[Cite as *State v. Greene,* 2004-Ohio-6701.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2002-A-0104**
- vs -	:	
WILLIAM H. GREENE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 02 CR 25.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Angela M. Scott*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Dean F. Topalof, 4920 State Road, #102, Ashtabula, OH 44004 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, William H. Greene, appeals from the October 29, 2002 judgment entry of the Ashtabula County Court of Common Pleas, in which he was sentenced for complicity to trafficking in cocaine.

{¶2} On March 6, 2002, appellant was indicted by the Ashtabula County Grand Jury on one count of complicity to trafficking in drugs with a forfeiture specification, a

felony of the fifth degree, in violation of R.C. 2923.03 and R.C. 2925.03. Appellant entered a not guilty plea at his arraignment on March 15, 2002.

{¶3} A jury trial commenced on September 4, 2002. At the close of the state's case, appellant's counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court. At the close of appellant's case, appellant's counsel renewed the Crim.R. 29 motion, which was again overruled by the trial court. On September 5, 2002, the jury found appellant guilty.

{¶4} On January 24, 2002, Officer Thomas Azzano ("Officer Azzano") with the Cuyahoga Metropolitan Housing Authority's Police Department assisted the Ashtabula Police Department ("APD") in conducting "buy/busts" or "controlled buys" of narcotics in two high drug traffic/high crime areas in the city of Ashtabula. Officer Azzano, who was unknown in the two crime areas of Station Avenue and the Ohio Village apartment complex, drove an Apple Heating van that was wired with a radio transmitter and which concealed several APD officers and a canine.[1] Also, marked APD cruisers were in the two areas to assist in any possible arrests. Officer Azzano was given fifty dollars from Officer George Cleveland ("Officer Cleveland") of the APD in order to make a controlled drug buy attempt. Officer Azzano testified for the state that he was instructed by officers from the APD to use the word "sweet" as a signal that a drug transaction had taken place.

{¶5} According to Officer Azzano, he turned down West 34th Street, and a white Dodge Caravan came behind the van he was driving. Officer Azzano indicated that the driver of the Caravan, appellant, was flashing its lights and gesturing for Officer

1. The quality of the tape is poor since appellant's and Robin Jackson's ("Jackson") words are muddled and/or unintelligible.

Azzano to stop. Officer Azzano stated that he stopped the van at a stop sign at Superior Avenue and West 34th Street. Based on his prior experience with drug interdiction, Officer Azzano believed that appellant was attempting to "serve" him, or sell him narcotics. Officer Azzano stated that appellant's Caravan pulled up about one and a half feet away from the van he was driving, and appellant asked him if he had a cigarette. Officer Azzano told appellant that he did not have a cigarette. At that time, Officer Azzano explained that appellant and the occupants in appellant's Caravan, his brother, Edgar Greene ("Greene"), and Jackson basically told Officer Azzano to exit his van. Because the two vehicles were so close, Officer Azzano was unable to exit, so he pulled the van forward.

{¶6} Officer Azzano testified that appellant got out of the Caravan, walked to the driver's door of the van that Officer Azzano was driving, and "looked at [Officer Azzano] for maybe, like, ten seconds, like [appellant] was trying to figure [Officer Azzano] out." Officer Azzano said that appellant again asked him for a cigarette, and Officer Azzano responded that he did not have one. Officer Azzano stated that he asked appellant if he could get a "fifty," which is street slang for fifty dollars worth of crack cocaine. According to Officer Azzano, appellant immediately responded, "yeah, hold on[,]" and started walking to the Caravan. At that time, Officer Azzano indicated that Jackson exited the passenger side door of the Caravan, talked with appellant, and both walked back to the van that Officer Azzano was driving.

{¶7} Officer Azzano explained that he showed Jackson fifty dollars, and she asked, "you want fifty?" Officer Azzano responded that he did, and indicated that Jackson handed him "three small suspected rocks of crack cocaine" in exchange for fifty

dollars. Officer Azzano stated "sweet," to indicate to the other officers that a drug transaction had taken place. Officers from the APD then emerged from the back of the van that Officer Azzano was driving, and appellant and Jackson were taken into custody.

{¶8} Patrolman James Kemmerle ("Patrolman Kemmerle"), a patrolman and canine handler with the APD, testified for the state that he and his dog were in the back of the van that Officer Azzano was driving on the day of the incident. At about 5:00 p.m., Patrolman Kemmerle indicated that after he heard Officer Azzano say "sweet," he jumped out of the van and saw both appellant and Jackson talking with Officer Azzano. Patrolman Kemmerle stated that Jackson had a reputation on the street as a prostitute and drug dealer.

{¶9} According to Officer Cleveland, who also testified for the state, he, too, was in the van that Officer Azzano was driving and heard Officer Azzano ask appellant for a fifty. Officer Cleveland explained that he then heard Officer Azzano speak with Jackson and say "sweet." At that time, Officer Cleveland stated that he jumped out of the van and saw both appellant and Jackson standing outside of the van speaking with Officer Azzano.

{¶10} Greene, who testified for appellant, indicated that he suffers from paranoia/schizophrenia, which causes him to forget things, and is on medication. Greene said that he was on medication on January 24, 2002, as well as when he testified. According to Greene, Jackson wanted appellant to catch the van that Officer Azzano was driving. Greene explained that officers patted him down and found a crack

cocaine pipe and a "push" in his jacket pocket, which he claimed that he did not know were there. Greene stated that appellant got out of the van to get cigarettes.

{¶11} According to appellant, he and Greene were on their way to a relative's house at approximately 2:00 p.m., when they saw Jackson walking down the road. Appellant testified that he stopped and agreed to give Jackson a ride to Station Avenue and drop her off at a convenience store. On Station Avenue, appellant indicated that Jackson had him flag down the van that Officer Azzano was driving, and he complied. Appellant stated that he pulled his Caravan next to the van that Officer Azzano was driving and asked him for a cigarette. Appellant explained that Officer Azzano told him that he could have a cigarette. Appellant said that he then pulled his Caravan over to the curb and Jackson got out and walked to the van that Officer Azzano was driving. Appellant testified that he went over to Officer Azzano to get cigarettes for himself and for Greene, at which time the police came out. Appellant stressed that he never had a conversation with Officer Azzano about a fifty.

{¶12} Pursuant to its October 29, 2002 judgment entry, the trial court sentenced appellant to two years of community control. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignments of error:

{¶13} "[1.] The trial court committed prejudicial error by admitting evidence of appellant's prior conviction which was more than ten years old in violation of Evid.R. 609.

{¶14} "[2.] The trial court erred to the prejudice of [appellant] when it returned a verdict of guilty against the manifest weight of the evidence."

{¶15} In his first assignment of error, appellant argues that the trial court erred by admitting evidence of a prior conviction which was more than ten years old in violation of Evid.R. 609. Appellant stresses that the trial court erred in ruling against his motion in limine and objection to allowing the prosecutor to cross-examine him with regard to his prior robbery conviction from 1976. Appellant contends that the trial court should have addressed the probative value versus the prejudicial effect and then ruled in his favor.

{¶16} Evid.R. 609(B) provides that:

{¶17} "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of probation, or shock probation, or parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

{¶18} The Supreme Court of Ohio stated in *State v. Wright* (1990), 48 Ohio St.3d 5, syllabus, that: "Evid.R. 609 must be considered in conjunction with Evid.R. 403. The trial judge therefore has broad discretion in determining the extent to which testimony will be admitted under Evid.R. 609."

{¶19} With respect to a reviewing court's standard of review, this court stated that: "'the trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court.'" *State v. Seitz*, 11th Dist. No. 2001-P-0123, 2003-Ohio-1879, at ¶12, quoting *State v. Issa* (2001), 93 Ohio St.3d 49, 64.

{¶20} In the case at bar, prior to trial, the state filed a notice of submission on June 13, 2002, giving the trial court notice that it had provided appellant's counsel with a discovery request, discovery response, bill of particulars, and notice of intent to use as evidence the prior robbery conviction. The state also provided supplemental discovery and on July 12, 2002, filed a notice of submission and intent to use evidence with respect to appellant's criminal history. Thus, pursuant to Evid.R. 609(B), the record clearly shows that the state provided appellant with sufficient advance written notice of its intent to use such evidence. Also, based on Evid.R. 609(B), appellant had a sufficient opportunity to contest the use of such evidence prior to trial.

{¶21} In chambers on the morning of trial, appellant's counsel made an oral motion in limine with respect to the use of appellant's prior conviction. Appellant's counsel argued that appellant's prior conviction was over twenty-five years old and that the state had to provide its intent to use such evidence in a timely manner in writing. The state, however, stressed that the notice of intent to use such evidence was provided to appellant's counsel on July 12, 2002, almost two months before trial. The state indicated that appellant's 1976 crime of robbery constituted a crime of dishonesty. The trial court agreed with the state and overruled appellant's motion. However, the

trial court did not make a specific finding on the record of whether the probative value of appellant's prior conviction substantially outweighed its prejudicial effect. As such, there is no evidence in the record of the trial court's determination pursuant to Evid.R. 609(B). Nevertheless, this error was harmless. See *State v. Williams* (1983), 6 Ohio St.3d 281, 290.

{¶22} Aside from being mentioned in the trial transcript, appellant failed to provide this court with a record of his prior robbery conviction pursuant to App.R. 9(B). See *State v. Mayes* (Dec. 30, 1999), 12th Dist. No. CA99-01-002, 1999 Ohio App. LEXIS 6405, at 8. "It is [an appellant's] burden to demonstrate that [a] prior conviction exceeded the time limit of Evid.R. 609(B)." *State v. Maddox* (June 4, 1998), 8th Dist. No. 72765, 1998 Ohio App. LEXIS 2408, at 5. Without an adequate record, we cannot determine whether appellant's prior robbery conviction is within the appropriate time frame set forth by Evid.R. 609(B). *Mayes* at 8-9. Therefore, we "must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision." Id. at 8, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Thus, we are unable to determine that appellant's substantial rights in this regard were affected or that he was prejudiced as a result of the trial court's ruling. In addition, none of appellant's substantial rights were affected here nor was he prejudiced in any manner. Appellant's first assignment of error is without merit.

{¶23} In his second assignment of error, appellant contends that the trial court erred when it returned a verdict of guilty against the manifest weight of the evidence. Appellant alleges that evidence was lacking to prove beyond a reasonable doubt that he

knowingly aided or abetted Jackson in committing the offense of trafficking in drugs. Thus, appellant stresses that the jury lost its way in convicting him.

{¶24} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

{¶25} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶26} "'"(***)The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶27} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶28} "[A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS

3333, at 8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶29} In *Schlee*, supra, at 14-15, we also stated that: "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶30} "'In determining whether the verdict was 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶31} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶32} In the case sub judice, although appellant alleges a manifest weight argument, it appears that he is challenging the sufficiency of the evidence. In any event, appellant's argument fails under either analysis.

{¶33} With respect to complicity, R.C. 2923.03(A)(2) provides that: "[n]o person, acting with the kind of culpability required for the commission of an offense, shall *** [a]id or abet another in committing the offense[.]"

{¶34} With regard to trafficking in drugs, R.C. 2925.03(A)(1) states that: "[n]o person shall knowingly *** [s]ell or offer to sell a controlled substance[.]"

{¶35} Here, the jury heard from Greene and appellant. Greene testified that he suffers from paranoia/schizophrenia and was on medication on the day of the incident. Greene indicated that his condition and medication causes him to forget things and not remember details. According to appellant, he and Greene were on their way to a relative's house at approximately 2:00 p.m., when they picked up Jackson. Appellant indicated that he got out of his van to get cigarettes from Officer Azzano for himself and Greene, at which time the police came out. Appellant stated that he never had a conversation with Officer Azzano about a fifty.

{¶36} The jury also heard from Officers Azzano and Cleveland and Patrolman Kemmerle. Officer Azzano testified that he believed that appellant was attempting to "serve" him or sell him narcotics. Officer Azzano stated that he told appellant twice that he did not have a cigarette. Officer Azzano indicated that he asked appellant if he could get a fifty, and that appellant immediately responded, "yeah, hold on[,]" and started walking to the Caravan. Officer Azzano explained that Jackson exited the Caravan, talked with appellant, and both walked back to the van that Officer Azzano was driving. Officer Azzano said that Jackson gave him crack cocaine in exchange for fifty dollars. According to Officer Cleveland, he heard Officer Azzano ask appellant for a fifty. Both Officer Cleveland and Patrolman Kemmerle stressed that after they heard Officer

Azzano say “sweet” at approximately 5:00 p.m., they saw appellant and Jackson standing outside of the van speaking with Officer Azzano.

{¶37} The jury clearly chose to believe the testimony of Officers Azzano and Cleveland and Patrolman Kemmerle as opposed to Greene and appellant. Based on *Schlee*, supra, there is substantial evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of the offense have been proven. Also, pursuant to *Schlee* and *Thompkins*, supra, the jury did not clearly lose its way in convicting appellant of complicity to trafficking in cocaine. Thus, appellant’s second assignment of error is without merit.

{¶38} For the foregoing reasons, appellant’s assignments of error are not well-taken. The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.