[Cite as *State v. Osborne*, 2005-Ohio-6497.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon: John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2005-CA-09
JAMES ROGER OSBORNE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Knox County Court of Common Pleas, Case No. 04CR050067
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 8, 2005

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN THATCHER KNOX COUNTY PROSECUTOR 114 East Chestnut Street Mount Vernon, OH 43050	W. MARK ADAMS 21 Middle Street Galena, OH 43021

Gwin, P.J.

{¶1} Defendant-appellant James Osborne appeals his convictions in the Knox County Court of Common Pleas for three counts of trafficking in cocaine in an amount exceeding 10 grams but less than 100 grams, a felony of the third degree in violation of R.C.2925.03 (A)(1) and R.C. 2925.03 (C)(4)(d), and one count of trafficking in cocaine a felony of the fifth degree in violation of R.C. 2925.03 (A)(1) and R.C. 2925.03 (C)(4)(a). The plaintiff-appellee is the State of Ohio. The following facts give rise to this appeal.

{¶2} The charges in appellant's case were the result of an undercover police operation. The operation involved a confidential informant, James Michael Mourning. The State also utilized the testimony of Detective Kimberly S. Lemley, Detective Scott Duff, Agent Dennis Lowe, Chief Jerry Day of the Fredericktown Police Department and Detective Jeffrey Jacobs.

{¶3} The law enforcement officials and the confidential informant participated in pre-buy and post-buy meetings. During these meetings the location of the drug buy would be discussed. The detectives would search the confidential informant and his vehicle, provide him with buy money, and monitor the transactions via the informant's hidden microphone. Each transaction in appellant's case was recorded and the audiotapes were entered into evidence at appellant's trial. An audio tape of a telephone conversation between the informant and appellant concerning the January 15, 2004 transaction was also admitted into evidence.

{¶4} The informant, James Mourning testified that on November 21, 2003 he purchased one-half ounce of cocaine from the appellant for $600. On December 11, 2003 Mr. Mourning testified that he again paid appellant $600 for one-half ounce of

cocaine. The informant further testified that on January 15, 2004 he paid appellant $1,000 for one ounce of cocaine. Finally on February 4, 2005 the informant purchased approximately three and one-half grams of cocaine from the appellant for $180. On January 18 and 19, 2005 appellant's case was tried before a jury. The jury found appellant guilty of all four counts.

{¶5} The trial court deferred sentencing and ordered a pre-sentence investigation report. A sentencing hearing was conducted on February 4, 2005. The trial court sentenced the appellant to serve three consecutive two-year sentences on the third degree felony counts, counts one, two and three, and nine months on the fifth degree felony count, count four, for a total of six years and nine months. Appellant timely filed a notice of appeal and sets forth the following four assignments of error for our consideration:

{¶6} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING OFFICERS KIMBERLY LEMLEY, AND CHIEF JERRY DAY TO READ, AND REFER TO A POLICE INVESTIGATION REPORT FOR WHICH THEY DID NOT HAVE DIRECT PERSONAL KNOWLEDGE OF THE UNDERLYING FACTS IN VIOLATION OF OHIO RULE OF EVIDENCE 602.

{¶7} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING OFFICERS LEMLEY AND JACOBS TO REFER TO THE IDENTIFICATION OF, AND SUBSTANCE OF A TELEPHONE CONVERSATION THAT WAS IN VIOLATION OF OHIO RULE OF EVIDENCE 802.

{¶8} "III. THE CONVICTION OF APPELLANT ON ALL COUNTS ARE BASED UPON INSUFFICIENT EVIDENCE.

{¶9} "IV. THE CONVICTION OF APPELLANT ON ALL COUNTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶10} In his First Assignment of Error, appellant maintains that the trial court erred by allowing two of the investigating officers to refer to a police report written by a third investigating officer during their testimony in violation of Evid. R. 602. We disagree.

{¶11} Evid. R. 602 Lack of personal knowledge provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses".

{¶12} In the case at bar, Detective Lemley testified that she personally participated in each pre-buy meeting between the confidential informant and the other officers who had been assigned to the case, including the officer who authored the report in question. (1T. at 79-80; 89-90; 95-96). Detective Lemley participated in the surveillance and the monitoring of the transactions via the informant's hidden microphone. (Id. at 82-84; 90-92; 96-100).

{¶13} Chief Jerry Day of the Fredericktown Police Department testified that he attended the pre-buy meetings between the investigative team and the informant. (1T. at 197-98; 201; 203-204). Chief Day followed the informant on two of the transactions and monitored the transactions via the hidden microphone. (Id. at 201-202; 204-205). The trial court sustained defense counsel's objection to a portion of Chief Day's

testimony. (Id. at 199). The trial court found that the Chief was testifying based solely upon what was contained in the police investigation report. (Id.).

{¶14} The author of the report, Detective Sergeant Jeffrey Jacobs, testified during appellant's trial. (1T. at 116; 218). Detective Jacobs also attended the pre-buy meetings with Chief Day and Detective Lemley. (Id. at 217-218; 228-29; 233). He also participated in the surveillance and the monitoring of the transactions via the informant's hidden microphone. (Id. at 220-21; 223; 225-26; 228; 231; 233-235).

{¶15} Each transaction was recorded and the audio tapes were entered into evidence at appellant's trial. (1T. at 82-84; 90-92; 96-100). An audio tape of a telephone conversation between the informant and appellant concerning the January 15, 2004 transaction was also admitted into evidence. (Id. at 96-98).

{¶16} Evid. R. 612 states: "Except as otherwise provided in criminal proceedings by Rule 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure, if a witness uses a writing to refresh his memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. He is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld [sic] over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to

order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial".

{¶17} In *State v. O'Keefe,* 11th Dist. Nos. 2002-A-0015, 2002-A-0048, 2004-Ohio-5300, the Court observed: "Evid.R. 612 does not require that the witness have prepared the document used to refresh his recollection. Weissenberger, Ohio Evidence (2004), 312, Section 612.3. It is also important to remember that a writing used to refresh a witness's recollection is not being offered as substantive evidence, thus appellee was not required to lay the foundation of admissibility, nor was the rules of hearsay applicable. See, *Dayton v. Combs* (1993), 94 Ohio App.3d 291, 296, 640 N.E.2d 863; *State v. Sanders* (1998), 130 Ohio App.3d 789, 803, 721 N.E.2d 433, (Christley, J., dissenting)". In the case at bar, the substantive evidence was Detective Lemely and Chief Day's testimony based on their refreshed recollection. (Id.).

{¶18} In *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, the Ohio Supreme Court noted: "[t]he admission of hearsay does not violate the Confrontation Clause if the declarant… testifies at trial. See *California v. Green* (1970), 399 U.S. 149, 157-158, 90 S.Ct. 1930, 26 L.Ed.2d 489; State *v. Keenan* (1998), 81 Ohio St.3d 133, 142, 689 N.E.2d 929". Id. at 75, 2004-Ohio-6235 at ¶110, 818 N.E.2d at 258.

{¶19} In the case at bar, it is clear that each officer who testified had personal knowledge of the events leading to appellant's indictment. Each officer had specific duties; one officer, Detective Jacobs, took charge of writing the report. (1T. at 138). Appellant thoroughly cross-examined the report's author at trial. The trial court correctly

found that Detective Lemley and Chief Day could utilize the police investigation report written by Detective Jacobs to refresh their recollections of the events pursuant to Evid. R. 612.

{¶20} Appellant's First Assignment of Error is overruled.

II.

{¶21} In his Second Assignment of Error appellant contends that the trial court erred in permitting Detective Lemley and Detective Jacobs to testify at trial that appellant telephoned the informant to arrange a drug transaction. We disagree.

{¶22} As previously set forth in Assignment of Error I, supra, "[t]he admission of hearsay does not violate the Confrontation Clause if the declarant… testifies at trial. See *California v. Green* (1970), 399 U.S. 149, 157-158, 90 S.Ct. 1930, 26 L.Ed.2d 489; State *v. Keenan* (1998), 81 Ohio St.3d 133, 142, 689 N.E.2d 929". *State v. Leonard*, 104 Ohio St.3d 54, 75, 2004-Ohio-6235 at ¶110, 818 N.E.2d 229, 258.

{¶23} In the case at bar, the confidential informant testified at trial and was thoroughly crossed examined by appellant's trial counsel. (1T. at 244). The informant testified to the telephone conversation of January 15, 2004 in which the appellant telephoned the informant to arrange a drug buy. (2T. at 274). The informant's return call to appellant to finalize the meeting time and place was recorded and the tape recording was submitted into evidence during appellant's trial. (1T. at 96-98; 2T. at 274-75).

{¶24} Therefore, we find that the trial court did not err so as to affect any substantial rights of appellant. Accordingly, appellant's Second Assignment of Error is overruled.

III. & IV.

{¶25} In his Third and Fourth Assignments of Error, appellant maintains the verdict was against the sufficiency and manifest weight of the evidence.

{¶26} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the 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.

{¶27} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶28} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. On review for manifest weight, a reviewing court is "to examine 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 judgment

must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶29} To find the appellant guilty of trafficking in drugs in violation of R.C. 2925.03(A) (1) as alleged in the Indictment, the trier of fact in this case would have to find that appellant sold or offered to sell a controlled substance in an amount exceeding ten (10) grams but less than one hundred (100) grams on Counts One, Two and Three of the Indictment, and in an amount exceeding five (5) grams but less than ten (10) grams in Count Four of the Indictment.

{¶30} The state offered sufficient evidence, if believed by the trier of fact, to establish beyond a reasonable doubt that appellant sold or offered to sell crack cocaine in an amount exceeding ten (10) grams but less than one hundred (100) grams on three occasions and in an amount exceeding five (5) grams but less than ten (10) grams on one occasion.

{¶31} The informant, James Mourning, testified that on November 21, 2003, he purchased one-half ounce of cocaine from the appellant for $600.00. (1T. at 255; 259-261). The tape recording of this transaction was played for the jury. (2T. at 266-67). On December 11, 2003, Mr. Mourning testified that he again paid appellant $600.00 for one-half ounce of cocaine. (Id. at 269-71). A tape recording of this transaction was

played for the jury. (Id. at 272). Mr. Mourning testified that on January 15, 2004, he paid appellant $1,000.00 for one ounce of cocaine. (Id. at 275-76). The recording of the informant's telephone call to appellant and the recording of the transaction were played for the jury. (Id. at 274-75; 276). On February 4, 2005 the informant purchased approximately three and one-half grams of cocaine from appellant for $180.00. (Id. at 278-80). A tape recording of this transaction was played for the jury. (Id. at 280-81). The State presented witnesses from the Bureau of Criminal Identification and Investigation to establish the identity and the weight of the cocaine involved in each transaction. (Id. at 320; 328; 331; 348-349). As noted in addressing appellant's previous assignments of error, Detectives of the investigation team corroborated the informant's testimony.

{¶32} Viewing this evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of trafficking on four occasions as set forth in the Indictment.

{¶33} We hold, therefore, that the state met its burden of production regarding each element of the crimes of trafficking and, accordingly, there was sufficient evidence to support appellant's convictions.

{¶34} Appellant's arguments going to the manifest weight of the evidence are simply attacks on the credibility of the confidential informant. His testimony and credibility were for the trier of fact to weigh and determine. Although appellant presented evidence concerning the confidential informant, and cross-examined the confidential informant and the other State witnesses 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's 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.

{¶35} We conclude 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) but less than one hundred (100) grams on three occasions, and in an amount exceeding five (5) grams but less than ten (10) grams on one occasion.

{¶36} Accordingly, appellant's convictions for trafficking were not against the manifest weight of the evidence.

{¶37} Appellant's Third and Fourth Assignments of Error are overruled.

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

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

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JUDGES

WSG:clw 1128

[Cite as *State v. Osborne*, 2005-Ohio-6497.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES ROGER OSBORNE	:	
Defendant-Appellant	:	CASE NO. 2005-CA-09

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Knox County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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JUDGES