[Cite as *State v. Stevens* , 2009-Ohio-6143.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA3
	:	
vs.	:	**Released: November 17, 2009**
	:	
JEFFREY K. STEVENS,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Carol Ann Curren, Greenfield, Ohio, for Appellant.

James B. Grandey, Highland County Prosecutor, and Anneka P. Collins, Highland County Assistant Prosecutor, Hillsboro, Ohio, for Appellee.

McFarland, J.:

{¶1} Appellant, Jeffrey K. Stevens, appeals his conviction in the Highland County Court of Common Pleas after a jury found him guilty of two counts of drug trafficking, in violation of R.C. 2925.03(A)(1), both felonies of the fifth degree. On appeal, Appellant contends that 1) the state committed a discovery violation by not disclosing the existence of a still photograph taken from a surveillance video and that he was unfairly and unduly prejudiced by the introduction of the photograph; 2) the trial court erred to the detriment of the defendant in admitting the still photograph into

evidence when there clearly was a discovery violation; and 3) his conviction was against the manifest weight of the evidence and not supported by sufficient evidence. Because we conclude that the State's technical discovery violation was not willful and did not result in prejudice to Appellant, we conclude that the trial court did not abuse its discretion in admitting the still photo into evidence. Thus, we overrule Appellant's first and second assignments of error. Further, because we conclude that Appellant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence, we overrule Appellant's third assignment of error. Thus, we affirm the judgment of the trial court.

FACTS

{¶2} On October 21, 2008, Appellant, Jeffrey K. Stevens, was indicted in the Highland County Court of Common Pleas on three counts of drug trafficking, in violation of R.C. 2925.03(A)(1), felonies of the fifth degree. Each charge stemmed from investigations by the U.S. 23 Major Crimes and Drug Taskforce, which had set up and conducted controlled drug buys from Appellant with the use of a confidential informant. Appellant denied the charges and the matter proceeded to a jury trial on January 12, 2009.

{¶3} At trial, the State presented several witnesses, including: 1) Amy Lahrmer, a detective with the Highland County Sheriff's office assigned to the U.S. 23 Pipeline Drug Taskforce; 2) Major Randy Sanders, employed by the Ross County Sheriff's office and director of the U.S. 23 Major Crimes Taskforce; 3) James Brown, confidential informant; and 4) Dan Croy and Denny Kirk, both of the Highland County Sheriff's office, who testified regarding the chain of custody of the drugs recovered as a result of the transactions.

{¶4} Detective Lahrmer testified that confidential informant, James Brown, was utilized to stage three controlled drug buys from Appellant, one on September 15, 2008, and the other two on September 19, 2008. Detective Lahrmer testified that Brown's person and vehicle were searched both prior to and after each controlled buy and that Brown was additionally outfitted with an audio transmitter and digital recorder, which allowed her and Major Sanders to listen to each transaction. Further, with respect to the third transaction, Detective Lahrmer testified that she was able to video the transaction on a digital video recorder. As a result, the video, which clearly depicts a light-skinned black male, identified in court as Appellant, get into the confidential informant's vehicle, presumably in order to conduct the transaction that is the subject of the count three of the indictment. This

video was provided to the defense as part of the discovery process and was played for the jury without objection.

{¶5} However, at this stage in Detective Lahrmer's trial testimony, the State introduced another exhibit, which was a still photograph of Appellant created from the video recording. The defense objected to the introduction of the photograph, claiming that it had not received a copy of the photo prior to trial. The State argued that although it had not provided the defense with a copy of the photo, the defense was provided with a copy of the video from which the still photo was taken. The trial court overruled the objection and allowed the photograph to be admitted into evidence and shown to the jury.

{¶6} Major Sanders testified that he accompanied Detective Lahrmer and conducted surveillance on each transaction. He also testified that he personally conducted searches of the confidential informant's person and vehicle prior to and after each transaction. He further testified that he personally conducted field tests on each substance recovered from the confidential informant after each controlled buy from Appellant, and that the substances tested positive for cocaine.

{¶7} James Brown, the confidential informant, also testified at trial. In addition to explaining his criminal background, he explained his reasons for agreeing to act as a confidential informant, which originally included

having a pending felony charged dismissed. He further testified that he was searched prior to and after each transaction and he identified Appellant as the individual from which he purchased drugs as part of the controlled buys.

{¶8} The defense did not present any evidence and the matter was submitted to the jury. Ultimately, the jury convicted Appellant on counts two and three only and the trial court sentenced Appellant to consecutive terms of imprisonment for each conviction. It is from these convictions and sentences that Appellant now brings his timely appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. THE STATE COMMITTED A DISCOVERY VIOLATION BY NOT DISCLOSING EXISTENCE OF THE STILL PHOTOGRAPH TAKEN FROM A SURVEILLANCE VIDEO. THE DEFENDANT WAS UNFAIRLY AND UNDULY PREJUDICED BY THE INTRODUCTION OF THE PHOTOGRAPH.

II. THE TRIAL COURT ERRED TO THE DETRIMENT OF THE DEFENDANT IN ADMITTING THE STILL PHOTOGRAPH INTO EVIDENCE WHEN THERE CLEARLY WAS A DISCOVERY VIOLATION.

III. THE CONVICTION OF JEFFREY STEVENS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE."

ASSIGNMENTS OF ERROR I AND II

{¶9} In his first assignment of error, Appellant contends that the State committed a discovery violation in failing to disclose a still photograph that was admitted at trial, and that he was unfairly prejudiced as a result. In his second assignment of error, Appellant furthers this argument by claiming that the trial court erred to his detriment in admitting the still photograph into evidence when there was a clear discovery violation. Because Appellant's first and second assignments of error are interrelated and involve the same legal analysis, we will address them in conjunction with one another.

{¶10} Appellant argues that the State's introduction of a still photo of Appellant at trial that was not provided to the defense in the course of discovery was a willful violation of Crim.R. 16(B), which unfairly prejudiced him. The State concedes that it did not provide the photo to the defense prior to trial, but argues that it did provide the defense with a copy of the video from which the still photo was taken. Although Appellant objected to the introduction of the photo at trial, the trial court allowed the photo to be admitted.

{¶11} The eleventh district court of appeals considered a factually similar scenario in *State v. Heilman*, Trumbull App. Nos. 2004-T-0133,

0135, 2006-Ohio-1680. After noting that the decision to admit or exclude evidence rests within the sound discretion of the trial court and is reviewed under an abuse of discretion standard, that court reasoned as follows:

"Under Crim.R. 16(B), the prosecutor is required to disclose certain types of evidence to the defendant. *State v. Hinkle* (Aug. 23, 1996), 11th Dist. No. 95-P-0069, 1996 Ohio App. LEXIS 3562, at *10. The rule states, in relevant part, that '[u]pon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy * * * photographs * * * within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial * * *.' Crim.R. 16(B)(1)(c).

The State argues that it sufficiently complied with Crim.R. 16, by timely supplying the defense with a copy of the videos from which the photographs were derived. We disagree. Crim.R. 16(B) is unequivocal in its requirement that the prosecution is to provide the defense with photographs or tangible objects intended for use by the prosecuting attorney as evidence. The rule is silent as to the source of the evidence. It is abundantly clear that a photograph taken from a videotape is a discrete evidentiary item, even if the defense already has the source from which the additional evidence was derived. The State implicitly admits this fact, having submitted the videos and the photographs derived from the videos as separate exhibits at trial. Civ.R. 16(D) requires a continuing duty to disclose any additional evidence subject to original discovery request or order to the defense, the court, or both. *State v. Martin* (1985), 19 Ohio St.3d 122, 128, 483 N.E.2d 1157. Thus, the State was obligated to disclose the additional evidence, as soon as practicable." Id.

{¶12} We find the reasoning of the eleventh district on this particular issue to be persuasive and hereby adopt and apply it herein. Thus, we find that the State's failure to disclose a copy of the still photograph to the defense prior to trial, as part of the discovery process, was a technical

violation of Crim.R. 16(B). However, and as noted by the *Heilman* court, "[t]he court does not abuse its discretion in admitting evidence undisclosed in discovery unless the record shows that the prosecution's discovery violation was willful, that foreknowledge would have benefitted the accused in preparing his defense, or[1] that the accused was unfairly prejudiced." *Heilman* at ¶54; citing *State v. Otte*, 74 Ohio St.3d 555, 563, 1996-Ohio-108, 660 N.E.2d 711; See also, *State v. Joseph*, 73 Ohio St.3d 450, 1995-Ohio-288, 653 N.E.2d 285 (noting that satisfaction of the tripartite test results in reversible error).

{¶13} Based upon our review of the record, we find no evidence that the State committed a willful discovery violation. Although the State clearly intended to use the still photo at trial and introduced it as a separate exhibit, its explanation to the trial court upon the defense's objection to the use of the photo indicates that the State did not intend to violate discovery rules in doing so. As stated by the prosecution during a bench trial:

"MR. FEDERLE: I would object to this picture, because I don't believe it was disclosed to me.

[1] The *Heilman* court, relying on the reasoning of the Supreme Court of Ohio in *State v. Otte*, supra, phrased this tripartite test as disjunctive by utilizing "or," rather than conjunctive, which would include an "and." However, our research has revealed an inconsistency in the wording of this test, even within the Supreme Court itself. See, *State v. Parson* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689 (utilizing "or"); *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026 (utilizing "and"); *State v. Wiles* (1991), 59 Ohio St.3d 71, 571 N.E.2d 97 (utilizing "or"); *State v. Scudder*, 71 Ohio St.3d 263, 1994-Ohio-298, 643 N.E.2d 524 (utilizing "or"); *State v. Joseph*, 73 Ohio St.3d 450; 1995-Ohio-288, 653 N.E.2d 285 (utilizing "and"). As such, and in an abundance of caution, we apply the stricter, disjunctive standard, which requires the presence of only one of the factors in order to find reversible error.

MS. COLLINS: He was given the entire tape. He watched it in our office.

MR. FEDERLE: I did see the tape, but . . .

MS. COLLINS: And that's all it is, off that tape.

THE COURT: If it's a photo in a frame printed off of the tape that you received, then I think that's included in discovery. I think the State, you know, (one or two words not distinguished) to take every single frame in a photo they could, so I would overrule the objection on that basis."

Clearly, the State believed it had sufficiently complied with the discovery rules in turning over the video tape to the defense prior to trial. Thus, there is no indication that the State's actions constituted a willful violation.

{¶14} Further, other than his unsupported assertions, Appellant makes no argument as to how prior knowledge of the photograph would have benefited him in his defense or how the use of the photo prejudiced him. Contrary to Appellant's assertions that but for the use of the photo, he would not have been convicted, the photo was introduced only with regard to the count three of the indictment, which related to the second drug transaction occurring on September 19, 2008. The photo did not have any application with respect to the first transaction occurring on that day, but Appellant was nevertheless convicted on that charge as well. Further, after comparing the video footage with the still photo, this Court finds that Appellant was just as identifiable in the video as in the photo. Thus, there is no evidence which

suggests that Appellant suffered any prejudice from the nondisclosure of the photo prior to trial, nor from the court's allowance of its admission into evidence at trial

{¶15} Moreover, and of importance, is the fact that while the record indicates that Appellant objected to the use of the still photo at trial, he failed to request a continuance. As noted by the *Heilman* court, "The Supreme Court has stated that 'no prejudice to a criminal defendant results where an objection is made at trial to the admission of nondisclosed discoverable evidence on the basis of surprise but no motion for a continuance is advanced at that time.' " *Heilman*, supra; citing *State v. Wiles* at 80. Thus, we conclude that although the State's conduct at trial constituted a technical violation of Crim.R. 16(B), such conduct was not willful and did not prejudice Appellant. As such, we conclude that the trial court did not abuse its discretion in admitting the still photograph into evidence. Accordingly, Appellant's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

{¶16} In his third assignment of error, Appellant contends that his conviction was against the manifest weight of the evidence and was not supported by sufficient evidence. When reviewing a case to determine whether the record contains sufficient evidence to support a criminal

conviction, our function "is to 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. 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, 574 N.E.2d 492, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781.

{¶17} This test raises a question of law and does not allow us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Rather, the test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. We reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80, 434 N.E.2d. 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶18} Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than

that for sufficiency of the evidence. *State v. Banks* (1992), 78 Ohio App.3d 206, 214, 604 N.E.2d 219; *State v. Martin* at 175. In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine 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 granted. *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71, 659 N.E.2d 814; *Martin* at 175. "A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus.

{¶19} Appellant was convicted of two separate counts of drug trafficking, in violation of R.C. 2925.03(A)(1), which provides that:

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance[.]

Appellant contends that his conviction was against the sufficiency and manifest weight of the evidence, arguing that "[t]he only real evidence other than the drug that could have been supplied by the CI, came from testimony

of the CI." Appellant challenges the reliability of the confidential informant's testimony, describing him as "a convicted felon who used his associations to get out of another felony drug charge." Appellant suggests that the confidential informant "would have had ample opportunity to falsify the exchange by simply hiding a 'rock' on his person and claiming that it came from the defendant." Appellant supports this argument by stating that both the confidential informant and the detectives at trial testified that the search prior to and after the controlled drug buy was more of a "pat-down" and not a "skin-to-skin" search. Appellant further claims that the admission of the still photo, which he claims was erroneous and prejudicial, played a role in his conviction on the second and third counts of drug trafficking.

{¶20} In light of our disposition of Appellant's first and second assignments of error, which determined that the trial court properly allowed the admission of the still photo and that Appellant suffered no prejudice as a result, we reject Appellant's contention that the jury improperly relied on the still photo in reaching its verdict. Further, based upon our review of the record, we reject Appellant's suggestion that but for the admission of the still photo, the jury would not have convicted him on counts two and three.

{¶21} The record reveals that both of the detectives involved in the controlled drug buys that took place on September 19, 2008, testified at trial.

Amy Lahrmer, a detective with the Highland County Sheriff's office and assigned to the U.S. 23 Pipeline Drug Task Force, testified that she worked with a confidential informant in setting up the controlled drug buys involving Appellant. With respect to the first drug transaction that occurred Detective Lahrmer testified that James Brown, the confidential informant, while in her presence, placed a call to the Appellant to set up the transaction. She testified Brown was searched prior to and after the transaction, was given recorded money to make the purchase and was given an audio transmitter and a digital recorder in order that the detective could listen to the transaction as it occurred. Detective Lahrmer further testified that although she was unable to watch the actual transaction, she watched Brown go to the predetermined meeting place for the transaction, listened to the transaction via audio transmitter and met with Brown after the transaction, at which point Brown was searched again and provided her with a substance, later determined to be cocaine, which he stated he purchased from Appellant.

{¶22} With regard to the second drug transaction that occurred on September 19, 2008, Detective Lahrmer testified that same protocol was used with respect to the confidential informant, but that she was also able to film Appellant getting into Brown's vehicle in order to make the transaction.

Specifically, Detective Lahrmer, testified that she was able to view and also film a light-skinned black male, getting into Brown's vehicle, as per the arrangement. She identified Appellant as the light-skinned black male on the video tape and also in court, and the video was played for the jury without objection by Appellant.

{¶23} Major Randy Sanders, who is employed by the Ross County Sheriff's office and assigned to the U.S. 23 Major Crimes Task Force, also testified at trial. Major Sanders testified that he personally searched the confidential informant prior to and after each controlled buy. He described the body search as a "thorough pat-down search" and stated that the vehicle search was done like a "search incident to arrest." He further testified that he personally field tested the substances provided to him by the confidential informant after each transaction and that the substances showed positive for cocaine.

{¶24} Confidential informant, James Brown, also testified at trial. He stated that his body and vehicle were searched prior to after each transaction. In describing the pat-down search of his body, Brown testified that Major Sanders "stuck his hands in my pockets, uh, I would take off my shoes, uh, he ran his finger through my sock. I took off any outer . . . I never had a coat on or anything like that, uh, and I mean around my waist and the inside

of my pants. I mean I don't know what part of the body you're specifically asking, but almost skin-to-skin, and the other was within the shirt." Brown further testified that as he purchased crack from Jeff Stevens and identified Appellant as Jeff Stevens.

{¶25} In light of the foregoing evidence presented at trial, we reject Appellant's contention that his conviction was against the sufficiency and manifest weight of the evidence. Rather, we conclude that the jury's verdict was supported by not only sufficient evidence, but by substantial evidence. We note, with regard to Appellant's suggestion that the testimony that the confidential informant was unreliable, that issues regarding the weight to be given to evidence and the credibility of witnesses are reserved for the trier of fact. *State v. Thomas* at 79-80. Further, the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it. See *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438. Accordingly, Appellant's third assignment of error is overruled.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of the Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.