

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080312
	:	TRIAL NO. B-0709594
Plaintiff-Appellee,	:	
vs.	:	JUDGMENT ENTRY.
ROBERT ROGERS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

A jury found defendant-appellant Robert Rogers guilty of trafficking in heroin, for which he was sentenced to 18 months' incarceration. Rogers appeals his conviction, arguing that the trial court improperly communicated with the jury; that his due-process rights were violated; that his counsel at trial was ineffective; that the conviction was against the sufficiency and manifest weight of the evidence; that the trial court improperly overruled his acquittal motion; that his sentence was contrary to law; and that he was prejudiced when the state did not provide the name of a confidential informant. We affirm.

In November 2007, a confidential informant ("Bearcat") told police officers that, as he was driving up to the corner of McHenry and Baltimore Streets in Cincinnati, Ohio, he had been approached by a man (later identified as Markell Collier) who asked if he was looking for "dog." Bearcat testified that he had told Collier that he was looking for "dog" and that "dog" was street slang for heroin.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Collier then walked over to Rogers, and the two returned to Bearcat's car asking "how much [he was] looking to spend?" "Thirty dollars," replied Bearcat.

Rogers and Collier then got into Bearcat's car and instructed him to drive to an apartment building. After arriving at the apartment building, Rogers and Collier exited from the vehicle and went into the apartment building, leaving Bearcat alone in the car. Bearcat testified that he never saw Rogers again; but Collier later returned and robbed Bearcat. The police, having seen or heard all of these events, then swarmed in and apprehended both Rogers and Collier.

Rogers's first assignment of error charges the trial court with error when it commented on why Rogers had worn jail clothes to trial and had not posted bond. During voir dire, Rogers, through counsel, asked the jurors if they had any problem with the fact that he was wearing jail clothes, and he then explained to the jury that he could not post bond. A few jurors did express some concerns, but after further examination their concerns were allayed. Rogers's counsel later asked that those jurors be excused, but the court denied his request and then explained to the jury that the fact that Rogers was dressed in jail clothes could not be used against him:

"The Court has just a few questions for the jurors and also some explanation. Mr. Kraus asked if you would hold it against Mr. Rogers that he was wearing jailhouse clothes. And from what I got, all of you said that you would not hold it against him; that you would listen to the evidence and [would] be fair and impartial. Is there anybody that would change what I'm stating or that thinks they won't be fair and impartial? [No response.]

"Alright, and also, you're not allowed to feel sorry for the defendant because he's wearing his jail clothes either. Do you understand that? So you can't hold it against him. But he was given every right to wear street clothes if he wanted to, and he has chosen of his own free will to wear his jail clothes.

“The system allows you to wear street clothes, even if you’re being held on bond, and there are many reasons why someone could be held on bond. It could be the seriousness of the charge. Like on a murder case, the person probably is going to have a high bond pending trial if they pose a danger to the community.

“But honestly, I feel an explanation is in order for the reason that Mr. Rogers is being held on bond, because he is charged with a felony and a judge at the arraignment set what they thought was a fair bond. And then, if you can’t make it, then you’re in. And if you can make it, you’re out. It’s not to be held in his favor or against him on the issue of bond. Do you understand that?

“So with all the questions that Mr. Kraus asked about bond and why he might be locked up and why he’s wearing those clothes, it’s not any evidence of his guilt or his innocence at all. It doesn’t have anything to do with anything of your job or what you’re going to do, it’s to be fair and impartial and decide if he’s guilty or not guilty. And I’m telling you to disregard it, everything that’s been said about his clothes and about why he may or may not be held.

“All right, and Mr. Kraus was concerned with some people, some specific jurors. I don’t want to name names, but that you should be excused because you said you couldn’t put that aside. Is there anybody that, [and] I’m asking you as a complete body, can’t give Mr. Rogers a fair trial based upon the fact that he’s being held by the sheriff and on the fact that he didn’t make his bond and that he’s chosen, for whatever reason, to wear those clothes to court today given the choice to wear street clothes or what he’s wearing?

“Is anybody going to consider that he’s guilty or not guilty because of any of that; because I’m specifically instructing you that you can’t.” [No response.]

No jurors indicated that they would be biased because Rogers had not made bail or because he was wearing jail clothes.

In determining whether a trial court's comments were prejudicial, we consider the following rules: (1) the burden of proof is the defendant's; (2) there is a presumption that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for; (3) the remarks are to be considered in light of the circumstances under which they were made; and (4) consideration is to be given to their possible effect on the jury and to their possible impairment of the effectiveness of counsel.² But because Rogers did not object to the trial court's comments, he has waived all but plain error.³ And to prevail under a plain-error analysis, Rogers must demonstrate that the outcome of the trial clearly would have been different but for the alleged error.

We hold that the trial court did not err in explaining to the jury why Rogers was wearing jail clothes and why he was still in jail. The jury indicated that it would not consider those circumstances as indicia of guilt, and even if there had been an error, it was harmless and would not have caused a miscarriage of justice. Rogers raised the bond issue, and the trial court then clarified that neither the issue of Rogers's bond nor the fact that Rogers was wearing jail clothes could be used against him. This assignment of error is overruled.

Rogers next argues that his counsel's assistance was ineffective. Ineffective assistance of counsel occurs when (1) trial counsel's performance falls below an objective standard of reasonableness, and (2) the substandard performance prejudices the defendant.⁴

The thrust of Rogers's argument is that his counsel (1) requested a separation of witness too late; (2) stipulated to the events having occurred within 1,000 feet of a

² *State v. Wade* (1978), 53 Ohio St.2d 182, 373 N.E.2d 1244, sentence vacated in part sub nom. *Wade v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3138.

³ *Id.*

⁴ *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

school; (3) failed to object to the statements made by the trial court in voir dire; and (4) failed to ask for the confidential informant's real name. These arguments are meritless.

Testimony about the specifics of the case was heard only after the witnesses had been separated; and no prejudice resulted from the failure to separate the witnesses earlier.

Likewise, Rogers made a strategic decision to stipulate that he was within 1,000 feet of a school. The decision was made to "eliminate the issue [so that the jury] can focus on what [the defense] feel[s] is most important."

We have already noted that the trial court did not err in clarifying the bond and jail-clothes issues to the jury, so no objection to its comments was warranted.

Finally, Rogers objects to his trial counsel's failure to ask for the real name of the confidential informant ("Bearcat"). But Rogers was able to confront Bearcat at trial and cross-examine him accordingly. Nothing more could have been gleaned by the divulgence of Bearcat's real name. Rogers received effective assistance, and his assignment of error to the contrary is overruled.

Rogers also argues that his conviction was against the weight and sufficiency of the evidence, and that the trial court erred in overruling his motion for an acquittal. Not so. "In determining whether a conviction is supported by sufficient evidence, this court is not permitted to weigh the evidence; instead we must view all the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the offense proved beyond a reasonable doubt. But when reviewing the manifest weight of the evidence, this court sits as a 'thirteenth juror.' We review the record, weigh the evidence, consider the credibility of the witnesses, and determine whether the jury

clearly lost its way and created a manifest miscarriage of justice.”⁵ An acquittal under Crim.R. 29 is unwarranted when “viewing the evidence in the light most favorable to the state, a reasonable mind might fairly [have found] each element of the offense proven beyond a reasonable doubt.”⁶

The evidence showed that Rogers and Collier had offered to sell \$30 worth of heroin to Bearcat. The transaction was recorded by the police, and Rogers’s defense was mistaken identity (“it wasn’t me”). The jury believed the state and rightly so. The evidence supported the conviction, and this assignment of error is overruled.

In his final assignment of error, Rogers argues that his maximum sentence was contrary to law. Trial courts “have full discretion to impose a prison sentence within the statutory range and are not required to make findings or give reasons before imposing maximum, consecutive, or more than minimum sentences.”⁷ Rogers’s sentence was within the statutory range and was not contrary to law. We therefore review the sentence under an abuse-of-discretion standard⁸ and conclude that the court did not abuse its discretion. We hold that the court considered the relevant factors (including Rogers’s lengthy record) in sentencing him to the maximum term of incarceration. This assignment of error is overruled, and the judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 11, 2009
per order of the Court _____.

Presiding Judge

⁵ *State v. Traore*, 1st Dist. No. 060802, 2007-Ohio-6334, ¶12.

⁶ *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

⁷ *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶100; *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ___ N.E.2d ___, ¶12.

⁸ *Id.*