[Cite as *State v. Roy*, 2010-Ohio-4405.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-290
	:	O P I N I O N
- vs -		9/20/2010
	:	
DEANA M. ROY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-06-0984

Robin N. Piper III, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, Deanna M. Roy, appeals her convictions for six counts of trafficking in cocaine and four counts of possession of cocaine from the Butler County Court of Common Pleas.

{¶2} In March 2009, a man named David Brown was arrested for OVI. In conducting a search of Brown's vehicle, police found a crack pipe and marijuana. According to Brown, he often smoked crack with appellant. The pair would purchase the drugs from either James Behanan or Torrey Montgomery. Brown told the police that the

contraband was not his, but had been left in his vehicle by appellant. Being on federal probation and upset that appellant had left the contraband in his vehicle, Brown agreed to work as a confidential informant for the West Chester Police Department to set up controlled purchases of drugs from appellant, Behanan and Montgomery.

{¶3} Detective Joseph Buschelman of the West Chester Police Department led the investigation. The detective and Brown developed a "cover story" whereby the officer pretended to be Brown's friend "Terry," claiming to have worked together through an employment agency. The first transaction was scheduled for March 27, 2009. In Detective Buschelman's presence, Brown called appellant seeking to purchase an "eight ball" of crack cocaine. The phone call was recorded. After completing the call, Brown and his vehicle were thoroughly searched to ensure that he had no money or contraband. The officer then gave Brown $300 in cash and Brown drove to appellant's residence in West Chester. The officer followed Brown with four or five other officers to the perimeter of the property to maintain surveillance. Once Brown arrived, appellant met him outside and indicated that Montgomery had brought the drugs. After entering the trailer, Brown and Montgomery greeted each other and discussed the deal. After receiving $200 for the crack cocaine, Montgomery handed the drugs to appellant, who then passed them to Brown. At appellant's suggestion, Brown gave her $50 for assisting in the purchase. In addition, appellant asked to "pinch some [of the drugs] off" for herself, which Brown allowed her to do before leaving. The transaction was recorded using a wire attached to Brown's person. After leaving the property, Brown gave the officer the drugs and the remaining cash.

{¶4} The following day, Brown contacted appellant to schedule another transaction. Again, Brown sought to purchase an "eight ball" for $200. Brown told appellant that he would pay her $40 for getting it for him, but she stated she wanted

$50. Accompanied by the officer, Brown drove to the apartment of appellant's friend "Avis." Upon arriving at the parking lot, they called appellant. Appellant requested that they to come into the apartment upstairs, but Brown indicated they would wait outside. Appellant came outside and the three waited 20-30 minutes until Montgomery arrived. Detective Buschelman passed the money to Brown, who gave the money to appellant. Appellant walked to the passenger side of the Nissan Pathfinder where Montgomery opened the door and gave her the crack cocaine. She "pinched" some and then walked back to Brown's truck, giving the crack cocaine to the officer.

{¶5} Brown next contacted appellant to purchase another "eight ball" of crack cocaine on April 16, 2009. Brown arranged to meet appellant at Hall's Carryout, across the street from her residence on Cincinnati-Dayton Road in West Chester. The men were set to purchase the drugs from James Behanan. When Brown and Detective Buschelman arrived, appellant got into the vehicle and indicated that Behanan was "not there yet." Appellant contacted Behanan by phone. Following the conversation, appellant indicated that "something was wrong with [Behanan's] vehicle" and stated that they needed to drive towards Paddock Road and Seymour Avenue in Hamilton County to meet him. En route, appellant had another conversation with Behanan to confirm the meeting location. Appellant instructed that they should go to the Sunoco gas station on Mitchell Avenue. After arriving at the Sunoco, they waited 30 to 40 minutes for Behanan to arrive. Behanan arrived around 7:00 p.m. in the passenger seat of a black Acura. The driver of the Acura exited the vehicle, walked to the front of the Sunoco, walked back to the car, and tapped on the hood. Behanan then waved to appellant, who exited the detective's vehicle and got into the back seat of the Acura. The detective observed Behanan bend forward and then sit back up with a crack rock between his finger and thumb then hand it to appellant in the back seat. Appellant handed Behanan the cash,

exited the Acura, and returned to the officer's vehicle. Appellant gave the crack cocaine to the detective after wrapping it in a one dollar bill.

{¶6} A second transaction with Behanan was organized for May 7, 2009. This time, Brown drove his truck. The men picked up appellant at her residence then drove to the Mitchell Avenue Sunoco. Behanan arrived in the passenger seat of a Honda Accord. Like the previous transaction, the driver exited the vehicle, walked to the front of the Sunoco station, walked back to the car, and tapped on the hood. Behanan made eye contact and appellant entered the backseat of the Honda. Behanan looked down into his lap and came back up with what appeared to be crack cocaine in his fingers, handed it to appellant, who handed Behanan the money. Roy returned to Brown's vehicle and handed the substance to the officer after wrapping it in plastic. A third transaction with Behanan occurred on May 9, 2009 at the same location for the same amount of money and drugs.

{¶7} The final transaction occurred on May 29, 2009. This transaction involved the sale of one ounce of crack cocaine by Montgomery for $1,500 in the vicinity of the Rave movie theater in West Chester Township. To set up the transaction, Brown called Montgomery directly. That evening, Brown and the officer picked up appellant at approximately 7:00 p.m. in her driveway, informed her of the transaction, and drove to the location. Montgomery called Brown and indicated that he was having car trouble. Eventually, Montgomery called and said he was parked at the nearby Steak 'n Shake restaurant. Brown, Buschelman, and appellant went to the Steak 'n Shake parking lot. Detective Buschelman had given appellant $1,500 plus an additional $50 for appellant. As Brown started to get out of the truck to let appellant out of the vehicle, Montgomery shut the door and told them to "stay in the vehicle. There's too much going on." He then stated, "[h]urry up, man. Give me the money. Deana, I can county my own

money."

{¶8} Detective Buschelman told appellant to "give him the money," but appellant said "no" and hesitated to do so. The officer grabbed the money, reached over, and handed it to Montgomery. Appellant grabbed $50. Montgomery protested, "Deana give me my money." Appellant replied, "[t]hat's my money" and uttered several obscenities. After Montgomery counted the cash, he handed the crack to Detective Buschelman and told everyone to "be careful." The officer secured the crack cocaine in the glove box and signaled the surveillance team to execute a "bust." Appellant and Montgomery were arrested. The envelope containing $1,500 was recovered from Montgomery and the $50 given to appellant was recovered from under her purse on the seat of the truck.

{¶9} An audio recording of each transaction was made using a wire secured on Brown. All of the substances recovered from each transaction were submitted for analysis at the Ohio Bureau of Criminal Identification and Investigation and were determined to be crack cocaine. On August 4, 2009, appellant, Montgomery and Behanan were indicted for drug offenses. Appellant was charged with six counts of trafficking in cocaine, in violation of R.C. 2925.03(A)(1), and four counts of possession of cocaine, in violation of R.C. 2925.11(A). The three counts of trafficking occurring at the Sunoco gas station also alleged an enhancement for occurring within the vicinity of a school. Montgomery entered a guilty plea before trail, while appellant and Behanan proceeded to a joint trial. Following a jury trial, appellant was found guilty as charged, including the enhancement for trafficking in the vicinity of a school, and was sentenced to a total of six years in prison. Appellant timely appeals, raising six assignments of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT OVERRULED APPELLANT'S RULE 29 MOTION REGARDING THE DRUG TRANSACTION TAKING PLACE WITHIN 1,000 FEET OF A SCHOOL."

{¶12} In her first assignment of error, appellant challenges the state's evidence relating to the three transactions conducted in the Sunoco parking lot. Appellant argues the state failed to establish the transactions occurred within 1,000 feet of a school.

{¶13} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶14} "An offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises." R.C. 2925.01(P). "School premises" means "[t]he parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed." R.C.

2925.01(R)(1).

{¶15} Appellant does not dispute that Roger Bacon High School satisfies the definition of "school premises." However, appellant claims several errors with the state's evidence. Appellant urges that the detective never established that he measured to the Roger Bacon High School property because he was not "qualified as one familiar with the property or its meets and bounds." Appellant also argues that the measurement must be from the exact point of sale where the vehicle was situated, not from the property line of the Sunoco station. Finally, appellant claims error with the map because it was never provided during discovery.

{¶16} At trial, the state presented evidence of three separate measurements to establish the distance between the Sunoco station and Roger Bacon High School. The state submitted an aerial photograph of the area between the Sunoco station and the school furnished by the Cincinnati Police Department to Detective Buschelman. According to the map, the direct line from the gas station to the school measures 840 feet. In addition, Detective Buschelman testified that he personally made two separate measurements of the area on foot. The detective could not measure the direct line between the properties on the ground due to heavy foliage and other buildings located within the block. As a result, the detective measured two indirect routes along the perimeter of the block between the locations using a traffic wheel. Detective Buschelman testified that he was familiar with the use of a traffic wheel and began his measurements from the "exact location where we were parked all three times." Measuring along the west and north perimeter of the block, the distance totaled 975.06 feet. The officer also measured along the south and east perimeter, which totaled 1,009.16 feet.

{¶17} After review of the record, we find sufficient evidence to support the

enhancement. The detective's indirect measurements along the borders of the city block support the aerial measurement. One of the detective's indirect measurements was still within the 1,000-foot threshold.

{¶18} However, appellant suggests that the distance must be measured from the point of sale and argues that the point of sale was where Behanan was parked, not where the officer and Brown were situated. Even accepting appellant's argument that Behanan's position was the point of sale, sufficient evidence exists to support the enhancement. Detective Behanan testified that he was positioned 20 to 30 feet from Behanan. When combining this distance with the direct measurement, the transaction in the vehicle occupied by Behanan still occurred within 1,000 feet of the school.

{¶19} Appellant's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT AND IN VIOLATION OF DUE PROCESS OF THE OHIO AND UNITED STATES CONSTITUTIONS BY ENTERING JUDGMENT OF CONVICTION OF TRAFFICKING IN COCAINE AS TO COUNT ELEVEN OF THE INDICTMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION AS TO THIS COUNT."

{¶22} Assignment of Error No. 3:

{¶23} "THE JUDGMENT OF CONVICTION AS TO COUNT ELEVEN OF THE INDICTMENT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶24} Appellant combines her arguments for the second and third assignments of error. In the assignments, appellant challenges the sufficiency of her conviction relating to the May 29, 2009 transaction. Appellant argues that the evidence demonstrates she did not aid or abet the transaction. Appellant relies upon the fact

Brown independently set up the transaction and purchase price with Montgomery. Further, appellant claims Brown deceived her because he told her that they were going to a bar to "party." Appellant claims she did not know that Brown and Detective Buschelman planned to buy an ounce of cocaine until she was in the car and she never touched the drugs during the transaction.

{¶25} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. See *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117; *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence underlying a criminal conviction, the appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *Carroll* at ¶117. In reviewing a record for sufficiency, "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." Id.

{¶26} While the test for sufficiency requires a determination as to whether the state has met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. Id., citing *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶34. In determining whether a conviction is against the manifest weight of the evidence, the appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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. *Carroll*, 2007-Ohio-7075 at ¶118. However, while

appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. Id.; *State v. Ligon*, Clermont App. No. CA2009-09-056, 2010-Ohio-2054, ¶23.

{¶27} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Carroll* at ¶119, quoting *Wilson* at ¶35.

{¶28} R.C. 2925.03(A)(1) provides, "No person shall knowingly * * * [s]ell or offer to sell a controlled substance." With regard to count eleven, the state charged in the bill of particulars that appellant acted as the principal or accomplice in knowingly selling or offering to sell crack cocaine, i.e., that she aided or abetted another. R.C. 2923.03(A)(2). If an individual is found guilty of complicity as an aider or abettor, the individual "shall be prosecuted and punished as if he were a principal offender." R.C. 2923.03(F).

{¶29} At one point during the audio recording of the transaction, appellant can be heard objecting to the transaction. Specifically, after being told that Brown and the detective planned to purchase an ounce of cocaine, appellant questioned, "[a]n ounce, I don't want to go to jail. Are you crazy?" However, appellant's actions combined with other statements made during the transaction demonstrate her participation in the sale. In an earlier transaction, appellant stated that she considered herself to be a "mule." Like the previous purchases from Montgomery, appellant was given the money. Although appellant was reluctant to give the money to Montgomery, she demanded a fee for her role in the transaction. Once Montgomery was paid, appellant grabbed $50. Montgomery initially protested, but appellant replied "[t]hat's my money" and uttered an

obscenity. This evidence demonstrates appellant's complicity and willingness to engage in the sale on May 29.

{¶30} The jury had the opportunity to hear the testimony of Brown and the detective, as well as the audio recording of the transaction, and place the evidence in context with the other transactions. In viewing the evidence as a whole, it was reasonable for the jury to find appellant guilty of trafficking for the May 29 transaction.

{¶31} Appellant's second and third assignments of error are overruled.

{¶32} Assignment of Error No. 4:

{¶33} "THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ENTERING UNCONSTITUTIONAL VERDICTS AS TO COUNTS TWO, THREE, FIVE, SEVEN, NINE AND ELEVEN CONTRARY TO THE OHIO AND UNITED STATES CONSTITUTION BECAUSE THEY WERE NOT SUPPORTED BY EVIDENCE."[1]

{¶34} In her fourth assignment of error, appellant argues that all of her convictions for trafficking are against the manifest weight of the evidence. Appellant claims that she is merely a drug addict manipulated by "outrageous governmental misconduct." Appellant insists that she never approached Brown or Detective Buschelman to sell drugs on behalf of Behanan or Montgomery, she was merely a pawn, and did not need to be involved in the transactions as Brown could have contacted and purchased the drugs directly from Montgomery or Behanan. Appellant argues she should not be convicted of trafficking because she was not an indispensable party to the transaction and the West Chester Police were merely "setting her up."

{¶35} A manifest weight challenge "concerns the inclination of the greater

amount of credible evidence, offered in a trial, to support one side of the issue rather than the other; weight is not a question of mathematics, but depends on its effect in inducing belief." *State v. Ghee*, Madison App. No. CA2009-08-017, 2009-Ohio-2630, ¶9. "The power to reverse a judgment as against the manifest weight must be exercised with caution and only in the rare case where the evidence weighs heavily against conviction." *State v. Banks* (1992), 78 Ohio App.3d 206, 225.

{¶36} Having already concluded that appellant's conviction for trafficking in count eleven is not against the manifest weight of the evidence, we turn to the remaining counts. After a review of the record, we find that the remaining convictions for trafficking are not against the manifest weight of the evidence.

{¶37} Regardless of whether appellant was a necessary party to the transaction or if Brown could obtain the drugs directly from Montgomery or Behanan, appellant was involved, acted as an intermediary, and benefited from the drug transactions. Brown contacted appellant to purchase drugs from her suppliers, Montgomery and Behanan. Appellant willingly contacted Montgomery and Behanan, aided the trafficking by facilitating several transactions, handled the money and drugs, and received a $50 fee for her involvement in each transaction. Appellant actively sought payment for her role. When told that she would receive $40 for her assistance during the March 28 transaction, appellant instead demanded $50. During the audio recording of the April 16 transaction, appellant described herself as a "mule" who sought to "keep my customer happy." During the transactions, appellant handled the money, retrieved the crack cocaine directly from Montgomery or Behanan, and gave it to Brown or the detective.

{¶38} The jury was able to hear the audio of the transactions as well as the

1. Although appellant's fourth assignment of error suggests a challenge to the sufficiency of the evidence, in the assignment appellant argues that the convictions were against the manifest weight. Accordingly, we

testimony of Brown and Detective Buschelman. We find no indication that the jury lost its way or created a manifest injustice by convicting appellant of the remaining five counts of trafficking. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶11. Appellant was clearly involved in, aided and received a benefit from the various sales of crack cocaine.

{¶39} Appellant's fourth assignment of error is overruled.

{¶40} Assignment of Error No. 5:

{¶41} "THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN INSTRUCTING THE JURY ON AIDING AND ABETTING."

{¶42} The indictment in this case alleged that appellant sold or offered to sell the crack cocaine. In the bill of particulars, the state charged appellant with complicity, alleging that she served as an aider and abettor in the transactions. In her fifth assignment of error, appellant claims she was prejudiced by the state's failure to allege aiding and abetting in the indictment. Further, she argues the trial court incorrectly instructed the jury regarding aiding and abetting because she was aiding the police in obtaining the drugs, not the trafficker.

{¶43} "A charge of complicity may be stated in terms of this section, or in terms of the principal offense." R.C. 2923.03(F). "Thus, a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is 'stated * * * in terms of the principal offense' and does not mention complicity." *State v. Herring*, 94 Ohio St.3d 246, 251, 2002-Ohio-796.

{¶44} We find no prejudice by the state's failure to allege complicity in the indictment. Id. Appellant was clearly on notice that the state intended to pursue the convictions based upon complicity since it included an allegation of aiding and abetting

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will treat appellant's assignment of error as a challenge to the weight of the evidence.

in the bill of particulars. See *State v. Benson*, Butler App. No. CA2004-10-254, 2005-Ohio-6549, ¶31-32.

{¶45} Additionally, the state presented evidence at trial showing that appellant aided and abetted Montgomery and Behanan in selling crack cocaine. Appellant contacted the dealers, determined the meeting place, and acted as an intermediary during the transaction. She sought a benefit from each transaction by receiving a $50 fee and "pinching" some crack from the purchased drugs. Accordingly, we find no error by the trial court in instructing the jury on aiding and abetting. See *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 697.

{¶46} Appellant's fifth assignment of error is overruled.

{¶47} Assignment of Error No. 6:

{¶48} "THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN FAILING TO MERGE, FOR SENTENCING PURPOSES ALLIED OFFENSES OF SIMILAR IMPORT."

{¶49} In her final assignment of error, appellant argues that she cannot be convicted of both trafficking and possession for the same drugs since the offenses are allied offenses of similar import. Accordingly, she urges that the possession convictions in counts four, six, eight and ten must be merged with the respective trafficking convictions.

{¶50} Appellant failed to raise an objection at the trial level challenging whether the offenses were allied offenses of similar import. As a result, she waives all but plain error. "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52. Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, at ¶21,

citing *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. "[N]otice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

{¶51} Appellant was convicted of six counts of trafficking in cocaine in violation of R.C. 2925.03(A)(1) and four counts of possession of cocaine in violation of R.C. 2925.11. The controlling authority on this issue is *State v. Cabrales*, 118 Ohio St.3d 54, 2009-Ohio-1625. In *Cabrales*, the Ohio Supreme Court clearly found that trafficking under R.C. 2925.03(A)(1) and possession pursuant to R.C. 2925.11 are not allied offenses of similar import and therefore do not merge. Id. at ¶1, ¶29. See, also, *State v. Fritz*, 182 Ohio App.3d 299, 2009-Ohio-2175, ¶13; *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶82.

{¶52} Accordingly, we find no plain error by the trial court for failing to merge the offenses.

{¶53} Appellant's sixth assignment of error is overruled.

{¶54} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.