

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | Hon. W. Scott Gwin, P.J. |
| | : | Hon. John W. Wise, J. |
| Plaintiff-Appellee | : | Hon. Patricia A. Delaney, J. |
| | : | |
| -vs- | : | |
| | : | Case No. 2008-CA-00228 |
| DARRELL CORTEZ MOORE | : | |
| | : | |
| Defendant-Appellant | : | <u>OPINION</u> |

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2008-CR-0489 (A)

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 21, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Darrell Cortez Moore appeals his conviction and sentence in the Stark County Court of Common Pleas for one count of trafficking in cocaine in violation of R.C. 2925.03 (A)(1)(C)(4)(e). The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On or about November 16, 2007, a confidential informant, Marquis Baker, was shopping at a Lowes store with his friend Darin Colbert. While at Lowes, Baker asked Colbert where he could get some crack cocaine. Colbert responded that he would call “his boy,” the appellant. Later that day, Colbert picked Baker up and drove him to the residence of Juanita Kennedy, appellant’s girlfriend.

{¶3} Once inside, Baker saw that appellant was present, but transacted the drug buy with Colbert, i.e., handed Colbert the buy money and received the crack cocaine in return – he specifically paid Colbert \$600 for a half ounce of crack cocaine. This transaction was recorded visually, and corroborated Baker’s testimony about what transpired within the residence. Upon completing the controlled buy, Baker met with police, turned over the evidence, and relayed what had transpired.

{¶4} The police then waited until appellant left his girlfriend’s residence, and proceeded to stop him for shortcutting through the parking lot of a Rite Aid. Upon being stopped, police ascertained that appellant had a dozen driving suspensions, and arrested appellant. Searching appellant incident to the arrest, police found \$675 in cash on his person. The \$600 in buy money used by Baker to purchase the half ounce of crack cocaine was included in this amount.

{¶5} After a trial by jury, appellant was found guilty of the charged offense. Upon accepting the jury's verdict and convicting him, the trial court sentenced appellant to a prison term of four years.

{¶6} Appellant timely appealed and raises the following assignment of error for our consideration:

{¶7} "I. THE TRIAL COURT'S FINDING OF GUILTY IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I.

{¶8} In his sole assignment of error appellant maintains that his conviction is against the manifest weight of the evidence and was not supported by sufficient evidence. We disagree.

{¶9} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks*, 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶10} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson*, 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d

1264, 1269-1270. "In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings." *State v. Wilson*, supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "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. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, supra.

{¶11} Employing the above standard, we believe that the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offense of trafficking in drugs.

{¶12} R.C. 2925.03(A) (1) sets forth the essential elements of trafficking in drugs: "No person shall knowingly sell or offer to sell a controlled substance."

{¶13} To find the appellant guilty of trafficking in drugs in violation of R.C. 2925.03(A) (1) (C) (4) (e) as alleged in the indictment the trier of fact, in this case the jury, would have to find that appellant sold or offered to sell a controlled substance in an amount equal to or exceeding ten (10) grams but less than twenty-five (25) grams, or did aid and abet Darin Bernard Colbert in so doing. (Indictment returned May 19, 2008; Bill of Particulars, filed July 10, 2008; 3T. at 31-34).

{¶14} R.C. 2923.03(F) states, "A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶15} "The Supreme Court of Ohio clarified Ohio's position on the issue of complicity in *State v. Perryman* (1976), 49 Ohio St. 2d 14, vacated in part on other grounds sub nom, *Perryman v. Ohio* (1978), 438 U.S. 911. The court unequivocally approved of the practice of charging a jury regarding aiding and abetting even if the defendant was charged in the indictment as a principal. *Id.* The court held that the indictment as principal performed the function of giving legal notice of the charge to the defendant. *Id.* Therefore, if the facts at trial reasonably supported the jury instruction on aiding and abetting, it is proper for the trial judge to give that charge. *Perryman*, supra at 27, 28." *State v. Payton* (April 19, 1990), 8th Dist. Nos. 58292, 58346. In the case at bar, the indictment charged appellant in terms of the principle offense and in terms of aiding and abetting.

{¶16} Generally, a criminal defendant has aided or abetted an offense if he has supported, assisted, encouraged, cooperated with, advised, or incited another person to commit the offense. See *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *State v. Mendoza* (2000), 137 Ohio App.3d 336, 342, 738 N.E.2d 822, quoting *State v. Stepp* (1997), 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342.

{¶17} The culpable mental state of "knowingly" is defined as follows: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has

knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

{¶18} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself.” *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, “[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria.” *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶19} For purposes of R.C. Chapter 2925, a sale is defined as follows: " '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. 2925.01(A) (incorporating definition found in R.C. 3719.01(AA)). (Emphasis added).

{¶20} In *State v. Mitchell*, 5th Dist. No. 2001CA00382, 2002-Ohio-6264, this court noted: “...the Ohio Supreme Court has held that ‘R.C. 2925.03 demonstrates a clear legislative intent to define commerce in controlled substances as criminal ... Consistent with this purpose, the General Assembly defined each of [the] stages of commerce in controlled substances as aggravated trafficking....’ *State v. Scott* (1982), 69 Ohio St.2d 439, 440-441, 432 N.E.2d 798. In *State v. Scott*, the Court held that by marketing a drug, an offender served as a link in the chain of supply. *Id.* Serving as a link in the chain of supply constituted an offer to sell. *Id.* From *Scott*, the Ohio Court of Appeals for the Eighth District noted that all links in the chain of supply are equally culpable. *State v.*

Latina (1984), 13 Ohio App.3d 182, 187, 468 N.E.2d 1139. Subsequently, the Ohio Court of Appeals for the Fourth District specifically held that a person who acts as a broker in a drug sale, acts as a link in the chain of supply and is guilty of 'offering to sell' drugs within the meaning of R.C. 2925.01. *State v. McDaniel* (Nov. 9, 1993), Vinton App. No. CA487 (citing *State v. Latina, supra*, which relied upon *State v. Scott, supra*)". Id. at ¶12.

{¶21} The State presented sufficient evidence of appellant's guilt beyond a reasonable doubt. Baker's testimony alone, construed in favor of the State, was legally sufficient to find appellant guilty of the charged offense. While shopping at Lowe's with his friend, Darin Colbert, Baker asked where he could buy some crack. Colbert responded that he would call appellant to arrange a possible sale. After dropping Baker off at his home, Colbert returned and picked Baker up and drove him to the home of Juanita Kennedy, appellant's girlfriend. While inside the house, Baker paid Colbert for the crack, who in turned handed the illegal substance over to Baker. Appellant was present during this transaction. After the transaction, the Alliance police waited for appellant to leave his girlfriend's residence and then stopped him for a traffic violation. After his arrest for no operator's license, appellant was searched and the buy money was found on his person. (2T. at 69-71; 132; 141-142). This evidence was sufficient to establish appellant's guilt on both offenses.

{¶22} Here, there was evidence that appellant acted, at the very least, as a link in the chain of supply by offering to deliver a quantity of cocaine to the other defendant.

{¶23} Appellant's arguments going to the manifest weight of the evidence are simply attacks on the credibility of the confidential informant. His testimony and its

credibility were for the trier of fact to weigh and determine. Although appellant attempted to impeach the credibility of the confidential informant, presented his own testimony and cross-examined the confidential informant and the other State witnesses regarding inconsistencies in the testimony of each, to contradict the State's inference that he engaged in trafficking, the trier of fact was free to accept or reject any and all of the evidence offered by the appellant and assess the witness' credibility. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶24} We conclude the trial court, sitting as the trier of fact, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant engaged in selling or offering to sell a controlled substance in an amount exceeding ten(10) grams, but less than twenty-five(25) grams. R.C. 2925.03(A) (1). Accordingly, appellant's conviction for trafficking was not against the manifest weight of the evidence.

{¶25} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

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