[Cite as *State v. Marhefka*, 2016-Ohio-7158.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-A-0013**
- vs -	:	
HANNAH MARIE MARHEFKA, a.k.a. HEATHER MARHEFKA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula Municipal Court, Case No. 2015 CRB 00191.

Judgment: Reversed and vacated.

Michael Franklin, Ashtabula City Solicitor, and *Lori B. Lamer,* Assistant Ashtabula City Solicitor, Ashtabula Municipal Court, 110 West 44th Street, Ashtabula, OH 44004 (For Plaintiff-Appellee).

Edward M. Heindel, 400 Terminal Tower, 50 Public Square, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} After a trial to the bench, appellant, Hannah Marhefka, was convicted of one count of permitting drug abuse, in violation of R.C. 2925.13(B), a misdemeanor of the first degree. Appellant now appeals the judgment of conviction entered by the Ashtabula Municipal Court. We reverse the judgment of the trial court and vacate appellant's conviction.

{¶2} Melissa Zirkle is the owner of a residence on 1312 Perryville Place, Ashtabula, Ohio. The residence was the former home of her grandfather and is in a neighborhood which Ms. Zirkle described as "very close," where neighbors "kept an eye on each other constantly[.]" According to Ms. Zirkle, many of the residents in the neighborhood were retired and remained at home most of the day.

{¶3} In January 2015, Ms. Zirkle leased the residence to appellant. Within the first week of appellant's tenancy, appellant permitted Laroo Wells to move in with her. Appellant testified she knew Mr. Wells during high school, some four years earlier. She stated she had not seen Mr. Wells since high school because she "lived in Geneva and stayed in Geneva," but acknowledged she had contact with him via Facebook or text message. Appellant provided Mr. Wells with a key because she was out of the residence frequently; appellant testified she worked at a nursing home up to 60 hours per week. Appellant stated she was aware that Mr. Wells had friends in the home, but these friends were not in the house when she was home.

{¶4} Approximately one week into appellant's tenancy, Ms. Zirkle received "multiple phone calls" from neighbors complaining about the high-traffic volume going in and out of the residence. Ms. Zirkle contacted appellant, who denied the allegations and stated the neighbors were simply being "nosey." Every time Ms. Zirkle received a call, she notified appellant and explained that if the traffic did not diminish, the police may be called.

{¶5} Appellant acknowledged Ms. Zirkle contacted her regarding the neighbors' concerns. Appellant stated she would attempt to address the issue; she explained,

however, that Ms. Zirkle should call the police if she was concerned because she was frequently not home during the day due to her work schedule.

{¶6} Appellant stated that she asked Mr. Wells about the problem and he indicated there was "nothing going on." Appellant conceded Ms. Zirkle contacted her on various occasions and was aware there were "a lot of complaints about what was going on at [her] house when [she wasn't] there[.] Appellant testified that she urged Ms. Zirkle to call law enforcement because she was "unaware of any drug dealing or anything going on in [her] home." Nevertheless, in February 2015, due to the complaints, appellant and Ms. Zirkle mutually agreed to negate the lease and appellant vacated the property.

{¶7} The day after appellant departed, Ms. Zirkle arrived at the property to inspect the residence. She testified it was "[a] mess." In the course of cleaning the home, Ms. Zirkle moved a picture frame from a shelf, and a "big ball of tissue fell off the shelf." When she opened the tissue, she found small, zip-lock bags that contained a tan substance. Ms. Zirkle immediately called police.

{¶8} Patrolman Thomas Perry was dispatched to the residence. He met Ms. Zirkle who directed him to the area where the bags were found. Patrolman Perry suspected the substance to be heroin and, after performing a field test on the substance, confirmed his suspicion. He further noted that, based upon his experience and training, the packaging indicated the heroin was meant to be sold to individual buyers.

{¶9} Patrolman Perry testified he had been observing the residence recently based upon information referenced in certain, unknown complaints. Based upon his

observations, Patrolman Perry learned that one Laroo Wells, a known drug trafficker, was residing in the home. He testified he had previously observed appellant's car, a green Kia Soul, at the home and had stopped that vehicle while Laroo Wells was driving the car.

{¶10} Patrolman Perry ultimately seized 13 small baggies containing the substance and the evidence was sent to BCI. After analysis, BCI confirmed the substance was, in total, 1.41 grams of heroin.

{¶11} Appellant knew Mr. Wells had no job; and she did not know how he supported himself. Appellant stated she did not ask for any rent from him and only requested that he "pick up after himself and try to find somewhere else to go as soon as possible." Appellant testified she had no knowledge that Mr. Wells dealt drugs; she did not buy drugs from Mr. Wells; and she never witnessed Mr. Wells with drugs in her residence.

{¶12} After considering the testimony, the trial court concluded the state met its burden, beyond a reasonable doubt, and found appellant guilty of permitting drug abuse. Appellant was sentenced to 60 days in jail together with a $500 fine. The 60-day jail sentence was suspended on the condition that she have no similar offenses for two years, no contact with Mr. Wells, and that she perform 40 hours of community service within 90 days. Appellant subsequently filed the instant appeal assigning the following error:

{¶13} "The conviction for permitting drug abuse was against the manifest weight of the evidence and not supported by sufficient evidence."

{¶14} A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. Lake No. 2010-L-0033, 2011-Ohio-4171, ¶25. "[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062 ¶9 (11th Dist.).

{¶15} In contrast, a court reviewing the manifest weight observes the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15 (Dec. 23, 1994).

{¶16} Appellant was convicted of permitting drug abuse, in violation of R.C. 2925.13(B). That statute provides:

> **{¶17}** No person who is the owner, lessee, or occupant, or who has custody, control, or supervision, of premises or real estate, including vacant land, shall knowingly permit the premises or real estate, including vacant land, to be used for the commission of a felony drug abuse offense by another person.

{¶18} Appellant first asserts the state failed to produce sufficient, credible evidence that appellant "knowingly" permitted the house to be used for the commission of a felony drug abuse.

{¶19} R.C. 2901.22(B) defines the culpable mental state of knowingly and states:

> **{¶20}** A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain

> result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

{¶21} In this case, the state produced sufficient evidence that appellant was the lessee of the residence. It also introduced adequate circumstantial evidence that the residence was used for the commission of a felony drug offense, viz., trafficking or possession of heroin. The state failed, however, to produce adequate evidence to permit the reasonable inference that appellant had knowledge that the residence was being used for the commission of such an offense or offenses.

{¶22} It is well-settled that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value * * *." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus. Circumstantial evidence has been defined as testimony not grounded on actual personal knowledge or observation of the facts in controversy, but of other facts from which inferences are drawn, showing indirectly the facts sought to be established. *State v. Nicely*, 39 Ohio St.3d 147, 150 (1988). An inference is "a conclusion which, by means of data founded upon common experience, natural reason draws from facts which are proven." *State v. Nevius*, 147 Ohio St. 263 (1947). It consequently follows that "when circumstantial evidence forms the basis of a conviction, that evidence must prove collateral facts and circumstances, from which the existence of a primary fact may be rationally inferred according to common experience." *Windle*, *supra*, at ¶34.

{¶23} In this case, the state produced evidence that neighbors were complaining about significant traffic at the home. Appellant was aware of the complaints and testified she addressed the issue with Mr. Wells, who claimed there was "nothing going on." Appellant knew Mr. Wells had friends at the home while she was not home, but testified those individuals were not present when she was in the residence. And, significantly, she testified she did not know Mr. Wells dealt drugs and had never observed him with drugs in the residence. Although Patrolman Perry testified he was aware Mr. Wells was a drug dealer, the state introduced no evidence to impute such knowledge to appellant.

{¶24} Moreover, the existence of people coming into and out of the house during the day, while appellant was at work, does not, unto itself, permit the reasonable inference that appellant was aware that drug trafficking was occurring in her house; especially in light of her testimony that she confronted Mr. Wells about the complaints *and* her repeated statements to Ms. Zickle that she should call the authorities if she was truly worried about the nature and volume of the traffic.

{¶25} Appellant denied she had any knowledge that Mr. Wells dealt drugs and further denied any knowledge that drugs were being sold from her residence. Appellant further testified she never witnessed Mr. Wells with drugs in her home. These denials were not rebutted. Moreover, appellant testified she removed her belongings and cleaned the residence before she left. If she knowingly permitted Mr. Wells to traffick heroin from the residence, it follows that she would have advised him to remove any contraband before she finally vacated the home. That obviously did not occur. We therefore hold the state failed to introduce sufficient, credible evidence to permit the

reasonable inference that appellant knowingly permitted Mr. Wells to use her residence for the commission of a felony drug abuse offense.

{¶26} Appellant's assignment of error has merit.

{¶27} For the foregoing reasons, the judgment of the Ashtabula Municipal Court is reversed and appellant's conviction for permitting drug abuse is accordingly vacated.

THOMAS R. WRIGHT, J.,

COLLEEN MARY O'TOOLE, J.,

concur.