[Cite as *State v. Schnecker*, 2005-Ohio-6427.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2004-10-264
	:	O P I N I O N
-vs-		12/5/2005
	:	
JANET R. SCHNECKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2003-12-1860

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45012-0515, for plaintiff-appellee

Repper, Powers & Pagan, Melynda Cook-Reich, 1501 First Avenue, Middletown, OH 45044, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Janet R. Schnecker, appeals the denial of her motion to suppress, her subsequent convictions, and the prison sentence imposed by the Butler County Court of Common Pleas.

{¶2} Schnecker was charged with four counts of felony drug possession, one misdemeanor count of drug possession, and a felony count of receiving stolen property after police executed a search warrant on the property in which she resided and recovered a number of drugs and a stolen credit card.

{¶3} Appellant moved to suppress evidence of the search, but her motion was denied by the trial court. Appellant was tried by a jury and found guilty of all counts. The trial court imposed a sentence for the convictions. Appellant appeals, presenting five assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE[.]"

{¶6} Appellant argues there was insufficient evidence of probable cause in the affidavit securing the search warrant to authorize the issuance of the warrant.

{¶7} In reviewing the sufficiency of probable cause in a search warrant's affidavit, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate or judge ("issuing judge") who issued the search warrant by conducting a de novo determination of whether the affidavit contains sufficient probable cause to issue the search warrant. *State v. George* (1989), 45 Ohio St.3d 325, paragraph two of the syllabus.

{¶8} The duty of a reviewing court is to ensure that the issuing judge had a substantial basis for concluding that probable cause existed. Id. Trial and appellate courts should accord great deference to the issuing judge's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. Id.

{¶9} Appellant supports her argument that probable cause was lacking by attacking anonymous tipsters. While there were some anonymous sources listed in the affidavit, the affiant also indicated that the information gleaned from those sources was corroborated by named sources acting against their penal interests, or by the

observations of other police officers. See *U.S. v. Harris* (1971), 403 U.S. 573, 583, 91 S.Ct. 2075 (admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility, sufficient at least to support a finding of probable cause to search).

{¶10} The information in the affidavit clearly established a connection between illegal activity and the property where appellant was residing. The affidavit provided a substantial basis for the issuing judge's conclusion that probable cause existed. The trial court did not err in denying appellant's motion to suppress evidence on that basis. See *State v. Bailey*, 2003-Ohio-5280, ¶8 (reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence, and will determine as a matter of law whether the trial court erred in applying substantive law to the facts).

{¶11} The trial court also concluded at the suppression hearing that the evidence secured from the search warrant would not be suppressed because the police officers were acting in good faith when they executed the warrant. We find that the trial court did not err in this regard. See *State v. George*, at paragraph three of the syllabus (with the good faith exception, the fourth amendment's exclusionary rule should not be applied to bar evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause).

{¶12} Appellant's first assignment of error is overruled.

{¶13} Assignment of Error No. 2:

{¶14} "THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY[.]"

{¶15} Appellant specifically argues that the trial court failed to instruct the jury that "constructive possession" requires either knowledge by appellant or that appellant was conscious of the presence of the object.

{¶16} Appellant does not cite this court to specific sections in the record where she objected to the jury instructions. See App.R. 16. We located a portion of the record wherein appellant objected to the jury instruction on "constructive possession," on the basis that it did not coincide with the Ohio Jury Instructions. Appellant apparently was arguing that a constructive possession instruction should not be given, not that the constructive possession instruction was missing an element.

{¶17} By failing to voice this specific objection, appellant did not give the trial court the opportunity to correct this specifically assigned error. When a claimed error in a jury instruction is not raised in the trial court below, it is waived, absent plain error. Crim.R. 30(A).[1] *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus (in determining plain error, the question is if, but for the error, the outcome of the trial clearly would have been otherwise).

{¶18} This court previously defined constructive possession as the following: where one is conscious of the presence of the object and able to exercise dominion and control over it, even if it is not within his immediate physical possession. *State v. Gaefe*, Clinton App. No. CA2001-11-043, 2002-Ohio-4995; *State v. Wright*, Butler App. No. CA2003-05-127, 2004-Ohio-2811; see, also, *State v. Miller* (Aug. 14, 2000), Butler App. No. CA99-06-098 (constructive possession requires a showing of "conscious

1. The second paragraph of Crim.R. 30(A) states: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

possession" or that the defendant "had knowledge that the subject property was on the premises").

{¶19} After reviewing the jury instructions presented by the trial court, we find that the instruction sufficiently informed the jury on the contested issue. While the trial court did not use the language previously discussed by this court, the trial court clearly instructed the jury as follows: "Before you can find defendant guilty, you must find beyond a reasonable doubt, that *** the defendant knowingly obtained, used or possessed [the name of the drug listed in each of the four counts]." The trial court proceeded to define the term "knowingly" for the jury.

{¶20} The trial court also instructed the jury that: "'Possess' 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." "Although mere presence of a person in the vicinity of contraband is not enough to support the element of possession, if the evidence demonstrates defendant was able to exercise dominion and control over the illegal objects, defendant can be convicted of possession."

{¶21} Based upon the fact that the jury was instructed on the elements of "knowingly possessed," we do not find that the trial court abused its discretion in its instruction to the jury. Finding no error, there is no plain error. Appellant's second assignment of error is overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE STATE ENGAGED IN MISCONDUCT BEFORE AND DURING TRIAL[.]"

{¶24} Appellant argues that the state engaged in prosecutorial misconduct by untimely disclosing evidence and witnesses, by permitting state witnesses to discuss the case with each other, and by making improper closing arguments.

{¶25} The test for prosecutorial misconduct is whether the conduct was improper and, if so, whether it prejudicially affected substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, 165.

{¶26} Crim.R. 16 describes what material is discoverable, the discovery process for both the parties, and the trial court's options should a party violate Crim.R. 16. Crim.R. 16(E)(3). The trial court is vested with "a certain amount of discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material." *State v. Parson* (1983), 6 Ohio St.3d 442, 445-446. The court has the option of excluding the material, or it may order the noncomplying party to disclose the material, it may grant a continuance in the case, or make such other order as it deems just under the circumstances. Id.

{¶27} The record shows that even though the trial court was irritated that both the state and appellant had ignored the trial court's discovery orders, it found there was no prejudice to appellant in permitting the admission of the testimony.

{¶28} As to the testimony of one police officer, the trial court found that the failure to disclose his name was inadvertent and that appellant was aware of this officer's testimony before trial. The trial court also offered to recess proceedings for the day so that appellant could review the testimony with the officer, but appellant only asked for a few minutes to do so.

{¶29} Upon review, we do not find that the trial court abused its discretion in its handling of the Crim.R. 16 issues.

{¶30} Appellant next argues that the state engaged in misconduct when it allowed its witnesses to discuss the case with each other outside the courtroom.

{¶31} Appellant proffered a witness who testified that he overheard police officers talking to a state's witness and telling her that things would work out for her if she testified. The state presented one of the officers, who admitted speaking with the witness, but offered a different version of the events.

{¶32} The trial court indicated that it did not believe that a violation occurred and would not strike any testimony. The admission or exclusion of testimony lies within the sound discretion of the trial court. *State v. Ahmed,* 103 Ohio St.3d 27, 2004-Ohio-4190, ¶79. We cannot say that the trial court abused its discretion in this regard. Cf. *State v. Morris* (1982), 8 Ohio App.3d 12, 18 (court reviewed whether offending party provoked the violation and the prejudice to the nonoffending party).

{¶33} Appellant next argues that prosecutorial misconduct occurred in closing argument, when the prosecutor gave personal opinions about the credibility of witnesses, attacked the character of appellant's trial counsel, and alluded to evidence not in the record.

{¶34} We address first appellant's assertion that the state alluded to evidence not in the record when it argued that appellant had assets located on the property because she "fenced" property for drugs.

{¶35} The prosecution is entitled to a certain degree of latitude in its closing remarks. *State v. Lott,* 51 Ohio St.3d at 165. Generally, the state may comment freely on "what the evidence has shown and what reasonable inferences may be drawn there from." Id. We find that the prosecutor's argument was not improper, as a prosecutor was pointing out for the jury reasonable inferences from the evidence in the record.

{¶36} We will combine for review appellant's remaining arguments that misconduct occurred when the prosecutor expressed personal opinions about the credibility of witnesses and made personal attacks on appellant's trial counsel.

{¶37} Prosecutors may not invade the realm of the jury by stating their personal beliefs regarding guilt and credibility. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. We have previously cautioned attorneys to avoid the expression of personal opinion on the veracity of witnesses and the guilt of the defendant. See *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶38 (reversed conviction for assault when prosecutor's repeated references could not be excused as a mere comment or two predicated on the evidence).

{¶38} In examining the prosecutor's arguments for possible misconduct, we review the argument as a whole, and may also examine the argument in relation to that of opposing counsel. See *State v. Moritz* (1980), 63 Ohio St.2d 150, 157-158.

{¶39} Appellant voiced several objections to the state's closing argument, to which the trial court indicated that it would overrule the objections because it was closing argument and both sides had been given "wide latitude." While it was addressing one objection, the trial court reminded the jury members that this was argument, and that they would judge the credibility of witnesses.[2]

{¶40} Specifically, appellant alleges as error the prosecutor's repeated comments that the jury would have to believe that the police involved in this case were "dirty cops," if the jury accepted appellant's theory of the case and the testimony of appellant and her witnesses.

{¶41} We note that there was testimony during appellant's case that the

2. Before counsel began closing arguments, the trial court reiterated that closing arguments by counsel were not to be considered evidence.

investigating officers lied, that individuals planted the incriminating evidence with or without police involvement, and that police may have planted evidence that connected

appellant to the incriminating evidence.

{¶42} After reviewing the record, we find that the arguments of the prosecutor were "marginally permissible," since the comments were based on the evidence presented at trial. See *State v. Clemons,* 82 Ohio St.3d 438, 452, 1998-Ohio-406. While this opinion should not be interpreted as condoning the comments presented by the prosecutor, after reviewing the entire record, we do not find that the comments deprived appellant of a fair trial.

{¶43} We note that appellant raises on appeal some of the state's comments to which she did not object at trial. These comments will be reviewed for plain error. See *State v. Baldev*, ¶11 (failure to object to alleged prosecutorial misconduct waives all but plain error.). An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Stojetz,* 84 Ohio St.3d 452, 455, 1999-Ohio-464; Crim.R. 52(B).

{¶44} Appellant alleges that the prosecutor attacked the credibility of defense counsel by stating that the theory that the police lied and planted evidence was "ludicrous" and "ludicrous thinking." Appellant also alleges that the prosecutor tried to "place his prestige and law-abiding life" in contrast to appellant by arguing that he might be nervous if police entered his property, but police need not be feared unless illegal activity was taking place. The prosecutor added that he calls police officers "police" and not "cops," because "that is respectful."

{¶45} We find these statements marginally permissible as comments on the evidence. See *State v. Brown* (1988), 38 Ohio St.3d 305, 317 (did not find improper prosecutor's comment that defense counsel "talked out of both sides of the mouth," and that counsel's theory of the case was "baloney"). We do not find these comments to

constitute prosecutorial misconduct rising to the level of plain error.

{¶46} We have reviewed the closing arguments in their entirety. While we again caution the parties to stay within the bounds of proper argument, we find no prosecutorial misconduct here that deprived appellant of a fair trial. Appellant's third assignment of error is overruled.

{¶47} Assignment of Error No. 4:

{¶48} "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

{¶49} Appellant specifically argues under this assignment of error that the state failed to prove that she knowingly possessed any of the items of contraband.

{¶50} In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment of a trial court on the weight of the evidence in a jury trial. *Thompkins* at 389.

{¶51} The record shows that the state presented evidence that appellant lived with Ray Skinner in a building on several acres in Butler County. Various other structures and a few businesses were also located on this property. Evidence was presented that Skinner and appellant apparently were engaged in the business of salvaging items and equipment and selling them, and therefore, numerous items and

materials were located about the property.

{¶52} The state presented evidence that police officers were executing a search warrant on the property on November 20, 2003, when they located a black carry or travel bag in a stall on the first floor of the building or barn in which Skinner and appellant resided.

{¶53} Inside the black bag, police found crack cocaine, powdered cocaine, and marijuana, approximately $2800 in currency, perfume, cell phone, jewelry, makeup, a grooming kit, and cleaning items that police testified are often used as crack pipe filters.

{¶54} A woman's purse was located within the middle compartment of the black bag. Inside the purse, officers found appellant's driver's license, her social security card, her library card, and a warehouse club card in appellant's name. Also included in the purse was a hardware store card in Ray Skinner's name. Within the purse were three prescription bottles: one bottle contained pills, some of which were oxycodone, one prescription bottle contained powder cocaine, and the third contained methamphetamine. The third bottle carried a label with the name of state's witness, Cherry Faber. The other two bottles carried labels with names that were identified, but not discussed further.

{¶55} Also located within the black bag were compact discs, gift certificates, letters, a glass pipe and paperwork that police characterized as "ledgers," containing various names and numbers. Some of the entries in these "ledgers" noted the word "pills." Some of the letters were addressed to Ray Skinner. Two of the letters to Skinner were from the Veterans Administration and were postmarked within a few days of the search on November 20, 2003.

{¶56} The state presented testimony from Cherry Faber that she was visiting

appellant at her residence when Faber noticed police on the property and informed appellant. Faber testified that appellant "panicked," agreed with Faber's statement that that they were "in trouble," and left the upstairs area with the black bag in question. Faber indicated that appellant returned upstairs a minute later without the black bag. Faber also acknowledged that she had a criminal history of drug-related offenses, and admitted that she previously wrote a statement at appellant's request, contradicting her testimony that appellant was carrying the black bag in question.

{¶57} A police officer testified that he observed a woman later identified as appellant, and dressed in the attire attributed to appellant, standing near the sliding door on the first-floor level as police approached the building. The officer testified that he called for the woman to exit the building, but the woman stepped away from the door and was observed seconds later in the second-floor window.

{¶58} An investigating officer testified that he later questioned appellant about drugs being present in the building, and appellant indicated that she did not know about any drugs. Later appellant would deny that the drugs belonged to her or any other individual the police named. The officer testified that appellant displayed a "defeated posture," but did not respond, when the officer discussed whether she had a drug problem.

{¶59} Appellant provided an explanation for some of her items by telling the jury that her driver's license and social security card were previously discovered missing. Skinner testified that he had helped appellant search for her social security card some time before the search warrant was executed on the property.

{¶60} Appellant testified that she was not familiar with the black bag, the purse, or any contents and had not been carrying the bag as alleged by the state. Appellant

testified that she never left the second-floor of her residence after police were observed on the property, and, therefore, she could not have disposed of the bag as the state alleged.

{¶61} Appellant testified that the lock on the first floor of her residence was inoperable and anyone had access to the first floor of the building. Appellant admitted that she kept the "ledgers" found in the black bag, but testified that the ledgers pertained to the salvage business, not a drug business.

{¶62} As to the receiving stolen property charge, the state presented a witness who testified that her Lerner's credit card was stolen from her workplace in Mason in October 2003. This witness identified the Lerner's card subsequently admitted into evidence. The state asked appellant on cross-examination: "Ma'am, you don't have any explanation then for the panel as to how this Lerner Gold Advantage Card that belonged to Jaime Nosse got in your purse then, do you?" To which appellant responded: "I sure don't. I wish you would have fingerprinted it first."

{¶63} After reviewing the record under the applicable manifest weight standard, we find that the jury clearly did not lose its way and create a manifest injustice when it found that appellant possessed the drugs and credit card that were found among items belonging to appellant and found in her residence.

{¶64} Accordingly, we find that appellant's convictions were not contrary to the manifest weight of the evidence. Appellant's fourth assignment of error is overruled.

{¶65} Assignment of Error No. 5:

{¶66} "THE COURT ERRED IN IMPOSING A SENTENCE ABOVE THE MINIMUM TERM[.]"

{¶67} Appellant argues that the trial court used facts not found by the jury to

impose more than the minimum prison term, in contravention of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and *United States v. Booker* (2005), ___ U.S. ___, 125 S.Ct. 738. We reject this argument under the authority of *State v. Combs*, Butler App. No. CA2000-03-047, 2005-Ohio-1923. Appellant's fifth assignment of error is overruled.

{¶68} Judgment affirmed.

YOUNG and BRESSLER, JJ., concur.