

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

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| STATE OF OHIO | : | |
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| Plaintiff-Appellee | : | C.A. CASE NO. 2009 CA 21 |
| | : | T.C. NO. 08 CR 148 |
| WILLIAM E. JACKSON | : | (Criminal appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |
| | : | |

OPINION

Rendered on the 19th day of March, 2010.

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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} William E. Jackson was found guilty by a jury in the Greene County Court of Common Pleas of two counts of aggravated trafficking in hydrocodone in an amount exceeding the bulk amount, but not exceeding five times the bulk amount. He appeals from his conviction.

{¶ 2} Jackson contends that the trial court erred in failing to give a jury

instruction about accomplice-witness testimony and that his trial counsel was ineffective in failing to request such an instruction. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 3} On February 29, 2008, Jackson was indicted on two counts of aggravated trafficking in drugs. These offenses were based on two instances in which a confidential informant working with the Greene County Sheriff's Department purchased hydrocodone, or Vicodin, from Jackson under detectives' supervision. The informant had been "friends" with Jackson for many years. The informant testified at trial that the purpose of his relationship with Jackson had been "drugs." He also acknowledged that he had agreed to work with the sheriff's department on purchasing drugs from Jackson to get out of his own legal trouble related to drug dealing.

{¶ 4} Prior to the first controlled buy, the confidential informant had run into Jackson at a grocery store after not seeing him for a couple of years, and Jackson had offered to sell him pills. After conferring with detectives, the informant arranged to buy Vicodin from Jackson at the Tecumseh Motel in Xenia on September 11, 2007. The informant was wired and videotaped, was provided with money for the purchase, and was within sight of the detectives at all times during this purchase. He then turned the pills over to the detectives.

{¶ 5} The second controlled buy occurred at Jackson's home on October 10, 2007, after Jackson called the informant offering to sell him methadone. The informant went to the house with an undercover detective after being searched by

detectives for contraband, wired, and provided with money. When the informant arrived, Jackson told him that he (Jackson) had sold all of his methadone, but offered to provide Vicodin instead. Jackson and the informant conferred with the undercover detective about the change in drugs, and the transaction was completed.

{¶ 6} Jackson was tried by a jury in February 2009. The informant testified at trial, along with several detectives and others. Jackson was convicted on both counts of aggravated trafficking in drugs and was sentenced to twelve months on each offense, to be served concurrently.

{¶ 7} Jackson raises two assignments of error on appeal.

II

{¶ 8} Jackson's first assignment of error states:

{¶ 9} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY STRUCTURAL CONSTITUTIONAL ERROR UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE JURY WAS NOT GIVEN THE ACCOMPLICE-WITNESS INSTRUCTION REQUIRED BY R.C. 2923.03(D)."

{¶ 10} Jackson contends that the trial court erred in failing to instruct the jury on accomplice-witnesses, as provided in R.C. 2923.03(D). That statute provides:

{¶ 11} "If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an

offense, or an offense, the court, when it charges the jury, shall state substantially the following:

{¶ 12} “The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

{¶ 13} “It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth.”

{¶ 14} Jackson did not request this instruction or object to the trial court’s failure to give it. The failure to object to jury instructions constitutes a waiver of any claim of error related to the instruction unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood* (1983), 3 Ohio St.3d 12, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus; Crim.R. 52(B). “[N]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Long*, 52 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 15} The legislative purpose of R.C. 2923.03(D) is to alert juries of the potentially self-serving motivation behind an accomplice’s testimony. *State v. Bentley*, Portage App. No. 2004-P-53, 2005-Ohio-4648, at ¶58, citing *State v. Williams* (1996), 117 Ohio App.3d 488, 495. An “accomplice” commonly means one “who is *guilty* of complicity in crime charged.” (Emphasis sic.) *State v. Wickline* (1990), 50 Ohio St.3d 114, 117, citing Black’s Law Dictionary (5 Ed.1979)

16. At the very least, therefore, “an ‘accomplice’ must be a person indicted for the crime of complicity.” *Id.*; *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, at ¶131. See, also, *State v. Howard*, Delaware App. No. 06CAA100075, 2007-Ohio-3669, at ¶62; *State v. Perry*, 157 Ohio App.3d 443, 2004-Ohio-3020, at ¶16; *State v. Carroll*, Clermont App. No. CA2007-02-030, 2007-Ohio-7075, at ¶147.

Because the informant in this case was not charged with complicity or any other offense related to the aggravated drug trafficking charges against Jackson, the trial court did not err in failing to give the accomplice-witness instruction.

{¶ 16} We recognize that, in some cases, it might be appropriate to consider whether a witness *could have been* indicted as an accomplice in determining whether the accomplice-witness instruction is warranted. See *State v. Howard*, Delaware App. No. 06CAA100075, 2007-Ohio-3669, at ¶59; *State v. Gillett*, Butler App. No. CA2000-10-205, 2002-Ohio-2596, at ¶19. However, “[i]n order to be an accomplice within the meaning of R.C. 2923.03, one must act ‘with the kind of culpability required for the commission of an offense,’ and thus, a law enforcement agent who participates in a crime for investigative purposes only is not an accomplice absent some showing of criminal intent.” *State v. Milbern* (Feb. 26, 1987), Montgomery App. No. 9720, citing *State v. Parish* (1984), 12 Ohio St.3d 123.

{¶ 17} Moreover, even if the informant could be considered an accomplice, there was no plain error. Applying R.C. 2923.03(D), “Ohio courts generally look to three factors to determine whether a trial court’s failure to give the accomplice instruction constitutes plain error: (1) whether the accomplice’s testimony was

corroborated by other evidence introduced at trial; (2) whether the jury was aware from the accomplice's testimony that he benefited from agreeing to testify against the defendant; and/or (3) whether the jury was instructed generally regarding its duty to evaluate the credibility of the witnesses and its province to determine what testimony is worthy of belief." *Bentley*, citing *State v. Woodson*, Franklin App. No. 03AP-736, 2004-Ohio-5713, at ¶17. Here, the informant's testimony was corroborated by the detectives' testimony, audio recordings and videotapes, the jury was aware that the informant received favorable treatment relative to other offenses in exchange for his cooperation as an informant, and the jury was instructed about how to evaluate the credibility of witnesses. Accordingly, we would find no plain error even if the informant were treated as an accomplice.

{¶ 18} Jackson's first assignment of error is overruled.

III

{¶ 19} Jackson's second assignment of error states:

{¶ 20} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY STRUCTURAL CONSTITUTIONAL ERROR UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 21} Jackson asserts that he was denied the effective assistance of counsel because his attorney did not request the accomplice-witness instruction.

{¶ 22} To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated both that trial counsel's conduct fell below an objective

standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. As we discussed under the first assignment of error, Jackson was not entitled to the accomplice-witness instruction because the informant was not an “accomplice.” As such, his attorney was not ineffective in failing to ask for that instruction. Moreover, we concluded that, even if the accomplice-witness instruction had been warranted, any error in failing to give the instruction clearly did not affect the outcome of the trial. In light of this conclusion, we must also conclude that the outcome of the trial would not have been different but for counsel’s failure to request the accomplice-witness instruction.

{¶ 23} The second assignment of error is overruled.

IV

{¶ 24} The judgment of the trial court will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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