

THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-626
 : (C.P.C. No. 11CR04-2209)
 Mohamud H. Hassan, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 21, 2013

Ron O'Brien, Prosecuting Attorney, and *Valerie B. Swanson*,
for appellee.

William R. Gallagher, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Mohamud H. Hassan, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On the evening of April 11, 2011, B.P. drove to an apartment complex on the west side of Columbus to sell marijuana to appellant. B.P. backed his car into a parking spot near appellant's car and appellant got into B.P.'s car. The two talked for a moment and then appellant pulled a gun out of his pocket. Appellant told B.P. that he was robbing him. B.P. also noticed some other people in his rearview mirror approaching his car. Appellant hit B.P. in the face with the gun and the other people dragged him out of his car

and began punching and kicking him. B.P lost consciousness for some time, but when he woke up, he discovered a number of items missing, including his cell phone, wallet, and the marijuana he had brought for the sale. B.P. talked to the police and was able to identify appellant and one other person, K.B., as people involved in the robbery.

{¶ 3} As a result of these events, a Franklin County Grand Jury indicted appellant with one count of aggravated robbery in violation of R.C. 2911.01, two counts of robbery in violation of R.C. 2911.02, one count of kidnapping in violation of R.C. 2905.01, and one count of felonious assault in violation of R.C. 2903.11. All of the charges contained a firearm specification pursuant to R.C. 2941.145. Appellant entered a not guilty plea to the charges and proceeded to a trial.

{¶ 4} At trial, B.P testified to the above version of events. K.B. also testified. K.B. was charged with similar offenses arising from this robbery but agreed to testify against appellant in exchange for a more lenient sentence. K.B. testified that he, appellant, and a number of other people planned to rob B.P. because they knew he dealt drugs and would, therefore, have money on him. K.B.'s description of the robbery was consistent with the facts described by B.P. K.B. also testified that appellant had a gun during the robbery. Appellant did not testify, but the jury heard his police interview during which he admitted to some level of involvement in the offenses. He denied, however, having a gun or harming B.P. Another person involved in the robbery also testified that appellant did not have a gun during the robbery.

{¶ 5} The jury ultimately found appellant guilty of all charges and one of the firearm specifications. The trial court sentenced him accordingly.

II. The Appeal

{¶ 6} Appellant now appeals and assigns the following errors:

First Assignment of Error:

A conviction based on insufficient evidence is a denial of state and federal due process. A conviction cannot stand against a defendant where a rational trier-of-fact could not find all the elements were proven beyond a reasonable doubt. The conviction in this case is not supported by sufficient evidence.

Second Assignment of Error:

The constitution prohibits a conviction which is against the manifest weight of the evidence. A conviction cannot stand against a defendant where the trier-of-fact loses its way in weighing the evidence. The conviction in this case is against the manifest weight of the evidence.

Third Assignment of Error:

Providing the jury with a supplemental instruction during deliberations violated Hassan's right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section Ten Article One of the Ohio Constitution.

Fourth Assignment of Error:

The trial court erred when it overruled Hassan's motion to suppress statements. The evidence established the statements obtained were a result of improper police interrogation which violated Hassan's right to remain silent as guaranteed by the Fifth Amendment to the United States Constitution and Article One Section Ten of the Ohio Constitution.

Fifth Assignment of Error:

The failure of trial counsel to object to the supplemental instructions given by the trial court constituted ineffective assistance of trial counsel in violation of Hassan's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section Ten Article One of the Ohio Constitution.

{¶ 7} For analytical purposes, we address the assignments of error out of order.

A. Appellant's Fourth Assignment of Error—Motion to Suppress

{¶ 8} Before trial, appellant filed a motion to suppress the statements he made during a police interview shortly after the robbery. Specifically, he argued that he made those statements involuntarily as the result of psychological police coercion. The trial court denied the motion, concluding that there was nothing in the videotaped interview of appellant suggesting improper police coercion. Appellant contends that the denial was erroneous. We disagree.

{¶ 9} " 'Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.' " (Citations omitted.) *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 10} In deciding whether a defendant's confession is involuntarily induced, a court considers the totality of the circumstances. *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶ 82. However, " 'police overreaching' is a prerequisite to a finding of involuntariness. Evidence of use by the interrogators of an inherently coercive tactic (e.g., physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis." *Id.*, quoting *State v. Clark*, 38 Ohio St.3d 252, 261 (1988); *State v. Treesh*, 90 Ohio St.3d 460, 472 (2001). Thus, appellant must first demonstrate that the detective used an inherently coercive tactic before addressing the totality of the circumstances. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 71; *State v. Underdown*, 10th Dist. No. 06AP-676, 2007-Ohio-1814, ¶ 12.

{¶ 11} In the trial court, appellant alleged that the detective coerced him by: (1) promising him leniency if he cooperated and named the other people involved with the robbery; (2) advising him of the prison sentence he faced; and (3) lying to him about having eyewitnesses to the robbery. We disagree.

{¶ 12} First, the detective did not promise leniency to appellant and, in fact, advised appellant that he had no control over what sentence he would receive. *State v. Dobbs*, 2d Dist. No. 2009CA70, 2010-Ohio-3649, ¶ 63. The detective did advise appellant that his truthful cooperation would be a good thing for him. However, "[a]dmonitions to tell the truth are considered to be neither threats nor promises and are permissible." *State v. Loza*, 71 Ohio St.3d 61, 67 (1994). A police officer's "[p]romises that a defendant's cooperation would be considered in the disposition of the case, or that a confession would be helpful, does not invalidate an otherwise legal confession." *Id.*, citing *State v.*

Edwards, 49 Ohio St.2d 31, 40-41 (1976). See also *State v. Huysman*, 12th Dist. No. CA2005-09-107, 2006-Ohio-2245, ¶ 22, quoting *State v. Stringham*, 2d Dist. No. 2002-CA-9, 2003-Ohio-1100, ¶ 16 ("A mere suggestion that cooperation may result in more lenient treatment is neither misleading nor unduly coercive, as people 'convicted of criminal offenses generally are dealt with more leniency when they have cooperated with the authorities.' "); *State v. Scholl*, 10th Dist. No. 12AP-309, 2012-Ohio-6233, ¶ 15 (addressing each of these concerns).

{¶ 13} Additionally, neither the detective's truthful advisements of the possible sentences appellant faced as the result of these offenses nor the lying about the strength of the evidence against him rises to the level of coercive conduct. *State v. Bays*, 87 Ohio St.3d 15, 23 (1999); *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 25.

{¶ 14} The detective did not use any inherently coercive tactics during appellant's interview. Accordingly, appellant cannot demonstrate that the statements he made during that interview were involuntary. The trial court did not err by denying his motion to suppress and we overrule appellant's fourth assignment of error.

B. Appellant's First and Second Assignments of Error—Sufficiency and Manifest Weight of the Evidence

{¶ 15} Appellant contends in these assignments of error that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶ 16} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law. *Id.*

{¶ 17} In determining whether the evidence is legally sufficient to support a conviction, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not

reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 18} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶ 19} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *Thompkins* at 387. Although there may be sufficient evidence to support a judgment, a court may nevertheless conclude that a judgment is against the manifest weight of the evidence. *Id.*

{¶ 20} When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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. *Id.* at 387. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 21} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons*

Coal Co. v. Cleveland, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 55. See also *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 22} 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. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.* In that regard, we first examine whether appellant's convictions are supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).¹

{¶ 23} Appellant argues that his convictions are against the manifest weight of the evidence because the victim and an alleged accomplice of the appellant were not credible and testified inconsistently. Specifically, appellant argues that B.P. was not credible because B.P. initially lied to the police about his role in the drug transaction. He first told the police that he was buying, not selling the marijuana. B.P. also lied about the amount of marijuana he had with him. Appellant also argues that K.B. was not credible because K.B. was a parole violator who agreed to testify against appellant in exchange for a reduced sentence. We disagree.

{¶ 24} Appellant made these credibility arguments to the jury. The jury obviously disagreed with appellant's assessment of the witnesses' credibility. Although this court, in conducting a manifest weight of the evidence review, can engage in some limited credibility weighing, we give considerable deference to the jury for these determinations, as they are in a much better position to judge the credibility of the witnesses given their ability to view the witnesses' live testimony. *State v. G.G.*, 10th Dist. No. 12AP-188, 2012-

¹ We note that because this court does not address credibility determinations in a sufficiency review, the testimony from the victim and accomplice describing appellant's involvement is sufficient evidence to support the convictions.

Ohio-5902, ¶ 7. Appellant's arguments do not establish that the state's witnesses lacked all credibility. *See State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991, ¶ 12. Additionally, a defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence is presented at trial. *Gravelly* at ¶ 45.

{¶ 25} In light of the evidence presented at trial, the trier of fact did not lose its way so as to create such a manifest miscarriage of justice. Accordingly, appellant's convictions are not against the manifest weight of the evidence. This disposition also resolves appellant's claim that his convictions were not supported by sufficient evidence. We overrule appellant's first and second assignments of error.

C. Appellant's Third and Fifth Assignments of Error—*Howard* Instructions

{¶ 26} In these assignments of error, appellant argues that the trial court improperly instructed the jury when it sought advice on its deliberations and that trial counsel was ineffective for not objecting to the instruction. We reject both arguments.

1. The *Howard* Instruction

{¶ 27} Hours after the jury began deliberating, it asked the trial court: "If we cannot agree on all counts and specifications, what happens?" (Tr. 315.) The trial court, outside the presence of the jury, asked the parties how to answer the question. The prosecutor requested a "dynamite charge," which the trial court apparently construed as a request for an instruction in accordance with *State v. Howard*, 42 Ohio St.3d 18 (1989).² (Tr. 315-16.) Appellant's counsel replied, "[t]hat's fine with me." (Tr. 316.) The trial court so instructed the jury and, within one hour, the jury arrived at its verdict.

{¶ 28} Appellant does not dispute the substance of the trial court's instruction. Instead, appellant argues that the trial court erred by prematurely providing the *Howard* instruction without first inquiring of the jury if it was deadlocked or if further deliberations would be helpful. We disagree.

{¶ 29} We begin by noting that trial counsel did not object to the instruction and did not ask the trial court to inquire whether the jury was deadlocked or if further deliberations would be beneficial. Because appellant did not object at trial to the trial

² A *Howard* instruction is a supplemental instruction a trial court may provide to a deadlocked jury "so as to challenge them to try one last time to reach a consensus." *State v. Robb*, 88 Ohio St.3d 59, 81 (2000).

court's decision to give the *Howard* instruction, appellant waived all but plain error in this regard. *State v. Dudley*, 10th Dist. No. 05AP-144, 2005-Ohio-6503, ¶ 66, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *Barnes*. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. *Id.*; *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶ 12 (10th Dist.). Courts are to notice plain error under Crim .R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of syllabus.

{¶ 30} The trial court did not err, let alone commit plain error, by giving the *Howard* instruction. First, we find no requirement that a trial court must first ask the jury whether further deliberations would be helpful before providing a *Howard* instruction. *State v. Berry*, 159 Ohio App.3d 476, 2004-Ohio-6027, ¶ 17 (12th Dist.). Second, whether a jury is deadlocked is a question within the trial court's discretion. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶ 127. There is no formula or required period of time a trial court must wait for a *Howard* instruction to be appropriate. *State v. Shepard*, 10th Dist. No. 07AP-223, 2007-Ohio-5405, ¶ 11-12. Additionally, there is no requirement that a jury explicitly state that it is deadlocked before providing a *Howard* instruction. *State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, ¶ 52. Here, even though the jury had only been deliberating for a few hours, this court and others have affirmed decisions to provide a *Howard* instruction under similar timelines and circumstances. *Id.*; *State v. Thompson*, 7th Dist. No. 08 CO 41, 2010-Ohio-3278, ¶ 66-67 (citing cases to find no plain error where *Howard* instruction provided only hours after deliberation began); *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 29 (*Howard* instruction given after jury asked similar question regarding deliberations).

2. Trial Counsel's Failure to Object to the *Howard* Instruction

{¶ 31} Appellant also argues that his trial counsel was ineffective for failing to object to the instruction. Again, we disagree.

{¶ 32} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 33} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 34} We have already concluded that the trial court did not err by giving the jury a *Howard* instruction. Therefore, trial counsel was not deficient for failing to object to the instruction. *State v. Howard*, 2d Dist. No. 23795, 2011-Ohio-27, ¶ 82. Neither does appellant demonstrate prejudice as a result of the trial court's instruction. *State v. Lewis*, 8th Dist. No. 82055, 2003-Ohio-5240, ¶ 32. Thus, appellant cannot demonstrate ineffective assistance of trial counsel for failing to object to the *Howard* instruction.

{¶ 35} Having found no error regarding the trial court's *Howard* instruction, we overrule appellant's third and fifth assignments of error.

D. Conclusion

{¶ 36} Having overruled appellant's five assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
