

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 0131
BRIAN T. SIMMS	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas Case No. 2008CR2147A

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 30, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Canton, Ohio 44702

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-appellant Brian T. Simms (“Simms”) appeals the judgment of the Stark County Court of Common Pleas finding him guilty of one count of trafficking in marijuana, a violation of R.C. 2925.03(A)(1)(C)(3)(a), and imposing a twelve month prison sentence.

{¶2} The testimony adduced at trial was as follows. On September 24, 2008, a confidential informant (“CI”) contacted Detective Steven Minich of the Alliance Police Department, and informed him of the opportunity to purchase marijuana from a Brian Simms. The CI called a cell phone number belonging to a John Powell. Powell called the CI back on her cell phone which revealed the house phone number of Simms. Powell engaged the CI in conversation, which was recorded by Detective Minich (Exhibit A). The CI and Powell discussed the availability of both dry and wet marijuana and their respective prices. Powell also conversed with Simms, whose voice is overheard in the background on the recording. Powell arranges to be picked up by the CI at “Munchies Bar” in Alliance. Prior to picking up Powell, the CI is provided with money and searched by the police. An audio/digital transmitter recorder is placed in her vehicle, which is also searched. Detective Minich testified he followed the CI in a separate vehicle.

{¶3} The CI stated she picked up Powell at approximately 9:00 p.m. at Munchies and drives to Simms’ residence located at 22830 Alden Avenue. She parks in the driveway next door to his trailer. Powell exits the vehicle and enters the trailer while the CI remained in the car. Within a few minutes, Powell leaves the residence and returns to the vehicle and hands a baggie of “weed” to the CI in exchange for \$80. The

CI then drives Powell home and returns to the Alliance Police Department with the baggie. The baggie contents are tested by the Canton-Stark County Crime Lab and found to be 9.4 grams of marijuana, a schedule I controlled substance (Exhibit B).

{¶4} On January 26, 2009, both Simms and Powell are indicted for one count of trafficking in marijuana, a felony of the fifth degree. Simms entered a plea of not guilty at his arraignment and appointed counsel. A bill of particulars and the State's discovery responses, along with a reciprocal request for discovery, was filed by the prosecutor on February 27, 2009. A jury trial was conducted on April 14, 2009.

{¶5} At trial, the detective, the CI, and Powell testified. Powell, who is characterized by the prosecutor as "slow" and receiving social security disability, corroborated the above testimony of the Detective and CI in almost all respects. He identified Simms' voice on the recording. After talking with the CI on the phone, Powell stated he went to Munchies where he meet her. They drove to Simms' residence where he had the CI park in the driveway next to Simms' trailer because a fence was in the way. He stated he was a "runner" for Simms and added that Simms grew the marijuana in his backyard.

{¶6} The State rested and the defense presented no witnesses. The jury promptly returned a guilty verdict and the court immediately proceeded to sentencing and imposed a twelve month prison sentence.

{¶7} Appellant timely appealed and raises two Assignments of Error:

{¶8} "1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} “II. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.”

I.

{¶10} Simms alleges in the first assignment of error that the verdict is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶11} In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819. To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weight the evidence, and conclude that in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶12} R.C. 2925.03 (A)(1)(C)(3) reads: “[n]o person shall knowingly do any of the following: (1) [s]ell or offer to sell a controlled substance. * * * If the drug involved in the violation is marihuana * * *, whoever violated division (A) of this section is guilty of trafficking in marihuana.”

{¶13} Simms argues that the State failed to present sufficient evidence that he sold marijuana because the CI never saw Simms, she only heard his voice in the background during the phone call with Powell, and Powell is biased and not credible. Simms submits in a general fashion that the jury clearly lost its way in reviewing the evidence and created a manifest miscarriage of justice.

{¶14} The definition of “sale” has the same meaning as in R.C. 3719.01. See, R.C. 2925.01(A). “ ‘Sale’ includes delivery, barter, exchange, transfer, or gift, or offer thereof, and each transaction of those natures made by any person, whether as principal, proprietor, agent, servant, or employee.” R.C. 3719.01(AA).

{¶15} The CI stated she knew Simms’ voice from prior contact and knew where Simms lived. She gave the money to Powell, watched as Powell went into Simms’ residence and then returns to the car with the drugs. Powell confirmed the nature of the telephone conversation with the CI and Simms presence at the house during the conversation. He also identified Simms’ voice on the recording. Powell stated he later went inside Simms’ house after the CI gave him the money. Simms handed him the bag of marijuana and he gave the money to Simms. Powell took the drugs out to the car and handed it to the CI.

{¶16} Although the defense questions the ability of the CI to view Powell enter the Simms’ residence due to fencing around the trailer, there was sufficient evidence to support the jury’s verdict that Simms sold or offered to sell the marijuana to the CI. Upon our independent review of the record, we conclude the jury did not lose its way in returning a guilty verdict.

{¶17} The first Assignment of Error is overruled.

II.

{¶18} In his second assigned error, Simms contends his counsel was ineffective in numerous ways and he was prejudiced by his counsel’s errors.

{¶19} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*, (1984) 466 U.S. 668, 80 L.Ed.2d 674, 104

S.Ct. 2052. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable presentation and that prejudice arose from the lawyer's deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. *Id.* at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343.

{¶20} First, Simms contends his trial counsel was deficient in requesting and submitting discovery, such as filing a request for discovery without a proof of service and failing to provide photographs to the prosecutor in discovery. Upon review of the record, we find no prejudice resulted to Simms because the State responded to Simms' discovery request and the photographs were admitted at trial.

{¶21} Simms next argues his counsel made inappropriate comments during opening statement, such as "I don't even know why they're bringing it to trial" and "He [Simms] can go to prison for this". The State objected to both statements and defense counsel was reprimanded by the court. Simms does not demonstrate how the comments prejudiced him, and the court instructed the jury the opening statement was not evidence to be considered.

{¶22} Simms also claims his counsel failed to object to the prosecutor's use of leading questions during the testimony of Detective Minich and Powell. Upon review of the trial transcript, we disagree with Simms' contention that the State used leading

questions in regards to Detective Minich, as evidenced by the Detective's narrative answers. In regards to Powell, the State did lead the witness on a few occasions and asked the court for leeway in questioning the witness due to his disability. Evid.R. 611(C) allows leading questions when attempting to develop the testimony. Here, the State was trying to develop the witness's testimony, not to influence his testimony.

{¶23} Lastly, Simms contends his trial counsel failed to object or motion for mistrial when: (1) Detective Minich testified that the police "knew who Brian Simms was obviously; he's got a past, he had a prior so we knew who he was", T. at 156-157; and (2) the CI testified "I knew Brian Simms because I purchased weed off Brian Simms before for my personal use in the year of 2007. That's how I knew Brian Simms dealt", T. at 196.

{¶24} Simms generally argues these statements violate Evid.R. 404, 608 and 609. ¹ Evid. R. 404(B) prohibits the admissibility of other crimes, wrongs, or acts 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.

{¶25} In this case, arguably the above statements could have been offered to establish identity and knowledge. Neither Simms or the State addresses these issues in the briefs filed with this Court. Upon review of the record, we conclude that although defense counsel should have objected to these statements, we cannot say that, absent the statements, there exists a reasonable probability the verdict would have been different.

¹ Evid. 608 and 609 do not apply in these instances because both pertain to attacking the credibility of a witness, which is not at issue here.

{¶26} Accordingly, Simms' second assignment of error is overruled.

{¶27} Judgment affirmed.

By: Delaney, J.

Farmer, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

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Defendant-Appellant	:	Case No. 2009 CA 0131
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN