[Cite as *State v. Watson*, 2012-Ohio-5929.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0053**
- vs -	:	
BRANDI LYNN WATSON, a.k.a. BRANDI LYNN PURBAUGH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 10 CR 63.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 102 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Trumbull County Court of Common Pleas. Appellant, Brandi Lynn Watson, seeks reversal of her convictions for possession of cocaine, possession of heroin, and tampering with evidence. She primarily argues that the jury verdict on all counts was against the manifest weight of the evidence.

{¶2} The investigation leading to appellant's indictment was based upon tips from a confidential informant, who was a lifelong resident of the City of Warren, Ohio. In 2007, the informant acted as an undercover agent for the Trumbull-Ashtabula Group, a multi-county task force that specializes in narcotics investigations. On one occasion, he participated in a "controlled" drug purchase. His decision to assist the task force in this manner was predicated in part upon his conviction for a non-drug crime. After that one purchase, the informant did not perform any other work for the task force, but continued to provide information to Detective Richard Tackett when he thought it might be helpful.

{¶3} In October 2009, the informant was hired to do some minor construction work at a car wash, located in the southwestern section of Warren. In performing his duties, he soon began to notice that persons were stopping at the car wash to purchase illegal drugs. The drugs in question were being sold primarily by Frederick Johnson and appellant, who lived together in a home a short distance from the car wash. In talking to the informant while he worked, appellant openly admitted that she was a "dealer" of cocaine and heroin, and she and Johnson made considerable money from trafficking. The informant further noticed that appellant carried a gun on her person at all times.

{¶4} The informant contacted Detective Tackett and told him of the illegal activities at the car wash. Although the detective accepted the information, he and the other members of the narcotics task force were too busy to immediately investigate the matter.

{¶5} In November 2009, the car wash ceased to operate as a business. About that same time, though, a new automotive repair shop went into business a few blocks from the car wash. The repair shop was owned primarily by Kenneth Cook, who was an

acquaintance of Johnson and appellant. Since Cook had frequented the car wash while it was open, Cook either hired or allowed many of the persons who had worked at the car wash to "hang out" at the shop. Since the confidential informant's adult son was one of the persons working at the shop, the informant himself, who was unemployed at the time, began to frequent the shop and assist in some of the repair work.

{¶6} During December 2009, the informant continued to witness illegal drug activity at the repair shop. In addition to appellant, he also saw Kenneth Cook sell cocaine and heroin. Again, he conveyed this information to Detective Tackett. This time, the detective launched an investigation into the matter. Specifically, the detective hired the informant to make a "controlled" purchase of narcotics from Cook in early January 2010. Following this purchase, Cook was not arrested immediately; however, the detective did obtain a search warrant for Cook's repair shop.

{¶7} Before the search warrant could be executed, the informant provided Detective Tackett with addition information. According to him, appellant had recently told him that she and Johnson were planning to travel to the state of Michigan to procure larger amounts of cocaine and heroin. The informant further indicated that he had agreed to help take care of appellant's minor children when her primary babysitter had to report each day to his probation officer.

{¶8} During the course of the Michigan trip, appellant frequently called the informant to notify him as to when she and Johnson would be returning to Warren. The informant then would relay the information to Detective Tackett. On the evening of January 15, 2010, the narcotics task force dispatched a number of undercover police officers to conduct surveillance at Cook's repair shop and the residence shared by

appellant and Johnson. Each of these officers was dressed in casual clothes and stationed in unmarked motor vehicles.

{¶9} At some juncture prior to 11:00 p.m. on the evening in question, a vehicle registered in appellant's name was seen pulling into the driveway of her Warren home. She and Johnson then exited the vehicle and went inside the residence. A short time later, Cook was observed leaving the repair shop and driving to the Johnson/appellant residence. After staying at the home for a relatively short period, Cook returned to his vehicle and drove away.

{¶10} At some point subsequent to Cook's visit, appellant and a second person left the residence and drove away in her vehicle. Appellant was in the front passenger seat, while the second person operated the vehicle. As appellant's vehicle turned from a side street unto a major roadway, two task force officers in separate unmarked cars began to tail the vehicle as it slowly meandered through the downtown area of Warren.

{¶11} After the two unmarked police cars had trailed appellant's vehicle for a few minutes, it was decided that the first unmarked car would turn off, thereby allowing the second unmarked car to pull directly behind her vehicle. This maneuver was used as a means of disguising the continuing surveillance. However, within a few moments after the switch, appellant's vehicle started to accelerate in an attempt to pull away from the trailing unmarked car. This immediately led to a high-speed chase in which appellant's vehicle went over 60 m.p.h. and drove through a number of stop signs and traffic lights. Although the unmarked cars of the narcotics task force were involved in the early stages of the chase, the majority of the chase was conducted by patrolmen in marked cruisers of the Warren City Police Department.

{¶12} At one juncture in the chase, the driver of appellant's vehicle tried to hide in the driveway of an abandoned home. One of the officers in an unmarked car spotted the vehicle and attempted to trap it by pulling directly behind it in the driveway. While the officer was waiting for other task force members to arrive, appellant's vehicle pulled around the back of the abandoned home and into the driveway of an adjacent structure. As the vehicle was exiting the second driveway, a second unmarked car tried to block its path, leading to a collision in which the right front of appellant's vehicle rammed into a back quarter-panel of the unmarked car. Despite the fact that the collision resulted in considerable damage to appellant's vehicle, the officers in the unmarked cars were not able to stop the vehicle, and the chase continued.

{¶13} Immediately after the collision, appellant threw two packages of cocaine out her front passenger window as the vehicle was driving through a residential area of the city. Police officers subsequently found the packages in the yards of two separate homes.

{¶14} Ultimately, none of the various police officers chasing appellant's vehicle were able to engage it in a traffic stop. Instead, the vehicle was found abandoned in the driveway of a home in the south-central portion of the city. After finding appellant's cell phone in the front seat of the vehicle, the officers noticed two sets of footprints going in different directions from the driveway. In following the first set of footprints, the officers found a package of heroin under a set of bushes. In following the second set through the yards in the area, they located appellant's firearm near a fence.

{¶15} In attempting to follow the footprints, the police were unable to apprehend either appellant or the driver of the vehicle immediately. However, based upon specific

information obtained from Kenneth Cook, Detective Tackett captured appellant within a few hours in a garage attached to a friend's home. She was then taken to the Trumbull County Jail, where she was interviewed by a second task force detective and a federal agent with the Bureau of Alcohol, Tobacco, & Firearms. During the process, appellant gave an oral statement concerning the extent of her involvement in the purchase of the drugs and the chase. However, because the two officers viewed this interview as being only preliminary in nature, no immediate steps were taken to record the statement or to have it written down. Moreover, when the two officers asked appellant the following day to repeat her statement so that it could be recorded, she declined.

{¶16} Subsequent to appellant's arrest, her boyfriend, Frederick Johnson, was apprehended and charged on the supposition that he had been the driver of her vehicle during the course of the chase. In March 2010, the county grand jury returned a three-count indictment against appellant, charging her with: (1) possession of heroin, a first-degree felony under R.C. 2925.11; (2) possession of cocaine, a second-degree felony under R.C. 2925.01; and (3) tampering with evidence, a third-degree felony under R.C. 2921.12. In addition to the main charge, each of the first two counts contained a firearm specification and a forfeiture specification. Furthermore, the "heroin" count also had a specification that appellant was a "major" drug offender.

{¶17} Appellant and Johnson were tried together in March 2011. In relation to appellant, the state relied essentially upon the testimony of the confidential informant, Kenneth Cook, and the two officers who heard appellant's oral statement. During his testimony, the informant stated that, after appellant and Johnson had returned to Warren on the night of January 15, 2010, she called him and asked whether they could

bring the drugs to his house because the police were "everywhere." The informant also stated that, after appellant was released on bond, she returned to the repair shop and gave a detailed explanation as to what she and Johnson had done during the chase and how they had disposed of the drugs obtained in Michigan.

{¶18} As part of his trial testimony, Cook asserted that, after he had stopped at appellant's residence on the night in question, she phoned him twice over the next two hours. During the first phone call, appellant told Cook that she and Johnson were being chased by the police. During the second call, she indicated that she had not followed Johnson after they abandoned the vehicle, and asked Cook to come and pick her up. According to Cook, he was able to find her and then take her to the friend's home where she was ultimately apprehended.

{¶19} In regard to appellant's oral statement following her arrest, the task force detective and the federal agent gave similar descriptions of its general substance during their respective testimony. According to both officers, appellant stated that: (1) she and Johnson had been dealing cocaine and heroin for nearly one year; (2) she and Johnson went to Michigan a number of times to purchase both drugs; (3) she gave a description of the exact amount of drugs they bought on their most recent trip, and indicated that it was the largest amount of heroin they had ever obtained; (4) she admitted that she and Johnson had been in her vehicle during the chase and that they had tossed some of the drugs out her window; and (5) she admitted that she lost her firearm while running from the vehicle following its abandonment.

{¶20} In response to the state's evidence, appellant testified on her own behalf. First, she stated that, although she had used cocaine frequently, she had never acted

as a drug dealer. Second, she denied that she and Johnson had traveled to Michigan immediately prior to January 15, 2010, and stated that Johnson no longer resided at her home because she had ended their relationship. Third, she testified that Kenneth Cook had been working on her vehicle the entire day in question, and had brought it back to her that evening. Fourth, she indicated that Cook then asked to borrow the vehicle, and that she went along with him to buy cigarettes at the store. Fifth, she testified that she had not been aware that Cook had placed the drugs in the vehicle, that she was not a willing participant in the chase, and that Cook had forced her to throw the cocaine out her window. Lastly, she expressly denied that she had made any admission to the two officers during the initial interview.

{¶21} The jury returned guilty verdicts on all three counts and the accompanying specifications. The trial court then merged the two firearm specifications and imposed a one-year sentence on the firearm specification and four years on the "major drug offender" specification, to be served concurrently. The court also sentenced appellant to terms of ten years, eight years, and three years on the main charges, to be served concurrent to each other but consecutive to the specifications, for an aggregate term of fifteen years.

{¶22} In appealing the foregoing conviction, appellant has asserted the following assignments of error for review:

{¶23} "[1.] The appellant's convictions are against the manifest weight of the evidence.

{¶24} "[2.] The trial court erred and abused its discretion by permitting the state to alter the testimony of a witness by requiring the witness to listen to a prior taped

statement the witness had given and then testifying in a fashion inconsistent with the prior trial testimony of the witness."

{¶25} Under her first assignment, appellant maintains that her conviction on all three counts must be reversed because the jury verdict was against the manifest weight of the evidence. In essence, she submits that the jury clearly lost its way in assessing the credibility of the state's witnesses. According to her, the jury should have found that her version of the events was more believable than that of the confidential informant, Kenneth Cook, and the two officers who testified regarding her alleged confession.

{¶26} The basic standard for reviewing the weight of the evidence supporting a criminal conviction is well established under the case law of this appellate district:

{¶27} "'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 added.)" *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-15, quoting *State v. Davis*, 49 Ohio App.3d 109, 113 (8th Dist.1988).

{¶28} In applying this standard, this court has emphasized that the reversal of a conviction on "manifest weight" grounds is only intended to occur in exceptional cases where the evidence weighs heavily in favor of the defendant. *State v. Sawyer*, 11th Dist. No. 2011-P-0003, 2011-Ohio-6098, ¶39.

{¶29} Notwithstanding the fact that an appellate court must review the credibility

of witnesses as part of a "manifest weight" analysis, we have also indicated that the jury is in the best position to assess witness credibility. *Id.* at ¶40, citing *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967). Accordingly, a certain degree of deference must be shown to the jury's credibility determination. *State v. Henderson*, 11th Dist. No. 2010-T-0095, 2012-Ohio-740, ¶42.

{¶30} At the outset of our analysis of the credibility issue in this case, this court would first note that the state was able to successfully contest appellant's own credibility in cross-examining her at trial. Specifically, the state was able to establish that, despite the fact that appellant had been given a number of opportunities to do so, she had not told any officer during the post-crime investigation that Kenneth Cook was the driver of the car, instead of Johnson. That is, even though fourteen months elapsed between her arrest and the beginning of her trial, she never stated her version of the various events to anyone of authority until she took the stand to testify. In support of its point, the state was also able to establish that, even though appellant visited Johnson regularly at the county jail during the time frame in which their cases remained pending at the trial level, she never attempted to obtain his release by telling her version of the relevant events.

{¶31} In light of the foregoing, the jury could have readily found that appellant's trial testimony had been fabricated to support her and Johnson's interests, and that the oral version she gave to the two police officers during the interview after her arrest had been truthful.

{¶32} Concerning the credibility of the two officers who testified as to her alleged oral confession, appellant argues that their testimony should have been rejected by the jury solely on the basis that the officers could have recorded her statement at the time it

was given. However, a review of the trial transcript shows that the task force detective who conducted the interview gave a justifiable reason for failing to record her statement. That is, the detective testified that he was not prepared to record the discussion in any manner because the interview was only intended to be superficial in nature and he did not know whether appellant would be willing to talk. Given that appellant was unable to demonstrate any legitimate reason why the detective and the federal agent would not state the truth as to the substance of her oral statement, the jury could have concluded that the detective's explanation for the lack of a recorded statement was genuine under the circumstances. Thus, the trial record does not support appellant's assertion that the testimony of the detective and the federal agent should have been totally rejected.

{¶33} In relation to the confidential informant's testimony, appellant submits that he could not be believed because he was related to a member of the county sheriff's department and had previously been paid to act as an informant for the task force. As to the informant, this court would indicate that no evidence was presented showing that he was given any benefit from providing information to Detective Tackett; i.e., his actions in this case were purely voluntary. Furthermore, the record shows that the nature of the informant's connection to the sheriff's department was fully explained to the jury. In light of the fact that the jury was informed that the informant himself had a drug problem earlier in his life, the record does not support an inference that he had an ulterior motive for testifying against appellant. Therefore, the confidential informant's prior dealings with Detective Tackett and the task force did not render his testimony completely unbelievable.

{¶34} Regarding Kenneth Cook, appellant maintains that her right to a fair trial

was prejudiced when the trial court did not allow her trial counsel to fully explore during cross-examination the issue of Cook's own prior acts in "dealing" drugs. Yet, a review of the trial transcript shows that the trial court only sustained the state's objection when counsel asked Cook to provide the names of the persons to whom he had sold illegal drugs from the repair shop. Given that the exact names of the buyers would not help to establish the extent to which Cook was a drug dealer, there is nothing before this court to indicate that appellant was denied a proper opportunity to contest Cook's credibility. Moreover, since the record indicates that appellant's counsel was unable to reveal any fact which rendered Cook's testimony completely incredulous, the jury did not abuse its discretion in believing Cook over her.

{¶35} Considered as a whole, the trial record clearly contains some competent, credible evidence upon which the jury could have found beyond a reasonable doubt that appellant was not merely an innocent bystander in the police chase, but was acting with Johnson to avoid apprehension while having possession of two illegal drugs. In light of this, the record before this court readily supports the conclusion that the jury did not lose its way in finding appellant guilty of the two drug offenses and tampering with evidence. Thus, since the jury verdict was not against the manifest weight of the evidence, her first assignment lacks merit.

{¶36} Appellant's second assignment concerns the propriety of the state's use of a prior recorded statement at trial. The trial transcript shows that, during the testimony of Kenneth Cook, the trial court allowed the state to employ the statement to refresh his memory as to a statement appellant had supposedly made to him during a conversation the evening of the police chase. Appellant contends that the use of the prior recorded

statement should not have been permitted because Cook specifically stated that he did not need to have his memory refreshed.

{¶37} Pursuant to Evid.R. 612, a prior written statement of a witness can be used at trial to refresh the memory of the witness so long as the adverse party has an opportunity to inspect the statement during the trial, cross-examine the witness on it, and introduce the relevant portions of it into evidence. Under this procedure, the party seeking to refresh the memory of its witness is not allowed to have its witness read the prior statement aloud before the jury; instead, the witness must read the statement silently or the jury must be excused. *See State v. Miller*, 12th Dist. No. CA2009-04-106, 2010-Ohio-1722, ¶10. "If the writing refreshes the witness's recollection, the witness then testifies using present independent knowledge. * * * It is the testimony, not the writing, that is the evidence." *State v. Knott*, 4th Dist. No. 03CA30, 2004-Ohio-5745, ¶15.

{¶38} Even though Evid.R. 612 only refers to the use of a "writing" to refresh the recollection of a witness, it has been held that other pre-existing items, such as videotapes or audio recordings, can be employed for this purpose. *Id*. at ¶15. Furthermore, this court has indicated that the decision to permit a party to refresh the memory of its witness lies within the sound discretion of the trial court. *State v. McLean*, 11th Dist. No. 98-L-239, 2000 Ohio App. LEXIS 2664, *9-10 (June 16, 2000).

{¶39} Near the outset of Cook's direct examination in the instant case, the state inquired regarding a telephone discussion which he had with appellant immediately after she and Johnson had returned from the state of Michigan. According to Cook, appellant wanted to know whether anyone was outside "watching" the repair shop at that time.

After Cook gave a description as to how he checked outside the shop and then relayed the information to appellant, the state asked whether she had made a specific reference to the possibility that police officers were conducting surveillance:

{¶40} "Q. Now, did she say they think there are cops around?

{¶41} "A. I don't remember the whole conversation. She just said they were told that someone was sitting at the end of the road.

{¶42} "Q. Would it refresh your memory if you heard a statement that you gave a few days after these events?

{¶43} "A. I don't remember what was said.

{¶44} "Q. Okay.

{¶45} "A. So she may have, she may not have. I don't remember.

{¶46} "Q. Again, my question is, would it refresh your memory if you heard a statement –

{¶47} "A. I don't need to hear the statement, she may have said it. I don't recall it."

{¶48} After the quoted testimony, the trial court excused the jury and conducted a separate hearing on the point. Upon considering the arguments of both sides, the trial court permitted the state to play for Cook his own prior recorded statement. This took place outside the presence of the jury. When this separate hearing concluded, the jury was brought back into the courtroom and Cook testified that appellant had referred to the possible presence of the police.

{¶49} In regard to the quoted exchange between the witness and the prosecutor, appellant maintains that Cook was indicating that it was not necessary to play the prior

recorded statement for him because he knew that appellant had only asked to look for "people" outside, not cops. However, our reading of the quoted exchange simply does not support appellant's position. Instead of indicating that he had a present recollection of what appellant said, Cook was clearly stating that there was no need to play the prior statement because he was willing to admit it was possible that he had previously said that a reference to the police had been made. Accordingly, appellant's entire argument is predicated upon a supposition which is not supported by the trial transcript.

{¶50} In this case, the trial record readily demonstrates that Cook admitted that it was possible that he was not accurately recalling the specific statement appellant made to him during the disputed telephone conversation. Because a legitimate need to refresh Cook's memory existed at that time, appellant has failed to show any abuse of discretion by the trial court. For this reason, her second assignment of error also lacks merit.

{¶51} Pursuant to the foregoing, each of appellant's assignments of error is not well taken. Accordingly, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.