

[Cite as *State v. Pollitt*, 2010-Ohio-2556.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 08CA3263
 :
 vs. :
 LISA POLLITT, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT:¹ Luke Brazinski, 612 Sixth Street, Portsmouth, Ohio
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COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney,
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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-1-10

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas court judgment of conviction and sentence. The jury found Lisa Pollitt, defendant below and appellant herein, guilty of: (1) the illegal possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A); (2) the illegal manufacture of drugs in violation of R.C.

¹ Different counsel represented appellant during the trial court proceedings.

2925.04(A); and (3) the conspiracy to manufacture drugs in violation of R.C. 2923.01(A) and R.C. 2925.03(A)(2).

{¶ 2} Appellant raises the following assignments of error for review.

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY ENTERING JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY ENTERING A JUDGMENT AGAINST THE APPELLANT THAT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 3} On March 20, 2008, law enforcement officers raided the house where appellant was a resident upon suspicion that it contained a methamphetamine lab. On June 2, 2008, the Scioto County Grand Jury returned an indictment charging appellant with the illegal possession of chemicals for the manufacture of drugs, the illegal manufacture of drugs, trafficking in methamphetamine, and the conspiracy to manufacture drugs.

{¶ 4} At the jury trial, Ohio State Highway Patrol Supervisor and Assistant Team Leader of the Special Response Team Brian Vierstra testified that he led the first team to approach the residence. Scott Creech was the first occupant to respond to the officers' request to exit the residence. Vierstra then saw an interior door crack open and a female look out at the officers. She ducked back into the room, which officers later discovered to be a bathroom. Vierstra screamed for the female to exit and, after several seconds, a female exited and closed the door behind her. Vierstra thought the

female looked back into the bathroom and stated something to another person who was still in the bathroom. Officers asked her if anyone was in the bathroom, and she responded that another female remained in the bathroom. The officers yelled for the remaining female (the appellant) to exit the bathroom. After several seconds, she complied. Vierstra stated that approximately forty-five seconds to one minute elapsed between the first female's exit and the appellant's exit. Appellant, who was dressed and had a towel wrapped around her head, said that she was getting ready to blow dry her hair. Officers then secured appellant and the scene. After Vierstra removed his gas mask, he detected a strong odor of ether.

{¶ 5} Scioto County Sheriff's Office Narcotics Investigator Adam Giles stated that he met appellant at this same residence approximately six months to one year prior to the search warrant's execution when he investigated a report that she was a missing person. Giles explained that in their search of the residence, law enforcement officers found chemicals used to manufacture methamphetamine throughout the entire house. In the bathroom where appellant had been located, officers found a clear Mason jar, a container of Epson salt, and ammonia household cleaner.

{¶ 6} Scioto County Sheriff's Narcotics Detective John Koch testified that he interviewed appellant and she admitted that she knew what was in the house and that she had cleaned the kitchen. The officers discovered various methamphetamine-making materials in the kitchen. She stated: "I know what's here. I know. I cleaned the kitchen this morning." Appellant also admitted that she had used methamphetamine the night before the officers raided the house.

{¶ 7} After the prosecution rested, appellant moved for a judgment of acquittal.

She asserted that the prosecution failed to present sufficient evidence to support a conspiracy conviction or that she possessed any of the contraband. The prosecution, however, asserted that it presented sufficient evidence to allow the jury to consider whether appellant aided or abetted her co-defendant in committing the charged offenses. The trial court denied her motion.

{¶ 8} After hearing the evidence adduced at trial, the jury found appellant guilty of: (1) the illegal possession of chemicals for manufacture of methamphetamine; (2) the illegal manufacture of drugs; and (3) the conspiracy to manufacture drugs. On October 10, 2008, the trial court issued² concurrent sentences of (1) three years on the illegal possession of chemicals for manufacture of methamphetamine offense; and (2) four years on the illegal manufacture of drugs offense. The court determined that the illegal manufacture of drugs offense merged with the conspiracy offense and, thus, did not impose a sentence on the conspiracy count.³ The court also dismissed count three.

² The trial court's judgment appears to contain a clerical error. The caption lists the defendant as "Lisa M. Pollitt." However, the body of the judgment refers to the defendant as "Scott D. Creech," one of Pollitt's co-defendants, and further refers to the defendant in the masculine. Because neither party has seriously disputed whether this judgment actually sentenced Pollitt, we conclude that the error is merely clerical and one that we may overlook.

³ Although the jury could find appellant guilty of both the conspiracy to illegally manufacture drugs and the illegal manufacture of drugs (whether as a principal offender or as an aider or abettor), the trial court could "convict" her of only one. See R.C. 2923.01(G); State v. Emery (Feb. 13, 1985), Hamilton App. No. 840102 ("The accused may lawfully be charged separately in terms of both conspiracy and the object offense; the prosecution may proceed to trial without being compelled to make an election between the charges; and both charges may, upon sufficient proof, be submitted to the jury as long as the accused is ultimately convicted only one.").

This appeal followed.⁴

{¶ 9} For ease of analysis, we combine appellant's first and second assignments of error. In her first assignment of error, appellant asserts that the prosecution failed to present sufficient evidence to support her convictions and prove: (1) that she committed the offenses of illegal assembly or possession of chemicals for the manufacture of drugs or illegal manufacture of drugs; (2) that she was complicit in committing either offense; or (3) that she conspired to manufacture drugs. Appellant claims that she was merely present at the residence and did not engage in any criminal activities.

{¶ 10} In her second assignment of error, appellant contends that her convictions are against the manifest weight of the evidence. She asserts that no competent, credible evidence supports her convictions and again argues that she was merely present at the residence.

{¶ 11} 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 (stating that "sufficiency is the test of adequacy"); State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. 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

⁴ On November 14, 2008, appellant filed an untimely notice of appeal. We later

reasonable doubt. Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; Jenks, 61 Ohio St.3d at 273. Furthermore, a reviewing court is not to assess “whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” Thompkins, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 12} When reviewing a sufficiency of the evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. See State v. Hill (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068; State v. Grant (1993), 67 Ohio St.3d 465, 477, 620 N.E.2d 50. A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. See State v. Tibbetts (2001), 92 Ohio St.3d 146, 749 N.E.2d 226; State v. Treesh (2001), 90 Ohio St.3d 460, 739 N.E.2d 749.

{¶ 13} “Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence.” Thompkins, 78 Ohio St.3d at 387. When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. See State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Once the reviewing

granted appellant leave to appeal.

court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 14} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. See State v. Eley (1978), 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus. A reviewing court should find a conviction against the manifest weight of the evidence only in the “exceptional case in which the evidence weighs heavily against conviction.” Thompkins, 78 Ohio St.3d at 387, quoting Martin, 20 Ohio App.3d at 175; see, also, State v. Lindsey (2000), 87 Ohio St.3d 479, 483, 721 N.E.2d 995.

{¶ 15} When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a finding that sufficient evidence supports the conviction. “Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” State v. Lombardi, Summit App. No. 22435, 2005-Ohio-4942, ¶9, quoting State v. Roberts (Sept. 17, 1997), Lorain App. No. 96CA006462. In the case sub judice, our disposition of appellant's second assignment will necessarily dispose of her first. Therefore, we first address her second assignment of error.

{¶ 16} In the case at bar, the evidence does not weigh heavily against conviction.

Rather, we believe the record contains ample competent, credible evidence that appellant aided or abetted her co-defendant in the illegal assembly or possession of chemicals for the manufacture of drugs and in the illegal manufacture of drugs.

{¶ 17} R.C. 2923.03(A), the complicity statute, states:

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

- (1) Solicit or procure another to commit the offense;
- (2) Aid or abet another in committing the offense;
- (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
- (4) Cause an innocent or irresponsible person to commit the

offense.

R.C. 2923.01, the conspiracy statute, states:

(A) No person, with purpose to commit or to promote or facilitate the commission of * * * a felony drug trafficking, manufacturing, processing, or possession offense, * * * shall do either of the following:

- (1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;
- (2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

{¶ 18} R.C. 2925.04(A) prohibits illegal manufacture of drugs and states: "No person shall knowingly * * * manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.041(A) prohibits the illegal assembly or possession of chemicals for the manufacture of drugs and states: "No person shall knowingly assemble or possess one or more chemicals that may be used to

manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.”

{¶ 19} In the case sub judice, appellant does not argue that the prosecution failed to present any evidence to show that the crimes of illegal assembly or possession of chemicals for the manufacture of drugs or illegal manufacture of drugs occurred. Rather, the focus of appellant’s argument is that the prosecution did not present competent, credible evidence that she was complicit in committing either offense or that she conspired to commit the illegal manufacture of drugs. In particular, she reduces her argument to whether the evidence shows that she aided or abetted her co-defendant in committing either of the primary offenses.⁵ Consequently, she contends that the evidence demonstrates that she was merely present at the residence and the prosecution presented no direct evidence that she engaged in unlawful conduct.

{¶ 20} “To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.” State v. Johnson

⁵ Appellant did not argue that the evidence fails to show all of the elements under the conspiracy statute, but, instead, she limits her argument to whether the prosecution presented sufficient evidence of aiding and abetting. We therefore do not address whether the evidence sufficiently demonstrates all of the elements under the conspiracy statute and instead focus on evidence concerning aiding and abetting.

(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.” Id. at 245 (quoting State v. Pruett (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884). Aiding and abetting may be established by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. State v. Cartellone (1981), 3 Ohio App.3d 145, 150, 3 OBR 163, 444 N.E.2d 68, citing State v. Pruett (1971), 28 Ohio App.2d 29, 34, 273 N.E.2d 884. However, “the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.” Johnson, 93 Ohio St.3d at 243, quoting State v. Widner (1982), 69 Ohio St.2d 267, 269, 431 N.E.2d 1025. “This rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission.” Id.

{¶ 21} In the case at bar, after our review of the evidence we believe that the prosecution presented competent, credible circumstantial evidence to establish that appellant aided or abetted her co-defendant in the illegal assembly or possession of chemicals for the manufacture of drugs and that she aided or abetted her co-defendant in the illegal manufacture of drugs. The evidence reveals that a substantial amount of methamphetamine-making materials existed throughout the residence, a dwelling where appellant had lived for at least six months to one year. When law enforcement officers entered the residence, they detected an extremely strong smell of ether and had to break out windows to help eliminate the smell. Appellant had been in a bathroom where officers located methamphetamine-making materials, including a

mason jar, salt, and ammonia. Another female had been present in the bathroom with appellant when the officers arrived, and appellant and the second female did not immediately exit the bathroom upon the officers' demands. Instead, the first female exited within one minute of the officers' demands, and appellant exited approximately one minute later. The jury could have reasonably inferred that appellant had been attempting to clean up an active methamphetamine production and place the clean items under the bathroom sink. Even if appellant was not the one who actually prepared the methamphetamine, her presence in such a small location and her delay in exiting the bathroom suggests her involvement in the production rather than her mere presence. Moreover, even though appellant provided an innocent explanation for her presence in the bathroom (that she had been showering or taking a bath), in view of the overwhelming amount of methamphetamine-making materials located throughout the house, appellant's admission that she knew that methamphetamine was being made at the residence, her admission to using methamphetamine, and her admission to helping clean the kitchen where methamphetamine-making materials were located, the jury could have reasonably rejected appellant's innocent explanation. From this, the jury could have inferred that appellant helped to assemble or possess at least one of the chemicals used to manufacture methamphetamine, however minimal. From this same evidence, the jury could have inferred that appellant's participation in cleaning the kitchen and discarding chemicals or materials used to manufacture methamphetamine constituted the offense of aiding or abetting her co-defendant in the illegal manufacture of methamphetamine. Thus, contrary to appellant's interpretation of the evidence, the jury could have reasonably concluded that she was not merely present at the residence,

but an active participant. Therefore, we believe that the prosecution presented sufficient evidence to support her convictions and that her convictions are not against the manifest weight of the evidence.

{¶ 22} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error and hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Scioto 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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, J.: Concurr in Judgment & Opinion

Harsha, J.: Dissents

For the Court

BY: _____
Peter B. Abele, Judge

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.