[Cite as *State v. Turner*, 2009-Ohio-3114.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee.	:	
	:	Case No. 08CA3234
v.	:	
	:	**DECISION AND**
Antonio L. Turner,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 6-01-09

APPEARANCES

David H. Thomas, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

Kline, P.J.:

{¶1} Antonio Turner appeals his five felony convictions from the Scioto County Common Pleas Court. A jury returned guilty verdicts for (1) trafficking in crack cocaine, (2) possession of crack cocaine, (3) trafficking in heroin, (4) possession of heroin, and (5) possession of criminal tools. On appeal, Turner contends that the State failed to introduce evidence that he committed the two trafficking offenses within the vicinity of a juvenile as required by R.C. 2925.03 and R.C. 2925.11. Because, after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the two crimes of trafficking proven beyond a reasonable doubt, we disagree. Turner next contends that the trial court erred in permitting introduction of other acts evidence. Because the other acts evidence was

admitted for the purpose of demonstrating Turner's possession of the drugs, we disagree and find that the trial court did not abuse its discretion. Finally, Turner contends that the prosecutor's closing remarks constituted prosecutorial misconduct. Because the remarks did not deprive Turner of a fair trial, and thus, we do not find plain error, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} The State's evidence at trial indicated Turner was the source for a drug distribution ring in Portsmouth, Ohio. Turner, under the assumed name of Shawn, had transported drugs from Columbus to Portsmouth for several months leading up to his arrest.

{¶3} Turner would only stay in Portsmouth as long as it took him to sell his present supply of crack cocaine, and he would then return to Columbus to resupply. Generally, Turner would come to Portsmouth for four days and then leave to resupply for three days. Turner stayed at the apartment of Carlene Walker while in Portsmouth. This pattern continued from the middle of July until October 12, 2007. However, in late September, Turner changed his practice of staying with Carlene Walker and started to stay with Tony Mershon. According to one witness, Turner changed to the Mershon residence because Carlene Walker wanted more money to permit Turner to stay there.

{¶4} Cindy Mershon testified that her 17 year old son and 9 year old daughter lived with her and her husband, Tony Mershon. She also testified that her husband was a drug addict and was addicted to pain medication, but she indicated she was unaware of Tony Mershon's heroin use. Finally, she testified that Turner stayed several times at their house.

{¶5} Trista Mershon, Tony Mershon's sister, testified that she was addicted to heroin. Trista also testified that she knew Turner as Shawn, and that she had seen Turner and two other men at a different house around a table repackaging heroin for sale. She further testified that she saw her brother use the money she gave him to purchase crack cocaine from Turner, and that Taylor, the Mershons' nine year old daughter, lived at the Mershon residence.

{¶6} The State originally charged Tony Mershon with the same crimes as Turner. However, Tony Mershon agreed to testify for the State pursuant to a plea agreement. Tony Mershon also testified that he knew Turner as Shawn, and that he purchased crack cocaine from Turner through Bert Thompson as a middle man. Eventually, Turner asked Tony Mershon to let him stay at the Mershon residence in return for heroin. Tony Mershon indicated the reason Turner wanted to change his venue of drug dealing was that an "incident" convinced Turner that there was too much "heat" at Carlene Walker's apartment.

{¶7} Tony Mershon testified that Turner stayed at his house and dealt crack cocaine and heroin on three different occasions. He testified that only Bert Thompson could come to the house for the purpose of purchasing drugs from Turner. When Bert Thompson arrived, he and Turner would go to the dining room where Turner would "cut the dope" and exchange it for money. Tony Mershon also indicated that he heard Turner talking on the phone with an individual known as "Ty" in Columbus who was, evidently, Turner's supplier.

{¶8} Tony Mershon also indicated Turner had on other occasions hidden his drugs in a light fixture in the dining room, and had hidden his drugs in other parts of the home or outside the home.

{¶9} Officer Timberlake testified that he had learned pursuant to an investigation that an individual named Shawn was present at the Mershon residence and was dealing drugs. Officers Timberlake and Bryant then proceeded to the Mershon residence, and then briefly surveilled the location. Officer Timberlake saw a child leave the Mershon residence immediately before he and Officer Bryant searched the residence.

{¶10} Officers Timberlake and Bryant then knocked on the front door of the Mershon residence. When Cindy Mershon answered the door, the officers asked for, and received, permission to search the residence. The officers asked where Shawn was, and Cindy Mershon directed the officers to Turner who was on the living room couch.

{¶11} When confronted, Turner insisted that he was not Shawn. The officers found a replica 9 millimeter pistol next to Turner's shoes as well as a small bag of crack cocaine and $2,900.00 in cash inside his shoes. During a pat-down of Turner, Officer Timberlake discovered $948.00 in the pocket of Turner's pants. The officers found a cache of 11.6 grams of crack cocaine and 5.2 grams of heroin in a vacuum cleaner. Finally, the officers found a set of digital scales in a boot in the dining room.

{¶12} According to the officers, Turner stated during this search that the police would find nothing because someone else "done came got everything."

{¶13} Officer Bower conducted a walk around Turner's car with a K-9 unit. When the K-9 alerted on Turner's car the police searched it. During the search, the police found a marihuana joint and several pieces of paper. The State contended that these pieces of paper contained figures that represented drug transactions.

{¶14} The State relied on the foregoing evidence at trial to prove Turner's guilt. The jury returned guilty verdicts, and the trial court sentenced Turner accordingly.

{¶15} Turner appeals his convictions and asserts the following three assignments of error: I. "The trial court erred and thereby deprived Appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution by overruling Appellant's Crim. R. 29[sic] motion for judgment of acquittal, as the prosecution failed to offer sufficient evidence to prove beyond a reasonable doubt each and every element of the offenses of trafficking in crack cocaine and heroin and possession of crack cocaine and heroin." II. "The trial court erred in permitting introduction of other acts evidence in violation of Rule 404 of the Ohio Rules of Evidence and Appellant's right to a fair trial and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution." And, III. "The prosecuting attorney's remarks during closing arguments constituted prosecutorial misconduct and plain error which deprived Appellant of a fair trial in violation of the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution."

II.

{¶16} Turner contends in his first assignment of error that the trial court erred when it denied his motion for judgment of acquittal under Crim.R. 29.

{¶17} We review the trial court's denial of a defendant's Crim.R. 29 motion for acquittal for sufficiency of the evidence. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, our function "is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶18} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, this test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. Accordingly, the weight given to the evidence and the credibility of witnesses are issues for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶19} Turner phrased his assignment of error in general terms, but in his argument, he relies solely on his contention that the State failed to prove any of the offenses occurred in the vicinity of a juvenile. However, only the two trafficking offenses

require proof that each offense took place within the vicinity of a juvenile. R.C. 2925.03(C)(4)(e); R.C. 2925.03(C)(6)(d).

{¶20} "An offense is 'committed in the vicinity of a juvenile' if the offender commits the offense within one hundred feet of a juvenile or within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense." R.C. 2925.01(BB).

{¶21} The State relies upon the testimony of several witnesses that the Mershons' 17-year-old son and 9-year-old daughter lived in the house in question. The State also relies upon the testimony of Officer Timberlake that he saw the Mershons' young daughter leaving the house immediately preceding the execution of the search. Transcript at 55.

{¶22} Turner was convicted of two counts of trafficking in drugs (crack cocaine and heroin) under R.C. 2925.03(A)(2), which prohibits preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distribution of a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

{¶23} The State's evidence demonstrated Turner would transport the controlled substance from Columbus to Portsmouth, deliver them to the Mershons' home, and then eventually distribute the controlled substance to local dealers in the Portsmouth area. Tony Mershon testified that Turner stayed at the Mershons' home and dealt crack cocaine and heroin on three different occasions. When the officers searched the

Mershons' residence they found Turner in the constructive possession of crack cocaine and heroin. This constructive possession was a part of Turner's overall criminal act of transportation, delivery, and distribution. The officer testified that he saw a young girl leaving the house immediately preceding the execution of the search, which found the drugs in the house. If believed, this testimony is sufficient to show that Turner had committed the two offenses of trafficking in drugs within the vicinity of a juvenile. See, e.g., *State v. Smallwood,* Wayne App. No. 07CA63, 2008-Ohio-2107, ¶24-¶26 (manifest weight and sufficiency); *State v. Flores,* Wood App. Nos. WD-04-12, WD-04-50, ¶43-¶46 (sufficiency).

{¶24} Therefore, after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the two trafficking in drugs offenses proven beyond a reasonable doubt.

{¶25} Accordingly, we overrule Turner's first assignment of error.

III.

{¶26} Turner contends in his second assignment of error that the trial court erred by admitting evidence of other acts in violation of Evid.R. 404.

{¶27} At trial, Turner objected to the admission of testimony from Josh Sadler (Transcript at 85-86) and Trista Mershon (Transcript at 131). Josh Sadler, an admitted drug addict and dealer, testified about Turner's practice of dealing drugs in Portsmouth from the middle of July until October 12, the date of Turner's arrest. Trista Mershon testified that she saw Turner and two other drug dealers repackaging heroin for sale at another house. She also testified that she saw her brother use money she gave him to purchase crack cocaine from Turner.

{¶28} Evid.R. 404 forbids the admission of "[e]vidence of a person's character or trait of character for the purpose of proving action in conformity therewith[.]" Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶29} A trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, at ¶33. A finding that a trial court abused its discretion implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶30} Because Evid.R. 404(B) and R.C. 2945.59[1] create an exception to the common law, we must construe the standard for admissibility against the state. *State v. Jamison* (1990), 49 Ohio St.3d 182, 183-84. For proper admissibility, the trial court must determine that: (1) the other act is relevant to the crime in question, and (2) evidence of the other act is relevant to an issue placed in question at trial. *State v.*

[1] R.C. 2945.59 provides "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

McCornell (1993), 91 Ohio App.3d 141, 146, citing *State v. Howard* (1978), 57 Ohio App.2d 1, 6; *State v. Strong* (1963), 119 Ohio App. 31. Additionally, the court must consider factors such as (1) the time of the other act, *State v. Henderson* (1991), 76 Ohio App.3d 290, 294; (2) the accused's modus operandi, see *State v. Coleman* (1988), 37 Ohio St.3d 286, 291-92; *State v. Hill* (1992), 64 Ohio St.3d 313, 323; (3) the nature of the other acts committed, *State v. Smith*, Ross App. No. 02CA2687, 2003-Ohio-5524, ¶¶13-14; and (4) the location of the other acts, *State v. Moorehead* (1970), 24 Ohio St.2d 166, 169, vacated on different grounds by *Moorehead v. Ohio*, 408 U.S. 938 (1972).

{¶31} Introduction of other acts evidence to prove a scheme or plan is permissible in only one of two situations. *State v. Curry* (1975), 43 Ohio St.2d 66, 72-73. "First, those situations in which the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment." Id. at 73. The second potential situation is where the identity of a perpetrator of the crime is at issue. Id. "One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes." Id., citing *Whiteman v. State* (1928), 119 Ohio St. 285; *Barnett v. State* (1922), 104 Ohio St. 298.

{¶32} Here, at trial, Turner's defense was that the drugs did not belong to him. Transcript at 284. The non-propensity use is not identifying the defendant from a singular or unusual modus operandi; instead, the non-propensity use is whether the

defendant possessed the drugs found in the Mershon residence. Evid.R. 404(B) only forbids the use of other acts evidence "to show action in conformity" with those other acts, the rule provides other acts may be admissible for other purposes and then provides a non-exhaustive listing of potential uses. See Evid.R. 404 commentary; *State v. Aliff* (April 12, 2000), Lawrence App. No. 99CA8, unreported (characterizing the listing in Evid.R. 404(B) as non-exclusive).

{¶33} This case is similar to *State v. Reed*, Champaign App. No. 2002-CA-30, 2003-Ohio-5413. In that case, the state found 9.36 grams of cocaine in the defendant's girlfriend's room. Id. at ¶17. The state introduced a ledger that established the defendant had engaged in prior drug transactions, and a witness that indicated the defendant frequently met individuals at the house in his girlfriend's room and these individuals left the house with something in their hands. Id. at ¶¶ 20-22. The court of appeals held the admission was appropriate. "In this case, the ledger was not offered to prove that [the defendant] is a bad character, but was offered for the legitimate purpose of establishing that the cocaine found in the residence was inventory in an ongoing enterprise in which [the defendant] sold cocaine to others[.]" Id. at ¶33.

{¶34} The present case is similar. Turner claims the drugs were not his and the State introduced evidence tending to show Turner had engaged in previous transactions. These transactions were part of an overall scheme concerning the transportation, delivery, and distribution of drugs from Columbus to Portsmouth. The State introduced these transactions to demonstrate that Turner exercised dominion and control over the inventory of drugs found at the residence.

{¶35} Turner attempts to rely on *State v. McDaniels* (Nov. 9, 1993), Vinton App. No. CA487, unreported. However, this case does not stand for the proposition that Turner cites it for. This Court in *McDaniels* did not reverse because "the trial court abused its discretion in allowing evidence of the earlier drug transactions." Turner's Brief at 9. Rather this Court reversed "[b]ecause the trial court neither made a factual determination [under Evid.R. 403] on the record, nor gave a limiting instruction * * * in admitting the evidence relating to seven or eight prior drug deals." In other words, *McDaniels* stands for the proposition that a trial court must make its Evid.R. 403 findings on the record and also properly instruct the jury as to the limited purpose of Evid.R. 404(B) evidence. Turner raises no arguments in this case that the trial court failed to make the required findings or properly instruct the jury, but concentrates solely on the admission of the evidence.

{¶36} Therefore, for the above stated reasons, we find that the trial court did not abuse its discretion when it admitted the "other acts" evidence.

{¶37} Accordingly, we overrule Turner's second assignment of error.

IV.

{¶38} Turner contends in his third assignment of error that the State engaged in prosecutorial misconduct during closing arguments by "improperly inject[ing] emotion and social obligation into the deliberations." Turner's Brief at 14. Turner claims "these comments were not isolated remarks in the midst of a long, complex closing argument. Rather, these were lengthy commentaries on right, wrong, and justice that bore no relationship to the actual evidence introduced at trial." Id at 13.

{¶39} "A prosecutor's remarks constitute misconduct if the remarks were improper and if the remarks prejudicially affected an accused's substantial rights." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, at ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶40} Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *State v. Harp*, Adams App. No. 07CA848, 2008-Ohio-3703, at ¶20, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 166. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, at ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219. We must "view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial." *State v. Treesh* (2001), 90 Ohio St.3d 460, 466.

{¶41} Because Turner failed to object at trial to the allegedly improper comments by the prosecution, he has waived all but plain error. Crim. R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604. "We may invoke the plain error rule only if we find (1) that the prosecutor's comments denied appellant a fair trial, (2) that the circumstances in the instant case are exceptional, and (3) that reversal of the judgment below is necessary to prevent a miscarriage of justice." *State v. McGee*, Washington App. No. 05CA60, 2007-Ohio-426, at ¶15, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶42} Our review of the closing arguments indicates Turner falls short of carrying his burden on this point. Turner only specifically identifies two statements of the prosecuting attorney as prejudicial.

{¶43} First, Turner contends the prosecution engaged in "a shameless appeal to jurors' emotions and sense of community by comparing drug trafficking to 'Hurricane Katrina.'" Turner's Brief at 13-14. The prosecutor offered this statement in explaining why his office was concentrating on Turner rather than Tony Mershon. "[Tony Mershon is] not the guy masterminding this. There's the guy that masterminded this, right there, that brought that stuff down from Columbus, right down U.S. 23 like Hurricane Katrina, and it hits our streets." Transcript at 336. Within context, this is simply a response to the arguments Turner's counsel offered to show that Tony Mershon was the owner of the drugs. Even if we suppose that the reference to Hurricane Katrina was gratuitous and inflammatory; the prosecution did not repeat it. It appears only once in the transcript. The clear import of the sentence is the prosecutor's accusation that Turner was the organizer or ringleader of a group of distributors and so deserved to be treated differently than Tony Mershon. Within context, we cannot say this comment denied Turner a fair trial.

{¶44} Second, Turner contends the prosecution engaged in misconduct when it "appeal[ed] for the jury to fulfill its civic duty and 'stop the likes of Antonio Turner[.]'" However, in context the prosecution is not appealing to the jury to "stop the likes of Antonio Turner," rather the prosecution is attempting to bolster the credibility of its witnesses. "I'm going to tell you right now and I'm going to submit to you that the men involved here, the people you see, Todd Bryant sitting right there, and Steve Timberlake are good, honest, brave and honorable men. * * * These are brave honorable men who go out into our streets to stop the likes of Antonio Turner. And if you think anything different, then find [Turner] not guilty." Transcript at 340. To the extent Turner has a

valid objection to this line of argument, it is that the prosecution engaged in impermissible vouching for the credibility of the police.

{¶45} During closing arguments, counsel "may state his or her opinion if it is based on the evidence presented at trial." *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, at ¶154. However, neither the prosecutor nor defense counsel is permitted to express his or her personal belief as to a witness's credibility. *Gapen* at ¶95; *State v. Williams* (1997), 79 Ohio St.3d 1, 12. Counsel may not vouch for a witness's credibility because, "[i]n order to vouch for the witness, [counsel] must imply knowledge of facts outside the record or place [counsel's] personal credibility in issue." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, at ¶117.

{¶46} Here, it appears that the State engaged in impermissible vouching. Nonetheless, Turner has failed to show that any such vouching satisfies the plain error standard. Turner must show that the prosecutor's comments denied him a fair trial. The prosecutor does appear to vouch for the honesty of the police, but does so in a single paragraph and any prejudice is greatly diminished by the prosecutor's closing sentence, which invited the jury to acquit Turner if the jury did not find the police credible.

{¶47} In addition to the specific statements above, Turner contends that the prosecutor made several "appeal[s] for the jury to fulfill its civic duty." Appeals for a jury to convict a defendant to "send a message" are improper. *State v. Dyer*, Scioto App. No. 07CA3163, 2008-Ohio-2711, at ¶47. But here, in context, the prosecution is merely arguing that the jury should do its duty and convict Turner because the evidence shows his guilt. "And Ladies and Gentlemen, it is now the time for you to decide, now the time

for you to speak the voice of this community. The evidence shows he is guilty, and we ask you to find him guilty of each and every count in the indictment." Transcript at 340. In context, we cannot say this statement prejudiced Turner or deprived him of a fair trial.

{¶48} Therefore, in applying the plain error doctrine, we find misconduct regarding some of the prosecutor's comments in closing argument but cannot find (1) that the comments denied Turner a fair trial, (2) that the circumstances in the instant case are exceptional, and (3) that reversal of the judgment below is necessary to prevent a miscarriage of justice. Consequently, we do not invoke the plain error rule in this case.

{¶49} Accordingly, we overrule Turner's third assignment of error. Having overruled all three of Turner's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.