

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-185
	:	(C.P.C. No. 08CR-05-3960)
Jeffery A. Mahaffey,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2009

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellee.

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Jeffery A. Mahaffey is appealing his conviction on the charge of drug abuse, in violation of R.C. 2925.11. He assigns six errors for our consideration:

First Assignment of Error: The trial court erroneously refused to permit DNA testing of a pipe recovered from the rear seat of a police cruiser along with the controlled substance which was the basis for the indictment.

Second Assignment of Error: The trial court erroneously refused to allow defense counsel time to prepare for cross examination of prosecution witnesses whose names did not appear on the witness list.

Third Assignment of Error: The trial court erroneously overruled appellant's motion for a mistrial.

Fourth Assignment of Error: Appellant's conviction was not supported by the evidence.

Fifth Assignment of Error: The court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

Sixth Assignment of Error: Appellant's conviction was against the manifest weight of the evidence.

{¶2} To provide a factual background for this case, we address the fourth, fifth, and sixth assignments of error first.

{¶3} Mahaffey and two other men were arrested in the early evening of March 28, 2008, after it was discovered that each of the three had active warrants for their arrest. Mahaffey was held in a police cruiser for a period of time before the arrest warrants were actually executed. After Mahaffey was removed from the cruiser, rolling papers, a crack pipe, and a small amount of crack cocaine were found in the cruiser. Two of the police officers involved in the discovery of the crack pipe and crack cocaine testified that they carefully complied with the mandate of the Columbus Division of Police that the cruiser be searched at the beginning of their shift and after each incident where a person was held in the cruiser. Therefore, no crack pipe or crack cocaine was present in the cruiser at 3:00 p.m. when their shift started. Crack cocaine was present after Mahaffey had been detained in the cruiser.

{¶4} In determining whether a verdict is against the manifest weight of the evidence, this court acts as a "thirteenth juror." This role allows the court to weigh the evidence in order to determine whether the trier of fact "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. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, the power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, i.e., when "the evidence weighs heavily against the conviction." *Thompkins*, at 387, quoting *Martin*, at 175.

{¶5} An appellate court acting in its role as "thirteenth juror" also must keep in mind the trier of fact's superior, first-hand position in judging the demeanor and credibility of witnesses. "On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A court of appeals cannot reverse a jury verdict on manifest-weight grounds unless all three appellate judges concur. *Thompkins*, at 389.

{¶6} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *Id.* at 386. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. *Id.* "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, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines

that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶7} Applying the legal standards to the evidence presented at trial, we can only conclude that sufficient evidence was presented to support the conviction for drug abuse. If no crack cocaine was present in the cruiser before Mahaffey was placed in the cruiser and crack cocaine was present in the cruiser immediately after Mahaffey was locked in the rear portion of the cruiser, the only reasonable inference is that Mahaffey took the crack cocaine into the cruiser with him. Mahaffey was not supervised the entire time he was in the cruiser and he was not handcuffed for a period of time before a final decision was made to arrest him. He easily could have removed the crack cocaine from somewhere in his clothing or in/on his body and shoved it down into a crack between the seat cushions of the cruiser.

{¶8} The fourth assignment of error is overruled.

{¶9} Crim.R. 29 reads:

(A) **Motion for judgment of acquittal.** The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶10} Crim.R. 29 requires that a judgment of acquittal be granted only when the evidence is not sufficient to support a judgment of conviction. The evidence was sufficient to support a conviction in Mahaffey's case. Therefore, a Crim.R. 29 motion should not have been sustained.

{¶11} The fifth assignment of error is overruled.

{¶12} Although a court of appeals is supposed to sit as the thirteenth juror when assessing the manifest weight of the evidence, our ability to assess the credibility of witnesses is limited. We do not get to see the demeanor of the witnesses at the time they are testifying. The jury was in a better position to determine if the police officers were truthful when they said they carefully searched the cruiser at the beginning of their work shift and when they claimed no one else was in the back of the cruiser until Mahaffey was placed there. Under the circumstances, we cannot say the guilty verdict was against the manifest weight of the evidence.

{¶13} The sixth assignment of error is overruled.

{¶14} Addressing the first assignment of error, the crack pipe and the crack cocaine were found at separate places in the back of the cruiser. The crack pipe was not the basis for the drug abuse charge. The fact that someone else's DNA might or might not have been present on the crack pipe does not mean that Mahaffey was not in possession of the crack cocaine when he was placed in the cruiser. Someone else might have and probably did possess both items at an earlier time. However, the fact someone else once possessed the items does not mean Mahaffey did not possess the items when he was placed in the cruiser.

{¶15} Normally a trial court should permit the criminal defense teams to conduct reasonable testing on items which might prove to be exculpatory. Here, the testing was not permitted because the request was made over seven months after the indictment and was made less than two weeks before a trial date. Given the marginal value of the test results, even if someone other than Mahaffey had used or touched the crack pipe, and

given the delay in requesting access to the crack pipe for testing, the trial court did not abuse its discretion in refusing to order the testing.

{¶16} The first assignment of error is overruled.

{¶17} The second assignment of error suggests a scenario which is somewhat misleading. Through an apparent oversight, the prosecution did not list the arresting officers as potential witnesses when providing discovery requested under Crim.R. 16. However, had even minimal investigation been conducted, defense counsel would have noticed the names of the officers from the police paperwork filed with the Franklin County Municipal Court at the time of Mahaffey's arrest. Specifically, a form called U-10-100 was filed, as it commonly is filed in all arrests by the Columbus Division of Police. The names of the arresting and searching officers were readily available.

{¶18} When the assistant prosecuting attorney assigned to the case realized his office had not listed the arresting and searching officers, he apologized for the oversight. The trial court permitted investigation over a recess in the court proceeding, but did not delay the proceedings further since defense counsel had made no effort to interview the other police witnesses whose names had been provided in discovery. Defense counsel appropriately noted that efforts to interview police witnesses by a criminal defendant's lawyer are generally futile. Nothing in the record before us indicates that defense counsel would or could have gained any useful information had counsel had the names before trial.

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

{¶20} The third assignment of error suggests that the trial court should have granted a mistrial after some less than complimentary things were said in an interchange

between defense counsel and the assistant prosecuting attorney handling the case. Since no juror heard the interchange, we cannot find prejudicial error. The actual trier of fact was not affected by the discussion.

{¶21} The third assignment of error is overruled.

{¶22} All assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.
