSSESSION OF DRUGS IN AN AMOUNT LESS THAN 50 TIMES THE BULK AMOUNT, in violation of R.C. 2925.11, a *Felony of the Third Degree*.

(Emphasis sic.) (R. 102, 104, 105.)

II. Assignments of Error

{¶ 13} On March 3, 2011, the State filed the instant combined appeal of right as well as an appeal seeking leave. We granted the State's request for leave. The State now raises the following five assignments of error for our review:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL, AS A PRESUMPTION OF PRISON APPLIED, AND THE COURT FAILED TO MAKE THE REQUISITE STATUTORY FINDINGS TO OVERCOME THE PRESUMPTION.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING A "MODIFICATION" OF THE VERDICT WHEN THE COURT STATED NO STATUTORY OR RULE BASIS FOR UNDERTAKING SUCH AN ACTION.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING A "MODIFICATION" OF THE VERDICT WHEN THE COURT DENIED THE SOLE MOTION THEN PENDING BEFORE IT AND WHEN THAT "MOTION FOR NEW TRIAL" COULD NOT BE CONSIDERED BECAUSE IT WAS UNTIMELY.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING A "MODIFICATION" OF THE VERDICT WHEN RES JUDICATA BARRED ANY CLAIM THAT THE VERDICT WAS INSUFFICIENT IN FORM.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING A "MODIFICATION" OF THE VERDICT BASED ON A REVIEW OF THE EVIDENCE AS TO DRUG WEIGHT, AS THE COURT HAD NO JURISDICTION TO CONDUCT SUCH REVIEW, IT FAILED TO STATE THE STANDARD OF REVIEW IT WAS APPLYING, AND THE COURT MISSTATED THE TESTIMONY AND EVIDENCE.

{¶ 14} For ease of discussion and analysis, we shall address the State's assignments of error out of order. Additionally, because some of the assignments of error are interrelated, we shall address them together.

A. The State's Second, Third, and Fifth Assignments of Error—Modification of the Verdict Was Improper Due To An Untimely Motion for New Trial and Lack of Authority Supporting Review and Amendment

{¶ 15} In its second and third assignments of error, the State argues the trial court erred in modifying the verdict because it failed to provide any authority to support its action and because the untimely motion for new trial, which it denied, could not provide a basis for modifying the verdict. Similarly, in its fifth assignment of error, the State argues the trial court erred in modifying the verdict based upon a review of the evidence regarding the weight of the drugs at issue because it lacked jurisdiction to conduct such a review. The State further argues the trial court erred in misstating the testimony and evidence and in failing to reference the standard of review it applied.

{¶ 16} We agree that the trial court erred in modifying the verdict. We begin our analysis by looking at Crim.R. 33, which addresses motions for new trial.

1. Motion for New Trial

{¶ 17} Pursuant to Crim.R. 33(B), an application for a new trial must be made by motion within 14 days after the verdict was rendered or, as in the instant case, within 14 days after the decision of the court in a jury-waived trial, unless the defendant shows by clear and convincing evidence that she was "unavoidably prevented" from filing her motion for new trial. If such a demonstration is made and an order is issued, the defendant's motion shall be filed within seven days from the court's order finding that she was unavoidably prevented from filing the motion within the applicable time frame. Crim.R. 33(B).

{¶ 18} Crim.R. 33(A) sets forth several grounds for granting a new trial. Under Crim.R. 33(A)(4), a new trial may be granted if the verdict is not sustained by sufficient evidence or if it is contrary to law. If the evidence demonstrates that the defendant is not guilty of the degree of the crime upon which he was convicted, but he is guilty of a crime of a lesser degree or of a lesser included offense, the court may modify the verdict without ordering a new trial and may sentence accordingly.

{¶ 19} Here, Jama's motion for new trial was filed on November 18, 2010. The original verdict was handed down on January 23, 2009. Jama's motion for new trial was filed more than 20 months after the 14-day time frame, and was clearly outside of the time frame established in Crim.R. 33(B). Furthermore, the procedure for establishing unavoidable prevention was not met. Although Jama argued in her motion that she had been unavoidably prevented from filing a timely motion due to prior counsel's ineffectiveness in failing to timely challenge the form of the verdict and by the State's filing of an appeal, neither of these assertions establish unavoidable prevention.

{¶ 20} First, any purported insufficiency with the form of the verdict would have been readily apparent from the beginning, so Jama's delay in addressing it cannot be attributed to unavoidable prevention. In addition, any purported ineffectiveness on the part of trial counsel in not filing a motion for new trial within 14 days of the verdict counts against the defense in establishing unavoidable prevention. *See generally State v. Wilson*, 10th Dist. No. 93AP-732 (Nov. 2, 1993). Finally, the State's filing of its appeal

occurred on September 17, 2009, well after the 14-day time frame and, therefore, it did not interfere with Jama's opportunity to present a timely filing.

{¶ 21} Moreover, the trial court never made a finding of unavoidable prevention or issued an order to that effect, as set forth in Crim.R. 33(B), because Jama failed to properly seek leave before filing her motion and also failed to establish unavoidable prevention, as set forth above. *See State v. Lanier*, 2d Dist. No. 2009 CA 84, 2010-Ohio-2921, ¶ 17 (a defendant may file a motion for new trial along with the request for leave to file said motion, but the court cannot consider the merits of the motion for a new trial until it makes a finding of unavoidable prevention). And, in addition, the trial court specifically stated: "The Court will - - on the motion for new trial, will deny - - it will be denied; however, the Court will grant - - will modify the judgment of guilty to conform to the evidence. And I may wind up rewording this. I'll have to do some research myself." (Feb. 3, 2011 Tr. 16.) Thus, it is apparent the trial court in fact denied Jama's motion.

{¶ 22} We further point out that Jama's counsel conceded at oral argument that the evidence was sufficient to support a conviction for a felony of the second degree. Pursuant to Crim.R. 33(A)(4), a new trial may be granted if the verdict is *not sustained by sufficient evidence* or if it is contrary to law. Therefore, even if Jama were somehow able to overcome the unavoidable prevention hurdle, under the parameters of the rule, because Jama has conceded there was sufficient evidence, if believed, to support a second degree felony offense, Crim.R. 33(A)(4) cannot serve as a basis for modifying the verdict. The rule only provides the court with the authority to modify the verdict if the evidence is insufficient. Under the rule, manifest weight is not considered in a Crim.R. 33 analysis.

{¶ 23} Nevertheless, Jama attempts to argue that it was not error for the trial court to apply a manifest weight analysis in determining the amount of khat possessed by Jama. Jama contends that a simple sufficiency analysis ignores all of the testimony which purportedly suggested she had no control or possessory interest in any of the khat in excess of the 4,634.9 grams upon which she was sitting when the police arrived.³ Jama argues a limited weighing of the evidence clearly demonstrates the lack of sufficient competent, credible evidence to show guilt beyond a reasonable doubt as to a second-

³ Evidence was presented to demonstrate that 6,899.4 grams of khat was recovered from the Midnight Café where Jama was arrested. Evidence was also presented to demonstrate that Jama was seated on numerous bundles of khat found to weigh 4,634.9 grams.

degree felony drug offense. However, we disagree with Jama's claimed application of manifest weight as a means for granting a new trial or modifying a verdict.

{¶ 24} Both Crim.R. 33(A)(4) and R.C. 2945.79(D) state that a new trial may be granted upon the defendant's motion or application if the verdict is not sustained by sufficient evidence. Neither of these provisions permits any type of weight of the evidence review, the type of review in which Jama claims the trial court properly engaged. The language of these provisions clearly does not permit a "re-weighing" of the evidence to modify the verdict.

{¶ 25} Therefore, for the reasons cited above, we find the trial court could not properly modify the verdict under these circumstances based upon Crim.R. 33 or upon a motion for new trial theory.

{¶ 26} Furthermore, given that the motion was denied, and that the trial court stated it would likely have to do some research on its own, it appears that the trial court had no authority in mind which would support its decision to modify the verdict. The trial court did not cite to any statute or rule which authorizes the modification of a verdict after the verdict has been announced following a bench trial, absent a *timely* motion for a new trial, which was not filed here, and no other motions were pending at that time. Such a statute or rule is not apparent to us either, and we need not guess as to what authority might allow the trial court to take this action. *See State ex rel. Corrigan v. White*, 46 Ohio St.2d 29 (1976) (the trial judge failed to show authority for modifying the verdict and, therefore, was required to sentence according to the original verdict).

2. Manifest Weight Review and Miscellaneous Purported Authority

{¶ 27} Alternatively, Jama argues reviewing courts have applied R.C. 2945.79 to approve modification of verdicts in situations where a motion for a new trial was never filed and where there was actually sufficient evidence to support the original verdict. However, a review of the cases cited by Jama reveals they fail to support Jama's contention that a manifest weight type of review is an appropriate basis for modifying a verdict.

{¶ 28} For example, Jama cites to *State v. Huntley*, 30 Ohio App.3d 29 (1st Dist.1986), and points out that the verdict in that case was modified despite a finding of sufficient evidence. Yet, it is important to note that *Huntley* involved two co-defendants

who were tried together and who received completely inconsistent verdicts. The greater verdict was modified in order to be consistent with the verdict received by the other co-defendant, in spite of the existence of sufficient evidence to support the greater verdict. The scenario in the instant case bears no resemblance to *Huntley*.

{¶ 29} Jama also cited to *State v. Durham*, 49 Ohio App.2d 231 (1st Dist.1976). But, *Durham* fails to support her position. In *Durham*, the court of appeals determined the evidence on the greater charge was both insufficient and against the manifest weight of the evidence. Jama's reliance upon *State ex rel. Shearer v. Wertz*, 50 Ohio St.2d 348 (1977), is misplaced as well. *Shearer* involved a writ of mandamus, not a direct appeal like in the instant case. In addition, *Shearer* involved an initial timely motion for new trial, which was denied, but which was later followed by a motion for reconsideration. Such a factual scenario is not present in this case.

{¶ 30} Jama attempts to rely upon R.C. 2945.831, which states that a motion for a new trial is not a prerequisite to obtaining appellate review of the sufficiency or weight of the evidence, in order to support the trial court's review of its verdict. However, we fail to see how this statute is applicable to the instant case with respect to the *trial* court's review and modification of the verdict.

{¶ 31} Finally, Jama argues the trial court was within its discretion to modify the verdict in order to correct a plain and substantial error pursuant to Crim.R. 52. However, the case law cited to by Jama, *In re Winship*, 397 U.S. 358 (1970), and *State v. Thomas*, 40 Ohio St.3d 213, 216 (1988), which address the proof beyond a reasonable doubt standard and instructions for lesser included offenses, respectively, do not provide support for her argument that the original verdict at issue was contrary to law and that it materially affected Jama's substantial rights. Under Crim.R. 52(B), plain errors or defects affecting substantial rights may be noticed even if they were not brought to the attention of the court. However, plain error is limited to the exceptional case in which the error, which was not objected to during the trial, " 'rises to the level of challenging the legitimacy of the underlying judicial process itself.' " *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶ 11, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997). In addition, we fail to see how plain error, standing alone, establishes a procedure which entitled Jama's verdict to be reviewed again by the trial court.

{¶ 32} Here, Jama has conceded there was sufficient evidence to return a verdict for a second-degree felony drug offense. Thus, there was no plain error. Furthermore, to be sufficient in form as to the amount of khat involved, the verdict form was only required to state either the degree of the offense for which the offender is found guilty or state that an additional element or elements are present. *See State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, ¶ 12. In this case, the original verdict form stated Jama had been found guilty of possession of drugs as a felony of the second degree. *See also* R.C. 2925.03(E) (it is unnecessary to find and return the exact amount for the drug involved; it is sufficient if the finding is to the effect that it is the requisite amount); and *State v. Young*, 6th Dist. No. E-03-033, 2004-Ohio-5896, ¶ 18 (while the initial verdict forms did not expressly include the exact amount of the controlled substance, the forms provided the applicable code sections and stated the jury found appellant guilty as charged in the indictment).

3. Inherent Authority

{¶ 33} Jama has also provided supplemental authority, specifically *State v. Mendise*, 8th Dist. No. 51530, 1987 WL 5457, 1987 Ohio App. LEXIS 5518 (Jan. 15, 1987), to support her counter-position that the trial court had inherent authority to modify the verdict. However, we reject any argument that the trial court had such broad inherent authority to modify the verdict.

{¶ 34} In *Mendise*, the Eighth District Court of Appeals upheld a trial court's decision to sua sponte vacate its earlier verdict finding the defendant guilty pursuant to a bench trial, and instead enter a not guilty finding some four months later, but prior to sentencing. Consequently, Jama submits *Mendise* stands for the proposition that this court has inherent authority to modify the verdict absent the filing of a timely motion for new trial pursuant to Crim.R. 33. Yet, we find *Mendise* to be neither controlling nor persuasive authority, and it does not support the trial court's actions in this case.

{¶ 35} Significantly, in *Mendise*, the Eighth District Court of Appeals stated: "Notwithstanding the theoretical propriety of the trial court's action, such a utilization of a court's inherent power, as here, to change a finding after a four-month delay, but before a final disposition is discouraged due to the indecorous perception this practice casts upon the judiciary." *Id.*, 1987 WL 5457, at *4, 1987 Ohio App. LEXIS 5518, at *10 Thus, it is apparent the Eighth District believed a court should use such inherent power with caution

and in rare circumstances. We, however, believe the eighth district court's use of inherent authority to permit the modification of a verdict, even prior to sentencing, was improper, ignores current authority, and should not be applied to the case sub judice.

{¶ 36} Criminal law in Ohio is statutory in nature. *State v. Moore*, 4th Dist. No. 03CA18, 2004-Ohio-3977, ¶ 10, citing *Lynn v. Limbert*, 117 Ohio App.3d 236 (7th Dist.1977). Therefore, courts have only that power which has been conferred by statute or by rule. *Id.* See also *State ex rel. Leis v. Outcalt*, 1 Ohio St.3d 147, 148 (1982) (in Ohio, criminal procedure is governed by statute); and *Municipal Court of Toledo v. State ex rel. Platter*, 126 Ohio St. 103 (1933), paragraphs one and three of the syllabus (Ohio criminal procedure is regulated entirely by statute; for example, Ohio trial courts do not have inherent power to suspend execution of a sentence in a criminal case and may only order such a suspension as authorized by statute).

{¶ 37} Furthermore, a trial court generally lacks the authority to reconsider its own valid final judgments in a criminal case. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶ 18; *State v. Boles*, 2d Dist. No. 23037, 2011-Ohio-3720, ¶ 34. However, the Ohio rules of criminal procedure establish some exceptions to this general rule. The rules of criminal procedure limit relief from judgments to motions which are expressly provided for within the criminal rules. *Moore* at ¶ 13. Relief from final judgment is allowed only through Crim.R. 29(C) (motion for acquittal after verdict or discharge of the jury), Crim.R. 33 (motion for new trial), Crim.R. 34 (motion in arrest of judgment), and Crim.R. 36 (motion to correct clerical mistakes). *Id.* A trial court is also authorized to correct a void sentence. *Cruzado* at ¶ 19.

{¶ 38} In the instant case, the original verdict issued by the trial court on January 23, 2009, was arguably not a valid, final judgment in a criminal case because the January 23, 2009 entry setting forth the verdict did not include the imposition of a sentence. See *State v. Roberts*, 11th Dist. No. 2005-T-0034, 2007-Ohio-5616, ¶ 6 (a valid, final judgment includes a formal entry which sets forth the verdict and delineates the sentence imposed). Nevertheless, we fail to see how the trial court, which holds only that power conferred upon it by rule or statute, could possess inherent authority to modify the verdict in this case more than two years after the original verdict was announced and

filed.⁴ A properly filed motion was not before it and we are aware of no rule or statute which would permit such a modification. Because criminal law is statutory in nature and because courts have only that power conferred by rule or statute, a trial court does not have "inherent power" to amend or modify a previous order upon good cause shown. *See Moore* at ¶ 10 (trial court did not have inherent authority to modify the identity of the restitution payee after the sentencing entry was issued; the limited power conferred by the statute governing restitution did not provide for modification of restitution orders upon the request of third parties). To otherwise determine that such inherent discretion or authority exists, without more, to modify a verdict several months after its announcement and journalization would have the alarming potential to work havoc upon a judicial system that relies upon and is governed by established rules and procedures, as well as finality, and such a determination cannot be supported.

{¶ 39} Although arguably different, we believe it is significant to note that were the trier of fact a jury, rather than a judge, it is well-established that the jury's verdict could not be rescinded or modified once a poll of the jurors was completed and all jurors assented to the verdict. *See State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 38. Here, the judge had announced his verdicts in open court and also journalized the verdicts and several months had passed before he attempted to modify or amend the verdict. We further note that courts in other states have drawn parallels between jury trials and bench trials and determined a trial judge has no more authority over a verdict in a bench trial than in a jury trial. *See Commonwealth v. Parker*, 305 Pa.Super. 516, 522 (1982) ("the verdict rendered by the trial judge after a non-jury trial is a general verdict and, after recording such a verdict, the authority of the trial judge over it would be the same as in the case of verdict by a jury"); and *People v. Carter*, 63 N.Y.2d 530, 533 (1984) (a trial judge rendering a guilty verdict after a non-jury trial has neither inherent power nor statutory authority to reconsider his factual determination, but can correct clerical errors; the trial judge is without authority to reassess the facts and change a guilty verdict to a not guilty verdict).

⁴ The trial court first modified the verdict using the improper nunc pro tunc order seven months after the original verdict had been announced and filed. The most recent modification occurred upon remand from this court after we determined the use of the nunc pro tunc order was improper.

{¶ 40} Even if we did find that inherent authority exists to modify a verdict prior to final disposition (which we do not), under these circumstances, the modification would not be supported. In *Mendise*, the trial judge indicated it had misinterpreted the applicable statute and upon reconsideration, it believed the defendant fell within an exception and was therefore not guilty. That determination appeared to be one based upon law. Here, the trial court failed to provide a clear explanation for why it did not think there was sufficient evidence (if believed) to support its original verdict, given that there was clear evidence introduced demonstrating the recovery of more than 6,000 grams of khat. If we chose to follow the rationale in *Mendise*, which *discourages* the use of inherent authority to modify a verdict, we believe the application of such inherent authority would not be supported here, given the vastly different circumstances.

{¶ 41} Based upon the foregoing, we find the trial court erred in modifying the verdict without providing some reference to a valid authority which permits such a review and modification. Accordingly, we sustain the State's second, third, and fifth assignments of error.

B. The State's Fourth Assignment of Error—Modification Was Improper Based on Res Judicata.

{¶ 42} In its fourth assignment of error, the State asserts the trial court erred in modifying the verdict because res judicata applies to bar any challenge to the verdict as insufficient in form. The State further argues res judicata bars any sufficiency or weight of the evidence review. The State contends Jama could have sought both sufficiency and weight review in the first appeal, either in her own appeal or in opposing the State's appeal demanding the verdict on the second degree felony offense be reinstated. Jama, on the other hand, argues res judicata does not bar her from challenging the form of the verdict because there was never a final appealable order entered as to the second degree felony drug possession, and therefore, the defective verdict was never placed into effect.

{¶ 43} We find the State's arguments claiming res judicata bars any review involving the form of the verdict, sufficiency or weight to be without merit.

{¶ 44} In Ohio, res judicata bars consideration of issues that could have been raised on direct appeal. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 16-17. "[A]ny issue that could have been raised on direct appeal and was not is res judicata and

not subject to review in subsequent proceedings." *Id.* at ¶ 16. "[I]f a defendant has 'already had the benefit of one direct appeal, [he can] not raise any and all claims of error in a second, successive appeal.'" *State v. Heard*, 9th Dist. No. 25358, 2011-Ohio-1513, ¶ 6, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 33. " 'Where an argument could have been raised on an initial appeal, res judicata dictates that it is inappropriate to consider that same argument on a second appeal following remand.' " *In re Estate of Barnett-Clardy*, 10th Dist. No. 08AP-386, 2008-Ohio-6126, ¶ 15, quoting *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶ 37; *State v. D'Ambrosio*, 73 Ohio St.3d 141, 143 (1995). "Thus, the doctrine of res judicata precludes a party who has had his day in court from seeking a second chance to litigate an issue that he could have raised earlier." *In re Estate of Barnett-Clardy* at ¶ 15, citing *Saxon* at ¶ 18.

{¶ 45} " 'Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment.' " (Emphasis sic.) *Saxon* at ¶ 17, quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. The doctrine of res judicata promotes principles of finality and judicial economy by preventing endless relitigation of an issue upon which there was already a full or fair opportunity to be heard. *Saxon* at ¶ 18. Therefore, where a party had the opportunity to assert specific arguments in an earlier cross-appeal but he or she failed to seize that opportunity, the doctrine of res judicata bars that party from asserting those arguments in the current appeal. *In re Estate of Barnett-Clardy* at ¶ 16. Res judicata also applies to motions for new trial and bars issues that could have been raised on appeal. *State v. Grinnell*, 10th Dist. No. 09AP-1048, 2010-Ohio-3028, ¶ 26.

{¶ 46} In *Jama I*, the State raised two assignments of error challenging the trial court's imposition of community control for a third-degree felony drug offense without making the required findings when a presumption for prison applied, as well as the trial court's decision to "amend" the verdict through the use of a nunc pro tunc order. The State did not appeal the merits of the final verdict, which is prohibited pursuant to R.C. 2945.67(A). Furthermore, although the State was, in essence, asking for the reinstatement of the original verdict, the State was actually appealing the trial court's

authority to amend the verdict by means of a nunc pro tunc order, rather than appealing the merits of the original verdict announced and journalized on January 23, 2009. Jama, on the other hand, filed a separate notice of appeal and her assignments of error challenged the trial court's failure to evaluate the credentials of the interpreter and to ensure that she understood the proceedings and had an opportunity to speak on her own behalf.

{¶ 47} To the extent the State claims any argument regarding the adequacy of the form of the verdict is barred by res judicata, we disagree. Although Jama did not separately raise this as an assignment of error in the first appeal, Jama did address this issue in response to the State's assignment of error on the use of the nunc pro tunc order. Jama argued the nunc pro tunc order was necessary to correct the trial court's January 23, 2009 entry journalizing the court's decision finding her guilty of second-degree felony drug possession because the court failed to determine the amount of khat possessed. We did not ultimately decide the issue of whether the trial court erred in failing to specifically set forth in the verdict form the amount of khat possessed. However, this issue is not barred by res judicata.⁵

{¶ 48} The State also seems to assert that any manifest weight or sufficiency challenge to the second-degree felony verdict as it relates to the adequacy of the evidence is also barred by res judicata. Again, we disagree. We decline to apply the doctrine of res judicata to the circumstances at hand where there was not a final appealable order in effect regarding the original second-degree felony verdict from which an appeal could be filed.

{¶ 49} Here, we fail to see how this argument was raisable in the first appeal. Admittedly, the State could not address this particular topic, as it involved what essentially amounted to a "not guilty" determination on the second-degree felony drug possession and consequently, a guilty verdict as to a third-degree felony drug possession offense. It is well-established the State cannot appeal from a not guilty determination or from the merits of a final verdict. Jama, on the other hand, would not be inclined to argue the merits (or lack thereof) of the second-degree felony conviction in her own appeal, as

⁵ Nevertheless, we do not decide the merits of the State's arguments regarding the sufficiency of the form of the verdict except to the extent addressed in our analysis of the second, third, and fifth assignments of error.

the trial court's "amendment" of the verdict to a felony of the third degree was obviously in Jama's favor. Nevertheless, the State seems to claim that Jama could have or should have argued in her first direct appeal (or in response to the State's appeal) that the nunc pro tunc order was necessary because the evidence regarding the weight of the drugs involved was insufficient to support a second-degree felony drug offense and/or that the second-degree felony verdict was against the weight of the evidence.

{¶ 50} We do not believe that Jama could have made this argument in response to the State's appeal, since, as previously stated, the State's appeal addressed whether or not the trial court had the authority to modify the verdict through the use of the nunc pro tunc order. The State's appeal did not (and could not) address either the merits of the second-degree felony "not guilty" verdict, nor the merits of the third-degree felony verdict. Therefore, the issue on appeal was whether the nunc pro tunc order was the proper vehicle by which to amend the verdict, not the sufficiency or weight of the evidence at issue and whether it supported the verdict. Additionally, the reinstatement of the original verdict was simply a consequence of the determination that the nunc pro tunc order had been improperly used. Although reinstatement of the original verdict was the State's end goal, the *reason* reinstatement was sought by the State was because the trial court used an improper vehicle (the nunc pro tunc order) to modify the verdict.

{¶ 51} In response to the State's first appeal, Jama attempted to argue (unsuccessfully) why the use of the nunc pro tunc order was a proper vehicle for amending the verdict, but the actual merits of the original verdict and whether it was supported by sufficient evidence or whether it was against the manifest weight of the evidence were not argued. Because the entry setting forth the second-degree felony verdict was not a final, appealable order and it was not "in effect" or "in play" once the trial court issued the nunc pro tunc order, we fail to see how Jama could have or should have raised arguments regarding sufficiency and manifest weight as it relates to the second-degree felony offense in the first appeal proceeding.⁶ The merits of the second-

⁶ Jama did not have a "conviction" with respect to the second-degree felony drug offense. Pursuant to Crim.R. 32(C), which sets forth the requirements for a final, appealable order in criminal cases, a judgment of conviction must include the plea, the verdict or findings, upon which each conviction is based, and the sentence.

degree felony offense only came into play again upon the reinstatement of the original verdict upon remand.

{¶ 52} At the time of the first appeal, the only judgment in effect was the one finding Jama guilty of a third-degree felony. Based upon "that judgment,"⁷ which found Jama guilty of a third-degree felony *and* sentenced her to community control, the issues involving the second-degree felony and the adequacy of a "conviction" on that offense were not before the court. Consequently, we do not find the doctrine of res judicata, as it could be applied to sufficiency and weight arguments, to be a basis upon which to reverse the trial court's modification of the verdict. *See generally State v. Shekerko*, 11th Dist. No. 2004-P-0093, 2005-Ohio-5392 (trial court's entry finding sexual offender classification requirements unconstitutional and declining to classify defendant after finding him guilty of rape and kidnapping was not a final order, and thus the prosecution's subsequent efforts to have his sexual predator status determined were not barred by res judicata); and *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766 (6th Dist.) (the doctrine of res judicata is inapplicable to a judgment that is not a final, appealable order).

{¶ 53} Accordingly, we overrule the State's fourth assignment of error.

C. The State's First Assignment of Error—The Imposition of Community Control Was Error Where A Presumption of Prison Applies and Statutory Findings Were Not Made to Overcome the Presumption

{¶ 54} Finally, in its first assignment of error, the State contends the trial court erred in imposing a sentence of community control for a third-degree felony drug offense where a presumption of prison applied without making the requisite statutory findings in order to overcome the presumption for prison. Jama concedes that a presumption of prison is applicable to this offense. Jama also concedes that the trial court erred in failing to make the necessary findings under R.C. 2929.13(D)(2)(a) and (b). Based upon this concession, it would appear at first glance that this matter should be remanded for resentencing in order to comply with the statutory requirement to make the necessary

⁷ *See Saxon* at ¶17, quoting *Perry* at paragraph nine of the syllabus ("Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant * * * from raising and litigating in any proceeding except an appeal from *that judgment*, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on appeal from *that judgment*." (Emphasis added.)).

findings. However, because we are vacating the third-degree felony verdict for possession of drugs and reinstating the original second-degree felony verdict for possession of drugs, we render this assignment of error moot.

III. Conclusion

{¶ 55} In conclusion, the State's second, third, and fifth assignments of error are sustained. The State's fourth assignment of error is overruled. The State's first assignment of error is rendered moot. The judgment of the Franklin County Court of Common Pleas is reversed and this matter is remanded for reinstatement of the original verdict and for further proceedings.

*Judgment reversed;
cause remanded.*

KLATT and FRENCH, JJ., concur.
