**[Cite as *State v. Garrett*, 2009-Ohio-2806.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2008-08-076 |
| | : | O P I N I O N |
| - vs - | | 6/15/2009 |
| | : | |
| RONALD A. GARRETT, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007CR00530

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Christine Y. Jones, 114 East 8th Street, Suite 400, Cincinnati, Ohio 45202, for defendant-appellant

**BRESSLER, P.J.**

**{¶1}** Defendant-appellant, Ronald A. Garrett, appeals his conviction for trafficking in cocaine and marijuana, and aggravated drug possession.[1] We affirm the trial court's decision.

1. This case was consolidated with Case No. CA2008-08-075 by entry dated December 16, 2008. The cases are hereby separated for purposes of issuing separate opinions.

**{¶2}** On March 27, 2007, an undercover agent of the Clermont County Multi-Jurisdictional Drug Task Force and a confidential informant each purchased cocaine from appellant in his home. The agent also secretly recorded the transaction. Based on this information, the agent obtained a search warrant which was executed early in the morning the following day. As a result of the search of appellant's home, police seized approximately 172 grams of marijuana, a digital scale, sandwich bags, approximately $2,500 in cash, jewelry, methylenedioxymethanphetamine (ecstasy) pills, oxycodone pills and a methadone pill. The police also seized two stolen firearms.[2] A jury found him guilty of all of the offenses for which he was charged. Appellant filed an appeal raising three assignments of error.

**{¶3}** Because a finding in one assignment of error will be dispositive as to the other two assignments of error, we have elected to address the three assignments of error together. See, e.g., *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶62-80.

**{¶4}** Assignment of Error No. 1:

**{¶5}** "THE JUR[Y] ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF TRAFFICKING IN COCAINE, TRAFFICKING IN MARIJUANA, AND AGGRAVATED POSSESSION OF DRUGS * * *, AS THE FINDINGS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

**{¶6}** Assignment of Error No. 2:

**{¶7}** "THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF TRAFFICKING IN COCAINE, TRAFFICKING IN MARIJUANA, AND AGGRAVATED POSSESSION OF DRUGS * * *, AS THOSE FINDINGS WERE CONTRARY TO LAW."

2. Although not the subject of this appeal, appellant pled guilty to two counts of receiving stolen property in violation of R.C. 2913.51(A).

**{¶8}** Assignment of Error No. 3:

**{¶9}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY OVERRULING HIS MOTIONS FOR ACQUITTAL UNDER OHIO CRIMINAL PROCEDURE RULE 29."

**{¶10}** In his assignments of error, appellant argues: the trial court erred in overruling his Crim.R. 29 motions for acquittal; there was insufficient evidence to support his convictions; and his convictions are against the manifest weight of the evidence.

**{¶11}** Arguments regarding the sufficiency of evidence and the manifest weight of the evidence are reviewed under two different standards. *State v. Martin* (1993), 20 Ohio App.3d 172, 175. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), Summit App. No. CA19600, 2000 WL 277908, at *1, citing *State v. Thompkins,* 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring).

**{¶12}** Sufficiency of evidence is governed by Crim.R. 29. *State v. Terry*, Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9, citing *State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91; *State v. Miley* (1996), 114 Ohio App.3d 738, 742. A trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). "[A] [trial] court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, paragraph one of the syllabus. "The legal sufficiency of evidence necessary to sustain a verdict is a question of law." *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶43, citing *Thompkins,* 78 Ohio St.3d at 386.

**{¶13}** An appellate court "need only find that there was legally sufficient evidence to sustain the guilty verdict." *State v. Feltner,* Butler App. No. CA2008-01-009, 2008-Ohio-009, ¶11, citing *Thompkins* at 386. As such we must "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." *State v. Jenks* (1991), 61 Ohio St.3d 260, 273 (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355). Therefore, our inquiry becomes: "after viewing the evidence in a light most favorable to the state, whether any rationale trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

**{¶14}** "An appellate court may only reverse a jury verdict as against the manifest weight of the evidence where there is a unanimous disagreement with the verdict of the jury." *Harry*, 2008-Ohio-6380 at ¶45, citing *State v. Gibbs* (1999), 134 Ohio App.3d 247, 255-56. "Under the manifest weight of the evidence standard, a reviewing court must examine the entire record, weigh all of the evidence and reasonable inferences, consider the credibility of witnesses and determine 'whether in resolving conflicts in the evidence, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Harry* at ¶45, citing *Martin*, 20 Ohio App.3d at 720-21; *Gibbs* at 256; *Thompkins*, 78 Ohio St.3d at 387.

**{¶15}** Sufficiency of the evidence is required before a case may be taken to a jury; so where a conviction is supported by the manifest weight of the evidence there is necessarily a finding of sufficiency. *Thompkins,* 78 Ohio St.3d at 388; *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35. Thus, where a conviction is supported by the manifest weight of the evidence it is also dispositive as to a claim of insufficiency of the

evidence.[3] *State v. Lee*, 158 Ohio App.3d 129, 2004-Ohio-3946, ¶18; *Wilson* at ¶35; *Smith*, 2009-Ohio-197 at ¶73.

**{¶16}** Appellant argues that he should not have been convicted for two counts of trafficking because the cocaine sale that occurred was conducted at the same time and with the same animus. We may assume from this argument that appellant is only asserting that he should have only been convicted of one count of trafficking, rather than two. We find appellant's convictions for two counts of trafficking in cocaine is not against the manifest weight of the evidence.

**{¶17}** "Where the defendant's conduct * * * results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B). "[I]f a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both pursuant to R.C. 2941.25(B)." *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, citing *State v. Jones,* 78 Ohio St.3d 12, 13-14, 1997-Ohio-38.

**{¶18}** R.C. 2925.03(A)(1) states "[n]o person shall knowingly * * * [s]ell or offer to sell a controlled substance." The statutory definition of a "sale" is a "delivery, barter, exchange, transfer, or gift, or offer thereof, and *each transaction* of those natures made by any person * * *." (Emphasis added.) R.C. 3719.01(EE).

**{¶19}** Illustrative of this issue is the seminal case of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180. In the first part of *Blockburger,* the Supreme Court held that that each sale of a discrete quantity of the same drug to the same purchaser on two different

3. Appellant's first and third assignments of error are essentially identical since one is a sufficiency argument and the other is a Crim.R. 29 argument which is also a test of the sufficiency of the evidence and governed by the same standard. *Smith* at ¶70, citing *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14.

occasions was a distinct offense, because "the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one-that is to say, of a new bargain." Id. at 303. Therefore, each of the sales constituted a separate quid pro quo transaction.

**{¶20}** In this case, appellant sold cocaine to two separate individuals who were working in concert with one another on behalf of the Clermont County Multi-Jurisdictional Drug Task Force. In the first transaction, the agent purchased approximately three grams of cocaine (actual weight .98 grams) from appellant for $200. After appellant handed the agent that amount of cocaine and after appellant received his payment, he engaged in a completely separate transaction with the confidential informant. In the second transaction, appellant sold approximately a half of a gram of cocaine (actual weight .33 grams) to the confidential informant for $50. Although each transaction occurred in appellant's hallway, within a relatively short space of time, they constituted two separate sales of cocaine to two separate individuals.

**{¶21}** Temporal proximity notwithstanding, appellant engaged in two discrete transactions involving two separate and distinct physical exchanges of cocaine for money. As such, the sales constituted two separate violations of R.C. 2925.03(A)(1) and support two separate criminal convictions. Therefore, after reviewing the record and weighing all of the evidence, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice requiring reversal of appellant's two convictions for trafficking.

**{¶22}** Appellant also argues that he should not have been convicted of trafficking in marijuana or aggravated possession of drugs because there was "ongoing pedestrian traffic in [appellant's] home, different clothing was found everywhere, and no fingerprints or direct evidence linked [appellant] to the drugs found." We find appellant's convictions for trafficking in marijuana and aggravated possession of drugs are not against the manifest weight of the

evidence.

**{¶23}** It is well-established that circumstantial evidence may be used to establish any element of any crime. *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. R.C. 2925.03(A)(2) states, "[n]o person shall prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute 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." We have held that "plastic baggies, digital scales, and large sums of money are often used in drug trafficking which constitute circumstantial evidence that appellant was using these items to commit that crime." *Harry*, 2008-Ohio-6380 at ¶50.

**{¶24}** Upon executing the search warrant at approximately 2:50 a.m. on March 28, 2007, the police located appellant in a basement bedroom with $137 in his pocket. The police also found a Brink's lockbox underneath the bed, and appellant indicated which key, from a keychain on the nightstand, would open the lockbox. Inside the Brink's lockbox, the police found approximately 172 grams of marijuana apportioned into three plastic bags; jewelry (two watches, nine rings, and a gold bracelet); a $20 bill; and two stolen firearms.[4] The room also contained a digital scale and a box of clear sandwich bags. In another room, police located appellant's wallet which contained $770 and in an upstairs bedroom they found $1,646 in cash. Although it was never definitively established that the basement bedroom belonged to appellant, appellant and several of his personal items were found in the room. Based on this evidence, and a review of the record, we find that appellant's conviction for marijuana trafficking was not against the manifest weight of the evidence, as the jury did not lose its way or engage in a miscarriage of justice.

**{¶25}** "No person shall knowingly obtain, possess, or use a controlled substance."

4. The agent testified it was his experience that jewelry, guns and electronics were often used to trade for drugs.

R.C. 2925.11(A). "Possession cannot be inferred by 'mere access' to the substance, instead it must be shown by the exercise of control over the substance." *Harry*, 2008-Ohio-6380 at ¶48, citing R.C. 2925.01(K). A person may have either actual or constructive possession of a substance. See *State v. Wolery* (1976), 46 Ohio St.2d 316, 329. "A party has constructive possession where, conscious of its presence, he exercises dominion and control over something even though it is not within his immediate physical possession." *Harry* at ¶48, citing *State v. Hankerson* (1982), 70 Ohio St.2d 87, 91. "[O]wnership need not be proven to establish constructive possession." *State v. Collins,* Summit App. No. 23005, 2006-Ohio-4722, at ¶11, citing *State v. Mann* (1993), 93 Ohio App.3d 301, 308. "The crucial issue is not whether the accused has actual physical contact with the controlled substance but, rather, whether the accused is capable of exercising dominion and control over the substance." *State v. Brooks* (1996), 113 Ohio App.3d 88, 90. "Finally, evidence that a person was located in close proximity to readily usable drugs may be used to show that the person was in constructive possession of the drugs." *Harry* at ¶48, citing *State v. Barr* (1993), 86 Ohio App.3d 227, 235.

**{¶26}** As noted above, appellant was found in the basement bedroom at the time the search warrant was executed. Along with the items mentioned previously, the police located one methadone pill in the nightstand, next to the bed, in the basement bedroom. Inside the Brink's lockbox, underneath the bed in the basement bedroom, the police found ecstasy pills wrapped in a plastic bag and oxycodone pills. Appellant was clearly capable of exercising dominion and control over the drugs found, as evidenced by the fact that appellant indicated which key opened the lockbox, in which a majority of the pills were found. The fact that appellant was located in the basement bedroom and in close proximity to all of the drugs is also indicative of constructive possession. Therefore, after reviewing the record and weighing all of the evidence, we find that the jury did not lose its way and create such a

manifest miscarriage of justice that we would be required to reverse appellant's convictions for aggravated possession of drugs as against the weight of the evidence.

**{¶27}** In conclusion, we overrule appellant's first, second and third assignments of error.

**{¶28}** Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

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